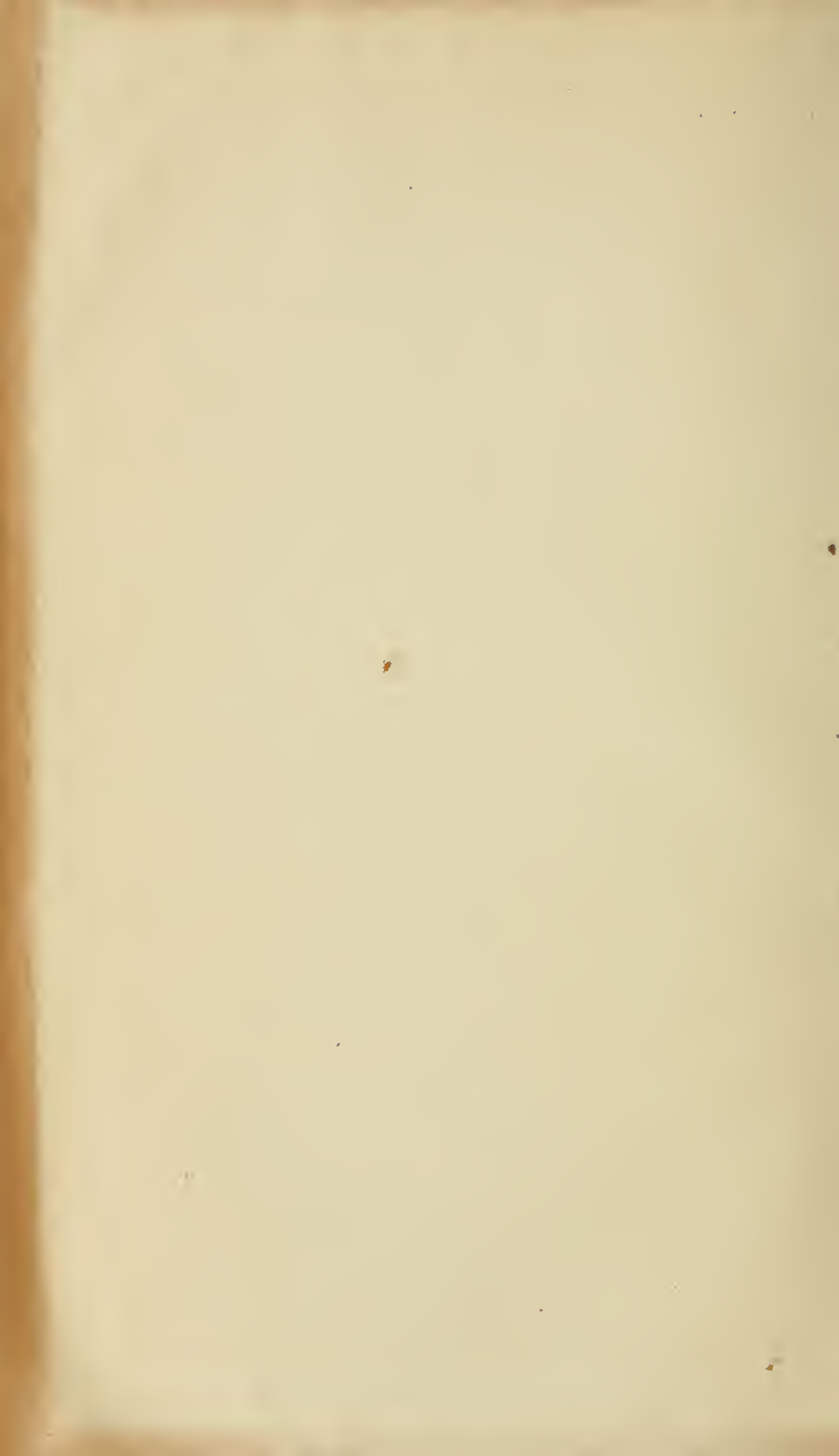


NEW JERSEY EQUITY REPORTS.

VOLUME XXVII.

C. E. GREEN, XII.

REPORTS OF CASES

ADJUDGED AND DETERMINED IN

THE COURT OF CHANCERY,

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

THE COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY.

CHARLES EWING GREEN, Reporter.

VOL. XII.

TRENTON, N. J.:
THE W. S. SHARP PRINTING CO.

1884.

Fac Lib
SFN
1848
.H2
v. 27

CHANCELLOR

DURING THE PERIOD OF THESE REPORTS,

HON. THEODORE RUNYON.

VICE-CHANCELLOR,

HON. ABRAHAM V. VAN FLEET.

CLERK IN CHANCERY,

HENRY S. LITTLE, ESQ.

JUDGES OF THE COURT OF ERRORS AND APPEALS.

EX-OFFICIO JUDGES.

Hon. THEODORE RUNYON, Chancellor.
" MERCER BEASLEY, Chief Justice.
" VANCLEVE DALRIMPLE,
" GEORGE S. WOODHULL,
" DAVID A. DEPUE,
" BENNET VAN SYCKEL,
" EDWARD W. SCUDDER,
" MANNING M. KNAPP,
" JONATHAN DIXON,
" ALFRED REED,

} Associate Justices Supreme Court.

JUDGES SPECIALLY APPOINTED.

Hon. EDMUND L. B. WALES,
" JOHN CLEMENT,
" FRANCIS J. LATHROP,
" AMZI DODD,
" CALEB S. GREEN,
" SAMUEL LILLY

CLERK.

HENRY C. KELSEY, Esq.

This volume contains the opinions delivered in the Court of Chancery and in the Prerogative Court, at February, May, and October Terms, 1876, and, commencing with the unpublished opinions in equity cases delivered in the Court of Errors and Appeals, at March Term, 1875, brings the decisions of that court through November Term, 1876.

References show where the cases herein reported have been cited, affirmed, reversed, or modified, down to Vol. 44, New Jersey Law Reports (15 Vroom), and Vol. 36, New Jersey Equity Reports (9 Stewart), inclusive.

Where Nixon's Digest is cited in the opinions, reference is also made to the Revision.

NEW JERSEY REPORTS.

LAW REPORTS.

COXE'S REPORTS, - - - - -	1 vol.
PENNINGTON'S REPORTS, - - - -	2 "
SOUTHARD'S " - - - -	2 "
HALSTED'S " - - - -	7 "
GREEN'S " - - - -	3 "
HARRISON'S " - - - -	4 "
SPENCER'S " - - - -	1 "
ZABRISKIE'S " - - - -	4 "
DUTCHER'S " - - - -	5 "
VROOM'S " - - - -	9 "

EQUITY REPORTS.

SAXTON'S REPORTS, - - - -	1 vol.
GREEN'S " - - - - -	3 "
HALSTED'S " - - - - -	4 "
STOCKTON'S " - - - - -	3 "
BEASLEY'S " - - - - -	2 "
McCARTER'S " - - - - -	2 "
C. E. GREEN'S " - - - - -	12 "

CASES

REPORTED IN THIS VOLUME.

A.

Adair, Sanborn v.................... 425
African Meth. Episcopal Church v. Conover.......................... 157
Alexander's will, In re............ 463
Alpaugh, Cregar v.................. 281
——— v. Roberson 96
Altmann v. Benz..................... 331
Asch, Kean v......................... 57
Attorney-General v. Delaware and Bound Brook R. R. Co...1, 631
Attorney-General v. Hudson Tunnel R. R. Co............176, 573
Avery v. Blees Manufacturing Co.................................. 412

B.

Bacon v. Bonham.................... 209
Bailey v. Citizens Gas Light Co. 196
Baker, Longwood Valley R. R. Co. v.................................. 166
Ballard, Gillette v.................. 489
Barnes v. Taylor...............259, 266
——— v. Trenton Gas Light Co. 33
Barnett v. Griffith................... 201
Beaghen, Washington B. and L. Association v...................... 98
Beatty v. De Forest................. 482
Benz, Altmann v....... 331
Bergen, Leake v..................... 360
Bigelow, Cassedy v.................. 505
Bigelow Blue Stone Co. v. Magee 392
Bishop, Meyer v..................... 141
Black v. Black........................ 664
Blanchet, Wagner v................ 356
Blees Manufact'g Co., Avery v.... 412
Bogert v. City of Elizabeth....... 568
Bolles v. State Trust Co........... 308
Bonham, Bacon v.................... 209
Boone v. Ridgeway's Ex'rs....... 297
Booraem v. Wood................... 371
Bowman, Jewett v............171, 275
Boyce v. Boyce.. 433
Brant v. Clark........................ 234
Britton's Adm'r v. Hill........... 389
Brokaw v. Hudson's Ex'rs........ 135
Brokaw's Ex'r v. Conover......... 462
Brooks, Ketcham v................... 347
Brown v. Welsh's Ex'r............ 429
Buckelew v. Snedeker.............. 82
Bullock, Woodward v.............. 507
Bunn v. Mitchell..................... 54

C.

Cairo and Fulton R. R. Co. v. Titus and Scudder................. 102
Camden, City of, Collings v...... 293
Carpenter v. Carpenter's Ex'rs... 502
Cassedy v. Bigelow................. 505
Chester, Holmes v.... 423
Chetwood, Wood v.................. 311
Chilver v. Weston 435
Citizens Gas Light Co., Bailey v. 196
Clark, Brant v......................... 234
Clarksville Man'f'g Co., Young v. 67
Clayton v. Somers' Ex'r........... 230
Cline v. Prall......................... 415
Clinton Station Mdse. and Manufacturing Co., Hummell v.... 497
Close v. Close......................... 504
Clow v. Taylor........................ 418
Coe v. New Jersey Midland R. Co...............................37, 110
Collings v. City of Camden....... 293
Colt, Salisbury v..................... 492
Conover, African M. E. Church v. 157
———, Brokaw's Ex'r v......... 462
Courter v. Stagg..................... 305
Crane v. Homeopathic Mut. Life Ins. Co............................. 484
Crane, Wheaton v............ 368
Creamer, Cregar v.................. 281
Cregar v. Alpaugh.................. 281
——— v. Creamer.................. 281
Crowell v. Currier.................. 152
——— v. Hospital of St. Barnabas................................ 650
Currier, Crowell v.................. 152
Cushman, Bush and Howard v... 131

D.

Davidson, Tappen v.................. 459
Dayton v. Melick..................... 362
Decker v. Decker's Adm'x.. 239
———, Ruckman v.................. 244
De Forest, Beatty v.................. 482
Delaware and Bound Brook R. R. Co., Att'y-General v............1, 631
Demarest, Jersey v.................. 299
Dey, Foster v.......................... 599
Dimock, Faulks v.................... 65
Ditmars, Large v...............283, 406
Dodd, Wakeman v.................. 564
Doughty v. Doughty................ 315
Dows v. Drew............... 442
Drew, Dows v......... 442
Dringer, Jewett v.................... 271
Dunster, Woodward's Ex'rs v. .. 84
Duryee v. Linsheimer.............. 366

E.

Elizabeth, City of, Bogert v 568
————————, Force v........ 408
Empson, Polhemus v............... 190
English v. English...............71, 579

F.

Faulks v. Dimock................... 65
Ferry and Akin v. Laible......... 146
Fey v. Fey............................ 213
Force v. City of Elizabeth......... 408
Foster v. Dey 599

G.

German Reformed Church v. Puechelstein......................... 30
Gibby v. Hall......................... 282
Gillette v. Ballard.................. 489
Gray, Trustees of School District v................................ 278
Griffith, Barnett v.................. 201
———, Platt v.................... . 207
Grover v. Wyckoff's Ex'r......... 75
Guerin, Harrison v.................. 219
Guest v. Hewitt...................... 479
Gulick v. Gulick's Ex'rs.......... 498

H.

Hagan v. Ryan....................... 236
Hall, Gibby v......................... 282
Harrison v. Guerin.................. 219
Hawk, Phillipsburg Mut. L. and B. Assoc'n v......................... 355
Hendrickson, Houseworth's Adm'r v.............................. 60
Hendrickson's Ex'rs, Romaine, v.................................... 162
Hennion's Ex'rs v. Jacobus...... 28
Henwood v. Jarvis and Schafer 247
Herbert's Ex'rs, Post v........... 540
Hewitt, Guest v...................... 479
Hill, Britton's Adm'r v............ 389
Hill v. Hill............................ 214
Hill's Adm'rs v. McCarter.... ... 41
Holcombe v. Holcombe's Ex'rs.. 473
Holmes v. Chester.................. 423
Homeopathic Mut. Life Ins. Co., Crane v............................. 484
Hoppock's Ex'rs v. United N. J. R. R. and Canal Co.............. 286
Hospital of St. Barnabas, Crowell v................................ 650
Houseworth's Adm'r v. Hendrickson............................ 60
Hoyt v. Hoyt......................... 399
Hudson's Ex'rs, Brokaw v........ 135
Hudson Tunnel Railroad Co., Att'y-General v.................... 573
Hummell v. Clinton Station Mdse. and Man'f'g Co........... 497

I.

In re Alexander's will............. 463
In re Wintermute's will........... 447

J.

Jacobus v. Mutual Benefit Life Ins. Co............................. 604
Jacobus, Hennion's Ex'rs v...... 28
Jamison v. Miller............. 586
Jaqui v. Johnson.................... 526
Jarvis and Schafer, Henwood v. 247
Jenkins v. Moore.................... 567
Jersey v. Demarest.................. 299
Jewett v. Bowman.............171, 275
——— v. Dringer.................... 271
——— v. Klein....................... 550
Johns v. Norris...................... 485
Johnson v. Jaqui.................... 552

K.

Kean v. Asch......................... 57
Ketcham v. Brooks.................. 347
King, Wilson v....................... 374

Kirkbride, Wilkins v.............. 93
Kirtland, Wheeler v.............. 534
———, Whitney v.............. 333
Klein, Jewett v.................... 550

L.

Laible, Ferry v.................... 146
Lanning, Parsons v................ 70
Large v. Ditmars..............283, 406
Larned, Randolph v. 557
Lawton, Price's Ex'rs v........... 325
Leake v. Bergen.................... 360
Lewis' Adm'r v. Reichey......... 240
Linsheimer, Duryee v............. 366
Longwood Valley R. R. Co. v. Baker.............................. 166

M.

Macknet v. Macknet............... 594
Magee, Bigelow Blue Stone Co. v.................................... 392
Marsh, Mitchell v 631
Mason's Ex'rs v. Meth. Episcopal Church......................... 47
Mayo, Powell v..................... 440
McArthur v. Montclair R. Co... 77
McCarter, Hill's Adm'rs v........ 41
Meirs, Waln v....................77, 351
Meldowney v. Meldowney........ 328
Melick, Dayton v.................... 362
Methodist Episcopal Church, Mason's Ex'rs v 47
Meyer v. Bishop..................... 141
Midmer v. Midmer's Ex'rs....... 548
Miller, Jamison v. 586
Miller's Adm'r, Reddish v........ 514
Mitchell v. Marsh.................. 631
———, Bunn v..................... 54
Montclair R. Co., McArthur v... 77
Moore, Jenkins v................... 567
Morris C. and B. Co., Shimer v.. 364
Mutual Benefit Life Ins. Co., Jacobus v.......................... 604

N.

New Jersey Midland R. Co., Coe v............................37, 110
New Jersey Southern R. Co., Upton v............................ 225
Nield, Rudderow's Ex'x v........ 89
Norris, Johns v...................... 485

P.

Parsons v. Lanning................ 70
Patterson, Red Bank Mut. B. and L. Assoc'n v............. 223
Phillips v. Schooley. 410
Phillipsburg Mut. L. and B. Assoc'n v. Hawk................. 355
Platt v. Griffith..................... 207
Polhemus v. Empson.............. 196
Post v. Herbert's Ex'rs........... 540
Powell v. Mayo..................... 440
Prall, Cline v......................... 415
——- v. Tilt.......................... 393
Price's Ex'rs v. Lawton........... 325
Provost's Ex'r v. Provost......... 296
Puechelstein, German Reformed Church v.......................... 30

Q.

Quinn, Stamets v.................... 383

R.

Randolph v. Larned... 557
Receivers, &c., N. J. Midland R. Co. v. Wortendyke. 658
Red Bank Mut. B. & L. Assoc'n v. Patterson....................... 223
Reddish and Ohlen v. Miller's Adm'r............... 514
Reichey, Lewis' Adm'r v......... 240
Ridgway's Ex'rs, Boone v......... 297
Rinehart v. Rinehart... 475
Rittenhouse v. Tomlinson's Ex'rs................................ 379
Roberson, Alpaugh v............... 96
Romaine v. Hendrickson's Ex'rs 162
Ruckman v. Decker................ 244
Rudderow's Ex'x v. Nield........ 89
Ryan, Hagan v....................... 236
Ryno's Ex'r v. Ryno's Adm'r... 522

S.

Salisbury v. Colt..................... 492
Sanborn v. Adair.................... 425
Schooley, Phillips v................ 410
Scott v. Shiner...... 185
Search v. Search.................... 137
Shimer v. Morris C. and B. Co.. 364
Shiner, Scott v....................... 185
Simon v. Townsend................. 302
Smith v. Smith's Adm'r........... 445
Snedeker, Buckelew v............. 82
Somers' Ex'r, Clayton v........... 230

Stagg, Courter v........ 305
Stamets v. Quinn........ 383
State Trust Co., Bolles v........ 308
Stearns, Van Winkle v........ 238
Stickle v. Van Doren........ 498
Swallow v. Swallow's Adm'r........ 278

T.

Tappen v. Davidson........ 459
Taylor, Barnes v........259, 266
———, Clow v........ 418
———, Terhune v........ 80
Terhune v. Taylor........ 80
Tilt, Prall v........ 393
Titus and Scudder, Cairo and Fulton R. R. Co. v........ 102
Tomlinson's Ex'rs, Rittenhouse v. 379
Townsend, Simon v........ 302
Trenton Gas Light Co., Barnes v. 33
Trustees of School District v. Gray........ 278

U.

United N. J. R. R. and Canal Co., Hoppock's Ex'rs v........ 286
Upton and Williamson v. N. J. Southern R. Co........ 225

V.

Van Doren, Stickle v........ 498
Van Winkle v. Stearns........ 238

W.

Wagner v. Blanchet........ 356
Wakeman v. Dodd........ 564
Waln v. Meirs........77, 351
Washington Build. and L. Assoc'n v. Beaghen........ 98
Welsh's Ex'r, Brown v........ 429
Weston, Chilver v........ 435
Wheaton v. Crane........ 368
Wheeler v. Kirtland........ 534
Whitney v. Kirtland........ 333
Wilkins v. Kirkbride........ 93
Wilson v. King........ 374
——— v. Wintermute........ 63
Wintermute, Wilson v........ 63
Wintermute's will, In re........ 447
Wood, Booraem v........ 371
——— v. Chetwood........ 311
Woodward v. Bullock........ 507
Woodward's Ex'rs v. Dunster... 84
Wortendyke, Receivers, &c., v... 658
Wyckoff's Ex'r, Grover v........ 75

Y.

Yard v. Yard........ 114
Young v. Clarksville Manufacturing Co........ 67

CASES

CITED IN THIS VOLUME.

A.

Case	Citation	Page
Ackerman v. Burrows	3 Ves. & B. 54	51
Adair v. Shaw	1 Sch. & Lef. 243	313
Allaire v. Allaire	8 Vr. 312	460
Allen v. Chosen Freeholders	2 Beas. 68	27
——— v. Dundas	3 T. R. 125	525
——— v. Smith	7 Halst. 159	142
Alston v. Davis	2 Head 266	500
Amsinck v. Barklay	8 Ves. 594, 597	62
Andrews v. Farnham	2 Stockt. 94	139
——— v. Torrey	1 McCart. 355	361
Annin v. Annin	9 C. E. Green 184	427
Armstrong v. Pennsylvania R. Co.	9 Vr. 1	290
——— v. Ross	5 C. E. Green 121	151
Arnold v. Mundy	1 Halst. 1	8, 638
Ashley v. Allden	10 E. L. & Eq. 314	262
Associates of the Jersey Co. v. Davison	5 Dutcher 415	622
Atkins v. Hiccocks	1 Atk. 500	546
Attorney-General v. Brown	9 C. E. Green 91	25
——— v. Del. & B. B. R. R. Co.	9 Vr. 282	633
Attorney-General v. Eastern Counties Railway Co	7 Jur. 806	28
Attorney-General v. Heishon	3 C. E. Green 410	25, 26
——— v. Johnson	2 Wilson C. R. 87	25
——— v. N. J. R. R. & T. Co	2 Green's Ch. 136	27
Attorney-General v. N. Y. & L. B. R. R. Co	9 C. E Green 49	25, 28
Attorney-General v. Sheffield Gas Co	3 DeG., M. & G. 304	25
Attorney-General v. Stevens	Saxt. 369	23

Case	Citation	Page
Attorney-General v. United Kingdom Electric Tel. Co.	30 Beav. 287	28
Atwater v. Walker	1 C. E. Green 42	361
Atwood v. Lamprey	3 P. W. 126	474
Aymar v. Bill	5 Johns. Ch. 570	235

B.

Case	Citation	Page
Bacot v. Wetmore	2 C. E. Green 250	93
Bagwell v. Dry	1 P. W. 700.	51
Baines v. Ottey	1 M. & K. 465	136
Balfour v. Welland	16 Ves. 151	35
Barham v. Earl of Thanet	3 M. & K. 607	653
Barnard v. Wallis	C. & Ph. 85	256
Barncord v. Kuhn	36 Penna. 388	609
Barnes v. Taylor		269
Barns v. Hatch	3 N. H. 304	618
Barrell v. Barrell	10 C. E. Green 173	195
Bartlette v. Vanzandt	14 Sandf. Ch. 396	536
Barry v. Harding	1 Jones & La Touche 485	653
Bassett's Adm'rs v. Pettit	1 Harr. 421	446
Bateman v. Willoe	1 Sch. & Lef. 204	106
Bavington v. Clarke	2 Penrose & Watts 124	194
Bean v. Pettingill	2 Abb. Pr. R. (N. S.) 58; 7 Robertson 7	254
Beatty v. Kurtz	2 Pet. 578	160
Beckley v. Newland	2 P. W. 182	212
Beekman v. Frost	18 Johns. 544	509
Belford v. Crane	1 C. E. Green 265	503
Bell v. Gough	3 Zab. 624	8
Benedict v. Gilman	4 Paige 60	439
Bennett, Ex parte	10 Ves. 381	165
——— v. Cooper	9 Beav. 252	212
Bennington Iron Co. v. Rutherford	3 Harr. 158	32
Benson v. Woolverton	1 C. E. Green 110	246
Bentley v. Long Dock Co	1 McCart. 486	354
Berkeley v. Swinburne	6 Sim. 613	597
Bill v. Cureton	2 Myl. & K. 503	156
Binney's case	2 Bland 99	9, 17
Blair v. Ward	2 Stockt. 126	47
Blauvelt v. Smith	7 C. E. Green 31	483
Blossom v. Railroad Co	3 Wall. 205	145
Blyer v. Monholland	2 Sandf. Ch. 478, 480	154, 655
Bogey v. Shute	4 Jones Eq. 174	95
Bolles v. Beach	2 Zab. 680	223, 349, 655
Boraston's case	3 Rep. 19	546
Borden v. Fitch	15 Johns. 121	320

Case	Citation	Page
Boulton v. Scott's Adm'rs	2 Green's Ch. 231	318
Bradshaw v. Heath	13 Wend. 408	325
Brantingham v. Brantingham	1 Beas. 160	402
Brookfield v. Williams	1 Green's Ch. 341	195
Brown v. Buckley	1 McCart. 294	312
Browne v. Paull	1 Sim. (N. S.) 92	597
Bryan's trust	2 Sim. (N. S.) 103	280
Burnham v. Dalling	1 C. E. Green 310; 3 C. E. Green 134	246, 601
Burr v. Beers	24 N. Y. 178	154
Butler v. Butler	5 Ves. 535	653
Butler and Baker's case	2 Coke 25	610

C.

Case	Citation	Page
Camden and Amboy R. Co. v. Stewart	3 C. E. Green 489; 6 C. E. Green 484	258, 508
Campbell v. Brownrigg	1 Phill. 301	500
——— v. Gardner	3 Stockt. 423	146, 418, 513
——— v. Mackay	1 M. & C. 618	150
Campion v. Kille	1 McCart. 229; 2 McCart. 476	328, 361
Carlisle v. Cooper	6 C. E. Green 576	26
Carter v. Denman	3 Zab. 260	535
——— v. Murcot	4 Burr. 2163	638
Central Park Extension, In re	16 Abb. Pr. R. 68	536, 538
Champion v. Brown	6 Johns. Ch. 398	161
Chiswell v. Morris	1 McCart. 101	206
Clarke v. Johnson	2 Stockt. 288	140
Close v. Close	10 C. E. Green 529	585
Clough v. Bond	3 Myl. & Cr. 491	313
Cobb v. Davenport	3 Vr. 369	639
Coddington v. Coddington	5 C. E. Green 264	329
Collier v. Whipple	13 Wend. 224	513
Collins v. Townley	6 C. E. Green 353	458
Colyear v. Mulgrave	2 Keen 81	156
Combs v. Little	3 Green's Ch. 310	565
Commercial Bank v. Cunningham	24 Pick. 270	37
Commissioners, &c., v. Withers	29 Miss. 21	9
Commonwealth v. Dana	2 Metc. 337	314
Conover v. Walling	2 McCart. 168, 178	418
Conway v. Taylor's Ex'r	1 Black 603	23
Cook v. Field	15 Q. B. 460	212
——— v. Johnson	1 Beas. 51	503
Cornell v. Matthews	3 Dutcher 522	626
Corning v. Smith	6 N. Y. 82	95

Cornish v. Bryan.......................... 2 Stockt. 146.......................... 134
Coster v. Griswold....................... 4 Edw. Ch. 374......... 134
Cotheal v. Blydenburgh.................. 1 Halst. Ch. 17, 63.................. 361
Courtenay v. Williams................... 3 Hare 539.............................. 136
Coxe v. Higbee............................. 6 Halst. 396............................ 206
Craft v. Ex'rs of Snook.................. 2 Beas. 122.............................. 500
Cresswell v. Cheslyn..................... 2 Eden 123.............................. 52
Crosby v. Allyn............................ 5 Greenl. 453.......................... 194
Cumberland v. Codrington............. 3 Johns. Ch. 229..... 654
Cummins v. Little......................... 1 C. E. Green 48................144, 513
Cunningham v. Murray................. 1 De G. & S. 366...................... 52
Currie v. Goold............................ 2 Madd. 163, 426..................... 474
Curtis v. Maston........................... 11 Paige 15.............................. 361
—— v. Tyler.............................. 9 Paige 432, 434................154, 655
Cutbush v. Cutbush.......... .... 1 Beav. 185.............................. 149
Cutler v. Wright........................... 22 N. Y. 472........................... 361
Cuyler v. Moreland....................... 6 Paige 273............ 393

D.

Daires v. Stainbank...................... 6 De G., M. & G. 679, 696.......... 254
Daniels v. Davison....................... 16 Ves. 249............................. 488
Davidson v. Thompson.................. 7 C. E. Green 83..... 195
Davis v. Headly............................ 7 C. E. Green 123.................... 319
Davoue v. Fanning....................... 2 Johns. Ch. 254...................... 165
De Carriere v. De Callonne........... 14 Ves. 577............................. 277
Del. and Rar. Canal Co. v. Rar. and Del. Bay R. Co.......................... 1 C. E. Green 379.................... 161
Den v. Baldwin............................. 1 Zab. 403............................... 134
—— v. White............................... Coxe 94.................................. 641
Derrickson v. Edwards.................. 5 Dutcher 468......................... 627
De Witte v. De Witte..................... 11 Sim. 41............................... 52
Dick v. Swinton............................ 1 Ves. & B. 371....................... 277
Dinsmore v. Westcott.................... 10 C. E. Green 470.................. 444
Ditson v. Ditson............................ 4 R. I. 87................................ 323
Dobson v. Pearce.......................... 12 N. Y. 165........................... 319
Doe v. Knight............................... 5 B. & C. 671......................... 608
Dolman v. Cook............................ 1 McCart. 56........................... 361
Done v. Read............................... 2 Ves. & B. 310....................... 69
Donne v. Lewis............................. 11 Ves. 601............................. 246
Donnington v. Meeker................... 3 Stockt. 362.......................... 81
Doran v. Wiltshire........................ 3 Swanst. 699......................... 35
Dorsheimer v. Rorback.................. 9 C. E. Green 33...................... 246
Doughaday v. Crowell................... 3 Stockt. 201.......................... 195
Downing v. Marshall.. .... 23 N. Y. 366........................... 51
Drake v. Pell .... 3 Edw. Ch. 270........................ 136
Duigan v. Hogan.......................... 1 Bosw. 645............ 254

Duncombe v. Greenacre........ 6 Jur. (N. S.) 987........ 254
Dunham v. Cox........ 2 Stockt. 437........ 393
Dunn v. Dunn........ 4 Paige 425........ 325
Durell v. Pritchard........ L. R., 1 Ch. 244, 250........ 171
Durling v. Hammar........ 5 C. E. Green 227........ 150

E.

Eagle Fire Ins. Co. v. Lent........ 6 Paige 635........ 95
Early v. Doe........ 16 How. 610........ 71
Edwards v. Grand Junc. R. Co........ 1 Myl. & Cr. 650........ 160
Elborough v. Ayres........ L. R., 10 Eq. 367........ 338
Elle v. Young........ 4 Zab. 783........ 310
Emans v. Emans........ 1 McCart. 118........ 150
European Bank, In re........ L. R., 5 Ch. App. 358........ 37
Exton v. Zule........ 1 McCart. 501........ 140

F.

Fanly v. Klive........ 2 Penn. 754........ 545
Fellowes v. Gwydge........ 1 Sim. 63; 1 R. & M. 83........ 190
Field v. Mayor of New York........ 2 Seld. 179........ 212
—— v. Schieffelin........ 7 Johns. Ch. 150........ 600
Finley v. Simpson........ 2 Zab. 311........155, 652
Firmstone v. De Camp........ 2 C. E. Green 317........ 257
Fitzwalter's case........ 1 Mod. 105........ 7
Flagg v. Munger........ 5 Seld. 483........ 656
Floyd acceptances........ 7 Wall. 667........ 200
—— v. Jayne........ 6 Johns. Ch. 479........ 110
Forrester v. Wilson........ 1 Duer 624........ 254
Foster v. Derby........ 1 Ad. & E. 783........ 623
Fox v. Mackreth........ 1 Lead. Cas. in Eq. 92, 209........ 567
Francis v. Norris........ 2 Miles 150........ 71
Franks v. Brookes........ 27 Beav. 635........ 280
Frey v. Demarest........ 1 C. E. Green 239........ 139
Fuller v. Van Geisen........ 4 Hill 171........ 609

G.

Gaines v. Nicholson........ 9 How. 356........ 258
Gardner v. Rowe........ 2 S. & S. 346........ 592
Garland, Ex parte........ 10 Ves. 120........ 148
Garnsey v. Rogers........ 47 N. Y. 233........154, 655, 657
Garrard v. Lauderdale........ 3 Sim. 14........ 156
Garratt v. Niblock........ 1 Russ. & Myl. 629........ 280
Gaskill v. Sine........ 2 Beas. 400........ 222

Gausen v. Tomlinson........ 8 C. E. Green 405........ 235
Gavit v. Chambers........ 3 Ohio 495........ 8
Georgetown v. Alexandria Canal Co. 12 Peters 93, 98........ 28
Gifford v. Thorn........ 1 Stockt. 702........ 232
Gittings v. McDermott........ 2 Myl. & K. 73........ 136
Glenn's Adm'r v. Whipple........ 1 Beas. 50........ 327
Glover v. Hedges........ Saxt. 113, 119........106, 318
Gordon v. Whieldon........ 11 Beav. 170........ 52
Gough v. Bell........ 2 Zab. 441, 490........8, 642
Grafton v. Brady........ 3 Halst. Ch. 79........ 250
Gray v. Brignardello........ 1 Wall. 627........ 246
Greenhalgh v. Manch. and Birm. R. Co........ 3 Myl. & Cr. 792........ 160
Gulick's Ex'rs v. Gulick........ 10 C. E. Green 324; 12 C. E. Green 493........ 51
Gwynne v. Cincinnati........ 3 Ohio 24........ 536

H.

Hackensack Imp. Com. v. N. J. Midland R. Co........ 7 C. E. Green 94........ 24
Hadow v. Hadow........ 9 Sim. 439........ 596
Haig v. Swiney........ 1 S. & S. 487........ 500
Hall v. Pidcock........ 6 C. E. Green 314........ 195
Halsey v. Reed........ 9 Paige 446........ 655
Hamilton v. Cummins........ 1 Johns. Ch. 517........ 570
Hammond v. Neame........ 1 Swanst. 34........ 596
Harding v. Alden........ 9 Greenl. 148........ 324
Hargraves v. Hargraves........ 23 Beav. 484........ 302
Harrison v. Forman........ 5 Ves. 207........ 500
——— v. Stewart........ 3 C. E. Green 451........ 150
——— v. Vreeland........ 9 Vr. 366........ 652
Hartshorne v. Hartshorne........ 1 Green's Ch. 349........ 655
Haughwout v. Boisaubin........ 3 C. E. Green 315........ 187
——— v. Murphy........ 7 C. E. Green 531, 546........161, 609
Hauser v. Shore........ 5 Ired. 357........ 35
Hawralty v. Warren........ 3 C. E. Green 124........ 187
Hayes' Ex'r v. Hayes........ 6 C. E. Green 267........ 501
Hays v. Whitall........ 2 Beas. 241........ 535
Heath v. Ross........ 12 Johns. 140........ 609
Hedge v. Drew........ 12 Pick. 141........ 618
Hendrickson v. Shotwell........ Saxt. 577........ 332
Herbert v. Mech. Build. and Loan Assoc'n........ 2 C. E. Green 497........101, 356
Hess v. Cole........ 3 Zab. 116........ 624
Heyer v. Deaves........ 2 Johns. Ch. 154........ 145
Heywood v. Buffalo........ 14 N. Y. 534........ 571

Hill v. Davidson........................ 5 C. E. Green 229.................... 327
Hill's Adm'rs v. McCarter............ 12 C. E. Green 41.................... 223
Hilton v. Woods........................ L. R., 4 Eq. 432.................... 338
Hobson v. Trevor........................ 2 P. W. 191.......................... 212
Holcombe v. Holcombe................ 2 Barb. S. C. R. 20.................. 95
———— v. Lake........................ 4 Zab. 688.......................... 307
Hollingsworth v. Barbour.............. 4 Pet. 466.......................... 624
Holmes v. Chester........................ 11 C. E. Green 79.................... 424
———— v. Taber........................ 9 Allen 246.......................... 474
Hopper v. Malleson........................ 1 C. E. Green 382.................... 444
Hora v. Hora........................ 33 Beav. 88.......................... 596
Horn v. Jones........................ 2 Cal. 194.......................... 626
Hornbeck v. Westbrook................ 9 Johns. 74.......................... 158
Howell v. Hester........................ 3 Green's Ch. 266.................... 293
Howell's Ex'rs v. Green................ 2 Vr. 570.......................... 545
Hoy v. Bramhall........................ 4 C. E. Green 74, 563......46, 223, 655
Huffman v. Hummer........................ 2 C. E. Green 269.................... 328
Hulfish v. O'Brien........................ 5 C. E. Green 230.................... 327
Hull v. Eddy........................ 2 Green 169.......................... 29
Hulme v. Hulme........................ 9 Sim. 644.......................... 500
Hutchinson v. Tindall.................. 2 Green Ch. 357.................... 593

I.

Irby v. Wilson........................ 1 Dev. & Bat. Eq. 568.............. 325

J.

Jackson v. Bard........................ 4 Johns. Ch. 230..............608, 610
———— v. Bull........................ 1 Johns. Cas. 81.................... 608
———— v. Cory........................ 8 Johns. 387.......................... 158
———— v. Dickenson........................ 15 Johns. 309..................609, 624
———— v. Edwards........................ 7 Paige 408.......................... 536
———— v. Noble........................ 2 Keen 590.......................... 500
———— v. Price........................ 10 Johns. 414, 417.................. 194
———— v. Ramsey........................ 3 Cow. 75.......................... 609
James ads. Cox........................ 4 Halst. 335.......................... 143
Jarman v. Wiswall........................ 9 C. E. Green 269.................... 154
Jarvis v. Henwood........................ 10 C. E. Green 460.................. 251
Jeffreys v. Jeffreys........................ 1 Cr. & Ph. 141...................... 156
Jennings, Ex parte........................ 6 Cow. 518, *n*...................... 640
Jennison v. Walker........................ 11 Gray 423.......................... 530
Johnson v. Foster........................ 12 Metc. 167.......................... 155
———— v. Stagg........................ 2 Johns. 510.......................... 609
Jones v. Alephsin........................ 16 Ves. 471.......................... 63
———— v. Roberts........................ 1 L. & Eq. Rep. 583 (Maine).... 619

Jones v. Soulard........................ 24 How. 41........................... 640
—— v. St. John........................ 4 Sandf. Ch. 208..................... 95
Jones' Ex'rs v. Stites.................. 4 C. E. Green 324, 325.........29, 500
Joslin v. N. J. Car Spring Co......... 7 Vr. 141, 146.....................155, 653
Juxon v. Thornhill...................... Cro. Car. 132......................... 7

K.

Kennedy v. Green,...................... 3 M. & K. 699........................ 37
Kilborn v. Robbins...................... 8 Allen 466............................ 438
King v. Clark............................ 3 Paige 76............................. 250
—— v. Platt.............................. 37 N. Y. 155.......................... 513
—— v. Ruckman........................ 7 C. E. Green 554; 9 C. E. Green 556.............................505, 519
—— v. Whiltey.......................... 10 Paige 465, 467..................154, 656
Kirtland's Adm'x v. Kirtland......... 9 C. E. Green 552, 555............. 334
Klapworth v. Dressler.................. 2 Beas. 62.........................154, 655
Kloepping v. Stellmacher............. 7 Vr. 178.............................. 143
Kyner v. Kyner.......................... 6 Watts 227........................... 661

L.

Landes v. Brant......................... 10 How. 348, 372.................... 608
Lane v. Goudge.......................... 9 Ves. 226............................. 547
Langton v. Horton...................... 1 Hare 549............................ 212
Lathrop v. Gilbert....................... 2 Stockt. 345......................... 161
Lawrence v. Bowman.................. 1 McAll. 419.......................... 256
—— v. Embree......................... 3 Brad. Sur. R. 364................. 29
—— v. Fox.............................. 20 N. Y. 268.......................... 653
—— v. Richmond...................... 1 J. & W. 241......................... 246
—— v. Taylor........................... 5 Hill 107.............................. 607
Leach v. Leach.......................... 13 Sim. 306........................... 596
Leake v. Robinson...................... 2 Merivale 363...................... 543
Lee v. Kirkpatrick....................... 1 McCart. 267........................ 134
—— v. Parker............................ 43 Barb. 611.......................... 95
Lefevre v. Laraway..................... 22 Barb. 167.......................... 513
Leith v. Leith............................ 39 New Hamp. 20.................... 320
Le Neve v. Le Neve.................... 2 L. C. in Eq. 23.................... 488
Leo v. Lambert.......................... 3 Russ 417............................ 277
Lewis v. Smith........................... 9 N. Y. 502, 514..................... 95
Lindsay v. Lindsay...................... 1 Dessaus. 150...................... 313
Little v. Cooper.......................... 2 Stockt. 274......................... 290
Lloyd v. Conover........................ 1 Dutcher 47......................... 194
—— v. Lynch............................. 28 Penna. 419, 423................. 265
Lock v. Lomas........................... 5 DeG. & S. 326..................... 35
Locke v. Lamb........................... L. R., 4 Eq. 373...................... 543
Losey v. Simpson........................ 3 Stockt. 253......................... 134

Case	Citation	Page
Lounsberry v. Locander	10 C. E. Green 554	610
Low v. Holmes	2 C. E. Green 148	193
Lush v. Wilkinson	5 Ves. 384	503
Luttrel's case	Coke's R., part 4, p. 84	533
Lyman v. Little	15 Vt. 576	95
Lyon v. Lyon	2 Gray 368	323

M.

Case	Citation	Page
Macintosh v. Thurston	10 C. E. Green 242	208
Mackay v. Gordon	5 Vr. 286	324
Magnolia v. Marshall	39 Miss. 110	7
Malloney v. Horan	49 N. Y. 116	535
Manfield v. Dugard	1 Eq. Cas. Abr. 195	547
Manley v. Pettee	38 Ill. 128	194
Marine Ins. Co. v. Hodgson	7 Cranch 335	106
Marlatt v. Warwick and Smith	3 C. E. Green 109, 121; 4 C. E. Green 441	513, 565
Marseilles Extension Railway, In re	L. R., 7 Ch. App. 161	37
Marsh v. Fulton County	10 Wall. 676	200
——— v. Marsh	1 C. E. Green 391	665
Marshman v. Conklin	6 C. E. Green 546	620
Martin v. Righter	2 Stockt. 525	134
——— v. Waddell	3 Harr. 495	8
Mason v. Clarke	17 Beav. 130	52
——— v. Mason's Ex'rs	2 Sandf. Ch. 433	310
Matthews v. Duryea	45 Barb. 69	535
——— v. Matthews	1 Edw. 565	194
Maure v. Harrison	1 Eq. Cas. Abr. 93	655
Mayers v. Townsend	3 Beav. 443	500
McCall v. Yard	1 Stockt. 358	438
McClain v. Shepherd	6 C. E. Green 76	265
McDavit v. Pierrepont	8 C. E. Green 42	488
McKim v. Mason	3 Md. Ch. 186	626
McNeillie v. Acton	1 De G., M. & G. 744	149
Mechanics Bank v. N. Y. & N. H. R. R. Co	13 N. Y. 599	200
Mechanics Build. and Loan Assoc'n v. Conover	1 McCart. 219	225, 356
Melick v. Drake	6 Paige 470	257
Mellen v. Whipple	1 Gray 317	155, 653
Mellon v. Mulvey	8 C. E. Green 198	503
Merritt v. Brown	6 C. E. Green 404, 406	521, 565
Merwin v. Smith	1 Green's Ch. 197	144
Meux v. Smith	11 Sim. 410	254
Micheau v. Cranford	3 Halst. 102	310
Middleton v. Pritchard	3 Scam. 510	8, 640

Case	Citation	Page
Millard v. Baldwin	3 Gray 484, 486	155, 653
Miss. and Mo. R. Co. v. Ward	2 Black 485	26
Mole v. Smith	Jac. 490	95
Montesquieu v. Sandys	18 Ves. 302	403
Montgomery's Ex'r v. Beatty's Adm'r	6 C. E. Green 324	545
Moore v. New York	8 N. Y. 110	536
——— v. Gamble	1 Stockt. 247	319
Moores v. Moores	1 C. E. Green 275	73, 329, 580, 601
Morgan v. Pindar	3 Rep. Ch. 76	371
——— v. Reading	3 S. & M. 366	7
Moroney's appeal	24 Penna. 372	208
Morris and Essex R. Co. v. Pruden	5 C. E. Green 530	26
Morris C. & B. Co. v. Dennis	1 Beas. 249	258
Morris County Bank v. Rockaway Man'f'g Co	1 C. E. Green 150	626
Moses v. Murgatroyd	1 Johns. Ch. 119	655
Muir v. Newark Savings Inst	1 C. E. Green 537	492
Munday v. Vail	5 Vr. 418	96
Mundy v. Mundy	2 McCart. 290	460
Murray v. Costar	20 Johns. 604	510
——— v. Lylburn	2 Johns. Ch. 442	134
Muzzy v. Allen	1 Dutcher 471	254
Myer v. Myer	10 C. E. Green 28	277

N.

Case	Citation	Page
National Bank v. Sprague	6 C. E. Green 458	508
Neptune Ins. Co. v. Dorsey	3 Md. Ch. 338	662
New Jersey Patent Tanning Co. v. Turner	1 McCart. 326	484
New Jersey Turnpike Co. v. Hall	2 Harr. 337	623
New London Bank v. Lee	11 Conn. 112	655
Nichol v. N. Y. & E. R. Co	2 Kernan 121	578
Nicholls v. Peak	1 Beas. 69	35
Nichols v. Nichols	10 C. E. Green 60	325
Nightingale v. Meginnis	5 Vr. 461	81
Nims v. Bigelow	45 N. H. 343	535
North of England Junc. R. Co. v. Clarence R. Co	1 Coll. 507	171
Northampton, Inhabitants of, v. Elwell	4 Gray 81	653

O.

Case	Citation	Page
Obert v. Obert	1 Halst. Ch. 397	195
Olcott v. Robinson	20 Barb. 148	71

Osterman v. Baldwin	6 Wall. 116.	194
Owen v. Delamere	15 Eq. Cases 139	148
—— v. Owen	1 Atk. 494	51
—— v. Thomas	3 Myl. & K. 353	242
Oxford, Earl of, v. Lady Rodney	14 Ves. 417, 423	653

P.

Packham v. Gregory	4 Hare 398	544
Page v. Page	2 P. W. 489	51
Paine v. Hathaway	3 Vt. 212	113
Palin v. Hills	1 Myl. & K. 470	136
Parker v. Child	10 C. E. Green 41	439
—— v. Hill	8 Metc. 447	618
—— v. Parker	1 Beas. 105	277
Parsons v. Freeman	Amb. 115	653
Passaic, The Village of, v. State	8 Vr. 538	569
Patten v. Heustis	2 Dutcher 293	652
Pawlet v. Clarke	9 Cranch 331	160
Payne v. Hathaway	3 Vt. 212	205
Pearce v. Creswick	2 Hare 286	290
—— v. Olney	20 Conn. 544	319
Peat v. Chapman	1 Ves., sr., 542	51
Peavey v. Calais R. Co	1 Am. Ry. Cas. 147	23
Peeble's case	15 Serg. & R. 42	525
People v. Babcock	11 Wend. 590	23
—— v. Central R. R. Co. of New Jersey	42 N. Y. 283	15
People v. Vanderbilt	26 N. Y. 287	17
Perrine v. Applegate	1 McCart. 531, 538	458
Phillips v. Thompson	2 Johns. Ch. 418	655
Potter v. Wheeler	13 Mass. 504	194
Potts v. Whitehead	5 C. E. Green 55	187
Powell v. Mayo	11 C. E. Green 120	440
Powell's Ex'rs v. Butler's Adm'rs	3 Green's Ch. 465	318
Pratt v. Adams	7 Paige 615	655
—— v. Potter	21 Barb. 589	608
President, &c., v. Trenton City Bridge Co	2 Beas. 46	647
Proprietors, &c., v. Hoboken Land and Imp. Co	2 Beas. 81, 503	19
Pyke v. Northwood	1 Beav. 152	258

Q.

Quidort's Adm'rs v. Pergeaux	3 C. E. Green 477	524

R.

Railroad Co. v. Schurmeir.............. 7 Wall. 272, 287...................... 639
Raven v. Waite......................... .. 1 Swanst. 553.......................... 30
Read v. Robinson......................... 6 Watts & Serg. 332................. 98
Reade v. Livingstone............. ...... 3 Johns. Ch. 481...................... 503
Richardson, Ex parte..................... 3 Madd. 138................. 149
Robert v. Hodges......................... 1 C. E. Green 299..................... 393
Robins v. Bunn........................... 5 Vroom 322........................... 627
Rochester v. Curtiss........................ Clarke 343.............................9, 17
——— v. Erickson.................... 46 Barb. 92.............................. 17
Roddam v. Hetherington............... 5 Ves. 91................................. 277
Rogers v. Potter............................ 3 Vroom 78............................. 608
Rouse's estate, In re .... 9 Hare 649.............................. 30
Rowe v. White.............................. 1 C. E. Green 411.................... 29
Rundle v. Del. and Rar. Canal Co... 1 Wall., jr., 275; 14 How. 80....8, 639
Russell v. Asby............................ 5 Ves. 96................................ 277

S.

Salter v. Williamson...................... 1 Green's Ch. 480..................... 140
Sanford v. McLean........................ 3 Paige 116............................ 660
Sandford v. Remington................... 2 Ves., jr., 189........................ 313
Savings Association v. Vandervere.. 3 Stockt. 387.......................... 225
Scudder v. Trenton Del. Falls Co.... Saxt. 694...........................24, 25
Scull v. Reeves............................. 2 Green's Ch. 85, 131...........98, 654
Seal v. Duffy................................ 4 Barr. 274............................. 98
—— v. Hudson............................ 7 Bail Court Rep. 55; 1 Dow. & Lowndes 760........................ 143
Seaman v. Riggins......................... 1 Green's Ch. 214.................... 513
Sexton v. Wheaton........................ 8 Wheat. 229.......................... 503
Shannon v. Marselis...................... Saxt. 413.............................. 327
Sharp v. Humphrey....................... 1 Harr. 26............................. 310
Shaw v. Shaw.............................. 17 Conn. 189......................73, 585
Sheldon v. Smith.......................... 28 Barb. 593.......................... 607
Shelley's case.............................. 1 Coke 99............................. 609
Shinn v. Budd.............................. 1 McCart. 234............ 660
Shippen v. Newton........................ 5 Vr. 79................................ 443
Short v. Lee.................................. 2 Jac. & W. 468...................... 146
Simar v. Canaday......................... 53 N. Y. 298.......................... 536
Smith v. Lowry .... 1 Johns. Ch. 320................106, 109
——— v. Smith............................ 2 Halst. 515........................... 535
Smithurst v. Edmunds.................... 1 McCart. 408........................ 212
Staats v. Bergen........................... 2 C. E. Green 558.................... 164
Star Brick Co. v. Ridsdale............. 7 Vr. 229............................... 32
State v. Elizabeth......................... 8 Vr. 353.........................59, 60
—— v. Hudson Tunnel Co........... 9 Vr. 548..........................184, 573

State v. Mayor, &c., of Newark	2 Vr. 360	60
Stevens v. Pat. & New. R. Co	5 Vr. 532, 553	183
Stevenson v. Black	Saxt. 338	655
Stillman's Ex'rs v. Stillman	6 C. E. Green 126, 129, 130....46, ...47,	66
Stokes v. Tilly	1 Stockt. 130	297
Stover v. Eccleshimer	46 Barb. 84	212
Stratton v. Allen	1 C. E. Green 229	36
Stultz v. Schaeffle	18 E. L. & Eq. 576, 598	458
Swan v. Patterson	7 Md. 167	662
Sweet v. Parker	7 C. E. Green 453	280

T.

Tash v. Adams	10 Cush. 252	295
Tasker v. Small	3 M. & C. 63	95
Taylor v. Biddall	2 Mod. 289	547
——— v. La Bar	10 C. E. Green 222............204,	208
——— v. Morris	7 C. E. Green 606	484
——— v. Sheppard	1 Y. & C., Exc. 271	109
Thayer v. Stark	6 Cush. 11	618
Thomas v. West Jersey R. R. Co	8 C. E. Green 431; 9 C. E. Green 567	369
Thomas' Ex'r v. Anderson's Adm'r	6 C. E. Green 22	545
Thompson v. Andrews	1 M. & K. 116	149
——— v. Hardman	6 Johns. Ch. 436	79
——— v. Murray	2 Hill's. Ch. 204, 213	222
Thorne v. Halsey	7 Johns. Ch. 189	277
Tichenor v. Dodd	3 Green's Ch. 454	655
Tindall v. Phillipsburg	4 Vr. 38	443
Titus and Scudder v. Cairo and Fulton R. R. Co	8 Vr. 98	104
Tomkins v. Tomkins	3 Stockt. 514	319
Totten v. Stuyvesant	3 Edw. 500, 503	194
Trenton Banking Co. v. McKelway	4 Halst. Ch. 84	258
Trotter v. Hughes	12 N. Y. 74; 2 Kernan 74..154, 155,	656
Trusdell v. Jones	8 C. E. Green 121	81
Turner v. Bapt. Miss. Union	5 McLean 349 350	256
Tweddell v. Tweddell	2 Bro. C. C. 101	653
Tyler v. Wilkinson	4 Mason C. C. 397	638

V.

Van Dorn v. Van Dorn	2 Penn. 697; Penn. 513.......206,	539
Van Dyne v. Vreeland	3 Stockt. 370; 1 Beas. 142	654
Van Mater v. Sickler	1 Stockt. 485	140
Van Meter v. Jones' Ex'rs	2 Green's Ch. 523	318

Van Orden v. Johnson........ 1 McCart. 376........ 47
Van Waggoner v. McEwen........ 1 Green's Ch. 412........ 327
Vanderkemp v. Sheldon........ 11 Paige 28........ 438
Vandyke's Adm'r v. Vanderpool's Adm'r........ 1 McCart. 198........ 545
Vanneman v. Powers........ 56 N. Y. 39........ 504
Vansciver v. Bryan........ 2 Beas. 434........ 620
Vartie v. Underwood........ 18 Barb. 561........ 535
Vaugh v. Johnson........ 1 Stockt. 173........ 106
Vischer v. Vischer........ 12 Barb. 640........ 321
Voorhees v. Voorhees' Ex'rs........ 3 C. E. Green 227........136, 140
Voorhees' Ex'rs v. Melick........ 10 C. E. Green 523........ 280
Vreeland v. Van Ryper........ 2 C. E. Green 134........ 547

W.

Wade v. Miller........ 3 Vr. 296........ 95
Walker v. Hill's Ex'r........ 6 C. E. Green 191, 195, 196; 7 C. E. Green 513, 519, 520......265, 565
——— v. Maxwell........ 1 Mass. 104........ 362
Ward's Ex'rs v. Hague........ 10 C. E. Green 397........ 47
Waring v. Ward........ 7 Ves. 337........ 653
Warwick v. Nowell........ 1 Rob. (Va.) 308........ 258
Washburn v. Burns........ 5 Vr. 19........ 309
Watts v. Kelson........ 6 Ch. Ap. Cas. 169........ 531
Westcott v. Cady........ 5 Johns. Ch. 335........ 547
Westerfield v. Bried........ 11 C. E. Green 357........ 361
Westminster Brymbo Coal and Coke Co. v. Clayton........ 36 L. J., Ch. 476........ 171
Wetmore v. Midmer........ 6 C. E. Green 242........ 93
Wheeler v. Kirtland........ 9 C. E. Green 552, 555, 556........ 334
Whitchurch, Ex parte........ 1 Atk. 55........ 276
Whitehouse v. Partridge........ 3 Swanst. 365........ 62
Whittell v. Dudin........ 2 Jac. & W. 279........ 500
Williamson v. N. J. Southern R. R. Co........ 11 C. E. Green 398........ 212
Wills v. Cooper........ 1 Dutcher 137........ 310
Wilson v. Brown........ 2 Beas. 277........ 151
——— v. King........ 8 C. E. Green 150........223, 349, 375
Winants v. Terhune........ 2 McCart. 185........ 233
Winchester v. Balt. & Susq. R. R. Co........ 4 Md. 231........ 37
Winchester v. Charter........ 102 Mass. 272........ 503
Winter v. Peterson........ 4 Zab. 524........ 639
Wintermute v. Snyder........ 2 Green's Ch. 489........ 545
Wood v. Harman........ 5 Madd. 368........ 35
Woodruff v. Taylor........ 20 Vt. 65........ 623
Woods v. Huntingford........ 3 Ves. 128, 131........ 653

Wright v. Oakley........................ 5 Metc. 400............................... 562
——— v. Rogers.................. ...... 1 L. R., P. & D., 678................ 460
——— v. Stanard................ ...... 2 Brock. 311.............................. 535
Wyckoff v. Gardner............. ...... Spenc. 556................................ 309

Z.

Zouch v. Parsons.............. .... Burr. 1794, 1801...................... 193

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1876.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAHAM V. VAN FLEET, ESQ., VICE-CHANCELLOR.

THE ATTORNEY-GENERAL *vs.* THE DELAWARE AND BOUND BROOK RAILROAD COMPANY.*

1. Where the suit immediately concerns the rights of the state, the information is generally exhibited without a relator.

2. In matters of purely public concern, as where the property of the state, owned by it in its political capacity, or where public rights in which no merely private interest is involved, are in question, the courts are open to the state without requiring security for costs.

3. The Delaware river became, by conquest, the boundary between the States of New Jersey and Pennsylvania; and being such, and the original property being in neither of them, and there being no convention between them in regard to it, when, in 1783, the King of Great Britain relinquished all claims to government, propriety and territorial rights in the United States, each state, by the rule of international law, had dominion to the middle of the stream.

4. A river may be navigable below the ebb and flow of the tide in the sense of the common law, and, in fact, navigable above; and the question of boundary in respect to lands adjoining it will be determined by one principle above, and by another below tide water.

---

* Cited in *Traphagen* v. *Mayor and Aldermen of Jersey City*, 2 *Stew.* 208; *Long Branch Com'rs* v. *West Line R. R. Co.*, *Id.* 569.

5. New Jersey has no *jus privatum* in the soil of the Delaware river above tide water; that is in the riparian owners, subject to the public easement of navigation, and to such regulations by the legislature of the waters as the public right of navigation may require. As to the jurisdiction and power of the state over it, the river above tide water is to be regarded as a navigable stream.

6. The Delaware and Bound Brook Railroad Company, in erecting piers upon the land under water in the Delaware river to the middle of the stream, for the erection of a viaduct for a railroad track to connect with the track of the North Pennsylvania Railroad Company, have not violated the 36th section of the general railroad law, prohibiting corporations formed under that law from taking any land under water belonging to the state, unless the consent of the riparian commissioners shall first have been obtained.

7. If it be merely doubtful whether there is a purpresture or not, an injunction asked for on the ground of purpresture will not be granted. To warrant an injunction in such case, it must be clear that there is a purpresture.

8. The provision of the compact of 1783, between Pennsylvania and New Jersey, on the subject of fisheries, relates to fisheries below the head of tide water, which were the subject of private ownership and individual occupancy. The right in the riparian owners, of several fishery in front of their lands is distinctly recognized in this state.

9. The objects and purposes of that compact were merely to secure the administration of justice, and to secure to the contracting parties the use of the river as a public highway. The provision for concurrent jurisdiction had reference to the former only; it was a police regulation, merely.

10. The compact of 1783 gives no jurisdiction to Pennsylvania over the soil of the Delaware river within the territorial limits of this state, nor does it confer on her any right therein. It gives her a right to complain of, and to be relieved against, any structure or other occupation of the river on the soil of this state injurious to the free navigation of the river.

11. In an action to remove an erection in a public river, on the ground that it is an injury to the *jus publicum*, the common right of navigation, it must appear that a nuisance, in fact, exists; even though the erection be an encroachment on the soil of the state.

12. The viaduct built by the Delaware and Bound Brook Railroad Company, from the Jersey shore to the middle of the river, to meet part of the same structure built by the North Pennsylvania Railroad Company from the Pennsylvania shore, held to be authorized by the 36th section of the general railroad law, conferring power upon corporations organized under it to build a viaduct "across any navigable or other river, stream or bay in this state."

13. That viaduct *held* not to interfere with the navigation of the river, and not to be a nuisance in fact.

14. That viaduct is not a toll bridge, but merely the railroad connection of two railroads; a highway by railroad, over the river. The company so operating it is not chargeable with a usurpation of a franchise to take tolls.

15. Pennsylvania gave authority to build this bridge by the act of incorporation of the North Pennsylvania Railroad Company, in 1852. New Jersey has acquiesced by her silence in the construction which Pennsylvania thus put upon the compact of 1783.

16. Authority to bridge the river has been given by both states. Long lapse of time between the giving of the consents does not affect it.

17. A doubt as to the authority of a corporation to do an act is fatal to an application for an injunction to restrain such act on the ground of want of authority.

18. Where a party acting *bona fide* and upon its not unreasonable construction of a public grant, has been permitted to expend a large sum of money in the construction of a public work, in the confidence that it possessed all requisite legislative authority, without a word of protest or remonstrance till the work is practically completed, equity will refuse its aid, even to the state, leaving it to its remedy at law.

Motion for injunction. On bill and answer and order to show cause why injunction should not issue.

Mr. J. Vanatta, Attorney-General, and *Mr. Cortlandt Parker,* for the motion.

Mr. A. Browning, Mr. Williamson, and *Mr. Ashbel Green,* contra.

THE CHANCELLOR.

The information complains that the defendants are constructing a bridge across the Delaware river, and so have been and are guilty of purpresture, and that the structure is a public nuisance. It prays that they may be restrained from erecting or completing it, and from placing or raising its abutments, piers or supports, which, it alleges, are to be placed in the waters of the river, and from using and maintaining the structure, and taking tolls or fares for passing or repassing on or over it; and that it may be declared to be a purpresture and public nuisance, and that the defendants may, by the decree of this court, be ordered to abate so much of it

as shall have been erected before the final hearing, and to remove the materials from the river. It alleges that the Delaware is the boundary line between New Jersey and Pennsylvania, and is now, and of right always has been, a public highway in its whole length and breadth, free and common to the citizens of this and other states, and is navigable for many purposes of trade and commerce at the point where the bridge is being erected; that the compact of 1783 between New Jersey and Pennsylvania is in full force, and has, ever since its ratification by the respective legislatures, been in all respects recognized as binding, and has been observed and conformed to by the parties to it until its violation and infringement by the defendants, in erecting the viaduct; that the defendants claim to have been incorporated under the general railroad law of this state, and, in their articles of association, their road is described as beginning at a point in the boundary line between the States of Pennsylvania and New Jersey, in the middle of the Delaware river, in the township of Ewing, in the county of Mercer, in this state, somewhere between an island in the river called Slack's Island, northward of Yardleyville, in the State of Pennsylvania, and another island in the river called White's Island, southward of Yardleyville; and the termination point of the road is in the southerly line of the railroad of the Central Railroad Company of New Jersey, at or near the village of Bound Brook; that the defendants, under pretence of constructing a railroad according to their articles of association, have commenced the erection of the bridge in question across the Delaware (an inter-state river), from a point in the township of Ewing, in Mercer county, in this state, to a point in the township of Lower Makefield, in Bucks county, in Pennsylvania, and that they propose to use it, when finished, for their road; that they allege that the bridge is part of their road, and that they intend to charge and receive fares or tolls from persons using the bridge; whereas the Attorney-General insists that the bridge is not a part of the road, and that the attempt to erect the structure, and take tolls for its use, is unlawful. He

also insists that the general railroad law does not, in terms or by implication, confer on the defendants the right to erect any bridge over the Delaware; that the erection and construction of the bridge is a direct and positive infraction of the compact of 1783, between the states, and that the power to erect a bridge over the Delaware can only be conferred by concurrent legislation of both states, and that neither state can, of its own authority, authorize a corporation to place piers, erect a bridge, take tolls, and construct a highway over the river, but such franchise can only be conferred by concurrent legislation; that not only has there been no concurrent legislation in this case, but there has been no grant of the franchise to the defendants from either state; that the grant of the franchise cannot be implied from any act or law of this state, and that the structure, therefore, is without authority of law, and an invasion of the sovereignty of this state, and if the erection and construction be permitted, it will be a purpresture, and will be liable to be abated as such. The information states that the erection of the bridge at the point where it is located will greatly imperil, obstruct, and interrupt the use of the river as a highway, and that the bridge will be a common nuisance to the people of this state. It further alleges that the defendants, on application to them, have refused to remove the structure, or to desist from their purpose of finishing and using it.

The defendants have answered fully. The answer insists, and on the argument it was urged, that the information cannot be maintained in its present form, inasmuch as it is exhibited without a relator. This objection is not well taken. The practice is settled. Where, as in this case, the suit immediately concerns the rights of the state, the information is generally exhibited without a relator. *Laussat's Fonblanque, p. 5, n; Mitford's Plead., by Jeremy,* 99; 1 *Newland's Prac.* 55; *Blake's Chancery Prac.* 40; *Cooper's Eq.* 101, 102. While in practice it is usual to name a relator, and the contrary course may tend to oppression, since, if there is no relator, the defendant can recover no costs, still in matters of

purely public concern, as where the property of the state, owned by it in its political capacity, or where public rights in which no merely private interest is involved, are in question, the courts are open to the state without requiring security for costs.

The information is filed to remove out of the Delaware the viaduct built by the defendants and the North Pennsylvania Railroad Company, (about one-half by each company), across the river near Yardleyville, above the falls of Trenton, and therefore above tide-water.

The Attorney-General claims that the structure is a purpresture; that it is a public nuisance, and that its maintenance and use for the purposes for which it is designed will be a usurpation of a franchise, and will be a violation of the compact of 1783, between this state and Pennsylvania. The defendants, on the other hand, allege that the land on which the viaduct is built is not the property of the state, but is private property; that, by the provisions of the general railroad law, under which they were incorporated, they are authorized to construct the bridge in question, and that its erection and maintenance are no violation of the compact, and that consent to its erection has been given by the State of Pennsylvania.

The royal charters for the territories in which what are now the States of New Jersey and Pennsylvania were embraced, bounded them on the Delaware; that in which this state was included, by "the east side" of the river, and the other, "on the east" by the river. The crown was advised in 1721 that these grants did not include the river, or any part of it, or the islands therein, and that the right to them remained in the crown. *Chalmers' Opinions* 90. By the treaty of peace between the United States and the King of Great Britain, in 1783, the latter relinquished all claims to government, propriety and territorial rights in the former. The consequence was that the river became, by conquest, the boundary between the states; and being such, and the original property being in neither of them, and there being then no

convention between them in regard to it, each state, by the rule of international law, had dominion to the middle of the stream. At the close of the Revolution, the common law of England was in force in this state; for, by the constitution of July 2d, 1776, it was provided that that law should remain in force in New Jersey until altered by the legislature. By the common law, the ownership of the soil of all rivers not navigable, that is, in which the tide does not ebb and flow, is in the riparian owners. In the case of public rivers which, though not navigable in the common law sense of the term, are, nevertheless, navigable in fact, the ownership of the soil is in the riparian owners, subject to the public right of navigation. And so, too, though the river be declared (as was the Delaware, by act of the colonial legislature of New Jersey in 1771, [*Allinson's Laws* 347] and the compact between this state and Pennsylvania in 1783) to be a public or common highway. *Juxon* v. *Thornhill, Cro. Car.* 132; *Hale's De Jure Maris*, c. 3; *Harg. Law Tracts, p.* 9; *Lord Fitzwalter's case,* 1 *Mod.* 105; 3 *Kent's Com.* 427; *Angell on Watercourses,* §§ 535, 545. It has been held, even in the case of the great river Mississippi, that the common law, and not the civil law, governs; that that river, above the ebb and flow of the tide, is not navigable in the common law sense of the term, and that the riparian owner owns the soil to the middle of the river; and further, that the act of Congress establishing the river as the western boundary of the Mississippi territory, and adopting the common law for the government of that territory, fixed the boundary line at the middle of the river, and that, therefore, the right of riparian owners on the east side of the Mississippi must be determined by the common law; and still further, that their rights to the soil of the river, or to the use of the bank, are not affected by the fact that the act of Congress makes the river a common highway, free to every citizen without tax or duty. *Morgan* v. *Reading,* 3 *S. & M.* 366; *Magnolia* v. *Marshall,* 39 *Miss.* 110. In Ohio it has been adjudged that the ordinance of 1787, for the government of the North Western territory, which declares

that the navigable waters leading into the Mississippi shall be common highways, and forever free, does not prevent the application of the common law principle that he who owns the bank owns to the middle of the river, subject to the easement of navigation. *Adm's. of Gavit* v. *Chambers*, 3 *Ohio* 495. See also *Middleton* v. *Pritchard*, 3 *Scammon* 510. A river may be navigable below the ebb and flow of the tide, in the sense of the common law, and, in fact, navigable above, and the question of boundary in respect to lands adjoining it will be determined by one principle above and another below tide-water. Though, in some of the United States (among them Pennsylvania), the civil law doctrine as to the ownership of the soil has been adopted as to great rivers not navigable in the common law sense, in many of them the common law doctrine governs the subject. It governs it here. *Arnold* v. *Mundy*, 1 *Halst.* 1; *Gough* v. *Bell*, 2 *Zab.* 441; *Bell* v. *Gough*, 3 *Zab.* 624; *Martin* v. *Waddell*, 3 *Harr.* 495; *Rundle* v. *Del. and Rar. Can. Co.*, 1 *Wall., Jr.*, 275. In the last case it was applied to the Delaware. The court there said: "The river Delaware is the boundary between the States of Pennsylvania and New Jersey. The tide ebbs and flows to the part of the Trenton Falls where the Trenton bridge crosses the river; above that point it is a fresh water stream. Previous to the Revolution, the channel and waters of the river below Trenton, so far as the river was navigable in the common law sense of the term, were vested in the King of England. The grant, both for New Jersey and for Pennsylvania, was bounded by the river Delaware. So far as the tide ebbed and flowed, the proprietors had no title to the bottom of the river below low water mark. But above the bridge and the flow of the tide, the proprietors of each province held *ad filum medium aquæ* by the established principles of the common law, according to which their respective grants must be construed. So far as the river was the property of the crown, it devolved on the two states by the Revolution and the treaty of peace with Great Britain. Immediately after the treaty of peace, the States of Pennsylvania and New Jersey entered into

the compact of April, 1783, making the Delaware a common highway for the use of the states." See, also, *S. C.*, 14 *How.* 80.

The state has no *jus privatum* in the soil of the Delaware above tide-water; that is in the riparian owners, subject to the public easement of navigation, and to such regulation by the legislature of the waters as the public right of navigation may require. The right of the riparian owners to the soil of the river is subordinate to the right and power of the state to use and appropriate the river to the public good in promotion of navigation; and, as to the jurisdiction and power of the state over it, the river above tide water is to be regarded as a navigable stream. *Vattell, Book* 1, §§ 249, 272; *Binney's Case*, 2 *Bland* 99; *Commissioners of Homochitto River* v. *Withers*, 29 *Miss.* 21; *Woolrych on Waters* 46.

There is therefore, in this case, no purpresture, and the defendants have not violated the proviso of the thirty-sixth section of the general railroad law, which prohibits corporations formed under that law from taking any land under water belonging to the state, unless the consent of the riparian commissioners shall first have been obtained.

But if it be merely doubtful whether there is a purpresture or not, an injunction asked for on the ground of purpresture will not be granted; for, to warrant an injunction in such case, it must be clear that there is a purpresture. *Story's Eq. Juris.*, § 924 *a*; *City of Rochester* v. *Curtiss, Clarke* 343.

It is argued on behalf of the state, that this view of the ownership of the soil of the river will give to the riparian owner the right of fishery in front of his land, and that the terms of the compact of 1783 between this state and Pennsylvania, forbid such construction. The provision of the compact, on the subject of fisheries, is that "each of the legislatures of said states shall hold and exercise the right of regulating and guarding the fisheries in the said river Delaware, annexed to their respective shores, in such manner that the said fisheries may not be unnecessarily interrupted during the season for catching shad by vessels riding at anchor on the fishing ground, or by persons fishing under a claim of

common right on said river. In *Gough* v. *Bell*, 2 *Zab.* 441, 462, Chief Justice Green, referring to this provision of the compact, says, that the act of June 13th, 1799, (*Pat.* 416, § 9,) shows clearly that the legislature of this state understood this clause of the compact of 1783 as relating to fisheries below the head of tide-water, which were the subject of private ownership and individual occupancy; and he adds, that the rights of the riparian proprietors to fisheries in the Delaware are also clearly recognized by the acts of November 26th, 1808, (*Bloomfield* 204,) of February 9th, 1819, (*Rev. Laws* 653,) of February 15th, 1819, (*Rev. Laws* 659,) and the laws of November 26th, 1808, (*Rev. Stat.* 480), and the act of December 27th, 1826, (*Rev. Stat.* 479); and he says, "such repeated and unequivocal legislative recognitions of a right furnish proof of its existence which cannot be disregarded." The act of 1799, above referred to, provides for the regulation of fisheries in the Delaware, between the falls at Trenton and the mouth of the Machacomack river, which is near the north station. It appoints commissioners to grant licenses to erect weirs, fishing dams, pounds and baskets in the Delaware; but provides that no license shall be granted to erect any weir, rack, fishing dam, pound or basket opposite to or adjoining the land of any person without his or her consent in writing, previously obtained, thus distinctly recognizing the right of several fishery in the riparian owners.

I proceed to consider the subject in the light of the obligations of this state to Pennsylvania, under the compact of 1783. The theory of joint ownership by New Jersey and Pennsylvania of the entire river, asserted on behalf of the state in this case, is by no means a new one. It was advanced by Pennsylvania many years ago, and stoutly resisted by this state. It has not only never been assented to by New Jersey, but the practice of both states is opposed to it. Since the compact of 1783 was made, the citizens of Pennsylvania have, both with and without the sanction of her legislature, and without receiving or asking the consent of this state, erected wing-dams and other structures in the river on her side. In

like manner our citizens have occupied the soil of the river on our side, and each state has withdrawn, without the consent of the other, the water from the river for the purpose of artificial navigation. The requirements of the administration of justice, and the necessity of providing for the protection of the navigation of the river, gave rise to the compact. These, and these alone, were the objects of it. This appears both from the preamble and the provisions of the compact. The following are the preamble and the first and second sections: "Whereas inconveniences and mischiefs have arisen, and may hereafter arise, from the uncertainty of jurisdiction within and on the river Delaware; therefore, to prevent the same, and in order that law and justice may hereafter in all cases be executed and take effect within and upon the said river from shore to shore, in all parts and places thereof, where the said river is the boundary between the said states, the said commissioners do agree and establish, for and in behalf of their respective states, in manner following, that is to say: First—It is declared that the river Delaware, from the station point on the northwest corner of New Jersey, southerly to the place upon said river where the circular boundary of the State of Delaware toucheth upon the same, in the whole length and breadth thereof, is, and shall continue to be and remain a public highway, equally free and open for the use, benefit and advantage of the said contracting parties; provided, nevertheless, that each of the legislatures of said states shall hold and exercise the right of regulating and guarding the fisheries on the said river Delaware, annexed to their respective shores, in such manner that the said fisheries may not be unnecessarily interrupted during the season for catching shad, by vessels riding at anchor on the fishing ground, or by persons fishing under claim of a common right on said river. Secondly—That each state shall enjoy and exercise a concurrent jurisdiction within and upon the water, and not upon the dry land, between the shores of said river; but in such sort, nevertheless, that every ship and other vessel, while riding at anchor before any city or town in either

state, where she hath last laded or unladed, or where it is intended she shall first thereafter either lade or unlade, shall be considered exclusively within the jurisdiction of such state; and every vessel fastened to or aground on the shore of either state, shall in like manner be considered exclusively within the jurisdiction of such state; but that all capital and other offences, trespasses or damages committed on said river, the judicial investigation and determination thereof shall be exclusively vested in the state wherein the offender, or person charged with such offence, shall be first apprehended, arrested or prosecuted." The third section provides that all islands, islets and insulated dry land within the bed and between the shores of the river, and between the above mentioned station point northerly, and the falls of Trenton southerly, shall, as to jurisdiction, be deemed and considered as parts and parcels of the state to which such insulated dry land lay nearest at the time of making the compact; and that certain designated islands below the falls, shall be annexed to and be parts of this state, and that other designated islands shall be annexed to and be part of Pennsylvania; and that all islands below the falls shall be annexed to and be part of the state nearest which they, at the time of making the compact, lay; and so of islands which might thereafter be formed in the river. The last section provides for the ratification of the compact by the legislatures of the states, and that when so ratified it shall be forever irrevocable, except by mutual concurrence.

By act of the 26th of November, 1783, the islands in the Delaware belonging to this state were annexed to the respective counties and townships nearest which they lay, except Petty's Island, which was annexed to Newton township, in Gloucester county. *Paterson's L., p.* 50. In 1817, differences arose between the states in regard to wing-dams and obstructions placed in the river on the New Jersey side by riparian owners, of which Pennsylvania complained on the ground that they were injurious to the navigation. The report of a committee of the General Assembly of this state to that body on the subject, is evidence of the construction which

had been put upon the compact of 1783. It was presented by the chairman, Isaac H. Williamson, and it distinctly asserts the right of each state to authorize, without the concurrence of the other, the erection of mills and wing-dams on its own shores, and within its own jurisdiction, not injurious to navigation. *Min. of Assembly of* 1817. And still further, the commissioners appointed by this state to settle, in conjunction with those appointed by Pennsylvania, the differences above mentioned, were William S. Pennington, David Thompson, and Elliot Tucker. In their first written communication, dated September 15th, 1817, to the commissioners of Pennsylvania, they say: "It appears to us that the respective legislatures of Pennsylvania and New Jersey, notwithstanding the agreement of 1783, have a right to give their assent to, and to regulate by law, the erection, on their respective shores, of all useful piers, docks, wharves, banks, and even mill-dams, or other buildings for the beneficial use of the respective shores; but that in the exercise of this authority they are bound, as well by public law as by the agreement of 1783, to preserve the navigation of the river. We consider the agreement of 1783 nothing more than a declaration that the river Delaware, within the limits prescribed, then was, and should continue to be, a public navigable river, in contradistinction to a private river, and that it must be subject to the same law as all other public navigable rivers that are deemed public highways. We apprehend it to be a mistaken opinion, however extensively it may have spread itself, that the whole bed of the river is sacred, and cannot be touched without a violation of the rights of the state we represent. The soil of the river to the midway thereof, at least at and above the falls of Trenton, if not below, is vested by law in the owners of the adjoining land. It is true the same principle of law that vests this private right in the owners of the adjacent soil, also vests in the public the rights of unobstructed navigation. We admit that this private right must be so exercised as not to injure the public right of navigation. It is not every erection on the bed of the river that becomes a nuisance, and is to be

construed as a violation of the agreement of 1783; if this was the case, all the piers and docks erected in the river must be destroyed. Docks and wharves judiciously placed on the river, are useful to commerce; in which case they are innocent and lawful erections. But, should they become so far extended as to obstruct navigation, they would become public nuisances, be unlawful, and liable to prostration. We apply the same reasoning to mill-dams, and other erections on the river. Their lawfulness or unlawfulness depends on the fact whether they are or are not obstructions to navigation. We have been more particular in disclosing our opinions on this head, that we might, at one view, enable you to understand the reasoning that led to certain legislative acts of New Jersey relative to wing-dams."

The commissioners close a subsequent communication to the commissioners of Pennsylvania, dated September 17th, 1817, as follows: "Whether the English doctrine, conferring the bed of the river to the middle thereof, on the owners of the adjacent soil, is adopted in this country or not, is a question wholly immaterial in the present inquiry. Whether it is in the owners of the adjoining land, the representatives of the original proprietors, or the state, is a question to be settled in each state by the laws thereof, and has no bearing on the subject under investigation. It is sufficient that it is in one or another of them. We contend that the agreement of 1783 did not touch the soil, but was confined to questions of jurisdiction and navigation, and that the bed of the Delaware river to the midway thereof, from the first settlement of the country to this hour, has belonged to the State of New Jersey, or some of the citizens thereof, and that the Commonwealth of Pennsylvania never had, and, as we believe, never pretended to have any title thereto."

It appears from these public documents, which respectively have the sanction of two eminent names of the past generation, the first Governor Pennington and Governor Williamson, that thirty-five years after the making of the compact, the theory of joint ownership of the river was not entertained by

this state, and was not regarded as an implication from the compact. It has never been recognized since then. The act of March 1st, 1820, to "prevent obstructions to the navigation of the river Delaware," (*Rev. L.* 708,)* cited in support of it, does not recognize it. The objects and purposes of the compact were merely to secure the administration of justice, and to secure to the contracting parties the use of the river as a public highway. The provision for concurrent jurisdiction had reference to the former only. It was a police regulation merely, and gave to neither of the states any dominion or authority whatever over, or right in, or control of, that part of the soil of the river which, by the law of nations, belonged to the other. The construction put by the Court of Appeals of New York, in *The People* v. *The Central Railroad Co. of New Jersey*, 42 *N. Y. R.* 283, upon the compact made in 1833, between this state and the State of New York, (*Nix. Dig.* 965,)† is in point. By the third article of that compact it was declared that New York should have and enjoy exclusive jurisdiction of and over all the waters of Hudson river lying west of Manhattan Island, and to the south of the mouth of Spuytenduyvel creek, and of and over the lands covered by the said waters, to the low water mark on the westerly or New Jersey side thereof, subject to certain designated rights of property and jurisdiction of New Jersey, among which was the exclusive right of property in the land under water lying west of the middle of the bay of New York, and west of the middle of that part of Hudson river which lies between Manhattan Island and New Jersey, and exclusive jurisdiction of and over the wharves, docks, and improvements made, or to be made, on the shore of this state, and of and over all vessels aground on the shore, or fastened to any such wharf or dock, except that such vessels were to be subject to the quarantine or health laws of New York. The suit was brought by the Attorney-General, in behalf of the state, to abate as nuisances, and cause the removal of certain wharves, bulkheads, piers, and railroad tracks, and other erections which the defendants had placed in the harbor of New York, and extending into

* *Rev.*, *p.* 728, *sec.* 9. † *Rev.*, *p.* 1173.

the harbor and the Hudson river about a mile from the New Jersey shore. The complaint claimed that the erections were within the limits and jurisdiction of New York, and were an obstruction to navigation, and injurious to the public health, and were constructed without lawful authority. They were all placed on the west of the designated boundary line. It was held that the jurisdiction conferred upon New York over the waters of the river and bay was a qualified and limited jurisdiction, for police and sanitary purposes, and to promote the interests of commerce in the use and navigation of those waters, and was not designed to confer or create control over the lands or domains of New Jersey, or to give to New York any right to interfere with the complete political or governmental jurisdiction of this state, as a sovereign state, of and over her own soil, and its appurtenances, and of and over every description of property of any appreciable value, within her territorial limits.

The appositeness of the conclusion expressed in that case to the case now under consideration, will be all the more noticeable when it is observed that by the compact just referred to, *exclusive* jurisdiction was given to New York, not only over the waters, *but over the lands covered by the waters*, while, by the compact with Pennsylvania, *concurrent* jurisdiction is given to the contracting parties, and such jurisdiction is *expressly confined to the waters.*

The compact of March 28th, 1785, between Maryland and Virginia, among other things, provides that the Potomac river shall be considered as a common highway for the purposes of navigation and commerce to the citizens of those states, and of the United States, and to all other persons in amity with Maryland and Virginia, trading to or from either of those states; and it establishes concurrent jurisdiction in those states over that river, and provides for concurrent legislation; also for the preservation of fish, and for the performance of quarantine, and keeping open the channel and navigation by preventing the throwing out of ballast, or making any other obstruction. *Laws of Maryland*, 1785, c. 1. It has been held

that the compact was confined exclusively to matters of jurisdiction and navigation, and left the territorial rights of the parties to it untouched. *Binney's Case*, 2 *Bland* 99, 126, 127.

The compact of 1783 gives no jurisdiction to Pennsylvania over the soil of the Delaware within the territorial limits of this state, nor does it confer on her any right therein. It gives her a right to complain of, and be relieved against, any structure or other occupation of the river on the soil of this state injurious to the free navigation of the river.

But it is insisted that the bridge is at least an unauthorized erection in a public highway, and is therefore a public nuisance, and that it is a public nuisance in fact, because it will interfere with the navigation of the river. In an action to remove an erection in a public river, on the ground that it is an injury to the *jus publicum*, the common right of navigation, it must appear that a nuisance in fact exists, even though the erection be an encroachment on the soil of the sovereign. *Hale De Portibus Maris, chap.* 7; *Harg. Law Tracts*, 85. The case of *The People* v. *Vanderbilt*, 26 *N. Y.* 287, which was much relied upon by the state on the argument of this motion, was a case of purpresture on the soil of the state in the harbor of New York. The case of *The City of Rochester* v. *Erickson*, 46 *Barb.* 92, cited on the part of the state, was an action for a perpetual injunction to restrain the defendant from erecting a foundation wall necessary for the support of his building, situated in Rochester, on the bank of the Genesee river, on the ground that the building projected into the channel of the river, and interrupted the natural flow of the water in time of floods, contributing to the overflow of the water at such seasons into the streets of the city, and was a public nuisance. The decision is put upon the ground of nuisance. In *City of Rochester* v. *Curtiss*, *Clarke* 343, (1840), an application for an injunction, under similar circumstances, was denied on the ground that, as the abutment of the bridge across the river then stood, the structure complained of in that case, though in the stream, was no nuisance. In 1866, when City of Rochester *v.* Erickson was decided, the

bridge had been rebuilt, and the abutment did not project so far into the stream.

What injury, impediment or obstruction to navigation will be occasioned by this viaduct? There are above and below it, between Easton and the falls at Trenton, thirteen bridges. The height of piers and the space between piers of each of them are less than those of this structure. The greatest height of piers in any of those bridges is thirty-eight feet, while the height of the piers of this is forty. The greatest space between piers in those bridges is one hundred and ninety-two feet. In this the space is one hundred and ninety-three. The answer states that, in the erection of the viaduct, scrupulous care has been exercised against impairing the little navigation of which the river is at that point susceptible, and also in reference to all other public rights of the river; that it is constructed as nearly as may be at right angles to the river and its current there; and that the piers are so shaped and constructed as to occasion the least possible impediment to the passage of ice, rafts, scows, boats and other vessels that do now, or may by possibility in the future, navigate the river there. That the navigability of the river is limited, appears by the qualification in the statement of the information on the subject, that the river is navigable "for many purposes of trade and commerce" at the point where the viaduct is. It appears from the affidavits annexed to the answer, that the river at that point is floatable for rafts only at high stages of the water when the river is swollen by freshets or rains, and that then and at other times it is navigable by craft drawing only from six to eighteen inches of water, and that this navigation is now, and for from fifteen to twenty years past has been, confined to small scows employed in gathering cobble or paving stones, and small batteaux, skiffs, and other small boats. To none of this navigation have the existing bridges proved any obstruction. Obviously, the viaduct which affords more room for passage under it than any of them, cannot be regarded as a nuisance in fact. It adds no impediment to the navigation, nor does it create or increase any difficulty therein.

It is insisted on behalf of the state that the viaduct has been erected without authority, and that the use of it, and taking tolls or fares for the use of it, are a usurpation of franchise which it is the duty of this court to restrain. The viaduct will occasion no injury to the public, and the application is on behalf of the state alone. It is not alleged by the state that any private interest whatever, under any franchise granted by the state, is involved. It may well be left to the courts of law to determine whether, in building the viaduct, the defendants have been guilty of usurpation or not. But are they, in fact, guilty of usurpation? Their viaduct is not a toll bridge. It is merely the railroad connection of two railroads; a highway by railroad over the river. *The Proprietors of the Bridges over the Rivers Passaic and Hackensack* v. *The Hoboken Land and Improvement Co.*, 2 *Beas.* 81; *S. C., on appeal, Ib.* 503. As was said by Chancellor Green in his opinion in that case, (2 *Beas.* 94): "The defendants' structure is not a toll bridge. They have no franchise of taking tolls. They have no right to charge for crossing the river, any more than if it were not in existence. The structure which they are erecting is not a mere connection between the opposite shores; it is part of an extended line of railway connecting distant points, over which the defendants are to transport passengers at a stipulated rate. Its character and purpose are, in fact, essentially different from those of a bridge used merely as a connecting link for the transfer of passengers between the opposite shores of the river." See, also, *S. C.*, 1 *Wall.* 116. The defendants cannot, therefore, be chargeable with the usurpation of a franchise to take tolls. Is the viaduct unauthorized? They are duly incorporated under the general railroad law. That law provides (§ 23), that companies whose roads shall be constructed under the provisions of that act, shall have the right to connect their roads with any railroad within this or any other state, and (§ 36), that it shall be lawful for any company incorporated under that act to build viaducts over any navigable or other river, stream or bay of water which such railroad may cross. It provides

also that the second section of the "act to prevent accidents on railways" shall not be considered to extend to or affect in any way or manner corporations which may be formed under the general railroad act. The second section of the act to prevent accidents on railways is (*Pamph. L.*, 1869, *p.* 807): "That hereafter no railroad shall be laid upon any bridge across the Delaware river intended for public travel, unless special authority for that purpose be given by legislative act, particularly designating the bridge to be subjected to such use." That the legislature did not intend to except from the powers conferred upon the corporations organized under the general railroad law the power to make connection with railroads across the Delaware by means of bridging the river, is evident from the fact that no such exception is made from the general grant of power to connect with railroads in other states, and to bridge any navigable or other river, stream or bay in this state. It also appears from the fact of the repeal, so far as corporations under the general railroad law are concerned, of the second section of the act to prevent accidents on railways, which has reference only to bridges across the Delaware. That this second section might not prove an impediment to a connection with a railway in Pennsylvania by preventing the acquisition of a turnpike bridge already in existence by a railroad company organized under the general law, the legislature repealed it, so far as such companies are concerned. That they contemplated the connection of railroads under the general law, with railroads in Pennsylvania, by viaducts across the Delaware, is too clear for question. But it is argued that the power to build a viaduct "across any navigable or other river, stream or bay in this state," does not confer the power to build one in the river on the New Jersey side, to the boundary line between the states. I do not concur in that view. The act gives the power to cross the river; impliedly provided the consent of Pennsylvania be obtained; for, unless such consent be obtained, inasmuch as this state cannot authorize the occupation of soil belonging to Pennsylvania, the grant is of no practical use. The grant,

therefore, does not differ practically from those made by the legislature of both states in various charters authorizing structures across the river; as for example, the grant to the Morris Canal and Banking Company by this state, (*Pamph. L.*, 1849, *p.* 35,) by which that company was empowered to erect and construct either a bridge or aqueduct across the Delaware, provided that the erection should be so constructed as not to interfere unnecessarily with the navigation or fisheries, and provided also that the grant should not take effect until a similar power was conferred on the company by Pennsylvania. So, too, the charter of the Alexandria Delaware Bridge Company (*Pamph. L.*, 1841, *p.* 70,) gives power to bridge the river on the like condition.

The states, as before remarked, have not acted upon the doctrine that the consent of both is required to erections on the soil of the river not designed to cross the river or to occupy other soil than their own; as the dams before spoken of erected on each side, with and without the consent of the legislature of the state on whose side of the river they are constructed, and without the consent of the other state, abundantly testify. If the doctrine advanced and contended for in this case on the part of the state is correct, each of those erections was a violation of the compact, but that has never been conceded. When Pennsylvania complained of the wing-dams, in 1817, it was because they interfered, as she insisted, with navigation. If she complained because they were erected without her consent, her claim to consideration and redress on that, as a substantive ground, irrespective of the alleged injury to navigation, was not admitted, as has been already shown. The compact provides for concurrent jurisdiction, not for mutual sovereignty, and the jurisdiction conferred by it is a mutual concession, and does not extend beyond the terms and necessary implications of the agreement.

But in the case in hand, I am of opinion that there has been what is equivalent to, and may properly be regarded as concurrent legislation of the states. The State of Pennsylvania, in 1852, granted to the corporation now known as the

North Pennsylvania Railroad Company, (then called the Philadelphia, Easton, and Water Gap Railroad Company), power to maintain and operate a railroad from a point north of Vine street, in the county of Philadelphia, by the most expedient and practicable route, to near the borough of Easton, or some other point in Northampton county, and to "connect their railroad, by lateral or branch roads, with any railroad constructed, or to be constructed, in any of the counties through which the same might pass; and also to construct one or more bridges across the river Delaware, and to connect by one or more lateral or branch roads, with any railroad, or other public improvement in the State of New Jersey." *Pamph. L. of Penn.*, 1852, *p.* 654. This grant, it may be remarked, is evidence of the construction which Pennsylvania put upon the compact. In this, as in the erection of wing-dams in the river without the consent of this state, and in like manner withdrawing the water of the river for the purposes of her canal navigation, Pennsylvania has given a practical construction to the compact which conclusively establishes against her the right of this state to do the like acts without her concurrence. This grant does not make concurrent legislation, or any legislation, or any consent on the part of this state, a condition precedent to its operation, but it gives to the company, absolutely, leave to bridge the river, not by one bridge merely, but by one or more. The North Pennsylvania Railroad Company, shortly after the passage of that act, under the power granted to them, constructed, and have ever since maintained and operated a main line or trunk railroad from Philadelphia to Bethlehem; and about the time when the defendants were incorporated, they located a lateral branch railroad, called the Delaware River Branch, from a point in their main road, at the Jenkintown station, in a northerly direction through the counties of Montgomery and Bucks, to the line between this state and Pennsylvania, in the middle of the river, in the township of Lower Makefield, in Bucks county, immediately adjoining the state boundary line in the river where the defendants' road begins; and they pro-

ceeded to construct their road, and have constructed their viaduct in the river to the boundary line. So that, of the bridge complained of in this suit, one-half, or thereabouts, was constructed by them under their grant from Pennsylvania, and the rest by the defendants, under their powers claimed under the general railroad law. Pennsylvania, so far as she is concerned, gave by this legislation in favor of the North Pennsylvania Railroad Company, express authority to bridge the Delaware, and New Jersey has acquiesced in the construction which Pennsylvania thus put upon the contract, and has acquiesced in the action of the North Pennsylvania Railroad Company in erecting their part of the viaduct under that authority, for she has not even protested against either. To make the grant available, the consent of New Jersey was requisite, for until that was obtained the railroad company could not build beyond the boundary line. New Jersey gave, by her general railroad law, power to the defendants to connect their railroad with any other railroad out of this state, and to that end to cross any navigable or other river, and that power of itself implied and included authority, so far as the state could give it, to bridge the river for that purpose. *Att'y-Gen.* v. *Stevens, Saxt.* 369; *Peavey* v. *Calais R. R. Co.*, 1 *Am. Railway Cases* 147; 1 *Redfield on Railways* 341. The legislature of each state conferred on the company chartered by it, the requisite power, so far as it could give it. And these grants are respectively valid to that extent. As the grant of the franchise of a ferry over an inter-state river by one of the states alone, is not void for want of the consent of the other, but is good so far as it goes, so here the grant is valid to the extent of the power of the state which makes it, and to that extent is complete. In *Conway* v. *Taylor's Ex'r*, 1 *Black* 603, it was held that the concurrent action of both states is not necessary to the grant of a ferry franchise over a river that divides them. See, also, *People* v. *Babcock*, 11 *Wend.* 590. Each state, then, has given consent to the bridging of the river by these companies. Nor does it matter by what length of time the consents are separated. The authority

to construct the viaduct is complete. But were it otherwise, Pennsylvania does not, and cannot, complain of the structure, for she surely authorized its erection. One-half of the viaduct stands in its place in the river by her express leave and authority, given more than twenty years ago. There is, therefore, no occasion for New Jersey to complain of it on the ground that it is a violation of the compact of 1783. Nor, it may be remarked, could this court, in the exercise of its power, reach that part of the bridge which stands on the Pennsylvania side of the river. It is beyond its jurisdiction. Surely, it would not be contended, (though the prayer of the information has that aspect), that this court has jurisdiction to decree the prostration of the part of the bridge which is west of the middle of the river. That is within the domain of Pennsylvania. If this court possesses such jurisdiction, the courts of Pennsylvania have it also, as to structures erected in the river on this side of the middle line. No such conflict of jurisdiction exists. The claim of concurrent jurisdiction surely would not be urged to that extent.

But if there be doubt as to the authority claimed by the defendants under the act, the fact of the existence of such doubt would be fatal to the application for injunction on the ground of want of such authority. *Hackensack Improvement Commission* v. *N. J. Midland R. R. Co.*, 7 *C. E. Green* 94; *Scudder* v. *Trenton Del. Falls Co.*, *Saxt.* 694.

There is still another consideration constraining me to the conclusion at which I have arrived. The defendants have acted *bona fide*, under what they believed to be sufficient legislative authority. They have expended a very large sum of money in their enterprise. It appears by the answer that the estimated cost of their railroad, including viaduct and right of way, is nearly two millions of dollars, of which a million and a quarter have been actually paid on account of the work, and for the balance of the work, to cost nearly six hundred thousand dollars, contracts have been made on which they are liable. At the time of filing the information, the North Pennsylvania Railroad Company had expended on their part of the

enterprise nearly a million and a quarter of dollars, making an aggregate of expenditures, by them and the defendants, of about two millions and a half, of which about three hundred and thirty-seven thousand dollars were expended on the viaduct alone. The information was not filed until nearly a year after the construction of the viaduct was commenced, and not until it and the road were almost completed, and no excuse is given for the delay. The state authorities must have been aware of the circumstances, of the great cost of the work, of its vital importance to the enterprises of which it was part, and of the great expenditure made upon them. The locality of the viaduct is near the capital of the state. The legislature has had its usual annual session of many weeks, since the work on the viaduct was begun. The work has been, from its commencement, a matter of public notoriety, and yet no action has been taken on the part of the state authorities, nor even any warning uttered by them against the work. The defendants have been permitted to make their immense expenditure upon their enterprise, in the confidence of their convictions that they possessed all requisite legislative authority, without even a word of protest or remonstrance. Under such circumstances, equity will refuse its aid, even to the state, leaving it to its remedy at law. *Att'y-Gen.* v. *Heishon*, 3 *C. E. Green* 410; *Scudder* v. *Trenton Del. Falls Co., Saxt.* 694; *Att'y-Gen.* v. *Johnson*, 2 *Wilson C. R.* 87; *Att'y-Gen.* v. *Sheffield Gas Co.*, 3 *D., M. & G.* 304; *Att'y-Gen.* v. *N. Y. & L. B. R. R. Co.*, 9 *C. E. Green* 49; *Att'y-Gen.* v. *Brown*, 9 *C. E. Green* 91; *Kerr on Injunctions* 202–206; *Joyce on Injunctions* 1264.

In Attorney-General *v.* Johnson, which was a proceeding to restrain a purpresture in the river Thames, delay in the proceedings, on the part of those who sought the aid of the court, was recognized as a reason which would prevent the court from interposing, and induce it to leave them, as in other cases, to deal with it at law. A court of equity exercises its restraining power in cases of nuisance with great caution. "Its jurisdiction," says the Court of Appeals of this state, in

Carlisle v. *Cooper*, 6 *C. E. Green* 576, "over the subject matter is not an original jurisdiction. It does not arise from the fact that a nuisance exists, but results from the circumstance that the equitable power of the court is necessary to protect the party from an injury for which no adequate redress can be obtained by an action at law, or its interference is necessary to suppress interminable litigation for the recovery of damages for an actionable wrong. As a condition to the exercise of that power, it is essential that the right shall be clearly established, or that it should previously have been determined by the action of the ordinary tribunals for the adjudication of the rights of the parties, and the injury must be such, in its nature or extent, as to call for the interposition of a court of equity." The same court held, in *Morris and Essex R. R. Co.* v. *Pruden*, 5 *C. E. Green* 530, that where there is an invasion of a public right, and there is an ample remedy by indictment, equity will not enjoin at the instance of the Attorney-General, unless there is pressing public necessity for its intervention. In *Att'y-Gen.* v. *Heishon*, 3 *C. E. Green* 410, this court (Chancellor Zabriskie,) said: "This court has no doubt power to cause nuisances to be abated; nuisances to individuals, on bill, and public nuisances like this, on information. But it will only exercise that power when the fact of nuisance is beyond doubt, or has been settled by a verdict at law; and where the nuisance is erected and complete, this court should not interfere without a trial at law, except, perhaps, in cases of irreparable mischief from its continuance, especially where there is a full and complete remedy at law." The like doctrine was declared by the Supreme Court of the United States, in *Mississippi and Missouri R. R. Co.* v. *Ward*, 2 *Black* 485. In that case application was made by bill in equity, to the District Court of the United States for Iowa, for a decree directing the removal of a bridge or viaduct built by the Mississippi and Missouri Railroad Company over the Mississippi river, from Rock Island, in Illinois, to Davenport, in Iowa, as having been erected in violation of law, and as an obstruction to the navigation, and a nuisance. The bill alleged that the

river was the boundary line, in whole or in part of ten states, its importance as an avenue of commerce, and that its navigation was a necessity of trade, and almost the only means of transportation between Wisconsin, Northern Iowa, Minnesota and the Upper Mississippi. It insisted that the right of free and unobstructed navigation in the river, and all parts of it, was secured by the treaties with France, in 1803, and the acts of Congress, and the universal principle recognized by the common law, and that the bridge was a nuisance in fact, imperiling navigation, and obstructing the stream. It alleged that the bridge was built by the company, with the aid and assistance of the Chicago and Rock Island Railroad Company, a company created for the purpose of erecting it, by the State of Illinois. It appears that the part of the bridge erected by the defendants was authorized by Iowa. In deciding the case on appeal, the Supreme Court of the United States held, that inasmuch as the removal of the three piers, between the middle of the river and the Iowa shore, would not materially remedy the nuisance complained of, though it would render the bridge useless, that court would not affirm a decree ordering such removal; and that the rule of the law is that where a bridge over a navigable stream is erected for public purposes, and produces a public benefit, and leaves reasonable space for the passage of vessels, it is not indictable; and that another rule is, that the bridge must appear plainly to be a nuisance before it can be so decreed, since a court of equity proceeding by bill, like a criminal court trying an indictment, must give the defendant the benefit of all reasonable doubts.

In the case before me, there is no purpresture; the structure, which is for a public purpose, and for the public advantage, is completed. It creates no impediment to the navigation of the river. It has been built *bona fide*, and there is cogent evidence of acquiescence on the part of the state in the construction which the defendants have put upon the law under which they have acted. Under such circumstances, an injunction will not be granted. *Att'y-Gen.* v. *N. J. R. R. & T. Co.*, 2 *Green's C. R.* 136; *Allen* v. *Chosen Freeholders*, 2 *Beas.*

68; *Att'y-Gen.* v. *N. Y. & L. B. R. R. Co.*, 9 *C. E. Green* 49; *City of Georgetown* v. *Alexandria Canal Co.*, 12 *Peters* 93, 98; *Att'y-Gen.* v. *United Kingdom Electric Tel. Co.*, 30 *Beav.* 287; *Att'y-Gen.* v. *Eastern Counties Railway Co.*, 7 *Jur.* 806.

The order to show cause will be discharged.*

HENNION'S EXECUTORS *vs.* JACOBUS and others.†

1. A gift of a fund, with limitation over in the contingency of the legatee's dying without leaving lawful issue, entitles the legatee to possession of the fund.

2. The rule is settled, that interest begins to run on general legacies to which no time of payment is fixed, from the expiration of one year from testator's death.

3. The rule that a general legacy in favor of a child will draw interest from testator's death, when given for his maintenance, does not apply to a legacy to adults; nor where the maintenance of the child is otherwise provided for, either by the will or in any other mode.

Bill for directions to executors.

Mr. J. G. Trusdell, for executors.

Mr. J. W. Taylor, for legatees.

THE CHANCELLOR.

The will of James H. Hennion, deceased, contains the following sections: "Item First. I give and bequeath to my two sons, Daniel and John H., in equal portions, all of my real and personal estate, whom I hereby declare and appoint my executors, out of which they shall meet all expenses incident to my sickness, death and burial." "Item Second. I give to my daughter Phebe Ann the sum of $1000, to be paid out of the estate devised to my sons Daniel and John H." "Item

*Decree affirmed, *post* p. 631. †Cited in *Woodward* v. *Woodward*, 1 *Stew.* 125; *Howard* v. *Francis*, 3 *Stew.* 448; *Miller* v. *Sandford*, 4 *Stew.* 429; *Van Blarcom* v. *Dager*, *Id.* 786, 795; *Welsh* v. *Brown*, 14 *Vr.* 40.

Third. I give to my daughter Margaret the sum of $1400, to be paid out of the estate given to my sons Daniel and John H.; and if she dies without issue, the same to revert to the remaining children of mine, or their legal heirs, if dead, in equal portions as represented by the children." "Item Fourth. I give to my daughter Mary E. the legal interest of $1400, to be paid to her annually, of the above estate given to Daniel and John H.; and after her death, the principal shall be equally divided among her legal heirs, provided that she may not need; if, in the judgment of my sons Daniel and John H., her necessities do require, they may from time to time pay her such sums as they may deem proper, of the principal; the rest to be divided as above stated."

The testator died on the 24th of May, 1874.

The questions presented are: *First.* Whether Margaret is entitled to possession of the $1400 bequeathed to her; and, *second.* At what time the interest given to Mary began to accrue.

Margaret is entitled to the possession of the $1400 given to her by the will, notwithstanding the gift over in the contingency of her dying without leaving lawful issue. *Ex'r of Rowe* v. *White*, 1 *C. E. Green* 411; *Jones' Ex'rs* v. *Stites*, 4 *C. E. Green* 324; *Hull* v. *Eddy*, 2 *Green* 169.

The interest given to Mary began to accrue on the 24th of May, 1875, and the first payment will consequently be due to her on the 24th of May, 1876. The rule is settled, that interest begins to run on general legacies to which no time of payment is fixed in the will, from the expiration of one year from the death of the testator. 2 *Redfield on Wills* 565; *Lawrence* v. *Embree*, 3 *Brad. Sur. R.* 364. Mary, however, claims that because she is a child of the testator, and, as she alleges, the provision is made for her maintenance, she is entitled to interest from the death of the testator. She is an adult, and a married woman. There is no evidence in the will that the interest is given to her for her support. Besides, it is presumed that her support and maintenance are provided by her husband. Nor does it appear but that she is in affluent cir-

cumstances. The rule which she seeks to apply to her legacy does not apply to adults, nor where the maintenance of the child is otherwise provided for, either by the will or in any other mode. *Cessante ratione, cessat ipsa lex.* *Raven* v. *Waite,* 1 *Swanst.* 553; *In the matter of Rouse's Estate,* 9 *Hare* 649.

The Board of Domestic Missions of the German Reformed Church in America *vs.* Von Puechelstein.

1. An objection to a bill filed by a corporation, that it does not aver that the complainants are a corporation, is an objection of form which cannot be raised under a general demurrer for want of equity.

2. An averment of the corporate existence of the complainants is unnecessary.

3. A statement in the bill in reference to the execution of a mortgage by a corporation of the German Reformed Church that it was executed "through their trustees," under the "act to incorporate trustees of religious societies," *held* sufficient as a matter of pleading.

4. A general demurrer for want of equity overruled, with leave to file a new one, on the ground that the bill showed no title to a mortgage; unless complainants should amend.

On bill to foreclose and demurrer.

Mr. J. M. Scovel and *Mr. S. D. Dillaye,* for demurrant.

Mr. J. E. P. Abbott, for complainants.

The Chancellor.

The bill is filed to foreclose two mortgages on the same premises; one stated to have been given directly to the complainants by The German Reformed Church in Egg Harbor City, and the other by them, through their trustees, to "George Gelbach, treasurer of the Church Extension Fund of the Reformed Church in the United States." The bill states that

this latter mortgage was given by the same parties as the first, and that it was given "for the use and benefit of the German Reformed Church in America, to the German Reformed Church in Egg Harbor City." The consideration of the second mortgage is not stated. That of the first is stated to have been a debt due from Henry Hotz, vice-president, and John Henry Fisher, secretary of the congregation of the German Reformed Church of Egg Harbor City, to Rev. Dr. J. H. A. Bomberger, of Philadelphia, in the State of Pennsylvania, president of the Board of Domestic Missions of the German Reformed Church in America. The bill alleges that the German Reformed Church of Egg Harbor City, in order to secure the payment of that money, with interest, made and executed under the hand and seal of their vice-president, attested by their secretary, a bond or obligation which they delived to the complainants; that the condition of the bond was that the "said congregation" should pay to "said Rev. Dr. J. H. A. Bomberger, president aforesaid, $1500 in five years, with $1.00 a year interest." It further states that in order to secure the payment of the money, The German Reformed Church of Egg Harbor City executed and delivered to the complainants a certain indenture of mortgage of even date with the bond, which mortgage was made between the former of the first part and the latter of the second part. The defendant, Louisa Baroness von Puechelstein, administratrix, is the owner of the equity of redemption of the mortgaged premises through purchase at sheriff's sale under an execution at law. She has filed a general demurrer for want of equity. On the argument the following causes of demurrer were assigned: that the bill does not aver that the complainants are a corporation, and that the mortgages are not (according to the bill) executed according to the requirements of the act under which the mortgagors are incorporated, (*Nix. Dig.*, *p.* 804, § 13,)* which provides that no deed or instrument of conveyance for any lands, tenements, hereditaments or real estate of the corporation shall be good and effectual in law unless it be sealed with the common seal, and signed by a majority of the corporators.

**Rev.*, *p.* 960, *sec.* 15.

The first ground of demurrer is an objection of form, which cannot properly be raised under a general demurrer for want of equity. But to dispose of it: The complainants are not required to allege in their bill that they are a corporation. *Bennington Iron Co.* v. *Rutherford*, 3 *Harr.* 158; *Star Brick Co.* v. *Ridsdale*, 7 *Vroom* 229.

As to the second objection: The defendant's counsel insist that the mortgages were not executed in conformity with the provisions of the law under which the mortgagors were incorporated, and that they therefore have no validity as against the defendant. The first mortgage is stated to have been executed and delivered by the mortgagors to the mortgagees, the complainants. There is a statement as to the officers by whom and the manner in which the bond which that mortgage was given to secure was executed, but none as to the mortgage. The other mortgage is stated to have been executed by the German Reformed Church of Egg Harbor City, "through their trustees." The act declares, (*Nix. Dig.*, 804, § 11,)* that the minister or ministers, elders and deacons for the time being of the church shall be the trustees thereof, and a body corporate and politic in law by whatever name they shall assume. As a matter of pleading, the statement of the bill in reference to the execution of the mortgages is sufficient.

But the bill alleges that the second mortgage was given to "George Gelbach, treasurer of the Church Extension Fund of the Reformed Church in the United States," and that it was given for "the use and benefit of the German Reformed Church in America, *to* the German Reformed Church of Egg Harbor City." This statement is, in the latter part just quoted, unintelligible, probably from the use, by mistake, of the word "to" for the word "by." But apart from this, the complainants show no title to that mortgage. The bill alleges that it was given to the treasurer of the "Church Extension Fund of the Reformed Church in the United States," for the use and benefit of The German Reformed Church in America, not for the use or benefit of the complainants, The Board of Domestic

**Rev., p.* 960, *sec.* 13.

Missions of the German Reformed Church in America. This objection, however, was not raised on the argument.

The demurrer is too extensive. It will, therefore, be overruled, with leave to file a new one, on the ground that the bill shows no title to the second mortgage; unless the complainants shall, within ten days from the time of filing the order overruling this demurrer, amend the bill in that respect.

Barnes *vs.* The Trenton Gas Light Company.*

1. Where executors are authorized to sell the real estate of their testator at their discretion, and the sale is to be made with a view to the investment of the net proceeds on a special trust, the purchaser is not bound to see to the application of the purchase money.

2. An allegation that the purchase money of real estate sold by executors was not paid to or received by them "as executors," and that they, "as executors," received no consideration for the conveyance, is not equivalent to an averment that no consideration was, in fact, paid.

3. If, by such allegation, the pleader intended to state that, although the consideration was paid to the executors, it was paid in such a way as that it ought not to be regarded as having been paid to or received by them in their representative or trust capacity, the facts should have been set forth so as to enable the court to determine the character of the payment.

4. The rule, that notice of facts to an agent is constructive notice thereof to the principal himself, has no application to a case of a sale to a corporation, by its president, of property purchased by him in his private capacity; in such a transaction the officer, in making the sale and conveyance, stands as a stranger to the company.

5. When an officer of a corporation is dealing with them in his own interest opposed to theirs, he must be held not to represent them in the transaction so as to charge them with the knowledge he may possess, but which he has not communicated to them, and which they do not otherwise possess, of facts derogatory to the title he conveys.

On bill for relief and demurrer.

Mr. B. Gummere, for demurrant.

Mr. S. D. Dillaye, for complainant.

---

*Cited in *Gardner* v. *Butler*, 3 *Stew.* 711; *Parsons* v. *Lent*, 7 *Stew.* 73; *First National Bank of Hightstown* v. *Christopher*, 11 *Vr.* 440.

THE CHANCELLOR.

The bill is filed by the widow of John R. S. Barnes, deceased, who died in April, 1874, to recover her dower as such widow, in certain land in Trenton, which, by the will of Isaac Barnes, father of her late husband, was given to his three children, John R. S. Barnes, William S. Barnes, and Lydia S., wife of Dr. John L. Taylor. By that will the testator gave all his property to his children, subject, however, to a provision that his executors, (his two sons and son-in-law above mentioned), might sell any part, or the whole of the property, as they might deem expedient, the net proceeds of sale to be put at interest so that the testator's widow, Mary Barnes, should receive the interest during her life. The bill states that Isaac Barnes died on or about the 7th of March, 1848; that his will was proved by the executors, and that afterwards, and on or about the 20th of July, 1848, they conveyed the premises in question to Joseph C. Potts, who was a counsellor-at-law, and was their legal adviser, and that he subsequently, on or about the 1st day of August, in the same year, sold the property to the Trenton Gas Light Company, of which he was president. The bill charges that the executors, as such, had no title to the land, and had no power to sell it, except under the will; that on the sale to Mr. Potts, they, as executors, received no money or consideration for it, and that he received the deed from them without paying to them, as executors, any consideration whatever; that at the time of that conveyance there were no legal demands existing against the property; that he took the deed from the executors with full notice of the will and its provisions, and of the powers and duties of the executors; that no money was put at interest by the executors as the net proceeds of the sale, or as any part of the proceeds, in order that Mary Barnes, the testator's widow, should receive the interest during her life; that neither Mr Potts nor the executors saw to the application of any purchase money for the property, and that the executors never applied any money received by them as the consideration for the sale of the property to the satisfaction of any debts

or demands against the testator, and that the conveyance to Mr. Potts was in fraud of the provisions of the will, and was made with the fraudulent intent of defeating the complainant's right of dower in the property. The bill charges notice on the defendants, solely on the ground that at the time of the conveyance to them, Mr. Potts was their president.

The executors had power under the will to convey the property in question. They were authorized to sell at their discretion, and the sale was to be made with a view to the investment of the net proceeds on a trust which might last for the lifetime of the testator's widow. The purchaser was not, under the circumstances, bound to see to the application of the purchase money. *Perry on Trusts*, §§ 704, 799; *Nicholls* v. *Peak*, 1 *Beas.* 69; *Doran* v. *Wiltshire*, 3 *Swanst.* 699; *Lewin on Trusts* 433; *Wood* v. *Harman*, 5 *Madd.* 368; *Lock* v. *Lomas*, 5 *DeG. & S.* 326; *Hauser* v. *Shore*, 5 *Ired.* 357; *Balfour* v. *Welland*, 16 *Ves.* 151. "The general rule," says Perry, "is controlled, if a sale is directed, but the proceeds are not to be paid over to the *cestui que trust*, but are to be held by the trustees upon some special trusts. In such case the implication is plain that the settlor intended to confide the execution of the trust to the trustees, and that they have power and authority to receive the trust fund and give receipts." The purchase money, it may be assumed, was paid by Mr. Potts. The bill does not deny that it was paid, but it alleges that it was not paid to or received by the executors, "as executors," and that they, "as executors," received no consideration for the conveyance. This qualification forbids the acceptance of the statement as an averment, or as equivalent to an averment that no consideration was, in fact, paid. *Lubé's Eq. Pl.* 350; 1 *Dan. Ch. Pr.* (*4th ed.,*) 545. As the statement stands, it is equivalent to an averment that the consideration was paid to and received by the executors, but not in their trust capacity. If the pleader intended to state that, although the consideration was paid to the executors, it was paid in such a way as that it ought not to be regarded as having been paid to or received by them in their representa-

tive or trust capacity, the facts should have been set forth so as to enable the court to determine the character of the payment.

The bill charges that Mr. Potts had notice "of the will and its provisions, and the character, power and duties of the executors." Notice of all these things would not have devolved upon him the duty of seeing to the application of the purchase money, for the reason already given.

Passing by the question as to whether the complainant has any valid claim to dower on the case made by the bill, seeing that her claim to relief is based on the allegation that the executors, of whom her hushand was one, were, in selling, guilty of a fraud upon the beneficiaries under the will, who were the testator's widow and children, and giving her the benefit of the general allegation in the bill, that the conveyance was intended to defeat her dower, the main question presents itself, as to whether, on the statements of the bill, the action can be maintained. That the defendants are *bona fide* purchasers for valuable consideration, is not denied. Their title is not impugned, except on the ground of notice, and the claim to relief is based on the allegation that at the time when the conveyance was made by Mr. Potts to them, he was their president, and this fact is relied upon as, of itself, sufficient to establish notice to them of all the facts which the bill charges were within his knowledge. The general proposition is undoubtedly true, that notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with the subject matter of his agency. The rule is based on the presumption that the agent has communicated such facts to the principal. *Story on Agency*, § 140. On principles of public policy the knowledge of the agent is imputed to the principal. But the rule does not apply to a transaction such as that under consideration; for, in such a transaction, the officer, in making the sale and conveyance, stands as a stranger to the company. *Stratton* v. *Allen*, 1 *C. E. Green* 229. His interest is opposed to theirs, and the presumption is, not that he will communicate his knowledge of

any secret infirmity of the title to the corporation, but that he will conceal it. Where an officer of a corporation is thus dealing with them in his own interest opposed to theirs, he must be held not to represent them in the transaction, so as to charge them with the knowledge he may possess, but which he has not communicated to them, and which they do not otherwise possess, of facts derogatory to the title he conveys. *Commercial Bank* v. *Cunningham*, 24 *Pick.* 270; *Kennedy* v. *Green*, 3 *M. & K.* 699; *In re European Bank, L. R.*, 5 *Ch. App.* 358; *In re Marseilles Extension Railway, L. R.*, 7 *Ch. App.* 161; *Ang. & Am. on Corp.* 308; *Winchester* v. *Balt. & Susq. R. R. Co.*, 4 *Md.* 231.

The defendants then, according to the bill, are *bona fide* purchasers for valuable consideration, without notice. The complainant can have no relief against them.

The demurrer will be sustained and the bill dismissed, with costs.

COE and others, trustees, *vs.* THE NEW JERSEY MIDLAND RAILWAY COMPANY

1. An application by receivers of an insolvent railroad to issue certificates of indebtedness to cover certain expenses, and an order of the court thereon accordingly, does not bind the receivers or the trust fund to pay particular items of such expenses, the propriety of whose payment was not before the court.

2. Application to compel the receivers of an insolvent railroad company to deliver to creditors certain certificates of indebtedness, which the receivers were authorized by this court to issue, and which they had offered to such creditors in payment of rolling stock, and which the creditors had accepted, refused; the creditors having had it in their power to retake their property at any time, and it appearing that it would have been to the disadvantage of the trust fund for the receivers to have paid the contract price.

On petition of The Rhode Island Locomotive Works Company, for an order requiring the receivers of the defendants to

deliver to the petitioners certain certificates of indebtedness, which the receivers were authorized by this court to issue, and to which the petitioners claim to be entitled.

Mr. Cortlandt Parker, for petitioners.

Mr. Ashbel Green, for receivers.

THE CHANCELLOR.

The respondents are the receivers appointed in this suit on application of the complainants, as mortgagees. One of them, Mr. Garret A. Hobart, was, previously to the filing of the bill in this cause, appointed receiver for the creditors and stockholders of the defendants, under proceedings taken under the act "to prevent frauds by incorporated companies." The petitioners, The Rhode Island Locomotive Works Company, on or about the 13th of January, 1875, entered into an agreement with the defendants, by which they furnished to the latter ten locomotive engines and tenders, as upon lease, but with the agreement that on payment in full of the rent reserved, ($119,536.36,) they should be the property of the defendants. The rent was payable in installments, between the date of the agreement and the 5th of January, 1876, and the defendants gave to the petitioners their notes for the amount of it. At the time of the appointment of the receiver in insolvency there was, according to the petition, due to the petitioners for rent about $120,000. The locomotives and tenders were then in the possession of the receiver, and (except one of the locomotives, which had been so damaged by fire as to be useless,) were in use on the road. Nothing has been paid to the petitioners since then. The petitioners base their claim to the relief they seek, on the ground that, shortly after his appointment, the receiver in insolvency requested them to leave the locomotives and their tenders in his possession, for use on the road, he guaranteeing that he would keep them in good order, and promising to apply to the Chancellor for authority to pay their claim for

rent under the lease; on the faith of which undertaking they permitted the property to remain in his hands; that subsequently, application was made by the receivers appointed in this cause, (which is a suit for the foreclosure and sale of mortgaged premises) for authority to issue certain certificates of indebtedness, to be used for the purposes of their trust, among which was the payment of the rent which had become due, and was unpaid, and that which would accrue up to the 31st of December, 1875, in all $28,300.23.

Of the rent reserved, $85,354.68 did not, by the terms of the lease, become due until the 5th of January, 1876. The authority for issuing the certificates was obtained, and one of the receivers applied to the treasurer of the petitioners, stating that the receivers found difficulty in negotiating the certificates, and suggested that the petitioners should take them as so much money. It is alleged that before that communication was made, the receivers had offered to deliver the certificates in payment of so much of the rent, and the offer was accepted, but the certificates were not sent. The receivers admit, by their answer, the foregoing facts, substantially.

They allege, however, that they have been warned and notified by persons interested in the first mortgage bonds of the defendants not to pay the rent or deliver the certificates therefor, because, as is alleged, the property is not worth the amount agreed to be paid for it, but a very much less sum, and the receivers say they have ascertained that it is not for the interest of the trust which they represent that the rent should be paid.

The petitioners have no equity arising from the conduct of the receivers to have the agreement between them and the defendants specifically performed, without regard to advantage or disadvantage to the trust fund. The most that can be said of the transaction is, that the petitioners were induced by the hope, and, perhaps, reasonable expectation engendered by the statements of the receivers, to leave their property in the possession of the receivers for use on the road. It was alleged on behalf of the receivers, on the argument, and was not denied,

that the property is in better condition than it was when it came to the hands of the receivers. It has been in the power of the petitioners, at all times since the appointment of the receivers, to retake their property, and sell it to raise the amount remaining due to them.

The receivers do not appear to have contracted to purchase the property. They appear to have been willing, up to the time when they were warned not to do so, to pay for it according to the agreement between the petitioners and the company.

It might have been a very improvident act on their part to have paid the rent under the lease. If the allegations made in their answer are true, it would have been. The fact that they applied for leave to issue certificates to pay the rent neither binds them nor the trust. The question as to the propriety of paying the rent was not before the court. The propriety of making provision to cover that and other expenses, was. There is nothing in the application of the receivers, and the order in pursuance of it, to bind the trust estate to the payment of the rent to the petitioners under the lease.

I am unwilling to grant the prayer of the petition until I shall be satisfied that it is for the interest of the trust that it should be done. If the petitioners are willing to accept for the property in the hands of the receivers what it is in fact worth, irrespective of the price fixed in the agreement, and to allow on account of such price what has been received by them on account of rent, the receivers will be authorized to purchase the nine locomotives and tenders of them at their true value, and pay for them in the certificates.

And, in any event, the petitioners will be allowed just compensation for the use of the property since it has been held by the receivers.

HILL'S ADMINISTRATORS vs. MCCARTER and others.*

1. The rule in equity is well established, that where mortgaged premises are sold in separate parcels successively to different purchasers, with covenants against encumbrances, the parcels are liable to sale to satisfy the mortgage, in the inverse order of their sale. But the rule will not be applied in any case where its application would work injustice.

2. A conveyance of part of mortgaged premises, expressly subject to existing mortgages, is an assurance to the subsequent purchaser of the other parts, that the property will be subject to its due proportion of the burden of such mortgages.

3. Where part of mortgaged premises is conveyed subject to mortgages thereon, and the rest of the property is sold and conveyed in fee in parcels to other persons, the part first conveyed is bound to pay its due proportion of the mortgages, according to the comparative value of the respective portions at the time of its conveyance.

4. A purchaser of part of mortgaged premises is not entitled to the benefit of a release by a prior mortgagee from the lien of his mortgage, of another part of the premises, when the mortgagee had not actual notice of the conveyance at the time of making the release.

On bill to foreclose. On final hearing on pleadings and proofs.

Mr. Thomas Kays, for complainants.

Mr. W. S. Whitehead, for Albert P. Condit, surviving trustee.

Mr. R. Hamilton, for McCarter's assignee in bankruptcy, and others.

THE CHANCELLOR.

The question presented arises between the purchasers of certain land containing sixty-nine and fifty-two hundredths acres, which, on the 5th of June, 1865, was owned by John McCarter, as to the manner in which the burden of two mortgages which are on the property, and were given by him, shall be borne. On one of these mortgages there was at that date

* Cited in *Warwick* v. *Ely*, 2 *Stew.* 85.

due of principal, $2500, besides interest. It was originally given to secure $4000, but $1500 of the amount had been paid. This mortgage was given to Frances M. Anderson, and was by her assigned to the complainants' intestate. The other mortgage was for $1000 and interest, and was given to Ross C. Browning. On the 5th of June, 1865, McCarter sold part (forty-nine and thirty-six hundredths acres,) of the premises to William M. Babbitt, for the consideration of $8255, and conveyed it to him by deed in fee simple, with the usual full covenants, including warranty general. Following the description of the premises, is this statement: "These lots are sold subject to one mortgage to Frances M. Anderson, of $2500, and the interest thereon after April 1st, 1865, and a mortgage given to Ross C. Browning, for $1000, interest from same time." McCarter subsequently, and on the 27th of June, 1865, sold and conveyed in fee simple to Emma Barrett, another part (seventeen and forty-two hundredths acres,) of the land, which was subject to the mortgage of $2500, and on the same day the complainants' intestate released that land from the lien of his mortgage. Subsequently, the rest of the property was sold and conveyed in fee, in parcels to other persons. No part of the purchase money of the sale to Babbitt was paid by him in cash, but at or about the time of the delivery of the deed from McCarter to him, he delivered to the latter an assignment, executed by himself and William M. Vermilye, of a mortgage made by Sardius Stewart and Farrand K. Stagg, to them, upon certain real estate in Wayne county, Pennsylvania, to secure the payment of $10,000 in installments, with interest. This assignment contained the following covenant, made by Babbitt and Vermilye: "And we do hereby covenant and agree to and with the said John McCarter, that there is now unpaid on the said bond and mortgage the sum of $10,000 of principal, and for the consideration aforesaid, ($10,000,) and as part of the agreement under which this assignment is made, we do hereby guarantee the payment of the said bond, and do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, to pay to the said John McCarter,

his executors, administrators or assigns, the said sum of money unpaid on and secured by the said bond and mortgage." This assignment is dated on the 2d of June, 1865. By an instrument of writing under seal, dated on the tenth of the same month, executed by McCarter and delivered to Babbitt, the conveyance of the land by the former to the latter, and the existence of the encumbrances of the mortgages thereon were recited, and it was also recited that in payment of the purchase money of the property, Babbitt had, with Vermilye, assigned and set over to McCarter the Stewart and Stagg bond and mortgage, and that after deducting from the amount of that bond and mortgage the amount of the consideration ($8255) of the conveyance of the property sold and conveyed by McCarter to Babbitt, there was a balance of $1745, for which, and Babbitt's note to McCarter for $881, McCarter had assigned to Babbitt a mortgage for $2424, principal and interest, given to him by Richard Sherred, on other land. The instrument thereupon declared that in order to effectually secure Babbitt against loss or damage by reason of the two mortgages on the property conveyed to him by McCarter, being liens and encumbrances on that property, it was thereby expressly understood and agreed by McCarter with Babbitt, that so much of the interest money as might become due from year to year on the Stewart and Stagg bond and mortgage, and as might be necessary for the purpose, should be applied to the payment of the interest money which might become due on the two mortgages on the land conveyed to Babbitt by McCarter, and that when the last payment should become due on the Stewart and Stagg mortgage, so much thereof as might be necessary for the purpose should be applied by McCarter to pay off and discharge the mortgages on the land conveyed by him to Babbitt.

On the 30th of December, 1865, McCarter, for the consideration of $6500, assigned the Stewart and Stagg bond and mortgage, and Babbitt and Vermilye's guaranty thereof, to James A. Goodale, in trust to collect the money secured by them, with the interest, as fast as the installments should fall

due, and to apply the first $6500 collected on account of the principal and the interest thereon, to Goodale's own use, and after receipt of the $6500 of principal, to take up, pay off and discharge, and cause to be canceled, the two mortgages on the property conveyed by McCarter to Babbitt; and until such payment, satisfaction and discharge, to pay to the holders of those mortgages the interest which should be received on the Stewart and Stagg bond and mortgage over and above the interest on the $6500, or such part thereof as should remain unpaid, as interest on those mortgages, semi-annually on the first days of January and July of each year, until they should be paid off and discharged; and it was thereby declared to be the intention of the parties to the instrument, to apply, out of the principal of the Stewart and Stagg mortgage, the last $3500 to the payment of the mortgages on the Babbitt property, and to apply the surplus of the interest collected on the Stewart and Stagg mortgage, after deducting the interest on the $6500, or so much thereof as might remain unpaid, to the payment, half yearly, of the interest on the mortgages on the Babbitt property. And this further trust was declared: In case the last mentioned mortgages should be collected by the holder or holders thereof, before the last $3500 should be collected on the Stewart and Stagg mortgage, to pay over to McCarter the $3500, or such part thereof as might not have been paid by Goodale under the provisions of that instrument, with the interest which might have been collected by him. McCarter guaranteed to Goodale the payment of the Stewart and Stagg mortgage, on condition that Goodale should, in case of any default of payment thereon, prosecute Babbitt and Vermilye on their guaranty. Default was made in the payment of the interest on the Stewart and Stagg mortgage, and Babbitt, on being called on to do so, paid the interest on the two mortgages on his property. In or about June, 1869, Goodale prosecuted Babbitt and Vermilye, in the name of McCarter, in the Supreme Court of this state, on their guaranty, and recovered judgment on the 8th of November following, for $7405.13 damages and costs. Both Babbitt and Ver-

milye were insolvent. On the 3d of June, 1870, the premises covered by the Stewart and Stagg mortgage were sold under judicial proceedings on that mortgage, at public sale, for $5000. On the 22d of September, 1865, Babbitt mortgaged to himself and Albert P. Condit, trustees under the will of Daniel Babbitt, deceased, the premises bought by him of McCarter, with other premises, to secure the payment of $35,000, with interest. The premises so mortgaged by him were already encumbered by mortgages other than those on the part conveyed to Babbitt by McCarter, to the amount of $13,860, besides interest. Afterwards, and in 1869, William W. Shippen purchased the equity of redemption of the premises mortgaged to the trustees, at sheriff's sale, under an execution at law against Babbitt. The sheriff's deed to him is dated in August, 1869. By deed dated the 4th of April, 1870, he conveyed the equity of redemption to Babbitt and Condit, as trustees under the will of Daniel Babbitt, deceased, for the consideration, as expressed in the deed, of $1. William M. Babbitt is dead.

The surviving trustee under the will of Daniel Babbitt, deceased, insists that of the land covered by the complainants' mortgage, the parcels sold and conveyed by McCarter subsequently to the conveyance to Babbitt, should be first sold to pay that mortgage. On the other hand, those subsequent purchasers insist that the parcel conveyed to Babbitt should be first sold. The rule in equity is established, that where mortgaged premises are sold in separate parcels successively, to different purchasers, with covenants against encumbrances, the parcels are liable to sale, to satisfy the mortgage, in the inverse order of their sale. This, however, being a rule of equity, will not, of course, be applied in any case where its application would work injustice. The deed from McCarter to Babbitt contained, as before stated, the usual full covenants, including covenants against encumbrances and warranty general. But the property was conveyed expressly subject to the mortgages, and the interest thereon, from the 1st day of April, 1865. This was an assurance to the above-mentioned

subsequent purchasers, that the property would be subject to its due proportion of the burden of the mortgage. *Hoy* v. *Bramhall*, 4 *C. E. Green* 74; *S. C., on appeal, Ib.* 563; *Stillman's Ex'rs* v. *Stillman*, 6 *C. E. Green* 126. The evidence shows that it was understood between Babbitt and McCarter that the former was to pay off the mortgages. He did not pay in cash any part of the purchase money. He transferred to McCarter the Stewart and Stagg mortgage in payment of the purchase money, stipulating that for his protection against the lien of the mortgages on the property conveyed to him, those mortgages should be paid off by McCarter, out of the last payment of principal, which was $6000, and did not fall due until about five years thereafter—June 1st, 1870; and that so much of the interest on the Stewart and Stagg mortgage as might be necessary for the purpose, should, from time to time, be applied to the payment of the interest on the mortgages on the property conveyed by McCarter to Babbitt. Babbitt and Vermilye guaranteed the payment of the Stewart and Stagg mortgage. It proved to be worth only $5000, and the guaranty was utterly worthless. The declaratory instrument executed by McCarter on the delivery of the assignment to him states, indeed, that Babbitt, in payment of the purchase money of the conveyance, had, with Vermilye, made the assignment, but McCarter evidently did not agree to accept the Stewart and Stagg mortgage as absolute payment of the purchase money, for he required that Babbitt and Vermilye, as to whose solvency the former gave him strong and satisfactory assurance, should guarantee its payment to him. As between Babbitt and McCarter, the purchase money, so far as it represents the amount due on the mortgage, has never been paid. But, whatever might be the equities as between them, the question is not to be dealt with as if it were a question of vendor's lien for unpaid purchase money between Babbitt and McCarter. The question is a question of equities between successive purchasers of parcels of mortgaged premises covered by one mortgage. The declaration in the deed, that the conveyance was made subject

to the mortgages, was notice that the property was not exempt from the payment of the mortgages, but was, with the rest of the mortgaged premises, subject to them, and was to bear its share of the burden of those encumbrances. The property, therefore, is still in the hands of the trustees under the will of Daniel Babbitt, subject, with the rest of the mortgaged property, to the payment of the mortgages, and is bound to pay its due proportion according to the comparative value of the respective portions at the time of the conveyance by McCarter to Babbitt. *Stillman's Ex'rs* v. *Stillman*, 6 *C. E. Green* 126, 129, 130.

The judgment recovered by Goodale in the name of McCarter is of no value. Babbitt died wholly insolvent, and Vermilye is insolvent. As to $3500 of the amount of it, and whatever other sum is included in it for interest which was payable on the Stewart and Stagg mortgage, and which, if collected, would, under the agreement, have been applicable to the interest on the mortgages on the property conveyed to Babbitt by McCarter, equity will give such relief, on due application, as may be just in the premises.

There is no evidence that the complainants' intestate had, at the time when the release to Emma Barrett was delivered, any actual notice of the conveyance to Babbitt. The trustees are not therefore entitled to any reduction on account of that release. *Blair* v. *Ward*, 2 *Stockt.* 126; *Van Orden* v. *Johnson*, 1 *McCarter* 376; *Hoy* v. *Bramhall*, *supra*; *Ward's Ex'rs* v. *Hague*, 10 *C. E. Green* 397.

MASON'S EXECUTORS *vs.* THE TRUSTEES OF THE METHODIST EPISCOPAL CHURCH AT TUCKERTON and others.*

1. Where a bequest was made to a Sunday school connected with an incorporated church, the amount to be placed at interest on bond and mortgage so that it might receive annually the interest for the purpose of procuring books for said school, the court appointed the church corporation

---

* Cited in *Hand* v. *Marcy*, 1 *Stew.* 64; *Noe's Adm'r* v. *Miller's Ex'rs*, 4 *Stew.* 235; *Taylor* v. *Trustees of Bryn Mawr College*, 7 *Stew.* 104; *Brown* v. *Pancoast*, *Id.* 324, 328; *Hesketh* v. *Murphy*, 9 *Stew.* 308.

trustee to receive the money bequeathed, on the trust declared in the bequest.

2. A bequest to A, B and C and their heirs, with direction that the money be invested, and the interest "be divided equally between them forever," is a gift to A, B and C as tenants in common, and there is, therefore, no survivorship. The fact that the gift is to them and their heirs, would not limit their interest in the fund to a life estate, unless there were a clear expression of intention that the gift to them should be only a life estate.

3. The gift of the produce of a fund, without limit as to time, or further disposition of the fund or interest, is a gift of the fund itself.

4. A bequest by codicil to a legatee named in the will, "in full" of all bequests to such legatee, *held* to be "in lieu" of such bequests.

5. Where, after a gift by his will to A, B and C, absolutely, the testator, by a codicil, gives to A a legacy in full of all bequests to him, thereby revoking the bequest to A of his share in the original gift, such revocation, and the fact that that share is not otherwise disposed of, will not give to B and C the entire fund; they will each be entitled to one-third of it only.

6. A gift to A and her children of "$1000, to be invested on bond and mortgage of real estate, and the interest to be collected and paid over to them annually, and equally divided between them," is a gift of the fund absolutely, and the legatees take as tenants in common in equal shares, the children each taking an equal share with their mother. They are entitled to be paid at once, notwithstanding the direction to invest.

7. A bequest to two townships of a fund to be invested on bond and mortgage for the use and benefit of the inhabitants of those townships, the interest to be divided between the townships in proportion to the number of inhabitants in each, for the purpose of educating their poor orphan children, and in case the interest should not all be consumed for this purpose, the balance to be appropriated annually to the poor widows of the township, is a charity which this court will sustain and effectuate.

8. The township corporations are not proper trustees of the fund. A trustee will be appointed by the court.

9. A gift of a fund to the New Jersey State Lunatic Asylum, the interest to be appropriated annually under the superintendence and direction of Dr. B., the superintendent of the institution, and his successors in office forever, for the purchase of books and papers for the benefit of the inmates, was directed to be paid to the treasurer of the institution.

Bill for construction of will.

Mr. A. Browning, for executors.

Mr. H. A. Drake, for legatees.

THE CHANCELLOR.

The bill seeks a construction of the will of Dr. William K. Mason, late of Tuckerton, in Burlington county. The will is dated March 16th, 1870. To it there are two codicils, one dated August 27th, 1872, and the other April 14th, 1874. The questions propounded arise upon the following items of the will and codicils: Eighth section of the will: "I give and bequeath to the Sunday school of the Methodist Episcopal Church at Tuckerton, the sum of $150; to the Sunday school of the Methodist Episcopal Church at Bass River, the sum of $100, and to the Sunday school of the Presbyterian Church at Tuckerton, the sum of $100, to be placed at interest under bond and mortgage, so as that they may each receive annually the interest accruing thereon, for the purpose of procuring books for the said school each and every year."

Tenth section of the will: "I give and bequeath to the children of my deceased sister, Mary Ann Cook, viz.: William Montgomery, Sarah Hyflinger and Mary Ann Wright, and their heirs, the sum of $800, to be invested on real estate, and secured by bond and mortgage, and the interest accruing thereon to be collected annually, and to be equally divided between them forever."

First item of the first codicil: "I do hereby give and bequeath unto William Montgomery, the son of my niece, Elizabeth Montgomery, deceased, my wearing apparel and $150 in cash, in full of all bequests to him."

Eleventh item of the will: "I give and bequeath to my sister, Sarah Whitaker, and her children, the sum of $1000, to be invested in real estate under bond and mortgage, and the interest to be collected and paid to them annually, and divided equally between them forever."

Fourth item of the second codicil: "I give and bequeath to my sister, Sarah Whitaker, the additional sum of $300, in addition to what I have already bequeathed to her."

Twelfth item of the will: "I give and bequeath to the townships of Little Egg Harbor and Bass River, in trust, the sum of $500, to be invested in real estate under bond and

mortgage, for the use and benefit of the inhabitants of said townships, and the interest to be collected annually, and divided between said townships in proportion to the number of inhabitants in each, for the purpose of educating their poor orphan children; and in case the same shall not all be consumed or used for this purpose, the balance of said interest so to be appropriated annually to the poor widows of said townships."

Thirteenth item of the will: "I give and bequeath unto the New Jersey State Lunatic Asylum, the sum of $500, to be invested in real estate under bond and mortgage, and the interest to be collected annually, and to be appropriated annually under the superintendence and direction of Dr. Buttolph, the superintendent of said institution, and his successors in office forever, for the purchase of books and papers for the benefit of the unfortunate inmates of said institution."

The question submitted on the eighth item of the will is, whether the moneys mentioned therein shall be paid, and if so, to whom? The bequests are to the Sunday schools of three churches. They are charities for the benefit of the children taught in those schools. The schools are not incorporated bodies. They are organized adjuncts of the churches, and are part of the means of religious instruction therein. The churches to which they are attached are corporations. The objects and purposes which the testator intended to accomplish by the bequests are within the general scope of the purposes of the institution of those corporations, and the trusts relate to matters which will promote and aid their general purposes. Each church corporation will, therefore, (there being no trustee appointed by the will,) be appointed trustee to receive the money bequeathed to its Sunday school on the trust declared in the bequest, and will be required to administer the trust accordingly. *Perry on Trusts*, § 43.

The bequest of $800, made in the tenth item, to the children of the testator's deceased sister, Mary Ann Cook, and their heirs, naming as such children, William Montgomery, Sarah Hyflinger and Mary Ann Wright, with direction that

the money be invested on bond and mortgage of real estate, and that the interest thereon "be divided equally between them forever," is a gift to the persons therein named as tenants in common, and there is, therefore, no survivorship. *Hawkins on Wills* 111, 112; *Jarman on Wills* 293, *n.*, 295, *n.*; 2 *Redfield on Wills* 586; *Bagwell* v. *Dry*, 1 *P. W.* 700; *Page* v. *Page*, 2 *P. W.* 489; *Owen* v. *Owen*, 1 *Atk.* 494; *Peat* v. *Chapman*, 1 *Ves., sr.*, 542; *Ackerman* v. *Burrows*, 3 *V. & B.* 54; *Downing* v. *Marshall*, 23 *N. Y.* 366. The fact that the gift is to them and their heirs, would not limit their interest in the fund to a life estate, unless there were a clear expression of intention that the gift to them should be only a life estate. 2 *Redfield on Wills* 385. There is no such expression. And under the bequest the legatees named are entitled to the fund itself. The gift of the $800 is absolute. The produce of the fund is given to them without limit as to time. There is no limitation over, or further disposition of the fund or interest. *Gulick's Ex'rs* v. *Gulick*, 10 *C. E. Green* 324, and cases there cited. *S. C. on appeal, post*, 498.

That bequest, so far as William Montgomery is concerned, was revoked by the first codicil, the first clause of which gives to him the testator's wearing apparel and $150 in cash, "in full of all bequests to him." This bequest in the codicil is not a cumulative legacy, but is substitutional. The testator had, by the will, given to William Montgomery, in addition to a share of the $800, his wearing apparel; and he had also given the residue of his estate, if any, to the children of his sister, Sarah Whitaker, and the children of his deceased sister, Mary Ann Cook, among whom he reckoned William Montgomery, as will have been seen by the $800 bequest. Montgomery, in fact, was not the child, but the grandchild of Mary Ann Cook. He was the son of her deceased daughter. That the testator intended the bequest in the codicil as a substitute for the bequest in Montgomery's favor in the will, is evidenced by the fact that he had, in the will, as before stated, given his wearing apparel to Montgomery, and by the words used in the bequest in the codicil, "in full of all bequests to

him." By the words "in full," the testator meant "in lieu." Where he intended to give a cumulative legacy, he used appropriate and unequivocal language for the purpose, as appears by the fourth item of the second codicil, in which he gives and bequeaths to his sister, Sarah Whitaker, "the additional sum of $300, in addition" to what he had already bequeathed to her.

The fact that the bequest to William Montgomery of a share of the $800 was revoked, and that that share is not otherwise disposed of, will not give to Sarah Hyflinger and Mary Ann Wright the entire fund. *Cresswell* v. *Cheslyn*, 2 *Eden* 123; *S. C.*, 6 *Bro. P. C.* 1. They are each entitled to one-third of the $800. They have applied for payment of the fund to them. Their shares will, notwithstanding the direction for investment, be paid over to them.

By the eleventh item of the will, the testator gives to his sister, Sarah Whitaker, and her children, "$1000, to be invested on bond and mortgage of real estate, and the interest to be collected and paid over to them annually, and equally divided between them." This is a gift of the principal sum, absolutely, and the legatees are entitled to it accordingly. The gift is to them as tenants in common, and the context shows that the mother and children are all to take at once. The gift is immediate and absolute, and Mrs. Whitaker and her children, who were living at the death of the testator, take, as tenants in common, in equal shares; her children each taking an equal share with her. *De Witte* v. *De Witte*, 11 *Sim.* 41; *Mason* v. *Clarke*, 17 *Beav.* 130; *Gordon* v. *Whieldon*, 11 *Beav.* 170; *Cunningham* v. *Murray*, 1 *DeG. & S.* 366. They are entitled to the fund, and having applied for it, and the children being all adults, it will, notwithstanding the direction to invest, be paid over to them.

The fourth item of the second codicil, the additional bequest to Mrs. Whitaker, is an absolute gift.

The gift to the townships of Little Egg Harbor and Bass River, of the sum of $500, to be invested on bond and

mortgage of real estate, for the use and benefit of the inhabitants of those townships; the interest to be collected annually, and divided between those townships in proportion to the number of inhabitants in each, for the purpose of educating their poor orphan children; and in case the interest should not all be "consumed," or used for this purpose, the balance to be appropriated, annually, to the poor widows of the townships —is a charity such as this court will sustain and effectuate. The testator constitutes the townships trustees of the fund as an entirety. He evidently contemplated committing it to the administration of the townships, jointly. This part of the testator's plan, so far as respects the persons (the township corporations) by whom the trust is to be administered, cannot be carried out. They are not proper trustees of the fund. The court will appoint a trustee to administer the trust according to the intentions of the testator, as expressed in the will.

The thirteenth item of the will gives to the New Jersey State Lunatic Asylum, $500, to be invested on bond and mortgage of real estate, and the interest to be collected annually, and to be appropriated annually, under the superintendence and direction of Dr. Buttolph, the superintendent of the institution, and his successors in office, forever, for the purchase of books and papers for the benefit of the unfortunate inmates of the institution.

The managers of the State Lunatic Asylum are authorized, by law, to receive this bequest, and will be required to administer the trust according to the directions of the will. By the fifth section of the act "to provide for the organization of the State Lunatic Asylum, and for the care and maintenance of the insane," (*Nix. Dig.* 523),* it is enacted that the managers of that institution may take and hold, in trust for the state, any grant or devise of land, or any donation or bequest of money or personal property, to be applied to the maintenance of insane persons, or the general use of the asylum. The legacy will, therefore, be ordered to be paid to the treasurer of

Rev., p. 608.

the institution, to be held and administered by the managers, on the trust declared in the will.

The question (raised on the argument, but not by the pleadings,) under the third item of the second codicil, by which $500 are given to the Methodist Episcopal Church at Tuckerton, in addition to a bequest in the will to that corporation of $300, to be invested, and the interest applied to maintaining a fence around a cemetery, is whether the money given in the codicil is to be invested, and the interest only applied to the debt, or whether the legacy is to be paid over, to be applied at once to the debt? The $500 are given towards paying off the debt of the church, and the testator adds an expression of his earnest desire that the money shall never be used for any other than strictly religious purposes and the worship of Almighty God. He distinctly expresses the purpose to which he intended that the money should go—the payment of the church debt. This money is to be paid to the treasurer of the corporation, and the corporation will hold it in trust, to apply it to that purpose.

BUNN, Trustee, &c., and others, *vs.* MITCHELL and others.

A trust estate, held under a deed of conveyance not declaring the trust, protected against a creditor of the trustee.

Bill for relief. On final hearing on pleadings and proofs.

Mr. A. A. Clark, for complainants.

Mr. J. Schomp, for defendant Dunham.

THE CHANCELLOR.

The complainants, Hugh R. Bunn and his children, seek, by means of this suit, to restrain Calvin Dunham, who is the owner, by assignment from James F. Ballantine, of a judg-

ment recovered by the latter against Bunn, from levying upon and selling under execution on the judgment, a farm in Somerset county, occupied by Bunn and conveyed to him by his father's executors, or the produce thereof, or the implements thereon, belonging to the children. They seek also, to restrain him and the sheriff from proceeding at law against James D. Vanderveer, one of the coroners of the county of Somerset, in respect to a writ of replevin, executed by the latter and issued at the suit of Bunn, by virtue whereof the coroner took out of the hands of the sheriff, certain hay, standing corn and growing oats and a lot of manure, which the sheriff had levied on as the property of Bunn, under an execution on the judgment; and also from bringing suit on the replevin bond given to the coroner by Bunn, and from proceeding to recover the damages or costs of the replevin suit, out of the property of the children held in trust for them by Bunn, or the produce thereof. John Bunn, the father of Hugh R. Bunn, died in 1866. By his will, he ordered his executors to sell all his estate, real and personal, and after paying his debts and legacies, to divide the residue among his children and the children of his son, Hugh R. Bunn, and those of his deceased daughter, Ruth Baird; the children in each case, to take one share in the division; and he directed that the share of Hugh's children be given to him in trust for them, they to receive the benefit therefrom in their maintenance and education, and at his decease, to be equally divided among all of them.

It appears that, in 1867, the executors, under the power in the will, conveyed to Hugh, for the consideration of $7000 as expressed in the deed, a part of the testator's real estate. This consideration was made up as follows: $2500, which it was then estimated would be the amount of the share of Hugh's children; $2500, the share of his brother John, which Hugh proposed to secure to John by a mortgage on the property; $1500 due his sister Elmira from the estate, and which he proposed to secure in like manner; and $500 paid by Hugh's wife. The property thus conveyed remained in Hugh's possession under the deed until 1869, when he re-conveyed it to

the executors, at their request. It appears that the reason of the re-conveyance was, that Elmira refused to take the mortgage for $1500 which Hugh proposed to give her for so much of her interest in the estate, and it had been discovered that the deed to Hugh had not been so drawn as to protect the interest of his children in the property. It was, therefore, considered desirable that Hugh should re-convey the property, to the end that a new conveyance might be made of a less amount of land, an amount equal, or nearly so, in value to the amount of his children's share in the estate, and in such form as to protect the interest of the children as *cestuis que trust* in the property in the hands of their father. Accordingly, the executors, by deed dated the next day after the re-conveyance, conveyed to Hugh part of the property conveyed by the former deed to him. In the new deed, the provision of the will in regard to the trust in favor of Hugh's children was recited, but no trust was declared in it. The whole consideration of this conveyance was accounted for out of the share of the children. Hugh neither paid nor agreed to pay anything on account of it. This last deed, as before remarked, expressed no trust. The parties to it, however, supposed that it did, until about the time when the levy was made. Mr. Mitchell, one of the executors, says, referring to the conveyance, "We intended to secure this (the property) to the children, and obtained the services of a lawyer to do this business. We intended to convey it for the benefit of the children, and supposed we did so." There seems to be no room to doubt that all the parties to the deed supposed that it conveyed the property to Hugh in trust for his children, on the trust declared in the will. The property was the homestead of John Bunn. Hugh resided there with his children after the making of the last deed. He and they were partially supported by the produce of the property. It was by no means sufficient for the support of the children. The defendant Dunham, having obtained an assignment of the Ballantine judgment, (which was recovered prior to the testator's death,) and having caused execution to be issued upon it, the sheriff of Somerset levied

on the hay, corn, oats and manure above mentioned, all of which were produced on the property. Hugh, in order to protect the property levied on, brought an action of replevin, which resulted in a non-suit. The executors had power to sell the land bought by Hugh. He bought it with the money of the children. A trust results in their favor, and they have a right to have the deed reformed so as to declare the trust. The produce of the farm is therefore theirs. The complainants are entitled to the relief they seek. The evidence shows that Dunham knew, when he levied, that the property was held by Hugh in trust for the children. But whether he had notice or not, he has no equity against them. His debt was not contracted on the faith of Hugh's apparent ownership of the property, but was contracted before the testator's death. The children are entitled to be protected against him, and Hugh and his sureties are entitled to protection against the replevin bond, except so far as the value of the manure, (which I cannot, from any evidence before me, hold to belong to the children,) and the costs of the replevin suit are concerned.

There will be a decree, but without costs, declaring the trust and reforming the deed accordingly, and on the payment to Dunham of the value of the manure and the costs of the replevin suit, the injunction will be made perpetual.

KEAN and others *vs.* ASCH.

The defendant purchased the interest of the city of Elizabeth in a certain alley and other lands, which interest had been purchased by the city at a sale under the charter for the non-payment of assessments for municipal improvements. He then commenced the erection of a building on and across the alley. The alley had been an open private way for forty years, and was the only means of access to the rear of the complainants' lots, except through their dwellings. Neither of the assessments was made upon, nor was any notice given to, any one as the *owner* of the property, as required by the charter. Upon bill filed to restrain the erection of the building on the alley, the defendant being a *bona fide* purchaser for valuable considera-

tion, *decreed* that upon the complainants paying to him the amounts paid by him for the tax titles, with lawful interest from the time of purchase, the injunction would be made perpetual.

Bill for relief. On final hearing on pleadings and state of the case.

Mr. J. R. English, for complainants.

Mr. R. E. Chetwood, for defendant.

THE CHANCELLOR.

The bill is filed for an injunction to restrain the defendant from erecting a building on a lane or alley in Elizabeth, over which the complainants, who respectively own lots of improved land upon it, have a right of way in respect of their land. The defendant claims title to the premises in question under sales by the municipal authorities of Elizabeth, under their charter, for assessments upon the property for municipal improvements. Those improvements were the construction of a sewer and the paving of a street. The assessment for the construction of the sewer was ratified by the city council on the 6th of June, 1868, and the sale under it took place on the 6th of February, 1872. The amount for which the property was then sold was $58.50, the amount of the assessments, with interest and costs. The city became the purchaser for a term of fifty years. The premises were not redeemed, and the city sold their term in them to the defendant for the $58.50. The assessment for paving was ratified on the 30th of May, 1868, and under it the property was, on the 8th of September, 1874, sold to the defendant for a term of fifty years, for $155.76, the amount of the assessment, with interest and costs. When the bill was filed the defendant had begun the erection of a frame building on and across the alley. The charter of the city, as it stood when the assessments in question were made, directed that the cost, damages, and expenses of the construction of a sewer should be justly and equitably assessed

upon *the owners* of all the lands and real estate benefited thereby, in proportion, as nearly as might be, to the advantage each should be deemed to acquire, and that the costs and expense of paving should be assessed on *the owners* of lands and real estate on the line of the street or section of street paved. In case of the construction of a sewer, the assessment was to be made by commissioners, and in the case of paving, by the city surveyor. Notice of the assessment, of the time when it was made, and of the time and place when and where the parties interested could be heard in reference to it, was to be given by publication in a newspaper in Elizabeth, for one week. *Charter of Elizabeth*, §§ 101, 104, 105, 106, *Pamph. L.*, 1863, *pp.* 148, 149, 150. Neither of the assessments in question was made upon any one as the owner of the property. The notice of the assessment for the sewer stated no owner for the alley. It designated the property by the number on the assessment map, and as "lane." There was a like designation of another piece of property in the same notice, and there was another alley or lane also running as the alley in question does, from Mechanic street, which was also assessed for the same improvement. The notice of the assessment for paving contained no particulars of the assessment, and was substantially the same as that which was condemned in *State, Kellogg, pros.*, v. *City of Elizabeth*, 8 *Vroom* 353. The case presented is appropriate for relief by this court. Were the defendant to be permitted to erect his building across, and so to shut up the alley, it would inflict irreparable damage on the complainants. The alley is twelve feet wide. It has been an open private way for about forty years. It is in the thickly settled and built up part of the city. The front of the lots of the complainants which are bounded in the rear by the alley, are entirely occupied with buildings, so that the complainants have no access for horses or carriages to the rear of their lots, except by the alley. On the lot of one of the complainants there is, and for many years past has been, a barn adjoining the alley, and to which he and those holding the barn under him have had access by the alley, and

except by the alley, he has no access to his barn without going over the land of others, or going through his dwelling-house. Another of the complainants has a large garden and grounds adjoining the alley, to which he has no access for horses and wagons except over the land of other persons, if deprived of the use of the alley. The title of the complainants to the easement of the alley is not denied. The tax titles cannot be sustained. It is enough on this head to say that neither the assessment nor the notice, in either case, is in conformity with the provisions of the charter. There was no assessment against, nor any notice to any person as the owner of the property, or of any interest therein. *State, Peters, pros.*, v. *Mayor, &c., of Newark*, 2 *Vroom* 360; *State, Kellogg, pros.*, v. *City of Elizabeth, ubi supra.* The defendant, however, is a *bona fide* purchaser of the tax titles for valuable consideration—the amount due on the assessments. He should be dealt with equitably. On the complainants paying to him the amounts paid by him for the tax titles, with lawful interest thereon from the time of his purchase thereof, the injunction will be made perpetual. No costs will be awarded.

HOUSEWORTH'S Administrator *vs.* HENDRICKSON.

1. A *ne exeat* obtained upon affidavits substantiating declarations and acts of the defendant as evidence of his intention to depart the state, will not be discharged upon a counter affidavit by the defendant denying the intention.

2. When, to a bill filed by an administrator against his intestate's co-partner for an acconnt, and for a writ of *ne exeat*, the answer, denying the right to an account, substantially admits the correctness of the allegations of the bill as to defendant's statement of the assets of the firm, and the amount of its indebtedness, but denies that the estimates were correct, and that defendant owes anything to the estate of the intestate—such denial cannot avail to discharge the writ.

3. Writ to be discharged and the bond given under it canceled, on the defendant's giving bond, with security, in the sum for which bail was ordered.

On motion to discharge *ne exeat*, on bill and answer and affidavits to each annexed.

Mr. William Luse, for motion.

Mr. J. G. Shipman, *contra*.

The Chancellor.

The bill is filed by an administrator against the co-partner of the intestate. It prays an account and a decree thereupon in favor of the complainant. It prays also for a writ of *ne exeat*, on the ground that the defendant intends quickly to leave this state, and go to Middletown, in the State of New York, to join his son, whom, as the bill alleges, he has set up in business there. The bill states that the death of the intestate took place on the 20th of February, 1873, and that seven days afterwards, his widow and Mr. James Purnell Toadvin were appointed administrators; that they made an inventory and caused an appraisement to be made of the goods, chattels, and credits of the intestate, on the 4th of March following, and that on that occasion the defendant made a statement that the available assets of the late firm of P. M. Hendrickson & Co., (which was composed of himself and the intestate), in his hands as surviving partner, amounted to $3150.64, and that the debts of the firm amounted to $1004.88, leaving a balance of $2145.76. It further states that the administrators, with the consent and approval of the defendant, caused the amount due to the estate from the defendant, for its share of that balance, to be appraised at $1000, and charged themselves in the inventory filed by them in the surrogate's office of Warren county, with that amount accordingly.

The above-mentioned administrators were removed on the 6th of March, 1875, and the complainant was appointed in

their stead. The allegations of the bill as to the statement made by the defendant and the action of the administrators thereupon, are sustained by the affidavit of Mr. Toadvin, attached to the bill. The allegation that the defendant intends quickly to depart out of the state, is supported by the affidavit of John V. Deshong, who swears that, on the 26th of August, 1875, four days before the filing of the bill, the defendant told him that he was going to Middletown, in New York, on that day ; and that some time before that time, the defendant informed him that he intended to move his family to that place in the fall of 1875, and that his son Charles was in business there.

Deshong further swears that the defendant told him that he was going to Middletown because there was no business in Belvidere, and that on one occasion the defendant spoke of the business in Middletown as his own. The statements of this affidavit as to the intention of the defendant to leave the state, are not denied. It is true the defendant states in his answer that he never intended to remove to Middletown. If, for the purpose of such a motion as this, the general affidavit that the facts, matters, and things contained in the answer, so far as they relate to the acts and deeds of the defendant, are true, were accepted (as it manifestly cannot be) as a verification of the statement as to the defendant's *intentions*, contained in the answer, that statement could not countervail the facts sworn to by Deshong. The court will not discharge a *ne exeat* obtained upon affidavits substantiating declarations and acts of the defendant as evidence of his intention to go abroad, upon a counter affidavit by the defendant, denying the intention. *Whitehouse* v. *Partridge*, 3 *Swanst.* 365, 375 ; *Amsinck* v. *Barklay*, 8 *Ves.* 594, 597. The complainant has sought relief in the proper forum, and the debt was sufficiently established by the bill and affidavits annexed, to authorize the award of the writ. The defendant alleges, in his answer, that the widow and daughter, the only next of kin of the intestate, a few days after the death of the latter, took the place of the intestate in the business, under an agreement

between them and the defendant, and that the business was, with the acquiescence of Mr. Toadvin in this appropriation by the widow and daughter, of the intestate's interest in the assets, continued in the same firm name of P. M. Hendrickson & Co., and that subsequently the individual creditors of the defendant and those of the original firm, pressed him for payment of their demands, and the result was that the defendant placed the books of the original firm in the hands of the attorney of the creditors, on an agreement that they were to collect the accounts, and to apply the proceeds to the payment of the debts, as well those of the defendant individually, as of the original firm, and the stock of goods was sold out under executions at a great sacrifice. The answer states that there has been no settlement between the members of the new firm. The defendant comes to no account with the complainant, but denies his right to an account. While substantially admitting the correctness of the allegations of the bill as to the statement of the value of the assets of the original firm and the amount of its indebtedness, the defendant denies that the estimates were correct, and he also denies that he owes anything to the estate of the intestate. Such a denial under such circumstances, cannot avail to discharge the writ. *Jones* v. *Alephsin*, 16 *Ves.* 471. Nor does it appear otherwise by the answer, that the defendant is not indebted to the estate. The motion will be denied. The writ will be discharged however, and the bond given under it canceled, on the defendant's giving bond, with security, in the sum for which bail was ordered, conditioned to abide the decree of the court.

Wilson and others *vs.* Wintermute and wife.

An application to amend a sworn answer, on the ground of mistake discovered at the time the answer was read to the party making it, made more than two years after the discovery and filing of the answer, without excuse for the delay, and upon feeble and unsatisfactory proof of the alleged mistake, refused.

Motion to amend answer.

Mr. Wm. Luse, for motion.

Mr. Wm. H. Morrow, contra.

THE CHANCELLOR.

The defendant, Rusilla Wintermute, applies for leave to amend her separate answer, by qualifying an admission therein that her husband was, as stated in the bill, the owner of certain promissory notes, &c., in her hands, for the recovery whereof this suit was instituted. From this admission, she would except a note of $400, which she alleges was her own property. The ground of the application is mistake. She says she discovered, after the answer had been sworn to, that the admission embraced that note, and she says she spoke to her solicitor on the subject and suggested that the error should be corrected, but was then informed by him that it could only be corrected by leave of the court, for which he promised to apply. Whether the answer had been filed when the discovery was made, does not appear. It was filed on the 30th of May, 1873. She says it was when the answer was read over to her that she discovered the mistake. She has permitted more than two years to elapse before making an application to amend, and there seems to be no excuse for the delay. Besides, the proof of the alleged mistake is by no means satisfactory; she should have given a direct and clear statement of the circumstances. Her testimony too, as to the ownership of the note, a point on which positiveness was to be expected, is strikingly feeble and evasive.

The motion must be denied.

FAULKS vs. DIMOCK and others.

A mortgagor has the right to purchase a mortgage given by himself and wife on property belonging to her, and it is a valid security in his hands. It is no ground for declaring such mortgage satisfied in the hands of an assignee, that the consideration of the assignment was paid by the mortgagor, and that it was held by the assignee to the mortgagor's use.

On order to show cause and depositions taken thereunder.

Mr. A. Dutcher, for defendant Butterfield.

Mr. W. J. Magie, for Henry H. Howland.

THE CHANCELLOR.

The design of this proceeding is to obtain a decree adjudging that the complainant's mortgage is satisfied. The final decree in this suit, which was for the foreclosure and sale of mortgaged premises in the city of Elizabeth, was entered on the 1st of August, 1871, in favor of the complainant, whose mortgage was the first lien on the property, for $8483.77, besides interest and costs, and of the defendant, Frederick Butterfield, the owner of the second mortgage, for $21,843.33, with interest and costs. On the 27th of September, 1871, the complainant, for the consideration of $8774.39, assigned his mortgage, and the decree thereon, and the benefit of all proceedings thereunder, to A. Vaughn Dimock, who, on the 6th of November following, for the consideration of $8000, assigned the mortgage to Rebecca A. Howland, executrix of William W. Howland, deceased, and she assigned it on the 15th of March, 1873, to her son, Henry H. Howland, (by whom it is now held,) for part of his share of the estate of his father, the testator, William W. Howland. The mortgage was given by Helen W. Dimock, and her husband, Anthony W. Dimock. The former was the owner of the mortgaged

premises. It appears that Anthony W. Dimock paid the consideration of the assignment to A. Vaughn Dimock, by his own check, and that he attended to procuring the assignment. Whether he received the money from A. Vaughn Dimock, (who is dead,) does not appear. He was not examined as a witness under the order to show cause. A. Vaughn Dimock appears to have received the consideration of the assignment to Mrs. Howland. Her check for the money was made payable to the order of her son, Joseph T. Howland, who attended to the business for her, and it was by him endorsed to A. Vaughn Dimock, by whom it appears to have been endorsed to the firm of Dimock, Myers & Co., of which he was a member. Anthony W. Dimock was not a member of that firm. Mr. Joseph T. Howland testifies, that he is under the impression that he delivered the check to a clerk of the firm of Dimock, Myers & Co. The evidence does not show that A. Vaughn Dimock was not, in fact, as from the assignment he was presumptively, the actual *bona fide* assignee of the mortgage for his own benefit. But, if it were conceded that Anthony W. Dimock paid the consideration of that assignment, and that it was held by A. Vaughn Dimock to the use of Anthony W. Dimock, that fact would be no ground for declaring the mortgage satisfied. The mortgage was, as before stated, given by Mrs. Dimock and her husband to the complainant, on property belonging to her. Her husband could have purchased and held that mortgage, and it would have been a valid security in his hands. *Stillman's Ex'rs* v. *Stillman*, 6 *C. E. Green* 126.

The order to show cause will be discharged, with costs.

YOUNG *vs.* THE CLARKSVILLE MANUFACTURING COMPANY and others.

1. An answer filed by one of several judgment creditors, joining with him therein his co-plaintiffs in the judgment, filed in time as to himself, but out of time as to them, sworn to by him but not by them, was permitted to stand as filed in time by him, and as his answer, though purporting to be the answer of his co-plaintiffs also.

2. So much of the answer as set up the defence of usury, was stricken out as to such co-plaintiffs.

On bill to foreclose and answers, and cross-bill and answer. Motion to strike out certain parts of the answer of The Clarksville Manufacturing Company, and part of the answer of certain other defendants to the original bill, and motion to dissolve the injunction issued on the cross-bill.

Mr. J. N. Voorhees and *Mr. H. C. Pitney*, for motion.

Mr. G. A. Allen, contra.

THE CHANCELLOR.

The complainant, Eli W. Young, filed his bill for the foreclosure and sale of mortgaged premises owned by The Clarksville Manufacturing Company, and situated in Hunterdon county. His mortgage is for $3000 and interest, and was, as he alleges, given to him by the company. The company was duly served with process of subpœna to answer. They did not answer within the time limited by law, but obtained an extension of the time, and answered within the time so granted. The bill states that William Gardner, Marcus D. Wells, Lewis Young, George Gardner, Abraham S. Banghart and Samuel Apgar, after the recording of the complainant's mortgage, recovered a judgment in the Supreme Court of this state against the company, for $1688.79. All these persons, except George Gardner, who was an absent defendant, were

served with subpœna to answer, but none of those who were served answered within the time limited by law for the purpose. An order of publication was taken as to George Gardner. Within the time fixed by that order he answered. Though the answer purports to be the answer of the other plaintiffs in the judgment also, it is sworn to by him alone. Subsequently to the filing of the answer of the company, they filed a cross-bill to restrain the complainant from proceeding in an action of ejectment, brought by him on his mortgage to recover from them the possession of the mortgaged premises, and an injunction was granted thereon. He answered that bill. He now moves to dissolve the injunction, and to strike out so much of the answer of the company as sets up the defences of usury and *ultra vires*, and to strike out so much of the answer of the above-mentioned judgment creditors as sets up usury. The ground of the motions to strike out is, that the answers not having been filed within the time limited by law for the purpose, the defendants will not be permitted to set up therein any inequitable defence; and it is insisted on behalf of the complainant, that although the defendant, George Gardner, filed his answer in due time, yet, that having joined therein his co-plaintiffs in the judgment, whose time for answering had expired, the answer must be treated as if filed out of time by him also.

The defences set up in the answer of the company are none of them unconscionable. The answer relates the history of the mortgage; alleges that it was not lawfully authorized or executed, so as to bind the company; that it was made, executed and delivered in fraud of the stockholders, under the circumstances set forth in the answer, and that the company was never indebted to the complainant. It quotes from the book of minutes of the company, a statement that Lewis Young, then the president of the company, had agreed to furnish the company with $3000, at seven per cent. per annum interest, for a premium of ten per cent.; the loan to be secured by a mortgage to Eli W. Young & Co.; but it alleges that no money whatever was advanced or paid by the

complainant for the mortgage, and that it was a fraudulent contrivance on the part of Lewis Young and the complainant, his son, to obtain the obligation of the company, secured by a lien upon their property, without consideration. It states, also, that the complainant was elected a director of the company on the 28th of October, 1871, and was elected treasurer on the 4th of December following; that he held the office of treasurer until December 27th, 1873, and that as treasurer he obtained possession of a large amount of the money of the company, for which he refuses to account. It claims an equitable offset of this money against any demand which he may be able to substantiate against them, and offers to pay whatever, if anything, is legally or equitably due to him from them. The answer neither sets up usury nor *ultra vires.* The motion to strike out must be denied.

The answer of the judgment creditors above named sets up the defence of usury; but, as before stated, it is sworn to by George Gardner only. As to the other persons whose answer it purports to be, the motion to strike out must prevail. Indeed, the answer might, as to them, have been suppressed, for, as to them, it was neither filed in time nor sworn to. The bill prays answer on oath. The answer will be permitted to stand as the answer of George Gardner, notwithstanding the fact that it purports to be the answer of his co-plaintiffs in the judgment, also. *Done* v. *Read*, 2 *V. & B.* 310; 1 *Dan. Ch. Pr.* (*4th Am. ed.*) 732, *and note.* The motion to strike out must therefore, as to his answer, be denied. His answer was filed in due time.

The injunction should be retained until the final hearing. The bond which was given pursuant to the 45th rule, on granting it, will secure the complainant's rights in reference to the rents, issues and profits of the mortgaged premises.

PARSONS and others *vs.* LANNING and others.*

The "act relative to sales of land under a public statute or by virtue of any judicial proceeding," requires the first publication of the notice in the newspapers to be made four whole weeks next preceding the day appointed for the sale.

Motion to set aside sheriff's sale of mortgaged premises.

Mr. I. W. Lanning, for motion.

Mr. J. S. Aitkin, contra.

THE CHANCELLOR.

The "act relative to sales of lands under a public statute or by virtue of any judicial proceeding," (*Rev.*, *p.* 752,) directs that notice of the sale be given by public advertisements set up at five or more public places in the county, one whereof shall be in the township where the real estate is situated, of the time and place of sale, at least two months next before the time appointed for the sale, and by notice published in two of the newspapers printed and published, &c., at least four weeks successively, once a week, next preceding the time appointed for the sale. The notice in this case was published in one of the two newspapers, "The Princeton Press," for the first time, on the 15th of January. That is a weekly paper, published on Saturday. The sale was advertised to take place on the 10th of February following. This publication was not a compliance with the requirement of the statute. The notice, by advertisement in the newspapers, is to be for four weeks next preceding the day appointed for the sale. There must be four whole weeks between the first insertion of the advertisement in the newspaper and the day fixed for the sale. There were only twenty-six days in the publication in "The Princeton Press." There were, indeed, four insertions in that paper, viz., on the 15th, 22d, and 29th of January, and on the

* Cited in *State, Barkley, pros.*, v. *Elizabeth*, 12 *Vr.* 518.

5th of February, but that is not a compliance with the direction of the act. *Francis* v. *Norris*, 2 *Miles* 150; *Olcott* v. *Robinson*, 20 *Barb.* 148; *Early* v. *Doe*, 16 *How.* 610.

For this defect in the notice, the sale will be set aside.

ENGLISH *vs.* ENGLISH.*

Decree of divorce from bed and board forever, on the ground of extreme cruelty, consisting mainly in gross abuse by the husband of his marital rights, rendering it unsafe for the wife to cohabit with him, or to be under his dominion or control; the parties left at liberty to apply by mutual, free and voluntary consent, to be discharged from the decree.

Bill for divorce from bed and board. On final hearing on pleadings and proofs.

Mr. Jacob Weart and *Mr. I. W. Scudder*, for complainant.

Mr. R. Gilchrist and *Mr. B. Williamson*, for defendant.

THE CHANCELLOR.

The bill is filed for a divorce *a mensa et thoro*, on the ground of extreme cruelty. The main charge is gross abuse of marital rights. I shall leave out of consideration all the others which were urged on the hearing, because they are either not pleaded, or if pleaded, are perhaps, under the evidence, not of themselves sufficient to control the judgment of the court. The case is of such a nature, and the relations with which it deals are of so delicate a character, that the court would gladly have been spared the necessity of judging between the parties. The complainant, however, has invoked its aid and protection, and the defendant denies her right to it; it therefore becomes the duty of the court, however unpleasant the task, to dispose of the questions presented for determina-

* Cited in *State, English* v. *English*, 4 *Stew.* 545.

tion. The parties were married in 1867. The complainant is, and since June, 1873, the date of the birth of her third child, has been, afflicted with a uterine disease of such a character as to make connubial intercourse very distressing to her. She speaks of it as "agonizing," and as causing her intense suffering, indescribable pain. Notwithstanding her condition, and in spite of her remonstrances and entreaties, the defendant has, ever since that time, insisted on having intercourse with her, frequently even using force to accomplish his purpose. To her entreaties and expressions of apprehension that the intercourse would be fatal to her, he would reply, "No fear of its killing you; you will not die until your time comes; you know how I am—I cannot control myself;" or, "You have stood it before and will stand it again; you know I cannot help it;" or, "It is the same old story; I am sick of hearing it." She swears, that from June, 1873, to November, 1875, (on the 6th of which last-mentioned month she left his house and went to her father's) with the exception of two weeks after the birth of her child in the first-mentioned month, and the two weeks after her miscarriage in 1874, he had intercourse with her every night when her catamenia were not upon her, (and it appears that he did not spare her even then,) and frequently twice and sometimes three times in a night; and she says she has been kept awake "many and many a night" by the pain she has suffered during and after intercourse.

This treatment continued up to the night of the 2d of November, 1875, when, after he had had intercourse with her against her remonstrance, which she urged on account of the pain which the act would cause her, he sought it twice again, once at about midnight, and the last time at about three o'clock in the morning, when he strove to accomplish his purpose by force, and only desisted at the crying of her and the children. She swears, that he then struck her in the back with his fist, and that, subsequently, when they had both got out of bed, he, violently striking his fist on the mantle piece, said to her, "I'll fix you, you can make up your

mind to that," and this, she says, he repeated several times. She testifies, that when he commenced that night, she told him she could not stand it, that she felt unusually ill, and he replied, "You will have to stand it." She says she told him she felt so sick and weak that she was afraid she would not live long if he persisted as he had done lately; to which he answered, "That there was no fear of her; that she would not die till her time came;" and she says he then held her down to the bed and accomplished his design. She adds that she suffered the most excruciating pain, and that she cried and told him of her sufferings; she says also, that in holding her down he bruised her limbs so that they were lame and sore for more than two weeks afterwards. The character of his conduct on that occasion is shown by the fact that from that time until the 6th of November, when she left the house and went to her father's with her two children, he was morose and sullen, and did not notice her or the children. He admits that this was caused by her refusal to submit herself to him on the night of the 2d. Such gross and reprehensible abuse of marital rights as that of which he has been guilty, is just ground for a divorce from bed and board. *Moores* v. *Moores,* 1 *C. E. Green* 275; *Shaw* v. *Shaw,* 17 *Conn.* 189; 1 *Bishop on Marr. and Div.,* § 760.

But it is insisted by the defendant's counsel, that if the divorce prayed for be granted, it will be in contravention of the settled rule of the court that a divorce will not be granted on the testimony of the complainant alone.

The testimony of the complainant does not stand alone, however. Strong corroboration of it is found in that of both of the physicians as to her physical condition, and also in the defendant's own testimony. He says that eight or nine months prior to July 1st, 1875, she assigned her delicate health and weakness as a cause of her unwillingness to submit herself to him; that she assigned her feebleness as an objection; that she was in delicate health between July and November, 1875; that she told him that her physician said she should have rest, that she should abstain from intercourse with him;

that on the night of the 2d of November, 1875, she told him she was not very strong, that she felt delicate, and that she did not want him to have intercourse with her; that he struggled with her in bed, that night, in his endeavor to effect his purpose; that she cried when she jumped out of the bed, and that she cried because she did not want him to have connection with her. He further admits that she often tried, by physical means, to protect herself against him, and that she complained that his intercourse with her injured her, that it made her weak.

There can be no doubt that she was so diseased that connubial intercourse inflicted great and distressing pain upon her; nor can there be any doubt that her condition was known to him. According to his own testimony he insisted on having connection with her against her will, and her remonstrance and entreaties, urged on the ground of her delicate and diseased condition, and he even, by his own admission, struggled with her to effect his purpose. The rule which he invokes in his aid cannot avail him. In the light of all the testimony her statements are entitled to credit, and if so, she is entitled to the relief which she seeks. He has been guilty of extreme cruelty towards her, so as to render it unsafe for her, under existing circumstances, to cohabit with him or to be under his dominion or control.

A divorce from bed and board forever, will be decreed. The complainant's health, however, may hereafter be restored, and it may become desirable that they should again live together. In order that the decree now pronounced may not be an insuperable obstacle to such a re-union, leave will be given to the parties to apply, by mutual, free, and voluntary consent, to be discharged from this decree.

The custody of the children will be awarded to the complainant, subject to the future order of the court. The boy is about seven years old, and the girl is nearly five. Provision will be made for free access, at proper times, by the defendant to his children; and the parties will have leave to apply from time to time, as occasion may arise, in reference to the custody,

maintenance and education of the children. On the hearing it was urged by the defendant's counsel that the court should, in disposing of the custody of the children, take into consideration a promise made by the complainant previously to the performance of the wedding ceremony, that the children of the marriage should be brought up in the Roman Catholic faith. She then was and still is a Protestant. On the other hand, the defendant then was and still is a Roman Catholic. The promise in question is alleged to have been made to the priest by whom they were married, and who required it of her as a prerequisite to the marriage, without which he would not perform the ceremony. It was not made to the defendant, nor was there any agreement between her and him on the subject. The promise thus made cannot control or influence the action of this court in disposing of the children.

The defendant will be ordered to pay to the complainant, until the further order of the court, for the support and maintenance of her and the children, and the education of the latter, alimony at the rate of $25 a week, and to pay her costs of this suit and a counsel fee of $200 to her counsel.*

Grover *vs.* Wycoff's Executor and another.

The executor of A sued B and C jointly, upon a joint and several promissory note held by his testator at the time of his death, and recovered judgment. Subsequently B filed his bill in this court, alleging that he neither signed the note nor authorized any one to do so for him, and that he did not know of its existence until after A's death. It further alleged that C fraudulently signed complainant's name to the note, and that the executor sued the complainant and C jointly, so that the complainant, by reason of the executor's suing in a representative capacity, could neither testify himself, nor avail himself of C's testimony to prove the fraud. It prayed an injunction against the executor and the sheriff, to restrain a sale. The executor pleaded the trial and judgment in bar, and answered the bill. *Held*, that the fact that the complainant was unable to avail himself, on the trial at law, of his own testimony or of that of C, was no ground for relief.

---

*Decree reversed, *post* p. 579.

Bill for relief. On final hearing on pleadings and proofs.

Mr. J. F. Hageman, for complainant.

Mr. R. M. J. Smith, for defendants.

The Chancellor.

The bill is filed for relief against a judgment at law. The complainant and William C. Forman were sued together, in an action of *assumpsit* in the Supreme Court, by the defendant, Abraham B. Wycoff, as executor of Cornelius Wycoff, deceased, on a joint and several promissory note, purporting to have been made by them, and judgment for $844.39 was recovered therein against them, on the 5th of November, 1873. The note was held by Cornelius Wycoff at the time of his death. It was given to him at or about the time of its date, April 25th, 1867. The bill alleges that the complainant neither signed it nor authorized any one to do so for him, and that he did not know of its existence until after the death of Cornelius Wycoff. It further alleges that the defendant Wycoff caused the complainant and Forman (who, it states, fraudulently signed the complainant's name to the note,) to be sued together, so that the complainant, seeing that the defendant Wycoff sued in a representative capacity, could neither testify himself, nor avail himself of the testimony of Forman to prove the fraud. It prays an injunction. The defendant Wycoff (the other defendant is the sheriff of Middlesex), pleaded the trial, verdict and judgment in bar, and answered the bill.

There is no evidence whatever, of any fraud on the part of the executor in obtaining the judgment. The fact that the complainant was unable to avail himself on the trial at law, of his own testimony, or of that of Forman, is no ground for relief. The law made both of them incompetent to testify under the circumstances.

The bill will be dismissed, with costs.

McArthur *vs.* The Montclair Railway Company.

Compensation of receivers of an insolvent railroad company.

The Chancellor.

The master has reported that two of the trustees should receive for their compensation $3000 each, and the other about $1400. The report is accompanied by depositions as to the services rendered and the value thereof. The trustees were appointed in July, 1873. The usual practice of appointing but a single receiver was departed from in this case at the instance of the representatives of the different interests in the trust property. The gentlemen selected were chosen for their fitness for the discharge of the various duties which were to be devolved upon them in the management of the railroad and the examination of the affairs of the company. They were all men of experience in business, one in the management of trusts, another in the superintendence of railroads, and the third in financial affairs. They appear to have necessarily devoted much time during a period of two years to the interests of the trust, (which involved the sale of the road,) and to have been very diligent and thorough in their attention to, and discharge of their duties.

The amount reported by the master seems not to be unreasonable. The report will therefore be confirmed.

Waln *vs.* Meirs and others.*

1. In partition proceedings, where an answer has been filed, the court usually determines on the hearing, on the evidence, as to the divisibility of the property. In case of default, it determines the question on the evidence and the report of a master.

2. If, on the hearing, there should be doubt as to the practicability of

* Cited in *Smith* v. *Frenche*, 1 *Stew.* 116.

partition without great prejudice, the court may appoint commissioners to divide, and should they report against partition, may order sale.

3. An answering defendant to a bill for partition, who made no objection to an order of reference, and took part in the proceedings under the reference, *held* to have waived the irregularity, but on the day noticed for a motion to confirm the master's report, was given permission to be heard on the merits of the report, on exceptions thereto.

In partition. Motion for order to confirm master's report.

Mr. F. Voorhees, for complainant.

Mr. W. H. Vredenburgh, for defendants Meirs and wife.

THE CHANCELLOR.

The bill in this cause was filed on the 17th of September, 1873, for the partition of land of which Robert Waln, deceased, died seized. The defendants, John G. Meirs and wife, answered. Their answer was filed on the 31st of October, 1873. By it they admit all the facts stated in the bill, and joining in the prayer for partition, insist that partition of the land is practicable without great prejudice to the owners, and oppose a sale. No replication was filed. On the 2d of June, 1874, an order of reference was entered, referring it to a master to report the rights of the parties, and whether the land could be divided without great prejudice to the owners, and if, in his opinion, it could not be so divided, whether it should be sold as a whole or in parcels, and whether, in case of sale, the dower of the widow of Richard Waln, deceased, in the property, should be excepted from the sale, or be sold with the property. The master was directed to report on the 14th of July, 1874. Under the order, the master took a very considerable amount of testimony. More than thirty witnesses were examined. The counsel of the answering defendants was present at the examination, and took part therein. He offered witnesses, who were sworn and examined in relation to the subject matters of the reference. The master reported that the property could not be divided without great prejudice to

the owners, and that it should, therefore, be sold; that the dower right should be sold with it, and that the property should be sold in certain designated parcels. The report was filed on the 30th of August, 1875, and thereupon an order was entered, directing that the defendants be notified of the filing of the report, and requiring them to file their objections to it on or before the 14th of September then next. The counsel of the complainant, on that day, moved that the report be confirmed. The counsel of the answering defendants interposed the objection that the order of reference was irregular, in view of the fact that the answer was on file when it was made. He insisted that, according to the practice, the cause should have been set down. There are no merits in the objection. The only matter in controversy, the divisibility of the property, may, by leave of the court, be heard on the evidence, on exceptions to the master's report. The answering defendants have had full opportunity to produce testimony on the subject. They not only did not move to set aside the order of reference, but making no objection to it, they took part in the proceedings under the reference. They may fairly be presumed to have consented to the order. They will be held to have waived the irregularity. The counsel also insisted that the practice was settled by the decision of the Court of Appeals in Bentley *v.* Long Dock Co., and that, according to that case, no sale can regularly be ordered unless commissioners shall have reported that the partition cannot be made without great prejudice. Such, however, is not the practice. The court usually determines on the hearing, on the evidence, as to the divisibility of the property. In case of default, it determines the question on the evidence and the report of a master. *Thompson* v. *Hardman*, 6 *Johns. C. R.* 436. If, on the hearing, there should be doubt as to the practicability of partition without great prejudice, it may appoint commissioners to divide, and should they report against partition, may order sale. The course which was directed to be taken in Bentley *v.* The Long Dock Co. was exceptional. In that case there was an appeal from the order for sale. The Court

of Appeals were not satisfied by the proofs, of the necessity of a sale. They, therefore, ordered that commissioners should be appointed to make partition, and that in case the commissioners should be of opinion that partition could not be made without great prejudice, they should so report. No opinion of the Court of Appeals in the case is extant. The order for sale was not reversed for irregularity, although it was subject to the same objections in all respects, as the order of reference in this cause, but, as appears by the decree, (1 *McCarter* 486,) because the court were "not satisfied by the proofs," that the property could not be partitioned without great prejudice. The answering defendants will be heard on the merits of the master's report, on exceptions thereto.

TERHUNE *vs.* TAYLOR and others.*

1. A mortgage free from usury in its inception, is not affected by a subsequent agreement to forbear suit in consideration of the payment of illegal interest.

2. Interest paid in excess of the legal rate, under agreement for its payment in consideration of forbearance to sue, will be credited on the amount due on the mortgage.

3. Complainant's title, stated in the bill, not being complete, he was permitted at the hearing to amend his bill by setting up his title proved in the cause, to the mortgage, as administrator; his title, though questioned on the hearing, not being questioned by the answer.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. J. C. Paulison, for complainant

Mr. Z. M. Ward, for Nathaniel Taylor.

---

* Cited in *Hutchinson* v. *Abbott*, 6 *Stew.* 382.

THE CHANCELLOR.

The defendant, Taylor, alleges, in his answer, the payment by him to the complainant of usurious interest on the complainant's mortgage, pursuant to an agreement between them, by which, in consideration of such payment, the complainant agreed with him to forbear bringing suit on the mortgage. The mortgage was given by the defendant to William and Alfred Stoutenborough, by whom it was assigned to the complainant's sister, who died intestate, and the complainant became her administrator. The complainant, in his bill, which is filed in his individual right, and not in the representative capacity of administrator of his sister, claims to be the owner of the mortgage, by verbal assignments from the persons who, besides himself, were entitled to distributive shares of his sister's estate. The agreement set up in the answer is stated to have been made with the complainant. It is not alleged that the mortgage was usurious in its inception. The subsequent agreement to forbear suit in consideration of the payment of illegal interest, would not affect the mortgage. *Donnington* v. *Meeker*, 3 *Stockt.* 362. Any interest which might have been paid in excess of the legal rate, under an agreement for the payment thereof in consideration of forbearance to sue, would be credited to the defendant on the amount of the money due on the mortgage. *Nightingale* v. *Meginnis*, 5 *Vroom* 461; *Trusdell* v. *Jones*, 8 *C. E. Green* 121; *S. C., on appeal, Ib.* 554. The proof, however, does not satisfy me that the agreement set up in the answer was made. On the other hand, the weight of the evidence is, that the trifling sums paid by Taylor to the complainant, were gratuities paid in consideration of dilatoriness in paying the interest.

The objection is made on behalf of Taylor, that the complainant has not proved his title to the mortgage. The answer, however, does not question the complainant's title. The complainant does not show a complete title to the mortgage, by his bill. He does not state that it was assigned to him by all the persons who, besides himself, were entitled to distributive shares, but only by some of them, and such is

the proof. He has put in evidence his letters of administration, however, and he will be permitted to amend his bill by setting up his title to the mortgage, as administrator, and when he shall have so amended his bill, he will be entitled to a decree for the principal and interest of his mortgage, with costs of suit.

BUCKELEW *vs.* SNEDEKER.

1. A tenant in common is not chargeable to his co-tenant for the latter's share of the rental value of the premises, which are equally open to and may be occupied by both.

2. A tenant in common who cultivates the land and receives the entire proceeds, is chargeable to his co-tenant for his share of the profits.

Bill for partition and account. On exceptions to master's report of account.

Mr. D. R. Boice, for exceptions.

Mr. P. L. Voorhees, contra.

THE CHANCELLOR.

The bill states that from on or about the 1st day of April, 1869, up to the time of filing the bill, the defendant had sole possession of the property, and had received all the rents, issues and profits thereof, and had neglected and refused to account to the complainant for her share, and had appropriated all of them to her own exclusive use, and it prays an account and payment accordingly. The answer denies that the defendant had had possession of the part of the dwelling-house, which, by the agreement of the parties, (who are sisters) had been set apart for the occupation of the complainant, but alleges that, on the other hand, it had been unoccupied and at

the disposal of the latter ever since she left the premises. It denies, also, that the defendant had sole possession of the land prior to August, 1874, but admits that since that time she has had such possession, and states that she has, since then, cultivated the property, or so much thereof as was capable of cultivation, and has received the rents, issues and profits thereof. It alleges that such sole possession was with the consent of the complainant, and that the defendant cultivated the land for the common use and benefit of the complainant and defendant, and that in cultivating the property and paying taxes, and for repairs and improvements, the latter has spent large sums of her own money as well as that which was received by her from the products of the farm, for which she should be credited, and has been put to great trouble, for which she ought to be compensated. The defendant denies any indebtedness to the complainant for the use of the property, and claims that, on the other hand, she should be paid for superintending and conducting the cultivation of the premises since April 1st, 1869, from which time to the time of filing the bill, she claims to have had full charge of the cultivation of the property for herself and the complainant. Under the reference ordered to take the account, the master has reported that there is due to the complainant from the defendant $189. He has charged the latter with $35 a year, as the complainant's share of the rents and profits. The defendant has excepted to the report. I am of opinion that the charge is excessive. The defendant is not chargeable with rent for the half of the house. The complainant left the premises of her own accord, and there is no evidence of any exclusion of her by the defendant from any part of the property. On the contrary, the evidence is that the complainant voluntarily left the premises on account of some disagreement between her and the defendant, but there is no evidence as to the cause of her departure. The defendant is only chargeable with the rents, issues or profits of the land, because she cultivated the land and received the benefit of its entire product. The annual value fixed bv the master included the value of

the house. To the extent of the annual rental value of the buildings, at least, the valuation is excessive. The defendant should be charged with no more, at most, than one-half of the fair rental value of the land cultivated by her since 1868. In 1872 the land was tilled on shares, pursuant to an agreement made by the complainant with a person who cultivated it that year. The defendant had the benefit of half of the products of that year. She should, for that year, be charged with the value of one-quarter of the products, whatever they were. She should have credit in the account for the marl purchased by her and put on the property, and for the repairs to the barn. I am not able to determine from the evidence what would be the proper sum to be awarded to the complainant, as the result of the account. I regret this the more because I would be glad to spare these litigants the trouble and expense of a new account. I cannot doubt, however, that the counsel of the parties will be enabled, by this expression of the views of the court as to the principles on which the account should be taken, to arrive at a satisfactory and inexpensive adjustment of the matter.

The first and third exceptions are allowed. The second, which is based on the non-allowance of interest to the defendant, on payments made by her, and with which she is credited, is not allowed, for the reason that the master allowed no interest to the complainant.

Costs will not be awarded to either party on the exceptions.

WOODWARD'S Executors *vs.* DUNSTER and others.

Where a testator ordered his executors to pay, at his son's death, to the children of his son, if the latter should leave any children, a sum of money, the executors were ordered to invest the money, and to pay the interest, during the life of the son, to the residuary legatees.

Bill for construction of will.

Mr. J. V. Voorhees and *Messrs. Bartine & Davis*, for complainants.

THE CHANCELLOR.

The will of Oliver Woodward, deceased, after directing payment of the testator's debts and funeral expenses, gives to his widow, household and kitchen furniture to the value of $200, and the interest of $3000 of his personal property, during her widowhood. It then proceeds as follows:

"And after the decease of said Phebe, my beloved wife, the aforesaid amount of $3000 to return to my estate, and be equally divided among my lawful heirs, as I shall order.

"I do will and order that my real estate be sold at the earliest and most convenient time, at public sale; the said time not to exceed two years from the time of my decease, and that the proceeds of my real estate, with the remainder of my personal property, be divided and apportioned among my children, grandchildren, and heirs, as I shall further order.

"I do order, will and bequeath, as a legacy to my eldest son, Austin Woodward, the interest accruing from $700, to be paid to said Austin semi-annually, during his natural life, by my executors; the $700 to be taken from my estate for said purpose and intent, and to be held by my said executors; and after decease of said Austin Woodward, the said amount, $700, to return to my estate, and be equally divided, and paid to my lawful heirs. I further bequeath all my wearing apparel to said Austin Woodward.

"If my son, Austin Woodward, should die, leaving lawful issue, then it is my will that such heir or heirs shall be paid to them the said sum of $700, and the additional sum of $800, to be paid out as directed in this my last will and testament.

"And I do order and will that all moneys returning to my estate, occasioned by death or other delinquencies, at future time after my decease, shall be proportioned and paid to my lawful heirs, with the exception of said Austin Woodward;

the understanding being that said Austin Woodward has received out of my estate, at sundry times, cash, notes, bonds, and sufficient in amount to an equivalent of his share of my estate. I order and will that my executors pay to Sarah, wife of Austin Woodward, $100, as a legacy, to be taken from my estate, and to be paid to Sarah two months after my decease, or earlier, if convenient for my executors so to do.

"I will and bequeath to my son, Theodore Woodward, $500, independent of his equal share of the proceeds of my estate. I will and bequeath to my son, Abraham B. Woodward, $500, as a legacy, independent of his equal share of the proceeds of my estate, provided that he return home within two years after my decease; his absence being of a character to suppose him dead, I therefore order that if no intelligence of him is obtained before the expiration of said term—two years—it shall not be obligatory on the executors to hold the amount of his share of my estate for him, but to make an equal distribution, and to pay to each heir their proportion; the executors not held responsible in case of his (said Abraham B. Woodward's) return.

"I will and bequeath to my daughter Elizabeth E., wife of Francis A. Drake, as a legacy, $800; the said Elizabeth to receive the interest accruing from said amount, semi-annually during her natural life; my executors to invest the said $800 in or on good and sufficient security; the said $800 to be exclusively independent of the indebtedness due me from the estate of Amedee Sanders, now deceased, for which I hold bonds against said estate, now held, by will of Amedee Sanders, by my daughter Elizabeth E., now wife of Francis A. Drake; the said $800, after the decease of Elizabeth, to be equally divided among her children that she now has or may hereafter have, share and share alike; but in case of decease of said Elizabeth and all her children, the said principal sum of $800 to return to my estate and be equally divided among my lawful heirs that be surviving.

"I will and bequeath my daughter Ann Augusta, wife of John B. Dunster, as a legacy, $1500, independent of her

share of proceeds of my estate; the said Ann Augusta to hold the amount of the proportion of my estate in trust for her children during their minority, and pay or cause to be paid to each and all their share and amount held by her, as they, the children, arrive at age; said Ann Augusta to receive the interest accruing from the principal held by her in trust for her children; in case of death of any of said children during their minority, the share or portion of said child deceased to be divided among the remaining children; but in case of all the children of Ann Augusta Dunster decease, then the said amount to be retained and held by said Ann Augusta for her use and benefit during her natural life, and at her decease to return to my estate and be equally divided among my surviving heirs.

"I will and bequeath to my daughter Mary Jane, wife of Jacob G. Ballentine, as a legacy, $1500, independent of her share of proceeds of my estate; the said Mary Jane to hold the amount of her proportion of my estate in trust for her children, during their minority, and to pay or cause to pay to each and all their share and amount held by her, as they, the children, arrive at age; said Mary Jane to receive the interest accruing from the principal held by her in trust for her children; in case of the decease of any of said children during their minority, the share of said child deceased to be equally divided among the remaining children of said Mary Jane Ballentine; the said amount to be retained and held by said Mary Jane for her use and benefit during her natural life, and at her decease to return to my estate and be equally divided among my surviving heirs.

"I further will to each of my grandchildren, Oliver Woodward Sanders, son of my daughter, Elizabeth Drake, and Oliver Dunster, son of my daughter, Ann Augusta Dunster, $250 each, to be paid to their representatives as soon as convenient after my decease, providing they are minors.

"I will and direct that my executors erect a head-stone for myself and wife, not to exceed $100 for each head-stone.

"I will and order my executors to have or to cause to have all my will faithfully carried out; the understanding being that the legacies given to the several heirs is to make an equivalent with each of my children, and receive each an equal portion of my estate, independent of the legacies to be taken from the proceeds of my estate, real and personal."

The testator did not die intestate of any part of his estate. He directs that his real estate be converted into money, and that the proceeds thereof and the residue of his personal property remaining after paying his debts and funeral expenses, and taking out a specific legacy of the value of $200, to his widow, and the sum of $3000 to be invested, that she may have the interest of it, "be divided and apportioned among" his "children, grandchildren, and heirs, as" he "shall further order." He also provides that all moneys "returning to his estate" shall be "proportioned and paid to" his "lawful heirs," with the exception of his son Austin, who, he says, has received his full share of the estate already. Near the close of the will, he declares it to be his "understanding" that the legacies of specified sums given to his children, are to make them equal with each other in their participation in his estate, and that each of them is to receive an equal portion of his estate, in addition to their legacies.

Austin is excluded from participation in the estate beyond the specific gift of wearing apparel and the gift of the interest of $700 for life. The rest of the children (except Abraham, who has not been heard from since 1862,) are entitled to an equal division of the residue of the estate which will remain after deducting the debts and funeral and testamentary expenses, the specific legacies, the legacies of specified sums of money, and the sums to be invested for the benefit of the widow and Austin respectively, and $800 to be held until it be ascertained whether the latter shall die without lawful issue or not. They will be entitled to an equal division among them, also, of the $3000 on the death of the widow, and of the $700 and $800 on the death of Austin without leaving lawful issue. The executors should invest the $800,

and if Austin leave lawful issue at his death, such issue will be entitled to the principal. The interest, in the meantime, will belong to those entitled to the residue of the estate. 2 *Roper on Legacies* 1306. The question was raised on the hearing, whether the testator's daughter, Elizabeth E. Drake, to whom the interest of $800 is given for life, and as to whose participation in the residue no particular mention is made, is entitled to such participation. The testator's intention is to be drawn from the will. There is nothing in it to exclude Mrs. Drake from participation in the residue. The testator's declaration of his intention, near the close of the will, that his children are each to receive an equal portion of his estate over and above the legacies, applies to her. When the testator intended to exclude Austin from a participation in the residue, he did so in express and unequivocal terms. There is no language in the will expressive of an intention to exclude Mrs. Drake.

RUDDEROW'S Executrix *vs.* NIELD and wife.

A power to sell all or any portion of testator's residuary real estate at the discretion of his executors, *held* not to be affected as to a share thereof by a devise of that share, the testator having evidently intended that the share should be subject to the power.

Bill for specific performance. On final hearing on bill and answer.

Mr. W. P. Douglass, for complainant.

Mr. Peter Bentley, for defendants.

THE CHANCELLOR.

The will of John Rudderow, deceased, dated March 6th, 1867, contains the following gifts and directions: "First. I

give and devise unto my son, Edward S. Rudderow, the dwelling-house and lot of land and premises wherein he now resides, situate on the easterly side of Grove street, in Jersey City, in the county of Hudson aforesaid, and now known by the street number one hundred and forty (140), and being the house and premises next north of and adjoining the house and premises situate on the northeasterly corner of Grove and York streets, in Jersey City aforesaid, to have and to hold the same unto him, his heirs and assigns, to his and their own proper use, benefit and behoof, forever.

"Second. I order and direct all my just debts and expenses to be fully paid and satisfied, as soon as conveniently can be after my decease.

"Third. All the rest and residue of my estate, real and personal, I dispose of as follows, viz.: The equal one-third part thereof I give, devise and bequeath unto my beloved wife, Ann B. D. Rudderow, to have and to hold the same unto her own proper use, benefit and behoof, for and during the term of her natural life, in lieu of her dower in my estate. The other two equal third parts thereof, and also the remainder of the former third thereof, after the termination of my said wife's interest therein, I divide into five equal shares, and one of said shares I give, devise and bequeath unto my said son, Edward S. Rudderow, in addition to the said dwelling-house and lot of land and premises hereinbefore devised to him, to have and to hold the same unto him, his heirs, executors, administrators and assigns, to his and their own proper use, benefit and behoof forever; and the four other shares thereof, I give, devise and bequeath unto my executrix and executors hereinafter named, and to the survivors and survivor of them, in trust, nevertheless, to collect and receive the rents, issues and profits of the real estate, and the interest and income of the personal estate, and to pay over the same unto my four daughters, viz.: Emma Louisa, Catharine Ann, Geraldine Hull, and Fanny Fowler, in equal proportions, share and share alike, during the term of their natural lives, respectively; and in case of the death of either of my said

daughters, leaving lawful issue her then surviving, to pay over and convey the share so held in trust for said daughter so dying, in both the principal and income thereof, to such issue so surviving; and in case of the death of either of my said daughters without leaving lawful issue of her then surviving, to pay over and convey the share so held in trust for said daughter so dying, in both the principal and income thereof, to her brother, my son, the said Edward S. Rudderow, and to her sisters, my said daughters, then living, and to the lawful issue of any such sister who may have died before her leaving lawful issue, such issue to take its mother's share therein.

"Fourth. I give full power and authority to my executrix and executors hereinafter named, and to the survivors and survivor of them, at any time in their discretion, to grant, sell and convey my real estate, and any part or portion thereof, except the said dwelling-house and lot of land and premises numbered one hundred and forty, Grove street, hereinbefore devised to my said son, Edward S. Rudderow, and to execute and deliver good and sufficient deeds of conveyance for the same in fee simple, and to receive the purchase money and give receipts for the same; and the purchaser or purchasers thereof having paid, or secured to be paid the said purchase money, shall not be held responsible for the proper application thereof; and I do order and direct my said executrix and executors to invest so much of the said purchase money as shall be derived from the shares of my said wife and daughters in said real estate so sold, and also in their shares of my personal estate, in good and sufficient securities on bond or mortgage, or otherwise, at their discretion, and to pay over the interest and income thereof, and also the principal thereof, whether derived from real or personal estate, as is herein above mentioned; and I also hereby authorize and empower my said executrix and executors, and the survivors and survivor of them, in their discretion, to pay over to my said daughters any part of the principal from which the income herein above appropriated to my said daughters is derived, anything hereinbefore contained to the contrary notwithstanding, if they,

my said executrix and executors, or the survivors or survivor of them, shall think proper so to do."

In 1874, the will was proved by Ann Rudderow, the widow, and Edward S. Rudderow, the son of the testator. The latter died in January, 1875, without having aliened or encumbered in any way his interest in the residue of his father's estate. The defendant, Margaret Nield, on or about the 1st of April, 1875, purchased of the complainant, Ann Rudderow, as surviving executrix of the will, a lot of land in Hudson county, which constituted part of the residue of the estate, and an agreement in writing between the latter and the defendants was made accordingly. The bill is filed to compel specific performance of that agreement, and the question is whether the surviving executrix has power to convey the title to the interest given by the will to Edward S. Rudderow, in the land which is part of the residue. The defendants' counsel insists that because the debts have been paid out of the personal estate, and there is, therefore, no occasion for recourse to a sale of real estate on that account, the power of sale in the will is at an end, so far as the interest given to Edward is concerned.

The power of sale was not given with reference to the payment of the debts, but with reference to the investment of so much of the residue as was real estate. The testator evidently intended that the share of Edward should be subject to that power. This is shown by the language of the power, which includes in terms all the testator's real estate, with the single exception of the house and lot specifically devised to Edward. It is evidenced by that exception itself also, which, notwithstanding Edward's interest in the residue, is confined to the land specifically given to him; and it is further shown by the express and distinct provision made for the investment of the shares of the widow and daughters, out of the proceeds of such real estate as might be sold pursuant to the power, and the consequent separation of those shares therefrom, and, therefore, from Edward's share thereof, which would be derived from the sale of his interest. Edward's interest in

the real estate comprised in the residue, was held by him in his lifetime, and since his death, has been held by his widow and children, subject to the power of sale. 1 *Redfield on Wills* 450, 451; *Bacot* v. *Wetmore*, 2 *C. E. Green* 250; *Wetmore* v. *Midmer*, 6 *C. E. Green* 242.

The defendant, Margaret, will be decreed to perform her contract specifically.*

WILKINS *vs.* KIRKBRIDE and others.†

1. A foreclosure suit is not a proper proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor.

2. Remainder-men who have not joined in a mortgage in fee, made by the life tenant, are neither necessary nor proper parties to a foreclosure suit on the mortgage.

3. A decree in a foreclosure suit, where the prayer of the bill is that the mortgagor and holders of encumbrances subsequent to the complainant's mortgage, may be foreclosed of all equity of redemption in the mortgaged premises, will not bind parties who have not joined in the mortgage, holding estates in remainder created prior to the mortgage.

4. Remainder-men, in such case, will not be barred by estoppel, although the mortgage sought to be foreclosed assumes to convey an estate in fee, and they knew it, and were aware of the foreclosure proceedings.

Bill to foreclose. On petition of Ella C. Stoy and others, to be admitted as parties defendant to the suit.

Mr. C. E. Hendrickson and *Mr. A. Browning*, for petitioners.

Mr. John C. Ten Eyck and *Mr. P. L. Voorhees*, for complainant.

---

* Decree affirmed, 1 *Stew.* 274.

† Cited in *Farmers' National Bank* v. *Lloyd*, 3 *Stew.* 443; *Coe* v. *N. J. Midland Railway Co.*, 4 *Stew.* 116; *Dickinson* v. *City of Trenton*, 6 *Stew.* 65; *Van Doren* v. *Dickerson*, *Id.* 392.

THE CHANCELLOR.

The bill in this cause was filed for foreclosure and sale of premises in Burlington county, mortgaged to the complainant's assignor by Phineas Kirkbride. The mortgage is, by its terms, in fee. The premises are said in the bill to be the same which were conveyed to the mortgagor by Robert W. Kirkbride and his wife. Besides the complainant's mortgage there are other subsequent encumbrances (mortgages and judgments) on the property. The prayer for relief is in the usual form. The parties defendant to the bill are the mortgagor and the holders of encumbrances subsequent to that of the complainant. The petitioners are children of Robert W. Kirkbride. They apply to be made parties defendant, on the ground that they have an interest in the mortgaged premises. They allege that, as to part of the property, Robert W. Kirkbride, their father, never had more than a life estate therein, and that they have, and, prior to the making of the complainant's mortgage, had, and ever since have had, and still have, a vested remainder in fee therein; and that, as to the rest, they have had for the same time, and still have, a contingent remainder in fee therein. It appears that the premises were the property of their grandfather, the father of Robert W. Kirkbride, and that by the will of the former, part of the property was devised to their father for life, with remainder in fee to them, and the rest to Phineas Kirkbride, who is their brother, with a contingent remainder in fee to them; and that their father and brother ignored the will, (which, though lodged in the surrogate's office soon after the death of the testator, was not proved until after the commencement of this suit,) and, the former claiming the mortgaged premises by descent, conveyed them to Phineas by his deed in fee. The petitioners seek to be made parties for the purpose of setting up and litigating their title to the remainders above-mentioned, as against the encumbrances mentioned in the bill. It is not necessary for their protection that they should be admitted. As the case stands, no right of theirs can be affected by the decree. Nor would they be proper parties. "So far as

mere legal rights are concerned," says Chancellor Walworth, in *Eagle Fire Ins. Co.* v. *Lent*, 6 *Paige* 635, "on a bill of foreclosure, the only proper parties are the mortgagor and mortgagee, and those who have acquired rights or interests under them subsequent to the mortgage; and the mortgagee has no right to make one who claims adversely to the title of the mortgagor, and prior to the mortgage, a party defendant for the purpose of trying the validity of his adverse claim of title in this court." See also *Holcomb* v. *Holcomb*, 2 *Barb. S. C. R.* 20; *Corning* v. *Smith*, 6 *N. Y.* 82; *Lee* v. *Parker*, 43 *Barb.* 611; *Lyman* v. *Little*, 15 *Vt.* 576; *Mole* v. *Smith*, *Jacob* 490; *Tasker* v. *Small*, 3 *M. & C.* 63. Prior encumbrancers are made parties in order that their claims may be paid out of the proceeds of the sale. A foreclosure suit is not a proper proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor. *Lewis* v. *Smith*, 9 *N. Y.* 502, 514; *Bogey* v, *Shute*, 4 *Jones' Eq.* 174; *Jones* v. *St. John*, 4 *Sandf. C. R.* 208. The petitioners' counsel, however, contend that should the petitioners, now that they have notice of the pendency of this suit, and of the fact that the complainant's mortgage assumes to convey an estate in fee, fail to set up and litigate their title in this suit, they will be liable to be held to be estopped from setting it up hereafter, on the ground of acquiescence. There is no occasion for such apprehension. As before remarked, the decree will not bind them. The bill prays that the defendants, the mortgagor and holders of encumbrances subsequent to the complainant's mortgage, may be foreclosed of all equity of redemption in the mortgaged premises. Its object is the extinguishment of the equitable title of the defendants. The title of the petitioners cannot be affected by the decree or the sale under it, for they are neither parties nor privies to the suit, nor will their rights have been litigated or in any way called in question. In *Wade* v. *Miller*, 3 *Vroom* 296, it was held that a decree in a foreclosure suit to which a widow was a party on other grounds than that of her claim to dower in the mortgaged premises, would not cut off her dower which

was paramount to the lien of the mortgage, although she was a party to the suit; the bill making no allusion to her claim of dower. See also, to the same effect, *Lewis* v. *Smith*, *ubi supra*. In *Munday* v. *Vail*, 5 *Vroom* 418, which was an action of ejectment, the court compared a decree in equity, which was relied on by the defendant in his defence, and on which his defence depended, with the issue in the suit in which it was entered, and finding that part of it (the part on which the defendant's title depended) was outside of the issue, held it to be a nullity, so far as that part of it was concerned, although the plaintiff was a party defendant to the suit in equity.

The petition will be dismissed, with costs.

ALPAUGH *vs.* ROBERSON and others.*

1. The cancellation or destruction of a deed by consent of parties, will not divest the grantee of an estate thereby granted to him and vested in him by virtue thereof, and re-vest it in the grantor; and this is equally true as to a deed made under the "act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors," as to any other.

2. By a conveyance made under that act, the real and personal estate of the assignor passes to the assignee and continues in him, notwithstanding the destruction of the deed.

3. The execution of such a conveyance is the creation of a trust which exists, notwithstanding the destruction of the instrument, and which the Court of Chancery will establish and execute.

4. Upon a renunciation by the assignee of his trust, under such a conveyance, application should be made to the Court of Chancery to appoint a trustee in his stead.

5. Where, after the destruction of a conveyance made under the act "to secure to creditors an equal and just division," &c., the grantor made an assignment to other assignees, such assignees were enjoined.

6. In such a case, declared, that if consent be given, the trust under the original assignment will be established by decree of the court, and a new trustee or trustees appointed under it; otherwise, a receiver will be appointed.

---

* Cited in *Pillsbury* v. *Kingon*, 6 *Stew.* 299.

Bill to establish a trust under a canceled deed of assignment for the benefit of creditors. Motion for injunction.

Mr. J. T. Bird, for motion.

Mr. J. N. Voorhees, *contra*.

THE CHANCELLOR.

The bill states that Andrew Roberson, of Hunterdon county, being largely indebted to the complainant and others, on the 6th of April, 1876, assigned, for the benefit of his creditors, to Gabriel H. Slater, of that county, by deed duly executed, acknowledged and delivered, all his estate, real and personal, in pursuance of and in accordance with the provisions of the act "to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors;" that the deed was, after its execution, left with a gentleman who was attorney for both the assignor and assignee; that Slater, before the execution of the deed, agreed with Roberson that he would accept it, and would execute the trust which, by law, would devolve upon him in the premises; and it also alleges, that after the execution of the deed, he stated that he had been appointed assignee. The bill further states that about two days after the execution and delivery of the deed, Slater being unable to give the security required by the act, the deed was, by consent of Roberson and Slater, destroyed, and the former executed and delivered a new deed of the same character and in accordance with the provisions of the act, to Moses K. Everitt and Peter S. Kugler, who accepted it, and having given bond according to law, entered upon the discharge of their duties as assignees under it. The bill charges that no title passed by this latter deed, but that the title to the real and personal estate of the assignor still remains in Slater, and it prays that the deed to Slater and the trust thereby created, may be established, and that a trustee or trustees may be appointed to execute the trust. It prays an injunction against Everitt and Kugler, and for the

appointment of a receiver. The counsel of the assignor and of Messrs. Everitt and Kugler, on the argument of this motion, admitted the truth of the facts stated in the bill.

The cancellation of a deed by consent of parties, will not divest the grantee of an estate thereby granted to him and vested in him by virtue thereof, and re-vest it in the grantor; and this is equally true as to a deed made under the act referred to, as it is as to one having no reference to it. The title to the real and personal estate of the assignor, passed to Slater by the deed to him, and still remains in him. Moreover, the execution of the deed to Slater was the creation of a trust, which, notwithstanding the destruction of that instrument, still exists, and which this court will establish and execute. *Scull* v. *Reeves*, 2 *Green's C. R.* 85; *S. C.*, *Id.* 131; *Read* v. *Robinson*, 6 *Watts & Serg.* 332; *Seal* v. *Duffy*, 4 *Barr* 274. On Slater's renunciation of the trust, application should have been made to this court to appoint a trustee or trustees in his stead. *Scull* v. *Reeves, supra; Burrill on Assignments* 282.

The injunction will be granted, and unless consent is given to the making of a decree establishing the trust under the deed to Slater, and the appointment of a trustee or trustees under it, a receiver will be appointed.

THE WASHINGTON BUILDING AND LOAN ASSOCIATION *vs.* BEAGHEN and others.

A mortgagee of land, holding an assignment of stock as collateral to his mortgage, released the latter, with actual notice of the existence of a subsequent mortgage on the land; *held*, that the prior mortgage was, so far as the right of the subsequent one was concerned, satisfied to the extent of the value of the stock.

On final hearing on pleadings and proofs.

Mr. O. Jeffery, for complainants.

Mr. G. A. Allen, for the administrators of Mary A. Aller.

Mr. J. Vliet, for Creveling, Spangenberg and Cook.

THE CHANCELLOR.

This is a suit for the foreclosure and sale of mortgaged premises in Warren county. There are numerous mortgages on the property. Of these, the first was given to the complainants, by whom it is now held. The next two are dated on the same day; one of them was given to Spangenberg and Creveling, and the other to the complainants, and they are still held by those to whom they were given. The fourth was given to Joseph B. Cornish and Benjamin C. Osborn, by whom it was assigned to Oscar Jeffery, who assigned it to the complainants, who now hold it. The fifth was given to Mary A. Aller, (now deceased,) by whose administrators it is now held. The sixth was given to Adam W. Creveling, the seventh to the complainants, and the eighth to Creveling, Spangenberg and Cook, and the mortgagees still hold them. There are other mortgages upon the property, but they are not involved in or affected by the questions in this suit. When the complainants' first mortgage was given, the mortgagor, Beaghen, who was the owner of certain shares of the capital stock of the complainants, assigned to them eight of those shares as collateral security for the payment of the mortgage. After their second mortgage was given, they held them in like manner as collateral to that mortgage also. After the filing of the bill in this cause, Creveling and Spangenberg requested Beaghen to assign those shares to them, and he did so in consideration of the payment by them to him of $12.80, their acceptance of an order upon themselves in his favor for goods to the amount of $100, the payment of the dues and fines in arrear on the stock, $121.66, and their agreement to credit the balance of the price upon their mortgage above referred to as the eighth. The price agreed upon between them and him for the stock was

$782.88. The amount credited on the mortgage, therefore, in respect of the stock, was $548.42. After this transfer had been made, the board of directors of the complainants, as appears by their resolution in their book of minutes, consented to it on condition that Creveling and Spangenberg should execute a bond (to be secured by mortgage) to the complainants, to pay all the mortgages which the latter held, made by Beaghen, with all arrears of interest, and also all fines due them from him. Creveling and Spangenberg accordingly gave to the complainants their bond in the penalty of $3200, and conditioned that they should well and truly pay to the complainants the principal, $1600, of all the bonds and mortgages given by Beaghen, held by the complainants, with all arrears of interest. The condition is prefaced with the statement that the complainants, at the date of the bond, held four bonds and mortgages given by Beaghen, amounting in all to the sum of $1600, for which sum, with arrears of interest, they had then begun suit; and that he had assigned all his interest in their capital stock to Creveling and Spangenberg. It appears, by the testimony, that this bond was given (and it was so understood by the parties to it) as security that the mortgaged premises should, on sale under foreclosure, bring the amount of the complainants' mortgages. By a by-law of the complainants, in force when the consent to the transfer of the stock to Creveling and Spangenberg was given, it was provided that no share should be transferred while any fine or any due of any kind against the owner thereof remained unpaid, nor until the transferree should have assumed all the obligations of the original stockholder to the company. Mary A. Aller's administrators insist that the complainants in thus relinquishing their claim upon the stock, became bound in equity, as between them and the holders of the Aller mortgage, to allow and credit on those of the complainants' mortgages which are prior to that mortgage, the amount of the value of the stock at the time when the consent to the transfer was given. The stock was pledged to the complainants for the payment of their mortgage debts. At the time of consenting to the trans-

fer, they had actual notice of the Aller mortgage, and the holders of that mortgage had an equity to require them to have recourse for the payment of their first and second mortgages to the stock, a fund on which the Aller mortgage was not a lien, before looking to the mortgaged land. *Herbert* v. *Mech. Build. and Loan Assoc.*, 2 *C. E. Green* 497. With knowledge of the equitable rights of the holders of that mortgage in the premises, they relinquished their claim upon the stock as security for the payment of their mortgage debts. That they then had actual notice of the Aller mortgage is shown by the testimony, and indeed, it is not denied. Besides, both Creveling and Spangenberg were directors of the association, and were present at the meeting at which the resolution of consent was passed, and voted in favor of it, and as before remarked, the relinquishment took place after the bill in this cause was filed. As against the Aller mortgage, the complainants' first and second mortgages must be held to have been paid to the extent of the value of the stock at the time of relinquishment.

The mortgage to Cornish and Osborn was, as before stated, the fourth mortgage upon the premises. When it was near its maturity, Beaghen, who then had two shares of the stock of the association in addition to the eight above mentioned, sought a loan from the association upon those two shares, which were then unpledged. It was awarded to him on terms that its re-payment should be secured by the transfer of the Cornish and Osborn mortgage, in order to pay which he desired the loan, and should execute a bond and mortgage to the complainants on the mortgaged premises, and assign to them the two shares of stock as further security. Those of the defendants who are holders of mortgages executed prior to the making of that loan, insist that as the loan was obtained in order to enable Beaghen to pay the amount of that mortgage to the holder thereof, and part of the money was used for that purpose, the mortgage was paid off, and therefore ought not to be set up as a valid and subsisting encumbrance. It was clearly part of the terms on which the loan was made,

that that mortgage, which was then held by Mr. Jeffery, should be assigned to the complainants as security for it. This appears by the resolution of the board granting the loan, and it is evident that Beaghen so understood the matter. The complainants are entitled to the benefit of the security of that mortgage accordingly.

THE CAIRO AND FULTON RAILROAD COMPANY *vs.* TITUS AND SCUDDER.*

1. Equity will relieve a party against a judgment at law when its justice can be impeached by facts, or on grounds, of which the party seeking its aid could not have availed himself at law, or of which he was prevented from availing himself by fraud or accident, or the act of the opposite party unmixed with any fraud or negligence on his part.

2. If new testimony be relied on as a ground for equitable interference with the judgment, and such testimony could, with proper care and diligence, have been procured in time to have been available at law, it cannot be available in this court as the ground for such equitable interference.

3. Nor will equity interfere when the facts, though discovered since the trial, might have been established at the trial upon cross-examination.

4. It will not suffice to show that injustice has been done by the judgment against which relief is sought, but it must appear that this result was not caused by any inattention or negligence on the part of the person aggrieved, and he must show a clear case of diligence to entitle him to an injunction.

Bill for relief against judgment at law. Motion to dissolve injunction, on bill and answer, and affidavits annexed thereto respectively.

Mr. Joseph C. Potts and *Mr. Cortlandt Parker*, for the motion.

Mr. T. N. McCarter, contra.

---

* Cited in *Hughes* v. *Nelson*, 2 *Stew.* 551.

THE CHANCELLOR.

The bill is filed to restrain the defendants, Titus and Scudder, from proceeding, by suit in Missouri, to recover the unpaid balance of the amount of a judgment recovered in the Supreme Court of this state, in their favor, against the complainants, The Cairo and Fulton Railroad Company, for $17,750, besides costs. The company have paid on account of the judgment, $9669.35, which, they allege, is a far larger sum than is due to Titus and Scudder on the transaction upon which the judgment was founded. Their claim for relief is based on the allegation that since the recovery of the judgment, they have discovered evidence of which they and their attorney and counsel were entirely ignorant at the time of the trial, and subsequently thereto, and until after the entry of final judgment, and until within a few days before the filing of the bill, which would have been most material to their defence, and would at least have prevented a judgment against them for more than $5000, and interest thereon from 1868, and costs of suit. The action at law arose out of a transaction which took place between Columbus B. Guthrie and Titus and Scudder, in the year just mentioned, in which, as the latter allege, Guthrie, as agent for the company, sold to them for the consideration of $5000, paid by them to him, twenty-five of the interest-bearing bonds of $1000 each, which were to be issued thereafter by the company to Guthrie, under a contract entered into by Guthrie and Joseph C. Potts with them, for the construction of the company's railroad. Payment under the contract was to be made in bonds of the company. The contract was then subsisting. Dr. Guthrie, in pursuance of the sale of the twenty-five bonds to Titus and Scudder, obtained from the then president of the company his official acceptance of two orders, one for fifteen, and the other for ten of the bonds, which were therein declared to be deliverable out of the bonds to which Guthrie, (between whom and Mr. Potts some arrangement for division of the bonds, or some part of them, deliverable under the contract, had been made,) would be entitled under that contract. The suit at law was begun

on the 28th of November, 1871. Jurisdiction of the company was obtained by their appearance to the action, in pursuance of an agreement made between them and the attorney of Titus and Scudder, whereby, in consideration of his delivering to them certain bonds of the company in his hands, or under his control, to which they laid claim, and their claim to which he was not disposed to question, except in order to acquire a lien thereon, (which it was supposed he could do by attachment,) to secure the payment of Titus and Scudder's claim against the company for damages for their alleged refusal to deliver the twenty-five bonds mentioned in the acceptances, or twenty-five other gold-bearing bonds, which Titus and Scudder alleged they had, at the request of the company, subsequently agreed to receive instead of those mentioned in the acceptances, the company agreed to appear to the suit. The declaration, as originally filed, was expressly based on the acceptances, and on them alone. It was subsequently amended by the addition of a count, declaring on the liability of the company as upon a sale of the bonds by them to Titus and Scudder. The issue was tried before Justice Bedle, without a jury, a jury having been waived by the parties. At the trial, Dr. Guthrie was sworn as a witness for Titus and Scudder. The company resisted the claim on which the suit was brought, on the ground that the acceptances were conditional, and that the contingency—that Guthrie should be entitled to the bonds—on which, according to the acceptances, the liability depended, did not appear to have happened; and further, that as to the liability, as upon a sale of the bonds to Titus and Scudder by Guthrie as agent of the company, there was no sufficient evidence of his authority to bind the company in the premises. The finding of the judge was, on the coming in of the postea, reviewed on a motion for a new trial, with a result adverse to the company. *Titus and Scudder* v. *Cairo and Fulton R. R. Co.*, 8 *Vroom* 98. The bill states that since the entry of the final judgment, the company have discovered that about the time of the transaction between Guthrie and Titus and Scudder, in which the liability in respect of which the suit at law

was brought, was claimed to have originated, an agreement in writing between those parties, and constituting part of the transaction, was executed by Titus and Scudder and Dr. Guthrie, by which an option was given to the latter to redeem the bonds on the payment of $5000 and interest; and they allege that the existence of that agreement was not known to them, or their attorneys or counsel, until after the entry of the judgment, and shortly before the filing of the bill in this cause. They insist that if it had been known to them, or their attorneys or counsel, at the time of the trial, or before the entry of the judgment, they could have availed themselves of it in the action at law; that if it had been known to them at the time of the trial, they could have introduced it, and the effect of it would have been at least to have discharged them from all liability beyond the $5000 and interest; for, that agreement having been made by Guthrie as part of the transaction from which their liability was claimed to have arisen, if he were held to have been their agent in that transaction, they would have been entitled to the benefit of the agreement for redemption; and if, though its existence was not known to them at the time of the trial, it had come to their knowledge in time to have enabled them to have availed themselves of it on their application for a new trial, they could have obtained a new trial on the strength of it. Titus and Scudder have answered the bill, and allege in their answer that the transaction in reference to the bonds was with Guthrie for and as agent of the company, and that they so understood the matter at the time; that the existence of the agreement in question was not remembered by them at the time of the trial, (no inquiry was made of them on the subject then,) but that Dr. Guthrie did remember it, and would have testified in regard to it if he had been interrogated on the subject; that the agreement for redemption, alleged in the bill, did not exist, and that the agreement which was made on the subject of the re-payment by Dr. Guthrie of the $5000, with interest, in connection with non-delivery of the bonds, was an undertaking by him to repay to them $5000 and interest, provided

the bonds should not be delivered to them in one year from the 1st day of May, 1868, which they insist did not give him a right to redeem, and if it did, it did not enure to the benefit of the company. They also insist that the company was guilty of negligence in not ascertaining the fact of the existence of the agreement before or at the trial, or in time to avail themselves of it on the motion for a new trial.

Equity will relieve a party against a judgment at law when its justice can be impeached by facts, or on grounds, of which the party seeking its aid could not have availed himself at law, or of which he was prevented from availing himself by fraud or accident, or the act of the opposite party unmixed with any fraud or negligence on his part; or, as it is stated by Chief Justice Marshall, in *Marine Ins. Co.* v. *Hodgson*, 7 *Cranch* 335, "any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agent, will justify an application to a Court of Chancery." If new testimony be relied upon as a ground for equitable interference with the judgment, and such testimony could with proper care and diligence have been procured in time to have been available at law, it cannot be available in this court as the ground for such equitable interference. *Glover* v. *Hedges*, *Saxt.* 113, 119. It will not suffice to show that injustice has been done by the judgment against which relief is sought, but it must appear that this result was not caused by any inattention or negligence on the part of the person aggrieved, and he must show a clear case of diligence to entitle himself to an injunction. *High on Injunctions*, § 85; *Bateman* v. *Willoe*, 1 *Sch. & Lef.* 204. In *Vaughn* v. *Johnson*, 1 *Stockt.* 173, Chancellor Williamson, said: "As a general rule this court will not interfere with a judgment of a court of law on the ground that a witness was mistaken as to a fact on which the defence turned, or that he swore corruptly." See also *Smith* v. *Lowry*, 1 *Johns. C.*

R. 320. The judgment against which relief is sought in this case, does not, apart from the question as to the right to redeem, appear to be against conscience, either as to the amount of damages or otherwise. If, as Titus and Scudder allege, and as appears to have been adjudged in the suit at law, Dr. Guthrie was the agent of the company in the transaction of the sale of the bonds, the latter have no reason to complain of the result of the suit. If their agent, in a fair business transaction, sold to Titus and Scudder for $5000, twenty-five of their bonds not yet issued, to be of the nominal value of $1000 each, no ground for complaint is to be found in the fact that by the transaction Titus and Scudder, if permitted to collect the amount of the judgment, will have reaped a large profit. Especially is this the case, if, as appears by the opinion of the court in the case at law, the company were proved to have promised, after the bargain had been made and the acceptances given, to deliver to Titus and Scudder gold-bearing bonds of the same amount in consideration of their agreement to discharge the company from their obligation to issue the currency bonds mentioned in the acceptances.

It is however, as before stated, insisted by the company that, conceding that Guthrie was their agent in making the bargain, they are entitled to the benefit of the agreement for redemption made by him. But the agreement, (which is not set out in the bill, but is set out in the words of the instrument in the answer, and verified by affidavit,) does not give to Dr. Guthrie the option to take the bonds on the re-payment of $5000 and interest, in case the bonds should not be delivered in one year from May 1st, 1868. Titus and Scudder did not agree to waive delivery on the re-payment of the $5000, with interest, within the time specified in the provision, nor that Dr. Guthrie should have the right to take the bonds, in case of such re-payment within the period limited; but the agreement shows a sale of the bonds by Dr. Guthrie to Titus and Scudder, and an agreement by the former to re-pay the $5000 and interest, in case the bonds should, for any

cause, not be delivered within the time limited. The agreement is not in the alternative, to deliver the bonds or re-pay the money, but it is for the delivery of the bonds, with provision for Titus and Scudder's benefit, that, if they saw fit to claim it, they might, in case the bonds should not be delivered within the year specified, demand a re-payment of their money with interest, and relinquish their claim to the bonds. This agreement did not deprive Titus and Scudder of the right to insist on delivery of the bonds at any time after the limited period, if they saw fit not to demand re-payment of the $5000, with interest. That such was their understanding of the agreement appears from the fact that, after the execution of the agreement, they obtained from Mr. Potts a written guarantee that the bonds would be issued. The construction put by the company on the agreement for re-payment, cannot prevail. Its effect would have been to secure the bonds to Titus and Scudder, if issued within the year and there was no value in them beyond the amount of $5000 and interest; and in case there was any such value beyond that amount, to deprive them of the advantage of it, and secure it to Dr. Guthrie or the company. A fair and just construction of the agreement would give to them the right to the bonds absolutely, if issued at all, and whenever issued, with an option on their part to look to Dr. Guthrie for the re-payment of the consideration money with interest, if the delivery should be delayed beyond the period fixed in that behalf in the agreement.

The company then, if their right to the benefit of the agreement were conceded, had, in this view of the matter, no right of redemption. The transaction was not a mere mortgage. The evidence of the agreement if it had been presented at the trial, could not have availed them. But there is another pertinent consideration in the case. The evidence might have been had upon the trial. A witness placed on the stand by Titus and Scudder was ready to give it, and would have done so if he had been inquired of concerning it. It appears from the affidavit attached to the bill, that he was

only restrained from giving it without inquiry, by his views of propriety in giving his testimony, and that inasmuch as no inquiry on the subject was made by either side, he supposed that the fact of the existence of the agreement for re-payment was not material to the issue, and therefore did not refer to it. Inquiry on the part of the company, who were defending on the ground that the transaction was Dr. Guthrie's private matter, and was not on their behalf or account, as to what papers were executed or agreements made between the parties, was reasonably to have been expected, especially in view of the fact that Mr. Marquand, who, as vice-president of the company, signed their appearance in the action, says, in his affidavit attached to the bill, that he understood from the attorney of Titus and Scudder at the time when the agreement that the company should appear to the suit was made, that the claim of Titus and Scudder was for the sum of $5000. In *Taylor* v. *Sheppard*, 1 *Y. & C.* (*Exc.*) 271, it was held that a bill in equity to set aside a verdict was not sustainable where the facts on which the bill was founded, though discovered since the trial, might have been established at the trial upon cross-examination. In *Smith* v. *Lowry*, 1 *Johns. C. R.* 320, it was held that an injunction would not be granted to stay proceedings at law on a judgment, on the ground that the defendant at law was prevented by public business from making due preparations for and attending at the trial, and that the plaintiff had, on the evidence of one witness whom he had suborned to swear falsely, recovered a judgment for a much larger sum in damages than he was entitled to, and that the Supreme Court had refused to grant a new trial in the cause. In that case Chancellor Kent said: "It would be setting a precedent most inconvenient to the public, for this court to interfere in a case like this of the alleged perjury of a witness on a question as to the amount of damages, and to provide for a new trial, when an application for a new trial has already been denied at law, and when courts of law exercise a most liberal and equitable discretion on the subject of new trials, and when the injury complained of is, in a great degree, to be

imputed to the party's own want of preparation." In *Floyd* v. *Jayne*, 6 *Johns. C. R.* 479, the same Chancellor said: "It is the settled doctrine of this court, as well as of courts of law, that a party is not entitled to relief after verdict, upon testimony which, with ordinary care and diligence, he might have produced upon the trial at law. It would be establishing a grievous precedent, and one of great public inconvenience, to interfere in any other case than one of indispensable necessity and wholly free from any kind of negligence."

It is further to be remarked that the judgment in the case before me did not depend on the liability of the company through the alleged agency of Guthrie. Conceding that the latter was acting merely in his own behalf, and in no wise represented the company in the transaction with Titus and Scudder, and that the acceptances were merely conditional, and that there was no evidence that the contingency had happened, the Supreme Court held the company liable, by reason of their having, with knowledge of the rights of Titus and Scudder in the premises, agreed, without their consent, to a rescission of the contract between the company and Messrs. Potts and Guthrie, under which the bonds mentioned in the acceptances were to be issued; and also, on the ground of a stipulation on the part of the company with Titus and Scudder, to deliver to them gold-bearing bonds, instead of the twenty-five bonds mentioned in the acceptances (which were currency bonds), which contract was held by the Supreme Court to have been made on a valid and sufficient consideration.

The injunction must be dissolved, with costs.*

Coe *vs.* The New Jersey Midland Railway Company.†

1. Equity will, as a matter of course, and without any agreement to that effect, substitute, in the place of a creditor, a person who advances money to pay the debt for which he is bound as surety.

---

* Decree reversed, 1 *Stew.* 269.

† Cited in *Coe* v. *N. J. Midland R. Co.*, 4 *Stew.* 134; *Gaskill* v. *Wales*, 9 *Stew.* 531.

2. A director of an insolvent railroad company is entitled to reimbursement out of the funds in the hands of a receiver, for advances made by him to save the property against an unquestionable lien. To the amount of such advances, his claim is paramount to that of mortgagees whose encumbrances are subordinate to the lien.

3. A person who pays a debt of a railroad company incurred under contracts of purchase for rolling stock, which, if not paid, would entail serious loss and embarrassment to the company, under agreement with the company for security for re-payment by subrogation to the rights of the vendors under the contract, is entitled to be subrogated to the rights of the vendors to the amount of his advances.

4. That the whole debt has not been paid under the contract, is no objection to the subrogation of the party making such payment. Such subrogation is subject to the rights of the vendors under the contract, but is superior to any claim of the receivers upon the property in respect to payments made by them under the same contract.

On petition for subrogation.

Mr. John Linn, for petitioner.

Mr. Ashbel Green and *Mr. B. Williamson,* for the complainant.

THE CHANCELLOR.

The New Jersey Midland Railway Company is an insolvent corporation. Its effects are in the hands of receivers appointed by this court by two orders, one in a suit in insolvency and the other in a suit for foreclosure of the first mortgage on its property. In the last mentioned suit, Cornelius A. Wortendyke has filed a petition in behalf of himself and certain others, who, with him, before the proceedings in insolvency, advanced money upon contracts which the company had made with certain vendors of locomotive engines and railroad cars. These advances were made to enable the company to meet its engagements to pay installments of money on account of rent, or, as it may more accurately be termed, purchase money of engines and cars delivered to it by those vendors as upon lease, but on agreement that on the payment

of the rent in full, according to the contract, the company should become the owner of the demised rolling stock. The agreement provided also, for the re-taking of the property by the lessors into their possession in default of payment of rent. There was, therefore, a consequent liability to loss by the company in case of inability to meet its engagements. The petitioner and all the others, except four, in whose behalf he appears, were guarantors of the company on the contracts, and all those by whom the payments were made, were, at the time of making them, directors of the company. The complainant claims that the rolling stock is covered by his mortgage. The petitioner prays to be subrogated to the rights of the lessors for the payments. All parties in interest have had notice of this application. The complainant's counsel took part in the examination of the witnesses in support of the petition, and on the hearing of the order to show cause granted on the petition, opposed the granting of the relief prayed for. Their opposition was, however, solely upon the merits, no objection being made to the form of the proceedings, but, on the contrary, they expressed a willingness that the matter should be disposed of on the petition and testimony.

The payments in respect of which subrogation is sought, were made under circumstances which entitle those by whom they were made to substitution. Some of those persons were sureties for the payment of that money, and, irrespective of suretyship, the money was paid by all of them at the request of the company, and on the understanding that they would be subrogated to the rights of the lessors in respect thereto. It is proved that these payments were made in pursuance and in partial execution of an arrangement by which, for the relief of the company, it had been agreed that a rolling stock company should be formed by the persons who made the payments, and that the rolling stock company should take, by assignment, the contracts of the railroad company for the rolling stock which the latter held under lease, and provide the means for paying the rent. The railroad company, under this arrangement, was to become the lessee or vendee of the

rolling stock company, in respect to the engines and cars, on more favorable terms than those of the contracts, and so would have relief from the stringent terms imposed by the contracts, and with which, in its then embarrassed condition, it was unable to comply, and a non-compliance with which threatened such serious consequences. At the time when these payments were made, it was understood between the railroad company and those who made them, that they were made on account of the rolling stock company, which had been incorporated, but had not yet been formally organized, although it appears to have had a temporary organization. Again, those who made these payments were directors of the railroad company. As such, they were in the position of trustees, and they are, therefore, apart from other considerations in favor of substitution, entitled to re-imbursement out of the trust property for advances made by them to save that property. It would manifestly be gross injustice to give to the mortgagees or other creditors of the railroad company, the benefit of those advances at the expense of those by whom they were made. It was argued by the complainant's counsel, that the payments under consideration must be regarded as voluntary, and that, therefore, no right of subrogation can be gained by means of them. The guarantors were in no sense volunteers; and as to the others, these payments were indeed made to relieve the railroad company and were made directly to it, but they were, nevertheless, made on an understanding that those by whom they were made, were to have security for their re-payment by subrogation, through the arrangement by which the rolling stock company was to have an assignment of the contracts. In *Paine* v. *Hathaway*, 3 *Vt.* 212, it was held that if a person who has agreed with a debtor to advance the money (to be secured by mortgage on land) to discharge a debt which is secured by encumbrance on that land, himself pays the debt with the money and discharges the encumbrance, he is not to be regarded as a volunteer. After such an agreement with the debtor, he will not be considered a stranger with regard to the debt he has paid, but in equity may be entitled to the

benefit of the security which he has satisfied with the expectation of receiving a new mortgage or lien on the land for the money paid.

In view of the resolutions of the board of directors of the railroad company on the subject, and of the testimony generally, none of the payments in question can be held to have been merely voluntary and made solely on the faith of the credit of the railroad company. As to the guarantors, their claim to subrogation does not depend on request or agreement. Equity will, as a matter of course, and without any agreement to that effect, substitute in the place of the creditor a person who advances money to pay the debt for which he is bound as surety.

But it is urged that no subrogation can take place here, because the whole debt has not yet been paid, and because, since the payments in question, there have been other payments made under the same contracts, on account of the same rolling stock, by the receivers. The subrogation decreed will be subject to the rights of the lessors, to which it will accordingly be postponed. The right to it is superior to any claim of the receivers upon the property in respect to payments made by them, for they represent the railroad company or its mortgagees of the property.*

Yard's Executor and another *vs.* Yard and others.

Conveyances set aside, on the ground that at the time of their execution the grantor was in such condition as to subject him to the influence of those in whose favor they were made, to such an extent as to deprive him of his free agency, and that the deeds were not those of the grantor, but of the grantees.

Bill for relief. On final hearing on pleadings and proofs.

* Decree reversed, *post* p. 658.

Mr. G. D. W. Vroom and *Mr. J. Wilson*, for complainants.

Mr. E. L. Campbell, for defendants.

THE CHANCELLOR.

Joseph Yard, late of Trenton, died on the 13th of May, 1872. He was never married. He had a son, William M. Yard, who is one of the complainants. He had two brothers, Jethro and Archibald W., and a sister Ann. He, and Jethro and Ann, who were both unmarried, lived together. Jethro (who was a quiet, nervous, eccentric man, of no force of character, and probably of no business qualifications,) and he were in business together as partners in the manufacture of soap. Joseph Yard's property consisted of an undivided half of the soap-house property, which was situated in Broad street, in Trenton, and was owned by him and Jethro as tenants in common, and was subject to a mortgage of $1500; his interest in the stock and fixtures of the soap factory, and the debts due the firm, which were of no considerable amount, and the property, a house and lot in Lamberton street, in Trenton, on which he lived. He was a man of intelligence and of considerable self culture. In his opinions he was positive, and in his disposition, decided. His brother Archibald says, "his way of doing business was to say he wanted it done, and when he wanted anything done, he wanted it done right away." He was very loquacious; "all he wanted," says one of the witnesses, "was a good listener." He was decided in his likes and dislikes. He was, says Dr. Coleman, a good hater, but only from cause. He was of impetuous temper, but quickly came to himself, and was ready to make amends. For some years before his death he had been afflicted with an organic disease. His feebleness was increased by a severe injury received by him in September, 1871, in falling down the stairs of his house. From that time till his death he appears to have done no work. On the 12th of April, 1869, he executed his will, by which he devised and bequeathed all of his estate to his executor, the complainant Randolph Moore, in trust, for the

use of his brother and sister, Jethro and Ann, and the survivor of them for life, and after their death to his son, the complainant, William M. Yard, with provision that in case of the death of his son before them, or the survivor of them, the estate should go to them, or to the survivor of them. When he made this will he was, as is admitted by the answer, in good health and of unimpaired mental faculties. Between him and his son there was a sincere attachment, which continued to the end of his life. On the other hand, his brother Archibald and his sister not only regarded his son with disfavor, but in their conduct towards him evinced positive dislike, and treated him with contempt, and even with harshness, when he came to the house to see his father in his severe illness. When the testator went to make his will, he said to his son, "I am going to make my will; I want to recognize you, my son." In his will he speaks of him accordingly as his "son, William M. Yard, born of Abjail Curry." William served him in his business, receiving no compensation except his support, and a trifling sum of pocket money from time to time, but having the assurance from his father that he would succeed to his interest and property, and he appears to have served accordingly, managing the business during the testator's illness down to the time when Archibald W. Yard took possession of the soap-house property, a few days before the testator's death.

In the testator's last illness he was attended up to the 8th or 9th of May, and, therefore, within four or five days of his death, by Dr. James B. Coleman. In 1871, and up to August of that year, he had had for his physician, Dr. J. I. B. Ribble, but being dissatisfied with him at that time, he had discharged him. Dr. Ribble says he was not formally discharged, but the evidence shows clearly that he was in fact discharged, and so understood it. William M. Yard says that his father was sick with erysipelas before his fall in 1871; that he then became dissatisfied with Dr. Ribble, and wished him, William, to go and pay Dr. Ribble off; that the testator "wanted to get clear of him." William expressing

reluctance to do the errand because of its unpleasant character, suggested that the testator send John Hopping. Hopping corroborates William on this point. He says that he went to see Dr. Ribble at one time, and paid him a bill, and that the testator told him William would not go for him. Dr. Ribble says that the testator sent the money by Hopping on the 12th of August, 1871, and that he never attended the testator after that, until a few days before his death.

On the 20th of April, 1872, twenty-three days before his death, the testator, with Jethro, conveyed to Archibald Yard the soap-house property, with the utensils and fixtures, for the consideration of $7000, of which $1500 were paid in money, and $4000 were secured by a mortgage on the property, made in favor of Jethro and Ann. There was, as before stated, a mortgage for $1500 on the property at the time of the conveyance, and the amount of this was computed as part of the purchase money. On the same day, he executed a deed to Jethro and Ann for the nominal consideration of $1, for his dwelling-house and lot, for their lives, and the life of the survivor of them. On the 3d day of May following, Jethro and Ann re-conveyed the property to the testator, and three days afterwards he conveyed the premises to them in fee. By these conveyances, (for the conveyance to Archibald included the soap-house fixtures,) he disposed of all his property. After his death his will was admitted to probate, and the complainants, the executor and William M. Yard, filed their bill in this cause to set aside the conveyance by the testator to Archibald, and the last-mentioned conveyance to Jethro and Ann, on the ground that they were fraudulently obtained. Their allegation is, that at the time when they were made, the testator was mentally incompetent to make them, and that they were procured through undue influence. The testator was then grievously afflicted with a mortal illness. He was of advanced years, having passed the ordinary limit of human life. His memory was so defective that, on the 27th day of April, he had no recollection whatever of the conveyance to Jethro and Ann, which he had executed

but seven days before; nor had he any recollection whatever of the transaction. His appearance had, before that time, changed most noticeably. He no longer took notice of his acquaintances. He was silent, and his look was vacant. He was a mere wreck of his former self.

The evidence is that, in the conveyance to Archibald, the latter was the chief actor. He applied to Randolph H. Moore in the month of March, 1872, to draw a deed from Jethro and the testator to him for the soap-house property, conveying it for the consideration of $7000, or $5500 over the mortgage upon it, and to draw a mortgage, to be executed by him and his wife, to the testator and Jethro, for $4000 of the purchase money. The papers were drawn; but, between that time and the 1st of April, he informed Mr. Moore that the testator and Jethro had refused to make the conveyance. On the 20th of April he again applied to Mr. Moore, and requested him to prepare the papers, in order that they might be executed immediately, and directed him to draw the mortgage for $4000 in favor of Jethro and Ann, instead of the testator and Jethro. The papers which had been drawn on the former application, had not been destroyed. Mr. Moore altered the mortgage to conform to the directions of Archibald, and went, on that day, to the house of the testator, to which the latter was confined by illness, and they were then and there executed. Mr. Moore testifies that, when he entered the house, the testator saw him, and raised his hand and said, "a pen;" that he, Moore, then said, "Mr. Yard, I want to read the papers to you before you execute them;" that he then took the papers from his pocket and read them to him; that he was very particular in reading and explaining them to him; that the testator said "yes" and "no," and talked very little, if any; that the testator signed the deed, as did Jethro also; that Mr. Moore felt satisfied that the testator was a very sick man, and he commenced a conversation with the testator, and tried to talk with him, but the testator seemed exhausted and vacant, and appeared to have such a singular look that he did not seem natural. Mr. Moore says he was struck with it at the moment, and it

immediately occurred to him that the testator was not fit to do the business he had transacted with him, and he felt very unpleasantly about it. It appears that Mr. Moore communicated to Archibald on his way to the testator's house on that occasion, the fact that the testator had made a will. On the same day, and about an hour after Mr. Moore had returned to his office from the house of the testator, which he left soon after the deed was executed, Archibald came to Mr. Moore's office and requested him to draw a deed from the testator to Jethro and Ann, for the testator's homestead property. Mr. Moore refused, on the ground that the testator was not in his opinion in a fit condition to execute any paper. The following week Archibald went to Mr. Moore and told him the testator wanted his will. Mr. Moore told him he would go to the testator's house and take the will with him. Shortly afterwards Jethro came with the like request, and, according to Mr. Moore's impression, said the testator wanted the will, to destroy or cancel it. He received a similar reply to that which had been given to Archibald. On the 27th of April Archibald employed a lawyer, Mr. Isaac W. Lanning, to get the will from Mr. Moore. Mr. Lanning made a written demand for it on Mr. Moore, but the latter declined, as before, to give it up. On the 8th of May Mr. Moore went to the testator's house, in company with Dr. Coleman, taking the will with him. He took Dr. Coleman with him in order that he might have the benefit of the opinion of a person competent to judge as to the testator's mental capacity. At the interview which he and Dr. Coleman then had with the testator, Jethro and Ann were present. The testator was lying on the bed in the same room in which the deed was executed. Mr. Moore then reminded the testator that he had prepared the will for him, and that the testator had given it to him to keep for him, and then said, "by this will you have given to Jethro and Ann all your property, both real and personal, during their natural lives, and at their death it is to go to William M. Yard—what do you want me to do with this will?" The testator, in a broken voice, replied, "keep it."

Late in the afternoon of the same day on which Mr. Moore refused to draw the deed to Jethro and Ann, Archibald employed Judge Reed to draw it. He told Judge Reed that the testator was sick, and desired to make some disposition of his property in Lamberton street, so as to provide for his brother and sister, Jethro and Ann, during their lives; that he wanted the property to go to them for their lives, and then to his heirs, and that he wanted the deed drawn at once. Judge Reed drew the deed and went with it to Archibald's house, according to appointment. While there, Archibald's wife told him that the testator was weak; that it was very difficult and painful for him to converse, and, therefore, he talked but very seldom, and only when it was absolutely necessary, but his mind was clear, and he understood everything as well as ever. Judge Reed accordingly went to the testator's house with Archibald, and witnessed the execution of the deed and took the acknowledgment. The testator, in the interview which Judge Reed had with him on that occasion, did not articulate a single word. When Judge Reed, after explaining the paper to him, asked him if he desired to sign it, he said nothing, but "half nodded and made a noise as of assent." He was raised up in the bed by Ann and Archibald, and with a great deal of difficulty signed the deed. To the usual question put to him to obtain his acknowledgment, he assented in like manner by an inarticulate sound, but said not a word. Judge Reed says that at that time he knew nothing of the testator's mental condition, and that as to his making no articulate demonstration, he relied on what Archibald's wife told him in reference to the testator, as a sufficient explanation. When Mr. Lanning, on the 27th of April, went to see the testator in regard to obtaining the will from Mr. Moore, he found him lying in bed. Jethro and Ann, and Archibald and his wife, were all there. Mr. Lanning says: "After I went in, I spoke to Mr. Joseph Yard, and had some conversation with him in the presence of the other persons, or some of them, and after a few moments' conversation with Mr. Joseph Yard, I re-

quested the other persons to leave the room, saying to them that I wished to have a private conversation with Mr. Joseph Yard; they then passed into the adjoining room, and I closed the door myself, between the two rooms; I then spoke to Mr. Joseph Yard about his having sold his property on Broad street, called the soap-house property; I told him I had heard that he had sold that, and he replied that he had; I then asked him in reference to the deed to his brother Jethro and his sister Ann, for the Lamberton street property, and whether he had made a deed to them of that property; he replied that he had no knowledge or recollection of that; I then asked him if he did not remember Judge Reed having been there with a deed, which he signed and acknowledged in the presence of Judge Reed; he said he had no recollection of it; he said he had no recollection of Judge Reed having been there, or of his having signed any paper in his presence; I then asked him if he had made a will; he said that he had; I asked him who had it; he replied, 'Randolph Moore;' I then put this question to him, 'Mr. Yard, in that will, did you make any provision for your son William?' he answered, 'yes;' I then asked him this question, 'Mr. Yard, do you wish William to have any of your property?' he said, 'yes, I do;' I then put this question to him, 'Mr. Yard, have you meant or intended to make any deed, or do anything which will deprive William of any interest or advantage which he might derive from your property under that will?' he answered, 'no sir, I have not;' I then asked him, 'do you wish to have that will delivered to you or any other person?' he answered, 'I don't;' I then said to him, 'Mr. Yard, do I understand you to say that you wish that will to remain as it is, and that Mr. Moore shall hold it?' he answered, 'yes sir;' I then cautioned him against signing any paper unless under legal advice. I then stepped out of the room and had a conversation with Mr. Archibald W. Yard, and told him (Archibald) that Joseph had no recollection of the deed drawn by Judge Reed—that he did not appear to remember anything about it; Archibald then stepped into the

room where Joseph was lying, went to the bed-side of Joseph, and asked him this question, 'Joseph, don't you remember signing a deed last Saturday, when Judge Reed was here?' Joseph answered, 'I do not;' Archibald then said to him, 'don't you remember his having a paper for you to sign, and that you signed it?' and Joseph answered him, 'no, I don't;' Archibald then addressed himself to me, and said, 'he doesn't appear to remember it.' I then said to Archibald that the property ought to be re-conveyed by Ann and Jethro to Joseph, as I considered his deed to them to be invalid and worthless, and that after so re-conveying the property to Joseph, let every thing remain until Joseph recovered from his illness and his mind became fit for the transaction of business; as I was then about leaving the house, I said to Joseph, in the presence of the other parties, or some of them, that I would call and see him at any time he might desire an interview with me, and I then left the house. On the 3d of May following, Mr. Archibald W. Yard called at my office and produced the deed drawn by Judge Reed; it was the deed from Joseph to Ann and Jethro Yard; he stated to me that he borrowed the deed from the county clerk; he left that deed with me, for me to draw a deed of re-conveyance of that property by Ann and Jethro Yard to Joseph Yard; he said he had been to Mr. Richey's office; that Mr. Richey was sick that morning, and he had there been referred to me as having some knowledge of the matter; I promised to draw the deed re-conveying the property from Ann and Jethro to Joseph, and would see them at the house at two o'clock in the afternoon; I drew it, and took it with the other deed—the deed drawn by Judge Reed—to the house at the hour named and Ann and Jethro executed it in my presence; I took their acknowledgment, and then had both deeds in my hand, and took both deeds to the clerk's office for record; the first deed had been entered in the clerk's office, but had not been actually recorded; some one asked me how much was to be paid for drawing the deed; I replied that my charges in this case would be $1.50; that the new deed required a revenue stamp

of fifty cents, which would make $2.00; Joseph then put his hand in his pocket and took out some money; the sum of $2.00 was again named; Ann and Jethro were there; Ann passed across the room from where Joseph was sitting, and as she handed me the money—two bank bills—she remarked, that he (Joseph) doesn't appear much like a man whose mind is not fit for business, from the way he counts money; as she placed the bills in my hand, I saw that one of them was a $5.00 bill, and I said to her, here are $6.00 instead of $2.00, and then Ann and Jethro, between them, corrected the amount."

Three days after the re-conveyance to the testator had been thus made, the testator made another deed, as before mentioned, conveying the property to Jethro and Ann in fee simple. This deed was drawn by Mr. George W. Smythe, a counsellor-at-law, who was employed for the purpose by Archibald's wife. Archibald was present when that deed was signed, and so were Ann and Jethro. Archibald's wife gave Mr. Smythe instructions in reference to the deed, and requested him to go to the testator's house and see him on the subject. Mr. Smythe testifies that he went there and found him lying on the bed. He stated to the testator what Archibald's wife had told him, and he says that the testator assented to the correctness of the statements; that he then drew the deed, and went to Dr. Ribble's office and asked him to go with him to witness the execution of the deed. Dr. Ribble went with him, and the deed was executed by the testator, both of them signing it as witnesses. When asked as to his reason for requesting Dr. Ribble to witness the execution of the deed with him, Mr. Smythe says: "I don't remember now the exact reason which weighed on my mind, why I had it signed by two witnesses; I think it occurred to me that Mr. Yard was old and sick, and Mr. Lanning said the deed ought not to be written; I thought it would be very proper to call on Dr. Ribble, who, as I understood, was then the attending physician of Mr. Yard, and ask him to go down with me to see Joseph Yard and attest the execution of the deed; I knew that Dr. Ribble was his physician, because I think Mrs. Yard told me so that morn-

ing; it is my impression that she told me Dr. Coleman had been his physician, and that he had discharged him and employed Dr. Ribble; I went after Dr. Ribble about three o'clock, and asked him to go down with me and see Mr. Yard and be the attesting witness to the deed, and he consented to do so; I don't remember whether Dr. Ribble said, at that time, that he was Joseph Yard's physician; I only asked him to go with me to witness the deed." Dr. Ribble, it may be observed, swears that he suggested to the testator that Jethro and Ann should re-convey the homestead property to the testator, in order that the latter might convey it to them in fee simple; but it is entirely clear that the re-conveyance was the result of Mr. Lanning's advice and not of Dr. Ribble's suggestion. Dr. Ribble appears to have taken much interest in the disposition of the testator's property. He, as before stated, had been discharged by the testator in 1871. He says he was re-employed by the testator very shortly before his death. His re-introduction to the testator, as his physician, was through the instrumentality of Archibald W. Yard. He, after the testator had been pronounced by Dr. Coleman incapable of transacting business, employed Dr. Ribble to visit the testator with a view, as they say, of forming a judgment as to his mental capacity. This visit, Dr. Ribble says, was in the latter part of April. It must have been after the 20th, for it was after the deed to Archibald had been executed. It was, therefore, at the earliest, within about three weeks of the time of the testator's death. He says, as the result of his examination, that he found the testator's mind entirely sound, his memory as good as it ever was, his reasoning faculties in good condition, his speech connected, his temper cheerful, his humor jocose, and he says there was nothing unusual in his manner or appearance, or expression of countenance. He immediately reported the result of his investigation to Archibald. His next visit, he alleges, was due to accident. He then went to the testator's house, not to see him, but to see Archibald's wife, who was under his medical care. On going to her house he found, he says, that she was not at home, but had gone to the testa-

tor's house. He followed her there, and there had another interview with the testator. In this interview, he says, the latter said he had conveyed his homestead property by deed to Jethro and Ann for life, and asked his advice as to how he could best convey the property to them in fee. Dr. Ribble says he advised him to do it by deed, "as deeds were less likely to be contested than wills." The unusual character of this professional visit—the physician following up his patient without any reason for doing so, connected with her state of health; the suggestion which Dr. Ribble says he made as to the comparative liability of the conveyance to be "contested," and the fact that he says he advised the re-conveyance by Jethro and Ann to the testator, whereas that re-conveyance was, undoubtedly, the result of the advice of Mr. Lanning; and the fact that he was called by Mr. Smythe to sign, as a witness, the deed to Jethro and Ann in fee simple, are worthy of remark. That he was re-introduced to the testator by Archibald with a view to the establishment of the conveyance to him, and to the execution and establishment of that which he proposed that the testator should execute in favor of Ann and Jethro, is manifest.

Dr. Ribble's description of the testator's appearance and condition, is at variance with the proof in the cause. Dr. James B. Coleman, who is a disinterested witness, testifies that he noticed a marked change in the testator in April, 1870; that he then began to grow weak-minded and incapable of transacting any but routine business; that on the 12th of April, 1872, and from that time to the 8th of May following, he visited him as his attending physician constantly, daily, and sometimes twice a day, and, during the whole time, he was suffering from softening of the brain and general breaking down of his system, and was entirely unfit for business—incapable of doing anything that required any operation of the mind, and incapable of connecting antecedents with their consequents. He says that when he visited him on the 8th of May, he was in a dull, stupefied condition, his mind sluggish and obtuse, and entirely different from what he was when

he was himself. Dr. Skelton, who was an old acquaintance of the testator, testifies that he last saw him six weeks or two months before his death; that his perceptive faculties were very much impaired, and he considered his mind was very much impaired; that he noticed a very decided change in his intellectual powers and in his judgment; and that his disease was softening of the brain. Mr. Moore, on the 20th of April, found him very sick. He says he seemed vacant and exhausted, and looked vacant and wild; that he appeared to him to have such a singular look that he did not seem natural, and Mr. Moore was immediately impressed with his incapacity to do the business which he had transacted with him—the execution of the deed to Archibald for the soap-house property; that the testator, in rising from the bed to sign that deed, was assisted by Ann, and that immediately after he had signed it he lay down again, and seemed to be exhausted. Mr. Moore says that it is his impression, that when Archibald came to him to get him to attend to that business, Archibald told him that the testator was confined to the house, and was not able to get out. He testifies that on the day on which Dr. Coleman and he went to see the testator together, (which Dr. Coleman says was on the 8th of May,) the testator did not speak to any one but very little, and that he only spoke when spoken to, and then with difficulty. Judge Reed says, that on the 20th of April, when he went to the testator's house to witness the execution of the deed he had drawn at Archibald's request in favor of Jethro and Ann, the testator was in bed, and that in the whole interview the testator did not speak a word, but made an inarticulate noise. Samuel Mellor saw the testator two or three weeks before he died, and, on that occasion, which was a visit of two hours, the testator said nothing he could understand. He says that he could not speak, and kept muttering something that the witness could not understand, and that during all the time he and his wife were in the house on that visit, neither of them could hold any conversation with him. He says that before the testator was confined to his bed,

he saw him in the alley which led from the testator's dwelling-house to the soap-house, and though he spoke to him, the testator did not recognize him, but stared at him; and when William, who was with the testator, informed him who Mr. Mellor was, the testator muttered or said something which Mr. Mellor could not understand. Mrs. Mellor says that, on the occasion of the visit by her and her husband to the testator, she took hold of the testator's hand, and he looked at her and made a noise, but she could not understand what he said or tried to say. Dr. Waldburg Coleman was called to attend the testator on the occasion of his fall, in the autumn of 1871. He says he answered his questions as if his mind was disturbed; that his answers were very slow, and he thought his mind was a good deal disturbed; that his disordered mental condition was more than could be accounted for by the bruises he had received, and that he thought he was childish. Mr. Slack, an old acquaintance of the testator and a pall-bearer at his funeral, says that the testator appeared to be very much broken up from the effect of the fall; that after the fall he noticed a very perceptible change in him; that his memory appeared to have failed, and his mind was weak, and, to a great extent, gone, and that he would talk very little, and "would sometimes commence in the usual way, and that what he wanted to say would slip from him," and that his loss of mind was very perceptible. To the same effect is the testimony of William M. Yard. He says, speaking of the testator's condition after the fall, that he has seen him often forget what he attempted to talk about; that there was a great change in his conversational powers; that he became stupid and childish, and his eyes would glare, and that between the 12th of April and the 12th of May, he held no conversation with anybody. John Miller, the barber, says that after the fall, the testator came to his shop to get shaved, generally three times a week; that his son William or one of his men came with him; that he always had somebody with him; that he looked as if he had had a stroke of paralysis; that he was changed in the face; that he did not

appear to have anything to say to anybody; that sometimes men in the shop who knew him, would speak to him, and he would not answer; that he "kind of murmured;" that they used to have to lift him into the barber's chair and out again, and that when he paid for his shaving, he handed the money to his son that he might pay for him, as if he did not know the difference in the pieces of money. And the witness says the testator did not know the difference. He says that before the fall he always talked to his old friends—to him, Mr. Hutchinson, Mr. Carlyle, and others—but after the fall he did not. John Birt, who was an old acquaintance of the testator, and saw him frequently, says he noticed a decided change in him while as yet he came to the soap-house. He appeared to him to be becoming more childish. Mr. Alexander H. Rickey was accustomed to see the testator at the soap-house for two or three years before his death. He says that before his death he perceived that he was failing in health and thought, and seemed to be getting feeble, and that on one occasion when he saw him there at about ten o'clock in the morning, the testator did not talk at all, and did not recognize him at first, when the witness spoke to him, though he did afterwards. He adds that the testator grew worse after that. Mrs. Aitken, a witness called for the defendants, says that about two weeks before the testator died, she went to see him, and that she thought he was too low to talk with him. Judge Scudder, who from his boyhood had known the testator, testifies that the last time he saw him was, as nearly as he can recollect, about three or four months before his death; that he then met the testator and his son in the street, in Trenton; that William spoke to his father, and said to him, "father, this is Judge Scudder;" that he raised his eyes and looked at the judge, but Judge Scudder doubts whether he recognized him; and he says that if he did, he showed no inclination to speak or converse with him, and that when he was well he always spoke to him on the street, and it was difficult to get away from him, he was "such a talker." He says his countenance was very much changed, particularly his eyes and cheeks;

they were very much altered, and he walked slowly and with much difficulty, and that he was a wreck of what he had been. Dr. Ribble himself says that the testator died from exhaustion from chronic Bright's disease; that he first visited him professionally in his last sickness, on the 6th of May; that from that time to the time of his death, which occurred seven days afterwards, he visited him very frequently—sometimes four, five, and six times a day, sometimes three, very rarely less than twice a day; that he visited him so often because he was very sick, and that he visited him from two to six times a day, at least, professionally. The evidence which this statement affords of the condition of the testator, of itself casts grave doubt, to say the least of it, upon the accuracy of the testimony of Dr. Ribble in regard to the testator's condition when he visited him at the request of Archibald W. Yard. It is by no means likely that a person of the advanced age of the testator, suffering under the disease with which he was afflicted, to such an extent as to require from two to six visits a day from his attending physician, would, two weeks before that time, have been not only cheerful but mirthful and jocular, telling amusing stories himself, and laughing at them, and relishing the jokes of others. Yet Dr. Ribble says this was the testator's condition at that time. The like considerations apply to the testimony of those witnesses on the part of the defendants who speak of the testator's habits and actions in the last days of his life; of his skill in card playing, of his novel reading, and smoking and jesting.

The testimony leads me to the conclusion that at the time when the deeds in question were made, the testator was of feeble mind; that he was constantly subjected to the influence of his brothers and sister, who exercised it in their own favor, and were actuated by a double purpose to obtain his property for themselves, and to prevent the testator's son from getting any part of it. The deeds were not the deeds of the testator, but of those by whom he was surrounded. His condition was such as to subject him

to their influence to such an extent as to deprive him of his free agency.

It may be observed that Archibald's account of the transaction of the sale of the soap-house property to him is contradicted in material respects. He says that in March, 1872, the testator offered to sell that property to him, giving, as his reason, that his health was failing; that he accepted the offer and agreed to take the property, and that on the 1st of April he went to see him to get him to fulfill his contract, and he refused, saying that he had got better and had sent for more stock. He says that on the 20th of April the testator sent for him to endorse a note, to be given in renewal of one which he had endorsed for the testator's firm, and which the testator wanted to renew, and he did it for him; that the testator said he was sorry he had not fulfilled his bargain to sell the property to Archibald; that Archibald said it was not too late to do so, and the testator said he would complete the sale that day, and requested Archibald to go to Mr. Moore and get the papers drawn. Now, the evidence is that the note of which Archibald spoke was discounted by the Trenton Banking Company on the 26th of January, 1872, and was payable at four months from its date. It was not due, therefore, until the latter part of May following. Further, Archibald says that when he went to the soap-house on the 20th of April, he got there about two o'clock in the afternoon. Hopping, a witness for the defendant, testifies as to that day. He says the testator was at the soap-house in the morning a little while; that the testator paid him on that day, and that after he had paid him the witness took him down to the soap-house and brought him back again; that the testator was there only a very few minutes; that the witness does not remember that any one else was at the soap-house when he took him down, and that he does not remember that any one came in while he was there. He says the testator was never there afterwards.

The conveyances in question were made under such circumstances that they ought not to be permitted to stand. The

deed to Archibald as to the testator's interest in the property thereby conveyed, and the sale of the testator's interest in the soap-house stock and fixtures and utensils, will be set aside as having been obtained by fraud. So, also, will the deed to Jethro and Ann for the Lamberton street property, in fee simple. Archibald will be required to account to the complainant, Randolph H. Moore, executor, for the half of the rents and profits of the soap-house property, and for half of the personal property just referred to. In the account he will be allowed one-half of the $1500 paid by him, and one-half of all principal and interest, or either of them, which he may have paid on the mortgage for $1500, subject to which the soap-house property was conveyed to him. He will also be allowed one-half of the cost of the improvements put by him on the property—the pavement, flooring, ceiling, stairways, sills, &c.

BUSH and HOWARD *vs.* CUSHMAN.†

1. A mortgagor who procures a third party to purchase a mortgage given by him and receives the whole proceeds, will not be permitted to assail its validity.

2. The assignee of a mortgage or any other chose in action, takes it subject to all equities and defences existing between the original parties at the time of the assignment. No rights accruing after the assignment, or defences springing from defaults, or even fraud of the assignor, committed subsequent to the assignment, and which had no existence, and were simply possibilities at the time of the assignment, can affect the assignee

---

On final hearing on bill, answer and proofs.

Mr. Leon Abbett, for complainants.

Mr. W. S. Whitehead, for defendant.

---

* Decree affirmed, 2 *Stew.* 376.

† Cited in *Woodruff* v. *Morristown Institution for Savings*, 7 *Stew.* 180; *Burhans* v. *Beam*, 9 *Stew.* 500; *North Bergen* v. *Eager*, 12 *Vr.* 189.

THE VICE-CHANCELLOR.

There are two unanswerable objections to the defence interposed in this case: First, that the complainants purchased the mortgage at the request of the defendant, and he cannot, therefore, be permittted to assail its validity; and second, the breach of contract imputed by the defendant to the assignor, and upon which his whole defence rests, was committed subsequent to the assignment of the mortgage.

The mortgage sought to be foreclosed was made August 25th, 1873, by the defendant, Robert M. Cushman, to William A. Ellis and Clarence M. Johnson, pursuant to an agreement bearing date August 26th, 1873, made by the defendant and his brother William, under the name of R. M. Cushman & Co., and the mortgagees, under the name of W. A. Ellis & Co., whereby the last-named firm agreed to advance to R. M. Cushman & Co. $5000 on that day, to be secured by the mortgage in suit, and also the further sum of $10,000, at such times and in such amounts as they might desire, to be secured by a mortgage on their real and personal property in Texas, to enable them to start and carry on the hide and tallow business in Aranzas county, Texas. The agreement also contained a contract of purchase by W. A. Ellis & Co. of all hides and tallow, at certain fixed prices, to be made by R. M. Cushman & Co. during the following season, embracing the period between September 1st, 1873, and February 1st, 1874. The defendant alleges that W. A. Ellis & Co. fraudulently refused to make the additional advance of $10,000, or any part of it, and to receive and pay for the hides and tallow delivered to them, except the first lot, and that, in consequence of their breach of contract, R. M. Cushman & Co. have sustained a loss of over $12,000.

The defendant claims that it was well understood by both parties, that the advance of $5000 would be of no advantage or benefit to R. M. Cushman & Co., unless W. A. Ellis & Co. accepted the hides and tallow according to the contract, and made the advance of the additional $10,000 when required; that the venture was for the joint benefit of both parties, and

that it was obvious from the outset it could only be made successful by the fulfillment of the contract by both; that the giving of the mortgage in suit was merely an initiatory step in the general scheme, and W. A. Ellis & Co. having, by their breach of faith, made the venture ruinous to R. M. Cushman & Co., would not, if they were complainants, be permitted to enforce the mortgage. It is also claimed that the mortgage in the hands of the complainants is subject to all the defences and equities which might be invoked against it if W. A. Ellis & Co. were seeking to collect it, whether they arose prior or subsequent to the assignment.

The proofs establish beyond all dispute, that prior to the execution of the mortgage, the defendant applied to the complainant, Myron P. Bush, to lend $5000 to W. A. Ellis & Co., on the mortgage, and take an assignment of it, and exhibited to him an abstract of his title to the mortgaged premises; that Mr. Bush declined to make the loan until a further search of the title had been made, and the mortgage had been approved by counsel; that the defendant thereupon retained a lawyer, selected by Mr. Bush, who, in company with the defendant, examined the mortgaged premises, and also made a search of the title. He subsequently passed the title and approved the security. The assignment to the complainant was executed, and the money paid, in the presence of the defendant; and immediately after, and while all the parties were still in the office of the counsel, W. A. Ellis & Co. passed to the defendant their check for the amount loaned by the complainants. The contract between R. M. Cushman & Co., and the assignment to the complainant, bear the same date.

These facts clearly prove the complainant invested his money in the purchase of the mortgage, through the procurement of the defendant. In fact, he made the sale and received the whole proceeds. He cannot, therefore, be permitted to assail its validity, The doctrine of equitable estoppel as it is called, has its foundation in the plainest principles of natural justice. It will not permit a person, either by word or act, to represent a security issued by him to be good, and thereby

induce another to give his money for it, and then, when he is required to pay it, repudiate the truth of his representation and escape its payment by showing, as between himself and the person to whom it was issued, it was invalid. No reference to books is necessary in vindication of a principle so clearly fundamental in every system of laws framed to promote justice. I refer to the following authorities simply to show how the doctrine has been applied: *Martin* v. *Righter*, 2 *Stockt.* 525; *Lee* v. *Kirkpatrick*, 1 *McCarter* 267; *Den* v. *Baldwin*, 1 *Zab.* 403; 2 *Smith's Lead. Cas.* 647, 660; *Story's Eq. Jur.*, § 1542.

But had the defendant had no connection with the transfer of the mortgage to the complainants, I am at a loss to discover upon what principle he could invoke against the complainants the default or breach of contract of the assignor, committed subsequent to the transfer. Unquestionably, the assignee of a mortgage or any other *chose in action*, takes it subject to all equities and defences existing between the original parties at the time of the assignment, but I do not understand that this rule embraces equities or defences springing from defaults or even fraud of the assignor, committed subsequent to the assignment, and which had no existence and were simply possibilities at the time of the assignment. The rule excludes defences and rights accruing after the assignment. *Cornish* v. *Bryan*, 2 *Stockt.* 146; *Losey* v. *Simpson*, 3 *Stockt.* 253; *Coster* v. *Griswold*, 4 *Edwards' Ch.* 374, *marg'l; Murray* v. *Lylburn*, 2 *Johns. Ch.* 442; 2 *Lead. Cas. in Eq., pl.* 2, 238. There can be no doubt the mortgage was a perfect security at the time the complainant's money was passed to the defendant and the transfer of the mortgage was made. No subsequent act or default of the assignor could impair or destroy it.

The complainants are entitled to a decree. I will so advise.

BROKAW *vs.* HUDSON'S Executors.*

1. A gift to A, "or to his heirs," "or to his representatives," is an absolute gift to A, on condition that he is alive on the death of the testator; but if he dies in the lifetime of the testator, the gift takes effect in favor of the other persons described as substitutes of the primary legatee.

2. In a gift of personal property, where the substitutes of the primary legatee are described by the word "representatives," those will take who have the right to represent the primary legatee as next of kin under the statute of distributions, and not his executors or administrators.

3. If such next of kin have left a will, the legacy passed by that; if not, the rights of creditors, if he had any, take precedence of those of his next of kin.

4. A gift of a legacy by a creditor to his debtor, whether the debt arose before or after the making of the will, does not, in the absence of any expression showing that the testator intended the gift should have that effect, release the debt, but it may be applied in payment of the legacy.

Final hearing on bill and answer.

Mr. A. Struble, for complainant.

Mr. B. S. Morehouse, for defendants.

THE VICE-CHANCELLOR.

The object of this suit is to procure a construction of certain parts of the will of Henry C. Hudson, deceased.

The testator made a gift of $2000, payable in gold coin of the United States, to his sister, Susan E. Hudson, "or to her representatives." The legatee died some months before the testator, Did the legacy lapse? It is not saved by the twenty-second section of the statute of wills. *Nix. Dig.* 1031.†

There can be not doubt about the rule which must govern the solution of this question. A gift to A, "or to his heirs," "or to his representatives," is an absolute gift to A, on the condition that he is alive on the death of the testator; but if he dies in the life of the testator, the gift takes effect in favor of the other persons described as substitutes of the primary

---

* Cited in *Huston* v. *Read*, 5 *Stew.* 597. † *Rev., p.* 1246, *sec.* 20.

legatee. *Gittings* v. *McDermott*, 2 *M. & K.* 73; 2 *Williams on Ex'rs* 956, *et seq.*

Who will take under the description of representatives? In a gift of personal property, where the substitutes of the primary legatees are described by the word representatives, those will take who have the right to represent the primary legatee as next of kin under the statute of distributions, and not his executors or administrators. *Drake* v. *Pell*, 3 *Edwards' Ch.* 270; *Baines* v. *Ottey*, 1 *M. & K.* 465; *Palin* v. *Hills*, *Ib.* 470.

It is alleged in the bill, and admitted by the answer, that David Hudson, a brother of the testator, who died after the testator, was the only next of kin of Susan living on the death of the testator; he, therefore, took the legacy which Susan would have taken had she survived the testator. The legacy must be paid to his executors or administrators, and not to his widow and children. If he left a will, the legacy passed by that; if he did not, the rights of creditors, if he had any, take precedence of those of his next of kin.

A gift of $300 is made to Robert H. Morris. Subsequent to the date of the will the testator loaned him $1500 on his promissory note, which is still unpaid. Morris is insolvent. Can the debt due from Morris be applied in payment of his legacy? A gift of a legacy by a creditor to his debtor, whether the debt arose before or after the making of the will, does not, in the absence of any expression showing that the testator intended the gift should have that effect, release the debt, but it may be applied in payment of the legacy. 2 *Roper on Leg.* 1063; *Courtenay* v. *Williams*, 3 *Hare* 539; *Voorhees* v. *Voorhees' Ex'rs*, 3 *C. E. Green* 227.

On the record as it now stands, no decree can be made. The suit is clearly defective for the want of necessary parties. Morris, the debtor legatee, is not a party, nor is the residuary legatee. Morris has a right to be heard upon the question whether the gift of a legacy to him discharged his debt or not; and the residuary legatee, upon the question of lapse. The

court has no jurisdiction over either of them, and cannot, therefore, make a decree which will bind them.

Unless the complainant shall amend his bill and bring the necessary parties into court within a reasonable time, his bill must be dismissed.

Search's Administrator *vs.* Search's Administrators.

1. A defendant in a suit in equity has a right to insist that he shall be distinctly and plainly informed of the nature and foundation of the claim made against him, and to be notified by the bill what he has said or done which gives his adversary a right of action against him. An assertion of a claim against the defendant by way of inference arising out of a recital in the bill of the finding of a master under an order of reference on *ex parte* proceedings by the complainant on petition, is insufficient.

2. The Court of Chancery has concurrent jurisdiction with the Orphans Court in the settlement of the accounts of executors and administrators, and may assume exclusive jurisdiction at any time before decree of allowance and confirmation; but where the settlement is proceeding regularly and properly in the Orphans Court, and there is nothing in the conduct of the executor or administrator, or in the nature of the estate or in the questions growing out of its due settlement, making it necessary or proper that this court should take control, the settlement will be permitted to proceed in that tribunal.

3. Where, in the exercise of its unquestioned power, the Orphans Court has pronounced a judgment in a proceeding in a matter over which the Court of Chancery has concurrent jurisdiction with that conrt, which proceeding was pending there before the institution of a suit in this court, that judgment, so far as it embraces the matters in controversy here, is conclusive against all persons, unless removed by appeal, and is not open to review in this court except upon proof of fraud or mistake.

4. A claim arising out of a single transaction, where it is alleged one person became a creditor and another a debtor, cannot be made the foundation of a suit in equity, especially where no discovery is sought.

On final hearing on bill, answer and proofs.

Mr. William Halsted and *Mr. O. S. Halsted*, for complainant.

Mr. John N. Voorhees, for defendants.

THE VICE-CHANCELLOR.

The bill in this case entirely fails to disclose any ground of equity on which relief can be given. Its material averments are that the complainant's intestate was the widow of the defendants' intestate; that subsequent to the grant of administration to the defendants, the complainant's intestate was duly declared a lunatic, and a guardian was appointed for her; that on the petition of her guardian, a reference to a master of this court was ordered to ascertain and report the kind and value of the property belonging to her; that a report was made, declaring that the lunatic was entitled, as a widow, to a distributive share of his personal estate, and to dower in the lands of which he died seized, and to one-third of the rents received by the defendants as administrators, amounting to $645.35, and that the lunatic, at the time of her marriage, had a separate estate of $400, which, on her marriage, passed into the hands of her husband, and was held in trust by him at the time of his death, and subsequently came to the hands of the defendants, as his administrators; that the lunatic died, and the complainant was appointed to administer her estate, and as administrator thereof, exhibited a claim to the defendants as administrators of the husband's estate, demanding, (to quote the language of the bill,) "first, the amount of $2000, with interest thereon; second, the amount of $400, trust money held by them, with interest thereon; third, balance of amount of sale of personal property set off to Sarah Search, and not delivered to her guardian, amounting to $186.25; fourth, the sum of $215.05, being her right of dower in rents and profits received by administrators from tenants of farms of said William Search, deceased;" and that the defendants refused to comply with such demand.

It is not averred the rents received by the defendants were not due at the death of the intestate, or did not properly constitute a part of his personal estate. It must be assumed, therefore, they received them rightfully, in the due administration of the estate.

The hearing before the master under the order of reference, so far as the bill gives any information, was *ex parte*, and, from the nature of the proceeding, must necessarily have been so.

The bill, it will be observed, charges no liability against either the defendants or their intestate, by distinct, direct averment; indeed, no claim is asserted as a matter of fact against anybody. The averment is simply that the master reported that a claim existed, and that the complainant exhibited a claim. The only assertion of a claim made by the bill, is by way of inference arising out of a recital of the action of the master and the complainant. This is not sufficient. A defendant in a suit in equity has a right to insist that he shall be distinctly and plainly informed of the nature and foundation of the claim made against him, and to be notified by the bill what he has said or done which gives his adversary a right of action against him. *Story's Eq. Pl.*, § 241; *Andrews* v. *Farnham*, 2 *Stockt.* 94.

The estate of the defendants' intestate was in course of settlement in the Orphans Court of the county of Hunterdon, when this suit was commenced. Their final account was filed February 8th, 1875, and allowed and confirmed by the court on the 1st day of March following. The bill was filed February 27th, 1875, but process was not served on the defendants until the 2d day of March. No effort was made to arrest the settlement in the Orphans Court. In the exercise of its unquestioned power, that tribunal has pronounced a judgment in a proceeding pending before it prior to the institution of this suit, which, so far as it embraces the matters in controversy here, is conclusive against all persons, and not open to review in this court except upon proof of fraud or mistake. *Revision* 528, § 108; *Frey* v. *Demarest*, 1 *C. E.*

Green 239; *Voorhees* v. *Voorhees' Ex'rs,* 3 *C. E. Green* 227. A decree of allowance and confirmation, as well as a decree of distribution, is a proceeding *in rem,* analogous to proceedings in admiralty, and unless removed by appeal, finally determines the rights of all persons, whether they are *sui juris* or under disability, to the property in question. *Exton* v. *Zule,* 1 *McCarter* 501.

This court has concurrent jurisdiction with the Orphans Court in the settlement of the accounts of executors and administrators, and may assume exclusive jurisdiction at any time before decree of allowance and confirmation; but where the settlement is proceeding regularly and properly in that court, and there is nothing in the conduct of the executor or administrator, or in the nature of the estate, or in the questions growing out of its due settlement, making it necessary or proper that this court should take control of it, this court will allow the settlement to proceed in that tribunal. *Salter* v. *Williamson,* 1 *Green's Ch.* 480; *Clarke* v. *Johnson,* 2 *Stockt.* 288; *Frey* v. *Demarest, supra; Van Mater* v. *Sickler,* 1 *Stockt.* 485. The bill presents no fact or reason, even by way of recital, which, at any stage of the administration of this estate, would have rendered it proper to withdraw its settlement from the Orphans Court.

The evidence produced by the complainant seems to have been offered with a view of attempting to establish a single fact, viz., that at the time of the marriage of Mr. Search and Mrs. Search, nearly twenty years ago, she had about $400 in money, which, on the marriage, passed into his possession to be held by him for her use and benefit. A claim of this character, consisting of a single transaction, where it is alleged one person becomes a creditor and another a debtor, cannot be made the foundation of a suit in equity, especially where no discovery is sought. *Story's Eq. Jur.,* § 459. The evidence, however, utterly fails to show even a slight *prima facie* case against the defendants' intestate.

In my judgment, the complainant has no case, either on his bill or in his proofs; the bill must, therefore, be dismissed, with costs. I will so advise.

Meyer *vs.* Bishop.

1. Equity will not give any aid not demanded by strict rules, to a party seeking to set aside a sheriff's sale under an execution issued out of this court, where, since such sale, he has procured a sale of the same premises to be made under a judgment recovered by himself while he was disputing the validity of such prior sale, and without the slightest notice to any of the persons interested, except such as was given by adjournment from week to week for more than a year.

2. A general verbal direction by a sheriff to an assistant in his office to make the sales and adjournments necessary on a given day, confers no authority to make a sale, and a sale made under such direction will be set aside.

3. A sheriff cannot constitute a special deputy to serve even an original writ by a mere verbal command, without delivery of the writ.

4. In the absence of statutory provision, the general rule is that judicial sales shall be made in the presence and under the immediate supervision of the officer designated in the decree commanding the sale. The statute (*Revision* 767,) however, held to be declaratory upon the subject.

5. A special deputy of a sheriff is in no sense a public officer, but merely the private agent or officer of the sheriff, and neither his appointment nor his relation to the sheriff can be presumed from his acts.

6. Where the complainant under foreclosure proceedings is the purchaser of the mortgaged premises, the sale may be set aside on petition; a bill is not necessary.

On petition of Ezekiel M. Patterson to set aside a sale of mortgaged premises made by the sheriff of Middlesex.

Mr. Oscar Keen, for petitioner.

Mr. A. V. Schenck, contra.

The Vice-Chancellor.

The petitioner, who claims to have a lien by virtue of a judgment recovered by him against James Bishop on certain mortgaged premises sold by the sheriff of Middlesex county under a *fieri facias* issued out of this court, seeks to have the sale set aside, and a re-sale made, for three reasons: First,

because it was made in the sheriff's absence, by a person having no authority to make it; second, because it was made on the day first advertised without adjournment, against the petitioner's protest, and contrary to the custom prevailing in that county for many years, whereby he was surprised, and lost an opportunity of bidding more for the property than it was sold for; and third, because the property was sold for a price grossly inadequate.

The proofs in support of the two last reasons entirely fail, in my judgment, to present a case which demands the action of the court. Besides, the conduct of the petitioner since the sale, in procuring a sale to be made under his judgment while he was disputing the validity of the prior sale in this court, and without the slightest notice to any of the persons interested, except such as was given by adjournments from week to week for more than a year, does not make it the duty of the court to give him any aid not demanded by strict rules.

The first reason presents the only question entitled to consideration. It is undisputed that the sale was made in the sheriff's absence, by a person who says he was the sheriff's assistant under a verbal contract to take charge of his office and business affairs, and who made it pursuant to a general verbal direction to make the sales and adjournments necessary on that day.

The important question is, did this general verbal direction confer authority to make the sale? Deputy sheriffs are of two kinds, general and special. A general deputy, or under-sheriff, is a public officer constituted by formal written appointment, executed under hand and seal, which confers upon him power to perform the ordinary duties of the office; while a special deputy is constituted by special appointment, creating him an officer of the sheriff *pro hac vice*, to execute a particular writ. *Allen* v. *Smith*, 7 *Halst.* 159. If the design in this case was to appoint an under-sheriff, and he could only take general charge of the office as such officer, the mode of appointment was absolutely ineffectual. Such an appointment can only be made by writing under the sheriff's hand

and seal; and until the appointee qualifies by oath, and by filing his appointment and oath in the office of the clerk of the Court of Common Pleas of his county, all his acts and proceedings by force of statutory provision are absolutely void. *Nix. Dig.* 893, §§ 37, 38.* At common law, a bailiff of a liberty, with general authority to serve and return writs, could only be appointed by writing under seal, but a servant or special bailiff might be authorized to execute a particular writ, either by delivering it to him with a verbal command, or by warrant in writing. *Kloepping* v. *Stellmacher*, 7 *Vroom* 178; *Sewell on Sheriffs* 103. In the case just cited, Judge Depue, speaking of the mode in which special deputies are constituted in this state to serve original writs, says: "In this state the practice has been to endorse a deputation in writing on the writ. Whether the service of a writ in ordinary cases by special deputy under a verbal authority would be sustained, it is not necessary to decide. The protection of sheriffs from the assumption of third persons to act in their names, as well as the safety of parties from the illegal acts of persons having no official character, would require that the authority of such persons to discharge the official duties of the sheriff should be in writing." In *James* ads. *Cox*, 4 *Halst.* 335, it was held a sheriff could not give a general authority to his attorney to appoint special deputies, and a writ of dower served by a person appointed by the sheriff's attorney, in the sheriff's name, by writing, was quashed. This case declares the sheriff cannot delegate his authority to an attorney to appoint a special deputy, and also that the sheriff's ratification will not give validity to the act of an unauthorized person, for the return to the writ in this case must have been drawn and signed by the sheriff.

The editor of Fisher's Digest, (4 *Fisher's Com. L. Dig.* 7817,) in his summary of the opinion in *Seal* v. *Hudson*, 2 *Bail Court Rep.* 55, and *S. C.*, 4 *Dow & Lowndes* 760, says, merely writing the name of a particular officer on the back of a *fi. fa.* or *ca. sa.* in the place where the direction to levy or

* *Rev., p.* 1107, *secs.* 43, 44.

arrest are written, coupled with a letter by the plaintiff's attorney directing the particular officer to hold possession after levy, is not sufficient to constitute an appointment of a special bailiff. The summary does not show who endorsed the officer's name on the writ, nor who delivered it to him.

In view of these authorities, I think it must be held a sheriff cannot constitute a special deputy to serve even an original writ by a mere verbal command, without delivery of the writ.

The appointment under consideration was not accompanied by the delivery of any process, and does not seem to have been limited to the performance of a specific act in a single case, but to have been designed to operate as a complete transfer of the general powers of the office, for that day at least, for the direction was to make all the sales and adjournments necessary on that day. The appointee was pro tempore to exercise all the powers of the office, and to be as fully invested with the sheriff's prerogatives as though he had been elected, commissioned and sworn. He was to exercise the discretionary power of adjournment conferred by the statute, (*Revision* 753, § 5); to decide the order in which the several sales advertised for that day should be made; also, whose bids should be accepted and whose refused, (*Merwin* v. *Smith*, 1 *Green's Ch.* 197); whether the sales had been properly advertised or not, and also whether the sum bid for any specific piece of property was sufficient to justify a sale, or was so grossly inadequate as to render a sale of it nugatory. (*Cummins* v. *Little*, 1 *C. E. Green* 49.) To permit a sheriff to delegate the large and important discretionary powers with which he is invested in making sale of real estate, by simply uttering a verbal command to any subordinate he may call to his aid, and to allow such subordinate to exercise these powers in the sheriff's absence without even an oath that he will use them faithfully, would manifestly inaugurate a new and dangerous practice, and give countenance to a palpable violation of the obvious purpose of the law. Whatever may have been

the real purpose of the sheriff, his conduct in the instance under examination must, in legal contemplation, be regarded as an attempt to appoint an under-sheriff, in utter defiance of the plain requirements of the statute.

A purchaser of land at sheriff's sale has a right to the best conveyance in point of form, that can be made. By the thirteenth section of the act relative to the sale of lands, (*Revision* 757,) it is made the duty of the sheriff, by oath appended to each deed made by him, to verify the validity of the execution under which the sale was made, so far, at least, as it could be affected by his acts, and to give assurance that the money ordered to be made by it has not been paid; that the time and place of sale were duly advertised, and that the grantee was a *bona fide* purchaser for the best price that could be obtained; and it is also enacted, that a deed executed in such form shall be evidence of a good and valid sale and conveyance. Every purchaser has a right to a deed executed in conformity to this statute. Its obvious design is to give greater security to titles made by virtue of judicial sales, and thus promote the interest of both debtor and creditor. The oath can only be made upon personal knowledge. To permit it to have full effect when made upon hearsay, or the representations of a subordinate having no official character, would defeat one of the main objects of the law. In my opinion, the statute contains a clear legislative declaration that judicial sales of land shall be made in the presence and under the immediate direction of the officer having authority to transfer the title. In the absence of a statutory provision like that just quoted, the general rule is that judicial sales shall be made in the presence and under the immediate supervision of the officer designated in the decree commanding the sale. *Blossom* v. *Railroad Co.*, 3 *Wall.* 205; *Rorer on Jud. Sales*, §§ 88, 89. Chancellor Kent, in *Heyer* v. *Deaves*, 2 *Johns. Ch.* 154, set aside a sale made by an agent of the master appointed to sell, who could not be present at the sale in consequence of sickness, declaring it was the evident purpose of a statute which directed "all sales of mortgaged premises under

a decree should be made by a master," that such sales should be under the direction of a known and responsible officer, and to allow a sale to stand, made in the way that had been, would open the door to a very lax and dangerous practice. It is clear the sale in question was not made by an officer having authority to make it, and it must, therefore, be set aside.

The acts of the sheriff's subordinate derive no strength from the rule that the acts of a public officer *de facto* are to be esteemed valid in respect to the public and the rights of third persons. As under-sheriff, all his acts were absolutely void by the plain letter of the statute, for the want of a valid appointment and an oath. As special deputy, he was in no sense a public officer, but merely the private agent or officer of the sheriff, and neither his appointment nor his relation to the sheriff can be presumed from his acts. *Short* v. *Lee*, 2 *Jac. & W.* 468 ; 1 *Greenl. Ev.*, § 83, *n.* 4. The rule referred to has no application to the acts of such an officer.

The sale may be set aside on petition; a bill is not necessary, the complainant being the purchaser. *Campbell* v. *Gardner*, 3 *Stockt.* 423.*

FERRY and AKIN *vs.* LAIBLE and others.†

1. Where a testator directs his executors to continue his business after his death, and they contract debts in its prosecution, so much and no more of the testator's assets as he has directed to be employed in the continuance of the business after his death, with the accumulations thereon, will stand charged in equity with all debts properly contracted in the prosecution of the business, and a creditor of such fund may look to it in the first instance for the payment of his debt, and before exhausting his remedy against the executors personally.

2. No general rule defining what causes of action may be properly joined, and what cannot, can be laid down. The question is always one of convenience in conducting a suit, and not of principle, and is addressed to the sound discretion of the court.

3. Where it appears that the causes of action or claims are so dissimilar or distinct in their nature that they cannot be heard and determined

* Decree affirmed, 1 *Stew.* 239. † Cited in *Ferry* v. *Laible*, 4 *Stew.* 576.

together, but must be heard piecemeal, first one and then the other, a clear case of misjoinder is presented.

4. But where a complainant has two good causes of action, each furnishing the foundation of a separate suit, one the natural outgrowth of the other or growing out of the same subject matter, where all the defendants have some interest in every question raised on the record, and the suit has a single object, they may be properly joined, and the objection of multifariousness or misjoinder will not be sustained.

On demurrers to bill.

Mr. A. Q. Keasbey, for complainants.

Mr. Wm. H. Morrow, for Johanna Laible.

Mr. Thomas N. McCarter, for Maria A. Laible.

THE VICE-CHANCELLOR.

The bill as originally framed, presented an ordinary foreclosure case. It prayed a decree for the sale of certain mortgaged premises in satisfaction of a mortgage made by Christopher Wiedenmayer and Johanna Laible, to the complainants, for the sum of $65,000. The mortgaged premises were the property of John Laible the first, at the time of his death in August, 1862, and were conveyed by his executors to Wiedenmayer just before the execution of the mortgage in suit. Answers were filed by certain of his children, denying the power of the executors to convey, and also alleging that the conveyance to Wiedenmayer was not made to carry out an actual sale, but was a mere artifice to enable him to execute the mortgage to the complainants. The complainants thereupon amended their bill, substantially alleging that the testator at the time of his death was engaged in the brewery business; that his executors, pursuant to the directions of his will, continued his business after his death; that the debt secured by their mortgage was contracted by the executors in the purchase of necessary brewers' materials used in the business; that the business under the management of the executors was

prosperous, and out of the means furnished by the complainants for carrying it on the executors, without the knowledge of the complainants, paid the testator's debts and erected on the brewery premises a large brick dwelling-house at a cost of nearly $30,000; also, a large new brewery and a cooling-house, and made large additions to the cellars, machinery and fixtures; that in consequence of the large outlays for these purposes the executors were unable to pay the complainants, and although never distinctly so informed, they suppose the conveyance to Wiedenmayer was made with a view of securing their claim, and preventing a sale of the brewery premises under judicial proceedings. They, therefore, insist that whether their mortgage is a valid lien on the mortgaged premises or not, the testator, by directing the continuance of his business after his death, embarked his whole estate in trade, and charged it in equity with all debts properly incurred in its prosecution.

Two demurrers have been filed, one by Maria A. Laible, the widow and sole legatee of the testator's deceased son John, insisting that the amendments contain no equity; and the other by the testator's widow, alleging that the bill as amended is multifarious.

In support of the objection of want of equity, it is said that where a testator directs his executors to continue his business after his death, and they contract debts in its prosecution, the primary remedy of creditors is against the executors personally, and they have no remedy against the assets until the personal remedy is exhausted, unless insolvency is alleged. This view seems to have the support of the judgment of Vice-Chancellor Bacon, in *Owen* v. *Delamere*, 15 *Eq. Cas.* 139, and he cites the judgment of Lord Eldon in *Ex parte Garland*, 10 *Vesey* 120, as his authority. Lord Eldon's opinion, as I read it, gives no support to this view, but so far as he lays down any rule on the subject of the order of liability, declares the fund or property embarked in trade primarily answerable. He says: "Creditors whose debts have been contracted after the death of the testator, have the whole fund that is embarked in

the business; and in addition, they have the personal responsibility of the individual with whom they deal. They have something very like a lien upon the estate embarked in the trade." It is manifestly just that so much of his estate as the testator has embarked in the business, shall be answerable in some form to the creditors of the business. I think this rule may be fairly deduced from the cases, that so much and no more of the testator's assets as he has directed to be employed in the continuance of his business after his death, with the accumulations thereon, shall stand charged in equity with all debts properly contracted in the prosecution of the business. *Ex parte Garland, supra; Ex parte Richardson*, 3 *Madd.* 138; *Thompson* v. *Andrews*, 1 *M. & K.* 116; *Cutbush* v. *Cutbush*, 1 *Beav.* 185; *McNeillie* v. *Acton*, 4 *DeG., M. & G.* 744. There can be no doubt that on payment by an executor out of his own funds of a judgment recovered against him personally, for a debt properly incurred by him in the business, he would be entitled to re-imbursement out of the trust property. It stands pledged, unquestionably, for the ultimate discharge of all debts contracted in its employment according to the will of the testator. Vice-Chancellor Bacon concedes that by directing a continuance of the trade the testator has created a trust estate, which the court will keep separate and apply exclusively to the purposes of the trust. *Owen* v. *Delamere*, *supra*. Why, then, should creditors who must in any event be paid out of the trust property, whether it be regarded as primarily or secondarily liable, be put to this circuity of action, with its delays and useless expense? No reason of policy or convenience was shown for limiting creditors in the first instance to a personal remedy against the executors, and in the absence of a binding authority constraining me to adopt that view, I think the demurrer alleging want of equity should be overruled.

The position of an executor continuing the testator's business pursuant to his will, is a hard one at best. If the business is prosperous, he can derive no benefit from it; if it proves disastrous, he is personally liable for all loss beyond the value

of the assets embarked in the venture. 2 *Williams on Ex'rs* 1526, *marg'l.* His position is one of pure hazard, which he assumes for the benefit of others without the slightest possibility of advantage to himself. Under these circumstances, the court should be slow to listen to an objection made by the beneficiaries of the testator, to the remedy adopted by a creditor, resting solely on the ground that it is not the most oppressive he could have employed.

The other demurrer imputes two faults to the bill as amended: First, that it seeks to prosecute, in the same action, two distinct causes of action; and second, that it brings before the court as defendants, certain persons who have no interest whatever in the controversy, so far as it relates to the question whether the complainants can or cannot charge the general estate of the testator with their debt.

No general rule defining what causes of action may be properly joined and what cannot, can be laid down. The question is always one of convenience in conducting a suit, and not of principle, and is addressed to the sound discretion of the court. *Emans* v. *Emans*, 1 *McCarter* 118; *Campbell* v. *Mackay*, 1 *M. & C.* 618; 1 *Daniell's Ch. Pr.* 334, *note* 2; *Story's Eq. Pl.*, § 284. If it appears that the causes of action or claims are so dissimilar or distinct in their nature that they cannot be heard and determined together, but must be heard piecemeal—first one and then the other—a clear case of fatal misjoinder is presented; but where a complainant has two good causes of action, each furnishing the foundation of a separate suit, one the natural outgrowth of the other, or growing out of the same subject matter, where all the defendants have some interest in every question raised on the record, and the suit has a single object, they may be properly joined, and the objection of multifariousness or misjoinder will not be sustained. *Story's Eq. Pl.*, § 284; *Durling* v. *Hammar*, 5 *C. E. Green* 227; *Campbell* v, *Mackay*, *supra.*

In *Harrison* v. *Stewart*, 3 *C. E. Green* 451, on a bill against husband and wife to foreclose a mortgage, made during coverture by the wife alone and therefore void, a

decree was made for the sale of the land described in the mortgage, on the ground that, though the mortgage was void as a deed, effect must be given to it as a valid charge of her debt on her separate estate. The bill was, doubtless, so framed in its premises and prayer, as to enable the court to give relief on either of the two distinct causes of action contained in it.

Separate causes of action growing out of the same transaction against the same defendants, were joined by order of the court in the same bill, in *Wilson* v. *Brown*, 2 *Beas.* 277.

And in *Armstrong* v. *Ross*, 5 *C. E. Green* 121, on a bill to forclose a mortgage given for the purchase money of land conveyed to a married woman, but void as a deed, because not acknowledged so as to pass her estate, the complainant was permitted, at the hearing, to add to his cause of action on his mortgage, his right to a vendor's lien, the defect of the bill being characterized by the Chancellor as merely formal.

These cases sufficiently illustrate, I think, what causes of action may be properly united in the same suit. They cover precisely the case under consideration. It must be admitted the demurrer ought not to be sustained, if, on final hearing, the court would permit the cause of action now objected to, to be added. Although two separate causes of action are set forth in the bill, its purpose is single, viz., the enforcement of a debt, either as a mortgage debt or as a charge upon the assets embarked in the business. Each of the defendants has some interest in all the questions raised on the record, whether they flow from the one cause of action or the other. They are all interested in the brewery premises, and are, therefore, necessary parties to a suit founded on either cause of action, for these premises constitute a part of the property answerable for the debt, whether it is enforced as a mortgage debt or as a charge in equity. Some of the defendants have no interest in so much of the trade property as consists of personalty, but their interest in the brewery premises, and in those portions of the testator's other lands which, it is alleged, have been greatly increased in value by the improvements made thereon

by the executors out of the earnings of the brewery business, render them necessary parties to a suit founded on either or both causes of action. All the defendants are clearly indispensable parties to a suit founded on either cause of action. Neither of them can say to either claim made by the complainants, what Lord Cottenham says in Campbell *v.* Mackay, a defendant must be able to say to uphold a demurrer for multifariousness, that "he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever."

Neither objection is well taken. Both demurrers must be overruled, with costs.

CROWELL *vs.* CURRIER.*

1. The principle that if one person makes a promise to another for the benefit of a third party, that third person may maintain an action on it, applies to simple contracts, not to contracts under seal.

2. In ordinary cases a mortgagee does not, by force of a contract of assumption of the mortgage, acquire a right of action against a purchaser of the mortgaged premises, but the benefit flowing to him from the contract is limited to a right to be subrogated to the rights of his debtor. He stands in his debtor's rights, and may appropriate to the satisfaction of his mortgage any security held by his debtor for its payment; he can, therefore, only have a personal judgment against the purchaser for his debt, when the mortgagor holds an obligation which will support such judgment.

3. Where parties have made a contract which will, either directly or indirectly, benefit a mere stranger, they may at their pleasure abandon it and mutually release each other from its performance, regardless of his interest, unless the parties, with knowledge that he is relying on the contract, suffer him to put himself in a position from which he cannot retreat without loss in case the contract is not performed; then he may ask to have the contract performed, so far as it touches his interests.

4. A holder of a mortgage is not entitled to a decree for deficiency against a purchaser of the mortgaged premises by virtue of his contract of assumption of the mortgage, where, before the mortgage fell due, the purchaser re-conveyed to the mortgagor, who, by his deed, assumed the

* Cited in *Wise* v. *Fuller*, 2 *Stew.* 261, 266.

mortgage; the holder of the mortgage having become the owner of it before the covenant of assumption, without reliance upon it as part of his security, and his conduct not appearing to have been in the slightest degree influenced by it.

Final hearing on bill, answer, and proofs.

Mr. Oscar Keen and *Mr. E. B. Crowell,* (of New York,) for complainant.

Mr. E. Q. Keasbey, for Hospital of St. Barnabas.

THE VICE-CHANCELLOR.

The controversy in this case is confined to a single question: Is the Hospital of St. Barnabas liable for deficiency, in case certain mortgaged premises are not sold for a sum sufficient to satisfy the mortgage in suit? The mortgage was made by John A. Currier to William D. Voorhees and Jarvis M. Andrews, March 13th, 1872, to secure the payment of $5000 March 13th, 1874, with interest payable semi-annually. The complainant obtained it by assignment, March 4th, 1873. On the 1st day of April, 1873, the mortgaged premises were conveyed by Currier to the Hospital of St. Barnabas subject to the complainant's mortgage, which they, by the deed, assumed to pay. On the 21st day of October, 1873, and before the mortgage fell due, the hospital re-conveyed the premises to Currier subject to the mortgage, which he, by the deed to him, assumed to pay. Suit was brought November 15th, 1875.

The fairness of the re-conveyance to Currier is not questioned.

It must be conceded, Currier had no right of action, legal or equitable, against the hospital when the suit was brought. By his covenant in the conveyance, he became the principal debtor again, the mortgage debt became his obligation exclusively, and the covenant of the hospital, so far as it gave him any right, was abrogated. I think it must also be conceded

that unless the covenant of the hospital invested the complainant with a right of action which, the instant it accrued, passed beyond the control of the contracting parties, and ceased to be dependent on the validity of the contract as between them, the complainant is in no better plight in this suit than Currier would be. In other words, if his right to relief is purely derivative and to be wrought out through rights and obligations resting in his debtor, he stands in the shoes of his debtor, and, in the absence of fraud, can take nothing his debtor could not take.

The right of a mortgagee to hold the purchaser of the equity of redemption for deficiency, who assumed the payment of his mortgage by covenant to the mortgagor, does not rest on the theory of a contract between the purchaser and mortgagee upon which an action at law may be maintained, but stands exclusively, according to an almost unbroken line of adjudications, on the ground that the covenant of the purchaser is a collateral security obtained by the mortgagor, which, by equitable subrogation, enures to the benefit of the mortgagee. *Klapworth* v. *Dressler*, 2 *Beas.* 62; *Jarman* v. *Wiswall*, 9 *C. E. Green* 269; *Garnsey* v. *Rogers*, 47 *N. Y.* 237; *King* v. *Whitely*, 10 *Paige* 467; *Curtis* v. *Tyler*, 9 *Paige* 434; *Blyer* v. *Monholland*, 2 *Sandf. Ch.* 480; *Trotter* v. *Hughes*, 12 *N. Y.* 74. The remedy of the mortgagee is purely equitable. He has no remedy at law. This point was expressly ruled in Klapworth *v.* Dressler. *Burr* v. *Beers*, 24 *N. Y.* 178, declares a different rule. It was there held a mortgagee may maintain an action at law, before foreclosure, on the covenant made to the mortgagor by the purchaser of the equity of redemption to pay his mortgage. In the language of Denio, J., the judgment of the court was put distinctly "upon the broad principle, that if one person makes a promise to another for the benefit of a third person, that third person may maintain an action on it." This principle, in its application to simple contracts, has given rise to a great contrariety of judicial opinion. So far as it applies to simple contracts, it must be

regarded as settled in this state for the present. *Joslin* v. *N. J. Car Spring Co.*, 7 *Vroom* 146. But it has never been understood to apply to contracts under seal, and Burr *v.* Beers is, so far as I know, the first attempt in that direction. The rule that an action at law for breach of a contract under seal can only be brought in the name of a party to the instrument, and that a third person who is not a party to it cannot sue on it, though it appears to have been made expressly for his advantage, is so ancient and has been so generally adhered to, that it must be regarded as axiomatic and beyond the power of the courts to alter or destroy. 1 *Chitty on Con.* (11 *Am. ed.*) 77; *Johnson* v. *Foster*, 12 *Metc.* 167; *Mellen's Adm'x* v. *Whipple*, 1 *Gray* 317; *Millard* v. *Baldwin*, 3 *Gray* 486. The legal nature of contracts of assumption, when expressed in deeds, is no longer open to dispute in this state. They have been declared to be valid covenants, for breach of which an action of covenant may be maintained. *Finley* v. *Simpson*, 2 *Zab.* 311. So completely is the assumption of the purchaser regarded as a contract with the grantor alone, that unless the grantor is personally liable for the mortgage debt, the promise of the purchaser is held to be a *nudum pactum*, and of course, without efficacy in favor of either the grantor or mortgagee. *King* v. *Whitely*, 10 *Paige* 465; *Trotter* v. *Hughes*, 12 *N. Y.* 74.

It would seem to be clear then, that in ordinary cases the mortgagee does not by force of the contract acquire a right of action against the purchaser, but the benefit flowing to him from the contract is limited to a right to be subrogated to the rights of his debtor. He stands in his debtor's rights, and may appropriate to the satisfaction of his mortgage any security held by his debtor for its payment; he can, therefore, only have a personal judgment against the purchaser for his debt, when the mortgagor holds an obligation which will support such judgment. His right is simply the right of substitution, permitting a new creditor to take the place of an old one, and allowing the new to succeed to the rights of the old.

The adoption of the other view would lead to the establishment of this anomalous and unjust principle, that a person shall have a right of action on a contract to which he is not a party but a stranger, which was not made for his benefit, for which he gave no consideration, and which never influenced his conduct in the slightest degree.

In this case, the complainant was entitled to the right of subrogation, to be put in the place of his debtor, and invested with the rights his debtor held at the time the action was brought. The fact that the complainant held the unexercised risk to ask, by suit, to be subrogated to the rights of the mortgagor under the contract, did not put it out of the power of the contracting parties to abrogate the contract. Where parties have made a contract which will, either directly or incidentally, benefit a mere stranger, they may at their pleasure abandon it, and mutually release each other from its performance, regardless of his interests, unless the parties, with knowledge that he is relying on the contract, suffer him to put himself in a position from which he cannot retreat without loss in case the contract is not performed; then he may ask to have the contract performed so far as it touches his interests, not, however, in virtue of any right he acquired by force of it, but on the new and independent equity springing from their conduct and his action induced by it. 2 *Spence's Eq. Jur.* 280, 281; *Addison on Con.* (7 *ed.*) 25; *Hill* v. *Gomme*, 1 *Beav.* 540; *S. C.*, 5 *Myl. & Cr.* 250; *Colyear* v. *Mulgrave*, 2 *Keen* 81; *Jeffreys* v. *Jeffreys*, 1 *Cr. & Ph.* 141. Even where a debtor conveys his property to a trustee to pay his debts, his creditors not being parties to the transfer, and not having directed or assented to it, nor changed their position in consequence of it, they have no right to ask for its enforcement. *Bill* v. *Cureton*, 2 *Myl. & K.* 503; *Garrard* v. *Lauderdale*, 3 *Sim.* 14; *Colyear* v. *Mulgrave*, 2 *Keen* 94, *n* 1. The reasoning on which these cases proceed is, that the transfer having been made solely with a view to the benefit of the debtor without the knowledge of his creditors and without prejudice to their rights, they ought not to be permitted to assume the

character of *cestuis que trust* if they please, and defeat an arrangement to which they are not parties and which does not interfere with their rights.

The complainant became the owner of the mortgage before the covenant of the hospital was made; he did not purchase relying upon it as part of his security, nor does it appear that his conduct since has been, in the slightest degree, influenced by it. Standing, then, simply in the rights of his debtor, with no equity except that flowing through his debtor, and his debtor being stripped by his own act of all shadow of claim, I think it is clear the complainant is not entitled to a decree for deficiency against the corporate defendant.*

African Methodist Episcopal Church *vs.* Conover.

1. There must be a person, either natural or artificial, *in esse*, to receive a conveyance of an immediate estate in land.

2. An unincorporated association or community is not competent to purchase or to take title to land by deed. Capacity to take title must exist before a valid conveyance can be made.

3. Where a purchase is made by several persons representing a voluntary association of christians, for the common benefit of all the persons composing the association, and the purchase money is paid and possession of the land given, equity raises a promise by the vendor to make a title, either to the persons making the payment, or to the corporation if one be created.

4. In such case the vendor, as to the title, becomes a trustee for the purchasers; and they being the mere agents of the voluntary association, the moment the association is incorporated it has a right to a conveyance from the vendor.

5. Where, after a purchase of lands by a voluntary association, and after the registry of their deed but before the incorporation of the association, a judgment is recovered against the vendor, any rights acquired under the judgment and levy are subject to the trust in favor of the association, and the judgment creditor will be perpetually enjoined from accepting a deed, or attempting to sell by virtue of his judgment.

6. Ordinarily, an injunction cannot be granted under a prayer for general relief; it must be the subject of a special prayer. But the bill may be so amended.

---

* Decree affirmed, *post* p. 650.

In September, 1867, Johnson Van Cleef, George Locker and William Patterson, representing a voluntary association of christians, purchased and paid for an acre of land, at Pine Brook, Atlantic township, Monmouth county, with a view of erecting thereon a house of worship. Possession was taken of the land at once, and a church edifice, costing between $400 and $500, erected thereon. On the 27th of September, 1867, a deed was made by the vendor, Lucius W. Fish, to the African M. E. Church of Atlantic township, which was recorded December 3d, 1867. More than six years after the registry of the deed, the defendant recovered a judgment in the Monmouth County Common Pleas, against the grantor, Fish, and by virtue of an *alias fi. fa.* issued on it December 23d, 1874, the land was seized and sold by the sheriff to the defendant, May 28th, 1875. It does not appear the sale has been carried into effect by the delivery of a deed. The complainants were incorporated May 19th, 1875. The corporation represents the voluntary association for whose benefit the land was purchased. The bill was filed June 11th, 1875, to set aside the sheriff's sale, and to have it declared that the title to the land is in the complainants, and for general relief. The cause was heard upon bill, answer and proofs.

Mr. James Steen, for complainants.

Mr. Robert Allen, Jr., for defendant.

THE VICE-CHANCELLOR

There must be a person, either natural or articial, *in esse*, to receive a conveyance of an immediate estate in land. An unincorporated association or community is not competent to purchase, or to take title to land by deed. Capacity to take title must exist before a valid conveyance can be made. 2 *Washb. on Real Property* 566, ¶ 32; *Robie* v. *Sedgwick*, 35 *Barb. Sup. Ct.* 328; 2 *Sugden on Vend.* 883, *marg'l; Jackson* v. *Cory*, 8 *Johns.* 387; *Hornbeck* v. *Westbrook*, 9 *Johns.* 74; *Com. Dig., Capacity, B.* 1.

It is clear the court cannot declare that the complainants hold the legal title to the land in controversy, but it does not follow they must be turned away without relief.

The defendant stands in the rights of the grantor of these lands. He has no new or independent equity. The lands had been paid for, under a contract of purchase, more than six years before he recovered judgment; for all that time they were in the possession of a voluntary association of persons, now represented by the corporation, and were used for purposes which gave notice to the world they were not held in individual proprietorship, or for purposes of gain or business. It requires no argument to show that the lowest notions of justice would not tolerate a claim by the vendor to the possession of these lands, against those whose money he had received in payment for them. The defendant's position is not a whit stronger.

There can be no doubt there was a contract of sale. The purchase money was paid and possession given. It was not a contract with the corporation, for it did not exist, but there were natural persons. The negotiation was with them, or with one or more of them representing the others, and their money paid for the lands. When the purchase money was paid and possession given, equity raised a promise by the vendor to make a title, either to the person making the payment or to the corporation when created. The purchase was made for the common benefit of all the persons composing the voluntary association, and when they were transformed by due form of law from a mere voluntary assembly into a body corporate, the corporation, as to these lands, took the place of the individual members, and, although the vendor had already made a deed to the corporate name, if he had been requested to execute another at the expense of the corporation, and refused, equity would have compelled him to do so, because such act on his part was necessary to give legal effect to the intention of the parties. Contracts made by the promoters of a projected corporation, before incorporation, on behalf of themselves and others engaged in the same enterprise, have

been repeatedly enforced, specifically, in England against the corporation. *Fry on Spec. Perf.* 61, *marg'l; Edwards* v. *Grand Junction Railway Co.*, 1 *Myl. & Cr.* 650; *Greenhalgh* v. *Manchester and Birmingham Railway Co*, 3 *Myl. & Cr.* 792. Where the owner of land dedicated a lot to the use of a voluntary association of christians known as Lutherans, and they entered into possession of it, on a bill filed by certain persons describing themselves as trustees and agents of the association, against the heir-at-law of the donor, to restrain him from disputing their title and disturbing their possession, it was held the complainants could maintain the action in the character they set up, and a perpetual injunction was decreed. *Beatty* v. *Kurtz*, 2 *Pet.* 578. Judge Story, in speaking of their right to sue, says: "The only difficulty is, whether the plaintiffs have shown in themselves a sufficient authority, since it is not evidenced by any formal vote or writing. If it were necessary to decide the case on this point we should incline to think that, under all the circumstances, it might be fairly presumed. But it is not necessary to decide the case on this point, because we think it one of those cases in which certain persons belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having a like interest, as part of the same society, for purposes common to all, and beneficial to all." In the same case, the doctrine laid down in the *Town of Pawlet* v. *Clarke*, 9 *Cranch* 331, that in case of an appropriation or dedication of land to religious uses, the existence of a competent grantee was not necessary, but they would be supported on the ground that a trust was created, was expressly affirmed.

Upon well-established principles then, I think it is entirely clear that on the payment of the purchase money and the transfer of the possession of these lands, Fish, as to the title, became a trustee for the persons who made the contract of purchase and paid the purchase money. He held the legal title in trust for them. The purchasers were the mere agents of the voluntary association, and when the association became a legal entity capable of acquiring land, it succeeded to the

rights held by the individual members for the common benefit of all the members of the association. The moment the association had life and capacity, it had a right to a conveyance from Fish.

It is a familiar rule, that if a person purchase land knowing that another has a prior contract for its conveyance to him, the second purchaser stands, in equity, in no stronger position than the original owner, and if he takes title, the first purchaser may compel him to convey to him. *Story's Eq. Jur.*, §§ 788, 789; *Champion* v. *Brown*, 6 *Johns. Ch.* 398; *Haughwout* v. *Murphy*, 7 *C. E. Green* 546.

The possession of these lands by the association, the registry of the deed, and the presence of the church edifice on them, put the question of notice in this case out of the field of debate.

I therefore hold, at the time the defendant recovered his judgment, Fish held these lands in trust for the members of the association, and that when the complainants acquired corporate functions they succeeded to the rights of the individual members of the associaton in these lands, and that any rights the defendant acquired by his judgment and levy were subject to the trust in favor of the association.

The remaining question is, what relief must be given? It is a duty peculiar to courts of equity, to protect the beneficiaries of a trust, as well against the misconduct of the trustee as the claims of his creditors. Where the legal title to land is held by the husband for the benefit of his wife upon a trust not expressed in writing, and the land is liable to seizure and sale under a judgment against the husband, equity will enjoin the judgment creditor from making sale of the land. *Lathrop* v. *Gilbert*, 2 *Stockt.* 345. The bill in this case does not ask for an injunction. Under its present frame, it may be questioned whether an injunction can properly issue. Ordinarily, an injunction cannot be granted under a prayer for general relief, but must be the subject of a special prayer. 1 *Hoffman's Ch. Pr.* 77; 1 *Daniell's Ch. Pr.* 388. But this omission is a formal matter, and cannot be permitted to defeat justice. *Del. and Rar. Canal Co.* v. *Rar. and Del. Bay R. R.*

Co., 1 *C. E. Green* 379. The bill must be amended so as to embrace a prayer for a perpetual injunction, restraining the defendant from receiving or accepting a deed for these lands, also from attempting to sell them by virtue of his judgment, and from doing any act which will disturb the possession of the complainants.

When the bill is thus amended a perpetual injunction will be decreed against the defendant, with costs.

Romaine *vs.* Hendrickson's Executors.

1. A sale by a trustee to himself of trust property, is always voidable at the option of the *cestui que trust.*

2. A trustee who has taken a conveyance of lands of his testator from a purchaser thereof at a sale, in the notice of which such trustee joined with his co-trustees, and declared with them by the conditions of sale the terms upon which it must be made (thereby accepting the trust), cannot relieve himself from liability to his *cestui que trust* for the profits which he made on a re-sale of those lands, on the ground that he did not take out letters testamentary under testator's will.

This case was heard on bill, answers, and oral proofs.

Mr. William H. Vredenburgh, for complainants

Mr. J. E. Laning and *Mr. Robert Allen, Jr.*, for defendants.

The Vice-Chancellor.

The bill in this case has two objects: First, to invalidate the title made by the executors of Garret S. Hendrickson, deceased, to one of their number to a part of the testator's real estate, and, in the second place, to compel the defendants to account for the profits realized on a re-sale to innocent pur-

chasers, of certain other parts of the testator's real estate sold by the executors to themselves.

The testator appointed his widow, Hannah Hendrickson, and his two sons, Samuel W. and William H., to execute his will. The widow and Samuel qualified as executors; William did not. At the time of his father's death he was a minor, under seventeen years of age. He has never renounced his right to join in executing the will. Notice of the sale of the land at public auction was given in his name as executor, as well as in the names of the other two executors, and his name was affixed to the conditions of sale, with his knowledge, by the same person who wrote the names of the other executors thereto.

It is admitted that all the real estate of which the testator died seized, was purchased by Samuel T. Hendrickson at the joint request of the widow and Samuel. The fact that Mrs. Hendrickson joined in the request is clearly admitted in her answer to the interrogatories annexed to the bill. She says: "I first spoke to Samuel T. Hendrickson about bidding on the day of sale; I requested him to bid the farm up to $40,000, and he said he would; afterwards, I requested him to continue bidding after he had run it up to $40,000; I did request him to buy the farm and woodland." It is also admitted that, prior to the sale, it had been agreed between Samuel and William they would buy their father's real estate together, unless it was bid up to a sum beyond what they thought it was fairly worth; that, on title being made to Samuel T. Hendrickson, he immediately conveyed part of the lands to Samuel, and the residue to William, for the same consideration he had agreed to pay, and that they have since re-sold all, except about twenty-three acres still held by Samuel, at an advance of nearly $14,000.

The legatee whose rights are now held by the complainants was under nineteen years of age, and a *feme covert*, at the time title was made by the executors. She died about two years after attaining twenty-one.

It was not disputed that the title to that part of the land still held by Samuel must be nullified, and that he must account for the gains made by him on the parts he has conveyed away. The dispute in the case was limited to the question whether or not William was bound to account for the profit he had made. It was insisted he was not liable, because he had never formally accepted the trust by taking letters testamentary. It was not necessary. As to the land, his power was derived from the will. By joining in the notice of sale, and in declaring with the other executors, by the conditions of sale, the terms upon which the purchase must be made, he accepted the trust and placed himself in a position where it was his duty to subordinate his interests to those in whose behalf he assumed to act. He cannot be permitted to join in appointing a time and place of sale, and in deciding what notice shall be given of it and the terms on which it shall be made, and then deny his authority to participate in the sale in order to escape the consequences of his acts prejudicial to those for whom he assumed to act. He exercised the powers of a trustee over the property of the legatees, and must take the responsibility incident to the power. But if it were conceded he was not a trustee, and did not participate in the sale as a vendor, I cannot see how it would help him. The purchase was made at the instance of the two persons whose authority to act as trustees is not denied. They both swear, in answer to the interrogatories annexed to the bill, that the purchase was made by their direction. The rule invalidating a sale by a trustee to himself of trust property is a rule of public policy founded upon the highest considerations of safety. It cannot be violated in any case without putting it in the power of the *cestui que trust* to avoid the sale. *Staats* v. *Bergen*, 2 *C. E. Green* 558. One of its most obvious purposes is to prevent the trustee from using his knowledge of the character and value of the property, and of the wants, necessities, and situation of the *cestui que trust*, and his power over the estate, to the prejudice of the *cestui que trust*. He is bound to exert

his best skill and sagacity, and to sell to the best advantage. So jealous is the law of the interest of the *cestui que trust*, that it will not tolerate the slightest antagonism on the part of the trustee. The object of the rule is to prevent the trustee from using his information and power to the prejudice of the *cestui que trust;* whether they are used for the benefit of the trustee or some other person against the *cestui que trust*, the consequences are the same to him, and, in either case, justice requires the *cestui que trust* shall have the right to avoid the sale. *Davoue* v. *Fanning*, 2 *Johns. Ch.* 254; *Ex parte Bennett*, 10 *Ves.* 381. In the case last cited, Lord Eldon says: "Then if the principle be that the solicitor cannot buy for his own benefit, I agree, where he buys for another, the temptation to act wrong is less; yet, if he could not use the information for his own benefit, it is too delicate to hold that the temptation to misuse that information for another person is so much weaker that he should be at liberty to bid for another; and so he might bid for his son, his relation, or his employer. That distinction is too thin to form a safe rule of justice." The sale in controversy violated every consideration of safety and justice upon which the rule of policy invoked by the complainants is founded, and must, therefore, be held to have been voidable. In my judgment, William H. Hendrickson is bound to account for the gain made by him on the re-sale of that part of the land purchased by the executors for him.*

* Decree affirmed, 1 *Stew.* 275.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY.

MAY TERM, 1876.

THE LONGWOOD VALLEY RAILROAD COMPANY *vs.* BAKER and others.

1. Where a railroad company would be entitled to protection in laying a track over lands condemned under their charter, from an overflow of water, their licensees to lay a track over the same lands are entitled to the same protection.

2. An injunction to restrain a defendant from raising the water from his mill-pond above a certain height, is not mandatory; but if it were strictly mandatory, that would not constitute a valid objection to it.

3. There is no general rule against granting relief by mandatory injunction, interlocutorily, where the damage has been completed before the filing of the bill; and there is no difference between the case of injury to easements and injury to other rights.

4. Equity will not interfere by mandatory injunction, unless extreme or very serious damage, at least, will ensue from withholding that relief; and each case must depend on its own circumstances.

On motion (on order to show cause) for attachment for contempt for violation of injunction, and counter motion to dissolve the injunction.

Mr. H. C. Pitney, for complainants.

Mr. C. Parker and *Mr. E. D. Halsey*, for the defendants, Henry and William Baker.

THE CHANCELLOR.

The complainants are a corporation under a special act of the legislature of this state. Their contemplated railroad, as located, will cross that of the Morris and Essex Railroad Company, now, and for some years past, in possession of the Delaware, Lackawanna and Western Railroad Company as lessees thereof, at the place where the last-mentioned railroad crosses the Rockaway river, near Baker's mills, which are now owned by the defendants Henry and William Baker. That railroad crosses the river there on a viaduct, and the companies just mentioned, owners and lessees thereof, have given license to the complainants to lay their tracks across the river under the viaduct, the complainants agreeing to build a new superstructure for the viaduct, to enable them to pass under it with their locomotive engines, which, with the present superstructure, would not be practicable. The land on which the complainants had leave to lay their track in crossing the river, was taken by condemnation by the Morris and Essex Railroad Company, in or about 1853, under their charter, from the father of William and Henry Baker, who was then the owner thereof. The charter (*Pamph. Laws of* 1835, *p.* 28,) provides that, on condemnation, the company shall, upon payment of the value of the land and damages, with costs if any, be deemed to be seized and possessed of the land in fee simple. The complainants having located their road over adjoining land of William and Henry Baker, proceeded to the condemnation thereof. They included in their application the land covered by the river at the crossing. William and Henry Baker are the owners of a grist-mill below the crossing, and having, on the 4th of March last, received notice of the application for the appointment of commissioners in the proceedings for condemnation, they raised the dam of their pond there

about fifteen inches. The complainants subsequently, on the 23d of the same month, proceeded under their license to lay down their track across the river. Henry Baker then came to the ground and forbade the complainant's workmen to lay the track, and threatened to tear it up. His commands and threats being disregarded, he shut the gates of the dam of his grist-mill pond and opened the gates of a forge-pond, belonging to him and his brother William, above that place, and let down a great quantity of water into the river where the track was being laid, and so raised the water there about two feet, and entirely flooded the track, thus making it impracticable for the complainant's workmen further to proceed with the laying thereof. The bill was then filed and an injunction granted upon it, restraining the Messrs. Baker from interfering with the track under the viaduct, and from damming or penning back the waters of the river at and above their grist-mill pond in such manner as to cause the water to rise any higher, at and under the viaduct, than it was accustomed to rise at and previous to the 4th of March, 1876, the date of the service on them of the notice of the application for the appointment of commissioners in the proceedings for condemnation. They appear, from the affidavits which were used on the motion for an attachment against them for contempt for violation of the injunction, not to have reduced the height of the water in their grist-mill pond to the height at which it was on the day mentioned in the injunction, and which, from the evidence, was the height at which it had been accustomed to be for seven years before that time. It appears from the affidavits on the part of the complainants, that the height at which the water was accustomed to be at the viaduct during those seven years, was not above the plinth of the pier of that structure. On the 10th of April last, several days after the injunction was served, the water stood nineteen inches above the plinth. There was nothing unusual to cause this except the height of the water in the grist-mill pond, occasioned by the height of the dam. That the water in that pond might have been reduced to the level of the top of the plinth, there

is no room to doubt. The top of the tumbling dam was lower than the top of the plinth from October, 1875, at least, until the month of March in this year, when the addition complained of was made. Nor would it have occasioned damage to the mill-owners to have kept the water down to the height of the top of the plinth. They had made no addition to their machinery in view of the increased power they had provided by raising the dam; nor was there any alteration of the machinery in view of it. The fact seems to be that they are not disposed to yield the point that the top of the plinth is high water mark, but insist that it is rather the mark of average low water. I do not deem it important to discuss the testimony on that point here, although I have given it a very careful consideration. It is enough to say that the case leads to the conclusion that the raising of the dam and letting down the water were both done at the particular time when they were done, to embarrass the complainants in constructing their road under the viaduct. While the witnesses on the part of the complainants testify to observation for years past, as to the height of the water—observation all the more to be relied on because it was in connection with the feasibility of safely laying the track under the viaduct—it appears, by evidence adduced by the Messrs. Baker, that in October, 1875, and from thence until the raising of the dam in March following, the height of the dam was less than that of the top of the plinth, and though it is said that at the former date the dam was lowered, it appears to have been lowered not more than four inches. It is said, it should be remarked, that the intention to raise it higher in the spring was then declared.

On the evidence laid before me in the affidavits, I am not satisfied that the accustomed height of the water was not as sworn to by the complainant's witnesses. Under the circumstances I deem it my duty to preserve the *status quo* until the hearing, and, to that end, will modify the injunction so as to restrain the Messrs. Baker from keeping the water at a height greater than the top of the plinth. All intention of violating

the mandate of the court is disclaimed, and the complainants desire that this motion for an attachment should result in the authoritative and explicit declaration of the court as to the duty of the Messrs. Baker, rather than in punishment for contempt. The order to show cause will be discharged, without costs.

As to the motion to dissolve the injunction: The land on which the complainants were laying their track was acquired by the Morris and Essex Railroad Company, according to the terms of their charter, in fee simple. Whether that estate should be regarded as subject to condition limiting its duration to the time during which the property may be occupied by the company for the purpose for which the power to condemn was granted, it is not necessary to determine. They, by their lessees, were in possession of the land under their title at the time of giving the license, and have ever since continued to be in possession. It is not alleged that their title has ceased. The complainants could not lawfully take possession of the land for their track, without the consent of the Morris and Essex Railroad Company and their lessees, or on condemnation as against them. With that consent they might lawfully do so. If, notwithstanding the fee simple title acquired by the Morris and Essex Railroad Company, and the right of exclusive possession possessed by them and their lessees, the Messrs. Baker have rights in the premises in view of the new servitude to be imposed on the land covered by the river at the crossing, they will obtain compensation for them in the proceedings in condemnation, and in the estimate and appraisement thereunder. They will lose no claim to damages, nor any right by reason of the pendency of this suit or the injunction therein. As the Morris and Essex Railroad Company would be entitled to protection in laying their track where their licensees, the complainants, propose to lay theirs, so, and to that extent, the latter are entitled to protection.

The Messrs. Baker object also, that the injunction is mandatory, and that inasmuch as the addition had been made to the dam when the bill was filed, such an injunction is con-

trary to the established practice of the court. The objection cannot be sustained. The injunction is against causing the water to rise any higher than it was accustomed to rise on the day designated. The injury was a continuing injury from day to day. The mill-owners were not required to reduce their dam, but to refrain from raising the water beyond a certain height. Besides, if the injunction were regarded as strictly mandatory, that would not constitute a valid objection to it. There is no general rule against granting such relief interlocutorily, where the damage has been completed before the filing of the bill; and there is no difference between the case of injury to easements and injury to other rights. The court will not, however, interfere by mandatory injunction, unless extreme or very serious damage, at least, will ensue from withholding that relief; and each case must depend on its own circumstances. *Durell* v. *Pritchard*, *L. R.*, 1 *Ch.* 244, 250; *North of England Junc. R. Co.* v. *Clarence R. Co.*, 1 *Coll.* 507; *Westminster Brymbo Coal and Coke Co.* v. *Clayton*, 36 *L. J.*, *Ch.* 476; *Kerr on Injunctions* 230, 231.

JEWETT, Receiver of the Erie Railway Company, *vs.* BOWMAN AND DRINGER.

1. It is a violation of an injunction restraining a defendant from disposing of property, to deliver the property, though sold previously to the service of the injunction.

2. Where, on a bill for discovery and account, and general relief against an agent of the complainant and a third party, charging collusion between them, and an attempt fraudulently to obtain property of an estate held in trust by the complainant, (an officer of the court, acting under its control and direction,) an injunction was issued against the third party, restraining him from disposing of the property sold to him by the agent, a motion to dissolve the injunction made on such third party's answer was denied, on the ground (among others) that the co-defendant, the agent, had not answered.

Bill for relief. Motion for attachment against Dringer for contempt for violation of injunction, and motion for a receiver, and motion on Dringer's behalf to dissolve the injunction. On bill and affidavits and petition of complainant, and affidavits and Dringer's answer.

Mr. Cortlandt Parker, for complainant.

Mr. S. Tuttle, for Dringer.

THE CHANCELLOR.

The bill is filed by Hugh J. Jewett, receiver appointed by this court for the creditors and stockholders of the Erie Railway Company, against Henry Bowman, late purchasing agent of the complainant, and Sigmund Dringer, for discovery and account and general relief. It prays an injunction to restrain Dringer from disposing of any materials of the Erie Railway Company received by him, and for the return thereof to the complainant, or that they may be applied on the amount which, on the accounting, may be found due from him to the complainant. The bill states that Bowman, being the purchasing agent of the complainant, in violation of his instructions and in fraud upon the trust, and in collusion with Dringer, caused to be delivered to the latter as upon sale to him, very large amounts of valuable waste and other materials of the railway company; and the object of the suit is the protection and indemnity of the trust estate to which the goods in question belonged. On the filing of the bill, an injunction was issued according to the prayer and served on Dringer. Subsequently, the complainant filed his petition alleging that Dringer had violated the injunction, and praying an attachment against him for contempt, and the appointment of a receiver. On filing the petition, an order to show cause why the prayer of the petition should not be granted, was made. Dringer has answered, and moves to dissolve the injunction. Bowman has not answered.

The circumstances under which Dringer obtained the goods in question, are, as they appear by the affidavits, such as to lead to the conclusion that the goods were obtained by fraudulent collusion between him and Bowman, and other employees of the complainant. The large number of tons of old car wheels, for which, under the regulations, he bid in July, 1875, $22 a ton, were not delivered to him, because the complainant was not satisfied as to his pecuniary responsibility. The terms were fifteen per cent. in cash at the time of the award, and the rest in cash on delivery. They were, however, delivered to him immediately aferwards by Bowman, at $19 a ton, making a difference of $5100 in the amount realized by the complainant on the sale; the amount sold and delivered being seventeen hundred tons. Dringer says the difference in price was due to the greater stringency in the terms, the latter sale being, as he says, for cash on delivery. According to one of the affidavits, the only one which speaks on the subject, Bowman gave another reason for the difference, the fall in the market price of iron. The transactions by which Dringer became possessed of the property in question in this suit, as they are disclosed by the affidavits, not only show disregard of the regulations of the complainant, made for the protection of the property committed to his charge, in the sales to Dringer, but they show, also, knowledge on his part of the existence of the regulations, and that he knew that his purchases were made in violation thereof. They further show collusion between him and Bowman, and other employees of the complainant, fraudulently to obtain the property of the trust estate. It is unnecessary to particularize. It will be sufficient to refer to the steel in bars abstracted at his request from the racks in the shop, and loaded in the cars among, and in loading placed underneath, scrap metal of comparatively small value, and not accounted for, except at the price of the latter material; (of this steel, about one hundred and forty bars, all, except three or four from ten to twelve feet in length, are sworn to); the belting of the value of over $1100, received by him according to the affidavits, but which he denies that he received;

the fire-wood taken from the company's wood piles at the shops, and placed in such a manner on cars loaded with material for him as to conceal the character of the material; and the shears, the presses, and the stove made for him at the shops, and the oil received by him from the same place, without account therefor. It is a notable circumstance that the shears and presses were not sent to him directly, but were sent in boxes directed to an employee of the complainant at Paterson, in Dringer's care. Dringer has violated the injunction. He admits that after it was served on him he sent away large amounts of the material received from the Erie shops, but alleges that it had been sold by him previously to the service of the injunction. His counsel states that it was by his advice that Dringer sent the goods away, he not regarding the delivery of the goods, if sold previously to the service of the injunction, as a violation of the injunction. The injunction restrained Dringer from disposing of any of the materials received from the Erie shops. The excuse is insufficient. Moreover, it is a noteworthy circumstance in this connection, that though the material sent away after the service of the injunction was, as Dringer alleges, sent to dealers in Philadelphia, it was directed to those persons at Jersey City, where, as far as appears, they neither did business nor resided, and no explanation is offered. The rule to show cause will be made absolute, and a receiver of the property will be appointed.

In addition to the foregoing considerations there is still another, inducing me to appoint a receiver. The motion to dissolve the injunction will be denied. If there were no other reason, the fact that the answer of Bowman is not in would, under the circumstances, be sufficient ground for refusing to dissolve the injunction. The transactions between Bowman and Dringer are of such a character, that especially in view of the developments above referred to, I should not be willing to dissolve the injunction, at least until after Bowman shall have answered, and, inasmuch as the injunction is to stand, the interests of all parties require that a receiver

should be appointed. I am the more ready to take this course, because the propertyhis part of a trust estate which the complainant is managing under the control and direction of this court, and the conduct of Dringer in regard to it is at least open to the gravest suspicion, and, on the affidavits, it appears to have been absolutely fraudulent A very large indebtedness has been contracted by him through the agent of the complainant, with the full knowledge on Dringer's part that the sales from which the indebtedness arose were made to him, if not surreptitiously, yet in violation of the regulations of the complainant, made for the protection of the trust estate, in reference to the subjects of the sales. Dringer, in these purchases, was aware that he was dealing with an agent who was transcending his authority and violating his obligations. The character of these dealings is evidenced by the fact, that though Dringer's bid was rejected because the complainant was not satisfied as to his pecuniary responsibility, and Bowman was directed to re-advertise for bids upon the property, the latter disregarded his instructions, and sold the property to Dringer without re-advertisement, and without authority, and without reporting the sale, for a less price than Dringer had bid. It is manifested, also, by the further circumstance that, notwithstanding the fact that the complainant was unwilling to give credit to Dringer, Bowman sold property to him on credit without authority from the complainant, until at the filing of the bill Dringer was found to be indebted to the trust estate for goods of which the complainant had an account, to the amount of $25,233.11, which sum was swelled by subsequent discoveries of deliveries of goods to him, of which the complainant had no account, and of which no account had been given to him, to the sum of $38,655.31, which increased amount of indebtedness Dringer acknowledges

THE ATTORNEY GENERAL ex rel. The Board of Riparian Commissioners *vs.* THE HUDSON TUNNEL RAILROAD COMPANY.

1. The state has the reversion in fee in any lands leased by the Board of Riparian Commissioners, lying under the waters of the bay of New York adjacent to the city of Jersey City, between the original line of high water and the line fixed for the exterior line for piers in the Hudson river.

2. It holds the fee simple absolute in lands under water between such exterior line of piers and the state line.

3. The act of March 21st, 1874, extending the time for the completion by the Hudson Tunnel Railroad Company of their proposed tunnel, did not confer upon that company, organized under the general railroad law, the right to construct their tunnel in the land of the state under the waters of the Hudson, without first obtaining consent of the Board of Riparian Commissioners.

4. The Hudson Tunnel Railroad Company were permitted to proceed to condemnation as against the lessees of lands lying under the waters of the Hudson, leased to the Morris and Essex Railroad by the Board of Riparian Commissioners, but enjoined from taking possession of those lands, or the land between the exterior line of piers and the state line, until consent of the state should have been obtained.

On motion to dissolve injunction, on the information and the affidavits annexed.

The information is filed by the Attorney General, at the relation of the Board of Riparian Commissioners, for an injunction against the Hudson Tunnel Railroad Company, to restrain them from "possessing, entering upon, going or being upon the land of the state mentioned in the information, or any part thereof, for the purpose of making their tunnel on or in that land, and from doing any work or act in or on that land for or towards making the tunnel, or any part thereof, and from condemning the land or any part of it, and from doing any act or thing against any person or corporation whatsoever, in, about or towards, or for the purpose of condemning that land or any part thereof." The land referred

to is described in the information as being bounded on the north by the line between the cities of Hoboken and Jersey City; on the south by Twelfth street in Jersey City; on the west by the original line of high water mark, and on the east by the boundary line between the States of New York and New Jersey, in the middle of the Hudson river.

The information states that the tract was heretofore, at high tide, all under water; that in recent years divers tenants of the state have filled in a portion of the land and reclaimed it, while the larger part of it is still at all times under the tidal waters of the Hudson river; that the riparian commissioners were appointed pursuant to the act entitled "an act to ascertain the rights of the state and of riparian owners in the land lying under the waters of the bay of New York and elsewhere in this state," approved April 11th, 1864, and the several supplements thereto; that the third section of the supplement of March 31st, 1869, to that act, provides that, without the grant or permission of the commissioners, no person or corporation shall fill in or build upon, or make any erection on, or reclaim any of the land under the tide waters of this state in New York bay, Hudson river or Kill von Kull, and that any person or corporation so offending, shall be guilty of a purpresture, which shall be abated at the cost and expense of such person or corporation on application of the Attorney-General, under decree of the Court of Chancery or by indictment in the county in which the same may be, or opposite to and adjoining which the purpresture may be; that by the twelfth section of the same supplement, it is further provided that the commissioners may commence proceedings in the name of the State of New Jersey by ejectment or otherwise, against persons and corporations trespassing upon or occupying the lands of the state under water, or which were theretofore under water, and the Attorney-General is thereby required to commence and prosecute such actions as may be instituted or directed by the commissioners; that on or about the 28th day of April, 1875, the said commissioners let and demised to the Morris and

Essex Railroad Company, for certain yearly rents reserved to be paid by them to the state, a part of the land above described, extending from the middle of Fifteenth street in Jersey City on the south, to and north of Twentieth street on the north, and from the original line of high water on the west, out into the Hudson river to the line fixed in the river by the commissioners for the exterior line of piers; but the lease was upon the express condition that if it should happen that the yearly rent should at any time be in arrear for sixty days next after the same should become due, it should be lawful for the state without demand for the rent, to enter the demised premises, not only to distrain, but to re-enter them, and to have, possess and enjoy them.

The information further states, that on or about the 22d day of December, 1871, the commissioners, by lease of that date, for certain yearly rents reserved to the state, let and demised to the Jersey Shore Improvement Company another portion of the land, extending from the middle of Fifteenth street on the north, to Twelfth street on the south, and from the original line of high water on the west, into the Hudson river to the exterior line for piers, upon the like condition as the first-mentioned lease. So that the state still has in the lands so demised to those companies, an annual rent issuing out of the lands and a reversion therein.

The information further states, that in or about the month of November, 1874, the Hudson Tunnel Railroad Company, claiming to have been incorporated under the general railroad law, filed in the office of the secretary of state a map and plan of the tunnel for railroad purposes, which they proposed to construct from a point in Fifteenth street in Jersey City, westerly of the original line of high water; thence under the surface of the land and under the water of the Hudson river, across the river into the city of New York; the route of the proposed tunnel from Provost street in Jersey City being beneath the surface of the land in the middle of Fifteenth street easterly, to, or near to, the exterior line of solid filling, and then with a bend or curve to the north

of about five degrees, to extend across the river. The tunnel is to be twenty-six feet wide and twenty-four feet high, inside measurement, and from a point about fifty feet easterly of Provost street to the middle of the river, a distance of over a mile, it is located and intended to be built and used in the land of this state. That in or about November, 1874, the tunnel company, on the route of the tunnel in the land of this state about one hundred feet westerly of Hudson street, sank a working-shaft about thirty feet in diameter and thirty or forty feet deep, and lined and supported the sides of it with a brick wall, which shaft still remains open; that while the shaft was being sunk, the further prosecution of the work was stopped by injunction from this court, issued against the tunnel company at the joint suit of the Morris and Essex Railroad Company and the Delaware, Lackawanna and Western Railroad Company, until on or about the 17th of April, 1876, and that on that day the tunnel company made application in writing to the Honorable David A. Depue one of the Justices of the Supreme Court of this state, to appoint a time and place to hear their application for the appointment of commissioners to appraise the value of a certain portion of the above-described land of the state proposed to be taken for the tunnel, and to assess the damages and compensation to the owner or persons interested in that land; that in the application the tunnel company allege that the owner of the land proposed to be taken by them under the application is the Morris and Essex Railroad Company, and that the Delaware, Lackawanna and Western Railroad Company are lessees of the same land; that the application does not in any way make the state or the riparian commissioners, or any officer of the state, party to the condemnation proceedings; that the land proposed to be condemned in those proceedings is on the route for the tunnel above described, and extends from the easterly line of Provost street along the middle of Fifteenth street, below the surface of the ground, to a point one hundred and eighty feet westerly from the bulk-head line of the Hudson river as surveyed; thence curving to the left, with a radius eleven hun-

dred and forty-six and twenty one hundredths feet, a distance of one hundred feet, and thence on a course of five degrees northerly from the course of Fifteenth street, a distance of ten hundred and eighty feet, more or less, to the exterior line for piers; that the justice appointed the 28th day of April, 1876, to hear the application, and that there was no reason to doubt that if the application were then made, he would then appoint commissioners accordingly.

The information further states that similar condemnation proceedings as against the Jersey Shore Improvement Company at the suit of the tunnel company, to condemn a portion of the lands of the state leased to the improvement company, are pending before the said justice, and that commissioners therein were to be appointed by him on the 28th of April, 1876; that the avowed purpose and intent of the tunnel company are to obtain awards in the proceedings for condemnation as soon as possible, and at once to tender the amounts awarded, and then forthwith to take possession of the land and construct the tunnel therein to the state line; that the tunnel, when constructed, and during the course of its construction, will be a purpresture and a nuisance in the lands of the state, will impair their value, and endanger and diminish the revenue of the state from them; that neither the improvement company nor the railroad companies, who are the only tenants of the state occupying any part of the lands, have authorized or pretended to authorize the tunnel company to enter on any part of the land, or to locate or construct the tunnel therein, or consented to its location or construction there, but that all of them have constantly opposed the location or construction of the work; but the Attorney-General insists that if all of them had consented, or were to consent, such consent would not authorize or justify the construction of the tunnel in the lands of the state.

The information further states that the tunnel company have no power, right or authority to construct or use the tunnel in the lands of the state; that the Board of Riparian Commissioners has not at any time consented that the company may take

or use any of the above-described lands of the state, and that it has not, nor have any of its members, at any time bargained, sold, leased, granted or conveyed any of that land to the tunnel company, and that neither the riparian commissioners nor the board can hereafter lease, sell or in any manner convey any of that land to the tunnel company, without violating and impairing the obligations of the contracts between the state and its tenants, contained in the leases for the land; and that the tunnel company having no right, power or authority, to take, use or occupy any of the land of the state by condemnation, should not be permitted to institute or prosecute any proceedings of condemnation against any person or corporation whatever in respect to the land, as such proceedings must necessarily prejudice and complicate the rights of the state in and to the land, and cloud and injure its title thereto.

On the filing of the information, an injunction was issued pursuant to the prayer. The cause was heard upon the motion to dissolve the injunction.

Mr. B. Williamson and *Mr. H. S. White*, for motion.

Mr. Vanatta, Attorney-General, *contra*.

THE CHANCELLOR.

The defendants move to dissolve the injunction, on the ground of want of equity in the information. Part of the land in respect of which the aid of the court is sought, is held by the Delaware, Lackawanna and Western Railroad Company, under the lease from the riparian commissioners to the Morris and Essex Railroad Company; another part is held by the Jersey Shore Improvement Company, under like lease. Both leases are perpetual. The state has the reversion in fee in those parts, and holds the rest (so much as is between the exterior line of piers and the state line) in fee simple absolute. It appears by the affidavit of the president of the Delaware, Lackawanna and Western Railroad Company, and the president of the Jersey Shore Improvement Company, attached to the information, that neither of the above-mentioned compa-

nies has consented to the defendants taking any part of the premises held by them respectively under lease. It appears, also, by the affidavit of the chairman of the Board of Riparian Commissioners, that that board has never made any grant, conveyance, or lease, or granted any license whatsoever to the defendants to construct their tunnel, or to do any act on or in the land described in the information, and that the information is filed at the request of the board. That the defendants have no right to construct their tunnel in the land of the state without first obtaining consent of the Board of Riparian Commissioners, unless such right was conferred upon them by the act of March 21st, 1874, (*Pamph. L.*, 1874, *p.* 1167,) by which the time for completing the first mile of their tunnel, and for completing the entire tunnel and railroad, is extended, is almost too obvious for remark. The general railroad law, under which the tunnel company was formed, provides (§ 37)* that corporations formed under that act shall not take any land under water belonging to the state, until the consent of the riparian commissioners shall first be had and obtained, and those commissioners are thereby authorized to convey the land on such compensation as they themselves may fix. The act further provides that no corporation organized under that act shall be authorized to take by condemnation any lands belonging to the state. It is clear, then, that unless the right to occupy the land belonging to the state was, as the defendants' counsel contends that it was, granted by implication by the act of March 21st, 1874, the defendants have no right to occupy them. That act recognizes the defendants as a corporation under the laws of this state, and extends the time for the completion of their work as above stated, and it does no more. It was argued on the part of the defendants, that because that act was passed subsequently to the general railroad law, and recognizes the defendants as a corporation under the laws of this state and gives them time for the completion of their work, the legislature may be presumed to have thereby given the consent of the state to their occupation of so much of the

* *Rev.*, *p.* 934, *sec.* 124.

land of the state as the defendants proposed (as the legislature must have known) to occupy. It will be enough on this point to refer to the decision of the Court of Errors in *Stevens* v. *Paterson and Newark R. R. Co.*, 5 *Vroom* 532, 553, in which it was held that a statute giving a railroad company the right to lay their road along a river and to acquire the rights of the shore owners, will not be construed to give by implication the right to take the land of the state lying below high water line. Said the court: "The state is never presumed to have parted with any part of its property, in the absence of conclusive proof of an intention so to do." There is no evidence of an intention to grant the land of the state to the defendants, in the act of March 21st, 1874. On the case made by the information, the defendants have no right to occupy any part of the lands of the state. Nor can they obtain any by condemnation. The Attorney-General insists that they can obtain none from the riparian commissioners; for, according to the information, they are prohibited by existing covenants made between them and their lessees from giving such consent. The state is entitled to protection against the threatened injury to the reversion. That injury consists in taking possession of part of the property for and adapting it to permanent and exclusive occupation as part of a great work. The ground on which the injunction on this point rests is, that the defendants intend, as their president states, when they shall have made condemnation as against the lessees, to proceed at once with the construction of their tunnel.

But it is urged on behalf of the defendants, that the injunction should be dissolved, at least so far as it restrains them from proceeding to condemn the rights of the lessees in the premises. It is insisted that the state should not be permitted to interfere with the proceedings against its lessees. Were the proceedings against strangers, there would be no ground for nor propriety in the interference. But it is urged on the other hand, that the proceedings being against the lessees of the state in respect to the land in which the state has a rever-

sion in fee, which may be affected if not by, yet by means of or through the proceedings in condemnation, and it appearing by the information that the proceedings must necessarily, in view of the covenant made by the state with the lessees referred to in the information, be fruitless, this court should, in the interest of all parties, stop the proceedings against the lessees. This is undoubtedly true if the alleged impossibility exists. If it be assumed that the lessees will not consent to the granting by the riparian commissioners to the defendants of the right of way in the land under water beyond the exterior line of piers, still this court cannot assume that the right of way cannot be obtained. The covenant may not be found to present an insuperable barrier to the defendants' work. It appears to be a covenant based on the provision in that behalf, contained in the fourth section of the supplement to the act "to ascertain the rights of the state and of riparian owners in the lands lying under the waters of the bay of New York and elsewhere in this state," (*Pamph. Laws*, 1869, *p.* 1017,) and to be to the effect that the state will not make or give any grant or license, power or authority affecting lands under water in front of the lands leased to the above-mentioned lessees. And here important considerations in this controversy present themselves. Is this covenant to be held to absolutely deprive the state of all power of disposition over the land in question? Will it not be construed to prohibit only such grants, licenses, powers and authority as will interfere with the full and complete enjoyment of the leased premises, and as is reasonably to be presumed to have been in the contemplation of the parties to the covenant? Will the grant of right of way to the defendants far down below the bottom of the river in any wise interfere with the enjoyment of the leased premises? Besides these considerations, there is, also, the query suggested in the opinion of the Court of Errors in *State* v. *Hudson Tunnel Railroad Co.*, decided at the November Term, 1875, 9 *Vroom* 548, whether the lessees may not be deprived by condemnation of the benefit of the covenant, so far as may be necessary for the grant of the right of way to

the defendants. I cannot assume that the defendants will not be able to acquire the right of way. There is even no ground for assuming that the riparian commissioners, if they find themselves free to do so, will not grant it.

The injunction should be modified so as to permit the defendants to proceed to condemn, as against the lessees. Otherwise, it will stand for the protection of the rights of the state. The defendants have declared their intention to proceed immediately with their work, after the conclusion of the proceedings for condemnation against the lessees. They not having acquired the right to do so as against the state, the rights of the latter should be protected.*

SCOTT *vs.* SHINER.†

1. Two agreements made with different parties, giving them the refusal of the purchase of certain lands, held together to constitute a binding obligation on the defendant to convey to the complainant the lands in question in fee simple for the price therein specified, if the offer were duly accepted within the time limited. The offer held to have been accepted by the complainant's making tender and offering a deed for execution within the limited time.

2. To constitute a misrepresentation which will prevent a decree for specific performance, the statement in question must be so material to the contract built on it, that, if the statement be false, the contract becomes one which it would be unconscionable for the party who has made the statement to enforce. The misrepresentation must be shown to have operated to the prejudice of the defendant.

Bill for specific performance. On final hearing on pleadings and proofs.

Mr. C. Ewan Merritt, for complainant.

Mr. C. T. Reed, for defendant.

---

* Order reversed in part, *post* p. 573. † Cited in *Binns* v. *Mount*, 1 *Stew.* 26.

THE CHANCELLOR.

The bill is filed to enforce specific performance of an agreement in writing made and signed by the defendant, and delivered to the complainant on the 14th of March, 1874, giving to the latter the refusal of the purchase of the defendant's land adjacent to the National Cemetery at Beverly in this state, until the 1st of July then next, at the price of $3250.

This agreement was the extension of another written agreement made previously on the 3d of January in the same year and signed by the defendant, in favor of Wesley Markwood, by which the refusal of the purchase of the property was given to the latter at the same price, until the 1st of April, 1874. The agreement of the 14th of March was made with the complainant, with Markwood's consent. In March, 1874, after the making of the last-mentioned agreement, the complainant wrote to the defendant from Washington, D. C., stating that he would be prepared to take the property according to the agreement, and at or about the same time he wrote to Markwood to the same effect, requesting him to communicate the contents of the letter to the defendant. Markwood received this letter. The defendant denies that he received the one addressed to him.

Two days after the making of the agreement with the complainant, the defendant sent to him at his request a diagram, with a description in writing of the property referred to in the agreement. In June, 1874, the complainant called on the defendant, and informed him that he had come to obtain the particulars for the deed to be executed to him for the property, with a view to taking the property in pursuance of the agreement. The defendant thereupon told him that he had sold the property to other persons, but did not mention their names. On the 30th of June, 1874, the complainant, with his lawyer, called on the defendant, and, saying that he had come to take the property, tendered him $3250, the purchase money, and a deed to be executed by the defendant and his wife to the complainant, conveying the premises to the latter in fee simple, and requested him to take the money and sign

the deed. The defendant refused to do either. He denies having seen any deed on that occasion, but his workman, who was present and who was sworn in his behalf, testifies that he saw a paper in the hands of the lawyer, and heard the complainant say he had come to get the defendant to sign that deed.

On the 3d of July, 1874, the complainant filed his bill in this cause. The defendant, by his answer, denies the validity of the instruments of writing above mentioned, given to Markwood and the complainant respectively, and that any obligation to convey the property arose from them, and that the complainant gave him notice of his acceptance of the offer contained in the paper of March 14th. He denies the tender, also, and alleges that the instrument last mentioned, the instrument of March 14th, was made by him through misrepresentation on the part of the complainant; the alleged misrepresentation consisting in the statement which he says was made by the complainant to him at the time of signing that paper, that the complainant was the authorized agent of the United States government to purchase the land in question for cemetery purposes, which he says he subsequently ascertained to be entirely false.

The instruments of writing by which the refusal to purchase the land was given first to Markwood and then to the complainant, together constituted a binding obligation on the defendant to sell and convey the property in question in fee simple to the complainant for the price therein specified, if the offer were duly accepted within the time therein limited. *Hawralty* v. *Warren*, 3 *C. E. Green* 124; *Haughwout* v. *Boisaubin*, *Id.* 315; *Potts* v. *Whitehead*, 5 *C. E. Green* 55. And that offer was so accepted on the 30th day of June, 1874, when the tender and request for a deed were made. That the deed contained covenants which the defendant could not have been compelled to give, is of no consequence; his refusal was not based on objection to the contents of the deed. He simply refused to convey. He had, in the former interview with the complainant in June, alleged, as the complainant says in one

part of his testimony, that he had sold the land to other persons. The complainant says in another part of his testimony, that on that occasion the defendant told him that since he had made the agreement with the complainant he had made a conditional agreement with some other parties, and desired the complainant to see them. He further says, testifying generally, that before the tender of the money and the deed the defendant declined to carry out the agreement. From the testimony in the cause it appears to be very probable that the defendant had not, in fact, made any sale of the premises when he refused to carry out the agreement with the complainant. He told the latter that the agreement he had made with other parties was conditional, and requested him to see them on the subject. It was probably conditional upon his being able to escape from liability to the complainant. He admits in his testimony that he had not, in fact, sold the property at that time. His language is, "I told him I had sold it; I *considered* I had sold it to the United States government for cemetery purposes, as I had intended by the agreement with Mr. Markwood; I subsequently understood that Mr. Scott had nothing to do with the United States government, as he had represented himself to have; I then carried out my agreement as I first understood it, and sold to the United States government." The evidence shows that if the sale was made as he stated, no conveyance has been made, and that the sale was for only part of the property at the price of $2850, and that that sale awaits the event of this suit. Indeed, the practical question involved in this action is said to be who shall sell the property to the United States government—the committee appointed by the town of Beverly to negotiate the sale of this property to the government, or the complainant?

That committee are the persons with whom the conditional agreement referred to by the defendant in his conversation with the complainant in June previously to the tender, was made. The evidence is, that as late as December, 1874, the defendant had not sold the property; for two witnesses,

entirely unimpeached and uncontradicted, testify that in that month he offered to sell the property to one of them and give him an opportunity to gain something by selling it again.

Nor is the charge of misrepresentation sustained. Neither of the instruments by which the refusal was given, directly or indirectly refers to a sale to or for the United States government, nor to the use to be made of the property.

Mr. Inman testifies that in a conversation which took place, as he says, in February, 1874, (he is probably mistaken as to the month,) the defendant told him he had given a refusal to the complainant, and that he had also talked to the committee, and that he did not "feel like selling" to the complainant, inasmuch as there was another party negotiating for the property. The complainant swears that he did not represent himself to be an officer of the United States government, nor to be acting in any way for it. There appears to be no reason why he should have made any such representation. It does not seem to have been in any wise necessary or essential to his success in obtaining the refusal of the property. The proof of the alleged misrepresentation is not satisfactory. But if it were, it is not material. It does not appear that the defendant would not have sold the property to any one except the United States government, and for the purposes of a cemetery, or that he agreed to give the refusal to the complainant at a lower price than he would otherwise have done by reason of the fact that he supposed that the property was to be sold to the Federal authorities for the purposes just mentioned. In December, 1874, he offered, as before stated, to sell the property to Mr. Inman on the latter's own account, to give him an opportunity to make money by selling it. To constitute a misrepresentation which will prevent a decree for specific performance, the statement in question must be so material to the contract built on it, that, if the statement be false, the contract becomes one which it would be unconscionable for the party who has made the statement to enforce. In other words, the misrepresentation must be shown to have operated to the prejudice of the defendant. *Fry on Spec.*

Perf. 203; *Fellowes* v. *Lord Gwydye*, 1 *Sim.* 63; *S. C.*, 1 *R. & My.* 83. On the hearing, it was alleged on the part of the defendant that his wife is unwilling to execute with him a deed for the property to the complainant. The answer, however, does not allege, nor does it appear in the testimony, although she was examined as a witness, that she is unwilling to execute a deed to the complainant with her husband, if the latter be directed by this court to make conveyance as prayed by the bill. The defendant will be decreed specifically to perform his agreement, and therefore to convey the property to the complainant by deed, (but of bargain and sale merely, without covenants,) duly executed and acknowledged by himself and his wife.

POLHEMUS *vs.* EMPSON.*

1. A voluntary partition between tenants in common, in all respects fair, equal and just, upheld, and a lien upon the lands held in common under a judgment against one of the co-tenants, held to have been transferred to the lands conveyed in the partition to the judgment debtor.

2. If a judgment debtor has committed waste of premises held by him and another person as tenants in common thereof, a purchaser at the sale of his interest in the property under execution on the judgment must, in equity, accept the position of the debtor in respect to the partition; for partition in equity will be made on equitable terms and principles.

Bill for relief. On final hearing on pleadings and proofs.

Mr. C. E. Merritt and *Mr. James Wilson*, for complainant.

Mr. I. W. Carmichael and *Mr. Joel Parker*, for defendant.

THE CHANCELLOR.

On the 1st day of May, 1852, the widow and heirs-at-law of Nicholas Waln, deceased, conveyed to Emanuel Hodson

---

* See *Polhemus* v. *Empson*, 3 *Stew.* 405.

and Job Polhemus, the complainant, in fee simple, for the consideration of $586.83, a tract of woodland in Ocean county, containing eighteen and ninety-three hundredths acres, or thereabouts. The deed was not recorded until the 19th of November, 1863. On the 21st of August, 1865, Hodson and Polhemus made a voluntary partition of the property between them, by deeds of that date. The deed to the former was recorded on the 28th of November, 1867, and the deed to the latter on the 25th of April, 1866. The partition seems to have been in every respect equal and just. Each received, in severalty, an equal portion of the land; each deed conveying ten acres and twelve-hundredths of an acre. There is no reason to doubt that the partition was in all respects fair. Indeed, its fairness and equality are not disputed or called in question. Each entered into possession of his several part immediately after and pursuant to the partition. The complainant has enjoyed his accordingly ever since, and Hodson, for aught that appears, has had possession of his also up to the present time. He had such possession, at all events, up to the time of the sheriff's sale hereinafter mentioned. On the 21st of September, 1867, Hodson mortgaged his part to William W. Bullock, to secure the payment of $500 and interest, and subsequently, on the 6th of November, 1869, he sold the timber on it to certain persons residing in Trenton, for $1000. They cut off the timber and removed it. With part of the money received for it he paid off the Bullock mortgage.

On the 27th of March, 1861, the defendant, Ephraim P. Empson, recovered a judgment in the Court of Common Pleas of Ocean county against him for $1200 debt, (the real debt was $600,) besides costs. No execution was issued on this judgment until the 8th of August, 1871, when a writ of *fieri facias de bonis et terris* was issued, under which the sheriff sold and conveyed to Empson the interest of Hodson in the whole premises conveyed as above mentioned by the widow and heirs of Nicholas Waln, deceased, to Hodson and Polhemus.

Subsequently, Empson took proceedings under the act "for the more easy partition of lands held by coparceners, joint tenants and tenants in common," for the partition of the premises between him and the complainant. The complainant filed the bill in this suit to restrain him from proceeding therein, and an injunction was granted and issued accordingly.

The ground of the application for the injunction was that the defendant was bound by the partition by deed made between Hodson and Polhemus; and further, that at the time of the sale by Hodson of the timber on the premises set off to him in severalty, the defendant was present attending the sale and made no objection thereto, but permitted Hodson to sell the timber and to take the proceeds of the sale for his own use. It appears that the defendant was present on the premises at the time at which the sale was advertised to take place, and he says in his answer that he attended for the purpose of protecting his interest under his judgment.

The sale, however, was not made at public auction, as Hodson had intended it should be, but was made in private to some of the persons who attended with a view to purchasing.

The principal question in this cause, and the one on which its decision must depend, is, whether Empson is bound by the voluntary partition made between Hodson and Polhemus.

Between the time when that partition was made (August 21st, 1865,) and the time of issuing execution on the judgment (August 8th, 1871,) nearly six years elapsed, and, in the meantime, the mortgage to Bullock was made, and the whole of the timber on the part assigned to and held by Hodson in severalty, was cut off. The timber constituted nearly the entire value of the property, so that when the defendant issued execution on his judgment, Hodson had realized in money almost the entire value of his part of the property, while Polhemus had possessed his part wholly, or at least comparatively, intact.

Empson insists that as his judgment was a lien upon the undivided interest of Hodson in the whole tract, the lien was unaffected by the partition, because it was merely voluntary, and that, as to him, the partition is a nullity. Had it taken place by virtue of the decree of a court having jurisdiction, the lien of the judgment would, by force of the statute, (*Nix. Dig.* 669, § 14,)* have been transferred to the share assigned to Hodson in severalty, and Polhemus would have held his share in severalty, free from the lien of the judgment. Hodson could have been compelled to submit to such partition. The defendant would not have been a proper party to the proceedings. *Low* v. *Holmes*, 2 *C. E. Green* 148. The partition, if made through judicial proceedings, would have bound the defendant. That method would have secured to him no advantage, however, which was not secured to him by the voluntary partition. If it be said that he would have had the assurance, because the partition was made through judicial proceedings, that it was just and equal, it may be implied that he does not question the justice and equality of that which has been made; and further, it appears, as already mentioned, to have been, in fact, in all respects fair. There is every reason why the court should favor and uphold voluntary partitions where they appear to have been just. If fraudulent or unfair, those who may be affected by the fraud or unfairness may, on due application, be relieved against it. This court would relieve such a one against a fraudulent partition made through the instrumentality of legal proceedings.

I see no good reason why a judgment creditor should not be bound by a fair and just voluntary partition, as well as by a partition made by virtue of legal proceedings. The fact that the parties to the partition may be compelled to partition by legal proceedings, is a suffieient ground for upholding such a voluntary partition as would have been made at law. "If an infant," says Lord Mansfield, in *Zouch* v. *Parsons*, *Burr.* 1794, 1801, "does a right act which he ought to do, which

* *Rev.*, *p.* 804, *sec.* 36.

he was compellable to do, it shall bind him, as if he makes equal partition." The question now under consideration has been passed upon in numerous cases, in respect to the effect of a voluntary partition, either on dower, mortgages or attachments in or upon interests in land, and it has been determined in those cases that the estate in dower or the lien of the mortgage or attachment is transferred to the land set off to the husband, mortgagor or debtor in severalty, and the rest of the land freed therefrom. *Lloyd* v. *Conover*, 1 *Dutcher* 47; *Jackson* v. *Price*, 10 *Johns.* 414, 417; *Potter* v. *Wheeler*, 13 *Mass.* 504; *Crosby* v. *Allyn*, 5 *Greenl.* 453; *Totten* v. *Stuyvesant*, 3 *Edw.* 500, 503; *Matthews* v. *Matthews*, 1 *Edw.* 565. In *Bavington* v. *Clarke*, 2 *Penrose & Watts* 124, the subject was considered with reference to the lien of a judgment; and it was held that the judgment creditor was bound by the partition. In *Manley* v. *Pettee*, 38 *Ill.* 128, where the subject is referred to, the inclination of the court was in favor of the doctrine.

But there are other considerations bearing on the determination of the question in this cause.

The defendant having acquired the interest of Hodson by purchase at sheriff's sale, is indeed entitled, under his purchase, to the estate which Hodson had in the land at the time of the recovery of his judgment, or at any time afterward; but he took it and holds it subject to the equities in favor of the complainant which had attached to the property in Hodson's hands when the sheriff's sale took place. *Osterman* v. *Baldwin*, 6 *Wall.* 116. Had there been no voluntary partition, and were Hodson the applicant for partition under the "act for the more easy partition of lands held by coparceners, joint tenants and tenants in common," this court would, under the circumstances, in view of the waste committed by him on part of the premises, stay his proceedings at law, in order that equity might be done between him and the complainant in the partition, and, to that end, the wasted part would be set off to his share. If the judgment debtor has committed waste of premises held by him and another person as tenants in common thereof, the purchaser at the sale of his interest in

the property under execution on a judgment against him, must, in equity, accept his position in respect to the partition; for partition in equity will be made on equitable terms and principles. *Brookfield* v. *Williams*, 1 *Green's Ch.* 341; *Doughaday* v. *Crowell*, 3 *Stockt.* 201; *Obert* v. *Obert*, 1 *Halst. Ch.* 397; *Hall* v. *Pidcock*, 6 *C. E. Green* 814; *Davidson* v. *Thompson*, 7 *C. E. Green* 83; *Barrell* v. *Barrell*, 10 *C. E. Green* 173.

Where partition is sought in the Prerogative Court or the Orphans Court, timber cut off, or waste or destruction committed by any owner after the death of the testator or intestate, and before the division, is to be charged to the account of the share of the person by whom the timber has been cut off, or the waste committed. *Nix. Dig.* 669 § 13.* And so, on the other hand, if the judgment debtor had put improvements on part of the property, in the value of which improvements it would not be equitable that his co-tenant should participate, the purchaser under the sheriff's sale would have the benefit of the improvements awarded to him in the partition.

The fact that the defendant in this case asserted no claim under his judgment against the premises until six years after the time when the partition was made and Hodson had sold off all the timber from the land assigned to him in severalty, although the parties all lived in the county in which the land lies, is, under the circumstances of the case, sufficient ground for the injunction prayed against him. The bill prays that the partition may be confirmed. It will be so decreed, and that the sheriff's deed conveyed to Empson the part, and only the part, of the premises which, by the partition, had been assigned in severalty to Hodson, and the injunction will be made perpetual. The complainant is entitled to costs.†

* *Rev., p.* 799, *sec.* 15. † Decree reversed, 1 *Stew.* 439.

BAILEY and others *vs.* THE CITIZENS GAS LIGHT COMPANY and others.

1. While negotiations were pending between two gas companies for their consolidation upon a certain basis of indebtedness, one of the companies passed a resolution, without the knowledge of the other, declaring a scrip dividend of ten per cent. on the amount of their capital stock, with interest, payable at the option of the company, thus increasing their indebtedness to that amount. Certificates of indebtedness were issued in accordance with the resolution. Consolidation was effected between the companies without any knowledge of the other company as to such resolution and such increased indebtedness. Upon bill filed for that purpose, the scrip was declared void, and the company issuing it was restrained from recognizing the scrip as a valid obligation, and from permitting its transfer.

2. Such certificates should have put the purchaser thereof upon inquiry, and they are not, therefore, within the rule applicable to negotiable paper Though purchased without knowledge of its character on the part of the purchaser, and without inquiry, they were ordered to be delivered up to be canceled.

3. In view of the delay in seeking relief against such scrip, and of the possible hardship, the parties who had received interest on the scrip being numerous, and most of them having no knowledge of any wrong in the creation of the scrip, and having received the interest as their just due, no account of the interest was ordered.

Bill for relief. On final hearing on pleadings and proofs.

Mr. W. S. Whitehead, for complainants.

Mr. Joseph Coult, for the company.

Mr. W. H. Francis, for M. L. Smith.

THE CHANCELLOR.

The facts of this case may be briefly stated. Between The Citizens Gas Light Company, a corporation located at Newark, and existing under a special charter of this state, and The Orange Gas Light Company, a corporation located at Orange,

in this state, and existing under a like charter, negotiations were commenced in the latter part of the year 1870, looking to their consolidation. They resulted in an arrangement, made in May, 1871, for the purchase by the former company of the stock of the latter, at a valuation of $131,000, to be paid for in the stock of the Citizens company to the same amount, the Orange company agreeing to purchase, at par, $25,000 of the stock of the Citizens company, to enable the latter to defray the expense of making the connection between their mains in Newark and those of the Orange company. In the negotiations which resulted in this arrangement, the committee of the board of directors of the Citizens company, by whom the negotiations were conducted, represented to the like committee of the Orange company, that the indebtedness of the former company was only a convertible bond debt of $150,000. Pending the negotiations, and after the making of this representation, the board of directors of the Citizens company, without the knowledge of the committee of the Orange company, or of their principals, passed a resolution, by which they declared a scrip dividend of ten per cent. on the amount of their capital stock, with interest from the 1st day of April, 1871, payable at the option of the company. The fact of the creation of this additional indebtedness of the company (for such it was, in effect,) was not only not communicated to the Orange company, but, on the other hand, was concealed from them, and the negotiations were concluded and an arrangement made as above stated, which was carried out in good faith on the part of the Orange company, in entire ignorance of the resolution in question, or of the dividend, or of the existence of any debt beyond the $150,000 stated in the representations above mentioned to be the entire indebtedness of the company, on the faith of which representations the Orange company relied.

The scrip dividend so declared, amounted to the sum of $51,225. The Citizens' company had, before the commencement of the negotiations, issued capital stock to the full amount authorized by their original act of incorporation.

They were, by the supplement passed to authorize the consolidation, empowered to increase their stock, but only so far as might be necessary for the purpose of consolidation. They not only had no legal authority for declaring this dividend, but there was no ground or warrant in the situation of their affairs for so doing. It appears that, from the beginning of their business up to May 1st, 1871, (the resolution was passed on the 10th of April preceding that date,) their expenses in manufacturing gas, &c., amounted to $50,901.30, while the amount received for gas in the same period was only $38,160.35.

The scrip was issued pursuant to the resolution. The certificates were merely certificates of the indebtedness of the company, therein declared to be payable at the pleasure of the company, with interest at the rate of seven per cent. per annum.

The bill was filed against the Citizens company and the holders of the scrip, for a decree to declare the scrip void as being fraudulent and illegal, and to restrain the company from paying interest on or recognizing the scrip as a valid obligation, and from permitting the transfer thereof. The bill prays, also, that the holders of the scrip may be enjoined from transferring it, and may be required to deliver it up to be canceled, and that the company may be required to cancel it, and that the persons who have received interest on it may account for it to the company.

The company, by their answer, state that they are now under the management of a board of directors composed of persons, none of whom except two were of the board by which the resolution declaring the scrip dividend was passed, and disclaim all knowledge of the transaction in question, or any information except from their minutes. None of the holders of the scrip, except Morgan L. Smith, have answered. He alleges, and has proved, that he is a *bona fide* holder of scrip to the amount of $510, which he purchased in January, 1872, from one of the directors, who then transferred it to him, and that subsequently he, having relinquished for cancellation the

certificate assigned to him, obtained a new one instead thereof, in December, 1872. He appears to have had no information as to any illegality or irregularity in the issuing of the scrip, and to have paid $510 for the certificate which he purchased.

There can be no doubt as to the right of the complainants to relief. They file their bill for the benefit of themselves, and of all other stockholders of the Orange company at the time of the consolidation. They are still holders of stock received by them in the consolidation in exchange for stock then held by them in the Orange company. The scrip dividend was a palpable fraud upon the stockholders of the Orange company. The directors of the Citizens company, after making a representation to the Orange company as to the indebtedness of their company, to induce them to agree to a plan for consolidation, secretly created an interest-bearing indebtedness of $51,225 to themselves and to other stockholders of their company. Nor do they attempt to defend the transaction. As before stated, none of the holders of the scrip have answered, except Mr. Smith, and the bill has been taken as confessed as against them accordingly. Justice demands that at least those to whom the certificates were originally issued, and who still hold them, should be required to deliver them up for cancellation. Where a contract has been induced by false representations, or a transaction is in any way tainted by fraud, and the defrauding party is a party to the transaction, the transaction will be set aside, or the defrauding party will be compelled to make his representation good. It is obvious that there can be no rescission of the contract here without great loss and injury to both parties.

The only question is, whether Mr. Smith, a *bona fide* purchaser of the scrip for value without actual notice, will be protected in his purchase. That the company had no lawful authority for issuing the certificates, cannot be doubted. Had a purchaser of any of these certificates made inquiries as to their origin, he would have discovered that they had been issued contrary to law. Nor would he have found any-

thing in the situation of the affairs of the company to have warranted the board in issuing them. The rule which is applied to negotiable commercial paper is not applicable to such certificates as these. *Mechanics' Bank* v. *N. Y. and N. H. R. R. Co.*, 13 *N. Y.* 599; *Marsh* v. *Fulton County*, 10 *Wall.* 676. On its face the scrip bears evidence of its unusual character. It declares that the person to whom it is issued is entitled to a certain sum of money therein mentioned, payable, ratably with other certificates issued pursuant to the resolution of April 10th, 1871, at the pleasure of the company, with interest at the rate of seven per cent. per annum. No warrant for this scrip would have been found in the charter, and the reference to the prohibitory limitation contained in the act concerning corporations would have removed all question, and would have been decisive against its validity. *Charter, Laws of* 1868, *p.* 398; *Revision, title Corporations,* § 3; *Green's Brice's Ultra Vires* 147. That the purchaser bought it without inquiry will not protect him in his purchase, and bind the company to perform an obligation made without authority and in defiance of law. *The Floyd Acceptances,* 7 *Wall.* 667. Nor is the defence of the purchaser in this case strengthened by the fact that the certificate which he purchased was delivered up to the company and another issued to him in its stead. A novation of the contract was just as much beyond the power of the officers of the company as was the creation of the obligation originally. Nor will the stockholders be estopped by such action on the part of the officers. *Marsh* v. *Fulton County, supra.* The certificate held by Mr. Smith must also be delivered up to be canceled.

It appears that the fact that the scrip had been issued came to the knowledge of Mr. Charles A. Lighthipe and Mr. Blake, two of the committee on the part of the Orange company, very soon after the arrangement between the companies had been concluded. The former gentleman held the certificate of the Citizens company for the stock issued in exchange for the stock of the Orange company. No legal action was taken

for relief until the filing of the bill in this cause, in April, 1875. At the hearing, the account for interest paid to the holders of the scrip was not insisted upon. The scrip is held by very many persons, most of whom had no knowledge of the existence of any wrong in the creation of it. They have, from time to time, received interest on it, believing it to be their just due. To require them to account might be a hardship. Under the circumstances, in view of the delay of the stockholders of the Orange company in applying for relief for so long a time after they had full knowledge of the facts, I shall not order an account.

BARNETT *vs.* GRIFFITH and others.*

A agreed with B, at the execution of a mortgage by the former to the latter, that part of the amount for which it was given should be applied to the payment of two mortgages, then liens upon the premises embraced in that mortgage and certain other lands, and that the balance of it should be expended in building a house on the premises covered by B's mortgage. A had purchased the lands, subject to the two mortgages. At the execution of the mortgage, A's wife was a minor. Afterwards, but before the registry of the mortgage, a building was commenced on the lot covered by the mortgage given by A to B. Mechanics liens for materials furnished in the construction of the building, are claimed to be liens prior to B's mortgage. *Held*—

1. B was subrogated to the rights of the mortgagee under the mortgages on the premises when he took his mortgage, to the extent of the money paid by him on account of those mortgages. To that amount, with interest, his lien is prior to that of the lien claimants, and has a preference over the inchoate right of dower of A's wife in the *land*.

2. B's mortgage is entitled to priority over the dower right of A's wife in the *building*, to the extent of the money advanced by B, which was actually expended in the construction of the building.

* Cited in *Gaskill* v. *Wales*, 9 *Stew.* 532.

3. The priority of B's lien is not affected by the fact that the payment on account of the existing mortgages was made after the building was begun.

4. A's wife has no interest in the building.

5. The lien of A's wife by virtue of her inchoate right of dower is next in order of priority in the *land*, after the lien of B to the amount paid by him on account of the existing mortgages; next, the lien claims, and last, the balance of the amount due on B's mortgage.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. W. J. Magie, for complainant.

Mr. A. Dutcher, for Mrs. Griffith.

Mr. W. P. Wilson, for Jonas E. Wuchter, lien claimant.

Mr. R. S. Green, for William S. Killin, lien claimant.

THE CHANCELLOR.

The only question presented for consideration on the hearing was, whether the complainant's mortgage is entitled to priority over the lien claims and the inchoate right of dower of the wife of William J. Griffith, the mortgagor. The complainant's mortgage is for $4000 and interest, and is dated December 1st, 1871. It was recorded on the 9th of January, 1872. It was given by Griffith and his wife to William F. Van Deventer, by whom it was assigned to the complainant. When it was made, it was agreed between Griffith and Van Deventer that part of the amount for which it was given should be applied to the payment of two mortgages given to Laura D. Hopping, both upon the mortgaged premises. One of those mortgages was for the sum of $900 and interest, and was upon the lot covered by the complainant's mortgage and two adjoining lots; and the other was for $1600 and interest, and was on the lot covered by the complainant's mortgage and one of those other lots. Griffith purchased the three lots

subject to those mortgages. The lots were each fifty feet front and rear, by one hundred and thirty-six feet in depth. The balance of the money was to be employed in building a house on the premises covered by the complainant's mortgage. It is proved that of the money secured by that mortgage $1250 were paid by the mortgagee himself on account of the two prior mortgages above mentioned, and, of the rest, $2253.57 were used by Griffith in constructing the building. At the time of the execution of the complainant's mortgage, Mrs. Griffith was a minor. She insists that, therefore, her inchoate right of dower in the mortgaged premises cannot be sold by virtue of the mortgage. On the other hand, the complainant insists that, as to so much of the money secured by his mortgage as went towards the payment of the Hopping mortgages, subject to which, as before mentioned, the premises were conveyed to her husband, and as to so much of that money as was used in constructing the building, and so improving the premises mortgaged to him, she ought not to be permitted in equity to set up her inchoate right of dower against his mortgage. He claims the right of subrogation as to the $1250 paid on account of the two mortgages; and as to the money used in constructing the building, he claims to have an equity superior to her claim. He insists that he is entitled to priority over the lien claims, on the ground that the building had not been commenced when his mortgage was put on record; and he also insists, that if it should be found by the court that the building was begun before the mortgage was recorded, he is entitled to priority over the lien claims to the same extent, and for the same reasons, as over the claim of dower.

The weight of the evidence as to the time when the building was begun, is against the complainant. Van Deventer, indeed, testifies positively, and, as he states, from particular observation, that the building was not begun until after the mortgage was recorded, but the mason in whose contract the digging of the cellar was included swears, with equal positiveness, that the cellar was dug and completed by the 21st

of December, 1871, and he supports his testimony by the entry in his book on the subject, which was made after the cellar was dug, and which is between the dates of the 19th and 21st of December. He also testifies that the laying up of the cellar wall was commenced on the 3d of January, 1872. The mortgage was recorded on the 9th of that month. Griffith's testimony is the only other evidence on the subject. He refers, however, not to the time when the mortgage was recorded, January 9th, 1872, but to the time of its date, December 1st, 1871. He says that at the date of the mortgage no building had been commenced on the mortgaged premises. Mr. Van Deventer's language is similar, but he refers to the time of recording the mortgage. He says he went to the land a day or two after the mortgage was recorded, and "no building was then commenced." Whether he would consider the digging of the cellar and laying up the wall the beginning of the building, does not appear. The complainant's mortgage is not entitled to priority over the lien claims on the ground that it was recorded before the building was begun. Nor is it entitled to preference over them as to the money secured by it which was, pursuant to agreement between the mortgagor and mortgagee to that effect, expended in the construction of the building. In *Taylor* v. *La Bar*, 10 *C. E. Green* 222, it was held that a mortgage recorded before the commencement of a building, and given to secure advances to be made to pay for the construction of the building, for the payment of which advances in installments the mortgagee bound himself by written agreement when the mortgage was given, was entitled to priority over a lien claimed under the mechanics lien law for work done in the construction of the building, although all of the advances were, in fact, made after the beginning of the work on the building. In this case the mortgage was not recorded before the commencement of the building. But the complainant's mortgage is entitled to priority over the lien claims, in respect to the money paid by him out of the

money intended to be secured by his mortgage upon the Hopping mortgages, which, at the time of the payment, were liens only on the lot covered by the complainant's mortgage and the adjoining lot, the other lot having been released. The complainant advanced the money paid on account of those two mortgages, on the security of his mortgage, and to release the mortgaged premises from the encumbrance of those mortgages which were prior liens to his mortgage and to the claims of the lien claimants. He is entitled to be subrogated to the rights of the mortgagee under those mortgages, to the extent of the money paid and interest thereon.

It appears by the evidence, that the payment on account of the two mortgages was made after the building was begun, and it was no more than the due proportion which the lot mortgaged to the complainant should have borne, for the three lots were equal in value, and one of them had, as before remarked, been released. In *Payne* v. *Hathaway*, 3 *Verm.* 212, it was held, that where a lender advanced money to pay off an encumbrance on land upon which it was agreed that he should be secured by mortgage for his advance, and after the advance and application of the money to the payment of the encumbrance his security failed for want of title in the mortgagor, he was entitled to subrogation. The court were of opinion that the agreement between the debtor and the lender gave the latter an equitable claim to subrogation, which should have regularly been made by a transfer of the mortgage on payment thereof.

As to the equities claimed against Mrs. Griffith's inchoate right of dower: There is no evidence whatever of any fraud on her part. The complainant's mortgage stands precisely as if it had not been signed by her. So far as the money advanced for payment on account of the two mortgages subject to which her husband held the mortgaged premises is concerned, the complainant is entitled to subrogation as against her, and therefore to a preference over her right of dower. He has a right to look for his indemnity to the security which was so paid off, in part, with his money. *Chiswell* v.

Morris, 1 *McCarter* 101. But here the preference of the mortgage over the right of dower must end, so far as the land is concerned. But the proof is that the rest of the mortgage money was actually invested in the building on the premises. To that extent the complainant's mortgage is entitled to priority over the right of dower in the building. Where the land is aliened in the lifetime of the husband, dower is recoverable only to the amount of one-third of the value of the land at the time of the alienation. The dowress is entitled to no benefit from improvements made by the alienee. *Van Dorn* v. *Van Dorn*, 2 *Penn.* 697; *Coxe* v. *Higbee*, 6 *Halst.* 396. On this principle the wife in this case is not, as she clearly and obviously is not in justice and equity, entitled to any interest in the building. As far as the value of the building is concerned, her claim will not avail against either the mortgage or the lien claims.

The result is, that out of so much of the proceeds of the sale of the mortgaged premises as will represent the value of the land, the complainant will, in the first place, be paid the amount paid on account of the Hopping mortgages, and interest thereon from the time of payment, with his costs of suit. In the next place, out of the balance of the money representing the land, a sum equal to the present value of the inchoate right of dower therein will be paid to Mrs. Griffith. And out of the residue of the proceeds of the sale of the property, in the first place, the lien claimants will be paid their claims, with interest and costs, and then the complainant will be paid the balance remaining due on his mortgage.

Platt *vs.* Griffith and others.*

1. A mortgage executed *bona fide* to secure the payment of advances to be used in the construction of a building on the mortgaged premises, is a prior lien to claims for materials furnished in the construction of such building with notice of the mortgage, to the full amount of the mortgage if so much was advanced. That the agreement under which the advances were made was verbal, and not in writing, does not affect the lien.

2. Nor does the claim of inchoate right of dower in the lands mortgaged, on the ground of the alleged minority of the mortgagor's wife when the mortgage was executed, set up in her answer, affect the lien; her answer having been filed after the bill had been taken as confessed, without consent or leave of the court.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. W. J. Magie, for complainant.

Mr. W. P. Wilson, for Jonas E. Wuchter, lien claimant.

The Chancellor.

The only questions presented on the hearing were, whether the complainant's mortgage is entitled to priority over the claims of the mechanics lien claimants, and whether it is valid as against the claim of inchoate right of dower set up by the wife of the mortgagor in her answer. No question is made as to the legality or validity of the lien claims, but the question of priority alone is raised. The complainant's mortgage was given by William J. Griffith and wife to William F. Van Deventer, by whom it was assigned to Jacob S. Young, who assigned it to the complainant. It was given to secure the payment of $3500 in one year from its date, April 1st, 1872, with interest. It was recorded before the building was commenced, but the money which it was intended to secure was not advanced before the commencement of the building. Part of it ($1250) was advanced and applied, pursuant to an agreement made between the mortgagor and Van Deventer

* Cited in *Holt* v. *Creamer*, 7 *Stew.* 188.

at the time of the execution of the mortgage, towards the satisfaction of two mortgages given to Laura D. Hopping, which were upon the mortgaged premises, with other land, when the mortgagor purchased the property, but, at the time of the execution of the complainant's mortgage, they were only on the lot covered by his mortgage and the adjoining lot. Those lots were of equal value. On the principle of subrogation the complainant would be entitled to priority over the lien claims to the extent of the amount paid on those mortgages, which was the just share which the lot covered by his mortgage ought to have borne. He is, however, entitled to priority over them under his mortgage, not only as to that money, but as to the rest of the amount intended to be secured thereby. When the building was begun, his mortgage was on record and was notice to those who should furnish materials or labor for the building, that the land was pledged by the mortgage for the amount declared to be secured by it, $3500 and interest thereon. And the rest of the money over and above the $1250 paid on account of the Hopping mortgages was, in fact, advanced pursuant to a verbal agreement made between Van Deventer and Griffith, when the mortgage was executed, to pay it for or on account of the construction of the house. It is testified that the land without the building was not good security for even $2000. The money was advanced, according to the agreement, in installments as the work on the building progressed, and was used in the construction of the building. There appears to be no good reason why the complainant should not have the benefit of his mortgage. *Moroney's Appeal*, 24 *Penn* .372; *Taylor* v. *La Bar*, 10 *C E. Green* 222; *Macintosh* v. *Thurston*, *Id.* 242. Though in each of the cases just cited there was a written agreement on the part of the mortgagee, binding him to furnish the money as security for which the mortgage was given, while, in this case, the agreement was merely verbal, that circumstance will not affect the result. The conclusion flows from the fact that the lien claimants had notice, before giving credit on the security of the land, of the existence of the complainant's

mortgage, and of the amount for which it was to be security; and in such case, where the mortgage is executed *bona fide* to secure the payment of advances to be used in constructing the building, there appears to be no reason why the mortgagee should not have priority as against lien claimants with notice, to the extent of his advances *bona fide* made according to his agreement, up to the amount for which the mortgage is, according to its terms, intended to be security. The claim of the wife of the mortgagor in respect to her inchoate right of dower cannot be allowed. She alleges that she was a minor when she signed the mortgage. The bill was duly taken as confessed as against her, and, although she afterwards filed her answer, it was neither filed by consent nor by leave of the court.

BACON *vs.* BONHAM and others.*

1. A legacy in the hands of an executor upon no trust except to pay it over to the legatee, is not a trust within the meaning of the exception of a trust created by some person other than the debtor himself, and whose transfer to the debtor cannot, therefore, be prevented by proceedings for discovery against him under the supplement of March 20th, 1845, to the chancery act.

2. A legacy expectant is assignable in equity, and such assignment for valuable consideration, without fraud, will be enforced.

3. An assignment by way of mortgage, of a legacy, need not be filed in accordance with the act concerning chattel mortgages. That act does not apply to mortgages of choses in action.

Creditor's bill. On final hearing on pleadings and proofs.

Mr. W. E. Potter, for complainant.

Mr. J. J. Reeves and *Mr. A. Browning*, for defendant Elisha Bonham.

* Cited in *Hardenburgh* v. *Blair*, 3 *Stew.* 666.

The Chancellor.

This is a creditor's bill, filed by John S. Bacon against Belford M. Bonham and Elisha Bonham, in order to subject to the payment of two judgments recovered by the complainant against Belford M. Bonham, the legacy given to him by the will of Jehu Bonham, deceased, late of the county of Cumberland, or so much thereof as may be necessary for the purpose. One of the judgments was recovered in the Circuit Court of Cumberland county on the 17th of March, 1873, for $3004, the real debt being $1480.07. Execution was, shortly after the recovery of this judgment, issued thereon, and $200, or thereabouts, realized out of the sale of the defendant's personal property. His real estate was all sold under execution in foreclosure out of this court. On the 27th of March, the judgment was docketed in the Supreme Court, and on the 18th of June, 1874, an *alias fieri facias* was issued upon it, which was returned wholly unsatisfied, nothing having been made thereon, nor any property found whereon to levy. The other judgment was recovered on the 26th of March, 1875, in the same Circuit Court before mentioned, for $7000 debt, besides costs. The *alias* execution issued on this judgment was for $1211.79 debt, besides costs. That writ was also returned wholly unsatisfied. The bill was filed on the 25th of July, 1875, after the return of those writs. It was filed under the supplement of March 20th, 1845, to the "act respecting the Court of Chancery." *Revision, p.* 76. That act provides for the filing of a bill to compel the discovery of any property or thing in action belonging to the defendant in the judgment, and of any property, money or thing in action due to him or held in trust for him, except such property as is reserved by law, and to prevent the transfer of any property, money, or thing in action, or the payment or delivery thereof to the defendant, except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the debtor himself. The testator died on the 25th of March, 1875. By the will, which is dated December 16th, 1869, he directed that his real and personal property, except

so much of his household furniture as might be selected by his wife for her use, be sold by his executor, and the proceeds of sale invested. He made provision for his wife out of the interest of the investment, and directed that after her death the principal, with its accumulations, be divided, one-third thereof to go to his half-brother, Belford M. Bonham. The widow of the testator is dead. The defendants' counsel objects that it appears by the bill that the property sought to be reached is held in trust for the defendant Belford M. Bonham, under a trust not created by nor proceeding from him, but created by the will of Jehu Bonham, and insists that therefore the bill must be dismissed. The objection is not well taken. A legacy in the hands of an executor upon no trust except to pay it over to the legatee, is not within the exception of the act.

The case shows that, after making his will, Jehu Bonham became insane, and was, on inquisition, declared to be a lunatic, and the defendant Elisha Bonham was duly appointed his guardian. From the will which thus came to his hands, the latter became acquainted with the disposition which the testator had made of his property, and consequently with the provision made for Belford. Belford also knew of that provision. The will appointed Elisha sole executor. On the 27th of March, 1874, about one year before the death of the testator, Belford being indebted to Elisha in the sum of $2000, besides interest, executed, together with his wife and children, who joined in the instrument, for Elisha's greater security, an assignment to the latter of the legacy to Belford to the extent of $2000 and interest, as security for the payment of that debt. Elisha advanced the money which constituted the debt to Belford, with the understanding that it was to be re-paid to him out of the legacy. The bill alleges no fraud, nor is there evidence of any. The complainant's counsel insists that no title passed by the assignment, because the subject of it was not only a mere expectancy, but one of that character which it is against the policy of the law to permit the expectant to transfer. Contingent interests and expectancies may not only

be assigned in equity, but they may also be the subject of a contract, such as a contract of sale, when made for a valuable consideration, which courts of equity, after the event has happened, will enforce. *Story's Eq. Jur.*, § 1040 *c.*; *Fonblanque's Eq.* 216; *Smithurst* v. *Edmunds*, 1 *McCarter* 408; *Langton* v. *Horton*, 1 *Hare* 549. In equity, such expectancies as that in question are the subject of transfer. *Beckley* v. *Newland*, 2 *P. Will.* 182; *Hobson* v. *Trevor*, *Id.* 191; 2 *Spence's Eq. Jur.* 852, 853, 854, 865; *Stover* v. *Eccleshimer*, 46 *Barb* 84; *Field* v. *Mayor of New York*, 2 *Seld.* 179; *Bennett* v. *Cooper*, 9 *Beav.* 252; *Story's Eq. Jur.*, § 1040 *c.*; *Snell's Prin. of Eq.* 74. The last-mentioned writer says: "A mere expectancy, therefore, as that of an heir-at-law to the estate of an ancestor, or the interest which a person may take under the will of another then living, non-existing property to be acquired at a future time, as the future cargo of a ship, is assignable in equity for valuable consideration, and, where the expectancy has fallen into possession, the assignment will be enforced." In *Cook* v. *Field*, 15 *Q. B.* 460, it was held that a promise to assign a mere expectancy—a devise expected by the assignor—was a sufficient consideration to support a promise to pay for it. The transaction between Elisha and Belford appears to have been in all respects fair. Moreover, Elisha is in possession of the subject of the mortgage, and his equitable title is perfected.

It is urged, also, that the assignment by way of mortgage to Elisha, being of a chattel interest, and not having been filed in accordance with the provisions of the "act concerning mortgages, (*Revision* 485, *pl.* 39,) is of no validity against the complainant. But the act does not apply to mortgages of choses in action. *Williamson* v. *N. J. Southern R. R. Co.*, 11 *C. E. Green* 398.

It appears from the evidence that the share given by the will to Belford M. Bonham will not amount to enough to pay off the debt due to Elisha, to secure which it was assigned, and no other property has been discovered. The bill, therefore, must be dismissed, with costs.*

* Decree affirmed, 6 *Stew.* 614.

FEY vs. FEY and others.*

Matter in avoidance of complainant's claim, under proceedings to foreclose his mortgage, must be proved otherwise than by the answer. The testimony *held* not to establish the defence.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. S. H. Pennington, for complainant.

Mr. John Whitehead, for defendant Ward

THE CHANCELLOR.

The defendant George M. Ward, who, through sale under a judgment, became the owner of the mortgaged premises after the recording of the complainant's mortgage, in his answer sets up fraud as a defence to that mortgage. He alleges that the mortgage was given without consideration and in fraud of the creditors of Louis Fey, the mortgagor. His counsel insists that he is entitled to the benefit of his answer in support of this defence, and that the answer is responsive to the bill on that head, and is therefore conclusive unless overcome by proof on the part of the complainant. The matter thus pleaded is set up in avoidance of the complainant's claim, and it is a settled rule that such matter must be proved otherwise than by the answer. The testimony produced is of two kinds: proof of declarations and admissions of the mortgagee, which, it is insisted, show fraud; and testimony as to the business, wages and other pecuniary resources of the mortgagee, offered so show the improbability of his having been, at the time of making the mortgage, the creditor of the mortgagor, (who is his son-in-law,) to the amount of $1500, the principal of the mortgage. The defence is not proved. There will, therefore, be a decree for the complainant.

* Cited in *Dickerson* v. *Wenman*, 8 *Stew.* 370.

Hill *vs.* Hill.

1. Decree of divorce. The defence of insanity held not to have been established.

2. Depravity of character and abandoned habits, in themselves, are not evidence of insanity.

Bill for divorce. On final hearing on pleadings and proofs.

Mr. John Hopper and *Mr. A. B. Woodruff*, for complainant.

Mr. S. Tuttle and *Mr. Cortlandt Parker*, for defendant.

The Chancellor.

The bill states that the defendant committed adultery with persons unknown to the complainant, and with one Peter Brickman, in Paterson, in April, 1867, and that in June of that year she contracted venereal disease from her adulteries. The answer was put in by her father as her guardian *ad litem*, it being alleged that she was, at the time of the commission of the alleged offences, in the language of the answer, "somewhat deranged in her mind." The parties were married in 1852. The suit was begun in February, 1868, and a very large amount of testimony has been taken bearing upon the offences charged to have been committed, and the mental condition of the defendant at the time. The evidence shows satisfactorily, that in April, 1867, in the city of Paterson, she had carnal intercourse with Peter Brickman. This person was the driver of a baker's wagon, and, on a day in the last-mentioned month, stopped with his wagon at the complainant's house. The complainant's father, Smith Hill, who lived a short distance from and in sight of the complainant's house in which the parties to this suit then lived together, testifies that on the day before the occasion just referred to, he had

seen Brickman's wagon standing at the door of the complainant's house an unusual length of time, from half to three-quarters of an hour, and that his suspicion had been excited by the circumstance. On the occasion under consideration he was returning home in his wagon, and saw Brickman's wagon again standing at the door of the complainant's house. He quickly drove over there, a distance of from six hundred to eight hundred yards, and, hurrying into the house, found Brickman and the defendant together in a bed-room. He testifies that when he entered, Brickman was "putting his pantaloons together," or trying to button them up, while the defendant was at the foot of the bed; that he seized Brickman by the throat and took him out of the room; that the defendant followed them and begged him not to choke Brickman; that he then took Brickman in his, the witness', wagon to the witness' barn where the complainant was at work, and that, while there, Brickman offered to pay money to settle the matter. He adds that Brickman did not state what he was doing in the complainant's house with the defendant. The witness says there was a young man in Brickman's wagon when he saw it standing at the complainant's door on that day. Brickman, in his account of the transaction, says that he had been forbidden to leave bread at the house any more, and as he drove past on that day the defendant came running out of the house, hallooing for some bread; that he was driving slowly on, but she caught his wagon and took a loaf of bread out of the basket in the back part of the wagon, and ran into the house with it; that he stopped his horse and followed her into the house for his money, and that as he went in he did not see her in the kitchen nor in the large room, but saw her in the side room; that he went up towards that room and asked her for his money; that she was then searching the pocket of a coat there, saying she wanted to see if there was any money in Jake's (the complainant's) pocket; that while he was standing there, Smith Hill came in, and, as he came in, took hold of him, and the defendant came out of the room and went into the large room towards the table;

that Smith Hill asked him what business he had in another man's house, in the bed-room, and he told him he was waiting for his money for the loaf of bread the defendant had taken from his basket. He further says that Smith Hill was not satisfied with that, and pulled and jerked him around in the yard for a while, and then told him he must go to the complainant or he would have him arrested; and he adds that, as it was his route to go that way, he got into his own wagon and Smith Hill got into his, and they drove to the barn where the complainant was; that Smith Hill there told the latter he had caught him, Brickman, in the room in the complainant's house, and that they then let him go. There was a lad in Brickman's wagon when he stopped at the complainant's house. He remained there during the whole of the transaction. He testifies that the defendant did not come out to Brickman's wagon at all; that Brickman took bread in his hand-basket and went into the house, and that he was in there about ten minutes before the witness saw Smith Hill coming in his wagon; that when the latter and Brickman came out of the complainant's house, Hill held Brickman by the shoulder, and that they both got into Hill's wagon and drove to the barn. To say nothing of the defendant's full and circumstantial confessions to her husband, testified to by him and Mrs. Hibell, the nurse who attended her in her sickness, the proof of the carnal intercourse between her and Brickman is clear and convincing.

But the answer alleges that the defendant, for three or four years before the filing of the answer, which was in June, 1868, had been "somewhat deranged in her mind," and that her derangement had been "growing worse latterly," and that about a year before the answer was filed, the complainant, in a conversation he then had with her father on the subject of sending her to the lunatic asylum, admitted her insanity. On the hearing it was urged that because of her mental derangement at the time of the alleged offences, no decree should be made against her. A very careful consideration of the testimony has led me to the conclusion that her irresponsibility on

the ground of insanity has not been established. That her mind was weak, and that her moral perceptions were blunted, is proved. Her disposition to licentiousness was most pronounced and notorious. She was known to the police as a common prostitute, and she appears to have been unrestrained and shameless in her abandonment to the gratification of her sensuality. But, at the same time, she was discharging her household duties, and it appears in evidence that it was not until after she was grievously sick of what both of the physicians in attendance upon her (one of whom was called by her father), pronounced to be venereal disorder, that measures were spoken of, looking to her removal to a hospital or asylum. When she was committed to the asylum in 1872, more than three years and a half after the bill in this cause was filed, and about five years after she was sick with that disease, she was in confinement in jail under two indictments for adultery, and she was then sent to the asylum at the expense of the county. The adultery with Brickman was committed in April, 1867. In that year she had a venereal disease. Dr. Neer, who subsequently attended her while she was sick with that disorder, testifies that two or three months previous to November in that year she called at his office for medicine for that complaint, which she then told him she had, and that she then asked for and obtained the proper medicine, (she herself asking for the particular medicine she wanted) for the cure of her malady. She was not insane at that time. The experts who were examined in this cause on the part of the defendant, were Doctors Rogers, Moss and Buttolph. The last speaks of her as she was at the time when he was examined as a witness in this suit, which was in December, 1873, and as she had been since February, 1872, when she was admitted into the asylum. Doctors Moss and Rogers were two of the experts by whom she was examined on the inquisition taken under the statute in 1872, by direction of Judge Bedle, when she was under indictment as above mentioned. The former examined her then, but had never seen her before that time. He says "her mind was weak and imbecile, and

she did not seem to know what morality meant; providing her misdeeds were unknown, she did not seem to think it any harm." Dr. Rogers says, he first saw her in 1867 or 1868. He says his conclusion was that she was "in a measure" insane; that she was a person of very weak mind—of a naturally weak mind. On the other hand, Dr. Neer, who treated her for her venereal disease, visited her in the jail in 1872, and was one of the experts who testified in the investigation alluded to. He says he considered her perfectly sane. Dr. Merrill, also one of those experts, says: "I think her mind was very weak; instead of saying she was sane, I would rather say she was accountable for her acts, which I consider to be the same thing; I questioned her (referring to his interview with her in the jail,) on several topics; I found her very sharp; I would express it, not willing to commit herself until she found I knew about her, (referring to her habits of licentiousness); then she would ask me who told me; she said several times, 'I know Jake (her husband) has been telling you.'" He adds that her memory was good. It is to be borne in mind that the investigation ordered by Judge Bedle, and her consequent committal to the lunatic asylum, took place about five years after the alleged adultery with Brickman. There were two other experts examined in that investigation, Doctors Marsh and Hammond, but neither of them was called as a witness in this cause. The testimony of the witnesses who are not experts, on the subject of her insanity, is of such a character as to possess but little weight in determining the question of her mental capacity or moral responsibility. The circumstances detailed are either of but little value or significance, or admit of an explanation consistent with her accountability for her acts. That she was depraved in character, and consequently abandoned in habits, is of itself no evidence of her insanity. That she became lost to shame, and in her lewdness disregarded her duty to her husband and her family, is not proof of an unsound mind, but of vicious tastes and inclinations too powerful to be controlled by the demands of duty or the restraints of society. Her mental condition in

1872, might well have been the result of her long-continued sensual indulgence.

The complainant is entitled to a decree of divorce.

HARRISON and wife *vs.* GUERIN and others.*

1. As between a purchaser for value, holding under a deed with the usual full covenants, including warranty general, and a prior mortgagee, the right of such purchaser to require the mortgagee to have recourse for the satisfaction of the mortgage to the part of the mortgaged premises owned by the mortgagor, before looking to the part conveyed to him, is undoubted.

2. If the mortgagee in such case, with knowledge of the rights of the purchaser, and without his assent, releases from his mortgage any part of the mortgaged premises which is, in equity, liable for the mortgage debt before recourse can be had to the land of such purchaser, the mortgage will, as against the latter land, be discharged to the extent of the value of such released land at the time of the release; and if its value be equivalent to the whole amount of the mortgage, the land of the purchaser will be wholly discharged from the mortgage in consequence of such release.

3. As between a mortgagor and his grantee by voluntary conveyance, with covenant against encumbrances and warranty general, the latter has a right in equity, in the absence of any facts which would disentitle him to the protection, to cast the burden of an encumbrance existing at the time of the conveyance, upon the land of the former subject to the encumbrance.

4. But where such mortgagor conveyed to a voluntary grantee (in this case his wife) subject to a mortgage, and the covenants were inserted without his directions, and he executed the conveyance in ignorance that they were in the deed, the burden of the encumbrance is not shifted.

5. Testimony of the grantor that his voluntary grantee understood that the land conveyed to her was subject to the mortgage, is admissible to rebut the equity which would otherwise arise under the deed to shift the burden of the mortgage to that part of the premises retained by himself.

6. The effect of such testimony would be to make that part of the premises conveyed to her, liable to the payment of its proper proportion of the mortgage debt.

Bill to foreclose. On final hearing on pleadings and proofs.

* Cited in *Cogswell* v. *Stout*, 5 *Stew.* 241.

Mr. W. Freeman, for complainants.

Mr. M. R. Kenny, for defendants.

THE CHANCELLOR.

On the 30th of June, 1873, Patrick Cahill, of the city of Orange, in this state, being the owner in fee of two lots of land on Forest street in that place, executed and delivered to Daniel Guerin a deed of conveyance in fee, with the usual full covenants including warranty general, for one of the lots. The consideration expressed in the deed was $2500, but was merely nominal, the object of the conveyance being to convey the property to Ellen Cahill, the wife of the grantor. By deed of the same date, with like covenants, Guerin, for the same nominal consideration, conveyed the property to Mrs. Cahill. At the date of those conveyances, the two lots were subject to a mortgage given by Cahill and his wife to John H. Matthews, on the 1st of June, 1871, to secure the payment of Cahill's bond, for $1200 and interest. On the 3d of November, 1874, Mrs. Cahill died, having never had issue. The lot so conveyed to her descended to the defendants, her heirs-at-law. On the 1st of June, 1875, the complainants, (the mortgage having been duly assigned to Mrs. Harrison on the 1st of July, 1873,) at the request of Patrick Cahill the mortgagor, released the other lot, then and still owned by him, from the lien and encumbrance of the mortgage. Six days afterwards, the bill in this cause was filed for foreclosure and sale of the lot owned by the defendants. The defendants answered the bill, setting up their equity in the premises against the complainants. On the hearing, the complainants' counsel objected to the answer on the ground that it did not positively allege that the release was executed. The answer, however, sets up the release and claims any equity arising from it.

As between a purchaser for value holding under a deed such as that given to Daniel Guerin, and the prior mortgagee, the right of the former to require the latter to have recourse

for the satisfaction of the mortgage, to the part of the mortgaged premises owned by the mortgagor, before looking to the part conveyed to such purchaser, is undoubted. If the mortgagee in such case, with knowledge of the rights of the purchaser, and without his assent, releases from his mortgage any part of the mortgaged premises which is, in equity, liable for the mortgaged debt before recourse can had to the land of such purchaser, the mortgage will, as against the latter land, be discharged, to the extent of the value of such released land at the time of the release; and if its value be equivalent to the whole amount of the mortgage, the land of the purchaser will be wholly discharged from the mortgage in consequence of such release. That Mrs. Harrison was fully aware of the rights of the defendants in the premises at the time of the release, there appears to be no room to doubt. The evidence is that when, after the filing of the bill, she was reproached by the father of the defendants for having done them a wrong in executing the release, she stated that she knew what she was doing when she executed it, and that she had said, when she was requested to sign it, that she did not "wish anything mean about it"—obviously referring to the suggestion of her own mind as to the possible injustice towards the defendants of releasing the land owned by Cahill, and leaving the defendants to bear the burden of her mortgage. In her conversation with the defendant's father above referred to, she repudiated the suggestion that she had executed the release in ignorance of the rights of the defendants; when he said to her, "Now, Mrs. Harrison, when you see it was mean, and you did not know what you were doing, could you not undo it?" she answered, "No, I don't think I could; I signed it, and I must now leave it in the hands of my lawyers; it is in the law; but I don't want you to say I did not know what I was doing." She did not, in the conversation, claim to have acted in ignorance of the rights of the defendants, nor did she, by testimony in the cause, contradict this statement of the witness, nor attempt to show that she had not actual notice of those rights when she executed the release. It cannot be

doubted that she was well aware of them, and that she executed the release to enable Cahill to throw the entire burden of the mortgage on the land of the defendants. By the release she discharged a very large part of the mortgaged premises from the encumbrance of the mortgage, without any consideration whatever, only a few days before this suit was begun; and besides, it appears that the interest had been regularly paid up to the time of the filing of the bill. The design of Cahill in the matter, and the knowledge of Mrs. Harrison of his design, and the means by which it was proposed to effect it, are clear. But it is insisted by the complainants' counsel that the defendants, who claim by descent merely under a voluntary conveyance, are entitled to no equitable consideration in the premises. This position cannot be maintained. Obviously, as between the mortgagor and his grantee by voluntary conveyance with covenant against encumbrances and warranty general, the latter has a right in equity, in the absence of any facts which would disentitle him to the protection, to cast the burden of the encumbrance existing at the time of the conveyance, upon the land of the former subject to the encumbrance. *Gaskill* v. *Sine*, 2 *Beas.* 400; *Thompson* v. *Murray*, 2 *Hill's C. R.* 204, 213.

In this case, however, there is evidence in the testimony of Cahill, that the conveyance to his wife was made subject to the mortgage in suit, and that he supposed that the lot conveyed to her was the only property covered by the mortgage; and further, that the covenants in the deed from Cahill to Guerin were inserted by the lawyer who drew the deed, without directions from anybody, and that the deed was executed without any knowledge on the part of Cahill that they were in the deed. It appears from the evidence that Cahill intended to convey to his wife one-half of his real estate. There was probably no intention on his part to charge the residue of his real estate with the payment of the encumbrances on the land so conveyed to her. He testifies that she understood that the land conveyed to her was subject to the mortgage. This evidence may be received to rebut the equity

which otherwise would arise under the deed. *Bolles* v. *Beach*, 2 *Zab.* 680; *Wilson* v. *King*, 8 *C. E. Green* 150. Its effect will be merely to limit it. It will not destroy it altogether. If the land had been conveyed to her subject to the mortgage, it would, as against the residue of the mortgaged premises, have been liable in her hands to the payment of its proper proportion of the mortgage debt, and to that proportion only. *Hoy* v. *Bramhall*, 4 *C. E. Green* 74; *Hill's Adm'rs* v. *McCarter*, *ante*, *p.* 41. Cahill says, also, that he is sure that neither he nor his wife knew or thought that the mortgage covered any other lot than that which was conveyed to her. It is by no means probable that he was under a misapprehension as to whether the mortgage covered only one or both of the two lots, which, so far as appears, were all the real estate he owned. It may be remarked, that in Gaskill *v.* Sine there was not only no evidence to rebut the equity in favor of the voluntary deed, but, according to the testimony, the mortgagor, when, after the making of the voluntary deed, the husband of the grantee spoke to him in reference to the encumbrance on the property, declared his ability to pay it off.

Mrs. Harrison's mortgage will be held to be discharged as against the defendants' land, to the extent of the due proportion of the mortgage debt which the released land would have been liable to pay but for the release, and the defendants' land will be liable for the balance.

THE RED BANK MUTUAL BUILDING AND LOAN ASSOCIATION *vs.* PATTERSON and others.

1. A mortgage given to a building and loan association by a holder of its stock is not usurious because it requires monthly payments of interest, besides fines and impositions, in accordance with the provisions of its constitution.

2. In such a case, as between the association and a second mortgagee of the mortgaged premises, the stock held by the association as collateral security was ordered to be sold and the proceeds applied to the payment of the amount due on the mortgage, before recourse was had to the mortgaged premises.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. Charles H. Trafford, for complainants.

Mr. R. Allen, Jr., for the holder of the second mortgage.

THE CHANCELLOR.

The complainants are a corporation under the "act to encourage the establishment of mutual building and loan associations." *Nix. Dig., p.* 92.* The defendant, John H. Patterson, being the holder of ten shares of the stock, obtained from the association an advance of the amount of those shares to him, and gave his bond and mortgage as security, under and according to the provisions of the constitution. The bond is in the penalty of $2000, and is conditioned for the payment by Patterson or his heirs, executors or administrators, to the association, of interest for that sum, monthly, at the rate of seven per cent. per annum, payable on or before the second Tuesday of each and every month, from and after the date of the bond, and also all the monthly dues or installments which thereafter should become due and payable on the shares, as well as all fines and other impositions whatsoever which might be lawfully charged against him or them as the holder or holders of the shares or of the loans, until there should be sufficient money on hand and due to the association to divide to each share of the capital stock the sum of $200, over and above all its debts and liabilities, and the loans be thereby, in pursuance of the constitution of the association, fully satisfied and paid.

The proviso of the mortgage was to the same effect, but contained a provision for insurance, &c. The complainants' mortgage is the first encumbrance on the property. The

---

* *Rev., p.* 92.

holder of the second mortgage insists that the complainants' mortgage is usurious, because it requires monthly payments of interest, besides covering fines and impositions. The question thus raised was decided in this court, in *Mechanics Building and Loan Association* v. *Conover*, 1 *McCarter* 219, and *Savings Association* v. *Vandervere*, 3 *Stockt.* 387. The suit in the first-mentioned case was upon a mortgage similar to that of the complainant here, and the conclusion of the court, after a very full consideration of the same objection made in this cause, was that the defence of usury was not sustained, and that the association were, by reason of the mortgagor's default, entitled to a decree for the amount of the shares and the accrued interest thereon.

In this case the complainants are entitled to a decree for $2000 and the accrued interest, and the insurance premiums.

They will be required to sell the stock which they hold as collateral security, and apply the proceeds of the sale to the payment of the amount due on their mortgage, before having recourse to the mortgaged premises.

WILLIAMSON and UPTON *vs.* THE NEW JERSEY SOUTHERN RAILROAD COMPANY and others.

An application to compel a trustee for mortgage bond-holders to redeem certain property, refused; the necessities of the trust estate not being regarded by the court such as to make it its duty to make the order, and an agreement, which was the foundation of the application, being held to be merely executory, essentially outside of the main issues in the cause, and practically for the benefit of only the parties who may enter into it, without regard to the interests of others interested in the trust estate.

Bill to foreclose. On petition of Henry Day and others, representing certain first mortgage bond-holders, for an order directing the trustee under that mortgage to redeem the East End Hotel property at Long Branch.

Mr. A. Q. Keasbey and *Mr. John W. Sterling* (of New York,) for the petitioners.

Mr. B. Gummere, for B. Williamson, trustee.

THE CHANCELLOR

According to the petition, a large majority of the holders of the first mortgage bonds and a large number of the holders of the second mortgage bonds of the New Jersey Southern Railroad Company, have entered into an agreement of settlement with the defendant Jay Gould, by which, for considerations therein expressed, he is to consent to a decree (apparently, but only apparently, in conformity with part of the prayer of the supplemental bill in this suit,) as against him, and is to execute the decree, when so made, so far as the property covered by the stipulation is concerned. A part of the property claimed by the supplemental bill to be subject to the complainants' mortgage, is the property known as the East End Hotel, at Long Branch, with its fixtures, furniture, &c., the title to which is in Mr. Gould. There are decrees in foreclosure suits against that property, on mortgages prior to that of the complainants, amounting at this time to about $50,000, and there are taxes due upon the property. The petition states that the loss of the property to the bond-holders by reason of these encumbrances is imminent, but may be prevented by the timely payment of about $1500, and it prays that the trustee of the first mortgage bond-holders, who is in possession of the Southern and Sea Shore railroads as mortgagee, and has accordingly been, and still is, receiving the income thereof, may be required to pay the $1500 to save the property. The petitioners have submitted affidavits as to the value of the property. The valuations thus presented are of a general character, are opinions merely, and range from $50,000 to $70,000. The trustee declines to pay the money except by order of this court. He insists that he cannot safely do so, and that the property is worth but little, if any, more than the encumbrances under which it is advertised to

be sold, and he is of opinion that the interests of the trust will be far better served by leaving him to exercise his discretion to purchase or not at the sale, than by requiring him to redeem. The agreement which appears to have been entered into with Mr. Gould is as yet entirely executory. He agrees for a consideration to be secured to him, to control, to the end that they may be sold under the final decree to be made in this suit, as part of the property mortgaged to the complainants, the sixteen hundred and nineteen shares of the stock of the Sea Shore company mentioned in the supplemental bill and therein claimed to have been fraudulently acquired and disposed of by him, and to permit the East End Hotel to be sold under the decree as part of the mortgaged premises, and to execute a deed of conveyance therefor to the purchaser.

It would be enough to say in regard to this application, that the arrangement rests wholly in agreement, and only a majority (though it is said to be a large majority,) of the bond-holders have consented to it. Whether it is one which the court, having regard to the interest of all the bond-holders, would sanction or recognize if called upon to do so, it is not necessary to determine. It is not submitted for sanction, and I do not feel called upon to recognize it. The court is asked to base an order upon it, directing the trustee to make payments on the faith of its execution. The petitioners' counsel insist that the suit is by this agreement practically ended in accordance with the views and theory on which the supplemental bill was filed. Were it, indeed, at an end by a decree in accordance with the prayer of the supplemental bill, the court would not hesitate to make the order, on being satisfied that it was for the benefit of the trust estate to redeem the property. But the agreement for settlement is very far from a concession on the part of Mr. Gould and his co-defendants claiming the property in dispute, of the right of the complainants to the relief sought by the supplemental bill.

Part of the prayer of that bill is that it may be decreed that the New Jersey Southern Railroad Company owed nothing to Mr. Gould when he became possessed of the sixteen hundred

and nineteen shares of stock, and that to that end an account may be taken of his dealings with that company, and its earnings and property, either through its directors or otherwise; and that it may be decreed that he acquired no title to the stock, and that his sale thereof may be decreed to have been illegal and fraudulent, and may be set aside; and that James and Field may be decreed to have no valid title to the stock, and to surrender the certificate thereof; and that the steamboats "Jesse Hoyt" and "Plymouth Rock" may be decreed to be the property and part of the plant of the New Jersey Southern Railroad Company, and subject to the lien of the complainants' mortgage; and that Mr. Gould may be decreed to redeem the same from all maritime liens thereon, and from any pretended sale thereof, and return those steamboats within the jurisdiction of this court to the end that they may be sold under the decree in this cause; and that for the same end Mr. Gould may be decreed to return within the jurisdiction of this court, two locomotive engines, one passenger car, thirty-three flat cars, and ten box cars, belonging to the New Jersey Southern Railroad Company and covered by the complainants' mortgage, and which were removed by him and, at the filing of the bill, were alleged to be held by him on his railroad in Delaware and Maryland, and that the locomotives and cars may be decreed to be subject to the complainant's mortgage; and that the East End Hotel, and the furniture and equipment thereof, may be decreed to be the property and part of the plant of the New Jersey Southern Railroad Company, and not the property of Mr. Gould or of any other person, and to be subject to the lien of the complainants' mortgage.

It will be seen that the claim to the stock and to the East End Hotel as the property of the New Jersey Southern Railroad Company has been, to a great extent, abandoned in the settlement; and the claim to an account, and to the steamers and locomotive engines and cars, has been wholly so. By the agreement Mr. Gould, in consideration of the transfer of the stock and hotel property, is to receive in the new organization, (in case it should include the Southern and Sea Shore rail-

roads, with the sixteen hundred and nineteen shares of stock and the hotel property merely,) $104,000 in first mortgage bonds, and $87,500 in preferred stock, in satisfaction, according to the language of the agreement, of certain claims against the stock and hotel which the bond-holders signing the agreement agree to allow. In case the stock should be sold under the decree to any other parties, he is to have $220,000 out of the proceeds of the sale. The holders of the sixteen hundred and nineteen shares of stock are not, as it appears by the agreement, parties to the arrangement. Mr. Gould, indeed, undertakes to obtain a proper transfer of that stock from the present holders thereof to the purchaser under the decree, and agrees that he and the Long Branch and Sea Shore Railroad Company, and Messrs. Field and James, or any other parties claiming to own the stock, shall withdraw their opposition to the suit and consent to a decree of foreclosure and sale of the Southern Railroad, including the sixteen hundred and nineteen shares of stock and the hotel. He may not be able to accomplish this. But, however that may be, the agreement, if its terms were regarded as a satisfactory settlement of the matters in controversy in this suit, being merely executory, would not be sufficient foundation for the order which is sought. Moreover, the smallness of the amount of money required to preserve the property warrants the conviction that those who are interested in the settlement do not need the aid of the court in the premises. Their agreement provides for the purchase by them of the mortgaged premises at the sale under the final decree to be entered in the cause, with a view to a new organization in which the parties to the agreement are to be interested. It is essentially an arrangement outside of the suit, and practically for the benefit of those alone who may enter into it. I do not regard the necessities of the trust estate as being such as to make it my duty, irrespective of the agreement, to grant the prayer of the petition. The petition will be dismissed.

CLAYTON and others *vs.* SOMERS' Executor.

1. A legacy to A when he arrives at the age of twenty-one years, is contingent on A's attaining that age.

2. A provision for the payment of such a legacy by the sale of real estate, does not change its character and vest the legacy.

3. Interest does not accrue on contingent legacies until the time for payment arrives.

4. Where land not otherwise disposed of by the will is charged with legacies, if the heir furnish the money for the legacies, he will be entitled to the land.

5. An executor who pays the debts and funeral expenses of his testator, for the discharge of which there is no personal estate, is entitled in equity to be re-imbursed therefor out of the real estate.

Bill for relief. On final hearing on pleadings and proofs.

Mr. A. H Sharp, for complainants.

Mr. J. E. P. Abbott, for defendant.

THE CHANCELLOR.

Enoch Lard, late of the county of Atlantic, died in 1863, leaving a last will and testament, by which, after directing that his debts and funeral expenses be paid, he gave certain pecuniary legacies to various persons, respectively. He then bequeathed "the balance" of his "personal property" to John E. Barrell and Lucretia Risley, in equal shares. He then ordered his executors to sell the land which he purchased of John M. Babcock, at public or private sale, to the best advantage, to pay the legacies; and he then directed them to procure suitable tomb-stones, and cause them to be put up at his grave. He appointed David B. Somers and Joseph H. English his executors. The latter having renounced, letters testamentary were issued to David B. Somers. Among the legacies were three to Daniel, Nicholas, and Richard Clayton, children of the complainant Joab Clayton—$100 to each,

payable when they should respectively arrive at the age of twenty-one years. Nicholas died under that age, and his father took out letters of administration upon the estate. Richard is still a minor, and his father is his duly appointed guardian. David B. Somers settled the testator's estate. The personal estate appears to have been but $50.80, while the debts and expenses of settlement amounted to $392.40. He settled his final account in the Orphans Court of Atlantic county, in April, 1865. It shows a balance of $683.40 in his hands, including the money received from the sale of the Babcock property. That was all of the testator's real estate. The executors sold it under the power, and applied so much of the proceeds as was necessary for the purpose, after application of the personal estate, to the payment of the debts and expenses. David B. Somers died in April, 1874, intestate. No administration was granted of his estate. His son, the defendant, collected the money due his estate, and the bill is filed against him as executor *de son tort*, and as trustee by succession from his father.

The complainants are Joab Clayton (who sues as guardian of Richard and administrator of Nicholas,) and Daniel Clayton and Samuel Lard, the last of whom is the sole heir-at-law of the testator. Joab Clayton seeks a decree, ordering that the legacy of $100 given to Nicholas be paid over to him as administrator, and that the legacy of the like amount given to Richard be paid over to him as Richard's guardian. Daniel Clayton, to whom Daniel B. Somers paid his legacy without interest when he attained to his majority, seeks a decree for the interest thereon from the 21st of January, 1864, the date of the sale of the Babcock property by the executor; and Samuel Lard prays a decree for the payment to him of $350, the amount of the proceeds of the sale of that property above the amount of the legacies. He insists that, as heir-at-law, he is entitled to so much of the proceeds of the sale of the land as was not needed to pay the legacies, and that no allowance is to be made for the payment of any of the testator's debts out of it. On the death of Nicholas Clayton, the

amount of the legacy given to him was paid to the residuary legatees.

Joab Clayton has no claim to relief unless the legacies to his son were vested, and not contingent merely. That they were of the latter character, there is no room to doubt. The gift is to the legatees when they arrive at the age of twenty-one years. It is established that the right to a legacy given in such terms is contingent on the legatee's attaining to the specified age. *Gifford* v. *Thorn*, 1 *Stockt.* 702. It is insisted, however, that in this case the provision for the sale of the Babcock property for the payment of the legacies, gives to them a different character from that which they would otherwise have, and that by reason of that provision they are vested. This position cannot be maintained. The mere fact that the testator provides the means for the payment of the legacies out of his real estate, cannot affect the question as to whether they are vested or contingent. The legacy to Nicholas lapsed, therefore. For the same reason the complainant, as guardian, is not entitled to the legacy given to Richard, and Daniel is not entitled to interest for any time preceding the time when he attained his majority. Interest is not due on contingent legacies until the time for payment arrives. *Roper on Leg.* 1309. Samuel Lard, the heir-at-law of the testator, is entitled to the lapsed legacy. The language of the residuary bequest confines the gift thereby made, expressly and explicitly, to the personal estate. And though the testator orders an absolute conversion of his real estate for the payment of the legacies, that will make no difference. *Roper on Leg.* 500, 516. Where land not otherwise disposed of by the will is charged with legacies, if the heir furnish the money for the legacies, he will be entitled to the land.

The heir in this case is entitled not only to the lapsed legacies but to the interest accrued on the money set apart from the proceeds of the real estate to pay them. He is also entitled to the interest which accrued on the legacy to Daniel Clayton up to the time of vesting. He is, in like manner, entitled to the interest accruing on the legacy to Richard up

to the time of lapse or vesting. The defendant is entitled, in the account for the interest, to an allowance for taxes paid on the money from which the interest is derived. The heir, as before stated, insists that he is entitled to the money realized from the sale of the Babcock property over the amount necessary to provide for the legacies, and that the executor ought not to be allowed for any debts of the testator paid out of those proceeds. He relies for support of his position on the case of *Winants* v. *Terhune*, 2 *McCarter* 185, but that case does not dispose of or affect the question. There the testator, who was a resident of this state at the time of his death, and had both real and personal property here, owned real estate in New York, also. By his will he ordered his executor to sell the last-mentioned property to pay certain specified debts. The executors sold it accordingly. After paying those debts a surplus of the proceeds remained in his hands. The personal estate was insufficient to pay the rest of the testator's debts. The executor accordingly applied to the Orphans Court of Bergen county for an order to sell land to pay debts. That court refused to make it, on the ground that the surplus of the proceeds of the New York property was personal property in his hands, applicable to the payment of the debts generally. The question there was as to the extent of the conversion of the New York property; and the Prerogative Court held that the Orphans Court was in error on that subject. It appears in the case before me (and the executor's final account had been passed about nine years when the bill was filed), that the amount of the personal estate was, as before stated, only $50.80, while the debts and expenses amounted to $392.40. The executor, having paid those debts and expenses, is entitled in equity to be re-imbursed for the amount out of the real estate which was by law charged with the payment thereof. After paying the debts and expenses and providing for the legacies, there remained only the balance of $8.40. To this amount, with the interest thereon, the heir is entitled.

The evidence shows that the defendant is chargeable, as executor *de son tort*, with the payment of that money. As trustee, he is liable for the amount of the lapsed legacy and the interest, as above stated. Inasmuch as the heir does not by the bill seek relief in respect to the lapsed legacy and the interest on the money set apart for the payment of the legacies, or either of them, he will not be entitled to costs although relief is granted in respect thereto. And in view of the insignificant amount of the balance due in respect to the proceeds of the sale of land, which were not required to pay the debts and legacies, costs will not be awarded to him. The bill will, as to Joab and Daniel Clayton, be dismissed, with costs as against both; for Joab, though suing as administrator of one of his children, as well as in the capacity of guardian of another, is not under the circumstances entitled to any immunity from the consequences of the litigation, but should be required to pay the costs himself.

BRANT *vs.* CLARK and MINTON.

1. The fact that a mortgagee joins with his mortgagor as surety in a bond given by the latter to a party taking a second mortgage on the property, gives the latter no lien upon the interest which the prior mortgagee had in the mortgaged premises.

2. Nor would the insolvency of the prior mortgagee and the mortgagor in such case entitle the junior mortgagee to priority of payment, in the absence of fraud on the part of the prior mortgagee.

Bill to foreclose. On exceptions to answer of defendant Minton.

Mr. Church, for the exceptions.

Mr. H. C. Pitney, *contra*.

THE CHANCELLOR.

The bill is filed for foreclosure and sale of certain mortgaged premises. The complainant's mortgage was given to him by Clark, and is prior in date, execution, and registry to that of the defendant Minton. The latter, in his answer, states that after the registering of the complainant's mortgage, the complainant joined as surety with Clark the mortgagor, who still held the premises, in a bond to him, which was secured by a second mortgage on the property. He also alleges that his bond is unpaid, and that the mortgagor and the complainant are both insolvent, and that the premises are insufficient to pay both mortgages. He insists that under this state of facts he is entitled to priority in payment of his mortgage over that of the complainant. The complainant excepts to these statements in the answer, as being impertinent.

It is obvious that the fact that the complainant joined with the mortgagor as his surety in the bond to Minton, gives the latter no lien upon the interest which the complainant has in the mortgaged premises. *Gausen* v. *Tomlinson*, 8 *C. E. Green* 405; *Aymar* v. *Bill*, 5 *Johns. C. R.* 570. In the latter case, the holder of a mortgage on real estate, having joined with the mortgagor in the purchase of other land, gave, with him, a mortgage of that land and the first-mentioned property, to secure part of the purchase money of the land they had so purchased together. It was held that his interest as mortgagee under the first-mentioned mortgage, did not pass by the mortgage last mentioned, and that the latter mortgage was not entitled to priority over the former. In that case, the complainant's mortgagor was not, as in this case, bound to him as a surety merely, but was a principal debtor; and he not only held a former mortgage on the premises, but, with the owner of the equity of redemption, had executed a mortgage to the complainant, covering that property, to secure the payment of his own debt. The defendant's claim to the relief he seeks in this case, must rest entirely on the fact of the alleged insolvency of the complainant and Clark the mortgagor, for without that it has no support whatever. But

that fact does not entitle him to it. There is no allegation that the complainant has been guilty of fraud. Minton took his mortgage with notice of the existence of the complainant's mortgage, and probably because of its existence and priority over the mortgage he was about to take, required a surety in the bond.

HAGAN *vs.* RYAN and wife.

1. The burden of proof is on the defendant to show payments on account of the mortgage debt, claimed by the answer.

2. An allegation of the bill that "a great part" of the principal of a mortgage is due, is not conclusive against complainant's claim that all of the principal is due.

3. Such allegation is a mere averment of pleading and is amendable.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. L. Zabriskie, for complainant.

Mr. C. H. Winfield, for defendants.

THE CHANCELLOR.

The question presented is as to the amount due on the mortgage in suit. The mortgage is dated February 9th, 1870. The complainant claims that the whole of the principal, $1378.50, is due, with the interest from February, 1873. The defendants claim that $1405 have been paid on account. No receipts are endorsed on the bond or mortgage, nor did the complainant, or any one in her behalf, ever give any.

Although the defendants produce what are alleged to be copies of memoranda of settlements purporting to have been signed by the complainant, the proof is that they were not signed by her or by her authority or direction. The burden of proof of payment is on the defendants, and the proof on

their part fails to substantiate the allegations of the answer, or to show that any more has been paid than the amount sworn to by the complainant. The proof of the payments set up in the answer, rests upon the testimony of Ryan alone. His testimony is not only unsatisfactory but fails of corroboration, although he produces as witnesses the persons who, he says, were present on the occasions as to which he testifies. He says he had three settlements with the complainant; one, the first, on the 3d of October, 1871, when it was agreed between them that the complainant had received $900. The second settlement, he says, was on the 12th of March, 1873, when she had received $1175. It appears by his own testimony, that the complainant did not take part in any settlement at that time, and that there was none then made or attempted. The third, he says, was on the 5th of November, 1873. She then received $30, and he says it was agreed between them that she had received $1395, including the $30. He produces what purports to be receipts, of the dates of those alleged settlements, signed by her, for the amounts which he says it was agreed were, on those accounts, found to have been paid; but he admits that she did not sign them. He says she refused to give him any writing on the first and last settlements; and it appears, as before remarked, that there was no settlement made or attempted on the second occasion mentioned by him. He says his wife was present at the alleged settlements. Her testimony, instead of corroborating him, contradicts him, and so does that of his step-son, Foley. Ryan says that he had a book in which he entered every payment made to the complainant, and that he threw it away after the suit was brought, having first, and after this suit was begun, had a copy of the account of the payments made. The alleged copy shows that the entire amount of his payments was $230. But it is insisted by the defendant's counsel that inasmuch as the bill does not state that all, but only that "a great part," of the principal is due, this should be taken as conclusive against the claim of the complainant that all of the principal is due. This is a mere averment of pleading and is amend-

able. There will be a decree for the complainant for the amount of the principal of the mortgage, with interest from February 9th, 1873.

VAN WINKLE *vs.* STEARNS and others.

Sheriff's sale set aside on the ground of surprise, upon terms.

Motion to set aside sheriff's sale under foreclosure, on the ground of surprise.

Mr. Thomas M. Moore, for motion.

Mr. James Van Blarcom, contra.

THE CHANCELLOR.

This is an application in behalf of Dr. Richard A. Terhune to set aside a sale made by the sheriff of Passaic county of certain mortgaged premises, by virtue of an execution for the sale thereof issued in this cause. It appears from the evidence that the foreclosure was begun and conducted at the request and in the interest of Stearns the owner of the property, who held it subject to the complainant's mortgage. The origin of that mortgage is this: Dr. Terhune was at one time the owner of the mortgaged premises. Having agreed to sell them he executed, at the request of the purchaser and for the accommodation of the latter, and without consideration, his bond and mortgage thereon for $1000 and interest, and conveyed the property to the purchaser subject to the mortgage. He did not, it may be remarked, ascertain the fact of his liability for deficiency until after the sheriff's sale had taken place. He had a mistaken notion that he could not be held liable personally. As between Stearns, who was

the real purchaser at the sale, and Dr. Terhune, the sale ought not, under the circumstances, to stand. There are other considerations also, arising out of the complainant's conversation with Johnston the evening before the sale, which are of much weight in favor of granting the relief which Dr. Terhune seeks. The property sold for only about one-fifth of its value. The bidder to whom it was struck off was nominally the complainant's son, but actually the complainant, and the real purchaser was Stearns. The sale will be set aside, and the sheriff will be directed to re-sell the property. Dr. Terhune will be required to pay the costs of the suit at law which the complainant has brought against him on the bond, and to give security that he will bid at the sheriff's sale an amount equal to the amount which will then be due to the complainant on his decree, including the sheriff's fees of both sales.

Decker *vs.* Decker's Administratrix.

The Court of Chancery will only assume jurisdiction over the settlement of intestate's estates, for cause.

Bill for relief.

The Chancellor.

The bill is filed by a creditor of the estate of Madison Decker, deceased, late of the county of Sussex, against his administratrix, for a settlement of the estate in this court. It alleges that, after letters of administration were issued to her, the defendant filed her inventory according to law; that out of the personal estate she received, as widow of the intestate, property to the value of $200, in pursuance of the provision of the statute; that there remained in her hands to be administered less than $100 of the personal estate; that the intestate died seized of a lot of land in Sussex county; that there are

debts amounting in the aggregate to a considerable sum, due from the estate; that the defendant, soon after receiving letters of administration, removed out of the county of Sussex, so that the creditors have had no opportunity to present to her their claims or demands against the estate, and that she has done nothing, except as above mentioned, towards the settlement of the estate, or in discharge of her duty as administratrix. It prays that an account may be taken of the personal estate, and of the claims of the creditors, and that they may be paid out of the personal estate, and that if that be insufficient for the purpose, the real estate may be sold and the proceeds applied thereto.

It is quite enough to say that the bill shows no reason for drawing the settlement of the estate into this court. It does not even appear by it or by the evidence, that the administratrix left this state. For aught that appears by either, she merely removed out of the county of Sussex into another county in this state. But however that may be, the complainant has an adequate remedy at law under every aspect of the bill. The bill will, therefore, be dismissed.

LEWIS' administrator *vs.* REICHEY.*

1. A description of property in a receipt, as follows: Received, Newark, N. J., December 9th, 1874, of G. L., the sum of $500, in full for title to property held by H. R. on Bruce street and Thirteenth avenue, and South Orange avenue, in city of Newark, N. J., which said title is held by said R. by declaration of sale from mayor and common council of Newark," (signed) A. M. H., attorney for H. R., &c., was held sufficient to warrant a decree for specific performance.

2. It was held, under the evidence, that the attorney was authorized to make the contract for the defendant.

Bill for specific performance. On final hearing on pleadings and proofs.

* Cited in *Lang* v. *Moole*, 4 *Stew.* 415; *Tillotson* v. *Gesner*, 6 *Stew.* 319.

Mr. W. H. Francis, for complainant.

Mr. S. H. Baldwin, for defendant.

The Chancellor.

George Lewis, the intestate, was, from 1848 to the time of his death in 1875, after the commencement of this suit, the owner of a tract of land in Newark. From 1857 to 1871 he, with his family, resided in Ohio, from which state he returned to New Jersey in 1871. After his return, and in 1874, he discovered that the land above mentioned had been sold for non-payment of an assessment made under the charter of the city, (and amounting with interest and costs, at the time of sale, to $22.04,) and purchased at the sale by the corporation of Newark for a term of fifty years, and that the corporation had sold the tax title for that sum to the defendant, by whom it was then, as it still is, held. Shortly afterwards, in the fall of 1874, he applied to the defendant with a view to purchasing the tax title. The result of their interview was, that the latter made an appointment to meet him at the office of Mr. Hassell, the defendant's attorney, in Newark. At the time designated Mr. Lewis went according to appointment, and met the defendant who was in company with Mr. Lueddeke a friend of the latter, at the street door of the building in which Mr. Hassell's office was. The defendant then told him, according to Mr. Lewis' testimony, that Mr. Hassell had gone to New York, but that he, the defendant, had left the matter entirely with him, and had authorized him to settle and cancel the tax title for $500. On Mr. Lewis objecting to the amount as being too large the defendant, Mr. Lewis says, replied that Mr. Hassell was fully authorized to settle the matter, and if Mr. Hassell chose to take $100, he, the defendant, would agree to it; that whatever Mr. Hassell agreed to he would sanction. Mr. Lewis testifies that he saw Mr. Hassell the next day; that the latter told him he was authorized to settle for $500; that he got the money and offered it

to Mr. Hassell, who refused to take it, but said he would go with him to the house of the defendant; that they went, and not finding the defendant at home, they returned, and Mr. Lewis gave to Mr. Hassell five bills of $100 each, for which the latter gave him the following receipt:

"Received, Newark, N. J., December 9th, 1874, of George Lewis the sum of five hundred dollars, in full for title to property held by Henry Reichey, on Bruce street and Thirteenth avenue, and South Orange avenue, in city of Newark, N. J., which said title is held by said Reichey by declaration of sale from mayor and common council of Newark, and which shall be assigned to said Lewis within two days from the date hereof. "ABRAM M. HASSELL,

"*Attorney for Henry Reichey.*"

The questions on the decision of which this case depends are, whether the receipt, if made by authority of the defendant, is sufficient to bind him; and, if so, whether Mr. Hassell was authorized to contract for the defendant. The counsel of the latter insists that the receipt is not binding, because it does not sufficiently describe the property. The location of the property is given. The land lies together on the street and avenues mentioned in the receipt. The defendant does not claim to have had any other title by declaration of sale from the corporation of the city of Newark. The description is sufficient. The maxim *id certum est quod certum reddi potest,* applies. Where an agreement in writing for the sale of a house did not, by description, ascertain the particular house, but spoke of it merely as "the house &c., in Newport," and referred to the deeds by saying, "the money to be paid as soon as the deeds can be had from Mr. Deere," it was held that the agreement was sufficiently certain, if it could be ascertained by inquiry before a master that the deeds in the possession of the person named referred to the house in question. *Owen* v. *Thomas*, 3 *M. & K.* 353. Here the declaration of sale referred to will give all requisite certainty as to the subject of the contract. The weight of the evidence is that Mr. Hassell was the duly authorized agent of the defendant to

contract to sell and to make the agreement to assign the tax title the term of years mentioned in the declaration of sale. He testifies to the fact unequivocally, and with circumstance. He says that on the day above referred to as that for which the appointment was made, the defendant and Lueddeke came to his office and spoke of the appointment, and on his informing them of his engagement to go to New York, they both directed him to accept $500 for the tax title. He further says that he was authorized by the defendant to "receive from Mr. Lewis $500 for a full assignment of the entire declaration of sale." He also says, he thinks he saw the declaration of sale, and that it was put into his hands; that the defendant, before the agreement for assignment was made between the witness and Mr. Lewis, instructed him to assign the declaration to Mr. Lewis for $500, and that Lueddeke was present at the interview at the witness' office, in which the instruction was given. The defendant in his testimony admits that he gave Mr. Hassell authority to sell, but denies that he authorized him to sell his tax title to the whole of the land included in the declaration of sale. He says he told Mr. Hassell when he went to see him, to say to Mr. Lewis he could "have the claim back" (referring to the assignment of the tax title,) for $500, without expenses, and if he, Mr. Lewis, was satisfied with the terms, Mr. Hassell could make out the papers. He says, indeed, that he did not authorize Mr. Hassell to close up the bargain, but he also says subsequently, that he told Mr. Hassell what part to sell; that he told him to sell "all from Koelhoeffer's corner on beyond Thirteenth avenue as far as Mr. Lewis owned, and then round to the shop" of the latter. He adds that that was all he owned at the time, and that he never made any agreement with Mr. Lewis other than this, or authorized Mr. Hassell to make any other. Here there is an admission that he did authorize Mr. Hassell to sell to Mr. Lewis. But further, he says he told Mr. Hassell that if Mr. Lewis wanted to "get back the declaration of sale" for $500 for that part of the property, he could have it, and that he

authorized Mr. Hassell to say so to Mr. Lewis for him, and that he told Mr. Hassell that if Mr. Lewis was satisfied, he could make out the papers. He clearly authorized Mr. Lewis to pay the sum to be agreed on between him and Mr. Hassell, to the latter, and authorized the latter to receive it for him, and to sell or agree to assign his title (he says as to part of the property only,) to Mr. Lewis, in consideration of the payment. Lueddeke, who was present at the examination of witnesses in the cause, was not called by the defendant, and there is no corroboration of the defendant's testimony on the subject of the instructions to Mr. Hassell in the particulars in which it differs from that of the latter and Mr. Lewis. There will be a decree for specific performance.

RUCKMAN *vs.* DECKER and others.

A decree dated February 13th, 1873, and filed on that day, not being in accordance with the opinion of the court, it was ordered that it be taken from the files, and a new one was drawn under specific directions of the then Chancellor. It was presented not to him, but to his successor in office, by him signed, and then filed. Motion to take the latter decree from the files as improvidently signed, refused. An order should have been taken, directing the latter decree to be filed *nunc pro tunc.* Such order made *nunc pro tunc.*

Motion to take final decree from the files as having been improvidently signed.

Mr. C. H. Winfield, for motion.

Mr. J. B. Vredenburgh and *Mr. Jacob Weart*, *contra.*

THE CHANCELLOR.

The late Chancellor Zabriskie having heard this cause on its merits in the term of October, 1872, filed his opinion

shortly prior to the 13th of February, 1873. A decree of that date was drawn by the complainant's counsel, and presented to him for his signature. He signed it, and it was filed on that day. The decree not being in accordance with the opinion, the defendants' counsel, then Mr. Barker Gummere, on the 18th of the same month of February, gave notice to the complainant's solicitor of a motion to be made before the Chancellor on the 25th of that month, to rectify the decree in certain specified respects. At the time fixed in the notice the motion was made and the matter discussed. The Chancellor pronounced the decree to be erroneous, ordered it to be taken from the files, and gave specific directions for another, which he requested Mr. Gummere to draw. Mr. Gummere did so, and sent the draft to the complainant's solicitor to be examined and, if found satisfactory, to be by him submitted to the Chancellor for his signature. The complainant's solicitor was satisfied with it, but retained it in his possession without presenting it to the Chancellor until some time in the following June, when he presented it to the present Chancellor, who signed it. It was dated on the 13th of February, 1873, and filed on the 11th of June following. Chancellor Zabriskie's term of office expired on the 1st day of May, 1873. After the filing of the decree in June, the master therein mentioned proceeded with the reference thereby directed, the solicitors of both parties attending before him accordingly. The master having made his report, it was filed, and a decree confirming it was entered on the 12th of April, 1876. No objection appears to have been made to the decree of June, 1873, from the time when it was entered until after the decree of April, 1876, confirming the master's report. Motion is now made on behalf of the defendants to take the decree of June, 1873, from the files, as having been improvidently signed, because, at the time of its date, the Chancellor by whom it was signed was not in office, his term not having then begun. The power of the Chancellor to order a decree to be signed *nunc pro tunc*, even after a very long interval has elapsed after pronouncing it, is beyond question. *Benson* v.

Woolverton, 1 *C. E. Green* 110; *Burnham* v. *Dalling*, *Id.* 310; *Donne* v. *Lewis*, 11 *Ves.* 601; *Lawrence* v. *Richmond*, 1 *J. & W.* 241; *Gray* v. *Brignardello*, 1 *Wall.* 627; 1 *Barb. Ch. Pr.* 340; 2 *Dan. Ch. Pr.* 1016, (3*d Am. ed.* 1028.) Said Lord Eldon, in Donne *v.* Lewis, which was a case where the original decree could not be found and the motion was to supply its place with another: "The court will enter a decree *nunc pro tunc*, if satisfied from its own official documents that it is only doing now what it would have done then." In Lawrence *v.* Richmond, the same Chancellor ordered that a decree be drawn up conformably to the minutes of the registrar's book, although twenty-three years had elapsed between the time of pronouncing the decree and the time of making the motion. The decree had been drawn up when it was pronounced, but it was not entered, and there had been no proceedings under it. In this court, in 1873, in the case of *Dorsheimer* v. *Rorback*, 9 *C. E. Green* 33, a decree made by Chancellor Zabriskie was amended by the present Chancellor from, and made to conform to the opinion on file, by the addition of a clause necessary to effectuate the remedy of the complainant under it, and which had been inadvertently omitted in drawing it. In the case before me there was, as already appears, an opinion on file. No objection is made to the decree under consideration on the ground of non-conformity to the opinion. Indeed there would seem to be no room for objection or criticism on that score, for it was drawn by the then counsel of the defendants under circumstances which were such as to secure conformity, and it was signed as drawn by him. The Chancellor by whom it was pronounced, dictated its terms. The counsel of the complainant was satisfied with it. There was, under the circumstances, no need of notice of presenting it for signature. It must be held to have been regularly entered, except that there should have been an order directing that it be filed *nunc pro tunc*. *Burnham* v. *Dalling*, *ubi supra*. Such an order will now be made, *nunc pro tunc*.

HENWOOD *vs.* JARVIS and SCHAFER.

1. When an injunction has been granted upon a bill filed merely for discovery in aid of a defence at law, it will be dissolved as soon as the answer is perfected. But the rule does not apply to a case where the bill is filed for relief, and discovery incidental to the granting thereof.

2. Though this court will respect the intention of the legislature in providing for the institution of summary proceedings for the trial of rights, and in all proper cases leave parties to their remedy at law, yet it will not, in a proper case, refuse equitable relief because the legislature has, in its wisdom, made these proceedings summary.

3. Equity will not refuse to interpose when the remedy is more complete and perfect in equity than at law.

4. To restrain the assertion of doubtful rights in a manner productive of irreparable damage, and to prevent injury to a person from the doubtful title of others, are among the legitimate functions of a court of equity.

5. Where, upon a bill to restrain proceedings at law, the question is one of fraud, and the interests involved are of great magnitude, and the answers do not satisfy the mind of the court that injustice would not be done the complainant if he were not permitted to pursue his application for relief here, this court will not remit him to a court of law when the question can be better examined in equity, especially when the proceeding in the law court is of a summary character, and the injury which may be inflicted upon him if fraud be permitted to prevail, will be irreparable.

6. Whether the defendant has been prejudiced by delay in commencing suit against him, enters into the question whether the complainant has by his delay forfeited his claim to the consideration of equity.

7. Where the complainant has a distinct ground of equitable relief, aside from his defence at law, he will not be obliged to abandon his legal defence by confessing judgment before equity will enjoin the suit at law.

8. The whole matter of terms on granting or continuing an injunction is in the discretion of the court.

Bill for relief. On motion to dissolve injunction restraining the defendant Schafer from prosecuting a suit at law for possession of premises demised by Jarvis to Henwood. On bill and answers.

Mr. R. Gilchrist, for motion.

Mr. J. F. McGee and *Mr. L. Abbett*, *contra*.

THE CHANCELLOR.

In 1869, Jarvis leased to Henwood for a term of five years from the 1st of January, 1870, with privilege of renewal for five years more, certain extensive and valuable buildings and premises in Jersey City then owned by the former, to be used for the storage and inspection of tobacco, or for general storage purposes only. The lease contained a provision that the lessor might terminate it upon a sale of the premises, on giving six months' previous notice in writing to the lessee, his representatives or assigns, who had the right to terminate or surrender it on like notice. In 1874, the lease which had been in some respects modified was, in accordance with its provisions in that behalf, renewed for five years from the 1st of January, 1875. On the 5th of November, 1875, Jarvis entered into a contract in writing with the defendant Schafer, for the sale of the premises to the latter, the deed to be delivered on the 10th of that month, for the consideration of $225,000, of which $25,000 were to be paid on the delivery of the deed, and the rest secured only by mortgage on the premises, (without personal liability on the part of Schafer for the mortgage debt, or any part thereof,) payable with interest at five per cent. per annum in ten years from date, with an option to Schafer or his heirs or assigns to pay the principal before the end of that period, on notice. On the 10th of November the deed and mortgage were delivered, and on the next day both were duly recorded in the register's office of Hudson county. On the 5th of November, the day on which the contract for sale was made, Jarvis served upon Henwood a notice in writing that he had made a sale of the premises, which was to be consummated as soon as the deed of conveyance for the property could be prepared and executed, and that the lease would be determined at the expiration of six months after the delivery of the notice to

Henwood, who would thereupon be required to surrender the premises to Schafer, the purchaser and owner. At the foot of the notice was one signed by Schafer, requiring Henwood to deliver up to him possession at the end of six months from the time of the delivery of the notice. On the 6th of May, 1876, Henwood still retaining possession, Schafer made a demand on him in writing for possession, with a notification that he would, if possession were not given, hold him liable for double the yearly value of the property, and that as soon as he might be able to do so, he would bring an action of ejectment, and also would, if entitled thereto, hold him responsible for all damages consequent upon his refusal to surrender possession. On the 11th of the same month he served on him another demand and notice of like character and purport. Henwood still holding possession, Schafer, on the 22d of May, instituted a suit for possession before a justice of the peace in Jersey City. The suit was, in a few days after it was begun, carried by the plaintiff therein to the Circuit Court of Hudson county, under the provisions of the twentieth section of the act "concerning landlords and tenants." *Revision* 430. The bill attacks the sale alleged to have been made by Jarvis to Schafer, denies its *bona fides*, and claims that it was merely a contrivance fraudulently designed by the defendants to deprive the complainant of his term, and oust him from the premises. It prays an answer not under oath, an injunction against the suit at law, and any other act, action or proceeding to obtain possession, and that the deed may be declared void as against the complainant's lease and term thereunder. The bill sets up a claim under an agreement made between the complainant and Jarvis before the renewal, by which the former, in case of the termination of the lease during the term by notice, on a sale of the premises, was to be entitled to $50,000 of the purchase money, if the property should be sold for $600,000 or more, and to a proportionate sum if the sale should be for a smaller price than $600,000. Jarvis insists that the claim is groundless, and that the agreement expired with the original

term, and was not continued by the renewal. Inasmuch as the bill assails the sale and conveyance to Schafer as fraudulent, and alleges that the property has not, in fact, been sold to him, and prays relief accordingly, and seeks no relief under or in pursuance of the agreement just referred to, or based in any way upon it, the claim will be left wholly out of consideration.

The bill is filed for relief against the sale and for discovery as incidental thereto. It attacks that transaction as a fraudulent contrivance, designed merely as a means of unjustly depriving the complainant of his term, and of inflicting irreparable injury upon him to a very great extent. Denying the *bona fides* of the defendants, it asks that they may be required to answer, (though not under oath,) and that they may be enjoined from taking any steps towards ousting the complainant from the premises. The defendants having answered the bill, their counsel insists that the injunction should be dissolved as of course, on the ground that they have made discovery. It is true that when an injunction has been granted upon a bill filed merely for discovery in aid of a defence at law, it will be dissolved as soon as the answer is perfected. *King* v. *Clark*, 3 *Paige* 76; *Grafton* v. *Brady*, 3 *Halst. Ch.* 79. In such case the only object of the bill is to obtain the defendant's answer to be used on the trial at law, and there can be no ground for restraining the defendant from proceeding at law after the discovery has been obtained. The bill in this case, however, is not such a bill. The rule therefore does not apply, and this motion is to be determined by the rules applicable to cases where the bill is filed for relief and discovery incidental to the granting thereof. The question therefore is, whether the equity of the bill has been answered.

The defendants have answered on oath, and of course, on this motion, are entitled to the benefit of their oaths. The facts relied upon in the bill as the ground for impeaching the alleged sale from Jarvis to Schafer are, with perhaps two exceptions, admitted in the answers. The exceptions are, the conversation which the complainant says took place between

him and Schafer on the 30th of November, 1875, on the payment by him of the rent, and the conversation between him and Jarvis previously thereto, in which he says the latter directed him to pay the rent to Schafer. The facts which are not denied are, that Jarvis is a man in easy pecuniary circumstances; that in the suit between him and the complainant in this court in the beginning of the year 1875, (*Jarvis* v. *Henwood*, 10 *C. E. Green* 460,) he swore that the premises were worth at least $300,000; that Schafer, at the time of the alleged sale, was one of the firm of bankers with whom Jarvis then did his banking business; that the price at which Jarvis claims to have sold the property is $225,000, $200,000 of which were secured only by a mortgage on the property, without any personal liability or security whatever, payable in ten years, (though Schafer has the option to pay sooner on giving notice,) with interest at five per cent. per annum, and that Schafer resides in New York and is a banker there. Jarvis, in his answer, gives as his reason for selling the property his desire to get the cash, $25,000, which, he says, he received on account of the purchase, and the mortgage money, $200,000, when it should be payable; and he adds that he "was willing and desirous of selling to any one by reason of the trouble and annoyance to which he was subjected by the complainant." He denies that the sale was made with the purpose of depriving the complainant of his term or of harassing him or doing him any injury. He says that $225,000 was as high a price as he could get for the property, and that he considers the sale a good and fair one, for a fair and adequate price, and that he accepted the mortgage for $200,000 without personal liability for the debt, and accepted five per cent. as the rate of interest, because he could do no better, Schafer refusing to agree to a higher rate of interest or to become personally liable for the $200,000, or any part of it. Schafer gives as his reason for refusing to become personally liable for the mortgage money, that he "never will, if he can help it, incur a personal obligation to pay money, for real estate especially, the extent of the depreciation of which no one can foresee;"

and he says the reason why the interest was fixed at five per cent. was because he would not pay any more. Notwithstanding the denial of fraud and of all intention to deprive the complainant of his term, it appears that on the very day of the alleged sale, and five days before the deed was to be delivered, notice to quit was given to the complainant. The disposition of Jarvis towards the latter is shown in his answer. He says he was, in view of the trouble and annoyance he had been subjected to by the complainant, "willing and desirous of selling the property to any one." What the trouble and annoyance were does not appear, except as he refers in that connection to the suit in this court above mentioned. It does appear that the rent was promptly paid. That Jarvis was dissatisfied with Henwood as his tenant, is abundantly evident. Between the time of the suit above referred to and the date of the contract of sale, was a period of less than a year. At the former date, Jarvis valued the property at $300,000 at least. At the latter, according to his statement, he was quite willing to take $225,000 for it, and that too, on terms extraordinary in their liberality; and noticeably so, when it is considered that he received only about ten per cent. of the purchase money in cash, with a mortgage, at a rate of interest unusually low, for the rest, without personal security or responsibility of any kind, and not becoming due before the end of ten years. It does not appear that he ever attempted or offered to sell the property to any one but Schafer, or in any way sought to get a higher price than $225,000 for it. He was under no obligation, indeed, to sell the property to Henwood, nor to offer it to him, but it was probably worth more to the latter than to any one else, and an offer to sell it to him, or an invitation for an offer from him, would have been an important fact in determining the *bona fides* of the transaction under consideration, and would have been quite in accordance with the conduct of business men in such matters. Jarvis was, it is admitted, under no necessity to sell, and it does not appear that Schafer was desirous of buying. Indeed, the terms of the alleged sale indicate the very reverse. Schafer was in no

business which would make it desirable to him to own the property; indeed, he was unwilling to buy it even at the price of $225,000, except on the exceedingly liberal terms agreed on between him and Jarvis. Without, so far as appears, seeking for any other purchaser, Jarvis entered into a contract to sell the property to his banker (between whom and himself it may be assumed that the confidential relations usual in such cases existed,) at a price and on terms which provoke the gravest suspicion as to the *bona fides* of the transaction. The rent paid by Henwood under the renewal was $18,000 a year, out of which Jarvis had to pay the taxes and insurance amounting, it is said, to about $6000. His income from the proceeds of the sale he states at $11,750, which sum is the aggregate of the interest at seven per cent. on $25,000, and the interest at five per cent. on $200,000. It may be that $225,000 were a full price for the property, even on the liberal terms on which it is said to have been sold, and that Jarvis did, indeed, offer the property to others; or it may be that he was willing, in his disgust with the property in consequence of the result of the suit in this court above referred to, to be rid of it even at the loss of $75,000; but none of these things satisfactorily appear. Schafer has not leased the premises. The business of the complainant conducted there is very extensive. He is an inspector of tobacco, and the buildings are used by him for the storage of that commodity packed in hogsheads, of which they will hold about ten thousand. The average number kept there on storage by the complainant is seventy-five hundred; the amount varying according to the season of the year. The tobacco belongs to numerous parties, many of whom he swears are unknown to him, (some residing out of this country,) his certificates of the receipt of the tobacco passing from hand to hand as evidence of ownership among dealers. To compel him to remove from the premises would destroy his business and inflict on him irreparable injury, while Schafer can be protected against loss from the continuance of the injunction.

But it is urged by the defendants' counsel that the com-

plainant may have adequate relief at law; that the question of the *bona fides* of the sale may be tried there. The defence, indeed, may be made at law, (*Muzzy* v. *Allen*, 1 *Dutcher* 471,) but the proceeding at law is of a summary character, and, though this court will of course respect the intention of the legislature in providing for the institution of such proceedings, and in all proper cases leave parties to their remedy at law, yet it will not in a proper case refuse equitable relief, because the legislature has in its wisdom made these proceedings summary. *Forrester* v. *Wilson*, 1 *Duer* 624; *Duigan* v. *Hogan*, 1 *Bosw.* 645. The very fact that the proceedings are summary and therefore may not be as favorable to the making of a defence which is within the jurisdiction of this court, may be a sufficient reason for the interference of this court. In *Bean* v. *Pettingill*, 2 *Abb. Pr. Rep.* (*N. S.*) 58, and *S. C.*, 7 *Robertson* 7, interference by injunction was refused to stay summary proceedings of this character, but it was on the ground that the claim on which relief was sought could be as well and effectively set up at law as in equity. Equity will not refuse to interpose when the remedy is more complete and perfect in equity than at law. *Duncombe* v. *Greenacre*, 6 *Jur.* (*N. S.*) 987; *Meux* v. *Smith*, 11 *Sim.* 410. The great purpose of a court of equity in assuming jurisdiction to restrain proceedings at law, is to afford a more plain, adequate and complete remedy for the wrong contemplated than the party can have at law. The bill in this case seeks relief on the ground of fraud. It asks relief, not only from the existing suit at law, but from any other step or proceeding on the part of the defendants to obtain possession. To restrain the assertion of doubtful rights in a manner productive of irreparable damage, and to prevent injury to a person from the doubtful title of others, are among the legitimate functions of a court of equity. *Mitf. Pl.* 5. Said Lord Justice Turner in *Davies* v. *Stainbank*, 6 *D., M. & G.* 679, 696, in answer to an argument under similar circumstances that there was a defence at law: "It is a fraud in the eye of the law in a creditor to proceed at law against a surety after he has agreed with the principal

debtor to enlarge the time for payment, and this court relieves against the fraud. The mere fact that a court of law, if called upon to do so, might possibly exercise concurrent jurisdiction in such a case, cannot defeat the jurisdiction of this court to interfere. If, indeed, the matters had been pleaded at law, and the court of law had entertained the plea and adjudicated upon it, the case might have been different; but it is clear that in this case the court of law has not entertained the question, and the bill was filed before the trial of the action." It would not be in accordance with the practice of this court in such a case as this, where the question is one of fraud, and the interests involved are of great magnitude, and the answers do not satisfy the mind of the court that injustice would not be done to the complainant if he were not permitted to pursue his application for relief in this court, to send him away from this tribunal where the question can be better examined than in a court of law, especially when the proceeding in that court is of a summary character, and the injury which may be inflicted upon him, if fraud be permitted to prevail, will be irreparable.

The defendants' counsel, on the argument, insisted that the complainant had been guilty of such laches as to have forfeited his claim to the consideration of this court. It is true that over six months elapsed from the time when the complainant was first apprised of the alleged sale and the time of filing the bill, but no objection is made in the answers, or either of them, on that score. But apart from that it does not appear, and it is not alleged that the defendants, or either of them, have been prejudiced by his delay to make application to this court in the premises. He appears to have regularly paid his rent to Schafer, and always under protest against the *bona fides* of the alleged sale, and as soon as proceedings for possession were commenced against him before the justice of the peace, he applied to this court for relief. The objection cannot avail the defendants.

The motion to dissolve will be denied, and the modification of the injunction permitting Schafer to keep the suit in the

Circuit Court alive by adjournment, will be vacated. The complainant will be required to execute a bond with sufficient sureties to the defendant Schafer, in a penalty equal to double rent of the premises for two years, with condition according to the forty-fifth rule of this court, to pay to him all such damages and costs as may be awarded to him either at law or in this court in case of the decision of this cause against the complainant. The defendants' counsel insists that it is the rule of this court, that where one comes into equity for relief against proceedings at law, and seeks on equitable grounds to enjoin such proceedings, the relief will be granted only on condition of his first confessing judgment at law, and that therefore, if the injunction be continued, it should be on terms that the complainant consent that judgment be entered against him in the proceedings for possession. Such terms are sometimes imposed in granting injunctions to stay proceedings at law, where the complainant, having no defence at law, applies for relief on the ground of equity alone. In such cases they are imposed in order that the plaintiff in the action at law may not be delayed in obtaining judgment, inasmuch as the defendant has no defence at law. *Turner* v. *B. Miss. Union*, 5 *McLean* 349, 350. But see *Lawrence* v. *Bowman*, 1 *McAll.* 419. The rule in England is thus laid down by Kerr: "The terms on which an injunction is granted are in each case a question for the discretion of the court, but the general principle upon which the court proceeds is, to put the party applying upon such terms as will enable the court to do justice to the party restrained in the event of his failing to make out his case at the hearing." *Kerr on Inj.* 18. But it is difficult to discover a good reason for compelling a party, as terms on which alone the protection of equity will be afforded him, to abandon what he may be advised is a good defence at law. In *Barnard* v. *Wallis*, *Craig & Phill.* 85, cited on the argument, parties in possession of an easement filed a bill to restrain the owner of the land from proceeding with an action of trespass, alleging three grounds of defence to the action, two of which were legal and the other equitable. The Court of Chancery did

not require the complainant to confess judgment, but allowed the action to proceed to judgment, inasmuch as, if the legal grounds of defence should be sustained, the interposition of the Court of Chancery would be unnecessary, and if they should not be sustained, and it should therefore become necessary to entertain the equitable question, it would know what amount of damages a jury had assessed as a compensation for the easement, and be able to secure that amount until the hearing of the cause. *Firmstone* v. *De Camp*, 2 *C. E. Green* 317, also cited in this connection, is not in point. The injunction there was modified, indeed, so as to permit the defendant to proceed with his suit at law if he should deem such course advisable, but it was on the final hearing, and it restrained him from setting up at the trial any other meaning of the contract in question than the one indicated in the opinion. It was the final disposition of the cause. *Melick* v. *Drake*, 6 *Paige* 470, also cited on the argument, was expressly decided under the thirty-third rule of the then Court of Chancery of New York, which was as follows: "When an injunction bill is filed to stay proceedings in a suit at law, the complainant shall state in his bill the situation of such suit, and whether an issue is joined or a verdict or judgment obtained therein. If no issue has been joined or judgment obtained in the suit at law, and the bill is not a mere bill of discovery, or to aid the defence in the suit at law, the Vice-Chancellor or master on whose certificate the injunction is granted, shall direct a provision to be inserted in the injunction, that the defendant be at liberty to proceed to judgment at law without prejudice to the equitable rights of the complainant, notwithstanding the injunction. But the complainant in such cases may, on application to the court and sufficient cause shown, obtain an absolute injunction to stay all proceedings in the suit at law, or all proceedings after issue joined, in the discretion of the court." In that case, an injunction to restrain all proceedings at law was sustained. The Chancellor said: "In this case I think, from the fiat of the Vice-Chancellor endorsed on the bill, that he considered himself as acting in the char-

acter of judge having jurisdiction of the cause, and with power to exercise his discretion as to the extent of the injunction, and not as acting in the character of an injunction master merely. He recites the fact that it appears to him that a discovery is necessary to aid the defence in the suit at law, and then concludes with a fiat for an injunction to restrain all proceedings in the suit at law. And as he had jurisdiction and authority to make such an order in the present case, according to the course and practice of the court, it was the duty of the clerk to enter the order and issue the injunction accordingly. The injunction was therefore regular, and the order appealed from was correct, and must be affirmed, with costs." That case, therefore, does not sustain the position of the defendants' counsel. The forty-fifth rule of this court recognizes the practice of staying proceedings at law in ejectment, at the discretion of the Chancellor. It provides for the imposition of no terms except the giving of a bond in case issue shall have been joined in the suit at law. Where the complainant has a distinct ground of equitable relief, aside from his defence at law, he will not be obliged to abandon his legal defence by confessing judgment before equity will enjoin the suit at law. *Warwick* v. *Nowell*, 1 *Rob.* (*Va.*) 308; *High on Injunctions*, § 52; *Gaines* v. *Nicholson*, 9 *How.* 356; *Pyke* v. *Northwood*, 1 *Beav.* 152; *Lawrence* v. *Bowman*, *ubi supra.* The practice in this court is in accordance with this view of the subject. *Trenton Banking Co.* v. *McKelway*, 4 *Halst. Ch.* 84; *Morris Canal, &c.*, v. *Dennis*, 1 *Beas.* 249; *Camden and Amboy R. R. Co.* v. *Stewart*, 3 *C. E. Green* 489.

The whole matter of terms on granting or continuing an injunction, is in the discretion of the court.

BARNES and others *vs.* TAYLOR and others.*

1. A stale claim by the children of deceased executors against a surviving executor, sought to be enforced more than twenty years after the occurrence of the transactions out of which his alleged liability arose, and not till after the death of the executor, who was the only witness who, besides the defendants, could speak of the transactions which are called in question, cannot be favored in a court of equity.

2. Upon such a claim there should be an offer to account for so much of the estate as came into the hands of the deceased executors.

3. Evidence of parol admissions by defendant that he had purchased certain lands for the benefit of the complainants is insufficient, under the statute of frauds, to create a trust as to such lands in their favor, without proof of an agreement made before the sale.

4. A trust *e malificio*, and therefore constructive, is barred by the statute of limitations.

Bill for relief. On final hearing on pleadings and proofs.

Mr. S. D. Dillaye, for complainants.

Mr. J. S. Aitkin and *Mr. B. Gummere*, for defendants.

THE CHANCELLOR.

The bill is filed by the children of William S. Barnes, deceased, and the widow and children of John R. S. Barnes, deceased, against Dr. John L. Taylor and his wife, and against Dr. Taylor as executor of Isaac Barnes, deceased, who was the father of William S. Barnes and John R. S. Barnes and of Mrs. Taylor. The controversy between the parties is in reference to the estate of Isaac Barnes, the testator above mentioned. By his will he gave all his estate, real and personal, to his three children, John R. S. Barnes, William S. Barnes and Mrs. Taylor, subject to a provision for his wife, contained in a power to his executors, (his two sons and Dr. Taylor,) to sell any part or the whole of his estate, as they might deem expedient, with direction to invest the proceeds

---

* Cited in *Wood* v. *Chetwood*, 6 *Stew.* 21.

of sale, after paying the legal demands against the property; his wife to receive the interest of the investment for life. The testator died in 1848; his widow in 1851; William S. Barnes in April, 1873, and John R. S. Barnes in May, 1874. The bill was filed on the 29th of June in the last-mentioned year. The testator was the owner, at his death, of certain household furniture and a stock of merchandise in his store in Trenton, and he died seized of certain real estate in that city. Part of the latter was encumbered by a mortgage given to Isaac Brown Parker, and another part by a mortgage given to James J. Duncan. Under foreclosure of those mortgages, the land thereby mortgaged was sold to Dr. Taylor by the sheriff, in 1852. The rest of the testator's land consisted of a lot sold by his executors to Joseph C. Potts in 1848, for $6250, and a lot sold by his devisees in 1850 to William B. Brittain, for $1212.50. The bill alleges that Dr. Taylor was acting executor; that no inventory or account of the personal estate was ever filed; that he received all the rents of the real estate, and is chargeable with the price of the land sold to Potts and Brittain, which, or so much thereof as might have been necessary for the purpose, after application of the personal estate and rents received by him, the complainants insist he ought to have applied to the satisfaction of the Parker and Duncan mortgages. The bill charges that instead of so doing, he caused the property mortgaged to Parker and Duncan respectively, to be sold under foreclosure, and purchased it at the sheriff's sale, and that he purchased the property mortgaged to the former, on an agreement made by him with William S. Barnes and John R. S. Barnes before the sale. The statement of the bill on the subject of the agreement is, that it was understood and agreed by and between him and William and John, that as they were not in a condition to enable them to raise money to pay off their respective proportions of the money due on the decree of foreclosure, the mortgaged premises should be sold, and that he should become the purchaser at the sale, provided they were sold at about the sum for which they stood charged by the decree; but that such pur-

chase was to be upon the express understanding and agreement between him and them, that he should take and hold the title, first as security for the sum he might be required to bid and pay therefor on the sale, and next for the joint use of his wife (who was their sister,) and them, according to the devise in the will of their father. The bill states that he purchased the property at the sheriff's sale, and paid for it $11,000. The decree was for $6133.36, besides interest. It further states that he purchased the property mortgaged to Duncan on the same agreement, understanding and trust. The decree in that case was for $1016.28, besides interest, and the property was sold to him for $1655. The bill alleges that at these sales he prevented bidding against him by requesting different persons who were in attendance, not to bid against him, as he was, as he alleged, bidding on the property to buy it for the devisees. It states that he permitted William S. Barnes to occupy part of the property purchased at the sale under the Parker foreclosure, during his life, and his children after his death, and that John R. S. Barnes, also, after the sheriff's sales, occupied, without paying rent, other parts of the property, and that such occupation, on the part of William and John, was under an agreement between him and them that it was to be accounted for in the settlement thereafter to be made under the trust. The bill prays an account, and that Dr. Taylor and his wife may be compelled to convey to the complainants their shares in the property, or that the property may be sold and the complainants may be paid their just shares.

The claim in this case is one which, for obvious reasons, cannot be favored in a court of equity. It is a stale claim, made under circumstances which cannot fail to weigh heavily against it. It is an effort to hold to the strictest possible accountability one of the three executors, after a period of over twenty years has elapsed since the occurrence of the transactions from which his supposed liability is claimed to have arisen; and not only so, but the persons who make the claim are the children of one, and the widow and children of

the other of his co-executors. The filing of the bill has been deferred until both of these co-executors are dead. William S. Barnes died in 1873, and John R. S. Barnes died in May, 1874. The bill was not filed until June of the year last mentioned. By the death of John, the defendants were deprived of the only witness who, besides Dr. Taylor, could speak of the transactions which are called in question. It appears that the personal estate of the testator consisted of his stock in trade and household furniture. The former went into the hands of William and John, who had the entire benefit of it, and they, or one of them, also had the benefit of the latter, except such insignificant part thereof as was taken by their mother for her own use. These complainants, claiming under William and John, who never accounted at all for the property which came to their hands, are in no situation to demand an account from Dr. Taylor of the personal estate. It does not appear that he had any part of it, except it may have been the bed and bureau brought to his house, for her own use there, by the testator's widow. No offer is made in the bill by the complainants, to account for that part of the personal property received by William and John. *Ashley* v. *Allden*, 10 *E. L. & Eq.* 314. It appears that there was no personal estate applicable to the payment of the mortgage debts, because it was taken into possession and consumed by William and John. It appears, also, that the same persons received all the consideration, $6250, of the sale by the executors to Potts, and, for aught that appears, they received also, all the consideration, $1212.50, of the sale to Brittain. But, however that may be, this latter sale was not made by the executors, but by the devisees. It is in evidence, also, that William and John received the rents of all the real estate sold under the foreclosures up to the time of the purchase thereof by Dr. Taylor. The mortgages had been given by the testator. That at the time of the foreclosure of the mortgages, there was no personal property applicable to the payment thereof and no means to prevent a sale of the premises under foreclosure, is abundantly manifest from the

statements of the bill itself. It alleges that the reason for the making of the agreement which it sets up, by which Dr. Taylor was to purchase the mortgaged premises in trust for himself to re-imburse him for the purchase money he would have to pay, and interest, and in the next place for the devisees, was that William and John "were not in a condition to enable them to raise the money to pay off their respective proportions of the mortgages or decrees and the costs and expenses thereof." At that time, then, there were no means to pay off the mortgages, whether personal property or rents, or proceeds of sale of real estate. If such an agreement was made, it distinctly recognized the fact that it was necessary, in order to pay off the mortgages, for the devisees to make contribution. At that time the furniture and stock in trade, which were all the personal property, had been disposed of, and the land sold by the executors had been conveyed to Potts, and that sold by the devisees had been conveyed to Brittain. It was not claimed that Dr. Taylor had received any part of the estate for which he ought to account, but the statement as to the agreement concedes the fact that there were no means of the estate applicable to the payment of the mortgages. William and John, by whom the agreement is alleged to have been made, were both fully aware of the situation of their father's estate. Their opportunities for knowledge were quite as good, to say the least of it, as Dr. Taylor's. They, rather than he, had been the active executors. Indeed, there is no proof to sustain the charges of the bill that he was the active executor. They knew who had received the benefit of the personal property. They knew who had had the rents, and who had received the $6250 for the land sold to Potts, and the $1212.50 for the property sold to Brittain. Nor did they or either of them, at any time, so far as appears, make any demand or claim upon Dr. Taylor for any account in respect of the estate, but both were recipients of pecuniary favors at his hands, granted by him as bounty, and recognized by one of them, at least, as such. It is incredible that these two men,

both poor from the time of these purchases at sheriff's sale down to the day of their death, should not, if the allegations of the bill are true as to the purchase of the mortgaged premises, at least have made some application to Dr. Taylor, looking to the receipt by them of their interest in the property, or some equivalent therefor, or some compensation for or in respect to it. It is incredible that, under such circumstances, they should both have been the recipients of what he extended to them as bounty, without a suggestion of claim on their part to any interest in the property. The bill states that he paid the price at which the property was struck off to him, and that he paid it out of his own money, also. The very terms of the alleged trust were, according to the bill, that he should, in the first place, re-imburse himself out of the property for the sum he might be required to bid and pay therefor. He denies the existence of the alleged agreement. On this point, his answer is responsive. It explicitly denies the statements of the bill, and he is entitled to the benefit of it. Mrs. Paxson, indeed, testifies that she, with others, signed a paper in 1851 or 1852, as nearly, she says, as she can remember, in Dr. Taylor's office, and she says she was "under the impression, and was led to believe, that it was to give him authority to act for the heirs of the property left by her grandfather, William Smith, and the testator, Isaac Barnes." Dr. Taylor testifies that there never was any such paper. The testimony of Mrs. Paxson on this point is not sufficiently positive or distinct to found a trust upon. She has probably mistaken the character of the paper she was requested to sign. The great length of time which elapsed between the act to which she testifies and the time of her giving her testimony will account for the indistinctness of her recollection, and for the error into which she has probably fallen as to the nature of the paper. The only other evidence of trust as to the property sold under the foreclosure of the Parker mortgage is the testimony of Isaac Barnes and Lewis H. Leigh, two of the complainants, who swear that in a conversation after the death of William S. Barnes, which occurred,

as before stated, in April, 1873, Dr. Taylor said he "bought in the property for the heirs." This evidence of admission is insufficient under the statute of frauds, without proof of an agreement made before the sale. *Walker* v. *Hill's Ex'r*, 6 *C. E. Green* 191, 195, 196; *S. C.*, 7 *C. E. Green* 513, 519, 520; *Lloyd* v. *Lynch*, 28 *Penn.* 419, 423. As to the property sold under the Duncan foreclosure, the only additional evidence is that of William H. Potts, who testifies that Dr. Taylor, at the sheriff's sale of that property, requested him to stop bidding, giving as his reason, that he did not want the property to go out of the family, and that it was being sold to perfect the title. He says he stopped accordingly. It may be remarked that there is no attempt made to prove any declarations of Dr. Taylor at the sale of the property sold under the Parker foreclosure, nor that there was any effort on his part, on that occasion, to deter any one from bidding. The answer denies that at any of the sheriff's sales, Dr. Taylor requested any person attending to refrain from bidding for any part of the land exposed to sale, or that he represented to any person, in any way, that he was bidding at the sale for the benefit of the devisees of Isaac Barnes; and he expressly and explicitly, when examined as a witness, contradicted Mr. Potts. He is entitled to the benefit of his answer. Mr. Potts alone testifies to the alleged fact, and he is not corroborated by any witness or any circumstance. Besides, the trust which would be raised by such action on the part of Dr. Taylor would be *e maleficio*, and therefore a constructive trust, and such a trust is barred by the statute of limitations, which the defendants have pleaded. *Angell on Limitations*, § 469; *McClain* v. *Shepherd*, 6 *C. E. Green* 76. For over twenty years, Dr. Taylor has held possession of the property in question, and has exercised over it acts of complete and exclusive ownership. He has paid the taxes on it as his own, has mortgaged it, and has in every way notoriously claimed to be the owner, to the knowledge of both William and John, who permitted him so to treat and deal with it, and never questioned his right so to do. John, notwithstanding the statement of the bill to the con-

trary, does not appear to have occupied any part of the property after the sheriff's sales. William occupied part of it, but Dr. Taylor swears it was entirely by sufferance, and there is no evidence to the contrary. Neither William nor John ever took any steps to bring Dr. Taylor to a settlement, or to challenge his title, but for over twenty years permitted him to claim and deal with the property in all respects as his own. Here is such proof of acquiescence on the part of those immediately affected by the alleged frauds, as conclusively settles the merits of the case, before this court, against the complainants. The bill does not seek an account of the surplus on the sale of the property covered by the Parker mortgage. The widow of Isaac Barnes was dead at the time when that sale and the sale under the Duncan mortgage took place. The surplus on them belonged to the devisees. Dr. Taylor swears that he paid the sheriff $11,000 for the property sold under the Parker foreclosure, and the bill states that he paid it. He swears that he paid the sheriff the amount at which he purchased the property sold under the Duncan foreclosure, and that he never received any part of the surplus in either case. The sheriff is dead, and there is no evidence on his books as to what disposition was made of the surplus in either suit. Dr. Taylor was not chargeable with the money as executor. Nor is there any evidence that William and John did not receive, at least, their shares of it. The bill will be dismissed, with costs.*

BARNES and others *vs.* TAYLOR and others.†

A trust was sought to be decreed in favor of the complainants, in lands purchased by the defendant at a sale under foreclosure proceedings more than twenty years before the filing of the bill, and over which, during all that time, the defendant had openly exercised acts of exclusive ownership, in the knowledge, and without challenge on the part of the complainants.

---

*Decree affirmed, 1 *Stew.* 625. † See, further, 3 *Stew.* 8.

On the ground of the unsatisfactory evidence of an express trust, and of the absence of evidence of any trust from the relation of the parties, the relief was denied, except as to a certain part of the property which proved not to have been covered by the sheriff's deed to the defendant. As to that part, a partition was decreed, and an account of the rents and profits for six years next preceding the filing of the bill.

On final hearing on pleadings and proofs.

Mr. S. D. Dillaye, for complainants.

Mr. J. S. Aitkin and *Mr. B. Gummere*, for defendants.

THE CHANCELLOR.

This suit is brought to establish a trust in the defendant, Dr. Taylor, in favor of the complainants, in reference to certain land which the former claims to own, and which was purchased by him at sheriff's sale under foreclosure of mortgages, one called the Swift mortgage and the other the Cadwallader mortgage. The bill prays an account and partition of the land. The complainants are Mrs. Elizabeth Paxson, the children of William S. Barnes, deceased, and the children of John R. S. Barnes, deceased. The property covered by and sold under the Swift mortgage, was owned by Isaac Barnes, who gave the mortgage upon it. He subsequently conveyed it to his brother-in-law, John R. Smith. On the death of the latter, the property descended to his two sisters—Mary, the wife of Isaac Barnes, and Lydia, wife of Thomas Barnes. Isaac Barnes became his administrator, and sold the land, under the order of the Orphans Court, to William P. Sherman, for $15, and the latter conveyed it to Mary Barnes, (then wife of Isaac Barnes), and Mrs. Paxson (then Miss Barnes), daughter of Lydia, who was then dead. The property was sold in 1851, under foreclosure of the Swift mortgage, in a suit to which Mrs. Barnes and Mrs. Paxson were the parties defendant. The property sold under the Cadwallader mortgage was owned by William Smith, father of John R. Smith. The mortgage was given by him. He died

intestate, and the property descended to his children, the before mentioned Mary Barnes and Lydia Barnes, and John R. Smith. On the death of John R. Smith, his part of the land descended to his two sisters. On the death of Lydia Barnes, subsequently, her share of the property was inherited by Mrs. Paxson, her only child. By order of the Orphans Court, however, John R. Smith's share was sold, and it was purchased by Joseph A. Yard, who conveyed it to Mrs. Mary Barnes and Mrs. Paxson. On the death of Mrs. Mary Barnes, in 1851, her share descended to her children, William S. Barnes, John R. S. Barnes, and Lydia, wife of Dr. Taylor. The suit for foreclosure of the Cadwallader mortgage was instituted against Mrs. Paxson and the children of Mary Barnes and Dr. Taylor, who was the husband of the daughter. At the sale under these mortgages, the property was purchased by Dr. Taylor, and he has held it as his own ever since (a period of over twenty years before the filing of the bill,) exercising acts of ownership over it, and in all things dealing with and treating it as his own. Nor has he, in all that time, so far as appears, ever recognized any right of the complainants, or of William S. Barnes and John R. S. Barnes or their mother, Mary Barnes, or either of them, in it. The complainants allege that, inasmuch as Dr. Taylor was one of the executors of Isaac Barnes, deceased, who was the administrator of John R. Smith, who was the administrator of his father, William Smith, and no account of either administration was ever made, it was the duty of Dr. Taylor to pay off the mortgages out of the estate of Isaac Barnes. It does not appear, however, that any money ever came, or ought to have come, to the hands of John R. Smith from the estate of his father, nor, if any was or ought to have been received by him, that he was, at his death, accountable for anything in that behalf. Nor does it appear that Isaac Barnes, as administrator of John R. Smith, was, at his death, chargeable with any money of the estate of John R. Smith. His final account was settled at June Term, 1847, of the Mercer Orphans Court, and by it there appeared to be in his

hands $6092.38, distributable among creditors, whose claims proved against the estate amounted, on the 4th of January, 1841, to $8578.63. The parties interested in the estate of William Smith appeared to have acquiesced in the administration thereof for fifty years before the filing of the bill, and those interested in the estate of John R. Smith appeared to have acquiesced in the administration of that estate for over thirty years before the filing of the bill. It is alleged by the complainants that Isaac Barnes was trustee of the property in question for his wife and Mrs. Paxson, but the fact does not appear. He probably acted as their agent in collecting the rents, paying taxes and interest, but this agency ended with his death, and if there was, in fact, any trust, it devolved upon his heir-at-law. Undoubtedly, his agency was merely such as might have been expected under the circumstances, and not by virtue of any trust formally committed to him. The considerations presented in this case, in reference to the duty of Dr. Taylor, arising out of the fact that he was one of the executors of the estate of his father-in-law, have been passed upon in the case of *Barnes* v. *Taylor*, (*ante*, *p*. 259,) decided at this present term. The distinctively different features presented by this case have reference to the alleged dealings by Dr. Taylor with Mrs. Paxson and Mrs. Barnes, his mother-in-law, and the obligations which are claimed to have arisen out of the relations between him and them, and his inability, as the complainants insist, arising from his being a tenant in common with Mrs. Paxson and Mrs. Barnes, to acquire an adverse title as against them by means of purchase at the foreclosure sales. The evidence of express trust, as remarked in the case just referred to, is by no means satisfactory. Nor is there evidence of a trust from the relation of the parties. That Mrs. Paxson and Mrs. Barnes lived in Dr. Taylor's family and were supported by him, is not enough to charge him with the care of their interest in an encumbered estate, or to disqualify him from acquiring it for his own use by purchase at foreclosure sale. He denies, in his answer and testimony, that any agreement whatever ever existed between

them, or either of them, and him on the subject of a trust, or that any confidence existed between them, or either of them, and himself in respect to the property in question, or that he was ever clothed with any trust in their favor in relation to that property, or that there existed between them and him any fiduciary relation in regard to any property or interest in property belonging to them. It does not appear that Mrs. Barnes ever claimed that any such relation existed, nor that Mrs. Paxson did so until after the suit to which reference has just been made, was brought, which was in June, 1874, and it seems strange that if such relation had been understood by Mrs. Paxson to exist, she should not, in all of more than twenty years, at least, have made some inquiry as to the property, or some reference to the subject of the trust or her interest therein. If, because of his tenancy in common with her and Mrs. Barnes by virtue of his curtesy initiate, he was unable to buy, or buy under the outstanding paramount encumbrance, except it were in trust for his co-tenants to the extent of their interest therein, those co-tenants are barred by failure for over twenty years to contribute their proportion of the money advanced by him; for, in all that time, so far as appears, none of them ever even referred to the subject, although the complainants allege in the bill that the property was bought by him under an express understanding between Mrs. Paxson and him on the subject; and again, for over twenty years before the filing of the bill, he had, as before remarked, exercised notoriously, acts of exclusive ownership over the property, and had openly claimed to be the exclusive owner of it, and yet for all that period his ownership had not been challenged. The defendants set up in the answer the statute of limitations, and it is applicable in bar, so far as the property covered by the Swift and Cadwallader mortgages is concerned. It appears that one of the lots described in the bill was not covered by either of those mortgages, and therefore, Dr. Taylor has never had title to it under either of the foreclosures, and he does not claim title otherwise. He alleges that until the filing of the bill, he supposed that this land was in-

cluded in and covered by the mortgage held by Lambert Cadwallader, and that the title to it had passed to him by sale under the foreclosure of that mortgage, but he says he is satisfied that he was in error. The complainants are entitled to a decree of partition of that lot, and to an account of the rents and profits for six years next preceding the filing of the bill. It is urged by defendants' counsel that no partition should be decreed, because there is no sufficient description fixing the boundaries of that lot. The lot is described in the bill by its ancient description, and there is nothing to lead to the conclusion that the identity of the property cannot be established and its boundaries ascertained therefrom. On the other hand, I am satisfied that both may be done without great difficulty. All other relief prayed by the bill will be denied.*

JEWETT, Receiver of the Erie Railway Company, *vs.* DRINGER AND BOWMAN.

1. An attachment as for contempt was discharged, where the complainant had failed to exhibit interrogatories within the time limited by the rule, and a long time had elapsed since the expiration of the period within which, according to the rule, the interrogatories should have been filed.

2. An application for further time to exhibit interrogatories, not made until the making of a motion to discharge for non-observance of the rule, was, under such circumstances, refused.

3. The court will hold an injunction until the hearing, in its discretion.

4. In suits instituted for the purpose of impeaching transactions on the ground of fraud, reasonable distinctness and particularity in the averments and charges is required.

Motion on behalf of Dringer to dissolve injunction and to discharge the attachment against him, and counter-motion on behalf of complainant for further time to exhibit interrogatories under the attachment.

* Decree affirmed, 1 *Stew.* 625.

Mr. J. W. Griggs, for Dringer.

Mr. Cortlandt Parker, for complainant.

THE CHANCELLOR.

The motion for further time to file interrogatories under the attachment against Dringer as for contempt, will be denied. The provision of the rule on the subject of attachments, requiring that interrogatories be exhibited within a limited time, has not been observed, and a long time has elapsed since the expiration of the period within which, according to the rule, the interrogatories should have been filed. No application was made for further time until the making of the motion to discharge for non-observance of the rule. It would be unjust to Dringer, under the circumstances, to hold him longer under the attachment, or to subject him to disability in this court, now, by reason of it. The attachment will be discharged.

When the former motion to dissolve the injunction was made, Bowman's answer was not in. Now that it has been filed, Dringer renews the motion. The case for an injunction made by the bill and the affidavits annexed thereto, has not been overthrown by the answers. I am not satisfied of the *bona fides* of the dealings between Dringer and Bowman, especially the sale of the seventeen hundred tons of old car wheels. Dringer bid for these materials, in June, 1875, $22 a ton, according to the bill, (according to the statements of the defendants, $21 a ton,) on terms of payment which required fifteen per cent. in cash at the time of the award, and the balance in cash at the time of delivery. After the award had been made, the general superintendent, being unwilling to give Dringer credit, forbade Bowman to deliver the materials to him, except for cash on delivery. Bowman, on the 9th of July following, sold the materials to Dringer at $19 a ton, payable on or before delivery, and subsequently delivered them to him. Bowman says that this latter sale was approved and sanctioned by the general superintendent, but that officer,

in his affidavit appended to the bill, swears that it was without his authority. Dringer's account of the transaction is, that his bid was on terms of payment of fifteen per cent. of the price in cash on the making of the award, and the rest in cash on delivery; that the complainant refused to let him have the property unless he would pay the price in full before delivery; that he would not have bid so high a price as $21 a ton if he had been required to pay before delivery, and that he afterwards agreed with Bowman to pay $19 a ton, payable before delivery. Bowman, in his answer, says that the general superintendent refused to permit the delivery of the materials to Dringer, unless the latter would pay the price in full, at or before delivery, and that his orders were not to allow the delivery of the materials until and except as they were paid for. It will be perceived that the new terms, as stated by him, were not only not more stringent than those on which the bid was made, but were, in fact, less so; for the latter required the payment of fifteen per cent. at the time of making the award, and the balance on delivery, while the new ones only required payment of the whole price at or before delivery, and it appears by Dringer's answer that the seventeen hundred tons above mentioned were not, in fact, wholly paid for before, nor even on delivery. According to his own account, they were all delivered before the 12th of August, and yet $10,000 of the price (all of the payments on account of which were made by check delivered to Bowman,) were not paid until the 1st of September following. It appears by the affidavit of the general superintendent, before referred to, that Bowman gave as his reason for lowering the price from $22 to $19 a ton, not the increased stringency in the terms of payment, but the fall in the price of iron in the market. It is very clear that the refusal to permit the delivery to Dringer, unless payment were made at the time, was, as Bowman knew, want of confidence in his pecuniary responsibility. Yet it appears that Bowman not only, in violation of specific orders, gave Dringer credit to the extent of $10,000, at least, in the transaction of the sale and delivery of the seventeen hundred

tons of old car wheels, but also subsequently sold materials to him on credit—on the 2d of September, 1875, to the value of $2280, and on the 9th of October following, to the amount of $9468, out of a bill of $24,468. Dringer's indebtedness for materials sold to him by Bowman amounted, at the time of filing the bill, to more than $35,000. Bowman indeed, in his answer, says that all the materials sold by him to Dringer were paid for, and he imputes the indebtedness to sales made by other persons, but Dringer does not say so. On the contrary, it appears from his answer that it was contracted through Bowman. The very existence of a very large part of it was unknown to the complainant and his officers, until about the time of filing the bill. It had not been reported. On this head Dringer says in his answer, that he has been informed, and believes, and therefore admits it to be true, that, in some instances, there has been a failure on the part of some or one of the agents of the complainant, or of the company, to keep full and correct accounts of all the materials sold and delivered to him. Before deciding as to the character of the transaction of the sale of the seventeen hundred tons of old car wheels, it is proper to await the developments of the proof in the cause.

But there are other considerations to be taken into account in disposing of this motion. Dringer, in his answer, offers to pay the amount of what he states to be his indebtedness (between $36,000 and $37,000,) to the complainant, in the materials bought through Bowman, either at the price at which he purchased them, or at the present market price. That indebtedness, as stated by him, far exceeds the amount which the complainant's books show against him. This is, in effect, an offer to return materials to the amount of the indebtedness, and I see no good reason why it should not be accepted. If it be accepted, the complainant's demand will consist of a claim to an account for a higher price for the other materials, or some of them, (he has already received on account of them $61,630,) than that at which they were sold by Bowman to Dringer, and an account for the price of

materials sold by the former to the latter, and not yet accounted for at all. There does not appear to be any property wholly unaccounted for, and the only sale specified in the bill is that of the seventeen hundred tons of old car wheels, the difference claimed by the complainant in respect to which is $5100.

In dealing with the rights of parties in such a case as this, regard will be had to the rule which, for the just protection of defendants, requires reasonable distinctness and particularity in the averments and charges in suits instituted for the purpose of impeaching transactions on the ground of fraud, and refuses judicial action when invoked upon suspicion merely.

On Dringer's returning to the complainant materials, as proposed in his answer, at cost, (or at the present market value, if that be lower than the cost,) to the amount of the indebtedness admitted by him, and giving proper security in the sum of $15,000, to abide by and perform the decree of this court in this action, if it be adverse to him, the injunction will be dissolved. Such return will not prejudice his defence in this suit.

JEWETT, Receiver, &c., *vs.* BOWMAN and another.

1. Writ of *ne exeat* declared void for service on Sunday, and bond given thereon ordered to be canceled.

2. A defendant is entitled to the benefit of his sworn answer to the charges of the bill upon which a *ne exeat* issued.

Bill for relief. On motion to discharge *ne exeat* and to cancel bond given thereon, and to vacate the order for the writ. On the bill and the answer of the defendant Bowman and the affidavits annexed thereto, respectively.

Mr. T. N. McCarter, for motion.

Mr. Cortlandt Parker, *contra*.

The Chancellor.

On the filing of the bill, a *ne exeat* was ordered against the defendant, Henry Bowman. Under the writ, he was arrested by the sheriff of the county of Passaic, on Sunday, the 2d day of April last, and on that day, to relieve himself from custody, he gave bond of that date to the sheriff, with condition that he would not go, nor attempt to go into parts without this state, without the leave of this court. Having answered the bill, he now moves to set aside the service of the writ, because it was made on Sunday, and, for the like reason, to discharge the bond; and he also moves, on the answer and the annexed affidavits, to vacate the order for the writ. By the fifth section of the act "for suppressing vice and immorality," (*Revision, p.* 818,) it is enacted that "no person or persons, upon the first day of the week, commonly called Sunday, shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree, (except in criminal cases, or for breach of the peace,) but that the service of every such writ, process, warrant, order, judgment, or decree, shall be void to all intents and purposes whatsoever; and the person or persons so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, process, warrant, order, judgment, or decree." The service of the writ in question was, therefore, illegal and void. It is true that in *Ex parte Whitchurch*, 1 *Atk.* 55, a discharge was denied to the petitioner, who had been arrested on Sunday by the Lord Chancellor's tipstaff, under a warrant of the court for a contempt in disobeying an order. Lord Harkwicke, however, not only doubted at first whether the arrest could, in view of the statute, 29 *Car. II., ch.* 7, § 6, (of which the section of our act above quoted is an almost exact copy,) be sustained, but, although on consideration he thought it lawful, though made on Sunday, he upheld it on the ground that the petitioner voluntarily surrendered himself, and the order and warrant of commitment (the latter being directed

to the jailer) were different from processes of other courts issuing to sheriffs and other ministerial officers, and also because the petitioner might have a *habeas corpus,* and might bring an action of false imprisonment. The plain language of the act leaves no room for doubt in this case. The service will be declared void, and the bond will be ordered to be canceled.

The question remains, whether the order for a *ne exeat* shall be vacated. Upon this question the defendant is entitled to the benefit of his sworn answer. *Parker* v. *Parker,* 1 *Beas.* 105; *Thorne* v. *Halsey,* 7 *Johns. C. R.* 189; *Dick* v. *Swinton,* 1 *Ves. & B.* 371; *De Carriere* v. *De Calonne,* 4 *Ves.* 577; *Roddam* v. *Hetherington,* 5 *Ves.* 91; *Russell* v. *Asby, Id.* 96; *Leo* v. *Lambert,* 3 *Russ.* 417; *Myer* v. *Myer,* 10 *C. E. Green* 28. The demand set up in the bill is an equitable one. It arrises out of the alleged abuse by Bowman of his trust as agent for the complainant. The statements of the bill and of the affidavits annexed to it, show an equitable demand to the amount at least, of the sum with which the writ was endorsed. The affidavits were deemed to be sufficiently positive in reference to the transaction between Bowman and Dringer, by which the former sold to the latter one thousand tons of old car wheels at $19 a ton, to warrant, in connection with the evidence of the intention of Bowman to leave the state, the award of the writ. The bill prays an answer on oath, and Bowman has answered accordingly. As the case now stands, with the denials and statements of the answer and the affidavits annexed thereto, the order for a *ne exeat* should be vacated. They show that his sickness was not feigned, but real, and that the departure of his wife for Maryland was in no wise a just ground for suspicion against him. It appears, indeed, that she returned from her visit on the very day on which the bill was filed. The significance of the facts relied on as evidence of his intention to leave the state, is wholly destroyed.

Trustees of School District No. 44, in the County of Morris, vs. Gray.

An injunction issued to restrain the defendant from in anywise interfering with land claimed by the bill to have been dedicated to public use, was continued to the hearing, the defendant showing no title to the property from any one in possession, nor under those in whom the title was vested.

Bill for relief. Motion to dissolve injunction, on bill and answer and affidavits annexed thereto, respectively.

Mr. G. A. Allen, for motion.

Mr. H. C. Pitney, contra.

The Chancellor.

The injunction should be retained until the hearing. The bill claims that the land in question was dedicated to public use, and it appears by the affidavits on both sides, that it has been used, as alleged in the bill, for fifty or sixty years past. Indeed, it appears not to have been in the exclusive occupation of any person, from time immemorial. The defendant's affi davits show this, as well as the complainants'. The defendant, in his answer, shows no title to the property from any one in possession. Nor does he show any title under those in whom the title was vested. The right of Sharp to the land at the time of his conveyance to Welsh in 1854, does not appear.

Swallow vs. Swallow's Administrator and others.*

1. Under a testamentary direction, "that if either of testator's sons should die without leaving lawful issue, the *widow of the decedent* should receive one-third of the rents of the real estate devised to him by the will,"

* Cited in *Johns* v. *Norris*, 1 *Stew.* 150; *Swallow* v. *Swallow*, 4 *Stew.* 392.

&c., *held*, that the benefit of the provision not being restricted to a wife living at the time of the making of the will, or at testator's death, that person who was the wife at the time of the son's death was entitled to the rents.

2. An objection of non-joinder for want of a party defendant, taken at the hearing, will not lie where, so far as the complainant's rights are concerned, the interest of such party is represented by the defendants, and the presence of the absent party is not necessary to a decree against the objectors.

3. Where several persons liable for rents permit one of their number to take sole actual possession of the property charged with the rents, and use it, all are chargeable.

4. A question of fact is not reviewable on the re-hearing of a decree advised by the Vice-Chancellor, unless he certify that it should be re-heard upon the evidence.

On re-hearing.

Mr. J. R. Emery, for complainant.

Mr. G. A. Allen, for administrator.

THE CHANCELLOR.

This cause comes before me on a re-hearing of a decree made therein on the advice of the late Vice-Chancellor. The principal question is as to the construction of a provision of the will of Nicholas Swallow, deceased, by which he ordered and directed that if either of his sons should die without leaving lawful issue, the widow of the decedent should receive one-third of the rents of the real estate devised to him by the will, so long as she should remain his widow, and that after her decease the real estate given to such decedent should be equally divided among all the testator's children then living. Enoch, one of the testator's sons, died after the testator's death, leaving no lawful issue, but leaving a widow, the complainant. She, however, was not the wife of Enoch at the time of the making of the will, or at the testator's death. At both of those dates, Enoch's first wife was living. The defendants insist that the complainant is not entitled to the pro-

vision made for Enoch's widow by the section of the will above stated. I am of opinion that she is. The testator having given to his sons real estate in fee, directs that in case of the death of either of them without leaving lawful issue, the widow of the decedent shall have one-third of the rents of the real estate devised to him, and that after her death the property shall be equally divided among the testator's children then living. He evidently intended to provide by the devise in question, that the decedent's widow should have an equivalent to dower, notwithstanding the limitation over. It could not, of course, be ascertained until the death should have occurred, who would answer the description—who would be the widow. The provision is not declared to be in favor of any person living at the date of the will; nor is the language employed, to be so construed. The gift is not to the wife of the decedent, but to his widow, the person who should be his wife at the time of his death. Therein the case differs from those in which bequests have been made by a testator to his "beloved wife," (*Garratt* v. *Niblock*, 1 *Russ. & Myl.* 629,) or by a testatrix to the "husbands of her daughters," (*Bryan's Trust*, 2 *Sim.* (*N. S.*) 103; *Franks* v. *Brookes*, 27 *Beav.* 635,) in which the bequest has been held to be confined to the persons answering the description at the date of the will.

The objection of non-joinder is not well taken. The testator's other son, William, was not made a party to the suit. As far as the complainant's rights are concerned, the interest of William is represented by the defendants. *Sweet* v. *Parker*, 7 *C. E. Green* 453; *Voorhees' Ex'r* v. *Melick*, 10 *C. E. Green* 523. No defendant, except the administrator *cum testamento annexo* of the testator, objects on account of the absence of William as a party. His presence as a party is not necessary to the establishment of the complainant's right as against the administrator. Nor is there any error in the conclusion reached by the Vice-Chancellor as to the persons who are liable to pay the rent to the widow since she has been out of possession. Being out of possession, she is entitled to the one-third of the rents at the hands of those who had the right of possession,

and who held the possession as against her. They will all be chargeable with the widow's share of the rent, notwithstanding the fact that only one of them had actual possession. If they permitted one of their number to take possession of the property and use it without account to them, they will nevertheless, under the circumstances, be chargeable. As to the amount, that appears to have been fixed upon a correct principle. The account was properly brought down to the time of making the decree. The amount of the rents is a question of fact not reviewable on the re-hearing, the decree having been advised by the Vice-Chancellor. *Rule* 180.

CREGAR *vs.* CREAMER. CREGAR *vs.* ALPAUGH.

An injunction issued to restrain defendant from taking advantage at law of a release alleged to have been given at his own solicitation and on what was substantially a promise that he would not seek to take advantage of it, was retained till the hearing, though the defendant had answered all the equity of the bill.

THE CHANCELLOR.

The case presented by the bill in these suits will, if established, entitle the complainant to the relief he prays. The defendants, Alpaugh and Creamer, against whom the relief is sought, have answered all the equity of the bills filed against them respectively. Notwithstanding that, the injunction should, under the circumstances, be retained until the hearing. According to the bills, the defendants, Alpaugh and Creamer, are seeking to take advantage, at law, of releases which were given at their own solicitation and on what was substantially their promise that they would not seek to take advantage of them. If the bills be true, the right to relief is clear. The motion to dissolve will be denied, but without costs.

Gibby *vs.* Hall and others.

An injunction will not be dissolved upon the hearing upon the bill and answer, when the answer is unsatisfactory as to any matter which is an essential part of the complainant's equity.

Bill for injunction to stay a suit at law. Motion to dissolve the injunction on bill and answer.

Mr. G. R. Lindsay, for motion.

Mr. Joel Parker, *contra.*

The Chancellor.

The complainant, who was the owner of mortgaged premises which were advertised to be sold under a decree of foreclosure of this court, swears that just before the time appointed for the sale, October 27th, 1875, the defendant, Hall, accepted a deed from him and his wife for the premises, and agreed, in consideration of the conveyance, to stop the sale and deliver up his bond to them. The bond and mortgage were given by the complainant to Hall in 1870, to secure the payment of part of the purchase money of the mortgaged premises, which were then conveyed by the latter to the former. Though Hall, in 1872, assigned the bond and mortgage to his daughter, Mrs. Marsh, and claims that he was, therefore, from that time no longer interested in them, yet it appears that he entertained negotiations, on the part of the complainant, on the subject of the proposed conveyance of the property to him in satisfaction thereof. The property was struck off at the sheriff's sale to Mrs Marsh for $300, subject to prior encumbrances. According to the complainant, it did not bring one-half of its value. A few days after the sale, suit was begun against the complainant on his bond, and the bill is filed to stay that action.

The complainant's allegation in the bill that Hall told him, during the negotiation for the re-conveyance of the property, that notwithstanding the assignment to his daughter, he was still the owner of the bond and mortgage, derives some support from the fact that immediately after the sheriff's sale, Mrs. Marsh and her husband conveyed the property to Hall at the price at which it was struck off to her. Besides, it would appear from the bill and answer, that Hall was permitted to deal with the bond and mortgage in the negotiations for re-conveyance, as though they were his own, if they were, indeed, the property of his daughter. The answer is not satisfactory as to the alleged agreement with Hall, by which, in consideration of the re-conveyance, he agreed to stop the sale and deliver up the bond. The deed was retained by Hall, and is still in his possession. Under the circumstances of the case, the injunction should be retained until the hearing.

Large *vs.* Ditmars.

An injunction, issued on bill for account by a member of a dissolved firm against his late co-partner, restraining the latter from collecting partnership money or intermeddling with the partnership concerns, continued until the hearing; the defendant not denying the statement of the bill that he refuses to account, and it appearing from written statements made by him and set out in the bill, that he has no interest in the assets, and the claims of his answer as to capital contributed by him, not being substantiated by those statements.

Bill for relief. Motion to dissolve injunction on bill and answer.

Mr. A. A. Clark, for motion.

Mr. J. N. Voorhees, contra.

THE CHANCELLOR.

The bill is filed by one of the partners of the late firm of Large and Ditmars against the other, for an account of the partnership transactions, and for an injunction and other relief in aid of the complainant, who, by the bill, claims that the defendant is indebted to him in a large amount in respect of their partnership dealings and affairs. On the filing of the bill, an injunction was granted restraining the defendant from collecting any partnership moneys or intermeddling with the partnership concerns until the further order of this court. The defendant now moves to dissolve the injunction on his answer. The parties entered into co-partnership in the retail lumber business, at White House station, in Hunterdon county, in April, 1865, pursuant to a verbal agreement between them, under which they continued in business together until the 10th of January, 1876, when the co-partnership was dissolved by mutual consent. By the agreement, Ditmars was to furnish so much capital as he might find it convenient to furnish, and Large was to furnish the rest. The former was personally to attend to and conduct the business for the firm, and the latter was to provide, free of rent, premises for a lumber yard, and to contribute $200 a year, to be applied by Ditmars in paying for labor. It appears that in the beginning, Large contributed $6063.86 of capital, while Ditmars, according to his own statement, contributed $1875 at that time, and $3000 subsequently. The books were kept by Ditmars, and there appears to have been no balance sheets made, but from time to time statements were made, showing the condition of the concern, its transactions (personally), the profits, the assets, and the respective interests of the partners. They appear to have been made as of February 1st, 1867, 1868, 1869, 1871, 1872, and 1874, and March 1st, 1875, and to have been accepted by both parties as correct. The last statement, (March 1st, 1875,) showed $29,899 due to Large, and nothing to Ditmars, and a deficiency of over $8000 in the assets to pay the amount due to the former. The statement of 1874 showed a deficiency of $4000 in the assets to

pay the amount then due to Large from the concern, and Ditmars then promised to contribute money to make up the deficiency. He did not do so, and although the next year's business showed a net profit of $1842.91, the deficiency, as before stated, increased to over $8000. Ditmars having failed to make up the deficiency, the co-partnership was dissolved, as before stated, on the 10th of January, 1876, and Ditmars then assigned to Large, to be credited on the firm's debt to the latter, his interest in all the lumber in the yard, and in the claims on book account for lumber purchased after December 1st, 1875, and sold by the firm. Ditmars subsequently refused to deliver up to Large certain assets of the concern in his hands and the books of accouut, and while denying the correctness of the statements before mentioned, on the ground that the principle on which they were made was erroneous, refused to come to an account with Large, and on Large's saying that if he would not come to an account with him, he would be compelled to have recourse to this court, Ditmars replied that "that, perhaps, would be the best." Large then filed his bill of complaint. Ditmars, by his answer, repudiates the statements, on the ground that they give to Large interest upon interest on his capital, and not only give him interest on his profits, but interest on that interest also. According to the bill, the co-partnership agreement provided that the firm should pay interest, to be charged in the expense account, on capital furnished by either of the partners. The answer states that the agreement was that interest should be allowed and paid by the firm on the final settlement, upon the capital which each member should contribute. The statements show that, in fact, interest was calculated and allowed to both parties, from time to time, both on capital and profits, and that interest was allowed upon such interest also. While Ditmars had capital in the concern, interest was allowed to him on interest thereon, and interest was allowed to him on the profits left by him in the concern. It appears by the statements that Large left both the interest on his capital contributed in the beginning (which interest

was, according to the partnership agreement, as stated in the bill, to go to the expense account,) and all his profits and the interest thereon, in the concern, for the benefit of the business; and the statements would seem to be some evidence, at least, of an agreement between the partners, that the interest and the profits due Large should be left in the concern as additional capital contributed by him, and that they should bear interest accordingly, according to the partnership agreement. The statements, it may be remarked, show, also, the capital contributed by each partner, and they do not show the contribution to the capital by the defendant, of the $3000 claimed in the answer to have been furnished by him, The defendant's refusal to account is not denied. The co-partnership has been dissolved. The statements show that the defendant has no interest in the assets. As the case stands, the injunction ought not to be dissolved.

Hoppock's Executors *vs.* The United New Jersey Railroad and Canal Company and The Pennsylvania Railroad Company.

1. The Court of Chancery exercises concurrent jurisdiction with courts of law in cases where, though the rights are of a purely legal nature, other and more efficient aid is required than a court of law can afford, to meet the difficulties of the case and insure full redress.

2. The Court of Chancery will take jurisdiction of a suit whose subject matter is properly cognizable at law, and though adequate relief may be given there in order to a discovery; and in this case, under the circumstances, it was held that a suit in equity might be maintained for discovery of the party who should be sued at law, and as to the liability of the parties against whom the bill was filed.

3. An agreement by the Delaware and Raritan Canal Company, guaranteeing to A, his heirs and assigns forever, out of the feeder of the canal, sufficient water for three runs of stones at all times, and for a fourth run of stones at all times except when the water could not be taken without injury to the company, &c., in consideration of a grant of land by A to the com-

pany for its purposes according to its charter, and the release of damages awarded against the company in A's favor on proceedings in condemnation, and the relinquishment by A of valuable water rights in the Delaware river, *held* not to have been *ultra vires.*

Bill for relief. On general demurrer by both defendants.

Mr. E. T. Green, for demurrants.

Mr. W. Halsted, for complainants.

THE CHANCELLOR.

The causes of demurrer assigned on the argument were, that the contract on which the bill is filed was *ultra vires,* and that if it were not, the complainants have an adequate remedy at law. The bill is filed by the executors of William L. Hoppock, deceased, and the claim to relief is based on an agreement in writing, made on or about the 27th of June, 1834, between the testator and John S. Wilson, of the one part, and the Delaware and Raritan Canal Company, of the other part, by which the company guaranteed to Hoppock and Wilson, and their heirs and assigns forever, out of the feeder of the canal, sufficient water (to be taken out above the dam then to be built across Wickhechcoke creek,) for three runs of stones at all times, and for a fourth run of stones at all times except when the water for it could not be taken out without injury to the company, as to which it was to be the judge. The water used for the mill was to be discharged into the feeder, and Hoppock and Wilson, by the agreement, agreed "to release to the company the damages assessed by the commissioners," and agreed also that the company, in passing through their land, might take, if it saw fit, a strip of that land not exceeding fifteen feet in width in addition to what it then had along the line of its canal, and also land, in size not to exceed thirty by fifty feet, for a house for the keeper of the guard-lock; and they thereby yielded up all privileges or rights of taking water for mills out of the river Delaware. The bill alleges that Wilson subsequently transferred all his

rights in the premises to Hoppock, and that afterwards, in 1872 and 1873, the company, in violation of the agreement, failed to supply Hoppock with water, which caused him a loss in damages about $350, to which sum he, in his lifetime, was, and the complainants, as his executors, since his death, have been, entitled accordingly from the company, or from any other company or companies upon which its liability may have devolved. The bill further states that the canal company was, under the act of February 15th, 1831, consolidated with the Camden and Amboy Railroad and Transportation Company, and that the act provided that the companies should be jointly liable on all contracts made or to be made by either and each of them, and might jointly sue and be sued, plead and be impleaded, in all courts of law and equity. It further states that under the act of March 17th, 1870, the joint companies were consolidated with the New Jersey Railroad and Transportation Company, and that the consolidation adopted the name of The United New Jersey Railroad and Canal Company, and that, by the last-mentioned act, it was provided that the consolidation should not release or discharge the united companies, or any company or companies with which they should be consolidated, from any taxes, liabilities, obligations, or duties which they or either of them might be subject or liable to, either to the state or any other person or persons. The bill charges that, by the consolidation, The United New Jersey Railroad and Canal Company assumed all the duties, contracts and liabilities of the canal company, including the damages claimed by the complainants by reason of the breach of covenant. It further states that the former company, in 1872, leased its railroads and canal and franchises, under the act of March 17th, 1870, for nine hundred and ninety-nine years, to the Pennsylvania Railroad Company, and that the lease was ratified by the legislature. The bill claims that the last-named company, as lessees, became liable to discharge the covenants and obligations of the canal company. It further states that the act of March 14th, 1872, provided that, on the consolidation of the canal company, the Camden and Amboy Railroad

Company, and the New Jersey Railroad Company, those companies should cease to exist as separate organizations; and it further states that they have, in fact, ceased to exist accordingly, and have not had, since the act of 1872 was accepted, any officers or agents, so that no service of process can be made on either the canal company or the Camden and Amboy Railroad Company; and it further states that the Pennsylvania Railroad Company holds, under the lease, all the property of the canal company.

The bill seeks relief on the ground of the inability of the complainants to obtain redress at law from want of information as to whom they should sue, and it asks discovery. I am satisfied that the complainants are entitled to the aid of the court in the premises. With a cause of action for damages against the canal company, (and by the act of February 15th, 1831, against the Camden and Amboy Railroad Company, also,) they are unable to proceed against either of them, because these companies have both ceased to exist. The United New Jersey Railroad and Canal Company, which succeeded them, received, as a consolidation, all of the property of the consolidated companies, "subject," in the language of the act, "to all the duties and obligations" then "existing upon or made by said three corporations," and "subject to all contracts, agreements and engagements" theretofore "lawfully made" by those companies or either of them. That company has parted with the possession of all the property which belonged to the consolidated companies, by leasing it, as above mentioned, to the Pennsylvania Railroad Company and delivering it over to that company, which now holds it accordingly, and according to the bill, denies its liability to answer for the breach of the covenant. The property of the covenantor (part of it, perhaps, that which entered into the consideration of the covenant,) is here in the hands of lessees, whose lessors received it "subject to" the covenant, and the lessees claim to hold it free from obligation or liability in respect to the covenant. The lessors have no property which can be reached at law. Under the circumstances, the complainants are entitled

to discovery as to the liability of the lessees in the premises. They will not be required to try experiments at law. They are entitled to know whether the lessees are not liable. When discovery shall have been made, this court will act in the matter in conformity with its practice, and with due regard to the rights of the parties in reference to the forum in which the question of breach and damages should be tried. Said Chancellor Williamson, in *Little* v. *Cooper*, 2 *Stockt.* 274, on the subject of jurisdiction in cases where discovery is sought: "Where the subject is one which is properly cognizable at law only, and adequate relief can be given there, as where damages are to be ascertained or titles to land tried, and in cases of mere trespass, a Court of Chancery frequently takes jurisdiction, in order that a discovery may be had on the oath of a party, or to compel the production of papers and documents. The end for which the jurisdiction of the court was invoked having been attained, the party seeks his redress in the proper tribunal at law." In *Pearce* v. *Creswick*, 2 *Hare* 286, Vice-Chancellor Wigram said that "the necessity a party may be under, from the very nature of a given transaction, to come into equity for discovery, is a circumstance to be regarded in deciding upon the distinct and independent question of equitable jurisdiction." This court exercises concurrent jurisdiction with courts of law in cases where, though the rights are of a purely legal nature, other and more efficient aid is required than a court of law can afford, to meet the difficulties of the case and insure full redress.

But the defendants insist that the agreement stated in the bill and on which this suit is founded, was *ultra vires;* and the case of *Armstrong* v. *Pennsylvania R. R. Co.*, 9 *Vroom* 1, is cited in support of this position. That case, however, does not sustain it. On the contrary, it was there held that it was not *ultra vires* for the canal company, having a right to draw water from the Delaware river for its chartered purposes, to agree to discharge its waste water at a certain point; and that an action on such an agreement could be maintained. The agreement stated in the bill was not, as the defendants' counsel

insists it was, an agreement to sell the water, nor was it an agreement to furnish water for power, for a consideration unconnected with the business of the company, but it appears to have been a contract by which, in consideration of a grant of land by Hoppock and Wilson to the company, for its purposes, according to its charter, and the release of damages awarded against it in their favor, on proceedings in condemnation under the charter, and the relinquishment by them of water rights on the Delaware, the company agreed with them that they and their heirs and assigns should have water from the feeder at all times, absolutely, to a certain extent, and conditionally, to a certain further extent. The arrangement appears to have been the means by which the company obtained the release of damages assessed against it, and made compensation for the water rights and land above mentioned, acquired by it from Hoppock and Wilson. That the company had power to make such an agreement on such a consideration, cannot be doubted. It was not in conflict with its interests or the dictates of public policy, in connection with the purposes for which it was chartered. It does not appear, indeed, but that the arrangement was the most judicious that could have been made in the premises by the company, nor but that by means of it, and for a consideration which practically neither cost it anything nor inconvenienced it in any way, it acquired land for its purposes, and acquired, or extinguished in its own interest, valuable water rights, for which it otherwise would have been compelled to pay a large price. In Armstrong *v.* Pennsylvania R. R. Co., Chief Justice Beasley, delivering the opinion of the court, said: "I see no legal obstacle to this canal company, being in need of a place over which to discharge its waste water, agreeing with a landowner that in consideration of such privilege, he shall have the use of such water so long as it is consistent with the convenience or well-being of the company to let it off at that point. Whether an agreement can go beyond that and stipulate for a continuance of such supply, notwithstanding that, in the fair judgment of the officers of the company, its

convenience or real interest requires the cessation of such privilege, is a more important, and, it may be, a more difficult question, which it is not necessary to consider until the state of the circumstances is presented to the court." On the case made by the bill, it does not appear that the water agreed to be furnished absolutely, could not have been furnished at all times when it is alleged to have been withheld, without inconvenience to the company or its operations.

The bill prays specific performance of the covenant as part of the relief.

The demurrers will be overruled, with costs.*

Rea's Executor *vs.* Wheeler and others.

Sheriff's sale under foreclosure set aside upon terms, on motion of complainant in the same proceedings, on ground of gross inadequacy of price and surprise; the failure of himself or solicitor to be present and look after his interests, being satisfactorily accounted for.

Motion to set aside sheriff's sale of mortgaged premises. On petition of complainant, and affidavits.

Mr. W. H. Vredenburgh, for complainant.

Mr. R. Allen, Jr., for the purchaser.

The Chancellor.

Under the *fieri facias* issued in this cause for the sale of the mortgaged premises, the property was sold to a stranger for $215, about one-sixth of its value. The complainant was not present, nor was he represented at the sale. His mortgage was the only encumbrance upon the property, and the amount due upon it exceeds the value of the premises. The mortgagor is insolvent. The complainant resides in a remote part

* Decree reversed, 1 *Stew.* 261.

of the State of Pennsylvania, and he relied upon his solicitor here, and his counsel in New York, to protect his interest in the sale. The counsel expected to attend, and the solicitor, with good reason, relied on his doing so, and he, therefore, neither attended himself, nor made any provision for purchasing, or for an adjournment. The counsel was prevented by illness from attending the sale. He did not notify the solicitor of his sickness and consequent inability to be present at the sale, because he supposed the latter would surely attend. The complainant prays that the sale may be set aside. No deed has been delivered by the sheriff. He is entitled to the relief which he seeks. *Howell* v. *Hester*, 3 *Green's C. R.* 266. The sale will be set aside on terms that the complainant pay to the purchaser his costs of this application, and lawful interest on the purchase money from the time when it was paid to the sheriff.

Collings and others *vs.* The City of Camden.

An injunction, issued to restrain municipal authorities from increasing the debt of the city by contracting in its name and on its credit for municipal improvements, and for furnishing the city hall, &c., on the ground that the indebtedness of the city was thereby increased beyond the amount allowed by its charter, and that the proposed expenditures were not included within the appropriations for the year, was dissolved as to the furniture, on the ground of laches in filing the bill till after the contracts therefor had been made, and the parties had entered into bonds to perform them; those persons not being made parties to the bill, and the bill neither seeking to restrain them from performing the contract, or the city from compelling performance.

Bill for injunction. Motion to dissolve injunction on bill and answer.

Mr. Alfred Hugg, for motion.

Mr. D. J. Pancoast, *contra*.

THE CHANCELLOR.

The bill was filed on the 27th of December, 1875, for an injunction to restrain the municipal corporation of Camden from increasing the debt of the city by contracting in its name and on its credit, for the erection of a fence around the city hall, or for the furnishing that building, or for the purchase of a tower clock therefor, and from giving any evidence of debt, in its name, to any person or persons on account of any contract made in pursuance of certain resolutions of the city council, passed on the 27th of October, 1875, authorizing the city hall building committee to purchase the furniture and clock, and to advertise for proposals, and award contracts to the lowest bidder for the building of the fence. The first section of the supplement of 1873 to the charter, (*Pamph. L.*, 1873, *p.* 344,) provides that the city council shall not have power to raise by loan, in any year, a greater sum than $25,000, and shall not have power to increase the debt of the city beyond $1,000,000. The second section provides that they shall, during the month of June in each year, or as soon thereafter as possible, make the annual appropriations for the different departments of the city, and that no appropriation shall be exceeded, nor work contracted for or materials ordered, nor proposals asked for either work or materials, unless the cost thereof can be paid out of the appropriation of the year, unless in cases of extreme emergency, and then only by a vote of three-fourths of the members of the city council. The bill states that, at the time of the filing thereof, the debt exceeded $1,000,000; and that the council did not, during the year previous to the passing and adoption of the resolutions above mentioned, make any appropriation for any department of the city which included the expenditure thereby contemplated; and that the furnishing and improvement of the city hall, as provided by the resolutions, were not, when the resolutions were passed, and have not been since then, a case of extreme emergency within the meaning of the supplement; and that the resolutions were not passed by a three-

fourths vote. The answer admits the truth of the statements of the bill as to the amount of the debt, and the fact that there was no appropriation which included the proposed expenditure, but alleges that the resolutions were passed by a three-fourths vote; and it insists that the question whether an extreme emergency existed was to be determined by the city council alone, whose discretion on the subject was absolute, and their judgment final. It further states that before the filing of the bill, contracts had been made by the committee for the furniture, with persons who had given bonds to the city for the faithful performance of their respective contracts, and that the furniture has since been delivered to the city, according to the contracts. The answer was filed on the 19th of February, 1876. No replication has been filed. The city are the only defendants to this suit. I deem it unnecessary in disposing of this motion to consider any of the propositions of the defendants' counsel, as to the construction of the sections of the supplement to the charter above referred to. The laches of the complainants in applying for relief are sufficient reason for dissolving the injunction, so far as the contracts for the furniture are concerned. The resolutions were passed and approved on the 27th of October. The bill was not filed until the 27th of December. The contracts for the furniture had then been entered into with the city by persons who were then under bonds to perform them. These persons were not made parties to the suit, and the complainants did not seek to prevent them from performing their contracts, or to restrain the city from requiring such performance. Such negligence is a forfeiture of the right to equitable relief in the premises. *Tash* v. *Adams,* 10 *Cush.* 252. The injunction will be dissolved so far as the furniture is concerned, but it will be without costs.

Provost's Executor *vs.* Provost and others.

1. Testator authorized his executors, in their discretion, to sell all or any part of his real estate not devised by his will. He devised and unmistakably intended to devise, all of his real estate, but he specifically devised his homestead, using the term *devise* in that connection alone, and devised all the rest of his real estate by the residuary clause, using for the purpose, the word *give*. It was necessary to sell the real estate devised by the residuary clause, in order to execute the will and discharge the trusts thereby created. *Held*, that the power of sale was intended to apply to the real estate devised by the residuary clause.

2. The intention of the testator is the law of wills, and where that intention can be ascertained, if not in violation of the rules of law, it will prevail over technical rules, and words in their technical or even ordinary meaning.

Bill for construction of will. On final hearing on bill and answer.

THE CHANCELLOR.

Jonathan Provost, deceased, late of the county of Essex, by his will, after directing payment of his debts, gave to his wife for life, in lieu of dower, the use of his household furniture, and the interest of a certain considerable sum of money, and gave and devised to her for life, the use of his dwelling-house and appurtenant buildings and part of the homestead lot. He then gave considerable pecuniary legacies to two of his grandchildren, to be paid to them on their attaining to their majority; the interest, in the meantime, to be devoted to their support. He directed his executors to invest the sums requisite to raise the interest given to his wife, and to invest the legacies to his grandchildren, and to pay over the interest. He then gave to his son Thomas, after the death of his wife, the homestead premises, the use whereof he had, as before mentioned, devised to his wife for life, and then gave all the rest of his real and personal estate, including the money to be invested to raise the interest given to his

wife, to his three children. After appointing his executors, he adds (referring to them), "and do hereby authorize them, in their discretion, to sell and convey all or any part of my real estate not herein and hereby devised." It is necessary to sell the real estate devised by the residuary clause, in order to execute the will and discharge the trusts thereby created, and the question is whether the executors have, in fact, any power under the will to sell it. The testator devised, and unmistakably intended to devise, all of his real estate. He, however, uses the term "devise" only in connection with the gift of the use of his homestead for life to his wife. In devising the remainder therein to Thomas, he uses the word "give" only, and so in the residuary clause. The power of sale was obviously intended to apply to the real estate devised by the residuary clause, for otherwise it could have no application whatever. By that clause he had expressly devised all of his real estate, remaining after the devise of part of the homestead. By the term devised, in the power of sale, he evidently meant specifically devised. His intention is clear. Said Chancellor Williamson, in *Stokes* v. *Tilly*, 1 *Stockt.* 130: "The intention of the testator is the law of wills, and when that intention can be ascertained, if not in violation of the rules of law, it will prevail over technical rules, and words in their technical or even ordinary meaning." See *Wigram on Wills, Prop.* 1, and *Hawkins on Wills* 5.

Boone *vs.* Ridgway's Executors.

A decree of dismissal was, under the particular circumstances of this case, set aside.

Motion to set aside decree of dismissal.

Mr. S. H. Grey and *Mr. A. Browning*, for motion.

Mr. F. Voorhees, contra.

THE CHANCELLOR.

The complainant moves, on the allegation of surprise, to set aside the decree dismissing the bill. The cause was set down for hearing at the term of February, 1876. The hearing not being then brought on, an order was made on the 29th of that month, in open court, in the presence of the solicitors of the parties, that the complainant bring on the hearing before the Chancellor or Vice-Chancellor on the 3d of April, and that in default thereof the bill be dismissed. The complainant having failed to bring on the hearing according to that order, another order was made on the 24th of April, requiring her to bring on the hearing before the Vice-Chancellor on the 10th of May. These orders were duly served on her solicitor. He did not, however, bring on the hearing on the last-mentioned day, and the bill was accordingly dismissed, with costs. It appears from the affidavits read on the motion, that the decree of dismissal was a surprise to the complainant and to her counsel in Philadelphia, to whom she had confided the management of the cause and the employment of a solicitor here. The order of the 24th of April, was duly served according to its directions, but did not, in fact, reach the hands of the complainant's solicitor. He testifies that he was not aware of such service until the 18th of July. It appears that immediately after the order of the 29th of February was made, he set about the preparation of the case for hearing, but was unable to find the depositions. They had not been filed, and the examiner before whom they were taken was under the impression that he had, on a previous occasion, delivered them to the complainant's solicitor. The latter testifies that after making search for them, the subject "dropped out of his mind" until it was too late to get the case printed in time for the hearing on the 3d of April. As before stated, he testifies that he was not aware until the 18th of July, of the service of the order of the 24th of April upon him. Neither the complainant nor her counsel in Philadelphia, knew of its existence. The depositions were not filed until the 10th of May, the day on which the decree of dismissal was entered. It

appears that they were not in the possession of the complainant's solicitor, as the examiner had supposed they were when the former called upon him to get them in order to print the case. The complainant is a very aged lady, and necessarily relied upon others for the supervision and management of her cause. She appears to have employed counsel in Philadelphia, as well as a solicitor here. She is chargeable with no laches except such as are imputable to her from the inattention of her solicitor. The action is brought for the recovery of an amount, $2067.50, with interest, which she claims on the ground of mistake, made, as she insists, in an account between her and the defendant's testator in a settlement between him and her in respect to certain property belonging to them. Under the circumstances, she ought to be relieved from the decree of dismissal. She will, however, be required to pay the costs of that decree, and will be put upon terms to bring on the cause for hearing at such time as the Vice-Chancellor may fix.

JERSEY *vs.* DEMAREST and others.

A *bona fide* mortgage, given after the entry of a personal decree of this court against the mortgagor for the payment of money merely, but before the filing of a statement or abstract of the decree in the Supreme Court in accordance with the provision of the fifty-ninth section of the chancery act, is entitled to priority over the decree.

Bill to foreclose. On final hearing on bill and answer.

Mr. G. Ackerson, Jr., for complainant.

Mr. W. M. Johnson, for Van Valen, the answering defendant.

THE CHANCELLOR.

The question presented by the answer is whether a personal decree of this court, made in 1873, merely for the payment of money, became, as against a *bona fide* mortgage, a lien upon or bound the land of the person against whom it was made, before the time when a statement or abstract was, according to the provision of the fifty-ninth section of the chancery act (*Nix. Dig.* 112),* filed in the office of the clerk of the Supreme Court.

The answering defendant, Van Valen, obtained a final decree in this court in 1873, for the payment of money against the mortgagor, Albert Z. Ackerman. It, however, was not docketed in the Supreme Court until 1875. The complainant's mortgage was given by Ackerman, in the meantime, upon lands which he owned at the time when the decree was entered. Van Valen insists that his decree became, when it was signed, a lien on those lands, and that it is, therefore, a prior encumbrance to the complainant's mortgage thereon. He insists that when the decree was entered, he was not required by law to docket it to create a lien on the lands by virtue of it as against persons not parties to it. Though the fifty-fifth section of the act, as it stood at the date of the decree, provided that the decree of this court should, from the time of its being signed, have the force, operation, and effect of a judgment at law in the Supreme Court, from the time of the actual entry of such judgment, the fifty-ninth section provided that no decree of this court made after the date of the approval of the act (April 16th, 1846,) should, as against any person not a party thereto, become a lien upon or bind any lands, tenements, hereditaments, or real estate other than those specifically mentioned and described in the decree, or in the bill of complaint on which the decree was founded, until the parties interested in the decree, or some or one of them, should have filed in the office of the clerk of the Supreme Court (to be recorded by him), a statement or abstract of the decree, containing the names of all the parties

* *Rev., p.* 113, *sec.* 56.

thereto, designating particularly those against whom it was rendered, with the state and county in which they respectively resided, the time at which the decree was signed, and the amount of the debt, damages, costs, or other sum of money thereby directed to be paid. By the third section of the supplement to the act approved in 1855 (*Nix. Dig.* 118),* it was enacted that all decrees and orders of this court, whereby any sum of money should be ordered to be paid by one person to another, should have the force, operation, and effect of a judgment at law in the Supreme Court, from the time of the actual entry of such judgment, and that the Chancellor might order such executions thereon as in other cases. This enactment, as well as that of the fifty-fifth section of the act, was limited by the provision of the fifty-ninth section. The fifty-fifth section gave to decrees the force, effect, and operation of judgments in the Supreme Court. The third section of the supplement enacted, substantially, that not only decrees for the payment of money, but orders of that character, also, should have such force, effect, and operation, and that this court might issue execution thereon. The fifty-fifth and fifty-ninth sections, and the third section of the supplement, are all *in pari materia*, and should be construed together. The legislature evidently intended by the fifty-ninth section to limit the operation of the general terms of the fifty-fifth section, and in enacting the third section of the supplement, did not intend to repeal or abridge the limitation, but to extend the provision of the fifty-fifth section to orders for the payment of money, and to empower this court to issue execution to enforce decrees and orders for the payment of money. The continuance of the purpose of the legislature, as shown by the fifty-ninth section, to protect persons not parties to the decree against the lien thereof unless it should have been docketed in the clerk's office of the Supreme Court, is evidenced by the fact that that section was not repealed. It was neither repealed expressly nor by implication. The provision of the third section of the supplement is, as to decrees, no more extensive than that of the fifty-fifth section of the act.

* *Rev., p.* 113, *sec.* 56.

The extension of the provision of the last-mentioned section to orders for the payment of money, obviously created no necessity for repeal of the fifty fifth section, in any respect. The operation of both the fifty-fifth section of the act and the third section of the supplement, was limited by the fifty-ninth section of the act. *Hargraves* v. *Hargraves*, 23 *Beav.* 484, construing the thirteenth, eighteenth, and nineteenth sections of 1 and 2 *Vict., ch.* 110. The revision is in accordance with this construction. *Revision* 65.* The revisers merely construed the provisions by putting the fifty-fifth section of the act and the third section of the supplement together, and adding the fifty-ninth section of the act as a proviso. The complainant's mortgage is entitled to priority over the decree.

SIMON *vs.* TOWNSEND and others.

1. A defendant to an action at law, who, by pleading therein, has submitted himself to the jurisdiction of the common law tribunal, does not thereby forfeit his claim to relief in equity.

2. Though the equities of the bill be all denied, the court will, in its discretion, hold the injunction till the hearing.

Bill for relief. Motion to dissolve injunction on bill and answer.

Mr. J. C. Paulison, for motion.

Mr. J. W. Griggs, contra.

THE CHANCELLOR.

The defendant moves to dissolve the injunction, on the ground that all the material allegations of the bill are denied in the answers, and that the complainant, in view of his delay in applying to this court for relief, has forfeited all claim to

---

* *Rev., p.* 113, *sec.* 56.

the continuance of the injunction. As a further ground, it is urged that the complainant having, before he came here, submitted himself to the jurisdiction of a common law tribunal in respect to the subject of this action, should be compelled to abide the result of the litigation there. The complainant, on the 16th of March, 1872, purchased, at the price of $4200, certain land and premises, at a sale by the sheriff of Passaic county under an execution issued out of this court for the sale of mortgaged premises in foreclosure proceedings. At the sale, the complainant paid the sheriff $100 on account of his bid. By the conditions of sale, the deed was to be delivered on the 31st of the same month of March. On the 29th of that month the complainant gave the sheriff written notice not to prepare any deed of the property for him, and that he did not intend to receive any deed for it, and that he would require the sheriff to re-pay the $100 to him. The reason of this determination not to complete the purchase was, as the bill alleges, the fact that the mortgagors, (two persons of the name of Spickers,) in the foreclosure, representing themselves to be the owners of the property, and that it would be sold clear of all encumbrance, had urged and besought the complainant to buy the property for them, they agreeing with him, that if he would do so, they would take it off his hands at an advance of $500 in four months, when they would have extricated themselves from their financial embarrassments. After the sale, he discovered that the sale was in fact subject to the first mortgage, (for $1750 and interest,) on the property, on which there was, at the time of the sale, due more than $1400. No deed was tendered to the complainant by the sheriff, but the latter proceeded to re-sell the property under the execution, and on the 13th of July, 1872, sold and conveyed it accordingly to James Van Blarcom for $2100. In September, 1874, (according to the pleadings in this suit,) nearly two years and a half after the sale to the complainant, the sheriff began suit in the Supreme Court against the former to recover, under the conditions of sale, the amount of the deficiency between the price at which the property was struck

off to him and that at which it was purchased by Van Blarcom. The complainant pleaded in that action, and on the trial the plaintiff was non-suited. The non-suit was subsequently, at the term of November, 1875, of the Supreme Court, set aside, and a new trial ordered. The complainant on the 17th of April, 1876, before the time fixed for the new trial, filed his bill in this cause praying to be relieved of his bid, and for an injunction against the suit at law. He did not, by pleading in that action, forfeit his claim to relief here. He appears to have been advised that an action at law in the premises would not lie against him, and the judge so held on the trial. The Supreme Court, however, held otherwise. The grounds on which he seeks relief here would not be available to him as a defence at law. Nor has he forfeited his claim to relief, by laches. As soon as he discovered the falsity of the representation made to him by the Spickers, and in a few days after the sale, he notified the sheriff in writing, of his determination not to take the property. Instead of taking measures to compel him to complete his purchase, the sheriff re-advertised the property, and re-sold it. Nor did he, or any one else interested in the execution, as far as appears, even intimate to the complainant an intention to hold him upon the bid in any way. Nearly two years and a half elapsed without any demonstration against him. Ackerman, who was the holder of the second mortgage, and as such, the complainant in the foreclosure suit, was present at the first sale. The bid at which the property was struck off at the second sale was not enough to satisfy the amount due him on the decree, but after applying the proceeds of that sale there remained more than $1200 due him. Neither he nor any other of the persons holding encumbrances subsequent to his, took any steps, until the suit at law was brought in 1874, to compel the complainant to complete his purchase, and yet, had he completed his purchase, the amount realized by the sale would have paid off Ackerman's claim in full, and left a surplus. The defendants give no reason for the delay in seeking to hold the complainant to his bid. Indeed, it appears by

the answer of Ackerman, that after the sale to Van Blarcom he took a mortgage from the Spickers to secure the payment of the amount of a judgment he had recovered against them on their bond, for the mortgage debt. Although those of the allegations of the bill on which the claim to relief must depend, are denied, yet the case is one in which it is the duty of the court to hold the injunction until the hearing. If the injunction be dissolved the complainant will be wholly remediless.

COURTER *vs.* STAGG.*

1. Testatrix devised her residence to her daughter for her sole use and benefit, for so long a time as she might remain single and unmarried, or until such time as, in her judgment, she might deem it advantageous to sell and dispose of the same. The daughter is married. *Held*, upon bill filed for construction of the will, that the intention was that the daughter should have the residence until she either married or deemed it advantageous to sell, whichever should first happen; and the daughter having married, the executors have power to sell, and it is their duty to exercise it.

2. Plain, clear words, read in their ordinary sense, must always govern in searching for the intention of a testator, unless repugnant to other words, equally plain and clear, in another part of the same will.

3. Courts sometimes, in attempting to give effect to a testator's intention, displace "or" and substitute "and," and also put "or" where the testator has written "and," but such departures from the words of the will are never made except it is clear they are necessary to give effect to a clear purpose of the testator.

4. All doubts must be resolved in favor of the testator's having said exactly what he meant.

5. Persons having a right to be heard on a vital question, must be made parties before a decree will be made.

Heard on bill and answer.

* Cited in *Burnet* v. *Burnet*, 3 *Stew.* 597.

Mr. William B. Guild, for complainant.

Mr. William H. Morrow, for defendants.

THE VICE-CHANCELLOR.

The bill is filed by a legatee to procure a construction of the will of Julia Ann Sommers. The clause giving rise to the dispute is in these words: "I give, devise and bequeath the house and lot where I now reside, to my daughter, Ann M. Sommers, for her sole use and benefit, for so long a time as she may remain single and unmarried, or until such time as in her judgment, she may deem it advantageous to sell and dispose of the same." A naked power of sale is given to the executors. The will then directs, when the proceeds of sale are received, $3000 shall be set apart for the use of the complainant during life, and on her death the principal fund shall be paid to the persons who, at that time, are her heirs-at-law.

The testatrix died April 20th, 1873. Anna M. was married January 6th, 1875. She and the complainant are the only children of the testatrix, now living.

What is the extent, in duration, of the estate given to Anna: can she hold the house and lot not only up to the time of her marriage, but for such beyond as she may deem it best not to sell? In other words, did the testatrix mean that Anna should not only have the use of the house and lot to the time of marriage, but for such period beyond as she might deem it advantageous not to sell? To read the will so as to give an affirmative answer to this question, "or" must be struck out and "and" substituted. To read the will according to the natural sense of the words employed by the testatrix, it is clear it must be held to say, Anna shall have the house and lot until she marries, *or* until she deems it advantageous to sell, and that whenever she marries, or shall deem it advantageous to sell, whichever shall first happen, the executors shall exercise the power of sale. Plain, clear words, read in their ordinary sense, must always govern in searching for the

intention of a testator, unless repugnant to other words, equally plain and clear, used in another part of the same will. Courts sometimes, in attempting to give effect to a testator's intention, displace "or" and substitute "and," and also put "or" where the testator has written "and," but such departures from the words of the will are never made, except it is clear they are necessary to give effect to a clear purpose of the testator. *Holcombe* v. *Lake*, 4 *Zab.* 688. All doubts must be resolved in favor of the testator's having said exactly what he meant. *Redfield on Wills* 471, § 35. It is quite obvious, I think, no substitution of words, or change, is necessary to give effect to the intention of the testatrix in this case. Surely she did not mean to make the payment of a legacy given to one daughter, entirely dependent on the will of another to take a husband, or, if she had the will, on her ability to get him; at least, no such intention should be ascribed to her unless clearly expressed. If no power of sale arose until Anna married, and until she judged an advantageous sale could be made, her failure to marry, either from want of inclination or ability, in spite of the most advantageous offers for the property, would have prevented a sale at any time, and defeated the gift to the complainant and the other legatees. An intention so absurd and unnatural cannot be imputed to the testatrix.

The correct reading of this clause is, Anna shall have the use of the house and lot until, in her judgment, an advantageous sale can be made, or until she marries, whichever shall happen first, and whenever either happens, a sale shall be made. She, unquestionably, had the right to exercise a right of judgment, prior to her marriage, as to the time when a sale should be made, but she was bound to exercise it reasonably and fairly, with respect to the rights of others as well as her own. It did not give her the right to say, arbitrarily or capriciously, I will not consent to a sale, because it promotes my interest not to sell.

In my judgment, the executors now have power to sell, and it is their duty to exercise the power.

By the will, the children of David B. Pierson and grandchildren of the testatrix, are given $1000, payable when the proceeds of the sale of the house and lot are in hand. By the codicil, this bequest is reduced to $500, unless the house and lot are sold for $16,000 above encumbrances. These children have a right to be heard on the question whether the house and lot can be sold now or not. They are necessary parties to this suit. They have not been made parties. No decree should be made unless they are concluded by it. Unless they are made parties, the bill should be dismissed for defect of parties.

BOLLES *vs.* STATE TRUST COMPANY.*

1. When an estate in lands becomes vested in husband and wife during coverture, the husband is entitled to the exclusive use and possession during their joint lives; during this period the wife has no interest in or control over the property, and the husband alone may make a valid lease or other transfer of the right of possession.

2. When an equitable and a legal estate unite in the same person, the equitable sinks or merges into the legal, provided the legal estate is as extensive as the equitable.

3. Where there is a devise to trustees, one of whom is to take a beneficial interest in the trust property, he takes a legal estate to the extent of such interest; and that interest may be seized and sold under execution.

4. Such estate, where a power of sale is given by the will to the trustees, to be exercised in their discretion, is held subject to such power.

On demurrer to bill for want of equity. Enoch Bolles, by will, gave to his son Enoch and his son's wife, Phebe, the use and full enjoyment of the one half part of his estate, real and personal, during their joint lives, for their support, and the support, maintenance and education of their children. Power of sale is given to the executors, of whom Enoch is one, which they are to exercise whenever, in their judgment, it

* Cited in *See* v. *Zabriskie*, 1 *Stew.* 427; *Kip* v. *Kip*, 6 *Stew.* 215.

may seem for the best interest of the estate to sell, and for the purpose of making sale they are invested with the fee. The proceeds of sale are to be invested in other real estate, or in safe securities, for the benefit of those to whom the testator directed it should finally be distributed. On the termination of the life interest given to Enoch and his wife, the *corpus* of the gift is to go to the testator's grandchildren, or their heirs-at-law, in such shares and proportions as Enoch shall direct by will. Judgments have been recovered against Enoch and his son John, and their interests in the testator's real estate have been seized under execution and advertised for sale. The bill seeks to have the sale perpetually enjoined.

Mr. William S. Whitehead, for demurrant.

Mr. J. H. Ackerman, for complainants.

THE VICE-CHANCELLOR.

The proposition upon which the complainants' case rests is, that Enoch has no legal estate in his own right, in the lands devised, and if a sale is made under the judgments against him, it will cloud the title and seriously embarrass the executors in making sale of the lands.

If Enoch has a legal estate in his own right, it is obvious the complainants have no case, for whatever his legal estate is, whether for life or a less period, his creditors have an unquestionable right to have it appropriated, according to the forms of law, to the payment of his debts, and such appropriation will not be an obscuration of title, but the making of a valid title by judicial sale.

When an estate in lands becomes vested in husband and wife during coverture, the husband is entitled to the exclusive use and possession during their joint lives; during this period the wife has no interest in or control over the property, and the husband alone may make a valid lease or other transfer of the right of possession. *Washburn* v. *Burns*, 5 *Vroom* 19; *Wyckoff* v. *Gardner*, *Spencer* 556. This rule

flows necessarily from the unity of person of husband and wife.

Has Enoch a legal estate in his own right? It cannot be disputed there is a clear devise of a life estate to him and his wife, for their support, and for the support and education of their children. It may be he is trustee for his children, but he cannot be trustee for himself. He is one of the beneficiaries of the trust, and also trustee, and therefore, to the extent of his personal interest in the trust property, both the equitable and legal estates are vested in the same person. This union works a merger of the equitable estate. Where the equitable and legal estates unite in the same person, the equitable sinks or merges into the legal, provided the legal estate is as extensive as the equitable. *Wills* v. *Cooper*, 1 *Dutcher* 137. Where there is a devise to trustees, one of whom is to take a beneficial interest in the trust property, he takes a legal estate to the extent of such interest. *Mason* v. *Mason's Ex'rs*, 2 *Sandf. Ch.* 433. The application of this well-established principle to the case in hand, demonstrates clearly, I think, that Enoch has a legal estate in his own right, in the lands devised, which may be seized and sold under execution. He holds it, unquestionably, subject to the power of sale conferred upon the executors, but until that is exercised he has an estate in his own right, on which his deed or devise would operate. *Elie* v. *Young*, 4 *Zab.* 783; *Sharp* v. *Humphrey*, 1 *Harr.* 26; *Micheau* v. *Crawford*, 3 *Halst.* 102.

The complainants' case rests upon this fundamental error, that a man may be trustee for himself, and that it is the duty of a court of equity to prevent his creditors from seizing his individual interest in the property vested in him as trustee for the benefit of himself and others.

By agreement of counsel, the question raised by the demurrer has been considered as though the will had been set out at length in the bill

Wood *vs.* Chetwood and wife.*

1. As a general rule, testimony which is merely incompetent or irrelevant, will not be suppressed before hearing, but if it has been elicited by leading interrogatories, it may be suppressed before, so that the witness may be re-examined.

2. A man marrying a woman who is an executrix, by the marriage becomes an executor in her right, and renders himself a trustee with her of the assets of the estate, and as such, may be compelled to account.

3. To a bill against a woman as executrix, her husband is a necessary party.

4. When the husband of a woman who is an executrix or administratrix, survives her, he is liable for whatever assets came to her hands or his own, during coverture.

5. A communication made by a husband to his wife respecting trust property which it is their joint duty to carefully preserve and surrender to the lawful owner when lawfully entitled to it, is not confidential within the meaning of the statute relieving husband and wife from obligation to disclose any confidential communication made by one to the other during coverture.

6. Where, under a bill for an account against an executrix and her husband, the executrix produced in evidence, upon her examination before the master during her husband's absence from the country, certain letters, papers, and an account book of her husband's, which she found among his papers in their house during his absence, an application for an order suppressing the wife's testimony and the documents produced by her, and directing the documents to be returned to his solicitor, on the ground that their production was a breach of duty and a betrayal of confidence, was refused; it not appearing but that the documents might be material to the issue, and if they related to the trust property the husband was bound to produce them.

7. The court will not stop to consider how papers material to the issue were obtained by the party offering them, whether lawfully or unlawfully; if they tend to elucidate the point in dispute, the court is bound to receive the light they give.

On motion to suppress the testimony of a wife who is a party to the suit.

Mr. Cortlandt Parker, for motion.

Mr. Vanatta, Attorney-General, *contra*.

---

* Cited in *Williams* v. *Vreeland's Ex'rs*, 3 *Stew.* 578.

THE VICE-CHANCELLOR.

The defendants in this action are husband and wife. The complainant is the daughter of the female defendant. The object of the bill is to compel the defendants to account for certain property which, it is alleged, came to their possession as trustees of the complainant. At the time the defendants were married, the wife was one of the executors of the will of her first husband, Dr. Oliver H. Spencer, deceased, under which the complainant is entitled to a share of the estate, and it is alleged that shortly after their marriage, in consequence of the death of the other executor, the whole estate of Dr. Spencer passed into their hands, and that they now refuse to account fairly with the complainant, and to pay her her just share of the estate. An account is prayed, and that the defendants may be decreed to pay to the complainant her share of her father's estate. The bill was filed April 16th, 1875. Both defendants have answered, alleging a fair accounting with the complainant and her husband, who died in 1865, and payment to them of the full amount due. The husband has been in Europe continuously since the spring of 1872. The wife has recently been examined before a master, upon due notice, as a witness for the complainant, and produced in evidence certain letters, papers, and an account book of her husband, which she found among his papers in the house where they lived together before he went to Europe. Application is now made to suppress the testimony of the wife, including the documents produced by her, and for an order directing the documents to be returned to the solicitor of the defendants, and that the further production of proofs be suspended until the absent defendant shall have had an opportunity to return from Europe.

As a general rule, testimony which is merely incompetent or irrelevant, will not be suppressed before hearing, but if it has been elicited by leading interrogatories it may be suppressed before, so that the witness may be re-examined. *Brown* v. *Buckley*, 1 *McCarter* 294. So, if it discloses confidential communications made by a client to his legal adviser,

it may be suppressed before hearing. 1 *Daniell's Ch. Pr.* 951; *Sandford* v. *Remington*, 2 *Ves.* 189.

The present application is put upon the ground that a wife cannot be made a witness against her husband in a case like this, without producing a betrayal of that confidence which the law deems essential to the happiness of the married state.

There can be no doubt, upon the case made by the bill, that the husband and wife are both necessary parties to this action, and that if the complainant establishes the case made by her bill, a decree must go against both. A man marrying a woman who is an executrix, by the marriage becomes an executor in her right, and renders himself a trustee with her of the assets of the estate, and as such, may be compelled to account. *Lindsay* v. *Lindsay*, 1 *Dessaus.* 150. And even where the husband of a woman who is an executrix or administratrix survives her, he is liable for whatever assets came to her hands or his own during coverture, upon the familiar principle that all persons coming into possession of property bound by a trust, with notice of the trust, are chargeable in equity as trustees. 2 *Williams on Ex'rs* 1563; *Adair* v. *Shaw*, 1 *Sch. & Lefr.* 243; *Clough* v. *Bond*, 3 *Myl. & Cr.* 491. If the case made by the complainant's bill is established, the defendants are, unquestionably, jointly liable; they are both proper and necessary parties to the suit, and the complainant has a clear right, by statute, to call either, or both, to testify to all the facts within their knowledge pertinent to the issue. *Revision* 267, § 2. By the fifth section of the act concerning evidence, (*Revision* 268,) husbands and wives are made competent witnesses, and may be compelled to testify in the same manner as other witnesses, in any suit or proceeding in which either or both are parties, before any court or tribunal having power to hear evidence, except in criminal proceedings against either, or in actions by one against the other for divorce on the ground of adultery, or in actions for criminal conversation, but neither shall be compelled to disclose any confidential communication made by one to the other during coverture.

An examination of the testimony shows that none of the facts put in proof by the wife's evidence were communicated to her by her husband. Where nothing is drawn from the wife, confided to her by her husband, there is no violation of confidence. Indeed, I do not see how any communication made by him to her respecting the trust property, which it was their joint duty to carefully preserve and freely surrender to the lawful owners when they were lawfully entitled to it, can be regarded as confidential within the meaning of the statute. The law will tolerate no concealment by a trustee. He can have no secrets or confidences respecting the trust property, which a court of justice will permit him to keep from his *cestui que trust*. He can be safe only in the faithful discharge of his duty.

It appears part of the documents offered in evidence were found by the wife among the papers of her husband. They are not before me. It is not alleged they are objectionable because incompetent or irrelevant. I must assume, therefore, they are material to the issue. It is insisted their production by the wife is a breach of duty and a betrayal of confidence, which the court cannot permit without endangering the institution of marriage. If they relate to the trust property, the husband is bound to produce them. Besides, the court will not stop to consider how papers material to the issue were obtained by the party offering them, whether lawfully or unlawfully; if they tend to elucidate the point in dispute, the court is bound to receive the light they give. 1 *Greenleaf's Ev.* 254, *a; Commonwealth* v. *Dana*, 2 *Metc.* 337. However, I confess I am unable to see how the wife commits a breach of duty or a betrayal of confidence, in doing that which the husband would be compelled to do if he were within the reach of the process of the court.

The motion must be denied and the order to show cause discharged.

I would be inclined to advise an order suspending the further production of proofs until the defendant had had a reasonable opportunity to return to this country, if there was

anything before me showing that he intended to return soon. If he does intend to return soon, on proper verification of that fact, an application for such an order may hereafter be made.

Doughty *vs.* Doughty.

1. It is competent for a court of equity, upon an allegation that a judgment is founded in fraud, to inquire whether the cause of action spread upon the record is wholly fictitious and groundless; and also, whether the plaintiff fraudulently withheld from the court pronouncing it, any fact which, if disclosed, would have shown he had no cause of action.

2. In order to relief from a judgment on the ground of fraud, the proof in demonstration of the fraud must be so clear and strong as to render it certain the plaintiff knew, at the time he brought his suit, he had no right of action, and was without expectation of obtaining judgment unless he was successful in depriving the defendant of an opportunity of making defence.

3. A judgment of divorce obtained in Illinois, declared void, on the ground that the cause of action on which it purports to be founded, was fabricated.

4. A judgment by a court of one of the states, divorcing a husband and wife domiciled in different states, is not entitled to extra-territorial recognition in case the party procuring it could have given the defendant actual notice of the suit, but refused or neglected to do so.

5. The right of every person accused, to have an opportunity to make defence, is secured by a rule of general law; a judgment pronounced in violation of it is not entitled to general recognition.

On bill, plea supported by an answer, replication and proofs.

Mr. A. A. Clark and *Mr. Cortlandt Parker*, for complainant.

Mr. J. D. Bartine, *Mr. H. M. Gaston* and *Mr. B. Williamson*, for defendant.

THE VICE-CHANCELLOR.

This is a suit by a wife against her husband, for divorce *a vinculo matrimonii* for both adultery and desertion. Preliminary to the main relief, the bill asks a decree declaring that a judgment pronounced by the Circuit Court of Whiteside county, Illinois, in a suit by the present defendant against the complainant, adjudging the marriage of the parties to be null and void for fraud and duress and want of consent by the husband, is a nullity, because it was procured by fraud, and also for want of jurisdiction over the person of the present complainant. Whether this court is bound to recognize this judgment as a valid adjudication against the complainant respecting her matrimonial *status*, or not, presents the only question of difficulty in the case, for if it is, it is clear the complainant has no case, for the judgment finds she never was the lawful wife of the defendant; but if it is not, and a lawful marriage was contracted, then the admissions of the answer, showing that the defendant abandoned the complainant in the fall of 1866, went to the state of Illinois, and has ever since remained there, and has always since refused to recognize her as his wife, and that after procuring the judgment in controversy, he married another woman and has since cohabited with her as his wife, confess a state of facts which, if true, entitles the complainant to the relief she seeks.

The parties were married on the evening of the 8th of August, 1866, at the house of the complainant's father, in the village of Somerville, Somerset county—that being the birthplace and home of each, and where the complainant has lived all the days of her life—in the presence of her father, stepmother, sister, brother-in-law, two brothers, and a highly respectable gentleman of the village, besides the officiating clergyman, the venerable and distinguished Abraham Messler, D. D. They occupied the same bed that night. The defendant returned to his father's house the next day. He never visited the complainant again, except to announce his father had determined to send him to the west, and to bid her goodbye. In this interview he manifested a becoming love for the

complainant, expressed the deepest regret he was compelled to leave her, and promised to make an arrangement at once to have her join him in the west. On the 10th of September, 1866, a little over a month after the marriage, he went to the State of Illinois, and never afterward recognized the complainant or had any communication with her. The evidence is undisputed, that for a considerable period prior to April, 1866, the defendant had visited the complainant as a suitor almost daily, and, under a promise of marriage, had had sexual intercourse with her, resulting in the birth of two children shortly after the marriage. In November, 1868, the defendant commenced a suit in the Circuit Court of Whiteside county, Illinois, to annul his marriage, alleging in his bill of complaint, as his cause of action, that on the 17th day of August, 1866, he was enticed by false pretences into the house of the complainant's father, and detained there forcibly until the following morning, and that while so imprisoned there, although he absolutely and openly refused to consent to a marriage, and refused to stand up or join hands with the complainant, he was wrongfully and fraudulently declared to be the husband of the complainant, and she to be his wife, by a minister of the Gospel; that he never at any time had sexual intercourse with the complainant, and is not the father of the children to which she gave birth after the pretended marriage. The complainant was not notified of the pendency of this suit, and had no knowledge whatever respecting it, until long after its final determination. Although the defendant knew where she was, and where notice would be certain to reach her, no attempt was made to give her actual notice. The record shows the clerk of the court caused a notice to be published four times, at an interval of a week between each publication, covering a period of three weeks from the date of the first publication to the last, in a newspaper published in the county where the suit was pending, giving notice of the pendency of a suit for divorce. The record further shows the complainant did not appear to the suit, either in person or by attorney, but made default. Judgment was awarded October

13th, 1869, declaring the marriage ceremony between the parties null and void, for fraud and duress and want of consent by the husband to the celebration of the marriage.

If it is possible to prove any fact by the oaths of credible persons, so fully and perfectly that it must be accepted by the court as the truth, a lawful marriage between these persons, by the desire and with the full consent of both, must be considered conclusively established by the evidence in this case. All who were present at its celebration, except the defendant and one of the complainant's brothers, have testified, and been subjected to the most searching and exhaustive cross-examination; all the means provided by the law for detecting falsehood and testing the trustworthiness of human testimony have been applied with masterly skill, and unless it can be assumed they have proved utterly abortive in this instance, and the witnesses were endowed with a cunning and possessed by a spirit of wickedness almost miraculous in their power, it must be admitted their evidence proves, beyond all doubt, that a lawful marriage was solemnized between these parties on the evening of the 8th of August, 1866, at the house of the complainant's father, in the village of Somerville.

The foundation of the defendant's action in the Illinois suit was non-consent by him to the marriage. The evidence produced in this cause shows he did consent, and that every actionable fact stated in his complaint in that suit was totally false. Has the complainant a right to impeach this judgment by showing it rests on a fabricated cause of action?

There can be no doubt that a court of equity has power to look into the judgments of other courts, and if it appears they are infected with fraud, to give relief against them. This power has been repeatedly recognized in this state. *Glover* v. *Hedges, Saxt.* 119; *Boulton* v. *Scott's Adm'rs,* 2 *Green's Ch.* 231; *Van Meter* v. *Jones' Ex'rs, Ib.* 523; *Powers' Ex'rs* v. *Butler's Adm'rs,* 3 *Green's Ch.* 465. And the power of the court to relieve against fraudulent judgments is not limited to judgments recovered in the courts of the same state, but may be exerted against judgments recovered in the courts of other

states, whenever they are sought to be made the foundation of an action or a defence. *Davis* v. *Headley*, 7 *C. E. Green* 123; *Pearce* v. *Olney*, 20 *Conn.* 544; *Dobson* v. *Pearce*, 12 *N. Y.* 165.

In *Moore* v. *Gamble*, 1 *Stockt.* 247, Chancellor Williamson said: "The court will grant relief against a judgment which is against conscience, which was obtained by fraud, or in any other way by which injustice has been done." And in defining what conduct on the part of a plaintiff will make it the duty of the court to interfere, he said, a plaintiff who brings his action when his adversary is out of the state, for the purpose of depriving him of an opportunity of being heard and making defence, commits a gross wrong and fraud, and in a case so gross, a court of equity will not stop to inquire whether or not the injured party may get redress in the court pronouncing the wrongful judgment, but in such a case the propriety of affording relief would be so manifest that the court would act without hesitation. In this case the court went into an inquiry to ascertain whether a judgment in attachment was founded on a just debt, or not. The same eminent Chancellor, in the subsequent case of *Tomkins* v. *Tomkins*, 3 *Stockt.* 514, declared, in the clearest terms, it was the duty of the court, when a judgment was assailed as fraudulent because not supported by a just cause of action, to look into the judgment, and if the charge was shown to be true, to give relief. His forcible statement and illustration of the doctrine are so exactly pertinent to the case in hand, that they may be quoted almost literally as the judgment of this court on this branch of the case. He says: "In a case like the present, of foreign attachment, where the proceeding is *in rem*, and the judgment is obtained without the knowledge of the defendant, and the proceedings are all necessarily *ex parte*, it would be hard, indeed, if this court could not interfere to protect a party against the fraud of the plaintiff. The propriety of the court's interfering in such cases is too obvious to require its being vindicated. But even in a case where a judgment has been obtained in the absence of a party, and

upon a hearing entirely *ex parte*, this court will not try the merits of a case over again, where those merits have been *properly* submitted to the tribunal established by law to hear and adjudicate upon them. * * * If the plaintiff imposes a fictitious claim upon the auditors," (or the court,) "or a claim which has been satisfied, and for which the defendant has a receipt; in fine, if he conceals from the auditors, (or the court,) "any fact which tends to show that his claim is not a valid one, he commits a fraud upon the absent party, against the consequences of which this court will protect him."

Under the authority of these cases, it is clear it is competent for this court, upon an allegation that a judgment is founded in fraud, to inquire whether the cause of action spread upon the record is wholly fictitious and groundless, and also whether the plaintiff fraudulently withheld from the court pronouncing it, any fact which, if disclosed, would have shown he had no cause of action; but it is equally clear, where the merits of the case have been fairly submitted to the original tribunal, even on an *ex parte* hearing, the court will not, upon an allegation of fraud, enter upon a re-trial of the merits, and weigh, adjust and reconcile evidence to see whether or not, in its opinion, the original tribunal pronounced a correct judgment. The proof in demonstration of the fraud must be so clear and strong as to render it certain the plaintiff knew, at the time he brought his suit, he had no right of action, and was without expectation of obtaining a judgment unless he was successful in depriving the defendant of an opportunity of making defence.

Judgments in suits for divorce have been repeatedly adjudged void, on the ground that the cause of action set out in the pleadings was fabricated by the plaintiff. In *Borden* v. *Fitch*, 15 *Johns.* 121, a divorce granted by the Supreme Court of Vermont, at the suit of the husband, alleging desertion as the cause, was held to be invalid, it appearing the parties were living separate during the whole period of the alleged desertion, pursuant to a divorce *a mensa et thoro* granted by the legislature of Connecticut. In *Leith* v. *Leith*, 39 *New Hamp.*

20, a divorce granted by a Circuit Court of Indiana, on the application of the husband, was held to be invalid, it being shown that an actual residence in Indiana was necessary, by its laws, to give a person a right to bring suit for divorce, and that though the plaintiff was physically present in Indiana for the statutory period, he had not gone there to reside permanently, but merely to obtain a divorce. And in *Vischer* v. *Vischer*, 12 *Barb.* 640, a divorce granted by a Circuit Court of Michigan at the instance of the husband, for desertion by his wife, was declared to be invalid, it appearing that for the whole period of desertion, the wife was living separate from her husband under a decree of divorce *a mensa et thoro*, pronounced by the Court of Chancery of New York. In each of these cases, on an allegation of fraud, the court made inquiry whether or not the judgment was founded on a valid cause of action, and finding it was not, pronounced it void.

I think the complainant has a right to impeach the Illinois judgment by showing that the cause of action on which it purports to rest was fabrica ed, and I am of opinion that it is clearly shown that it was fabricated. It must, therefore, be declared void against the complainant.

The other objection to the validity of this judgment raises the question whether or not that great maxim of justice which declares no person can be lawfully condemned, nor be made to suffer, either in person, estate, or fame, without an opportunity of being heard in defence, applies to actions for divorce, and also to actions to settle the question of marriage or no marriage. It is an undeniable fact, the complainant did not have an opportunity to make defence to the foreign suit, and it is equally true the defendant had it in his power to give her such an opportunity, and refused to do it. He knew where she was, and that a notice sent to his father, or to any other of his relatives living in the same village where she did, for service on her, would have been sure to reach her, but all effort in that direction was limited to a publication in a local newspaper, where it was almost absolutely certain it would not come to her notice. The conviction

cannot be resisted that he sought a foreign jurisdiction to obtain a nullification of his marriage secretly, and to deprive his wife of an opportunity of meeting and disproving his accusations. His family bitterly opposed his attentions to the complainant, and his father had threatened to disinherit him if he married her; he was, therefore, assured of the sympathy and support of his family in any controversy he might have respecting the validity of his marriage. If it was true he was decoyed into the house where the marriage was solemnized, and there imprisoned while an atrocious outrage was committed against him, and also against law and decency, why, when he regained his liberty and was safe under the protection of his father, did he not instantly appeal to the law for redress and the punishment of the offenders at the place where the outrage was perpetrated, where all the proofs were, and where he would have had the aid and sympathy of a wealthy and influential family connection? It seems to me, if he had really suffered the indignities and outrage charged in his complaint, his sense of wrong would have been too deep to have permitted him, in the very flush of his indignation, to turn his back upon the conspirators, without so much as seeking, by a whisper, the aid of the courts for his protection and their punishment. According to the proofs, he did turn his back upon them and the scene of the outrage, sought a home in a distant state, and there slept uncomplainingly over his wrongs for over two years; and then, when he appeals to the law for redress, although he knows just where a notice of his suit will reach the woman who he charges has so deeply wronged him, he purposely refrains from giving her an opportunity to meet him face to face and answer his accusations. If he sincerely believed he had a just cause of action, he has unfortunately pursued just the line of conduct that an unscrupulous suitor, attempting to obtain an unmanly and fraudulent advantage of his adversary, would have adopted.

It will be observed this case does not raise the question, whether or not, where the parties to a suit for divorce are

domiciled in different jurisdictions, and the plaintiff does not know, and cannot, by diligent inquiry, ascertain the abode of the defendant, and cannot, therefore, give actual notice of his suit, the court can, by publication merely, acquire such jurisdiction over the person of the defendant as will enable it to pronounce a judgment which will be entitled to be recognized, in external jurisdictions, to be of the class of "judicial proceedings" entitled to full faith and credit in each of the states by force of constitutional provision. But the proposition upon which the defence rests, is this: that where the parties are domiciled in different states, a husband or wife may, by publication of notice in a local newspaper, and without actual notice to the defendant, even when the plaintiff knows where the defendant resides, and has it in his or her power to give actual notice, procure a judgment annulling their marriage, which will be entitled to full recognition by the judicial tribunals of each of the states. There is an *ex parte* case, *Ditson* v. *Ditson*, 4 *R. I.* 87, (a suit for divorce by a wife against her husband, who was a subject of Great Britain, and had abandoned his wife and returned to England,) in which this question is very elaborately discussed, not, however, in deciding an issue properly raised in the suit, but apparently in vindication of the soundness of a judgment pronounced in another suit, which the Supreme Court of Massachusetts subsequently refused to recognize. *Lyon* v. *Lyon*, 2 *Gray* 368. While the court declare judgments in divorce cases, where jurisdiction over the person of the defendant is acquired by publication merely, without actual notice, are entitled to recognition in external jurisdictions, they are careful to add that the defendant must have such notice, actual or constructive, as the nature of the case admits of, the purpose of the notice being to banish the idea of secrecy and fraud, as well as to give to the persons out of the jurisdiction of the court every possible chance, under the circumstances, of appearing to the *proceeding* and making defence. For many years prior to the promulgation of these views, it had been the practice of the Supreme Court of

Rhode Island in divorce cases, *when* the defendant was non-resident, and his residence unknown, and it became known during the progress of the suit, and was within the United States, to continue the hearing until personal notice of it could be given to the defendant. It is obvious this case gives no countenance to the proposition of the defence. No such doctrine has yet been declared to be law by any tribunal whose opinions have been deemed worth preserving, and I presume never will be, so long as the lowest notions of justice can appreciate the flagrant injustice of condemning the innocent as guilty, without giving them a chance of manifesting their innocence, when it is within the power of the person seeking the judgment to do so. The other case, *Harding* v. *Alden*, 9 *Greenl.* 148, cited as an authority for the proposition of the defence, fully recognizes the necessity of notice to entitle a judgment to full faith and credit in other jurisdictions. The court say: "It appears that by the order of the court a citation was served upon the defendant in person, and that a continuance was twice granted to give him an opportunity to appear in defence. This shows a due regard to that principle of justice which gives the party accused the right to be heard."

There can be no doubt that every independent government is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals, but in the exercise of this power no government, if it desires extra-territorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. *Mackay* v. *Gordon*, 5 *Vroom* 286. The right to have a fair opportunity (such as the defendant can make effectual to his protection) to make defence against any charge, is secured by a rule of general law, resting upon what is esteemed, in the judgment of mankind, a principle of natural justice. A judicial sentence, pronounced in violation of this right, is not within the protection of the constitution, nor entitled to general recognition as valid. Judgments dissolving the marriage relation have been repeatedly

declared void for a violation of this right. Besides Borden *v.* Fitch, Lyon *v.* Lyon, and Vischer *v.* Vischer, already cited, I refer to *Bradshaw* v. *Heath,* 13 *Wend.* 408; *Dunn* v. *Dunn,* 4 *Paige* 425; *Irby* v. *Wilson,* 1 *Dev. & Bat. Eq.* 568. It is quite evident such would have been the result in *Nichols* v. *Nichols,* 10 *C. E. Green* 60, if the facts had warranted it.

No tribunal, so far as I am aware, has attempted to maintain the validity of judgments of divorce in all jurisdictions, when pronounced without actual notice to the defendant, where it was in the power of the plaintiff to give it, on the ground that such suits are proceedings *in rem,* and, therefore, notice is not necessary. Accurately speaking, a proceeding *in rem* is a proceeding against tangible property, and actual notice is dispensed with on the theory that the owner is bound to know where his property is and what is being done with it. It is manifest this theory cannot be applied to the relation of husband and wife, especially where one abandons the other and refuses all intercourse.

For both reasons, the foreign judgment, in my opinion, is void against the complainant, and the proof of desertion for a much longer period than that fixed by statute being undisputed, the complainant is entitled to a decree dissolving the marriage.

There being a prayer for alimony and maintenance, a reference will be ordered to ascertain the faculties of the defendant, and what, under the circumstances of the case, will be a reasonable allowance.*

PRICE'S EXECUTORS *vs.* LAWTON.

1. An allegation that there is an outstanding paramount title will not enable the owner of the equity of redemption to arrest the enforcement of a purchase money mortgage.

2. If there has been an eviction by title paramount, or an action is pending by an adverse claimant to try the title to the mortgaged premises, the

* Decree affirmed, 1 *Stew.* 581.

court will interfere. But where the aid of the court is sought on the ground of the pendency of such an action, the record must be produced or proof of its contents given, that the court may be advised that such is the nature of the action.

3. *Quære.* Whether leave would be given, on the hearing, to amend, or to file a supplemental answer to a suit for foreclosure of a purchase money mortgage, to set up a defence of eviction from the mortgaged premises.

On bill, answer and proofs.

Mr. John Whitehead, for complainants.

Mr. Daniel W. Gillett, (of New York,) for defendant

THE VICE-CHANCELLOR.

This suit is brought to foreclose a purchase money mortgage. The mortgaged premises were conveyed by the mortgagor, by warranty deed, containing a covenant that he was seized of an estate in fee simple, absolutely. Except a denial that there is as much money remaining due on the mortgage as the complainants claim, the defence set up in the answer is limited to the matters set up in the eleventh paragraph, which is in these words:

"That since defendant entered upon the possession of the premises described, the defendant's servants, while engaged in labor upon a portion of the premises in the complainants' bill mentioned, were arrested and taken into custody on legal process, issued at the suit of David McDonald, Henry Day, Arthur Green and others, the said parties claiming to own and have good right to possess and enjoy a part of the said premises, in all amounting to fifty-six acres in one parcel, and about seventy acres in other parcels. That such proceedings were thereon had, that defendant's servants gave bail on such arrest, and the causes were thereupon transferred to the Bergen county Circuit Court, in which court the said actions are now pending and undetermined."

If the pleader intended to aver the pendency of an action attacking the defendant's title to any portion of the mortgaged

premises, it is obvious he has signally failed. The only facts alleged in the paragraph quoted, are, that the defendant's servants were arrested while working on the mortgaged premises, at the suit of persons claiming to have a right to the possession of several different parcels of them, and that these suits were subsequently transferred from a tribunal not named to the Circuit Court of Bergen county, where they are still pending, but it is not alleged that the ground of action or cause of arrest was an unlawful invasion of the mortgaged premises, or any portion of them, or that the suits brought against the servants had the slightest connection with the title to the mortgaged premises, or the right to their possession. It is perfectly manifest the answer does not aver the pendency of a suit to try the title to any part of the mortgaged premises. At most, it merely sets up the assertion of a right to a portion of the mortgaged premises, hostile to the defendant's title. This constitutes no defence. An allegation that there is an outstanding paramount title will not enable the owner of the equity of redemption to arrest the enforcement of a purchase money mortgage, but if there has been an eviction by title paramount, or an action is pending by an adverse claimant to try the title to the mortgaged premises, the court will interfere. *Shannon* v. *Marselis, Saxt.* 413; *Van Waggoner* v. *McEwen*, 1 *Green's Ch.* 412; *Glenn's Adm'r* v. *Whipple*, 1 *Beas.* 50; *Hill* v. *Davidson*, 5 *C. E. Green* 229; *Hulfish* v. *O'Brien*, *Ib.* 230.

Neither is there any proof of the pendency of an action assailing the defendant's title. The counsel of the two persons who, it is averred in the paragraph quoted, assert a claim to the possession of a part of the premises, says that he issued writs of summons in their favor against the defendant in this suit; that the defendant's attorney acknowledged service; that he gave defendant's attorney copies of the declarations to which he was to plead, and he presumes pleas were drawn; that he and the defendant's attorney often tried causes without pleadings; that he does not believe there is a paper in these suits on file, but he is not sure, for he has not looked for them.

This is all the evidence there is in the case tending to show the pendency of an action. It is needless to observe it is utterly insufficient. No effort has been made to produce the record, nor to show its contents. In the absence of the record or proof of its contents, it is impossible to declare what was the issue in these suits, or their purpose.

The answer does not allege that the defendant has been evicted from any part of the mortgaged premises. No defence of that nature is pretended. The answer is under oath. The bill required it. The defendant has not asked leave to amend, or to file a supplemental answer. It is doubtful whether, if application had been made on the hearing, leave would have been given. *Campion* v. *Kille*, 1 *McCarter* 229; *Huffman* v. *Hummer*, 2 *C. E. Green* 269. It could only be made on notice to the complainants. The question whether an eviction by paramount title has been proved or not, has not been considered, because it is no part of the matter controverted on the record.

The complainants are entitled to a decree, with a reference to have the amount remaining due ascertained. The evidence already taken on this point may be used on the hearing before the master.*

Meldowney *vs.* Meldowney.†

1. To render the withdrawal of a wife from the house of her husband such an abandonment as to constitute desertion in legal estimation, it must appear she left her husband and remained away from him of her own accord, without his consent and against his will, continuously, for the full period of three years.

2. Abandonment is not voluntary, where it is compelled by personal violence, coarse language, and constant neglect.

3. Desertion brought about by the misconduct of the husband cannot be made the ground of divorce on his application.

4. Language used by the petitioner, *held* to have given the defendant a right to infer the petitioner's consent to a separation.

---

* Decree affirmed, 1 *Stew.* 274.

† Cited in *Taylor* v. *Taylor*, 1 *Stew.* 208; *Sergent* v. *Sergent*, 6 *Stew.* 206; *Grant* v. *Grant*, 9 *Stew.* 505.

Submitted on pleadings and proofs, without argument.

Mr. James Chapman, for petitioner.

Mr. Thomas Carey, for defendant.

THE VICE-CHANCELLOR.

This is an action for divorce by a husband against his wife, on the ground of desertion. The desertion is alleged to have taken place on the 12th day of September, 1871, and to have continued up to September 23d, 1874, when this suit was brought. It will be observed the suit was instituted within less than two weeks after the lapse of the period which desertion must run to give a right of action. In my judgment, the evidence fails to show a case of desertion. To render the withdrawal of a wife from the home of her husband such an abandonment as to constitute desertion in legal estimation, it must appear she left her husband, and remained away from him, of her own accord, without his consent, and against his will. *Moores* v. *Moores* 1 *C. E. Green* 280; *Jennings* v. *Jennings*, 2 *Beas.* 38. And the desertion must be continued for the full period of three years, for desertion itself is no cause of divorce, but only its continuance for the period fixed by statute. *Coddington* v. *Coddington*, 5 *C. E. Green* 264. The wife in this case did not leave voluntarily. Her husband, by personal violence, coarse language, and constant neglect, as effectually drove her from his home as though he had put her out by physical force. In the language of a daughter of the parties, who testified as a witness: "Mother left because she could not stand it any longer." Desertion brought about by the misconduct of the husband, cannot be made the ground of divorce on his application. The petitioner made no effort to induce his wife to return until he had determined to sue for a divorce. I do not believe he desired her to return then. I think all his efforts in that direction bear upon their face unmistakable evidence that they were made solely with a view of insuring the success of his suit, and not with a sincere desire

to restore a broken home. After the receipt of the letter of August 11th, 1874, in which the petitioner says, "Now I am willing to give you a bill of separation. I do not want to hold you, and I don't want you to hold me, if we cannot live together happy," I think the defendant had a right to understand that the petitioner consented to a separation. Whatever may have been the effect of the wife's conduct prior to this time, by this letter he consented to her living in a state of separation. From this time on, the wife remained away from her husband with his consent. He is not entitled to a divorce. His petition must be dismissed, with costs.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY.

OCTOBER TERM, 1876.

ALTMANN and others *vs.* BENZ and others.

Where certain members of Teutonia Lodge, No. 177, D. O. H., withdrew from the jurisdiction of the grand lodge of this state and surrendered their charter, and formed a new lodge, adopting the same name, and other members continued steadfast in their allegiance, and the charter was duly delivered to them as the lodge, that body which continued true to its allegiance and holds the charter, was as to certain property of the original lodge, taken by the members who withdrew, adjudged to be Teutonia Lodge, No. 177, D. O. H., and as such, to be entitled to the property of the society.

Bill for injunction to stay execution at law. Motion to dissolve injunction, on bill and answer.

Mr. S. Collins, for motion.

Mr. M. Bretzfeld, contra.

THE CHANCELLOR.

Teutonia Lodge, No. 177, D. O. H., is an unincorporated benevolent association located in Jersey City. It has for its object the mutual aid of its members. As its name suggests,

it is one of a large number of like societies of the same order. These societies are chartered by the grand lodge of the United States, and they owe allegiance to the grand lodge of the respective states in which they are located. They are all subordinate to the grand lodge of the United States. The complainants being the majority of the members for the time being of Teutonia Lodge, No. 177, D. O. H., withdrew from the jurisdiction of the grand lodge of this state, and surrendered their charter accordingly. The minority of the members continued steadfast in their allegiance, and the charter was duly delivered to them as the lodge, and they ever since have been recognized by the grand lodge of this state and the grand lodge of the United States, as Teutonia Lodge, No. 177, D. O. H. After the charter was delivered to them, they being fully organized, appointed a committee to demand from John Altmann, the late treasurer, (he was one of those who withdrew,) the money of the lodge in his hands. He refused to pay it over, and the committee brought suit against him in the Supreme Court of this state, in their own names, to recover it. After a trial they recovered judgment against him for the money, and issued execution thereon. He and the rest of the members who withdrew, filed their bill to restrain them from collecting the amount due upon the execution. The defendants have answered. The truth of the facts stated in the answer was admitted on the argument. The question presented is, which of these bodies, both bearing the same name and each being composed of part of the members who, at the time of the withdrawal, constituted Teutonia Lodge, No. 177, D. O. H., is to be regarded as the society. There can be no doubt that that one which remained true to its allegiance to the grand lodge of the United States and the grand lodge of this state, and as a consequence holds the charter, is, for the purposes of this controversy, to be adjudged to be Teutonia Lodge, No. 177, D. O. H., and as such, to be entitled to the property of the society. *Hendrickson* v. *Shotwell*, *Saxt.* 577.

Altmann, in his affidavit appended to the bill, swears (though the bill is silent on the subject,) that the money received by

him as treasurer is not in his hands or under his control, but is deposited in the Hudson City Savings Bank, in the names of three trustees appointed by the lodge, and the complainants' counsel insists that the defendants ought not, therefore, to be permitted to compel him to pay the amount out of his own property. But the constitution of the lodge makes the treasurer the custodian of all the money of the lodge and holds him responsible therefor; and it does not appear whether "the lodge" to which he refers, is the lodge constituted by the members who withdrew, or the lodge as it was constituted before that time. And, moreover, the judgment at law has fixed his liability.

The injunction will be dissolved, with costs.

WHITNEY *vs.* KIRTLAND and others.

1. An attorney in fact, who, under agreement with A's creditors to undertake at his own expense the collection of their respective claims against A for a contingent compensation, obtained judgments upon the claims, and purchased the real estate of A at sheriff's sale under executions on the judgments, occupies, in a suit to compel the delivery of the deed for the property under his agreement of purchase signed by him at the sale, the same position that any purchaser who was an entire stranger to the proceedings and claims would occupy, and has the right to maintain such suit accordingly.

2. Such party not asking the advantage of his bargain with the creditors, but merely acting upon his rights as a purchaser at the sheriff's sale, is not liable to the defence that he is guilty of champerty and maintenance.

3. Where a sheriff has executed a deed to the purchaser at a sale under execution, and has received from the attorney of the plaintiffs in the judgment under which the land was sold, a receipt for the full amount bid, and delivered the deed to such attorney, he is not a necessary party to a suit by the purchaser against such attorney to compel the delivery of the deed.

4. A party who, though not a principal but an agent merely, holds a deed to a purchaser at sheriff's sale, and also money equitably belonging to the purchaser, under agreement made at the time of the sale, and applicable under that agreement to the payment of the purchase money, is a proper, if not a necessary party to a suit by the purchaser to compel the delivery of the deed.

Bill for relief. On final hearing on pleadings and proofs.

Mr. E. A. S. Man, for complainant.

Mr. C. Borcherling and *Mr. C. Parker*, for defendants.

THE CHANCELLOR.

This litigation arises out of a sheriff's sale of land belonging to John Kirtland, in Orange, in the county of Essex, made July 22d, 1873, under an execution at law, issued on a judgment recovered in the Supreme Court of this state, on the 13th of February, 1865, against him and George Kirtland, in favor of George W. Kirtland. The complainant was the purchaser at that sale. The officer by whom it was made, and in whose hands the writ was, was Frederick W. Ricord, then late sheriff of that county. The execution was for the sum of $16,714.15, and was levied on the land on the day on which the judgment was recovered. There were prior encumbrances on the property, consisting of a mortgage given by John Kirtland and his wife to George W. Kirtland, on the 23d of November, 1864, for $4000 and interest, and a trust mortgage for $7500, executed by John Kirtland to George W. Kirtland, on the day last mentioned, to secure the payment to Catherine Kirtland, the wife of John Kirtland, of the sum of $6000, and to Jared T. Kirtland, his son, of $1500. By the decree of the Court of Errors and Appeals, made on the 14th of July, 1873, (*Wheeler* v. *Kirtland*, and *Kirtland, Adm'x*, v. *Kirtland*, 9 *C. E. Green* 552, 555, 556,) a reduction of $5000 and interest from the date of the entry of the judgment had been made in the judgment above mentioned; the trust mortgage, as to the amount intended to be thereby secured to Catharine Kirtland, had been set aside, and as to the other amount, it stood and was reformed, (it being without words of inheritance,) so as to convey an estate in fee, except as against Wheeler and Green, subsequent judgment creditors. Their judgment was for $68,246.09, and was recovered against John Kirtland and George Kirtland in the Supreme Court of this

state, on the 16th of December, 1869. Under an execution upon this latter judgment, the property had also been levied upon by Andrew Teed, who, at the time of the levying of the last-mentioned execution, was sheriff of Essex county; and the sale under that execution was advertised to take place on the same day as the sale under the first-mentioned execution. At the sale under the execution in favor of George W. Kirtland, the property was struck off and sold to the complainant on a bid of $26,690, the amount then due on that execution, without the reduction decreed by the Court of Errors and Appeals; one of the defendants in this suit, an attorney-at-law, who, at the sale, represented Lucy Kirtland, administratrix of George W. Kirtland, as her attorney, bidding $26,688.60. At the conclusion of the sale, the complainant signed an acknowledgment of his purchase, and gave to the sheriff, with the consent of the attorney, a memorandum check for the part of the purchase money which, by the terms of sale, was to be paid at that time. Inasmuch as a re-argument of so much of the appeal above referred to as related to the reduction of the judgment in favor of George W. Kirtland, had been ordered, and it would depend on the result thereof whether the reduction would become necessary, it was agreed between the complainant and the attorney, that for the amount of the $5000, and interest thereon to the time of the sale, (amounting together, at that date, to $8850.27,) the complainant should give a mortgage on the property, which was, as the complainant alleges, to go to Lucy Kirtland, as administratrix of George W. Kirtland, in case the re-argument should result in her favor, and to Wheeler and Green, on account of their judgment, if the result should be adverse to her. According to the allegation of Miss Lucy Kirtland and her attorney, the mortgage was to be payable to the former, as administratrix, and if the re-argument should eventuate favorably for her, it was to be hers; and if otherwise, it was to be canceled. No mortgage was, in fact, given. Part of the premises had, while subject to the mortgages to George W. Kirtland and the judgment in

his favor, been taken by condemnation by the Essex Public Road Board, for a public street or highway, called Park avenue. It was understood between Miss Kirtland's attorney and the complainant, at the sale, that the money due for the damages which had been awarded upon that condemnation, would be the property of the purchaser at the sheriff's sale; that Miss Kirtland would look to the property for payment of the mortgage for $4000, and as to the trust mortgage, George W. Kirtland being then dead, is seems to have been regarded by both of them as having no validity. These mortgages were the only prior encumbrances on the premises. After the sale, Miss Kirtland's attorney proceeded to obtain the road board money, and subsequently, on the 15th of September, 1870, before the re-argument in the appeal took place, received from the road board $17,015.50, the amount of the award, with interest, out of which he allowed an assessment for benefits of the improvement on the property. The assessment, which was not yet due, and was payable in installments, was, in amount, $1500, but a rebate allowed in consideration of payment before it was due, reduced it to $1320. This sum the attorney allowed in settling with the road board. Since November 5th, 1874, the claim of Catharine Kirtland, wife of John Kirtland, for inchoate dower in the road board money, has been established and paid. There are other details in the matter which I do not consider it necessary to re-produce here. The result of the re-argument in the Court of Errors and Appeals was adverse to the administratrix of George W. Kirtland. The decision was rendered on the 1st of December, 1873. On the 23d of January, 1874, the complainant tendered to Miss Kirtland's attorney in cash, the balance due on the George W. Kirtland judgment as reduced by the decree of the Court of Errors and Appeals, after application of the money awarded for damages on the condemnation by the road board, and interest, and at the same time tendered to him a receipt from B. Williamson and Son, the attorneys of record for Wheeler and Green in their judgment, for the amount of the $5000 and interest, the reduction decreed by the Court of Errors and Appeals, which,

as the complainant insists, was to be credited on that judgment if the decision of that court, on the re-argument, should be adverse to the administratrix of George W. Kirtland. On the tender, he demanded an order on the sheriff for the deed. This was refused, and subsequently, on the 28th of February following, the like tender was made by the complainant to Mr. Ricord, who declined to deliver the deed until the amount realized by the sale should have been receipted for in his execution book, by the attorneys of the administratrix of George W. Kirtland. On the 5th of November following, Mr Ricord delivered the deed to Miss Kirtland's attorney, on the application of the latter, and on his giving him a receipt, in the name of his firm, as attorneys for the plaintiff in the Kirtland judgment, for $26,690, as received from Mr. Ricord, in full of the judgment, and the attorney still holds the deed.

The complainant's bill is filed against the attorney, the administratrix of George W. Kirtland, and John Kirtland and his wife. It prays that the agreement made between the complainant and Lucy Kirtland may be specifically performed, and that the defendants may be decreed to deliver to the complainant the sheriff's deed, on his performing his agreement in connection therewith, and that the trust mortgage may be paid off out of that part of the money realized by the sale which is applicable to the payment of the Kirtland execution, and may then be canceled of record, in order that the complainant's title under the sheriff's deed may be cleared therefrom. All of the defendants have answered.

The complainant was, and is, the attorney in fact of Wheeler and Green, and of the survivors of the firm of Hunt, Morton and Quigley, who are also judgment creditors of John Kirtland and George Kirtland. Their judgment was recovered in the Supreme Court of this state on the 8th of February, 1873, for $110,149.79. He is not an attorney-at-law. It appears that before suit was begun on these claims, he entered into an agreement with these firms respectively, to undertake, at his own expense, the collection of their respective debts, for a contingent compensation of half the amount collected on the

claim of Wheeler and Green, and the like proportion of the debt of Hunt, Morton and Quigley, after deducting a sum not exceeding $1200, also for his compensation for his time to be spent in the collection. His purchase at the sheriff's sale was, and was understood to be, as agent for Hunt, Morton and Quigley. He testifies that after the decision of the Court of Errors and Appeals on the re-argument, he paid to Wheeler and Green the surplus of the money at which the property was struck off to him, remaining after deducting the amount due on the execution on which the property was sold.

The defendants insist that the complainant is guilty of champerty and maintenance, and that his bill, for that reason, should be dismissed. He is not before this court asking the advantage of his bargain with Wheeler and Green, or of that made with Hunt, Morton and Quigley. His claim in this action is based on his purchase at the sheriff's sale under the execution in favor of George W. Kirtland, and he occupies precisely the same position in this suit, that any purchaser who was an entire stranger to the proceedings and claims would occupy. If his bid is to be regarded as $26,690, there was a surplus, after payment of the amount due on the Kirtland judgment, to be applied, on application to the court, to the Wheeler and Green judgment. If Wheeler and Green had made an improper bargain with the complainant, as their agent, in respect to his remuneration for the collection of their claim, that fact would not have deprived them of the aid of the court of law to obtain the surplus. Nor would the fact that Hunt, Morton and Quigley had made such a bargain with the complainant have deprived them of the benefit of his purchase in their behalf at the sheriff's sale. *Hilton* v. *Woods*, *L. R.*, 4 *Eq.* 432; *Elborough* v. *Ayers*, *L. R.*, 10 *Eq.* 367. He fairly bought the property at the sheriff's sale, and did all that was required of him upon the sale. That he did not pay the deposit, was due to the fact that there was an agreement between him and the attorney of Lucy Kirtland, which rendered it unnecessary. By direction of the latter, and in pursuance of that agreement, the sheriff accepted the memorandum

check of the complainant for the amount of the deposit. The complainant duly signed the acknowledgment of his purchase, and it does not appear that he failed, in any respect, to comply with his agreement made on the purchase. He was dissatisfied with the settlement made by Miss Kirtland's attorney with the road board, but that matter was adjusted to their mutual satisfaction. He was unwilling to allow the dower of Catherine Kirtland out of the road board money, but that, too, was satisfactorily arranged. Indeed, it is clear from the evidence, that the deed would have been delivered to him but for his refusal to yield to the requirement of the attorney on the 5th of November, 1874, that the amount of the purchase money should be changed in the sheriff's deed from the amount at which the property was struck off to him to the amount which was due on the Kirtland judgment, after the reduction. Ever since that time he has been endeavoring to obtain the deed, and has tendered himself ready to comply, in all things, with the agreement made at the sheriff's sale. In pursuance of that agreement the deed from the sheriff to the complainant was obtained by Lucy Kirtland's attorney from the sheriff, on his receipting for the purchase money. If the complainant is in no default he is entitled to the benefit of his purchase. The answer states the agreement as follows: "A verbal agreement was thereupon made between the parties litigant, the one represented by said Larned, (Mr. William Z. Larned, the New York counsel and general adviser of Miss Kirtland,) the others by said Whitney, (the complainant,) to the effect following: The sale under the Kirtland judgment was to go on; said complainant was to bid the amount of said judgment and costs, for which both parties thought the property good security, although subject to the prior lien of the $4000 mortgage; the amount of the road board money subject to the claim of Mrs. Catherine Kirtland for dower therein, which was then estimated at about $1200, to be applied as part of the purchase money." The answer also states that it was thought that the execution on the Kirtland judgment, having been levied prior to the taking of part of the premises by the road board, and describing

the whole property as it was before such taking, the purchaser under the levy would acquire at least an equitable right to the road board money, a right which a court of equity would enforce, subject, of course, to the prior liens of the two mortgages; and it was stated by Mr. Larned, Miss Kirtland's representative and counsel, that she was willing to look to the remainder of the property for the amount of the $4000 mortgage. It further states that no consideration was given to the trust mortgage, because the court had declared that but a life estate, for the life of George W. Kirtland, passed by it so far as regarded Wheeler and Green; and George W. Kirtland was dead. It appears to have been subsequently agreed between Lucy Kirtland's attorney and the complainant, that for a sum equal to the amount to be reserved out of the road board money to answer the claim of dower, and the amount allowed in the settlement with the road board by the attorney for the assessment for benefits, Miss Kirtland should take a mortgage upon the property.

The agreement made at the sale is binding on Miss Kirtland. She does not allege that she was not aware that it was made in her behalf, nor that it was made without her authority; but she insists that it is not binding on her, because it was not in writing and signed by her, or by her agent thereunto lawfully authorized. There is abundant evidence that she was consulted in respect to it, and that it was made with her sanction by those who were duly authorized by her to make it. Her attorney has in his hands the money received, under and in pursuance of that agreement, from the road board, and that money is applicable to the payment of the purchase money. Nor can the right so to apply it be questioned. John Kirtland is before this court in this cause, and does not call it in question. It is true he says in the answer, that he is the legal owner of the money, but he does not question the complainant's equitable right to it as purchaser under the sheriff's deed, if he is entitled to that deed. That title is beyond dispute. Nor will the lien of the $4000 mortgage prevent its application. Though, in the answer, that lien is set up, yet the answer shows by express statement, that Miss Kirtland agreed

with the complainant at the sale, that if he should buy the property she would look to the rest of it, not taken by the road board, for payment of that mortgage.

There appears to be no good reason why the agreement should not be executed. The reason why it was not carried out appears to have been that Mr. Larned and the attorney of Lucy Kirtland insisted that the consideration money in the sheriff's deed should be, instead of the sum bid by the complainant, the amount of the Kirtland judgment as reduced, and the sheriff's fees on the execution. Up to the 5th of November, 1874, the controversies which had arisen between the parties were in reference to the settlement made by the attorney with the road board. These matters had, at that date, been satisfactorily adjusted, and the complainant attended, by appointment, at the attorney's office, on that day, to receive his deed. He fully expected then to receive it, and the attorney as fully expected to deliver it to him at that time. It appears by the answer, that the attorney refused to deliver it unless the complainant would consent to the alteration of the statement of the consideration money as above mentioned. Though the statement of this transaction in the answer, may seem to suggest that this action was induced by the discovery by the attorney, then for the first time, from the complainant's conversation, that the latter had what the former regarded as an unfair if not a sinister object in view, it appears from the testimony of Mr. Larned, that both he and the attorney were aware of that design on the day of sale. The object referred to is stated in the answer to have been, to contend, in a suit then brought, or thereafter to be instituted, in behalf of creditors of John Kirtland and George Kirtland, that the judgment in favor of George W. Kirtland was fraudulent as against those creditors, and that Lucy Kirtland must answer as having made disposition of the property of John Kirtland to the amount of the bid of $26,690 ; and also to insist that the purchase money must be appropriated to the payment of the claims of Catherine Kirtland and Jared T. Kirtland, or one of

them under the trust mortgage. Mr. Larned testifies that on the day of the sale, the attorney of Lucy Kirtland asked the complainant if his principals, Hunt, Morton and Quigley, proposed, after the sale under the execution, to take any steps in an existing suit in the United States Circuit Court, to prevent the payment to Lucy Kirtland of the money raised by the sale, and that the complainant replied that he did not contemplate anything of the kind, but proposed in that suit to rely upon her responsibility, which he supposed was abundant. It also appears from the testimony of the attorney, that he knew of the design in question before the 5th of November, 1874. Although, in April of that year, a question was raised as to whether the bid should be regarded as $26,690, or as the sum due on the Kirtland execution after the reduction, it appears to have been abandoned. In the agreement of April, 1874, drawn by the attorney, but not executed, a copy of which is appended to the answer, it was provided that Wheeler and Green, "in order to the delivery of the deed," should receipt upon their execution the excess of the price bid at the sheriff's sale, over the amount due on the Kirtland judgment as reduced. The draft of agreement made by him, dated May, 1874, contains the same provision. In his letter of June, 1874, to the complainant's counsel, he suggests that certain things should be done for the complainant to facilitate the closing up of the business, and the first of them is, to "apply to the Circuit Court and get an order that the surplus in Ricord's hands be paid to the Wheeler and Green judgment." The testimony shows that at the sheriff's sale it was necessary for the complainant, in order to get the property, to bid $26,690 for it, and that, inasmuch as it was, in view of the re-argument, still undecided whether the reduction on the Kirtland judgment would be made, a mortgage for the amount of the reduction should be executed to the attorney of Miss Kirtland, to be given to her in case the decree for reduction should not stand; otherwise, according to the complainant's testimony, to go to Wheeler and Green. There is a conflict of testimony on the subject of the bid, not as to the amount, for that it

was $26,690, is admitted. It is also admitted that the deposit was upon that sum. The acknowledgment of purchase and the attorney's receipt to the sheriff both show the same sum. If the property had been struck off to Miss Kirtland on her bid of $26,688.60, she would, unquestionably, have been compelled to pay the surplus to Wheeler and Green. The conflict is as to the existence of an agreement, affirmed on the one side and denied on the other, that the bid of the complainant should be understood to be the amount of the Kirtland judgment and sheriff's execution fees, notwithstanding the fact that they might prove to be less in amount than the sum at which the property was struck off. In deciding the question, weight must be given to the fact that the bid was the sum of $26,690; that $26,688.60 were bid in behalf of Miss Kirtland, subject to no understanding whatever as to reduction, and that in the correspondence of the parties, and in the drafts of agreements before referred to, the surplus, the amount of the reduction, is provided for as belonging to Wheeler and Green. I do not regard the question as one of importance to Miss Kirtland, however, and indeed her attorney appears to have entertained a like view of it at times; for, from April, 1874, to November in that year, it was, as before remarked, apparently abandoned, and in July, 1875, according to Mr. Man's testimony, he told the complainant that he no longer insisted upon the reduction of the consideration money in the deed. The question, manifestly, is of no importance to Miss Kirtland, except it be in view of the complainant's design above referred to, and it has none in that aspect; for the Kirtland mortgage of $4000 and the Kirtland judgment have both been established, except as to the amount of the reduction decreed to be made in the latter. Miss Kirtland receives out of the proceeds of sale, only the amount due on her judgment. The complainant was at liberty to bid whatever sum he saw fit. It is difficult to conjecture what liability was reasonably to be apprehended by Miss Kirtland from the fact that the bid, over which she had no control, exceeded the amount due on her judgment. It is equally difficult to con-

jecture how, on the supposition that such liability would exist, she or her counsel could have avoided it if the property were sold under her execution. On the hearing, no suggestion was made that any liability is, in fact, to be apprehended in respect to the surplus.

It is insisted by the defendants' counsel, that Mr. Ricord is a necessary party to this suit. But no relief is sought against him. He has executed the deed to the complainant, and has been discharged by the attorneys of the plaintiff in the judgment from liability for the proceeds of the sale. On the 4th of November, 1874, the attorney of Lucy Kirtland, in order to obtain the deed, gave to the sheriff a receipt for the sum of $26,690, in full of the judgment under which the land was sold. Mr. Ricord is not a necessary party to this suit. He has no interest in it. The complainant does not look to him for the deed, but to the attorney who, as he insists, holds it in trust, to be delivered up to him on his complying with the agreement made at the sale. The attorney has in his hands by far the larger part of the purchase money. He received it as the property of the complainant, and on his account. To obtain it, he applied expressly on behalf of the complainant and Miss Kirtland, and he received it accordingly. In his communication to the road board, asking that the money be paid to him, he said: "Being fully acquainted with this matter, I state my opinion that the title to the land and the money is, by the sheriff's sale, in Stephen W. Whitney, subject to the lien of the two mortgages and the inchoate right of dower in Mrs. Catherine Kirtland, all of which are to be released. The title will thus be made good, beyond exception." By the sheriff's sale, the right to that money was vested, in equity, in the complainant, subject, of course, to prior liens. It is in the hands of the attorney of Miss Kirtland, and was obtained with a view to applying it to the payment of the purchase money due from the complainant. It is a payment *pro tanto*. The dower of Catharine Kirtland has been established and paid out of the money. There is, in equity, no lien of the $4000 mortgage on the money, for Miss Kirtland, as

appears by the answer, agreed with the complainant that, if he should become the purchaser of the property, she would look to the rest of the property, not taken by the road board, for the payment of that mortgage. He bought the property on that understanding, and on the faith of it he has paid over the surplus, $8850.27, to Wheeler and Green, on their judgment. There is also evidence of an agreement on the part of the counsel and attorney of Miss Kirtland, with her sanction, to accept a mortgage for an amount of the purchase money equal to the sum ($1400) ordered to be retained to answer the claim for dower, and the amount ($1370) allowed in respect to the assessment for benefits. The complainant is entitled to his deed on his complying with his part of the agreement. There is no allegation that he is in any laches, nor does there appear to be any ground for such allegation.

It is insisted by the defendants' counsel, that the bill should be dismissed as to the attorney of Miss Kirtland, because he appears to have been an agent or attorney merely, and in no wise a principal. It is true that in this matter he has acted as attorney and counsel merely, but he holds the deed and the money received from the road board, applicable to the payment of the purchase money. He is a proper, if he be not a necessary party to the suit.

The agreement between Miss Kirtland and the complainant, made at the sheriff's sale, is not only established, but it has, to a very great extent, been executed. The road board money collected under it, and applicable to the payment of the purchase money, might, at all times, have been, as it now may be, applied according to the agreement. In obtaining that money, the attorney of Miss Kirtland acted as attorney for the complainant, and his action in allowing the assessment for benefits was binding on the latter, who has no claim upon Miss Kirtland in respect to it. The dower was to be paid out of the road board money. That claim was, neither at law nor in equity, subject to or affected by the judgment against John Kirtland and George Kirtland, or the sale under it. The agreement made by Miss Kirtland to accept a mortgage

on account of the purchase money, for an amount equal to the sum retained to answer the claim of dower and the amount allowed for the assessment for benefits, was a merely voluntary agreement. It will not be enforced.

The prayer for a decree that the trust mortgage be paid out of the proceeds of the sale under the Kirtland judgment, in order that the complainant's title may be cleared of the cloud which it casts upon it, will not be granted. That mortgage, indeed, was not reformed as against the Wheeler and Green judgment, but it stands reformed as against the Kirtland judgment. The complainant, as purchaser under the latter judgment, has no equity to have it discharged out of the proceeds of the sale. None is set up in the bill, except that which is claimed to arise from the fact that that mortgage was not reformed as against the Wheeler and Green judgment, and that is, indeed, no equity.

The conclusion is that the attorney of Miss Kirtland will be decreed to deliver the deed to the complainant on receiving the balance, without interest thereon, remaining due on the Kirtland execution, as reduced, with interest up to November 5th, 1874, but not after that date, after applying the road board money, (deducting, of course, the amount paid for dower,) with the interest which he has received thereon, and the delivery to him of a receipt of Wheeler and Green's attorneys for surplus on the execution. The complainant is entitled to costs as against Miss Kirtland and her attorney.

KETCHAM *vs.* BROOKS and others.

1. The proof of the loss of a deed, in this case, *held* to be sufficient to warrant the admission of secondary evidence of its contents.

2. Such secondary evidence *held* to establish the fact that the grantee took his deed with full knowledge that it contained a covenant of assumption of a mortgage upon the property conveyed, and with knowledge of the nature of the liability thereby assumed.

3. Where the object of the bill is not to prove title by a deed alleged to be lost, but to prove a covenant of the grantee contained therein, it is not necessary that the subscribing witness to the deed or the officer before whom the acknowledgment was taken, should be produced, or that there should be evidence of the impracticability of obtaining their testimony, other satisfactory evidence of the covenant being offered.

4. A parol assumption by a grantee of mortgaged premises, made at the time of the conveyance to him, makes him liable to a personal decree for deficiency.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. D. A. Ryerson, for complainant.

Mr. W. S. Whitehead, for defendant Mandeville.

THE CHANCELLOR.

The contest in this case is between the complainant and Frederick B. Mandeville, the only defendant who has answered, as to the liability of the latter to a personal decree requiring him to respond for deficiency. The complainant, in his bill, alleges that Dr. Mandeville, on the conveyance of the mortgaged premises to him by Brooks, the mortgagor, and obligor in the bond which the mortgage was given to secure, assumed the payment of the mortgage. Dr. Mandeville, in his answer, admits the conveyance by Brooks to him, but says that he does not believe that in the deed to him from Brooks, there was any clause, as alleged in the bill, by which he assumed to pay the principal of the mortgage, and he further says that it was not his intention so to do, and further, that

he believes that the deed contained only a clause signifying that the conveyance was made "subject to" the mortgage.

The deed from Brooks to Mandeville is lost, and objection is made on the part of the latter that the proof of loss is insufficient to warrant the admission of secondary evidence of its contents. The deed was delivered by Brooks to Mandeville, and the latter testifies that subsequently and a short time after he received it, he gave it to Samuel Klotz or John K. Dunlap, real estate brokers, in order that the person to whom he gave it might, from it, prepare a deed from him to Mrs. Caroline Bodwell, with whom he had agreed to exchange the mortgaged premises for certain property of hers. That exchange was made, and the mortgaged premises were accordingly conveyed by Mandeville to Mrs. Bodwell. He testified on his examination as a witness in this suit, that he did not know where the deed was; that he had never put it on record, and that he had, at that time, no knowledge of its existence. Klotz testifies that he has no recollection of having ever received it from him, and he says that though he has no recollection of having ever seen it, he has searched for it in his office, but cannot find it. Dunlap testifies that he is under the impression that he received it from Klotz, but does not know what he did with it, and that he has searched for it, but cannot find it. Philander Bodwell conducted the negotiation for exchange between Mrs. Bodwell, his mother, and Dr. Mandeville. He signed the agreement for her between them, for the exchange. He testifies that the exchange was in pursuance of that agreement, and that his mother was not present at the execution of the agreement or the exchange of deeds. He further says that he has no recollection of the deed from Brooks to Mandeville, or of ever having seen it, and swears that he has no knowledge of its existence. Dr. Mandeville, in his answer, says that having, at the date of the conveyance to Mrs. Bodwell, neglected to record his deed from Brooks, he delivered it to her to be recorded at the same time with his deed to her. His statement is not sustained by any proof, and it appears to be incorrect. The complainant

has made sufficient proof of loss and diligence, to warrant the admission of secondary evidence of the covenant of assumption alleged to have been in the deed. The counsel of Dr. Mandeville insists that the subscribing witness to the deed should have been produced, or the officer before whom the acknowledgment was taken, and that because of the absence of the testimony of either of them, without evidence of the impracticability of obtaining the testimony, the proof of the deed is insufficient. It is to be observed that the complainant is not seeking to prove title by the deed, but to prove the covenant of the grantee contained therein. The answer admits the conveyance by deed, and Dr. Mandeville testifies that the mortgaged premises were conveyed to him by Brooks and his wife by deed, and Brooks testifies to the conveyance by deed, and the contents of the deed, including the covenant in question. The deed, for the purpose of this suit, was sufficiently proved by the testimony of Dr. Mandeville and Mr. Brooks. The assumption might have been by parol merely, and it would have been good; *Wilson* v. *King*, 8 *C. E. Green* 150; *Bolles* v. *Beach*, 2 *Zab.* 680; having, as it is alleged, been made by covenant, (by statement contained in the deed from Brooks to Mandeville,) it was incumbent on the complainant to produce the covenant, and in case of his inability to do so, to prove the loss and present secondary evidence of the covenant. This he has done. Mr. Brooks swears positively to the existence of the covenant in the deed, and to the very words of it. It appears to have been in the form commonly in use among conveyancers in Newark, where the papers were drawn. He testifies, also, to the circumstances. He says that when the deed was delivered, Dr. Mandeville objected to the covenant, saying, "I don't know about assuming the mortgage;" that upon Brooks' or Conselyea's, (the latter was Brooks' partner,) referring to the fact that he was requiring Brooks to assume the mortgage which was on the property which he was conveying to the latter in exchange for the mortgaged premises, and saying that, therefore, he must assume the mortgage on the property which he was receiving, he folded up the deed, slapped his

thigh, and said, "I suppose I shall have to stand it; give us your order for the horse." He was to receive in the exchange, from Brooks, a horse, wagon and harness. Conselyea corroborates Brooks. He says that his impression is that Dr. Mandeville objected to assuming the mortgage, and that Brooks and himself tried to persuade him that it was all right. He further says that his impression is that both deeds were drawn previously to the meeting at which the conversation which he refers to, and in part relates, took place, which was when the deeds were exchanged. The complainant testifies that after the conveyance to Dr. Mandeville had been made, he called on the latter to ascertain whether he had assumed the mortgage, and expected to pay the interest. He says he told Dr. Mandeville that the mortgage had come into his possession, and that he had been informed that the latter had assumed it; that he wished him to state whether he had assumed it or not, as the interest was due, and if he had assumed it, he wished him to pay the interest. He swears that Dr. Mandeville replied that he had assumed it, and expected to pay it when it became due, and requested him to call in a few days again, and he would pay the interest. Dr. Mandeville, indeed, swears that he did not agree to assume the mortgage, but he will not say that the covenant was not in the deed. He said to the complainant's solicitor that he did not know whether it was in or not, and when examined as a witness in this suit, he said he was not positive whether the covenant was in the deed or not. He says it is possible that such a conversation as that testified to by Brooks, in which he is said to have slapped his thigh, saying, "I suppose I shall have to stand it; give us your order for the horse," may have occurred, as the fact of Brooks' assuming the mortgage on his property was used as an argument. He says, however, that in this admission he does not mean to admit that he at any time said he "would have to stand it," in reference to assuming the mortgage. He insists that the deed from Brooks to him was not delivered as the latter and Conselyea both say it was, in the office, but that the latter brought it out to him as he sat in his wagon

before the door of the office. He cannot tell, however, where his deed to Brooks was delivered. He cannot tell who drew it, and he cannot remember whether the covenant of assumption was in the deed from Brooks to him or not. He says the deed from him to Brooks was not delivered at the same time that the deed from the latter to him was delivered, according to his recollection, but he cannot tell whether the deed from him was delivered before or after the deed to him was delivered, nor can he tell whether there was an adjustment of interest between him and Brooks. He was examined in January, 1876, two years after the transaction. His memory appears to have been at fault. The weight of the evidence is that he covenanted to assume the mortgage, and that he did so, understandingly. It is clear that the deed, when delivered to him, contained the clause; that the subject was dropped between him and Brooks and Conselyea, and that the deed was delivered to him without alteration. As before stated, he will not say that when delivered to him it did not contain the clause. If it did, he must be held to have accepted it accordingly. Under the evidence I am constrained to conclude that he did so, not only with full knowledge of the fact, but of the nature of the liability thereby assumed. There will be a decree against him for deficiency.

Waln *vs.* Meirs and others.

The master having reported in this suit for partition, that the lands could not be divided among the heirs without great prejudice to their interests, and the court being unable, upon the evidence, to reach the same conclusion, an order was made appointing commissioners to make partition among the owners, according to their respective interests, unless they should be of opinion that such partition could not be made without great prejudice, in which case they were to report to the court accordingly.

In partition. On exceptions to master's report as to whether partition can be made without great prejudice to the interests of the owners.

Mr. W. H. Vredenburgh, for exceptants, John G. Meirs and wife.

Mr. F. Voorhees, for complainants.

THE CHANCELLOR.

The premises whereof partition is sought, are a farm of about three hundred and seventy-four acres, of which Richard Waln, deceased, died seized, situated near Hornerstown, in Monmouth county, and certain tenant-houses and lots adjacent, and two lots of wood-land. The tenants in common are his three children, who are seized of it in equal shares. The master has reported that the property is not partible without great prejudice to the interests of the owners. The defendants, Meirs and his wife, the latter being one of the tenants in common, have excepted to the report in this respect. Much testimony was taken before the master on the subject. Eleven witnesses testify that in their opinion the property is divisible without prejudice into three parts, equal, or very nearly so, and thirteen others, on the other hand, testify to the contrary opinion. A careful examination of the testimony leaves me in very great doubt, to say the least of it, whether the property cannot be divided without prejudice to the interests of the owners. It is obvious that so large and valuable a farm cannot be readily sold as a whole, for an amount equal to its value. There would probably be but little competition in a public sale of so large a property, and it would be but reasonable to expect a sacrifice of a considerable part of its value in such a disposition of it. It would, undoubtedly, sell to far better advantage in parcels of about one hundred acres each, than as a whole. The question, however, is whether the whole property, the farm, the out-lands, and the tenant-houses, can be divided into three equal,

or nearly equal parts, without great prejudice to the interests of the owners. If they can, there must be a partition. A division of the whole property, suggested by both Andrew J. Allen and George Sykes, seems to be practicable and fair. By it the property is valued at about $40,000. One hundred and twenty acres on the east side of the farm, (valued at $100 an acre,) lying on the railroad, and the Hornerstown and Allentown road, are, with tenant-houses and lots to the value of $1500, to constitute one share, the value of which, at this estimate, would be $13,500; one hundred acres on the west side of the farm, with the mansion-house and buildings, (the land valued at $50 an acre, and the mansion-house and buildings at $8000,) are to constitute another share, the value of which, at these estimates, would be $13,000; the third share would be the rest of the farm—the middle—which would contain one hundred and fifty acres, valued at $75 an acre, with the rest (valued at $2000) of the tenant-houses and lots; the value of this share, at these estimates, would be $13,250. It may be remarked that there are ten tenant-houses and one shop on the property referred to as the tenant-houses and lots, and that Mr. Allen estimates their value at $3500. The wood-land in this division would be partitioned in equal shares between the tenants in common. It will be seen that the shares are, according to the estimates, by this division, nearly equal. They might, perhaps, be made exactly so in the partition of the wood-land and the tenant-house property. The objection urged against this partition is that it not only undervalues the mansion-house and buildings, but it charges them to the share of which they are to constitute a part at a price far beyond their value to that share. The complainant's witnesses value the mansion-house and buildings at from $10,000 to $15,000. In this division they are to be estimated as worth only $8000. Again it is argued that a farm of one hundred acres would not require buildings of half the value fixed upon these in the proposed division. The witnesses of the defendants Meirs and wife, value the mansion-house and buildings at from

$7000 to $10,500. It will be seen that the valuations of the witnesses vary considerably. If the mansion-house and buildings are fairly estimated at $8000, and buildings of that value are not so out of proportion to the value of a farm of one hundred acres in that place as that, at that valuation, a loss would probably be occasioned to the person to whom the share might be assigned; and if the valuation put by the witnesses of the defendants Meirs and wife, upon the different parts of the farm in the proposed partition are just, then it would appear that a partition can be made without great prejudice to the interests of the owners. The defendants Meirs and wife, according to the testimony, proposed to sell the interest of the latter in the property to the complainant, Nicholas Waln, junior, at a valuation of $40,000 for the whole property, or to purchase the interest of the complainant at the same rate, but received no reply to their offer, and they now declare themselves willing to accept, as part of the share of Mrs. Meirs, the land which would be set off from the east side of the farm in the proposed division above mentioned. This land, it may be remarked, was not originally part of the farm, but was purchased by Richard Waln of Augustus Joins in 1852, and added to the farm. Two, at least, of the complainant's witnesses testify that the farm could be well and advantageously divided into two parts. One of them, Mr. Taylor, says that "the land could be divided into two parts nicely; it could be very nicely divided about where the old line was—the Ivins line." I am unable to reach the conclusion at which the master has arrived, that the property cannot be partitioned among the heirs without great prejudice to their interests. The exception will, therefore, be sustained. The case is a proper one for the application of the practice adopted by the Court of Errors and Appeals in *Bentley* v. *Long Dock Co.*, 1 *McCarter* 486. Commissioners will be best able to determine whether the premises are or are not partible without great prejudice. There will be an order appointing three commissioners for the partition of the land among the owners and proprietors thereof, according to their

respective interests therein, unless they shall be of opinion that such partition cannot be made without great prejudice to those owners and proprietors, in which case they are to report to this court accordingly, in order that such order may be made for the sale thereof, or of any part thereof, as shall then appear to be equitable and just.

The Phillipsburg Mutual Loan and Building Association *vs.* Hawk and others.

Stock, assigned by a shareholder of a loan and building association as collateral security to a mortgage, (the first upon the mortgaged premises,) given by him to the association, will, as between the association and a second mortgagee of the land, be applied to the payment of the mortgage before recourse is had to the land; and this equity will not be defeated by a levy on the stock under a judgment against the mortgagor.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. B. C. Frost, for defendant Vought.

Mr. J. F. Dumont, for defendant Hawk.

The Chancellor.

The complainants' mortgage was executed on the 26th of March, 1868, and was recorded on the 31st day of the same month. On the 5th of April, 1875, the mortgagor executed another mortgage on the same land to the defendant Joseph Hawk. On the 11th of August, in the last-mentioned year, the defendant Vought recovered a judgment against the mortgagor in the Supreme Court of this state, and, as is alleged, under an execution issued thereon, levied on certain shares of the stock of The Phillipsburg Mutual Loan and Building Association, the complainants, which, at the time of the execu-

tion and delivery of the complainants' mortgage, belonged to the mortgagor, and were then assigned to them, by him, as collateral security to their mortgage debt. The holder of the second mortgage claims an equity to have the stock applied to the payment of the first mortgage before recourse is had to the land. The judgment creditor, on the other hand, denies this equity, and claims a right, by virtue of his levy, to apply the stock to the payment of his judgment. There is no legal evidence in the case of any execution or levy. But, apart from this, the question between these defendants was decided in favor of the mortgagee, under precisely the same conditions, in the case of *Herbert* v. *Mechanics Building and Loan Association*, 2 *C. E. Green* 497, reversing, on this point, the decision of the Chancellor in the same case, sub nomine *Mechanics Building and Loan Association* v. *Conover*, 1 *McCarter* 219. The question submitted has been presented without reference to the sufficiency of the pleadings for a decree upon the merits of the controversy. The bill is silent on the subject of the stock. A cross-bill will, therefore, be necessary to enable the court to make a decree for the sale thereof. On the case submitted, there would be a decree, if the pleadings would warrant it, that the stock be applied to the payment of the complainants' mortgage before recourse is hand to the land.

WAGNER and wife *vs.* BLANCHET and others.*

1. Motion to set aside an execution, and open decree and let in two defendants to answer, on the ground of want of legal service of subpœna upon them, and that they have lawful and equitable defences, refused as to one, because the service of subpœna upon her was substantially in accordance with the provision of the statute, and she was duly served with notice of the application for appointment of a guardian *ad litem* for her; it was allowed as to the other, because she had, in fact, no notice of the suit until after the property had been advertised for sale under the execution, in order that she might set up the defence of usury.

---

* Cited in *Corning* v. *Ludlum*, 1 *Stew.* 400.

2. Stay of sale was discharged, and the proceeds of sale, after paying the principal of the complainant's mortgage (less the alleged premium) and sheriff's execution fees, were ordered to be brought into court, to abide the result of the litigation on the defence of usury.

3. Service of subpœnas upon defendants, by leaving copies of them with defendant's father at work in a field near the house on his farm where they lived with him, the defendants being both absent from home, and there being no one at the house on whom they could be served, *held* to be a substantial compliance with the requirements of the statute.

4. Where the trust under which property is held, prohibits the sale or mortgaging of the trust estate by the trustee, except for the benefit of the *cestui que trust*, it is incumbent on a purchaser or mortgagee from the trustee, to look to the application of the purchase or mortgage money.

5. But where the trustee holds the property in trust for his wife and her heirs, the fee of the land is hers in equity, and a conveyance by the trustee and his wife, either absolute or by way of mortgage, is in accordance with the trust, and devolves on the purchaser or mortgagee no obligation to see to the application of the purchase or mortgage money.

Bill to foreclose. Motion to set aside execution for sale of mortgaged premises, and open decree and let in two of the defendants to answer. On petition and depositions.

Mr. A. W. Bell, for petitioners.

Mr. H. C. Pitney, for complainants.

THE CHANCELLOR.

The petitioners, Josephine Blanchet and Camille A. Blanchet, against both of whom a final decree on default has been regularly entered, ask that that decree be opened as to them, and that the *fieri facias* for the sale of the mortgaged premises, issued thereon, be set aside, and that they may be permitted to answer. The grounds of the application are that the petitioners have lawful and equitable defences, and that although the subpœna to answer, directed to them, was returned by the sheriff of Morris county as having been duly served by him upon them, yet there was, in fact, no lawful service upon them. Josephine, at the time of the com-

mencement of the suit, was more than twenty-one years of age, and Camille was past twenty. Both lived with their father on the mortgaged premises, which are a farm in Morris county, but both were, at the time, temporarily absent from home—the former in New York on a visit, and the latter calling upon a neighbor. The sheriff went to the house to serve the subpœna. He found nobody there except some children. Among them was one of the defendants', a boy, on whom he then and there served the process. The lad, in answer to his inquiries, directed him to a meadow near by, where his father and his brother, who were both defendants in the subpœna, were at work. He went there and served the subpœna upon them, and on his inquiring of the father for Josephine and Camille, was told by him that neither of them was at home; that the former was in New York on a visit, and the latter was temporarily absent from the house, and was somewhere in the neighborhood, he could not say where. He further said that there was no one on whom the subpœna, as to them, could be served at the house, and told the sheriff to leave the copies intended for them, with him, and said that "it would be the same thing," and that he would hand them to the girls when they came home. The sheriff left the copies with him accordingly, and returned to the house, where he had left his horse and wagon. Neither of the young ladies was at the house when he returned, and he did nothing further by way of service on them. Camille subsequently saw the copy of the subpœna which had been served on her brother, at the house, in his hands, and notice of application for the appointment of a guardian *ad litem* for her was duly served on her. Josephine swears that she had no notice of the suit until after the property had been advertised for sale under the execution.

The service of the subpœna, as to both of them, was substantially in accordance with the provision of the statute. The petitioners allege that they have legal and equitable defences, which, seeing that the decree is a surprise upon them, they ought to be permitted to set up. Those defences are

that the mortgaged premises were, when the mortgage in suit was given, held in trust by their father for their mother, on whose death they descended to them, and that the mortgagee knew of the existence of the trust; and they further allege that the debt which the mortgage was given to secure, was wholly, or to a very great extent, the individual debt of their father the trustee, and that the mortgage was usurious. The mortgaged premises were held by their father in trust. According to the deeds of conveyance therefor to him, in which the trust is declared, they were held by him upon the trust and confidence that he would hold them to and for the use and benefit of his wife, her heirs and assigns, forever; and upon the further trust and confidence that he should have full power and authority to sell and convey the whole or any part of the premises whenever he should deem it for the benefit of his wife and her heirs, and that he might raise money upon them and secure the payment thereof by mortgaging them, provided that the money arising from such sales or borrowed on mortgage should be for the use of his wife and her heirs. The mortgage in suit was not made by the trustee as such, but was executed by him and his wife to secure the payment of their bond. The trust prohibited the sale or mortgaging of the trust estate by the trustee, except for the benefit of his wife and her heirs, and made it incumbent on the purchaser or mortgage, in such case, to look to the application of the purchase or mortgage money. But the trustee held the property in trust for the use and benefit of his wife and her heirs; the fee of the land was, therefore, hers in equity, and a conveyance by him and her, whether absolute or by way of mortgage, would not be in contravention of, but in accordance with, the trust, and would devolve on the purchaser or mortgagee no obligation to see to the application of the purchase or mortgage money. The mortgage in suit is not subject to any defence arising out of the trust. But I am by no means satisfied that there was not usury in the debt which the mortgage was made to secure, and I, therefore, deem it proper to afford the petitioner

Josephine an opportunity to set up that defence. The proceedings under the execution, however, ought not to be delayed. The stay ordered on granting the order to show cause will be discharged, but the proceeds of sale, after paying to the complainants the amount due on the mortgage for principal, after deducting the amount of the alleged premium, and to the sheriff his execution fees, will be brought into court and deposited with the clerk, to abide the result of the litigation on the defence of usury. Josephine will be let in to set up this defence. The petition will be dismissed as to Camille. No costs will be awarded on this application.

LEAKE *vs.* BERGEN and others.*

1. The circumstances and facts constituting the usury, and not mere inferences, must be set forth in an answer setting up the defence of usury.

2. Where the defence of usury rests upon the laws of another state, the laws must be pleaded, and the pleading must set out what the laws are.

3. Where, in such case, an answer alleges violation of laws, the presumption is, in the absence of any averment to the contrary, that the laws are those of this state.

4. The laws of this state on the subject of usury do not apply to a transaction having its whole inception and completion in another state.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. A. Zabriskie, for complainant.

Mr. E. W. Runyon, for Bergen and wife.

THE CHANCELLOR.

The defendants, the mortgagors, in their answer set up usury. The loan was made in the city of New York, and the bond and mortgage were delivered there. The answer states

---

* Cited in *Cox* v. *Westcoat*, 2 *Stew.* 552.

that the complainant, the mortgagee, "demanded and exacted," as a consideration for the loan, that the mortgagors, or one of them, should pay him $1035.71, as and for a bonus or premium for the loan, which was of the sum of $7250, and insisted that they should give him their note for the first-mentioned sum; and it further states that they gave the note to him accordingly, for the bonus or premium. Though it subsequently states that the bond and mortgage and note were simultaneously executed by them in pursuance of "said agreement," yet no agreement on the subject is mentioned. The answer further pleads the alleged usury as follows: "And the defendants, in further answering jointly and severally, say that the complainant, in his exacting, demanding and receiving said note and retaining the same in his control aforesaid, received and took a higher rate of interest on said contract of loan than was then or is now allowed by the law of the place where the contract was made and entered into, respecting said loan and between the said parties, or of the place where payment of said loan, by the terms of the contract, was or is to be made. And further, they submit and insist that the contract contained in the aforesaid bond and mortgage and note, were and are usurious and corrupt, and contrary to the laws or statutes respecting usury, and against taking or contracting to take or receive interest at a rate higher or more than the legal rate of interest allowable by law, either directly or indirectly;" and they "insist on and pray the same benefit and advantage of said laws and statutes and of each of them as if they had, jointly and severally, specially pleaded the same fully, by their title and sections and exact phraseology and language thereof, herein." The usury is not well pleaded. *Westerfield* v. *Bried*, 11 *C. E. Green* 357; *Cotheal* v. *Blydenburgh*, 1 *Halst. C. R.* 17, 631; *Campion* v. *Kille*, 1 *McCarter* 229; *S. C.*, 2 *McCarter* 476; *Dolman* v. *Cook*, 1 *McCarter* 56; *Andrews* v. *Torrey* *Id.* 355; *Atwater* v. *Walker*, 1 *C. E. Green* 42. Where the defence of usury rests upon the laws of another state, the laws must be pleaded, and the pleading must set out what the laws are. *Curtis* v. *Masten*, 11 *Paige* 15; *Cutler* v. *Wright*, 22

N. Y. 472; *Walker* v. *Maxwell*, 1 *Mass.* 104. This answer merely alleges that the complainant, by "exacting, demanding and receiving the note and retaining it in his control," received and took a higher rate of interest than was or is allowed by the law of the place where the contract was made, or of the place where payment of the loan was or is, by its terms, to be made. And it "submits and insists" that the bond, mortgage and note were and are "usurious and corrupt, and contrary to the laws or statutes respecting usury, or contracting to take or receive interest at a rate higher or more than the legal rate of interest allowable by law, either directly or indirectly," and prays the benefit and advantage of the laws and statutes as if specially pleaded. What the laws are to which reference is thus made, does not appear. The loan appears by the answer to have been made in New York, and the bond and mortgage and note were given there. The laws and statutes referred to in the answer, must be presumed to be, in the absence of any averment to the contrary, the laws and statutes of this state; but the laws of this state on the subject of usury do not apply to the transaction, for it is shown by the answer to have been a New York transaction. There will be a reference to a master, to ascertain the amount due the complainant for principal and interest on his mortgage.

DAYTON *vs.* MELICK and others.*

A defendant to a bill to foreclose a purchase money mortgage, set up in his answer that the complainant falsely and fraudulently represented to him at the sale, that the contents of the property were ninety-seven and forty-two hundredths acres, whereas, there were in fact only eighty-six and eighty-hundredths acres; that the price was fixed at $130 per acre, so that the defendant was induced to agree to pay $1380.60 more for the property than he ought to have done; and further, that though the deed conveyed with full covenants, including covenant against encumbrances, there were at that time, and continue to be, two liens, under judgments, on the property.

---

*See, further, *Dayton* v. *Melick*, 5 *Stew.* 571. Cited in *McGuckin* v. *Kline*, 4 *Stew.* 458; *Fiacre* v. *Chapman*, 5 *Stew.* 465; *Lewis* v. *Cranmer*, 9 *Stew.* 124.

Held, that the question whether the defendant was entitled to deduction for the claims, could be tried under the answer, without prejudice to any right of the complainant, and without depriving him of any privilege or advantage to which he would otherwise be entitled; and hence, a cross-bill was not necessary.

Bill to foreclose. On exceptions to master's report upon exceptions to the answer of Peter W. Melick.

Mr. John T. Bird, for Melick.

Mr. A. A. Clark, for complainant.

THE CHANCELLOR.

The exceptions to the master's report present the question whether the defence of fraud set up in the answer can be entertained, as there pleaded, by way of answer. The complainant's counsel insists, that to be available, it must be set up by cross-bill. The bill is filed to foreclose a mortgage given by the answering defendant, Peter W. Melick, to the complainant, for part of the purchase money of the mortgaged premises, on a sale thereof by the latter to him. The answer admits the execution and delivery of the mortgage, but claims a deduction from it, on the ground that the complainant, in the sale, falsely and fraudulently represented to Melick that the contents of the property were ninety-seven and forty-two hundredths acres, whereas, there were in fact only eighty-six and eighty-hundredths acres. It states that the price was fixed, as upon a sale by the acre, at $130 per acre, so that Melick, by means of the fraud, was induced to agree to pay $1380.60 more for the property than he ought to have done. It also claims a deduction in respect of two judgments which were liens upon the property when the sale was made, and still continue to be so. The complainant conveyed the property to Melick, by deed, with the usual full covenants, including covenant against encumbrances. I see no reason for denying the defendant the right to litigate his claim to these deductions under his answer. He insists that by reason

of the fraud practiced by the complainant, he was induced to agree to pay for more than ten acres of land which he did not receive. If this be true, there can be no question as to his right to relief. Nor can there be any question that he is entitled to be relieved in this suit. The only question is as to the manner—whether he must file a cross-bill in order to obtain the relief. The reason for requiring a cross-bill in such cases as this is, that the complainant is entitled to his answer on oath, to the charge made against him. But, under the practice of this court since the act of March 6th, 1867, the complainant, in the cross-bill, might pray answer without oath, and so the defendant therein would be deprived of the advantage of his answer. In this case, the fraud alleged is sufficiently pleaded, and as it is matter not responsive, the defendant must prove it. He claims a deduction of a specific sum in respect of the fraud, and tenders himself ready to pay the amount which will be due on the mortgage, after making the deduction, and deducting also the amount of the judgments. The question whether he is entitled to these deductions can be tried under the answer, and without a cross-bill, without prejudice to any right of the complainant, and without depriving him of any privilege or advantage to which he would otherwise be entitled. *Cessante ratione, cessat ipsa lex.* The exceptions will be allowed, with costs.

SHIMER and others *vs.* THE MORRIS CANAL AND BANKING COMPANY and others.

1. Where the injury complained of is, in its nature, a continuing one, and the remedy at law must, therefore, be by successive suits if the defendants persist in inflicting the injury, and an action for damages would be wholly inadequate for the protection of the complainant's rights, he will not be put to his remedy at law.

2. Where, from the nature of the relief sought, performance of a contract *in specie* will alone answer the ends of justice, equity will decree specific performance.

Bill for specific performance. On bill and general demurrer. Submitted on written briefs.

Mr. T. N. McCarter, for demurrants.

Mr. B. Williamson, for complainants.

The Chancellor.

The bill sets up an agreement between certain former owners of the complainants' mill, and the Morris Canal and Banking Company, securing the mutual use of the waters of the Lopatcong creek by the parties thereto—by the canal company for their canal and by the mill-owners for their mill. It alleges that the complainants, as owners of the mill, are entitled to the benefit of the agreement, and have a right to enforce it, and that the defendants, the canal company, and their lessees, the Lehigh Valley Railroad Company, continually interfere with the water in such a way as, in violation of the agreement, to deprive the complainants of that use of it which it was intended to secure to them by the agreement. It prays an injunction to restrain them from continuing to violate the agreement in this respect, and it prays that they may be decreed to perform the agreement specifically. The defendants have filed a general demurrer. Their counsel, in his brief, admits that the bill shows a valid written contract, and that it shows that the complainants have the right to the use of the water in the way pointed out by the contract, but he insists that they have an adequate remedy at law in an action on the case for damages, and that, therefore, they are not entitled to relief in this court. He also insists that a bill of this character will not be entertained unless the right shall have been established at law. This latter proposition cannot be maintained. Nor can the former. It is clear that the complainants have not an adquate remedy at law. The injury complained of is, in its nature, a continuing one. The remedy at law must, therefore, be by successive suits, if the defendants persist in inflicting the injury. It is, therefore,

in this respect, wholly inadequate for the protection of the complainants' rights, and it obviously will not answer the purposes of justice. The character of the property, and the fact that the continual use of the water, as stipulated for in the agreement, is necessary to the use to which the property is alone adapted, and to which it is, and from a period anterior to the time of making the agreement has been, devoted, renders it manifest that an action for damages could not put the complainants in a situation as beneficial to them as would a decree for specific performance. Where, from the nature of the relief sought, performance of a contract *in specie* will alone answer the ends of justice, this court will decree specific performance.

The demurrer will be overruled, with costs.

Duryee *vs.* Linsheimer and others.

1. A exchanged properties with B. Upon the property taken by B was a mortgage, from which A agreed, upon certain terms, to obtain a release. A bill was filed to foreclose the mortgage. B answered, setting up breach of the agreement by A, as a defence, alleging that he had sustained great damages by the breach, and that the mortgage should be held to be satisfied. It alleged, also, that he had complied with the terms, and tendered himself ready to do what the conduct of A had prevented his doing in accordance with those terms. *Held*, the defence could not avail defendant, as it involved a question of damages which could only be ascertained by evidence, and in respect to which no proof had been offered.

2. Substantive relief by way of specific performance of an agreement, cannot be afforded upon an answer; a cross-bill is necessary for that purpose.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. T. H. Shafer, for complainant.

Mr. Gilbert Collins, for Linsheimer and wife.

THE CHANCELLOR.

In an exchange of lands between the complainant and the defendants, Linsheimer and wife, it was agreed that Mrs. Linsheimer should assume to pay $2400 of the principal of a mortgage for $6000, which was on the premises to be conveyed to her by the complainant and other land, with the interest thereon, and give to the latter a bond and mortgage for $5100 and interest, on the property to be conveyed to her. The complainant, in the contract for exchange, agreed with her that he would, wi hin four months from the date of that instrument, obtain a release of the property sold to her, from the mortgage for $6000, in consideration whereof, and of the cancellation of the $5100 mortgage, the Linsheimers were to give him, and he was to accept, a mortgage from them for $7500 on the property conveyed by him. He did not perform his agreement in this respect. The six months' interest, which fell due in November, 1872, being unpaid for more than thirty days, the principal became due by the terms of the mortgage. The complainant then filed his bill to foreclose. Linsheimer and his wife answered, setting up, as a defence, his breach of his agreement above mentioned, and stating that the object of that arrangement was to enable them to obtain releases for the property, as they might sell it in parcels; alleged that Mrs. Linsheimer had sustained great damages by reason of such non-performance, and insisted that the mortgage should, therefore, be held to be satisfied. They tendered themselves ready to execute a new bond and mortgage, according to the agreement. The evidence is contradictory. Mr. Linsheimer, on the one hand, swears that he, from time to time, demanded performance, but always in vain, and the complainant, on the other hand, testifies that the Linsheimers, by their sales, and permitting an attachment to be issued against them, made literal performance impracticable, though he was always ready, and so tendered himself. He swears, also, that he, in fact, performed the agreement substantially, and to the satisfaction of the Linsheimers, by reducing the $6000 mortgage to $2400 by his payments. It

appears that after the complainant had, as the Linsheimers insist, failed to perform his agreement, they sold all the property. Part of it, however, has been re conveyed. The defence cannot avail the defendants, for it involves a question of damages which could only be ascertained by evidence, and in respect of which no proof has been offered, and substantive relief by way of specific performance of the agreement, in which latter aspect a cross-bill was necessary.

There will be a decree for the complainant for the amount due on the mortgage.

Wheaton *vs.* Crane.

1. Where, under a submission to arbitration, a third arbitrator is called in by them, who hears simply the statements of the other two, in the absence of the parties, and without any notice to one of them, their award made under such circumstances will not be sustained as against the party who received no notice.

2. Such party was held not to be barred from relief against the award on the ground of acquiescence, by the fact that after the award had been delivered to him he continued for two weeks to settle the business of the late firm, and made up a statement in accordance with the award, and delivered it to his late partner, the other party to the award; it appearing that he was dissatisfied with and complained of it, and that the only reason why he did not take steps to set it aside was that he supposed the award was conclusive against him, and could not be litigated.

Bill for relief. On final hearing on pleadings and proofs.

Mr. G. W. Hubbell, for complainant.

Mr. Joseph Coult, for defendant.

The Chancellor.

On the 9th of September, 1872, the parties to this suit entered into co-partnership with Walter Crane for a term of five years. By a subsequent agreement, the term was limited

to the 1st day of January, 1875. Walter Crane withdrew on the 31st day of July, 1874, and the business was continued by the complainant and defendant on their own account until the 1st of January, 1875, when the co-partnership was dissolved pursuant to the limitation in the articles. Being unable to agree on the terms of settlement, the partners submitted the matter to the award and determination of two arbitrators, Messrs. Plume and Barnet, who, in case of inability to agree, were to appoint a third, and the award of the three, or of any two of them, was to be final and conclusive. Messrs. Plume and Barnet could not agree, and at about five o'clock on the afternoon of the day fixed by the submission as the limit of the period within which the award was to be delivered, they appointed a third arbitrator, Mr. Farmer, and thereupon, after he had been sworn, proceeded with the arbitration in a continuous session until the award was made, which was at about ten o'clock of that night. Mr. Farmer says he was called in great haste, and heard simply the statements of the other arbitrators in the absence of the parties, and without any notice to the complainant. An award made under such circumstances cannot be sustained. *Thomas* v. *West Jersey R. R. Co.*, 8 *C. E. Green* 431; *S. C.*, 9 *C. E. Green* 567. The defendant insists, however, that although the complainant himself had no notice, his counsel had. The complainant employed a lawyer, Mr. A. S. Hubbell, to draw the submission, but it does not appear that he had any counsel in the arbitration. He and the defendant appeared before Messrs. Plume and Barnet, and made their statements without the aid or presence of counsel. After the award had been made, the complainant employed Mr. G. W. Hubbell, son of Mr. A. S. Hubbell, and occupying the same offices with the latter, as his counsel in the matter. The defendant insists that both these gentlemen had notice of the appointment of the third arbitrator. It appears that Mr. Farmer was sworn before Mr. G. W. Hubbell, and that Mr. A. S. Hubbell was present. They, undoubtedly, were apprised of the appointment. Mr. Farmer testifies that the arbitrators met at the

banking-house of the Manufacturers National Bank in Newark; that he does not think that anything was said in the Messrs. Hubbell's office about their meeting at the bank, and that he does not know that they knew that he was going back to the bank; but he says he thinks it was stated that the meeting was to be on that day, and his impression is that it was said that the arbitrators were going back to finish the award. He further says that he did not, to his recollection, announce in that office that he intended to go on and make the award without notifying the complainant, and that he is not aware that any question was raised, while he was in the office, as to whether it was his duty to notify the parties to the arbitration that they were going on to make the award. This is all the evidence on the subject. It is quite clear that this testimony does not show notice to the complainant. Messrs. Plume and Barnet both say that the parties had no counsel in the arbitration, and it appears from the evidence that Mr. A. S. Hubbell could not have regarded himself as the counsel of the complainant, and he, therefore, could not have considered himself chargeable with any duty from his knowledge of the fact that a third arbitrator had been appointed, and that a meeting was about to be held. Mr. G. W. Hubbell had not then been consulted by the complainant on the subject of the arbitration. The complainant must be held to have had no notice.

But the defendant further insists that the complainant has lost all claim to relief by his acquiescence in the award. The award was delivered to him, and by it he was made aware of the fact that Messrs. Plume and Barnet had failed to agree, and that Mr. Farmer had been appointed, and that the award was the award of Messrs. Plume and Farmer alone. He was appointed by the award to settle up the affairs of the concern. He had, from the time of the dissolution, had charge of the settlement of the business. After the award he continued, for from ten days to two weeks, to settle the business, and he made up a statement in accordance with the award and delivered it to the defendant. This action, it is insisted, is evidence of acquiescence, and bars his

claim to relief. But it is evident from his testimony, that the only reason why he did not take immediate steps to set aside the award, was that he was under the erroneous impression that it was conclusive against him, and could not be litigated. He was not only dissatisfied with it, but complained of it, and actually convinced one of the arbitrators by whom it was signed, that it was wrong, and that it made an erroneous and unjust division of the assets of the firm. Besides, after the submission and before the award, the defendant had, without the complainant's consent, collected about $1000 of the money due the firm, which he refused to return, which action on his part was regarded by the complainant as a violation of good faith in view of the submission, and a fraud on the arbitration. The complainant's action in proceeding with the settlement after the award, and his delaying for about two weeks to take steps to set aside the award, will not, under the circumstances, bar him from his claim to relief. His seeming acquiescence was due to his mistake or ignorance as to his rights in the premises, and no action or omission of his, after the award, changed or affected the situation of the parties so as to induce the court to deny the relief which it would otherwise have accorded. In *Morgan* v. *Pindar*, 3 *Rep. in Chan.* 76, it was held that the fact that after an award mutual releases had passed, would not preclude an inquiry into its validity. The award will be set aside and an account between the parties decreed, and a receiver of the partnership assets will be appointed.

BOORAEM and others *vs.* WOOD and others.

1. A horse railroad company entered upon land with the consent of the owner, (the land being subject to a mortgage,) and constructed thereon, at great expense, an elevator to raise their cars from the bottom to the top of a hill. *Held*, that the elevator was subject to the encumbrance of the mortgage, and that the company would not be entitled to redeem the land on

which they had constructed the elevator, by paying to the mortgagee the value of the land at the time when the company took possession.

2. The company, *pendente lite*, took proceedings to condemn the land under their charter, but caused the commissioners to appraise only the value of the land without the improvements, (the elevator.) *Held*, that the condemnation being *pendente lite*, could not avail the company as against the right of the mortgagee to the land and the improvements.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. Lansing Zabriskie, for complainant.

Mr. R. Gilchrist, for the North Hudson County Railway Company.

Mr. C. Parker and *Mr. R. Wayne Parker*, for the receiver of the Erie Railway Company.

THE CHANCELLOR.

This suit is brought to foreclose a mortgage, originally for $150,000 and interest, dated the 24th of January, 1867, given by William H. Wood to Cornelia Booraem, one of the complainants, upon land partly in Jersey City and partly in Hoboken. A part of the premises was taken by condemnation by the West Hoboken and Hoboken Passenger Railway Company, now the North Hudson County Railway Company, in 1863; and after the giving and recording of the mortgage, the North Hudson County Railway Company, in 1873, under an agreement with William H. Wood, obtained possession of another part, eight hundred and fifty-six thousandths of an acre, of the premises for the purposes of their railroad, its inclined plane and elevator, and expended in improvements thereon still remaining there, a very large sum of money.

After the commencement of this suit, the company took proceedings to condemn the last-mentioned land, making the complainants parties to the proceedings. By the award of the commissioners, it appears that they awarded damages to the owners and persons interested, for the value of the land, irre-

spective of the improvements put thereon by the company. The damages have not, nor has any part thereof, been paid or tendered to the mortgagee. The company insist that the mortgage is no longer a lien upon that land, but that the lien thereof has been transferred to the damages awarded on the condemnation, and that if, for any reason, the court shall not so adjudge, then the mortgagee should be required to accept from them, in discharge of the lien, the value of the land at the time when the company took possession under the agreement with Wood. The question presented appears to me to present no difficulty. The company acquired their interest in the land under the agreement, subject to the mortgage, (which was duly recorded,) and the improvements there made, which it is admitted were part of the freehold, became subject to it in the same manner as they would if they had been put there by the mortgagor. That the mortgagor, if he had put them there, would have had no right as against the mortgagee, to remove them, cannot be disputed. It is obvious that his grantee, having notice of the mortgage, has no more right. If the company, at the time of entering upon the possession, had the power to condemn the interest of the mortgagee, they did not exercise it; and if they now lose the improvements by reason of the lien of the mortgage, their loss will be attributable to their own negligence. If they had not the power, the loss will be equally attributable to their negligence in not obtaining a release from the mortgagee before putting the improvements upon the land. It is insisted by the counsel of the company that equity requires that the company be permitted to take the land at its value, irrespective of the improvements, at the time when they entered into possession. and he cites certain cases in the courts of other states in which it has been so held. I do not deem it necessary to enter upon a discussion of them. The effect of such a doctrine would be to give to purchasers with notice of a mortgage, an advantage as to improvements which the mortgagor would not have had. And there is no good reason for discriminating in their favor. Such a doctrine would enable such purchasers to obtain from

the mortgagee, by means of their improvements, a compulsory release at the value of the land at the time of taking possession. Nor will the fact that in this case the company caused the land to be condemned after this suit was begun, deprive the complainant of the benefit of the improvements. Their power to condemn is disputed. But conceding it, the proceedings in condemnation cannot avail them. The maxim, *Pendente lite, nihil innovetur*, is applicable. Besides, it appears by the award itself, that the commissioners did not take into account the improvements. It also appears by the testimony that they estimated the value of the land at the time when the company entered into possession, giving interest thereon from that time. Moreover the compensation awarded has not been paid or tendered. The mortgagee was entitled to all of it. If there was doubt as to who was entitled to the money, no steps have been taken to ascertain to whom it is to be paid. The land in question is liable to be sold, with its improvements, to pay the complainant's mortgage. The company is, of course, entitled to the equity which subjects the part of the mortgaged premises which is in the hands of subsequent purchasers, to the payment of the mortgage before selling their land for that purpose.*

WILSON *vs.* KING and others.†

1. An alleged parol assumption of a mortgage upon the premises, claimed to have been made at the time of their conveyance, *held* not proved.

2. A mortgage conveying only an estate for the life of the mortgagee, will not be reformed to convey a fee, as against the rights of a *bona fide* purchaser of the mortgaged premises for valuable consideration, without evidence of actual notice on the part of the purchaser, more extensive than the record of the mortgage itself.

3. Mortgages of real estate are usually in fee, but constructive notice of the existence, merely, of a mortgage, with no notice as to the estate it is intended to mortgage, will not be notice that the mortgage is in fee, if its terms convey a life estate only.

---

* Decree reversed, 1 *Stew.* 450. See, also, *S. C., Id.* 593.

† Cited in *Gale's Ex'rs* v. *Morris*, 2 *Stew.* 226; *Bunker* v. *Anderson*, 5 *Stew.* 37.

On final hearing on pleadings and proofs.

Mr. W. S. Whitehead, for complainant.

Mr. J. H. Stone, for defendant John King.

The Chancellor.

The complainant is the holder of a mortgage given to Harriet H. Woodward, for $500 and interest, on land in Newark, assigned to him by Ford and wife, two of the defendants, to the latter of whom it belonged at the time of the assignment. She received it by assignment from the mortgagee. When the mortgage was made, the premises were owned by Ford, who was then unmarried. Previously to the assignment to Mrs. Ford, her husband sold and conveyed the property in fee to the defendant King, she joining with him in the deed. The mortgage was executed and delivered in the city of New York. It contains no words of inheritance, and therefore conveys only an estate for the life of the mortgagee. She is still living. The bill is filed to reform the mortgage by the addition of words of inheritance so as to convey a fee, and for foreclosure and sale of the premises. It also seeks a personal decree for deficiency against King, on the ground that he, on the conveyance to him, assumed the payment of the mortgage. King, after he became the owner of the property, conveyed part of it to the corporation of the city of Newark, who are also defendants. Both he and they demurred to the bill. The demurrers, however, were withdrawn, and King answered. The bill was taken as confessed as against the corporation. King, in his answer, not only denies that he assumed the payment of the mortgage, but declares that he never knew of the existence of it until after the former suit upon it (*Wilson* v. *King*, 8 *C. E. Green* 150,) was commenced against him. No mention of the mortgage is made in the deed to him. It contains covenants against encumbrances, of seizin, for quiet enjoyment, for further assurance, and of warranty. The evidence

relied on for a decree for deficiency, is the testimony of Mr. Wetmore, who was Ford's legal adviser at the time of the conveyance. He says that King, who was a creditor of Ford who had then just failed in business, was anxious to obtain a conveyance of this property in consideration of his debt, which appears, by King's testimony, to have been about $3000, not including interest. The witness says that he objected to Ford's conveying the property to King, on two grounds: first, because, seeing that Ford had just failed in business, it might, as a seeming preference, offend his other creditors; and next, because the mortgage in question was upon it, and he did not think the property, as it was represented to him by Ford, was of sufficient value to pay the mortgage. He adds that Ford represented it to him as being located in the outskirts of the city of Newark, and covered with water, and of little or no value. He says that Ford also told King about the mortgage and the condition of the property, and that Ford, under his instructions, refused to give a deed at that time; that King then left the witness' office where the conversation was held, and appeared to be very angry with the witness because of his advice to Ford, but returned again in the afternoon of the same day, and urged that the deed should be made to him, and said that if Ford would make it, he would discharge him from his indebtedness and assume the mortgage of $500. The witness says he still advised Ford not to give the deed, and Ford did not do so at that time, and that King again left the office very angry, and that Ford and the witness walked up town together. He subsequently says that he thinks he had another interview with Ford and King a day or two after that, and was informed by them that Ford had made a deed to King, as the latter had requested. It will be seen that this testimony does not prove that King assumed the payment of the mortgage. At most, it proves an offer of King to do so, which was not then accepted. As to the interview subsequent to the offer, the witness does not speak positively. He merely says he thinks it took place. The witness was not

present when the conveyance was made, nor did he take any part in that transaction. Ford, who was a witness in the cause, does not corroborate him. He does not say that King assumed the payment of the mortgage, or offered to do so. He says he supposed the property was conveyed to King, subject to the mortgage, and that he informed King of the existence of the mortgage before the conveyance; that his wife and Mr. Wetmore were present, and that when he conveyed the property to King, the latter asked him if that was the only mortgage on the property, and he told him that that was all, and he seemed to be satisfied. Mrs. Ford appears from her testimony, to have been present at no conversation between her husband and King, except that which took place when the deed was executed. She says that then King and Ford conversed some time in reference to the sale of the property, before the deed was signed, and that her husband then told King that there was a mortgage on the property. Mr. Wetmore is wholly uncorroborated in his statement as to the offer which he says was made by King to assume the mortgage. To fix the assumption upon the latter, the proof should go further than his statement goes. It may be remarked that it is difficult to perceive the reason why Mr. Wetmore should have advised Ford not to make a conveyance of a worthless lot of land to a creditor who not only requested, but urgently solicited it, and was not only willing to give up for it his claim of about $3000, but offered to assume the payment of a mortgage of $500, and interest upon it, in addition. On the other hand, it is difficult to perceive any reason why King should have made any such proposition. He denies, *in toto*, the statement of Mr. Wetmore, and says he was never in his office, and never saw him. He says he never had any conversation in reference to the title of the property, except that which took place in his (King's) office, in Broadway; that Ford offered him the property in discharge of his indebtedness, assuring him that the title was perfect and the property free of encumbrance; that he was ignorant of the value of the property, but Ford told him it was situated in Newark,

and was worth half of the indebtedness, and in time would pay it in full; that he accepted the offer, subject to the approval of his lawyer; that Ford had the conveyance prepared by his own lawyer, and brought it to him the next day; that he (King) then requested him to leave the deed with him for an hour, in order that he might submit it to his lawyer; that Ford replied that there was no necessity for taking it to a lawyer, repeating his assurance in reference to the title; that he did, however, retain the deed, and submitted it to his lawyer, who approved it; that Mr. and Mrs. Ford were with him at the office where the deed was executed, and that that was the only time he ever saw the latter. He further says that he gave up to Ford, as consideration for the deed, the notes he held against him for the indebtedness, and that he had given full value for them. His narrative has more of verisimilitude than that of Mr. Wetmore. Besides the deed, as before stated, conveys the property free from encumbrance. There are no grounds for a decree against King for deficiency. Nor will the mortgage be reformed. He is a *bona fide* purchaser for valuable consideration. The record was constructive notice to him. The mortgage there recorded purported to convey only an estate for the life of the mortgagee, and there is no evidence of actual notice more extensive than that of the mortgage itself. The facts relied upon as the grounds on which a decree reforming the mortgage may be based, are that the mortgage was made in New York, where its language would import a conveyance in fee, and that Ford and King both resided in New York, and therefore may be presumed to have understood by the term mortgage, a mortgage in fee. But the fact is, that neither of these parties knew anything about the language of the mortgage, or about the law of New York on the subject. Mortgages of real estate are usually in fee, but constructive notice of the existence, merely, of a mortgage, with no notice as to the estate it is intended to mortgage, will not be notice that the mortgage is in fee, if its terms convey a life estate only. King had notice of the

existence of a mortgage, but no notice as to the estate intended to be mortgaged thereby, beyond the import of the terms employed in the instrument. He could not have had notice of any mistake in the mortgage, for it was not until after the conveyance was made to him that it was alleged that there was a mistake. There will be a decree in accordance with the views above expressed.

RITTENHOUSE *vs.* TOMLINSON'S Executors.

1. Defendants' testator sold fifty shares of stock of the Central Railroad Company of New Jersey, and loaned the proceeds thereof, $4981.25, to the complainants, taking their promissory note therefor, payable to his order, twelve months after date, with interest from date. Complainants allege that the note was not intended to be a part of the contract, but merely a memorandum and evidence of the indebtedness, and that the contract really was that defendants' testator should have the dividends on fifty shares of said stock, and should receive fifty shares of capital stock in re-payment of the loan. They seek specific performance of this alleged agreement, and injunction to restrain defendants from parting with or suing upon the note. Relief refused.

2. Evidence of a contemporaneous understanding and agreement between the parties, by parol proof merely, in the absence of any allegation or pretence of fraud, accident or mistake, is inadmissible to vary a contract in writing.

Bill for relief. Motion to dissolve injunction on bill.

Mr. J. R. Emery, for motion.

Mr. G. A. Allen, contra.

THE CHANCELLOR.

The bill is filed to compel specific performance of a parol contract to pay $4981.25, in the stock of the Central Railroad Company of New Jersey. The defendants are the executors of Charles Tomlinson, deceased. In January, 1874, Moses

Rittenhouse and Thomas B. Rittenhouse, then his partner in business in New York, under the firm of M. Rittenhouse and Brother, applied to Tomlinson for a loan of $5000. To accommodate them, and with that object alone, he sold fifty shares of the capital stock of the above-named company, owned by him, in order to raise the money they desired to borrow. Having thus raised $4981.25, he lent it to them, taking their promissory note therefor, dated January 22d, 1874, and payable to him or his order, twelve months after date, with interest from date. The bill alleges that the note was not regarded as, nor intended to be, a part of the contract between him and them, but was to be, and was, merely a memorandum and evidence of the indebtedness, while the understanding and agreement really were that he should have the same dividends as should be declared from time to time by the railroad company, as long as the Rittenhouses should retain the money, as and for and in lieu of interest on the loan; and that he should receive fifty shares of the capital stock of the company in re-payment of the loan. The bill further states that Thomas B. Rittenhouse having retired from the firm of M. Rittenhouse and Brother, and George M. Rittenhouse having taken his place therein, a new note, made by Moses and George, dated April 1st, 1875, for the same sum, and payable one day after date to Tomlinson, or his order, with interest, was given to the latter in lieu of the note first mentioned; and that was given and accepted on the same agreement and understanding as the former note. It further states that from time to time, up to near the time of his death, the makers of the notes paid to Tomlinson, in lieu of interest, the amount of the dividends declared by the company on fifty shares of the stock, and he receipted for the payments accordingly; and that the amount of the dividend declared in July, 1875, was tendered to him, but by reason of his illness it was not received by him. It appears by the bill, that after his death, which occurred on the 5th of August, 1875, the makers of the new note paid no money for dividends, although the railroad company continued to declare them up to July, 1876;

and that on the 7th of April in that year, they paid to one of the executors, "on account of their indebtedness," $348.68. On the 8th of July, 1876, they tendered to the defendants fifty shares of the stock of the company, "with all arrearages of dividends remaining due and unpaid since Tomlinson's death, being the sum of $172.05," but the executors refused to accept the stock and deliver up the note. The bill prays that specific performance of the agreement may be decreed, and that the defendants may be enjoined from parting with or suing upon the note On the filing of the bill, a preliminary injunction was issued.

The complainants seek to compel specific performance of a parol contract on the part of Tomlinson, to accept stock in re-payment of the loan. It appears by the bill that for this loan they delivered to him their promissory note, payable with interest. They say, however, that the note was not intended to be regarded as evidence of an obligation to re-pay the money, but as a memorandum and evidence of debt, merely. No mistake, accident or fraud is alleged. The complainants seek to avoid the obligation of the note by contradicting its terms by parol evidence. It is an absolute obligation to pay money. They propose to show by parol proof, that it was not intended to be an obligation to pay money at all. A familiar rule of evidence forbids the admission of such proof to contradict the terms of the note. They ask that a decree of specific performance may be made upon the contract in writing, as varied by a contemporaneous understanding and agreement, which are to be evidenced by parol proof, merely. In order to give them the relief they seek, this court must first establish the variations by substituting the parol agreement for the written one, and that, too, as before remarked, in the absence of any allegation or pretence of fraud, accident or mistake. The evidence ought not to be received. It is not probable, apart from this objection, that the agreement alleged in the bill could be established. Tomlinson, merely for the accommodation of the Rittenhouses, converted a then valuable stock into cash. It is not reasonable to suppose that in so

doing he stipulated for the re-payment of the loan at the mere option of the borrowers as to time, ("when they were through with the use of the money and desired to return it," as the bill expresses it,) retaining no power to compel its re-payment in cash, but agreeing to receive stock in payment, without regard to its market value; in other words, that he thus loaned the money for an indefinite period, without security, and on an agreement that it was to be re-paid only in stock, to be delivered to him, not on demand nor yet on notice, but whenever the Rittenhouses should see fit. In fact, it appears by the bill that it was not until after the company had failed to pay a dividend, that the Rittenhouses offered to re-pay the loan in stock. Again, after Tomlinson's death they paid interest at seven per cent. per annum on the note, notwithstanding the fact that dividends had been declared by the company for the time for which the interest was paid. They say that they were prepared to pay him an amount equal to the dividend of July, 1875, on fifty shares of stock, but that he declined to receive it because of his extreme illness, which wholly incapacitated him from attending to business. They also say that the company paid dividends up to July, 1876, when it failed to pay any. There was, therefore, due from them in April, 1876, a sum equal to the dividends of July and October, 1875, and January and April, 1876, which, all together, amounted to ten per cent. Yet in the month last mentioned they paid to the executors $348.68, the amount of the interest at seven per cent., for one year, on the amount of the note. It is true they offered to pay "arrearages of dividends" in July, 1876, but it was not until the time when they tendered the stock in payment of the loan. As the transaction between the complainants and Tomlinson is presented by the bill, it would be exceedingly unfair to compel the estate of the latter to receive depreciated stock, of less value than the amount of the loan, in payment of the loan. That the stock is depreciated may, without reference to the quotations of the stock market, be fairly assumed from the fact stated by the bill, that the company failed to pay a dividend in July, 1876,

and the fact also there stated, that the complainants have purchased the stock in order to pay off the loan with it.

The understanding between the parties probably was, that in view of the fact that Tomlinson had sold valuable and productive stock to raise money merely for the accommodation of the Rittenhouses, they would, notwithstanding that the note was the legal evidence of their contract, see to it that he should suffer no loss by his kindness in accommodating them. The obligation thus to indemnify him probably was understood to rest merely in honor. The claim to relief, as it appears from the statements of the bill, by no means commends itself to favorable consideration.

The injunction will be dissolved, with costs. Had it been retained until the hearing, it would have been on terms that the complainants pay into court the amount due on the note, according to its terms, for principal and interest, or give security for the payment of the note in case the bill should be dismissed.

STAMETS *vs.* QUINN and WALSH.

Bill by creditor under attachment proceedings, to reach and apply to the payment of creditors' claims certain money allegedt o be due their debtor under contract for labor, and under an assignment by him to his co-partner of all his tools and implements, his interest in the contract, and the money due and to become due thereon, on the ground that the assignment was merely colorable, and for the purpose of protecting his interest and property against his creditors. *Held*, that the assignment was *bona fide* and absolute, and necessary to protect his co-partner, who had advanced the debtor large sums of money, and without which he would have been entirely without security.

Bill for relief. On final hearing on pleadings and proofs.

Mr. B. C. Frost, for complainant.

Mr. J. F. Dumont, for defendant Walsh.

THE CHANCELLOR.

The complainant's bill is filed actually, though not nominally, in behalf of himself and other creditors of Peter H. Quinn. For the recovery of his debt, he caused to be issued, out of the Supreme Court of this state, in December, 1874, an attachment against Quinn as a non-resident debtor, under which the money alleged to be due to Quinn from Clark and White, under a contract between him and them for the construction by him of a culvert over the Musconetcong creek, for the Easton and Amboy Railroad Company, was attached. The other creditors filed their claims under the attachment, and in September, 1875, judgment was entered in the suit in favor of the complainant and the applying creditors, for the amount reported by the auditor to be due to them respectively. The object of this suit is to reach and apply to the payment of their claims, certain money alleged to be due to Quinn for materials found and work done in and for the work above mentioned, prior to the 21st of January, 1874, up to which time he was engaged in the work on his own account alone, and the amount alleged to be due to him from that time for his share of the profits of the work. At that date, the defendant, Patrick Walsh, entered into co-partnership with him in the performance of so much of the work as then remained to be done. The partnership was formally dissolved by written agreement on the 12th day of March following, and, from that time, the work was continued to its completion by Walsh. After the work was completed, he entered into a verbal contract, in his own name, with Clark and White, for building a buttress, and built it accordingly. The complainant alleges, and his claim to relief is based on the allegation, that although, by the agreement of dissolution, Quinn assigned to Walsh, in consideration of payment to be made by the latter of the then existing partnership debts of Quinn and Walsh, his interest in the contract, and all money due or to become due, whether to him alone or to them under it, and all his tools and implements at the work, yet the assignment was, in fact, colorable merely, and was designed to protect that interest and property

against the claims of his creditors; and that he still continued to be a partner with Walsh in the work. The complainant insists that the contract for building the buttress was taken and executed by Walsh on the partnership account, and that, therefore, Quinn is entitled to half of the net profits thereof. The question involved is one of fact merely, and it has been submitted to the court without argument, on the testimony and exhibits. In addition to the facts above stated, it appears that, in January, 1874, Quinn, who was then engaged in constructing the culvert, was embarrassed by his debts; that his necessities in that respect were so great as to threaten him with the loss of the contract and of the per centage, (fifteen per cent.,) which, under it, had been retained by Clark and White as security for the completion of the work, and which they were authorized to hold accordingly until the work was done. In this strait, he, through Timothy Burke, his foreman, applied to Walsh, who lived in New York and was then a stranger to Quinn, but well known to Burke, for a loan of $2000. Walsh was unable to accommodate him with that amount, but endeavored to aid him in borrowing it elsewhere. The effort proving unsuccessful, he offered to lend $1000, provided the payment thereof should be secured to his satisfaction. He, at the request of Quinn, came to see the latter at the work, and Quinn then gladly accepted the offer of the loan of $1000, and proposed to secure its payment by a mortgage of his tools and implements there, which included a steam engine and certain derricks. This proposition was not acceptable to Walsh. He did not consider the security sufficient, and he, therefore, declined to lend the money upon it. Quinn then proposed that he should enter into partnership with him in the execution of the contract, and offered to give him an equal interest with himself in it, if he would contribute $1000 in cash as capital; Quinn proposing to contribute the materials which he then had on the ground or in the vicinity, and which were of the value of that sum. He also offered to secure Walsh against loss by mortgaging the tools and implements to him, to secure the $1000, and he assured him that

there was no lien or encumbrance upon them. Walsh, with some reluctance, consented to enter into the partnership, and in doing so, relied on the assurances of Quinn that $1000 in cash would relieve him from his embarrassment and enable him to complete the contract, and that the tools and implements were, indeed, free of lien or encumbrance. The partnership agreement was entered into between them on the 21st of January, 1874. Walsh living in New York, did not propose to attend to the work, but employed Burke as his substitute therein. Almost immediately after the partnership agreement was entered into, Quinn applied to Walsh for $400 to pay workmen, and again for the like sum to pay freights, promising to re pay the money out of the January estimate of the work. Walsh advanced the money. Quinn received the amount of the January estimate, but did not re-pay these loans or any part of them. In the January estimate was included the sum of $1200 for stone on the ground, being the very materials which were put into the concern by Quinn, as capital. This sum of $1200 he also received and applied to his own use. Walsh becoming indignant and alarmed by this action on the part of Quinn, upbraided him, and requested him to secure to him the money he had put in as capital and the money advanced, and to dissolve the partnership. Quinn, being unable to find security, although Walsh gave him full opportunity to do so, proposed to assign to the latter his interest in the contract, and the money due and to become due upon it, and the tools and implements before referred to, in consideration of Walsh's paying the debts of the firm. An agreement to that effect was accordingly entered into by them on the 12th of March, 1874, and Quinn left the state, and Walsh proceeded to complete the work, and did so, furnishing the capital necessary for the purpose, as, from time to time, it was required. The complainant's theory is, as before remarked, that this assignment was merely colorable, and that the arrangement was intended for no other purpose than to protect Quinn's interest and property against his creditors, and that the relations

between him and Walsh were not in fact changed, but that the understanding between them was that the latter was to proceed to finish the contract, superintending the work and finding the requisite capital, and divide the net profits with Quinn. However much Quinn may have been disposed to relieve himself from embarrassment from his individual creditors, and however that embarrassment may have contributed to his willingness to make the assignment, that clearly was not his sole, nor was it his principal motive. Walsh was very indignant, and justly so. He apprehended, as a result of his kind assistance of Quinn, a liability to very considerable pecuniary loss, and he was, with abundant reason, alarmed. He demanded security, and threatened to take severe proceedings immediately against Quinn, unless his demand was complied with. The latter then, as a dernier resort, offered to make the assignment, which was accepted. There is no evidence of a design on the part of Walsh to protect Quinn's property, or his interest in or under the contract from his creditors. There is evidence of bad faith on the part of Quinn in his abuse of Walsh's confidence. He had spent the $1000 contributed by the latter to the capital of the firm in paying his own debts. He had, in like manner, disposed of the $800 which he had received from Walsh to pay workmen and freight. He had received, in the January estimate, and applied to his own purpose, not only the money due for work done, out of which he had promised to re-pay the $800 just referred to, but he had also received and applied to his own purpose, $1200 for the price of the very materials which he had contributed as capital, and which constituted his entire contribution to the capital. That Walsh should have demanded a dissolution and security for his money, was to have been expected, and that he desired to leave the business is beyond question. Quinn endeavored to obtain security, first in this state, and then in Philadelphia, but was unsuccessful; and it was only when he found himself wholly unable to give security, that he proposed to make the assignment. The evidence is clear that Walsh, in

obtaining the assignment, was merely pursuing his own interest, irrespective of that of Quinn, and that he did not seek the assignment, but accepted it as his only means of extrication from the difficulties of his position. It is true, Quinn swears that there was an understanding between him and Walsh that he was to share in the profits, but he says, also, that the sole object and purpose of the assignment were "to protect Walsh's interest and prevent Walsh from selling out all the effects belonging to the partnership, and" him "individually, as he threatened to do." He further says, in answer to the question whether, in making the assignment, he had any purpose or object to prevent annoyance from his creditors, that his sole object was to get the work completed, and get what money belonged to him, either from the work that was to be done or that which had been previously done and was unmeasured, part of the price whereof had been retained by Clark and White under the contract, so that he could pay his creditors in full, or as much of their debts as he might thus be enabled to pay. Notwithstanding the testimony of Quinn, which is but slightly corroborated, the evidence shows conclusively, that the assignment, instead of being an arrangement for Quinn's accommodation, was made by him for the satisfaction of Walsh's claims against him, and in consideration thereof, and of the payment of the partnership debts by Walsh. The letters of the latter to Quinn, which are relied upon as proof of fraud against the creditors of Quinn, are, especially in view of the explanations and explanatory circumstances which appear in the case, of but little weight. The circumstances of the assignment forbid the conclusion that it was designed, in any way, to defraud, defeat, hinder, or delay the creditors of Quinn. From the time of the dissolution, the 12th of March, 1874, Walsh carried on the business in his own name and on his own account, furnishing all the capital required for it, and refusing, according to the testimony, to pay or recognize any of the individual debts of Quinn, and claiming that the latter had no interest whatever in the work. From the time

of the dissolution, Quinn stayed away from the work, and gave it no attention, and apparently had no interest in it. His creditors can, under the proof, have no claim to any of the profits of the contract after that date, and there is no ground on which any claim can be made in their behalf, in respect of the building of the buttress, which was done by Walsh under an independent contract made expressly with him, and understood to be made with him alone, by Clark and White. The money due Quinn individually, on the contract at the time of the dissolution, for per centage on work done by him alone, retained by Clark and White, was not sufficient in amount to pay his debt to Walsh. Quinn could not have got it except on the completion of the work according to the contract, and he was unable to finish it. Walsh had no means of re-imbursement, except the assignment, and to obtain the money withheld by Clark and White for security, it was necessary for him to complete the work. There are indications in the case that this suit is rather the suit of Quinn than of Stamets, the complainant. Quinn, of course, would have no standing before the court in the case made by the bill—fraud upon his creditors in making the assignment. The complainant has failed to show the fraud on which his claim to relief is based. The bill will be dismissed, with costs.

BRITTON'S Administrator *vs.* HILL and others.

Complainant's intestate planted oysters in Raritan bay upon certain grounds which he had staked off, and the boundaries of which he had plainly marked. The defendants having taken large numbers of oysters, and threatening to continue doing so, under a claim of public right, were enjoined, on the ground that they were acting in concert, taking away for their own use the property of the complainant, and might wholly deprive

him of it, and were, most of them, pecuniarily irresponsible, and besides, a multiplicity of suits would be necessary to relief. The injunction was continued until the hearing, unless, in the meantime, the question between the parties should have been determined at law in favor of the defendants, in which case the defendants had leave to renew the motion to dissolve.

Bill for relief. Motion to dissolve injunction on bill and answer.

Mr. George C. Beekman, for motion.

Mr. C. Robbins, contra.

The Chancellor.

This suit is brought by the administrator of John Britton, deceased, to restrain the defendants, fifteen in number, from trespassing upon certain oystering grounds in Raritan bay, which, at the death of Mr. Britton, were in his possession, and on which, in May, 1874, he planted a very large number (about ten thousand bushels) of Virginia, North river and Raritan bay oysters. He, at the same time, staked off the grounds, thus plainly marking their boundaries, and from that time until his death, which occurred in November of the year following, held possession of them.

In April, 1876, the defendants, who are oystermen living in the vicinity, at Keyport in this state, entered upon the grounds, and against the remonstrance and warning of the complainant, who was then administrator of Britton, fished for oysters there, and took and carried away about two hundred bushels of oysters, which they then caught on those grounds. Two of the defendants, on the 20th of April, took and carried away oysters from the grounds for their own use. The complainant caused them to be arrested for it. They gave bail, and two days afterwards returned to the grounds with the other defendants, and all of them fished for and caught oysters there and took them away for their own use. The complainant caused warrants to be issued for their arrest, and some of them were arrested upon them. After that, they

declared their intention to continue to take oysters there. Most of them are pecuniarily irresponsible. The complainant finding proceedings at law ineffectual to protect his property, and being unwilling, in view of the number of persons making common cause against him, to have recourse to force, filed his bill for an injunction. All of the defendants except one have answered, and the motion is now made to dissolve the preliminary injunction.

The question between these parties is, whether the grounds are or are not a natural oyster bed in the public or navigable waters of the state.

The defendants insist that they are, and that they, therefore, have a right to fish for the oysters there and take them to their own use; while, on the other hand, the complainant insists that the grounds are not a natural oyster bed. That the grounds were occupied, planted and staked off by Mr. Britton, as alleged in the bill, is admitted in the answer. The defendants are not to be regarded as lawless depredators, but as citizens claiming to have been, in the acts complained of, in the lawful exercise of a lawful right to fish in the public waters of the state. That Mr. Britton planted oysters there, they admit, but they insist that he could not, by so doing, lawfully exclude the public from the exercise of its then existing right to take the oysters there. Their determination to persist in taking oysters from these grounds until the law shall prohibit them, is not denied; that they are acting in concert, is manifest. It is true, they are acting together under a claim of public right, but they are acting in concert, nevertheless, and in considerable numbers also, and they are taking away from the grounds, for their own use, the property of the complainant. He obviously cannot, under the circumstances, obtain adequate relief at law.

During the pendency of proceedings at law, which, as to most of the defendants, could, on account of their irresponsibility, pecuniarily, be productive of no valuable result, the whole of the property, valued at about $8000, might be taken away. Besides, to obtain such relief, he would be compelled

to bring a multiplicity of suits. The injunction should be retained until the hearing, unless, in the meantime, the question between the parties shall have been determined at law in favor of the defendants. In that case, the motion to dissolve may be renewed.

The Bigelow Blue Stone Company *vs.* Magee and others.*

1. When a creditor comes into equity to reach the equitable interest of his debtor in land, he must show a judgment which would, in case the legal title to the property were in the debtor, be a legal lien thereon, and an execution returned unsatisfied.

2. It is not necessary in such case, to show a levy of an execution on the land which he seeks to reach.

On creditors bill and general demurrer.

Mr. T. D. Hodges, for demurrants

Mr. W. P. Wilson, for complainants.

The Chancellor.

The bill sets forth the recovery by the complainants of a judgment against Magee, for their debt, the issuing of an execution thereon, and the return thereof, *nulla bona aut tenementa.* The object of the suit is to reach real estate, the legal title whereto is and was, when the judgment was recovered, in another of the defendants, by whom, as the complainants allege, it was and is held in trust for Magee in fraud of his creditors.

The question presented under the demurrer is, whether it is necessary, in order to maintain the suit, to allege, and therefore to prove, a levy on the property under an execution on the judgment.

* Cited in *Graves* v. *Coutant*, 4 *Stew.* 779; *Wales* v. *Lawrence*, 9 *Stew.* 209.

When a creditor comes into equity to reach the equitable interest of his debtor in land, he must show a judgment which would, in case the legal title to the property were in the debtor, be a legal lien thereon, and an execution returned unsatisfied. This will show that his remedy at law is exhausted, and will entitle him to the aid of equity.

It is not necessary in such case, to show a levy of an execution on the land which he seeks to reach. *Robert* v. *Hodges*, 1 *C. E. Green* 299; *Dunham* v. *Cox*, 2 *Stockt.* 437; *Cuyler* v. *Moreland*, 6 *Paige* 273.

The demurrer will be overruled, with costs.

PRALL and others *vs.* TILT and others.*

1. *Held*, in this suit for the recovery of five hundred and fifty-eight shares of stock, pledged as collateral security for credit, that the holders were *bona fide* purchasers of the stock, without notice, for valuable consideration, to the extent of the indebtedness to them. The stock to be re-assigned only upon payment of their debt and interest, with costs of this suit.

2. In this case, the stock was the property of a deceased testator, and the executrix had power, under the will, to make advances to two of the testator's sons, by whom the pledge was made, on the representation that the stock had been assigned to them under that provision, for advances, and they accordingly presented to the pledgees, the certificates of the stock and a letter of attorney to assign the stock in blank, executed by the executrix and delivered to them by her to be delivered to the pledgees in pursuance of the agreement for credit; *held*, that the possession of the certificates and the letter of attorney were, under the circumstances, corroborations of the representations, the inquiry as to the truth of which, the pledgees had no means of pursuing.

Bill for relief. On final hearing on pleadings and proofs.

Mr. T. D. Hoxsey, for complainants.

Mr. Cortlandt Parker, for B. B. Tilt and Son.

* Cited in *Prall* v. *Hamil*, 1 *Stew.* 70.

THE CHANCELLOR.

The object of this suit is to recover from the defendants, Benjamin B. Tilt and Albert Tilt, five hundred and fifty-eight shares of the capital stock of the Phœnix Manufacturing Company, a corporation under the laws of this state, located at Paterson, which were assigned to them by an assignment executed by Rachel M. Prall, executrix of the last will and testament of Edwin T. Prall, deceased, in February, 1874. The complainants are William Prall, one of the sons of Edwin T. Prall, deceased, and Margaret A. Campbell, one of the daughters of the latter, and Henry G. Campbell, her husband. The defendants are Benjamin B. Tilt and Albert Tilt, Rachel M. Prall, the executrix, and Mortimer Prall and Edwin T. Prall, sons of the testator. All of the testator's children are beneficiaries under his will. In February, 1874, Mortimer Prall and his brother Edwin, who were then in business together, under the firm of Prall Brothers, in the manufacture of silk goods, needing capital or credit, offered to sell the stock in question to the Tilts, who were dealers in silk stock, under the firm of B. B. Tilt and Son. They declined to purchase it, but were willing to give, what is called in mercantile phrase, a "line of credit" upon it as security, and it was accordingly agreed between the firms that the shares should be assigned to B. B. Tilt and Son as collateral security for silk stock to be sold by them to Prall Brothers, on credit, and that they would, on that security, give the latter a line of credit accordingly, to an amount equal to one-half of the par value of the stock. The stock then stood in the name of Edwin T. Prall, the testator. A letter of attorney, executed in blank by the executrix, authorizing the transfer of the stock, was delivered, with the certificates of the stock, to B. B. Tilt and Son, in pursuance of the agreement, and they having caused it to be filled up, transferred the stock to themselves on the books of the company. They subsequently sold to Prall Brothers, goods on the security of the stock, and on the 1st of May, 1875, at, or prior to which time, the dealings appear to have ceased, the balance due to them for goods so sold was $9142.69,

besides interest, which indebtedness is wholly unpaid. The par value of the stock was $27,900. It was inventoried by the executrix, as of the value of $11,160. As before stated, the stock, at the time of the agreement and consequent assignment to B. B. Tilt and Son, stood in the name of Edwin T. Prall, the testator. Of this fact, the Tilts had notice. They were both directors of the Phœnix Manufacturing Company, and the former was president. The letter of attorney was, as before stated, signed by Rachel M. Prall as executrix. She alone proved the will. Edwin T. Prall, the testator, by his will, after making certain provisions for his children, gave the balance of his estate, real and personal, to his wife, Rachel M. Prall, for and during her widowhood, and directed that in a certain contingency, which had happened when the agreement for the assignment of the stock as security was made, his executors might advance to each of his sons, Mortimer and Edwin, $10,000, to be charged to their respective shares of his estate, and should pay to each of them a certain annuity. He empowered his executors to sell any part or parts of his estate, real or personal, at public or private sale, and to re-invest the proceeds at discretion. It is alleged that when the transfer of the stock in question to B. B. Tilt was made, Mortimer and Edwin had not only received all the money to which, under the will, they were entitled in any event before the death of their mother, but that each of them was indebted to the estate for advances made by the executrix, to an amount exceeding his entire interest in remainder in the estate, so that each of them had, at that time, received from the estate more than his share thereof in any event or contingency. The transfer of the stock to B. B. Tilt and Son, is said to have been made merely for the accommodation of Mortimer and Edwin, they and the executrix supposing that the latter had full power and authority so to dispose of the stock. It is alleged to have been, in fact, a fraud on the other children, legatees. The complainants insist that the Tilts should be decreed to deliver up the stock, as trust property misappropriated by the trustee. The Tilts had notice that the stock stood in

the name of the testator, but it does not appear that they were aware that the transfer to them was a misappropriation. No fraud appears in their conduct in the transaction. Edwin T. Prall, according to his own testimony, first approached them with an offer to sell the stock to them, and urged them to buy it. The object in selling it was alleged to be to raise capital for the business of Prall Brothers. They declined to buy. He then offered the stock to them as collateral security for credit, and the agreement to give credit upon it as collateral security was then made. Albert Tilt, between whom and Edwin T. Prall (Benjamin B. Tilt had retired from active participation in the business of his firm before that time,) the arrangement and agreement were made, testifies that he understood that the stock was the property of Prall Brothers, and had been acquired by them on account of their interest in the estate of their father, and that Edwin "so gave" him "to understand." It is true, that to the question, "Did you ever represent to Albert Tilt or Benjamin B. Tilt, or intend to represent, that this stock was the property of yourself and your mother, or either of you?" Edwin replied, "I never did;" but this ambiguous statement cannot outweigh the defendants' answer (which is full and responsive to the bill,) and the evidence of Albert Tilt. Besides, Albert Tilt was not sworn until after the giving of the above testimony by Edwin, and, although he testified that the statement made to him as to the ownership of the stock was made by Edwin, the latter was not called to contradict him. Moreover, the proposition in writing, made by Prall Brothers to the Tilts, is some evidence on this score. It is as follows: "We hereby offer to transfer to you 558 shares of the Phœnix Manufacturing Company, Paterson, N. J., as collateral security for credit to the amount of $14,000 on all bills of goods purchased by us from you to the above amount; also to give our promissory notes, at four months' time from the average date of said bills, to secure the payment of the same. If accepted, please send us receipt of stock and open our credit to the amount mentioned above, by sending an order for silk on the

Phœnix Manufacturing Company, Paterson, N. J." The certificates of the stock were, at the date of that paper, with the letter of attorney, in the possession of the Tilts, having been delivered to them by Prall Brothers in pursuance of the verbal agreement. The stock is not referred to in that proposition as the stock of the estate, but is treated as the property of Prall Brothers, and there is no pretence that there was any intention to conceal or misrepresent. There was, indeed, no reason or occasion for any concealment or misrepresentation. The executrix and Edwin both testify that they and Mortimer all thought that the executrix had the right to pledge the stock, and the Tilts had not, as yet, sold any goods on the faith of the transfer. Again, Edwin had been offering the stock for sale before the agreement was made. He offered it to Albert Tilt, and he had offered it to Mr. Green and to Mr. Ryle—to the latter at fifty cents on the dollar of its par value. The defence might rest on Edwin's representation that the stock was the property of himself and Mortimer, and the fact that Prall Brothers had possession of the certificates and a letter of attorney in blank, signed by the executrix, (who did not otherwise appear in the transaction,) given by her to them, with the certificates, to enable them to use and dispose of the stock as their own in the arrangement with the Tilts. That delivery of the certificates and letter of attorney was, under the circumstances, full corroboration of Edwin's statement to Albert Tilt. It was a representation on her part to the Tilts, that Prall Brothers were the lawful owners of the stock. and fully empowered to deal with and dispose of it accordingly. But, to go further, the Tilts had no actual notice of the contents of the will. If, under the circumstances, they were chargeable with constructive notice, such notice would have informed them that the executrix had power to dispose of the stock to change investments; that she had a life interest in it; that she had power to advance to Mortimer and Edwin each, $10,000, in a contingency which had happened, and that, in that contingency they were also each entitled to an annuity out of the estate. The notice would by no means have con-

tradicted Edwin's statement to Albert Tilt, and the Til's had no means of pursuing the inquiry as to the truth of that statement. It is argued, in behalf of the complainants, that the fact that, at a meeting of the creditors of Meyenburg, Prall & Co., of which firm Mortimer was then a member, in the fall of 1873, the executrix was advised by her counsel not to endorse, for the accommodation of that firm, their composition paper, was notice to the Tilts that Prall Brothers were not the owners of the stock in question; but obviously it was not notice to them, if they or either of them were present, (which is not clearly proved,) of the untruth of the representation made months afterwards in regard to an entirely different matter It may be further remarked, in connection with the subject of notice, that it was not until about a year after the transfer to the Tilts that Mortimer and Edwin formally released the executrix from the discretionary advances of $10,000 each, and the annuities given to them in the will. It is alleged that, at the time of the transfer, each of them was indebted to the estate in a sum exceeding his entire interest in it, but the fact is not proved. Edwin appears, according to his own testimony, to have been indebted, at that time, for advances, to the amount of only $7900, and it is said (though the evidence is by no means clear on that point) that Mortimer was indebted to the amount of $13,500, for money applied by him, without authority, from the funds of the estate to the use of his firm of Meyenberg, Prall & Co. It is true that it is said that in 1875, when Prall Brothers failed, the indebtedness of Mortimer to the estate, for advances, was $18,604.70, and that of Edwin, on the same account, was $20,576.88; but that was more than a year after the transfer. Nor is it possible to say from the evidence how these so-called advances should be regarded. It does not appear whether they were loans or not. If they were, they may have been secured. But however that may be, the Tilts had no notice on the subject. It is evident that the executrix continued to make advances to Mortimer and Edwin after the transfer to the Tilts. Prall Brothers failed

in the spring of 1875. The bill in this cause was not filed until September following. Mrs. Campbell and William Prall were of full age at the time when the transfer to B. B. Tilt and Son was made. That firm, beyond all question, took the assignment in good faith. Edwin testifies that it was given to them in good faith. He says that the pledge, so far as he and Mortimer were concerned, was made in good faith, without suspicion that their mother had not the legal right to make it. She testifies to the same thing, and the Tilts both answer and testify to their own *bona fides* in the transaction, and their want of notice, and the absence of any suspicion on their part of any legal or equitable objection to it. On the faith of it they sold their goods on credit to Prall Brothers, and that firm are now indebted to them in the sum of about $10,000, for which they have no security except the stock. B. B. Tilt and Son have an unquestionable right to the life estate of the executrix in the stock. They have an unquestionable claim, also, to any interest, present or prospective, which Mortimer and Edwin may have in it. But, in my judgment, their right goes further. They stand before the court as *bona fide* purchasers without notice, for valuable consideration to the extent of their debt, and as such, they are entitled to the protection of equity. They will not be decreed to re-assign the stock, except on payment of the debt and interest for which it is security, with their costs of this suit.*

HOYT *vs.* HOYT.†

1. *Held*, in a suit to set aside or to reform a deed on the ground of fraud, that the fraud was not proved.

2. Statements of a third party, respecting his rights in property in controversy between complainant and defendant, and denying defendant's rights, not made in his presence, are not competent evidence against him.

3. The parties are confined to the issues made by their pleadings in a court of equity, as much as in a court of law.

---

* Decree affirmed, 1 *Stew.* 479.

† Cited in *Pasman* v. *Montague*, 3 *Stew.* 393.

4. Where the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the complainant is not, in general, entitled to a decree by establishing some one or more of the facts quite independent of fraud, which might, of themselves, create a case under a distinct head of equity from that which would be applicable to the case of fraud originally stated.

Bill for relief. On final hearing on pleadings and proofs.

Mr. John Linn, for complainant.

Mr. W. Brinkerhoff, for defendant.

THE CHANCELLOR.

The complainant, by her bill, seeks to set aside, or, failing that, to reform, on the ground of fraud, a deed of conveyance in fee, for an undivided half of certain land in Jersey City, executed and delivered by her to the defendant, who is her son, in the spring of 1867. She alleges that she was then the owner of the premises in fee, and that, at the solicitation of the defendant, she consented to convey to him, in consideration of natural affection, an estate in remainder in the property, in fee, to begin at her death; that he caused a deed to be prepared, to be executed by her, and that she executed and delivered it in the belief that it conveyed such estate in remainder, and no more. She further alleges that she is surprised to learn that the deed was an absolute conveyance of the whole estate. The deed is dated February 1st, 1867, and was acknowledged on the 7th of March following, but was not recorded until January 27th, 1868. The defendant, by his answer, denies all fraud in the transaction, and alleges that the conveyance is according to the complainant's intention. He states that in 1860 he and his father, now deceased, were the owners of the land in equal snares, as tenants in common, by virtue of a conveyance of it to them by Barzilla W. Ryder, in 1859, for the consideration of $9000, of which $3000 were paid by them, in equal shares, and the balance, after deducting $2000, the amount of a

mortgage on the premises, subject to which the conveyance was made, and the payment of which was assumed by them, was secured by their bond and mortgage on the property. He further says that in 1860, his father, being about to leave his home in Jersey City, to go to New Orleans on business, and desiring to make provision for the complainant in case of his death, by conveying to her his half of the property, caused a deed of conveyance of his interest in the land to the defendant, to be prepared and executed, and delivered it to the latter, who directed an attorney-at-law of Jersey City to draw a deed of conveyance of that interest to the complainant, in fee, to be executed by him accordingly; and that a deed was thereupon prepared, and was executed by him in the belief that his instructions had been obeyed, and that it conveyed to his mother only his father's half of the property. He further alleges that he subsequently, but not until many years afterwards, discovered that that deed purported to convey the entire premises, and that he thereupon informed the complainant of the mistake, and requested her to re-convey to him his half of the property, to which she consented, and that he accordingly caused a deed of conveyance (the deed in question in this suit) to be drawn by a neighboring scrivener, which was executed by the complainant with a full understanding of its contents and their effect. The complainant admits that she intended to convey to the defendant an estate in the undivided half of the land, but alleges that by fraud, she was induced to convey a greater estate than she intended. The burden of proof is upon her. Apart from her own testimony, there is none. The testimony as to the statements alleged to have been made by her husband, the defendant's father, asserting his claim to the whole property, and giving his reasons for obtaining the conveyance from the defendant to the complainant, are not competent evidence. None of them were made in the defendant's presence. There can be no doubt that the deed in question was drawn with the complainant's knowledge, and that there was no concealment of its contents from her. She admits that it was read

over to her before she signed it, and there is no reason to believe that it was not read fully and correctly. She also admits that she understood that it conveyed the half of the property to the defendant. It appears from her own statement, it may be remarked, that she was willing to convey one-half of the property to him, although she had two other children; and it also appears by her testimony, that she relied on his assurance that she should, notwithstanding the conveyance, have the use of the property for her life. The defendant testifies that she not only understood the effect of the deed, but that after she executed it, she said to him that she was "only giving him his own." He denies that he gave her any assurance whatever as to the use of the property or receipt of the rents by her, before or at the time when the conveyance to him was made. He says he told her, in 1864, at the time of his father's death, that she should, on condition that she would pay the taxes, water rent, &c., and keep the property in repair, have the income of his part of the property until he should desire to have it himself; and he says that he intended this as a contribution to her support, to continue so long as he might see fit. He says that when she appeared to him no longer to need it, he proceeded to collect the income himself. The bill is not filed to enforce an agreement to permit her to take, for her lifetime, the rents and profits of the property conveyed to him. It recognizes no such agreement. It alleges, and the relief sought is based on the allegation, that the deed in question was, by fraud, made to convey the entire estate in the property, instead of an estate in remainder after her death. The parties are confined to the issues made by their pleadings in this court, as much as in a court of law. *Brantingham* v. *Brantingham*, 1 *Beas.* 160. And it is an established doctrine of this court that where the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the complainant is not, in general, entitled to a decree by establishing some one or more of the facts, quite independent of fraud, which might, of themselves, create a case under a distinct head of equity from

that which would be applicable to the case of fraud originally stated. 1 *Dan. Ch. Pr.* 328; *Montesquieu* v. *Sandys*, 18 *Ves.* 302. The defendant testified that he informed the complainant of the mistake which had been made in his conveyence to her, and thereupon, in view of it, requested her, as an act of justice, to re-convey to him his half of the property. He says: "I first discovered that there had been a mistake in the deed from myself to my mother, in conveying the whole of the property instead of one-half, by reason of Sidney B. Bevans (his brother-in-law, husband of his sister,) or his agent, searching the records and telling Mr. George McLaughlin that the whole of the property stood in my mother's name, and he first told me of it; when I first heard it, I went up to the county clerk's office to investigate for myself; I found it was so, by examining the records; I was not satisfied with my own examination, and got Jacob R. Wortendyke (since dead) to search the records; he reported to me that the whole property stood in my mother's name; I immediately went to my mother and asked her for a deed to correct it, which she gave me, after two or three applications; when I spoke to her the first time about it, she was as much surprised as I was; I told her that Bevans had discovered that it was so, and that I wanted it corrected and righted by giving me a deed for the half that belonged to me, which she did on the second application; she said if I would have one fixed up she would sign it; I explained to her how the mistake had occurred, that the lawyer, in drawing the deed, had drawn it up for the whole instead of the one undivided half; she said, 'get a deed up and I will sign it;' on my first application to her for a deed for the undivided one-half part, she objected, because she thought I wanted a deed for the whole of it; before she signed the deed, she consulted Joel I. Hoyt about it; she made no real excuse when I first asked her; I think it was on the second application she found that I did not want a deed for the whole of it; she made no particular objection at the first interview; it was a surprise to the whole of us; at this first interview, we were at my mother's

house, in Wayne street; no one else was present; no one was present at the second interview, besides us; at this interview, she asked me to have the deed drawn; I saw her again in a week or ten days; I saw her almost every night; it was in a week or ten days that I saw her in regard to this matter, again; that was as soon as I could get the deed prepared; I think the deed was then ready." He further says that no representations were made to her by himself or the scrivener, when the deed was signed by her; that before signing the deed, it was read over to her by the scrivener; that before he and she went there, he told her how the deed was to be drawn; that it gave him one-half of the whole premises; and he says he made no different representation to her on the subject; that although he withheld the deed from record, it was at her request, she giving as her reason, that if recorded it would make trouble with Bevans, her son-in-law. He adds that after withholding the deed from record for a time, according to her request, he, for his own protection, caused it to be recorded. He further says that nothing at all was said by him or her about the deed taking effect on her death; and he swears that it was given on no conditions, and that the only inducement for giving it was, a disposition to do justice to him by re-conveying to him the property which he, by mistake, had conveyed to her. It appears, from the testimony of Joel I. Hoyt, who was the half-brother and partner in business of the complainant's husband, that before the deed was executed, she told him that on searching the records it had been discovered that the whole of the property had been conveyed to her, and on his expressing his doubts, she assured him that such was the fact, and told him that the defendant requested her to re-convey half of the property to him; and she then asked the witness whether it would be right to do so, to which he replied, that she very well knew that one-half of the property belonged to the defendant, and if a conveyance of that half had been made by him to her, by mistake, it would be right to re-convey it. He testifies that she afterwards told him that she had re-conveyed the half to the defendant. The

position of the defendant is strengthened by the clear evidence that he was the owner, in his own right, of one-half of the property, and by the evidence that the release from his father to himself, and the conveyance from him to the complainant, were intended merely to change the title of the half owned by his father. Both deeds express a nominal consideration merely. The wife of the defendant did not join in the conveyance from him, and the deed to the complainant was never delivered over to her or her husband, but was left by the defendant at the county clerk's office to be recorded, and by him taken away from there and retained in his possession. Besides, the defendant, after the conveyance to the complainant, continued to deal with the property as if he were still the owner of half of it. He collected the rents and paid interest and principal upon the encumbrances. He caused the buildings to be insured against fire, in the name of both himself and the complainant as their property, and all the leases were signed by both of them as the owners. That at the time of the conveyance to the complainant he was the owner in his own right, of half of the property, is clear. He paid one half of the first payment, $200, on account of the purchase money, and also of the second payment, $2800, on the same account. The deed was to him and his father, and both assumed the payment of the mortgage of $2000 and interest, subject to which the property was conveyed to them, and both executed the bond and mortgage for $4000 and interest, to secure the payment of the balance of the purchase money. I do not consider it necessary to determine whether the defendant is or is not mistaken as to the person by whom the deeds, by which the conveyance to the complainant was made, were drawn. They were evidently drawn by the same person, and as evidently constituted part of the same transaction. It would not be surprising if the defendant should be mistaken as to the minor details of the transaction after the lapse of fifteen years. In all important particulars he is corroborated. I leave out of consideration, as foreign to the issue, a large amount of testimony which the acrimony which usually attends and characterizes a family

controversy, has introduced into the case. The fraud alleged in the bill of complaint is not proved. The bill, therefore, will be dismissed, with costs.*

LARGE *vs.* DITMARS and others.

Sheriff's sale set aside on the ground of surprise, such as to entitle the petitioner (mortgagor) to the aid of equity, upon terms. He was permitted to redeem complainant's mortgages by paying the amount due thereon, with execution fees, and complainant's costs of this application, within thirty days from the time of entering the order upon this decision.

Application to set aside sheriff's sale under *fieri facias* for sale of mortgaged premises. On petition and depositions.

Mr. John Schomp, for petitioners.

Mr. John N. Voorhees, for complainant.

THE CHANCELLOR.

This is an application to set aside a sale by the sheriff of Hunterdon county, of mortgaged premises under a *fieri facias* in a foreclosure suit. The premises were subject to three mortgages. The first was upon other premises also, (the latter property being of value sufficient to pay it,) and since the filing of the bill, it has been assigned to and is now held by the complainant. The second is the complainant's mortgage, on which the bill was filed. The third is held by the administrators of Andrew Suydam, deceased, who were not parties to the suit. The property was sold on the day fixed for the sale in the advertisement, notwithstanding earnest requests on the part of the owner, Mr. Ditmars, and the administrators of Suydam for an adjournment, if it were for only three or four days. At the sale, it was struck off to the complainant's son,

* Decree affirmed, 1 *Stew.* 485.

for $4950. There were no bids upon it except those made by the complainant's solicitors and the administrators. Both Ditmars and the administrators had had assurances from their counsel, on which they relied, that an adjournment would be granted by the sheriff. The complainant's son, one of his solicitors, had told Mr. John Schomp, the brother of Peter Schomp, one of the administrators, two or three weeks before the sale, that no adjournment would be granted if the complainant could prevent it, and Mr. John Schomp communicated this to his brother Peter, almost a week before the sale. The property is said to be worth at least $6000. It is the homestead of Ditmars, and has been adorned by him with much care and expense. As an investment, it is said by one of the complainant's solicitors to be worth $5000. If the application were based, however, on inadequacy of price alone, no relief would be granted; but it rests, also, on the refusal of the sheriff to adjourn the sale, and the consequent surprise of Ditmars. The complainant's reason for refusing to consent to an adjournment was that Ditmars would, if an adjournment were granted, be thus enabled to gather the crop of grapes, worth, it is said, from $300 to $400, from the vineyard on the premises, and apply the proceeds of the sale thereof to his own use. The complainant's solicitors offered to consent to an adjournment, if he would give security that he would apply the value of the crop of grapes towards payment of the decree. I am unable to find, from the testimony, that the sheriff's refusal to adjourn was an unreasonable exercise of his discretion, and yet there is such a case of surprise on the part of Ditmars as to entitle him to the aid of this court. He will be permitted to redeem the complainant's mortgages by paying the amount due thereon, with the execution fees. There is no decree for the administrators. Ditmars can be protected by means of subrogation in his equity in respect to the first mortgage. If, within thirty days from the time of entering the order upon this decision, he shall redeem complainant's mortgages by paying the amount due on the decree therefor, with the execution fees,

including the sheriff's fees of sale and the complainant's costs of this application, the sale will be set aside; otherwise it will stand.

FORCE vs. THE CITY OF ELIZABETH.*

1. Equity, in relieving against the loss of a bond payable to bearer, makes no discrimination against loss by theft.

2. A court of equity is not ousted of any part of its original jurisdiction by the fact that a court of law exercises the same or a similar jurisdiction.

Bill for relief and general demurrer.

Mr. R. E. Chetwood, for demurrer.

Mr. B. Gummere, for complainant.

THE CHANCELLOR.

The complainant, on the 21st of January, 1872, was the owner of two bonds payable to the bearer thereof, executed and issued by the defendant—one for $500 and the other for $1000, each payable with interest. The interest was payable on the presentation of coupons or warrants, also payable to the bearer thereof, attached to the bonds. The bonds, with the coupons attached, were, on the day above mentioned, stolen from the vault of the Trenton Banking Company, where the complainant had deposited them for safe keeping. She gave notice by advertisement of her loss, but failed to recover either the bonds or the coupons. In April, 1875, she tendered to the defendant proper indemnity, and demanded payment of the principal and interest of the bond for $500, the principal of which was then due, and of the interest due on the other bond. The principal of that bond was not due. Payment was refused. She subsequently instituted this suit

* Cited in *Force* v. *City of Elizabeth*, 1 *Stew.* 404.

to compel the defendant to pay to her the amount due, and to become due during the pendency of this suit, on the bonds, offering to indemnify the defendant against loss or damage by reason of the payment, in such manner and with such sureties as this court might direct. In support of the demurrer, the defendant's counsel insists that the complainant is not entitled to relief in equity, because the loss alleged in the bill was through theft, and the bonds and coupons were not due at the time when they were stolen, and were of the character of negotiable paper; and further, because she has an adequate remedy at law. Neither of these grounds is tenable. Equity, in relieving against the loss of such instruments as these bonds, makes no discrimination against loss by theft. If the complainant has a remedy at law, it is by virtue of the statutory provision that "in an action upon any negotiable instrument which is lost, or upon any plea or notice of set-off founded on such instrument, the fact that such instrument was lost while negotiable by delivery or otherwise, shall not prevent a recovery thereon in a court of law; but a court of law shall give judgment in the same manner as if such note was not lost, and may take the same order thereon as a court of equity would to indemnify the party charged against the payment thereof." *Revision* 688, § 7. Apart from the question suggested, whether the use of the word note in the latter clause of the section above quoted does not limit the power given by the section to suits upon or set-offs of lost promissory notes, it is enough to say that this court is not ousted of any part of its original jurisdiction by the fact that a court of law exercises the same or a similar jurisdiction.

The demurrer will be overruled, with costs.

PHILLIPS *vs.* SCHOOLEY.

The complainant sought a decree against the holder of a bond and mortgage by assignment from the legal owner thereof, awarding them to him on the ground of his equitable ownership of them. Demurrer to bill allowed, it not appearing thereby how complainant became entitled to the bond and mortgage, and there being no allegation that he was entitled to them at all, and it not appearing that he had not received the full benefit of the consideration of the assignment, and the allegations of fraud being general, and on information and belief merely.

Bill for relief and general demurrer

Mr. G. A. Anderson, for demurrant.

Mr. I. W. Lanning, for complainant.

THE CHANCELLOR.

The complainant seeks a decree awarding to him, from the defendant, a bond and mortgage of which he claims to be the equitable owner. The defendant is the holder of them by assignment from the legal owner thereof. The bill alleges that they were the property of the estate of Aaron Phillips, deceased, and were held accordingly by his administrators, Alfred W. Smith and Catherine E. Phillips, widow of the intestate, (she was the complainant's mother, and is now dead,) "as of the money and property of the estate of said deceased, or of the surplusage thereof in their hands for distribution;" that while they so held them, the complainant's mother (he being then a minor) took out letters of guardianship of his person and estate; that soon afterwards, Smith assigned his interest in the bond and mortgage to her as guardian of the complainant, and that they were received by her as such guardian, to hold them as the property of the complainant, for his use and benefit, and that they were so held by her

until they were assigned by her, as such guardian, to one Hartman, by whom they were assigned to William R. Schooley, who assigned them to the defendant. The bill further states that the complainant "is informed and believes" that the assignment from his mother to Hartman was procured by the latter "by means of false and fraudulent representations by him, made to her, by means whereof he procured the assignment from her in the way of payment or exchange for the so-called territorial right or privilege and liberty of making, constructing, using and vending a certain alleged patented improvement in dumping-wagons and extension trough therefor, in the State of Rhode Island, which so-called right and privilege were assigned, or pretended to be, to her by the said Hartman, and were taken and received by her in her personal capacity solely."

The legal title to the bond and mortgage is in the defendant. The complainant's statement of his equitable title to it is defective. The bill states that his mother's co-administrator assigned the interest of the latter in these securities to her as guardian of the complainant, and that she received and held them as the complainant's property. It does not appear that the complainant was entitled to them for or on account of his distributive share of his father's estate, nor, indeed, that there was any surplus to be distributed. His mother, at the time of the assignment by her, held the legal title to them, as far as appears, in trust for the estate. How he became entitled to them does not appear, and, indeed, the bill does not allege that he was entitled to them at all. It merely states, as before mentioned, that she received them as his guardian, to hold them as his property for his use and benefit, and that they were so held by her until she assigned them. The statements of the bill in relation to the consideration of the assignment, are upon information and belief merely. What the fraud alleged was does not appear, nor does it appear that the complainant, notwithstanding the fact that the assignment from Hartman to his mother was, as is

alleged, to her individually, and not as guardian, did not receive the benefit of it. Nor does it appear what has become of the right. He does not offer to re-assign it.

The demurrer will be allowed, with costs.

AVERY and others *vs.* THE BLEES MANUFACTURING COMPANY and others.

The bill in this cause was filed for relief against alleged fraudulent acts of a board of directors, alleged to be unlawful, and to have existed merely by usurpation. The property of the company requiring to be preserved pending the litigation, and the conduct of the president and his associates in the direction having been such that they could not be permitted to retain control of the affairs of the company, a receiver was appointed.

Bill for relief. Motion for the appointment of a receiver.

Mr. J. P. Stockton, for motion.

Mr. James Wilson, contra.

THE CHANCELLOR.

On the case made by the bill and answer, there is no room for doubt or hesitation as to the course proper to be pursued. Two of the complainants are creditors and stockholders, and the others are creditors only, of the company. The company was incorporated under the "act concerning corporations." Its capital stock was, nominally, $500,000, in shares of $100 each. Shares to the amount of $255,000 were issued to three persons, the complainants Avery and Studwell and the defendant Stears—eight hundred and fifty shares to each. Five shares were issued to each of two other persons. From the statements of the answer, it appears that Stears contributed $10,000 in money, for the purchase of the patent rights

under which the company proposed to carry on its business of manufacturing, and that machinery, tools, &c., to the value, according to the answer, of not more than $35,000, were purchased and paid for with stock of the company, to that amount, at its par value, and the factory was built, and the land whereon it was erected, purchased with $25,000, contributed to the company's funds for the purpose by the citizens and municipality of Bordentown, for which stock was issued to the contributors. The company has never entered upon the business of manufacturing. On the 1st of August, 1876, the president and two other persons, acting as directors, (though, as the complainants allege, they had not been lawfully elected as such,) unlawfully, and clandestinely and collusively, as the bill alleges, authorized the execution of a bond of the company and a mortgage on the factory premises, to Garrit S. Cannon, Esq., as trustee for the contributors of the $25,000, to secure the payment of that sum, with $2000 added, for interest, on or before the 1st of September, 1876, and on the same day, in like manner, authorized the signing and sealing of a note in behalf of the company, in favor of the president, for $4000, alleged to be due to him on account of his salary as president, and another note of $1045 for the amount of loans alleged to have been made by him to the company. The complainant states that though the seal of the company was affixed to the bond and mortgage and notes, it had been surreptitiously taken for the purpose from the office of the complainant Avery, who was the lawful secretary and treasurer, and as such, as the bill alleges, by appointment of the board, the lawful custodian thereof. The company, before the passing of the resolutions authorizing the making of those instruments, had been sued for debts and judgments recovered against them. Mechanics lien claims had been filed against the factory building and premises, and suit had been commenced on them. The company's treasury was empty. The bond and mortgage, it is alleged by the defendants, were made under threats of proceedings in equity to recover the contributions, the re-payment

whereof was intended to be thereby secured. The defendant, Mr. Cannon, says, in his answer, that the company was, when the resolution was passed, and still is, insolvent. There can be no doubt that the company then was fast going to wreck. It had, according to the bill, in November, 1875, employed a number of workmen in cleaning and setting up the machinery, but they were discharged before the filing of the bill. There was, when this suit was commenced, no reasonable prospect that the company would be able to save its property or carry on business, and there is none now. It has no available assets. Its factory premises are mortgaged for, as is alleged, more than their value. Numerous suits have been brought against it for the recovery of debts due from it, which it has no means to pay. According to the answer, its stock, excepting that issued for the $25,000, and for machinery, tools, &c., and the $10,000 paid for the patent rights, was issued without any consideration. The complainants Avery and Studwell, as stockholders, are in a position to invoke the aid of this court against the bond and mortgage, which were, in fact, given to stockholders for money contributed to the company, on an agreement to take stock therefor, and against the notes given to the president. Though these notes have been assigned by Stears, the assignment does not appear to have been for any consideration, and, as far as appears, the endorsee holds them in trust for him. Suit has been brought against the company, upon them, in the name of the endorsee. The president seems to be the real plaintiff therein. The bill is not filed under the provisions of the act concerning corporations in respect to insolvent corporations, but for relief against alleged fraudulent acts of a board alleged to be unlawful, and to have existed merely by usurpation. The property must be preserved pending this litigation, and the conduct of the president and his associates in the direction has been such that they cannot be permitted to retain control of the affairs of the company. A receiver will be appointed.

It seems quite clear that the corporation should be proceeded against in insolvency, either by a new bill or an amendment of the bill in this suit.

Cline *vs.* Prall and others.

1. Application to set aside sheriff's sale because of his alleged refusal to adjourn it, that the petitioner (a subsequent mortgagee) might have an opportunity to ascertain the amount of the encumbrances subject to which the property was to be sold, refused, it appearing by the affidavits submitted in opposition to the application, that such reason for adjournment was not given, and that a written statement of the exact amount due on those encumbrances was exhibited at the sale, and that pains were taken to give all desired information on the subject; the sale also appearing to have been conducted fairly, and every effort being made to make the property bring a good price, and the property appearing to have brought such a price.

2. Offers to pay more for property than it brought at a public sale are, in themselves, no grounds for setting aside the sale.

Motion to set aside sheriff's sale under *fieri facias* for sale of mortgaged premises. On petition and affidavits and counter-affidavits.

Mr. J. M. Robeson, for petitioner.

Mr. M. Wyckoff, for complainant and purchaser.

The Chancellor.

George W. Eckel, one of the defendants, holder of a mortgage subsequent to that of the complainant, applies for an order setting aside the sale by the sheriff of Warren under the *fieri facias* issued in this suit for the sale of the mortgaged premises. By that writ, the sheriff was commanded to raise, first, the money due to the administrator of Samuel Bellis, deceased, on his mortgage, with costs, and next, the amount

due the complainant on his mortgage, with costs, and then the amount due Mr. Eckel. The sale took place on the day fixed in the advertisement of sale. Eckel was present. The property, which was a farm of one hundred and thirty-two and a quarter acres, was sold to William Shurts, for $6050, subject to encumbrances, the holders of which were not made parties to the suit prior to those above mentioned, and amounting, on the day of sale, to the sum of $9512.07. The price of the property was to the purchasers, therefore, $15,562.07, or about $118 an acre. Eckel requested the sheriff to adjourn the sale for thirty days, but the latter refused to do so without the complainant's consent. This the complainant would not give. Eckel, in his petition, states that he requested the sheriff to adjourn the sale in order that he might have an opportunity to ascertain the amount of the encumbrances subject to which the property was to be sold. It was alleged on the argument, but it is not alleged in the petition, that other persons were deterred from bidding on the property by the uncertainty as to the amount due on the encumbrances subject to which the property was sold. It appears from the affidavits put in on the part of the complainant and the purchaser, that the sale was fairly conducted, and an earnest effort made to cause the property to sell to the best advantage. The complainant's reason for refusing to consent to an adjournment, was the conviction that the property would bring a higher price at that time than it would after an adjournment. It appears that Eckel gave no reason for desiring an adjournment; that he would not say whether he would buy the property or not, although he was urged by the complainant to purchase it, and the solicitor of the latter, as an inducement, told him that if he wished to buy the property, he should have as much time to raise the money for the purchase as he would have if an adjournment of thirty days was granted, and that the necessary arrangement with the holders of the Bellis mortgage would be made to that end. It also appears that a written statement of the exact amount due on each of the encumbrances subject to which the property was to be sold,

was exhibited at the sale, and pains were taken to give all desired information on the subject. It also appears that no one objected to the way in which the property was sold. Eckel has produced the affidavit of John Sherrer, in which it is alleged that the latter was prevented from bidding on the property "by the way in which it was put up, subject to encumbrances;" that he "not knowing what the encumbrances were, and expecting to bid by the acre and receive a clear title from the sheriff, and not understanding how much he would be bidding by the acre when the sale was made, by bidding a gross sum over the encumbrances, was deterred from making a bid." It appears, however, by the affidavits of a number of persons present at the sale, that the complainant's solicitor, during the progress of the sale, publicly proclaimed that if any one did not understand the written statement above mentioned, he would explain it to him fully, and that if any one wished to know at any time how much the bid would be by the acre, he would inform him. The sheriff swears that the sale was largely attended and fairly made; that no one interfered, or attempted to interfere, in any way with it, or did or said anything calculated to injure it, but every one spoke in praise of the property, and every effort was made to make it bring a good price; that it was cried for a much longer time than usual at such sales, and fair warning was given that the property would be sold; that though Eckel asked for an adjournment, he said nothing about wishing to have his counsel there to look after the title, nor did he say that he did not fully understand the situation of the property; that a full and clear statement of the claims on the property was made by the complainant's solicitor, who offered to give any information that any one desired; that the sale was cried for a considerable length of time, and there were two adjournments during its progress; and he adds, that the property brought as much as property ordinarily brings, at this time, at sheriff's sales. Eckel has no cause of complaint. The allegation of his petition on which he bases his claim to relief, and on which it must rest, is disproved by the affidavits submitted in opposition. He ex-

presses his opinion that the property, if re-sold, would bring a much larger price, and declares his willingness to buy it at the amount of encumbrances prior to his own. Sherrer, it may be stated, says that if the property be re-sold he will give, at least $125 an acre, but John H. Lantz swears that, after the sale, Sherrer, in a conversation with him, gave it as his opinion that the purchaser had "paid pretty near enough for the property, taking all things into consideration." It brought, as before mentioned, about $118 an acre. The purchaser, who is a stranger to this suit, swears that that is a fair price for the property, and that the bid at which the property was struck off to him, was the last he would have made. These offers of Eckel and Sherrer are, in themselves, no grounds for setting aside the sale. *Campbell* v. *Gardner*, 3 *Stockt.* 424, 425; *Conover* v. *Walling*, 2 *McCarter* 168, 178.

The order to show cause will be discharged, with costs.

CLOW *vs.* TAYLOR.*

1. Decree for specific performance of an oral agreement for the conveyance of lands, refused for want of certainty in the agreement, and on the ground that the claims on which the complainant based his right to the relief were not substantiated by the evidence.

2. The defendant consenting to the stating of an account of the transactions between himself and the complainant, it was so ordered.

Bill for specific performance or an account. On final hearing on pleadings and proofs.

Mr. Jacob Weart and *Mr. L. S. Chatfield*, (of New York,) for complainant.

Mr. C. H. Voorhis, for defendant.

---

* Cited in *Brown* v. *Brown*, 6 *Stew.* 657.

THE CHANCELLOR.

The complainant seeks to compel the defendant to perform specifically, an oral agreement made between them in September, 1864, for the sale by the latter to the former of about fifty acres of land, in the county of Bergen. He alleges that he had paid the whole of the purchase money, and that possession of the premises was given to him by the defendant, in 1864, in pursuance of the agreement, and that he has had possession ever since, and has taken charge of the property, and kept it in order and repair, and spent money for those purposes, and made improvements thereon, and has paid all the taxes. The defendant, by his answer, sets up the statute of frauds, and while he admits that an oral agreement for the sale of the land by him to the complainant, at the price of $100 an acre, was made at the time stated by the latter, he alleges that the sale was on condition that the money should be paid immediately, and that the complainant should immediately build upon the premises a dwelling-house, of not less value than $3000 or $4000. He further says that he gave possession of the premises to the complainant under the expectation that the latter would comply with these conditions, and that the complainant retained possession for a short time only, and not more than a year, and that since that time he himself has had possession, and has made all repairs, and paid all the taxes, and he denies that the complainant has paid all the purchase money.

The evidence shows that the complainant took possession of the property in 1864, and planted some trees upon it, and tilled it for one season, and that he paid the tax for one year, but he does not appear to have had possession since then, and the taxes, since 1865, have been paid by the defendant. Indeed, the evidence is not that the complainant has, as he testifies, "virtually" held possession ever since 1864, but that since 1865 he has not had possession at all, but abandoned it in that year. Nor does it appear that the complainant has paid all of the purchase money. He paid on account of it, $600 on the 29th of September, 1864, and $400 on the 8th

of December following. For these payments, he has receipts signed by the defendant. He testifies that he paid to the defendant $500 more on the same account in July, 1865, for which he has no receipt. He claims, also, to have paid $900, the full amount of a note made by the defendant, which he negotiated at the request of the latter, and, as he says, paid at its maturity out of his own funds. In addition to these sums, he testifies, and such appears to have been the fact, that it was agreed between him and the defendant that the money paid by him as the price of certain wood-land bought by them in partnership in the spring of 1865, the title to which was taken by the defendant in trust for himself and the complainant, should, in consideration of the release by the complainant to the defendant of all his interest in that property, be credited to him on account of the purchase of the land in question in this suit. The amount so paid was, according to the complainant's testimony, $3380. These payments amount, in the aggregate, to $5780. But the evidence of the alleged payment of the sum of $500 is not sufficient to establish it. The complainant swears that he made it in July, 1865. He says he thinks it was the year before he and the defendant bought the wood-land in partnership; but that was in the spring of 1865. The payment, therefore, could not have been made in July of the year preceding that purchase, for the land in question was not bought by the complainant until September, 1864. Again, he testifies that when he agreed to join the defendant in the purchase of the wood-land, he owed the latter all of the purchase money of the land in question in this suit except $1000, which he had paid in the two payments of $600 and $400. Besides, he has no voucher for the payment, nor any corroboration of his own testimony in reference to it, and the defendant explicitly and absolutely denies it. Reckoning all the other payments, he had paid when the bill was filed, which was on the 19th of April, 1870, the sum of $5280, which was not enough to pay the purchase money, with the interest to which the defendant would have been entitled thereon. The defendant testifies that he received

from the complainant $870 only, as the proceeds of the $900 note, and that of the purchase money of the wood-land, he himself paid $50. He testifies, also, that the complainant received of the proceeds of the sale of timber, &c., from the wood-land, while as yet they held it in partnership, $1055, for $900 of which he accounted by stating that he had applied the amount to the payment of the note for $900, and that for the balance he did not account at all. The complainant admits that he received that money, but swears that he paid it to the defendant. He has no voucher for the payment, nor is he corroborated in any way, and the defendant as positively swears that he never received it, and that the complainant kept it, accounting for only $900 of it, and that in the way above stated. It is urged on behalf of the complainant, that the fact that he is in possession of the note is corroboration of his statement. But it is to be remembered that he admits that the note was placed in his hands in order that he might get it discounted for the defendant's accommodation. It was payable to his order, and was endorsed by him. Had he paid it out of the $1055, he would have retained it as a voucher to be delivered up in settlement. By the arrangement between him and the defendant, the latter was to have the whole benefit of the wood-land property, in consideration of which the complainant was to receive credit on the purchase money of the land in question in this suit, for the money paid by him for the wood-land. There is no ground on which the alleged payment of the $900 can be allowed to the complainant, on account of the purchase money. Again, in June, 1868, the defendant, at the request of the complainant, and in order to raise money for the latter, executed his bond and mortgage on the premises in question in this suit for $2000 and interest, upon which that amount was borrowed and received by the complainant. The defendant was compelled, through proceedings for foreclosure and sale of the premises under that mortgage, and in order to save the property from sale under the execution in those proceedings in the hands of the sheriff, to pay the amount thereof, with interest

and costs, and he accordingly, in December, 1870, paid to the sheriff $2491.92, in satisfaction of the execution. This payment is set up in the answer to the original bill, but it was not until June 9th, 1875, four years and a half after the payment, that the complainant tendered the amount to the defendant.

In addition to the foregoing conditions, adverse to the complainant's claim for specific performance, there is another of quite as much importance. The agreement on which that claim is based, does not appear with certainty. The defendant swears that it was a condition that the complainant should immediately build a house and otherwise improve the property for his own occupation. The complainant denies that there was such an agreement; but it is evident that there was some agreement or understanding between them on the subject. He says he did not agree to build at any particular time; and in answer to the question whether he did not, at and before the agreement with the defendant, represent that his purpose in buying was to build on and improve the property as a residence for himself, he replies, "No further than I have previously stated in answer to a former question; that is, that I intended to build and live there." The defendant testifies that he sold the property to him at a low price, one-third of its present value, in consideration of his agreement to build upon and improve and occupy it for his residence. The complainant offers in evidence a letter from the defendant to him, dated December 9th, 1868. In that letter, the defendant says, in reply to a request on the part of the complainant that he would convey the land to a Mr. Davison, to whom the latter had sold it, "It is a bad season of the year, and I have no idea that the land can be sold at present, unless to some speculator, and that at large sacrifice. Speaking of injury to me, you know that I sold the property to you with the expectation of having it improved, and I would much prefer that if sold now it should be to some party that would improve; notwithstanding, if it would be of great benefit to you to have it sold, I will consent, if we can obtain a price that is satisfactory to you." It will be seen that he there

refers to the understanding between him and the complainant on the subject, and expresses a willingness to waive the condition, only out of consideration to the complainant. The improvements put on the property when the complainant was in possession, are some evidence on the subject. They were, it is admitted, made with a view to the building of a house there for the complainant's occupation. What the agreement was between the parties, in respect to building on and improving the property, does not appear satisfactorily, and specific performance would therefore, for that reason alone, be denied. The complainant, by his supplemental bill, asks an account, and the defendant, by his answer thereto, expresses his willingness to state and settle the accounts between them. There will be a decree, referring it to a master to take the account, with directions to reject the alleged payments of $900 and $500, above mentioned, the decree of the court in reference to which, on the evidence already taken, was requested by the complainant's counsel.*

HOLMES and others vs. CHESTER.†

Where one acting in a representative capacity, causes a levy to be made under an execution in his favor, on property not subject thereto, in a litigation between him and the owner of that property in respect to the levy, the latter is not debarred from testifying in his own behalf, by the fact that the former is sued in a representative capacity. In such case, he is not sued in a representative capacity, within the meaning of the statute.

Bill to quiet title. On final hearing on pleadings and proofs.

Mr. J. B. Huffman, for complainants.

Mr. P. L. Voorhees, for defendant.

THE CHANCELLOR.

This is a suit to quiet the title to certain land in Cape May county, which was conveyed to the complainant, Abigail H.

---

* Decree affirmed, 2 *Stew.* 649.

† Cited in *Smalley* v. *Lane*, 1 *Stew.* 351.

Holmes, on the first day of April, 1869, by her mother, Judith H. Holmes. Part of the land is still retained by Abigail, and the rest was subsequently, on the 19th of July, in the same year, conveyed by her and her husband, to her sister, Sarah T. Todd, also one of the complainants, who still holds the title thereto. Those deeds were recorded in a few days after they were made. The defendant claims to have a lien and encumbrance upon the property, under and by virtue of a writ of *fieri facias de bonis et terris*, issued out of this court on a decree in his favor, against Judith H. Holmes for the payment of money. His suit, in which that decree was entered, was commenced on the 7th of October, 1869, after the execution, delivery and recording of the deeds above mentioned. The defendant, by demurrer, called into question the right of the complainant to maintain this suit, but it was held that it was within the provisions of the act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same." *Pamph. L.*, 1870, *p.* 20;* *Holmes* v. *Chester*, 11 *C. E. Green* 79. The defendant answered, and the complainant replied. By the answer, the defendant admits the execution and delivery of the above-mentioned conveyances to Abigail H. Holmes and Sarah T. Todd but attacks them on the ground of fraud, alleging that they were made to hinder and defeat him in the recovery of the claim for which his suit was brought. The complainants having filed a replication, and no issue at law having been asked for, they took testimony to prove the allegations of their bill, and offered in evidence the deed to Abigail H. Holmes. The defendant examined no witness, and offers no evidence whatever. Among the witnesses sworn were the complainants. The material allegations of the bill are admitted by the answer. It admits, as before stated, the execution and delivery of the deeds to Abigail H. Holmes and Sarah T. Todd, respectively, and that they are in possession of the property, but alleges that the deeds are of no effect as against the defendant's decree, because of fraud. It was incumbent on him to prove the alleged fraud. Having failed to prove it, the case of the complain-

* *Rev.*, *p.* 1189.

ants would stand on the admissions of the answer alone. In addition to these is the proof. From this, it appears that the conveyance to Abigail H. Holmes was made in good faith for the consideration of $3000, due from Judith H. Holmes to James Holmes, the husband of Abigail; that this sum was the full value of the property, and that after the conveyance to Abigail, James put improvements, of the value of from $4000 to $5000, on the property, in buildings, fences, &c., &c. Objection was made on the hearing (though none was made when the testimony was taken, as appears by the record,) to the testimony of the complainants, as being incompetent, because, as is alleged, the defendant is sued in a representative capacity. But when one acting in a representative capacity, causes a levy to be made under an execution in his favor on property not owned by the defendant in the execution, the owner of the property levied on cannot be deprived of his testimony in protection of his rights, merely because the aggressor is, in a certain sense, acting in a representative capacity. The latter, when prosecuted in such case, cannot be regarded as having been sued in a representative capacity, within the meaning of the statute.

There will be a decree for the complainants.

SANBORN and others vs. ADAIR and others.

1. Where two purchasers of different parcels of the same tract of land, joined in a bill in equity for relief against a judgment creditor seeking to subject their land to the payment of the judgment, the objection of misjoinder and multifariousness, which was not made until the final hearing, was not entertained.

2. A person who, without notice except from the record, purchases land of one who holds it, in fact, by a defeasible title, but whose title, according to the record, is indefeasible, is, as between him and a subsequent purchaser of another part of the property, entitled to the equity which charges lands consisting of different parcels, subject to a general encumbrance, with the payment of the encumbrance, in the inverse order of the alienation of the several parts.

Bill for relief. On final hearing on pleadings and proofs.

Mr. A. A. Clark, for complainants.

Mr. H. M. Gaston, for defendant Rarick.

THE CHANCELLOR.

The question presented by the pleadings, is whether the land of the complainants is not entitled to exemption from sale under the judgment of the defendant Adair, until after recourse shall have been had for the satisfaction of that judgment, to the land of Rarick. The judgment was recovered by Adair on the 18th of September, 1868, against Jacob L. Sutphen and James Kinsey, and it then became a lien on the land in question in this suit, then owned by Sutphen, but now owned by the two complainants and Rarick in three several parcels, one owned by each of them. On the 20th of February, 1869, Sutphen conveyed to Samuel S. Hartwell, in fee, the portions of the property now owned by the complainants. On the 31st of March, in that year, he conveyed to Culver Barcalow, in fee, the part now owned by Rarick, and Barcalow conveyed it to Rarick in 1871. On the 13th of August, 1869, Hartwell conveyed to the complainant Stryker in fee, by deed with general warranty, that portion of the property conveyed to Hartwell by Sutphen, which is now owned by Stryker, and on the 21st of June, 1870, he conveyed the rest of that property in fee, by like deed, to the complainant Sanborn. The complainants, now that Adair is proceeding to sell their property under the judgment, invoke the aid of equity in the premises, claiming exemption for their property until after recourse shall have been had to that of Rarick. This claim is based on the ground that that property is, in equity, primarily liable, seeing that it was bought by Barcalow after the conveyance to Hartwell was made. On the other hand, Rarick insists that he is himself entitled to the exemption as against their property, on the ground that the conveyance to Hartwell was, originally,

entirely in trust for Sutphen, and after the 1st of March 1869, partially so; Hartwell, from that date, holding it in trust for his own indemnity against liability in respect of his endorsement for Sutphen's accommodation, of a note for $3500, made by the latter, and at the date of the conveyance to Hartwell not yet due, and still unpaid and outstanding, and subject to that claim and right of indemnity, holding the property in trust for Sutphen. The objection made at the hearing, on the ground of misjoinder of the complainants, cannot avail the defendants for the reasons given on that head in *Annin* v. *Annin*, 9 *C. E. Green* 184, in which the same question was presented under like circumstances.

That the complainants are entitled to the benefit of the rule that lands consisting of different parcels, subject to a general encumbrance, are, in equity, to be charged in the inverse order of the alienation of the several parcels, is clear, unless the fact that the deed to Hartwell was a conveyance in trust for Sutphen, deprives them of it. When the deed to Barcalow was made, the conveyance to Hartwell had become, and then was, in fact, merely a mortgage. It was, on its face, an indefeasible deed in fee, and though a defeasance was then in existence, it had not been, and never was, recorded, nor does its existence appear to have been known to any one except the parties to the deed. Sutphen and Hartwell both stated that the latter had purchased the property, and Hartwell professed to be the absolute owner of it, and Sutphen held him out to be so. It is not alleged that at the time of its purchase, Barcalow had not knowledge of the conveyance to Hartwell. Neither Stryker nor Sanborn knew that the conveyance to Hartwell was not, in fact, absolute, and for his own benefit alone. They are both *bona fide* purchasers for valuable consideration, without notice, and they are entitled to be protected accordingly. It is true, it is insisted that Sanborn had notice, when he purchased, that Hartwell was merely a trustee for Sutphen, but the proof does not satisfy me that such was the fact. He swears that he did not know that Hartwell was not the absolute owner of the property. He

indeed, appears to have gone to Sutphen, in Newark or New York, to inquire after the property, though he was present at the sale held by the latter, at which it was struck off and declared to have been sold to Hartwell, but he states that it did not, at the time, occur to him that the property had been sold. If it had occurred to him, he would, undoubtedly, have called on Hartwell, who resided in Somerville, as he himself did. He had no purpose or design whatever, except to buy the property of the true owner. He found that Sutphen had negotiated a sale of the land to Plummer, and he then went to the latter and bought it from him, and, as he had reason to do, regarded him as the equitable owner by purchase from Hartwell through Sutphen, whom Sanborn supposed to be Hartwell's agent. Plummer, in his order on Hartwell for the deed, speaks of the property as his own, and so he does in the contract for sale between him and Sanborn. Sutphen's testimony on this subject is too vague to be of any considerable importance. He testifies to nothing on this score, positively. At best, he gives his "impression" merely, and that derived from a recollection which seems to be too faint to entitle his impressions to weight in this controversy. He appears never to have told Sanborn that Hartwell held the property in trust for him, but says he thinks that the former saw the letter written by him in reply to a letter (not produced) brought by Sanborn from Hartwell, asking, it is said, for authority from Sutphen to make the conveyance, but he gives his impression merely. And though he says he sent the declaration of trust by the hands of Sanborn to Hartwell, yet it was with the letter to the latter, above mentioned, enclosed in a sealed envelope. As before stated, the evidence does not satisfy me that Sanborn had notice that the title to the land was held by Hartwell in trust for Sutphen. On the other hand, my conclusion is that he believed that the land was the property of Hartwell. That Rarick has no equity against the complainants, or either of them, to have their land sold before his to pay the judgment, is quite clear. And it is equally clear that Barcalow lost whatever equity he

had at the time of the conveyance to him, by his supineness, for, though he might, before the purchase by the complainants, have taken action to relieve his property by compelling payment of the judgment out of that which had been conveyed to Hartwell, he did not do so. He has paid to the judgment creditor the amount of the judgment, and has taken an assignment of it. Under the circumstances, he ought not to be permitted to sell the complainants' property to pay the judgment. The property sold by him to Rarick is abundantly sufficient to pay it, with all prior encumbrances, and it was conveyed to Rarick by Barcalow, by deed with warranty general. The complainants are entitled to the relief they seek, and there will be a decree accordingly.*

BROWN *vs.* WELSH'S Executor.

1. In the case of an adopted child, while on the one hand, so long as that relation continues, the person who stands *in loco parentis* is not entitled to pay for support, on the other hand, the person adopted can have no claim for services.

2. Where, as in this case, the money of the person taken into the family is applied, with her knowledge and consent, to her own use, after she had obtained her majority, it cannot be recovered from the person standing *in loco parentis*.

3. Settlements between a person standing *in loco parentis*, and one towards whom he occupies such relation, of the accounts of the former of expenditures made by him out of the latter's estate in his hands, made when the latter was of full age, and competent to make the settlements, can only be impeached by fraud or mistake; and to do this, the impeachment and the ground thereof must be set up in the bill.

On bill for an account. On final hearing on pleadings and proofs.

Mr. S. B. Ransom, for complainant.

Mr. A. Mills, for defendant.

---

* Decree affirmed, 2 *Stew.* 338.

THE CHANCELLOR.

The complainant files her bill for an account of moneys belonging to her, received by her uncle, Philip Welsh, now deceased, and interest thereon. She denies in her bill that she ever received these moneys, or any part thereof. She does not allege that Philip Welsh refused to come to an account with her, or that she ever requested him to account to her in the premises, though she states that since his death she has applied to the defendant, his executor, for an account, and that he has refused it. The moneys referred to are a legacy of $837.03, from the estate of Benjamin McCoury; another of $726, from the estate of her grandmother, Alche Williamson, and about $225, received from the estate of her mother. McCoury died in the spring of 1856. His will was proved in Morris county, in May of that year. Philip Welsh was one of the executors. The money due from her mother's estate was received by Philip Welsh, in 1854, and the legacy from her grandmother's estate was paid over by the executors in 1865. Philip Welsh's wife was the complainant's aunt. The complainant's mother died in 1833, when the complainant was but four years old. Her father died in 1852. She was taken into Philip Welsh's family when she was of but tender years, (the bill states that it was in 1835,) and continued to live there until the spring of 1874, when Philip Welsh and his wife died. When the money due from the mother's estate, (which was the first money received by him on her account,) was received by Philip Welsh, she was twenty-five years old, and she appears to have lived in his family, and to have been supported by him from the time when she was seven or eight years of age. For all that time he made no charge against her, but from July, 1854, he appears to have made charges against her for goods bought by her for her own use, and paid for by him, and cash advanced or paid to her. He charged her nothing, however, for her board. She lived in his family as a member of it. The executor answers that between the testator and the complainant, there were three statements, in which the former accounted for all the moneys received and

paid out for her by him, except $60.40, which he admitted to be due her as a balance. The bill is silent as to any accounting whatever between the complainant and Philip Welsh, in respect to these moneys. That there were such settlements of his accounts, there is no room to doubt. They are, of course, not impeached by the bill, nor is there any serious attempt to impeach them by the evidence. The complainant was, at the time of the settlement, of full age, and competent to make the settlements, and Philip Welsh is dead. They must be binding on her, unless she can impeach them by fraud or mistake, and to be permitted to do this, she should have set up the impeachment, and the ground thereof, in her bill. The evidence is, that on the 26th day of August, 1865, when she was thirty-six years old, there was a settlement between them, in which he accounted for the money received from the estate of Benjamin McCoury, and that received from her mother's estate, with interest on each. There was then found to be due to her $153.42; afterwards reduced, by a charge of $5, to $148.42. He acknowledged a balance of $150, for which he gave her his note, payable on demand, with interest. The note appears to have been paid off. Sums of money paid on account of it, to the amount of $151.92, are endorsed upon it, and the note was, at his death, in his possession, and he had written the word "paid" on its face. In his book, the same word is written across the entry stating the settlement. Again, there appears in his book a further statement of the account, in continuance, up to about July, 1869, in which the amount of the note is included as a charge against him, and credits are given to her for money received by him for her, including $26 received on account of the legacy from her grandmother, and credit is also given to her for $600 of government bonds, bought with the money received from her grandmother's estate, and interest received thereon. It shows a balance in her favor of $441.02. Again, under date of 1870, another statement appears, in which she is credited with the premium on the sale on those bonds. This statement shows a balance due her of $340.16, and finally, on the 25th of November,

1873, (he died on or about the 30th of January, 1874,) a statement of settlement was made by him, and delivered to her, by which it appeared that there was due to her from him, $60.40. It appears by the evidence, that of the money due her from her grandmother's estate, she, according to her own admission, applied to her own purposes $100, and with $600 of it bought government bonds. The evidence shows clearly that she was fully aware of the expenditures made for her by her uncle, and of the fact that he was making them on her account, and charging them, as he had a right to do, against her money in his hands. In a letter to him, without date, but probably written in 1873, referring to a debt she had contracted in her own name, and on her own credit, with E. M. Trimmer & Co., in a running account for articles of dress, or other articles for her own use, she says: "I don't wish you to think I want you to take any of your money to pay my bills. You have the control of what little I have, and you are perfectly willing (welcome) to it all, as long as it will pay you for what you have to pay out for me." After the death of Philip Welsh, she admitted to the defendant, then acting as his executor, that she knew the state of the account, and that there was but $60.40 due to her thereon. She did not charge fraud or mistake in the account. The book was before her and she and the executor examined it together. She in no wise impugned the correctness of the account, but her endeavor then was to obtain a compromise of a claim of $3600, which she had put in against the estate for her services in the family for six years preceding the death of the testator. The bill is not filed to obtain pay for these sums, but to recover the money received by the testator on her account. It will not be out of place to remark that the evidence does not maintain the allegation of the bill that she was, in her childhood, adopted by Philip Welsh. He appears to have taken her into his family to bring her up, and she found a home there accordingly until his death, at which time she was forty-four years old. Her services were not those of a domestic. They were at most such as are usually rendered by the female members of

a family as a matter of course, and as a due contribution to the requirements of the household. In the case of an adopted child, while on the one hand, so long as that relation continues, the person who stands *in loco parentis* is not entitled to pay for support, on the other hand, the person adopted can have no claim for services. Where, as in this case, the money of the person taken into the family is applied with her knowledge and consent to her own use, after she had obtained her majority, it cannot, for obvious reasons, be recovered from the person standing *in loco parentis.*

The bill must be dismissed, with costs.

Boyce *vs.* Boyce.

Permanent alimony, for wife alone, fixed at $1000 a year, that being a sum which would provide for her a support and maintenance equal to what she would have had a right to expect if living with her husband.

Application to fix amount of permanent alimony.

Mr. W. B. Williams, for complainant.

Mr. R. Gilchrist, for defendant.

The Chancellor.

By the final decree in this cause, made on the 13th of March, 1873, it was decreed that the complainant is entitled to have a suitable support and maintenance paid and provided by the defendant, her husband, for her, commencing on the 27th day of June, 1864, and that the defendant give reasonable security for such maintenance. By the decree, a reference to a master was ordered, to ascertain and report the amount of the defendant's estate, and his income from that and all other sources. The report has been filed, and the matter now

comes before me on the equity reserved to fix the amount of the alimony. It appears from the report that the value of the defendant's whole estate is $66,396; that the value of his real estate is $34,000, and the value of his personal estate is $32,396; that his average annual income from both, and from all other sources, for the ten years preceding May 1st, 1875, was $5818.10, and that his income from that date to the date of the report, October 1st, 1875, showed an income for the year ending May 1st, 1876, of $6474.36. By an order of this court, made on the 10th of September, 1866, the defendant was ordered to pay alimony, *pendente lite*, at the rate of $12 a week, and by another order, made March 22d, 1871, the temporary alimony was increased to $15 a week. The question now is as to the amount to be awarded for permanent alimony. Under the circumstances of the case, taking into consideration the situation and station in life of the parties, and the amount of the defendant's property and income, I am of opinion that the sum of $1000 a year will be a proper provision for the support and maintenance of the complainant. This sum will provide for her a support and maintenance equal, in all respects, to that which, taking into consideration the amount of his income, she had a right to expect at the hands of her husband had she continued to live with him. Her counsel will be allowed an additional and final counsel fee of $300 for services in this court and the Court of Appeals; and to the master, for whose services in the reference the statutory fees are by no means a fair compensation, an additional allowance of $35 will be made.

CHILVER *vs.* WESTON and others.*

1. Where the holder of a mortgage of real estate, on which was a subsequent mortgage, brought suit on his mortgage, in this court, for foreclosure and sale of the mortgaged premises, and they were sold accordingly, but the holder of the subsequent mortgage was not made a party to the suit—*held*, that the holder of such subsequent mortgage might maintain a suit to foreclose it.

2. In such last-mentioned suit the purchaser at the former sale will be entitled to the rights of all the parties foreclosed in the former suit, and will be subrogated thereto accordingly.

3. He will not be allowed the costs of the former foreclosure and sale, the proceedings not binding the holder of the subsequent mortgage.

4. The fact that the holder of such subsequent encumbrance has waited seventeen years before bringing suit for foreclosure, will not bar him of his claim to relief.

5. A judgment creditor, whose claim was secured by a trust mortgage on the premises, the trustee under which was made a defendant to the suit, although the judgment creditor was not, is barred of his claim against the property by the foreclosure and sale.

6. Where, after such foreclosure and sale, the first mortgagee, who was the purchaser, has, at the request of the mortgagor, and to release him from liability on his bond, receipted the bond and mortgage and signed an acknowledgment of receipt of the amount of the decree, and authorized cancellation of the mortgage and decree, though the mortgage and decree were not, in fact, canceled of record, he will, nevertheless, in the subsequent foreclosure suit, be entitled to the benefit of the bond and mortgage.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. C. L. Corbin, for complainant.

Mr. S. B. Ransom, for Weston and wife and their mortgagees.

THE CHANCELLOR.

Abraham B. Demarest and William Howe being partners in business and tenants in common of certain real estate in Jersey City, in 1855 dissolved their partnership, the latter

* Cited in *Atwater* v. *West*, 1 *Stew.* 363, 366; *Young* v. *Hill*, 4 *Stew.* 434; *Foster* v. *Union Bank*, 7 *Stew.* 50.

taking the business and also the real estate. For his partner's interest in the business and property, he agreed to pay $1000, and accordingly gave his bond to Demarest for that sum, with interest, secured by his mortgage to the latter on his real estate. He also agreed to pay the debts of the concern. He never paid anything on that mortgage. It was dated on the 1st of May, 1855, and was duly registered on the 10th of September, in that year. Demarest assigned it to Charles T. Duryea by assignment dated March 7th, 1856, and duly recorded on the 12th of that month. Duryea assigned it to William A. Lewis by assignment dated January 10th, 1869, and the latter assigned it to the complainant a few days thereafter. Demarest and Howe, on the 3d of January, 1855, gave a mortgage on the same premises to George Ford, to secure the payment of $4000 on the 3d of July, 1858, with interest. It contained a provision that in case any payment of interest should be in arrear for thirty days, the principal should thereupon be due and payable. This mortgage was assigned by Ford to Reuben Ross, junior, on the 23d of May, 1856, and Ross, on the 11th of August following, assigned it to the defendant Ezra B. Weston. On the 5th of March, 1857, the principal having become due by reason of failure to pay the interest for over thirty days, Weston instituted a suit in this court for foreclosure. To that suit Demarest was made a party by reason of the mortgage given to him by Howe, but which, at that time, was owned by Duryea, who was not made a party. Neither was John M. Wilcox, who, on the 9th of February, 1857, recovered a judgment against Howe in the Supreme Court of this state. The defendants were Demarest and Howe and their wives; Edgar B. Wakeman, to whom Howe had given a mortgage on the property, prior to that which was given to Demarest, to secure certain notes given by Howe to creditors of Demarest and Howe; Evan Jones, who held a mortgage given to him by Howe, subsequent in date and registry to that which was given to Demarest; and John L. Burst, who was supposed to have some claim, by deed, to part of the property. The proceedings resulted in a decree

that the mortgaged premises be sold to pay, in the first place, to Edgar B. Wakeman the amount due him, $175, for assessments, taxes and water rents on the property paid by him; in the second place, to Weston $4303.33, due to him on his mortgage, with interest thereon and his costs; and in the third place, to Edgar B. Wakeman $3914.56, due on his mortgage, with interest thereon. An execution was issued on that decree and the property was sold by the sheriff thereunder, on the 29th of October, 1857, to Weston for the sum of $300. The sheriff conveyed the property, by deed dated July 9th, 1858, to him accordingly. On the 1st of May, 1868, he mortgaged the property to John Ross, to secure the payment of $3500 and interest, and on the 26th of October following, he mortgaged it to Catharine Anderson to secure the payment of $1500 and interest. Weston has had possession of the property ever since the time of the sheriff's sale, or about that time. The complainant filed his bill to foreclose the mortgage given to Demarest. Weston, Anderson, Ross and Douglass, who is the owner, by assignment, of the Wilcox judgment, have each answered. All of these, except Douglass, insist that the complainant cannot maintain a suit for foreclosure of his mortgage, but can only redeem. They also insist that Duryea, who was the owner of the complainant's mortgage at the time of the foreclosure, had actual notice of the pendency of the suit, and further, that the complainant should be held to be estopped by the acquiescence of those under whom he claims, from setting up his mortgage against them. The complainant's mortgage was given for a full consideration and is a valid security. That Duryea and those who claim under it, have held it from May 7th, 1856, to July 1st, 1873, the time of filing the bill in this cause, without attempting to compel payment of it, will not deprive the complainant of his rights under it. Among these rights is that of maintaining proceedings to foreclose, and that right is in no wise affected by the foreclosure under the Ford mortgage. He does not, it may be remarked, appear to have had, in fact, any notice of that foreclosure. He seems to have never heard of it until after

the sheriff's sale. Nor would the fact that he knew of the pendency of the proceedings, of itself have barred his right to maintain a suit to foreclose, so long as he was not a party to the action. The complainant was bound, in order to foreclose him, to make him a party to the suit. *Vanderkemp* v. *Shelton*, 11 *Paige* 28; *McCall* v. *Yard*, 1 *Stockt.* 358; *Kilborn* v. *Robbins*, 8 *Allen* 466. Weston did not, by his purchase at the sheriff's sale, acquire Duryea's interest in the property, and those to whom he has since that time mortgaged the premises, cannot, under the circumstances, be held to stand in any better position than he himself does. Neither he nor they have acquired any title by estoppel. *Vanderkemp* v. *Shelton*, *supra.*

It is insisted by the complainant, that because Weston, after the sheriff's sale, receipted his bond and mortgage and decree in full, and authorized the cancellation of the mortgage and decree of record, neither he nor those who claim under him, can now avail themselves of them in any way, but all claim under them must be regarded as extinguished. It appears that after the sheriff's sale, Howe applied to Weston for a discharge of his liability on the bond, alleging as his reason, that without it he could not obtain his discharge from his other creditors. It appears, also, that Weston, in consideration of $250 paid to him by Howe, consented to discharge him from liability on the bond, and accordingly signed a receipt, written on the face of the bond, acknowledging the receipt of the full amount of the bond and mortgage, and requesting the clerk of Hudson county to enter satisfaction of the latter of record. On the same day he signed a receipt acknowledging that he had received from Demarest and Howe the full amount of the decree, and requesting the clerk of this court to enter satisfaction thereof. Neither the mortgage nor the decree was, in fact, canceled of record. He and his mortgagees, notwithstanding those receipts, are entitled to the benefit of the mortgage and the decree in this action. It is manifest that he intended, by the receipts, merely to discharge Howe from his personal liability on the bond, and had no intention of affecting his security under the mortgage, and for

aught that appears, neither he nor Howe contemplated any such result. By his purchase at the sheriff's sale he acquired not only the title which he had held as mortgagee, but the title which Edgar B. Wakeman had as mortgagee, both of these mortgages being prior to that of the complainant in this suit. He acquired, also, the title of Jones as mortgagee, and that of Howe as owner of the property.

The judgment now owned by William P. Douglass is proved to have been founded on promissory notes given to John M. Wilcox, the plaintiff therein. Those were among the notes, the payment of which was secured by the mortgage to Wakeman. By the sheriff's sale, Wilcox's claim to the mortgaged premises for payment of those notes was extinguished. The property was sold to pay them. There will be a decree for foreclosure and sale of the mortgaged premises, to pay, in the first place, the amount due on the mortgage to Ford and the mortgage to Wakeman, including the $175 awarded to Wakeman by the decree in the foreclosure suit for taxes, assessments and water rents paid by him, but not including costs of foreclosure or sale, (for the proceedings are not binding on the complainant, *Benedict* v. *Gilman*, 4 *Paige* 60; *Parker* v. *Child*, 10 *C. E. Green* 41,) and deducting therefrom the amount with which Weston is chargeable for rents and profits of the mortgaged premises, (allowing the cost of all necessary repairs, and all taxes and assessments paid by him for or in respect of the property,) and Weston's costs of this suit; and in the second place, to pay to the complainant, the amount due on his mortgage and his costs of this suit. Out of the moneys raised by the sale, excepting the money directed to be raised for the complainant, the defendants Anderson and Ross will be paid the amounts due them respectively, on their respective mortgages, with their respective costs of this suit, in the order of the priority of their mortgages, and any surplus remaining will be paid to Weston.

Powell vs. Mayo and others.

On the trial of an issue at law under a bill to quiet title, it is incumbent on the plaintiff (the defendant in the bill) to establish his title, as in an action of ejectment. And where the issue permits him to set up either of two different titles, his selection of one of them at the trial is binding on him, and he must abide by the result of his selection.

Bill to quiet title. Motion for new trial.

Mr. H. Richards and *Mr. J. Vanatta*, for motion.

Mr. W. J. Magie and *Mr. Cortlandt Parker*, *contra.*

The Chancellor.

A verdict in favor of the defendants in this suit, rendered at the September Term, 1874, of the Union Circuit, upon the issue at law as originally framed, was set aside and a new trial ordered. *Powell* v. *Mayo*, 11 *C. E. Green* 120. The issue was subsequently amended so as to permit them to set up, on the trial, title, either by descent from John De Hart, senior, or under the conveyance by John De Hart, junior, as surviving executor of his father, John De Hart, senior, to James B. Clark, and the subsequent conveyance by Clark to John De Hart, junior. On the trial of that issue (which resulted in a verdict in favor of the complainant), the defendants in the suit, who were plaintiffs in the issue, put in their claim of title by descent only. The complainant then put in the title of Clark under the conveyance above mentioned, and proved unbroken possession, adverse thereto, and rested. At the close of the evidence, the complainant's counsel asked the defendants' counsel whether he intended to put in, as part of his case, the conveyance from Clark to John De Hart, junior, which was the foundation of the second or alternative title mentioned in the issue, and the defendants' counsel declined to put in that deed, declaring his intention to stand

on the case as he had made it. The defendants in this suit, to whom, as before mentioned, the verdict was adverse, move for a new trial, on the ground of newly-discovered evidence, that the verdict is contrary to law, and that the issue which this court intended that the parties should try was not, in fact, tried. They insist that the verdict was contrary to law, on the ground that although the possession of Jane De Hart, under whom the complainant claims title, was adverse to Clark, it was not adverse to her co-tenants in common, the other heirs-at-law of John De Hart, senior, or those claiming under them, because she, at the time of that conveyance, was in possession, and her possession then was that of her co-tenants in common. This subject was considered in deciding the former motion for a new trial. It was then held that the possession of Jane De Hart and those claiming under her, could not have been, after the conveyance to Clark, that of a tenant in common, for the reason that there could have been no tenancy in common at that time, because the conveyance to Clark was a severance, and destroyed the community of interest of the heirs of John De Hart, senior, in the property, if, indeed, it existed up to that time. This appears, also, to have been the view of Justice Van Syckel, before whom the last trial took place. Still entertaining that opinion, I deem it unnecessary to say more in reference to that part of the application which rests on the allegation that the verdict was contrary to law.

Nor should there be a new trial, on the ground that the issue intended to be tried was not, in fact, tried, because of the election of the defendants' counsel, at the trial, to stand on the claim of title through descent from John De Hart, senior, and his refusal to have recourse to the alternative claim of title. The defendants here were, properly, plaintiffs in the issue. It was incumbent on them to establish their title on the trial of the issue, as in an action of ejectment. Though this court afforded them an opportunity of availing themselves, if practicable, of title under the conveyance from Clark to John De Hart, junior, thus enabling them to have recourse to either title as they might deem

most to their advantage, they deliberately chose to stand on the claim of title through descent from John De Hart, senior, ignoring the conveyance to Clark, and that from him to John De Hart, junior, and they must abide by the result of their choice. The real issue was tried.

The newly-discovered evidence is, that from 1846 to 1850, Edward C. Mayo pastured his horses on the premises in question. In the first place, it does not appear from the affidavit that he did not do so under circumstances which would deprive the fact of any importance, as, for instance, under an agreement with some person in possession under Jane De Hart, and, in the next place, the evidence would be merely cumulative, and, again, the fact would not strengthen the case on which the defendants relied for a verdict.

The motion will be denied, with costs.

Dows, Trustee, &c., *vs.* Drew.

1. In the absence of an express legislative declaration that a tax levied against a mortgagor on mortgaged premises subsequent to the execution and registry of the mortgage, shall be the primary lien and paramount against the mortgage, township authorities have no right, in a case where it is admitted the mortgaged premises are insufficient to pay the mortgage debt, to deprive the mortgagee of any part of his security.

2. A township collector was restrained from selling under a warrant issued under the thirty-fourth section of the act concerning taxes, any part of the standing timber on mortgaged premises admittedly insufficient to pay the mortgage debt; the tax being levied subsequent to the registry of the mortgage.

A final decree was made in this case March 28th, 1876. directing a sale of the mortgaged premises for the payment of a mortgage made by the defendants to the complainant, bearing date October 28th, 1873, and duly recorded January 7th, 1874. The tax laid on the mortgaged premises for the year 1875 not having been paid, a warrant was issued under the

thirty-fourth section of the act concerning taxes, (*Nix. Dig.* 942,) commanding the collector of the township in which the mortgaged premises are situate, to sell the standing timber thereon for the payment of the tax. The collector was proceeding to carry out the command of the warrant when the complainant applied to this court by petition, for an order restraining him from making sale of any part of the timber.

Mr. John R. Emery, for motion.

Mr. H. C. Pitney, contra.

THE VICE-CHANCELLOR.

This application was heard under an agreement of counsel that the matters alleged in the petition should be taken to be true; that all objection to the form of the proceeding should be waived, and that it should be considered the questions discussed were properly presented by appropriate pleadings.

Sections 33 and 34 of the act concerning taxes, (*Nix. Dig.* 942,)* plainly direct that the tax assessed on land held by a tenant shall be assessed against the tenant, and not against the owner. The tax is spoken of as the tenant's tax; he is made personally liable for its payment, and his goods and chattels may be seized and sold under the warrant issued for its collection; unless the assessment is made against him, the demand required by the eleventh section cannot be made, nor can he be returned as a delinquent, nor can a warrant be issued against him. In this case, the assessment was made against the owner; indeed, it could not legally be made against any other person. *Nix. Dig.* 947, § 63 †; *Tindall* v. *Phillipsburg*, 4 *Vroom* 38. The law required the assessor to assess the person who was the owner on the day when the assessment for that year was to commence. *Nix. Dig.* 951, § 84 ‡; *Shippen* v. *Newton*, 5 *Vroom* 79. The court, in the case last cited, say it is the intention of the law to make the person who is the owner on the day when, by law, the assessment is to commence, personally liable for the tax. It is the intention

* *Rev., p.* 1145. † *Rev., p.* 1163, *sec.* 114. ‡ *Rev., p.* 1150, *sec.* 61.

of sections 33 and 34 to make the tenant primarily liable, personally. The two provisions, therefore, are directly in conflict. It is obvious, as the law now stands, the tenant is not personally liable, nor can his goods and chattels be sold. His personal liability is no longer necessary to the collection of the tax, for the land itself may be sold for its payment. The condition of affairs made necessary by sections 33 and 34 to warrant a sale of timber, viz., inability of the tenant to pay, and of the township authorities to compel payment by a sale of his goods and chattels, cannot exist under our present system of taxation.

In the absence of an express legislative declaration that a tax levied against a mortgagor on mortgaged premises subsequent to the execution and registry of the mortgage shall be the primary lien, and paramount against the mortgage, I think the township authorities have no right, in a case where it is admitted the mortgaged premises are insufficient to pay the mortgage debt, to deprive the mortgagee of any part of his security. Taxes levied subsequent to the registry of a mortgage do not have priority over it, without express legislation giving them priority. *Hopper* v. *Malleson*, 1 *C. E. Green* 382; *Dinsmore* v. *Westcott*, 10 *C. E. Green* 470.

I will advise an order restraining the collector from making sale of any part of the standing timber on the mortgaged premises.*

* Decree reversed, 1 *Stew.* 459.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1876.

THEODORE RUNYON, ESQ., ORDINARY.

SMITH and others, appellants, and SMITH'S Administrator, respondent.*

1. The Orphans Court has no power to determine as to the validity of the claims of creditors of the estate, upon an application for an order for the sale of decedent's lands for the payment of his debts; they have such power only in the case of insolvent estates.

2. The only examination which the Orphans Court can make on such an application, is as to whether the necessity for the sale of real estate does, in fact, exist; and on that head they are to accept the report of the administrator or executor, as to the amount of debts, unless the *bona fides* of his statement be assailed, and it be made a question whether the claims he reports have, in fact, been presented to him, or whether the amounts thereof be not mis-stated. In such case, they are not bound to accept his statement.

On appeal from decree of Hunterdon Orphans Court, ordering sale of land of John Smith, deceased, to pay his debts.

Messrs. Honeyman and *Herr*, for appellants.

Messrs. Voorhees and *Large*, for respondent.

---

* Cited in *Middleton* v. *Middleton*, 8 *Stew.* 116.

THE ORDINARY.

This cause was argued on written briefs. The only question presented by the brief of the counsel of the appellants is, whether the Orphans Court did not err in making the order for sale, seeing that the appellants presented proof as to the invalidity of claims to the amount of $1800, against the estate, reported by the administrator. This proof, they insist, should have led the court to adjudge that those claims were invalid. Had they been rejected, the personal property in the hands of the administrator would have been sufficient to pay the debts of the estate, with all expenses of administration. The administrator reported personal estate in his hands to the amount of $1273.80, and that the debts and expenses would together amount to $2540.89, leaving a deficiency of $1267.09. Among the debts were included three of $600 each, to Jeremiah, Christiana, and Elizabeth Smith, respectively. These, the appellants insist, should have been rejected by the court. The Orphans Court has no power to determine as to the validity of the claims of creditors of the estate, except in the case of insolvent estates. *Bassett's Adm'rs* v. *Pettit*, 1 *Harr.* 421. The statute (*Revision* 514, 515, §§ 71, 72, 73,) provides that when an executor or administrator discovers or believes that the personal estate is insufficient to pay the debts, he shall exhibit, under oath, to the Orphans Court of the county where the lands are situate, a true account of the personal estate and debts, as far as he can discover, and ask their aid; that the court shall make an order to show cause, and if, at the time fixed therein, they shall, on full examination, find that the personal estate is not sufficient to pay the debts, they shall, unless the heirs or devisees give bond as provided by the act, order sale of the real estate, or so much as may be necessary. The examination to be made by the court does not embrace an adjudication upon the merits or validity of the claims of creditors. No provision is made for the litigation of these demands, as there is in the case of insolvent estates. Nor are the creditors notified to appear to substantiate their demands. The only examination which the court

can make, is as to whether the necessity for the sale of real estate does, in fact, exist; and, on that head, they are to accept the report of the administrator or executor, as to the amount of debts, unless, indeed, the *bona fides* of his statement be assailed, and it be made a question whether the claims he reports have, in fact, been presented to him, or whether the amounts thereof be not mis-stated. In such case, they are not bound to accept the statement. So, too, in reference to the personal estate. They are not required to accept the statement of the executor or administrator, but may inquire as to its correctness, and this involves the inquiry as to whether the executor or administrator has accounted for all the personal estate which has come to his hands, or, if he has, whether he has discovered all of the personal estate.

I see no error in the proceedings. The order for sale will be affirmed, with costs.

MAY TERM, 1876.

In the matter of the probate of the will of CHARLES WINTERMUTE, deceased.*

1. A testator, sixty-seven years of age at the time of the execution of his will, and somewhat enfeebled by disease, was held, under the evidence in the cause, to have been possessed of testamentary capacity.

2. A failure of memory in stating, as a witness in a suit, nine months after the execution of the will, and when, enfeebled with illness so severe as to endanger his life, that he had given his wife a part of his personal estate, when he had given her none, *held* to be no criterion of the condition of testator's mind at the time he executed the will.

3. That testator made no provision for his wife, is no reason for refusing probate on the ground of unnaturalness, especially when it appears that she had been cruel and unkind to him, and driven him from the house, and had surreptitiously taken papers, notes, and other evidence of indebtedness, and was holding them, and refused to give them up to him at the time of the execution of his will.

---

* Cited in *Mallett* v. *Bamber*, 6 *Stew.* 256.

4. Costs will not be allowed, unless in an extreme case, to an unsuccessful party in contesting a will.

5. Where testimony in opposition to the probate of a will has been protracted to a most extraordinary and unnecessary extent, and much of it is utterly incompetent, costs, which might otherwise have been given, will be denied.

Mr. W. H. Morrow, for proponent.

Mr. W. Luse and *Mr. J. G. Shipman*, for caveatrix.

The Ordinary.

The testator, Charles Wintermute, died in January, 1874. The paper propounded as his will is dated on the 14th of September, 1872. It was executed in Newton, in Sussex county, where it was drawn by Mr. Thomas Anderson, of the firm of Anderson and Johnson, lawyers of that place, and was executed by the testator in the presence of both of those gentlemen as attesting witnesses, and they signed it accordingly. The testator, at the time of its execution, was nearly sixty-seven years old, and he was somewhat enfeebled by disease. He had been twice married. By his first wife, he had eleven children, all of whom were living at the date of the will. After her death he married the caveatrix, in August, 1855. The probate of the will is opposed on the ground of the alleged incapacity of the testator and undue influence, which the caveatrix insists, was exerted over him by certain persons, among whom were the proponent, Lemuel F. L. Wilson, the executor named in the will; Isaac B. Wintermute, a son of the testator, and John N. Newman, one of testator's sons-in-law. By the will, the testator gave all his property to his children. It appears by the evidence that he and the caveatrix were not, at the date of the will, living happily together. The character of their relations to each other is shown by the fact that in July, 1872, he, by reason of differences then existing between them, left his house and slept in the barn for four or five consecutive nights. Though the caveatrix states that that was the only occasion on which

there was any serious rupture between them, the testimony shows, beyond all question, that there were numerous other occurrences of which he complained bitterly, alleging grievous ill-treatment at her hands and at those of some of her relations. Among other things, he complained of her having abetted one of her nieces, who was visiting her, in abusing him by word and deed, in August, 1872, in a transaction in which she and her niece, after he had forbidden the latter to take his horse, went to the stable and took the horse out, and on his re-taking it from them, she struck him, using coarse, violent, and abusive language towards him. He also complained, and it seems with reason, that his wife had taken away from him his valuable papers, his notes, mortgages, &c., and refused to give them up to him. He complained, also, that she had taken to her own use, against his will, the proceeds of products of his farm, to a large amount, sold by her.

In this situation of affairs, with his wife in hostility to him, he sent to Newton and caused to be drawn a letter of attorney, authorizing one of his neighbors, Lemuel F. L. Wilson, to collect all moneys due or to become due to him, and to that end to take his papers and securities into his possession, and to lease his lands and receive the rent from them, or to sell all his personal property, except notes, bonds, and other choses in action, and to invest his money. This letter of attorney was executed by him on or about the 7th of September, 1872. It proved insufficient for the purpose which it was mainly intended to answer. His attorney could not obtain possession of his papers by means of it. He then went to Newton with Mr. Wilson, and consulted with Mr. Anderson in relation to his affairs. The latter advised him to make his will, and in order to get his papers out of the hands of his wife, and to keep his affairs out of her control, to execute a deed conveying his property to trustees. The will was drawn and executed, but the testator took the making of the trust deed into further consideration, and it was not, in fact, executed until about five days afterwards, and it was then drawn in Belvidere. The formalities required by the

statute were all observed in the execution of the will. The subscribing witnesses testify distinctly, to the testator's capacity at the time. Mr. Anderson, having said that, in his judgment, the testator was of sound and disposing mind and memory when he executed the will, was asked by the counsel of the caveatrix for the grounds of his belief. He answered as follows: "My judgment or opinion was based upon what I heard Mr. Wintermute say during that visit, prior to the making of the will; he talked and acted like a man who was in full possession of his mental faculties; he seemed to know what he was talking about, in making the disposition of his property that he did by the will; he seemed to me to be acting from reasonable motives, and I saw nothing in his conversation about his business affairs, which indicated any mental derangement, or such mental imbecility as would disqualify a man from making a valid will; his mind appeared to be troubled about his difficulties with his wife, and he appeared to be suffering from bodily disease, but he seemed to understand, perfectly, the nature of the business he was doing, in making the will; in the conversation which I had with him the day before the will was drawn—I mean at the time I advised him to appoint a trustee—he seemed perfectly rational, talked about his troubles with his wife like a man who knew what he was talking about, and I could not then detect, either in his manner or his language, any sign of mental derangement, aberration, or imbecility. When I advised him to appoint a trustee, if my recollection serves me, and I am quite confident it does, he said that he would take time to consider the proposition to appoint a trustee; I thought that showed deliberation and caution on his part, because I informed him fully of the effect and force of a trust deed, explained to him that it would transfer his property from himself to his trustee, and enable the trustee, if so disposed, to set him at defiance, and that if he should appoint a trustee, the person selected by him should be some one in whom he could place undoubting confidence; he seemed to appreciate the fact that such a step on his part would be one

of grave importance, and one which ought to be thoroughly considered by him before taking action upon it." Mr. Robert T. Johnson, the other witness to the will, says, that at the time when the testator signed his name to the will, he was, in the witness' judgment, of sound and disposing mind and memory, and he says he bases his opinion upon the fact that he had considerable conversation with him at the time in regard to his business, and he saw nothing in his manner or conversation which denoted anything but a sound mind. After the will was drawn, and before it was executed, Mr. Anderson read it over and explained it to the testator, who, after the reading was finished, expressed his entire satisfaction with it. Mr. Johnson says, the testator said his wife had been acting badly; that she had drawn a knife on him, and had made threats against him; that he was afraid of his life, and that she had taken a portion of his property without his consent, and that he did not think, from the manner in which she had treated him, that she deserved to have any of his property. He says, the testator gave the directions to Mr. Anderson immediately before the will was drawn, and in his presence, and that he noted a part of the directions on paper for Mr. Anderson. According to the testimony of Messrs. Anderson and Johnson, it is clear that the testator, at the time of the execution of the will, had testamentary capacity, and was fully aware of the effect of that instrument upon his property, and of the claims of his wife and children upon him. Nor is there any evidence to the contrary in the fact that in giving to Mr. Anderson the names of his eleven children, he omitted the name of one, (it appears that he at once, as soon as the omission was observed, properly supplied it by giving the name of his son Andrew,) or in the fact that in giving those names he omitted the middle initial of some of them, or in the circumstance that when the will was read over to him before signing, he was described therein as resident of the county of Sussex. Mr. Johnson says he discovered the omission of the name of one of the children when the comparison of the names on the list, which had been made of the names of the children as

given by the testator, with the names in the will, was made, and he says he thinks the testator also mentioned it. The omission of the middle initial of the names of some of the children is a matter of no importance, and as to the mistake in stating the residence of the testator, Mr. Johnson testifies that when the will was read over before signing, he discovered the error, and it was at once corrected. The testator appears to have spoken freely, fully, intelligently and accurately of the occurrences between him and his wife, of which he complained, and which led him to make a will so that she might not have any part of his personal estate after his death. It is urged, however, as evidence of his incapacity, that subsequently to the execution of the will, when he was under examination on the 14th of June, 1873, as a witness in a suit brought in the Court of Chancery of this state by the trustees, against him and his wife, to obtain possession of his papers still withheld by her, he did not remember the contents of his will, and was then under the impression, and so testified, that by it he had given to his wife a part of his personal estate. It is, in the first place, to be remarked, that the examination in question took place nine months after the execution of the will, and that, therefore, his mental condition at that time is by no means to be accepted as a criterion as to the condition of his mind on the 14th of September, 1872; and in the next place, the testator was, at the time of this examination, confined to his bed with illness so severe as to endanger his life, was exhausted by the heat of the weather, and confused by the questioning to which he was subjected. And again, it appears in evidence that five days afterwards, in the same examination, he testified that after the parties had left, after the examination on the 14th of June, and all had gone to bed, his recollection returned to him, and that he then remembered talking to Mr. Anderson about his wife's "going on" and abusing him, and that he then told Mr. Anderson that "he wanted the will made in that way; that she had her share, and more, of the loose property,' and that, therefore, the 'land property' she must have, of course; that then Mr. Anderson 'went at

it' and wrote it just as he had told him to write it at that time; that Mr. Anderson read it and called Mr. Johnson, and they two signed it; that he told Mr. Anderson he wanted the 'loose property' to go to the children, and that the reason he did not have any provision made for his wife in the will, was that he thought she had her share of the 'loose property.'" He proceeded to give reasons for saying that she had had her share of his personal property. There is nothing in the examination of the testator, except the temporary forgetfulness as to the contents of his will on the 14th of June, explained by the circumstances above mentioned in that connection, to indicate any want of testamentary capacity even at the time of that examination, though the testator was confined to his bed with illness, and as before mentioned, it was nine months after the execution of the will. Moreover, he appears to have had no disposition, either then or at any time subsequently, to change the testamentary disposition he had made. But it is insisted on the part of the caveatrix, that there is positive evidence of incapacity, in the testimony of witnesses who were well acquainted with the testator, and who regarded him as being incompetent to make a will at the time when the will was signed. Of those who were produced by her, Andrew N. Snover, and the testator's son-in-law, Philip Johnson, are confidently relied upon as having had abundant opportunity for observation, and as not being liable to objection or criticism on the score of interest in the subject matter of the controversy; the former having, as is alleged, no interest whatever in it, and the interest of the latter lying in the direction of support of the will. The facts testified to by them as the basis of their opinion as to the incompetency of the testator, by no means warrant their conclusion, and the dealing of both of them with him during all the period of his alleged incompetency, not only manifested no doubt on their part as to his mental capacity, but showed their belief in his competency. This is notably illustrated by their effort to bring about a settlement between him and his wife, after the existence of the will was known. Johnson ap-

pears not only to have arranged, as he supposed, a settlement with the testator, in June, 1873, but he and the caveatrix, by artifice, by the unfounded allegation that the testator, who was then under examination in the suit in Chancery before referred to, was too ill to proceed with his examination, obtained delay in those proceedings in order to conclude the settlement without the influence of the trustees or their counsel. The terms of that settlement, according to Johnson's testimony, were, that the caveatrix was to pay her own costs and expenses of the litigation, and the testator was to pay his, and she was, at his death, to have one third of all his property, real and personal, which would remain after deducting those costs and expenses on his part, and was to have from him a guarantee to that effect. He was to pay her $300, and she was to provide her own support from that time forward. She was to give up to him, or to any one he should name, all the papers belonging to him, which she had in her possession. Johnson testifies that the testator was anxious to carry out this arrangement, and to that end was desirous of having the proper papers drawn and executed; that he told Johnson he wanted his trustees to consent to it; and he further says that the testator said, when he declined to carry out the proposed settlement, that some one of the trustees had told him that the terms were not as Johnson had told the testator they were. Johnson says he knew the testator understood the terms, and that the latter said he would be very glad to have the matter settled, and wanted it settled while he was living; that he requested that the lawyers intrusted should know nothing about it, for he was afraid they would bring up some objection and interfere with the settlement. In all this proposed adjustment of the difficulties between the testator and his wife, there is no intimation whatever of any want of capacity on the part of the testator, but, on the other hand, he was evidently regarded as being in all respects competent to contract on the subject of the relations between him and his wife, and the disposition and control of his entire estate. The same observation applies to the testimony of Mr. Snover. The opinion

of Samuel H. Lanterman as to the testator's want of capacity about the time of making the will, also, is not sustained by the facts he adduces to support it. The testator, in the conversation which the witness gives, appears to have had accrurate memory, and, indeed, none of the things which the witness says were said and done by the testator, and which he adduces as the grounds of his judgment, lead to the conclusion which he professes to have reached as to the testator's want of capacity. It may be observed, that he appears to have taken much interest in behalf of the caveatrix in this controversy. William C. Larzalier, another of the witnesses produced by the caveatrix on the subject of capacity, appears to have founded his opinion mainly on the physical condition of the testator. He says he was dull and stupid, and that he spoke in a low tone of voice, and was languid. The testator was sick at the time. The witness states an instance in which, in a business transaction between him and the testator in the winter of 1871–2 in regard to a life insurance, which one of the testator's sons proposed to obtain upon his own life, he had a conversation with the testator on the subject, and another subsequent conversation a few days afterwards, in which latter conversation the testator exhibited a want of memory with regard to the matter. The circumstance are not stated with sufficient particularity and definiteness to enable me to judge whether they did, in fact, indicate a want of capacity at the time. At most they exhibited a failure of memory which, judging from the other testimony in the cause, was temporary merely, and probably attributable to the severe illness from which the testator had been suffering. Marshall Hunt testifies that the sickness which the testator had in 1867 had weakened his mind, yet it appears that this witness was engaged in the effort to make a settlement between the testator and his wife, in June, 1873, and according to his own statement, treated the testator as a man of sound mind, memory and understanding at that time, as he must certainly be presumed to have done under the circumstances. Abraham Hill's testimony on the subject is unimportant. His opinions

are evidently based on the testator's physical condition as affected by age and illness. The testimony of Jacob L. Swayze, notwithstanding the witness' opinion as to the testator's incompetency, contains no fact from which a conclusion against the testator's capacity to make a testamentary disposition of his property, can fairly be deduced. On the other hand, it is evident that the witness did not regard the testator as being incompetent to transact business. The testator appears to have had money on deposit in the bank of which the witness was the cashier, and to have drawn it out by check as occasion required. Besides, in the investment made for him by the witness on the Struble mortgage, on or about April 1st, 1869, or 1870, and to which the witness refers as an occasion on which the testator exhibited unsoundness of mind in the witness' opinion, the testator appears not only to have taken part in the discussion as to the investment, but his inclination to loan the money to a friend, (or distant relation,) named Titman or Sipley, in Pennsylvania, had to be overcome by the witness, who recommended that the money be loaned to Struble. The witness says, in substance, that the testator said they proposed to make the loan to their friend, (or distant relation,) and talked about the rate of interest, and seemed to be anxious to make the loan and reluctant to take the witness' advice, because the testator preferred to make the loan to his friend or distant relation. He also says that the testator asked him from what date he would allow him interest on the loan if made to Struble. The testimony of John Lance is subject to the same general observations that have been made in respect to the testimony of Jacob L. Swayze. The opinions of these witnesses, (they are none of them experts,) are in themselves of no weight, except as they are sustained by the facts adduced in support of them, and the facts on which they rest are either inconsequential or inconclusive. They are all outweighed by proof of the efforts made in behalf of the caveatrix, by herself, her lawyer and others in June, 1873, to effect a settlement with the testator, by which his capacity to transact that business, involving, as before remarked, the dis-

position of his estate, is conceded. There is, however, other evidence in the cause in favor of the testator's capacity. The testator's brother Frederick, Marcus J. Lambert, John L. Teel, John Messler, Thomas Drumm, Philip L. Garrison, Alfred F. Fellows, Levi H. Newman and William M. Perrine all testify to his capacity. It is unnecessary to particularize or dwell upon their testimony. It may be remarked that the testator held office in the township, almost if not quite continuously, from 1848 until he moved away; and from 1867 to 1872, when he moved out of the township, he held the office of commissioner of appeals in cases of taxation. Dr. John C. Johnson also testifies to his capacity. He was the testator's physician from January, 1864, till the testator's death in January, 1874. He testifies, that having in view his examination of the testator, his intercourse with him and his observation of the effect of his disease and medicine and declining years, he saw no particular reason to consider him a very different man from the time of his illness in 1867, down to the time of his last sickness, from what he was previously, according to his knowledge of him; that before his sickness in 1867, he considered him a man of fair mind and common sense; that he considered him a man of disposing mind and memory during that time; that after the sickness of 1867, the testator was, in the witness' judgment, of sound mind, and that he seemed to him to be very much the same mentally, as he had always known him to be, from thence to the close of his life. The testator labored under no delusion in reference to his wife. The evidence shows that he had been subjected to the treatment at her hands, of which he complained. One of the terms of the settlement which was proposed to him in her behalf, in June, 1873, was, that she should return his papers to him which she then still held. The transaction, in which he charged her niece, Kate Shaw, with violence towards him in the presence of his wife, was an actual occurrence, the particulars of which he detailed correctly. His forced retirement from his house to sleep in the barn for four or five nights, was no figment of his imagination, but a reality. The other acts of his wife of which he complained as having rendered

his life miserable, are proved to have taken place. I cannot doubt that he had testamentary capacity when the will was executed, and I am satisfied from the testimony, that while in making the will he acted upon the suggestion and advice of his counsel, he was under no coercion or control; that he acted voluntarily in all respects, and that the will was the offspring of his own volition.

The will is attacked on the ground that it is an unnatural will, because it makes no provision for his wife. But the evidence is clear that such a disposition was in accordance with his views as to his duty. He said she had had more than her share of his personal estate. At the time when the will was made she had in her possession, and was withholding from him, his notes and bonds and mortgages and other evidences of debt, which she had surreptitiously, and against his will, taken away from him. In his then state of mind, arising from the occurrences between her and him before referred to, of which he complained, (and as the weight of the testimony shows, not without reason,) a will, by which she was to be excluded from participation in his estate beyond her right of dower, of which he could not deprive her, was to be expected. Nor do I find from the evidence that the proponent and others, against whom the charge of fraud is made, are in any wise justly subject to the imputation. The will will be admitted to probate.

The case is one in which no costs should be awarded to the caveatrix. "It must," said the Ordinary, (Chancellor Green,) in *Perrine* v. *Applegate*, 1 *McCarter* 531, 538, "be an extreme case that would justify a court in giving costs to an unsuccessful party in contesting a will." See also *Collins* v. *Townley*, 6 *C. E. Green* 353. In addition to this consideration, there is still another leading to the same conclusion. The testimony in this case has been protracted to a most extraordinary and unnecessary extent, and very much of it is utterly incompetent. Under such circumstances, costs, which might otherwise have been given, will be denied. *Stultz* v. *Schaeffle*, 18 *Eng. L. & E.* 576, 598.*

*Decree affirmed, 1 *Stew.* 437.

Tappen, appellant, *vs.* Davidson, respondent.*

1. The effect of the statement in the attestation, that the will was signed in the presence of the testator, is to throw the burden of proving that it was not so signed, upon the opponents of the will.

2. Where it is, at most, doubtful on the evidence, whether the will was not signed in testator's presence, the presumption arising from the statement of the attestation clause is not overcome.

On appeal from Hudson Orphans Court.

Mr. Lupton and *Mr. Joel Parker*, for appellant.

Mr. C. H. Winfield, for respondent.

The Ordinary.

The question presented on the hearing of this appeal was whether the paper propounded as the last will and testament of John W. Fisher, deceased, was signed by the attesting witnesses in the testator's presence. At the signing of the will, the testator was lying in bed in a small room which adjoined a larger one, from which it was separated by a partition in which were a door and a small window. The testator signed the will in the presence of the witnesses, as he lay in bed. They signed in the large room. In that room, there were a table and a desk. At the latter, the will was drawn. The person who drew it was a New York lawyer, Mr. Franklin Brown. This gentleman and Ole Erckson were the witnesses to the signing of the will by the testator. If the witnesses signed at the table, the testator could have seen them. If they signed at the desk, he could not. The attestation certificate states that the witnesses signed in the presence of the testator. Mr. Erckson, when the will was proved before the surrogate, made affidavit that he and Mr. Brown signed their names as witnesses in the presence of the testator. On the trial of the appeal before the Orphans Court, Mr. Erckson,

* Cited in *Mandeville* v. *Parker*, 4 *Stew.* 248; *Turnure* v. *Turnure*, 8 *Stew.* 440.

when first examined, testified that he and Mr. Brown signed at the desk. He subsequently returned to the witness stand to say, and then said, that he might have signed it at the table. Mr. Brown, in like manner, testified that he was not sure whether he signed it at the table or the desk, but that his best impression was, it was at the latter. He also was subsequently examined again, and testified that the more he thought upon the subject, the more he was inclined to believe that he signed at the table and not at the desk, but that he could not swear positively that he signed at the table, but believed that he did, and that his best recollection would be that he signed at the table. There were in the rooms, besides Mr. Brown and Mr. Erckson, the wife of the latter, the widow of the testator, Mr. Tappen one of the devisees named in the will, and the testator's son, John Fisher. Both Mrs. Erckson and Mrs. Fisher testify positively that the witnesses signed at the table, while, on the other hand, John Fisher testifies, with equal positivensss, that they signed at the desk. Tappen says he cannot say positively that he saw the witnesses sign. The effect of the statement in the certificate of attestation that the will was signed by the witnesses in the presence of the testator, is to throw the burden of proving that it was not so signed, upon the opponents of the will. *Mundy* v. *Mundy*, 2 *McCarter* 290; *Allaire* v. *Allaire*, 8 *Vroom* 312; *Wright* v. *Rogers*, 1 *L. R., P. and D.* 678. The question, therefore, is whether the negative proposition is proved. Though both of the subscribing witnesses testified, in the first place, in their examination in the Orphans Court, that according to their recollection, (and eight months had elapsed after the will was signed before they were examined in the Orphans Court), the signing took place at the desk, yet neither of them had a positive recollection on the subject. Erckson swore, in the affidavit above mentioned. on the 3d of March, 1875, less than two months after the signing of the will, that both witnesses signed in the presence of the testator. Mrs. Erckson, who has no interest in the controversy, and Mrs. Fisher, the testator's widow, both swear positively that the witnesses signed at the table. Opposed to

them is the testimony of John Fisher, who, though he had testified in the cause on the part of the appellant below, was recalled by them after the testimony in the cause had been closed, and the cause had been summed up by counsel and submitted to the court, and was under consideration accordingly. No reason is given for not having examined the witness on the subject, while the taking of the testimony in the cause was in progress. There is nothing in his testimony which entitles him to greater credit than Mrs. Erckson and Mrs. Fisher. It is suggested that he is testifying against his interest, according to the will. But that is obviously not a criterion to be absolutely relied on, and is at least not conclusive in his favor as against two other unimpeached witnesses who had equal opportunity of observation with him. His actual interest in the controversy may not appear. But however that may be, the evidence does not show conclusively that the will was not signed by the witnesses in the presence of the testator. Says the judge, (Lord Penzance,) in *Wright* v. *Rogers*, "the court ought to have, in all cases, the strongest evidence before it believes that a will, with a perfect attestation clause, and signed by the testator, was not duly executed, otherwise the greatest uncertainty would prevail in the proving of wills; the presumption of law is largely in favor of the due execution of a will, and in that light a perfect attestation clause is a most important element of proof." In that case, the testator signed his will in the presence of two witnesses, an attorney and his clerk, whose names were written at the foot of a full attestation clause. After the death of the testator, an affidavit was required as to certain interlineations which appeared on the face of the will, and such affidavit was prepared by the clerk on a printed form, the blanks being filled in by him. This affidavit was sworn to by the attorney, and contained the usual clause of due execution; more especially, that the witnesses had signed their names in the presence of the testator. After the death of the attorney, the clerk, for the first time, gave information that the will was not signed by the witnesses in the presence of the testator, (who, at the

time of signing the will, was at his house,) but in the attorney's office, and at the trial gave evidence to the same effect. No other witness, to corroborate or disprove the statement, was produced. The court, on review of all the circumstances, declined to act upon the recollection of the surviving witness, and decreed probate of the will as having been duly executed. In the case before me the testamentary witnesses, when examined eight months after the signing of the will, were in doubt as to whether the will was or was not signed at the table which was in sight of the testator. Two other witnesses who were present, testified that the testamentary witnesses did, in fact, sign at the table, while another swore that they signed at the desk. At most, it is doubtful on the evidence whether the will was not signed at the table, and under such circumstances the presumption arising from the statement of the attestation clause is not overcome.

The decree of the Orphans Court will be reversed.

Brokaw's Executor *vs.* Conover.

1. Costs and counsel fees of caveator, disallowed. Decree for payment of proponent's costs by caveator, refused.

2. An extra allowance of $225 to the Orphans Court, beyond legal fees, disallowed.

On appeal from Hunterdon Orphans Court.

Mr. G. A. Allen, for appellant.

Mr. J. N. Voorhees, for respondent.

The Ordinary.

This appeal brings up for review so much of the decree of the Orphans Court of Hunterdon county, admitting to pro-

bate the will of Dorothy Brokaw, deceased, as awards costs and counsel fees to the caveator, and so much of an order taxing costs in the suit, as makes an extra allowance of $225 to the court beyond legal fees. An examination of the evidence has satisfied me that the case is not one in which costs or counsel fees should have been allowed to the caveator. The part of the decree appealed from will, therefore, be reversed; but, under the evidence, and in view of the adjudication of the Orphans Court, I am not willing to go further and decree payment of the costs and counsel fees of the proponent by the caveator. The item of judges' fees, above referred to, will be struck out. No costs of the appeal will be awarded

---

OCTOBER TERM, 1876.

In the matter of the probate of the will of THOMAS ALEXANDER, deceased.

1. A testator, by his will, gave power to his son, a semi-imbecile, to make a testamentary disposition, under a certain restriction, of the property given to him by the will. *Held*, that this fact not only did not establish the testamentary capacity of the son, but was to be treated as the opinion, merely, of the father in regard to the son's competency to make a will. *Held also*, that the will of a person *non compos mentis* could not be sustained as the execution of a power.

2. The will under consideration *held* to have been the result of undue influence.

On appeal from the decree of the Orphans Court of Essex county.

Mr. A. Q. Keasbey, for appellants.

Mr. T. N. McCarter, for respondents.

In the matter of the will of Thomas Alexander.

THE ORDINARY.

Thomas Alexander, late of the city of Newark, in this state, died there in December, 1873. On the 2d of January, 1872, he executed, at the office of Messrs. Frelinghuysen and Kirkpatrick, in the presence of two witnesses, one of them the first named of those gentlemen, a paper purporting to be his last will and testament. This document had been drawn for him by the other member of the firm, who is named therein as one of the executors. By it he gave to his brother Reverdy $300, and to his sister Margaret, $600. He also gave to his nephew, Stewart B. Linthicum, $1000, and to his niece, Eliza Kerr, $500, to be held in trust for them respectively by the executors, until they should respectively have attained the age of twenty-one years, and then to be paid to them with all accumulations. These two legacies were to lapse and fall into the residue of his estate in case of the death of the legatees in his lifetime or before attaining the age of twenty-one years. To Allen Griffith he gave a chest of tools, which belonged to him the testator, before the death of his father, Thomas S. Alexander. All the rest of his property he gave to his sister Mary, now Mrs. Bingham. From the decree of the Orphans Court of Essex county, admitting this document to probate as his last will and testament, this appeal was taken.

The testator, though at the time of executing the instrument in question, of mature years, being then thirty-eight years old, was, as he had been from his childhood, of a very low grade of intellect. His boyhood and youth had been spent in Maryland, where his father long practiced the legal profession, of which he was a distinguished member. In 1866, the latter removed to Newark, bringing the testator with him as one of his family, and the testator resided with him there until his father's death, which occurred on the 4th of December, 1871. His father, by his will and the codicil thereto, after certain specific legacies and a small pecuniary one, gave all the residue of his estate to his four children and his granddaughter, the child of his deceased daughter. As to Thomas' share, which was one-sixth of the residue, he made the follow-

ing provision: "I desire and empower my executors to retain my son Thomas' part or share of my estate, and invest the same in some interest-bearing public stock or evidence of debt, and to apply the income or profits of such investment, or such part or parts thereof as they, in their discretion, may think necessary and expedient, to the support of my said son for and during the term of his natural life. I vest in them this large discretion because of the facility of the disposition of my said son, and to protect him against the practices of designing men. I desire that any surpluses of income, which may, at any time, remain over what may be expended on his proper maintenance, shall be invested in like manner. He is to have the power of disposing of the said principal fund and its accumulations by last will, to and among his brothers and sisters and niece and their descendants, or such of them as he may prefer, and as he may think proper; and in the absence of any valid disposition thereof as aforesaid, the said fund and its accumulations are to go to the person and persons who, at the time of his death, may be designated by law as his personal representatives, and in proportions as determined by law." He appointed Thales A. Linthicum (to whose wife, his daughter Emma, he gave one-third of the residue,) and his nephew, Julian J. Alexander, his executors. Both of them proved the will and codicil and accepted the trust. After the death of his father, Thomas the testator, whose will is under consideration, continued to live in the family mansion in Newark with his sister Mary who was then unmarried, for many months, and until she left this state. The testator was, at best, a semi-imbecile. His very personal appearance indicated his deficiency in mental capacity. While the testamentary witnesses and others, sworn before the Orphans Court, testify to his competency, in their opinion, to make a testamentary disposition of his property, it is, from the evidence, too clear for question, that he was, at best, a very feeble-minded man. His father anxiously endeavored by means of his own association with him and otherwise, to strengthen his intellect. He placed him in a training school under an

experienced and skillful educator of the feeble-minded. At one time, partly to break up habits of intemperance which he had formed, the testator was sent by his father to the Maryland Hospital, where he remained for a considerable period. While the result of these efforts was, probably, some improvement, he nevertheless, up to the time of his death, was justly regarded as a person of very feeble intellect. Mr. Haines, one of the testamentary witnesses, speaking of his condition at the time of executing the will, says, from what he observed of him, he had "no reason to think he was anything but sound." His acquaintance with him, however, was, he says, but very slight. The other testamentary witness, Mr. Frelinghuysen, was somewhat acquainted with him. He says that while the testator, in his opinion, had not a sound mind, he had sufficient intellect to dispose of his property; that he knew what he was doing, what disposition he was making of it, and to whom he was giving it. Mr. Kirkpatrick, one of his executors, by whom the will was drawn, says he thinks that he perfectly understood the manner in which he disposed of his property, and he adds that he gave his directions clearly. Numerous witnesses testify on the subject of the testator's capacity. Of these, many are persons of high social position in Maryland and elsewhere, some of whom were acquainted with him from his childhood. Their testimony leads to the conclusion that before he came to this state he was of so low a grade of intellect as to be incapable of transacting any business whatever, and if he had testamentary capacity, it was merely such as would satisfy the lowest requirements of the law. I deem it unnecessary to refer particularly to their testimony. The testimony of those witnesses who speak on the subject from their knowledge of him after he came to Newark to reside, makes it evident that his capacity had not materially increased. Mr. Thomas T. Kinney, one of these witnesses, who knew him well, and whose opportunities for observation were good, says he used to hear him spoken of as an idiot, and thought the matter over, and concluded he was not

exactly that, but thought he was of rather a low grade of intellectual development—a feeble-minded young man, but not an imbecile. He says, in explanation, " I thought he was of a very low grade of mind, though not an idiot, because I always had the idea that an idiot had no mind at all, and Tommy had a mind up to a certain point." It is in evidence that as late as July, 1872, five months after the making of the will, his sister, Mrs. Bingham, contemplated placing him in a training-school for feeble-minded persons. It was urged by the counsel of the proponents on the hearing of this appeal, that the fact that his father had, with full knowledge of his mental condition, provided in his will for the exercise by the testator of the power of testamentary disposition of his share of his father's estate, should have great weight in determining the question of capacity. It is, however, only evidence of the opinion of his father, and is of no legal value in determining the question. It was also contended on behalf of the proponents, that if there be doubt as to the testator's capacity, the will ought, in view of the above-quoted provision of his father's will, to be regarded as the execution of a power. But, surely, it is not necessary to say that an idiot or lunatic cannot execute a power involving the exercise of discretion, even though it should appear that the donor knew, at the time of the grant of the power, that the donee was *non compos mentis*.

The view which I take of this case, however, renders it unnecessary to pass upon the question of the testator's capacity except as connected with the question of undue influence. That he was of a facile disposition and liable to be imposed upon, is evident from all the testimony. His father vested a large discretion in his executors as to the testator's share of his estate, expressly because of the facility of the latter's disposition, and to protect him against the practices of designing men ; and he limited the exercise of the power of testamentary disposition. The testimony shows unmistakable evidence of undue influence over the testator by his sister Mary, the principal legatee, to whom he gave almost all of his estate. That she design-

edly influenced his mind against his sister Emma and the executors of his father's will, who were trustees of his share of his father's estate, and one of whom was the husband of Emma, and that she procured him to make a will of his property while he was under that influence, exerted not only against Emma but in her own favor, abundantly appears. By such a person as he, confinement in an asylum, of which he had had some experience, is regarded with ineffable dread, and no greater cause of enmity can be presented to the mind of such a one than the imputation of a design, on the part of another person having, or being supposed to have, some right to control over him, to subject him to such confinement. That the legatee referred to had filled the testator's mind with apprehensions of the intention on the part of his sister Emma and the executors of his father to put him into an insane asylum, with a view to getting his estate for themselves, is manifest. In her testimony she admits that she told him that the executors and his sister Emma had said that he ought to go to the hospital. As early as the 19th of December, 1871, which was but about two weeks after his father's death, she obtained the certificates of two physicians in Newark as to his condition, with reference to the necessity of putting him into an insane asylum, when, according to the evidence, nobody had proposed to put him there. The effect of her influence in this direction is seen in the testimony of Mr. Kinney, who says that, after the will was made, he had a conversation with the testator on the subject, in which he seemed to have a strong feeling against his Baltimore relations, and Mr. Kinney adds, "he had got an idea that they wanted to put him into a lunatic asylum, and that they were trying to entice him off, but he was determined to stay here." Mrs. Bingham's own testimony produces the conviction that she exerted her influence over him, (which is shown to have been great,) against his father's executors and his sister Emma, in this direction. To the question, "Did you ever talk to Tommy about the asylum, at all, afterwards?" she answers, "I don't remember that I did; I might and I might not. In calling Doctors Ward

and Dougherty" (the physicians just referred to) "I mentioned to them, when they entered, what their purpose was in coming; then I said Doctor, I am particularly anxious to have your opinion and certificate as to whether Tommy is a fit subject for the hospital, because of what Messrs. Linthicum and Alexander" (the executors) "had told me they always had—they made no secret of it; and if, in the event of my absence or sickness, they ever took Tommy to the hospital, I wished to have their certificates, so that I could take him right out, and so I made that remark distinctly at that time to the doctors." She further testifies as follows: *Q.* "Did you ever tell Tommy that they were going to take him to the asylum? *A.* "Did I ever tell Tommy?" *Q.* "Yes." *A.* "I don't remember it." *Q.* "Do you remember his telling you that you lied when you did say so?" *A.* "Tommy never used such words to me, and I never heard him use such words in the house." *Q.* "Then it was all a delusion in his letter, was it?" (referring to his letter to Julian J. Alexander, of June 21st, 1872,) "in which he says: Did you tell Missey" (meaning Mrs. Bingham) "in your letter that she must pack my clothes up, that you were coming on and take to a asylum. I told her she lie." *A.* "He may have said it, if he wrote it, and I never paid any attention to it." *Q.* "He wrote this on the 21st of June?" *A.* "What dates were those letters you have read in court—what years were they written?" *Q.* "He writes on the 21st of June, 1872, that Missey had told him that they" (the executors) "had told Missey that they were going to take him to an asylum, and he says I told her she lied—is that a mistake?" *A.* "Am I called upon to express my opinion of those letters?" Her counsel then said to her "No, you are called upon to state whether that is a mistake or not." She then replied, "I decline to answer the question." Her further examination on this subject is of the like character, and closes with her refusal to swear whether she did or did not tell the testator that the executors were trying to get hold of him to put him into a lunatic asylum. She admits, however, that, in fact, they

never did tell her that they were going to send him to an asylum. Her influence over him appears in the testimony of Mary D. Davis, a witness for the proponents. She was a frequent visitor at Mr. Alexander's house. She says, Mrs. Bingham's treatment of the testator was always very kind, but she adds, "of course she had to be firm." To the question, "What control had she over him; why had she to be firm and restrain him?" she answers, "Because no one else in the house could." Mrs. Bingham says that the certificates which she obtained from the physicians were procured at the testator's request, and if that be so, it is not difficult to understand what was the condition of such a mind as his under such circumstances. The certificates are addressed to her, and thus, and by other internal evidence, show that the examination was by her procurement. Dr. Ward certified that he had, long before that time, arrived at the conclusion that the testator was semi imbecile, and that his defective mental development was congenital, and he added, that his case was, without doubt, incurable. He further certified that he did not look upon him as insame in any sense, and was fully satisfied that it would be an act of injustice to place him in an asylum for the insane. He added to his certificate a statement that he considered him competent to make a will. The certificate of Dr. Dougherty is of a like character. He testifies as follows, referring to the examination by him and Dr. Ward; (the latter died before the trial in the Orphans Court): *Q.* "Was anything said about whether he ought to be sent to a lunatic asylum or not?" *A.* "I think such a question was raised; I think that was one of the objects of our inquiry, to determine whether he should be taken away from her control and put into an insane asylum; she preferred to have the control of him after his father's death." *Q.* "Did she say anything to you that led you to suppose that anybody was trying to take him away and put him into a lunatic asylum?" *A.* "I think that was so; I got that impression." *Q.* "Did you get the impression as to who she said was endeavoring to get him away and put him into a lunatic asylum?" *A.* "I don't

remember any individual, but my impression is, it was some of the members of the family who were desiring to do that." He further testifies that the testator seemed to be apprehensive that he would be sent to an asylum, and he did not want to go there. He, indeed, says that he and Dr. Ward, "mostly wanted to find out what his capacity was, if he had any property to dispose of;" but he also says that the principal object of the examination was to determine whether it was proper to take him from his sister Mary's custody to the lunatic asylum. That she caused him to make the will, is proved. Leaving out of consideration his statements on that subject to Mrs. Price and his sister Emma, to the former of whom he said that Mrs. Bingham had told him that if he did not make his will in her favor she would put him into a lunatic asylum, and to the latter that he had to make the will, and that Mrs. Bingham had said if he did not make his will he should not live in the house with her, and that she would give him over to Mr. Linthicum and Julian Alexander, and that they might do as they pleased with him; that they had said they were going to put him into the hospital, and that she intended to give him up to them and let them do as they pleased with him, and that all they wanted was to get him to Baltimore, put him into the hospital, and spend his money; her statement to Julian J. Alexander, one of the executors, is sufficient evidence of the fact. He testifies that about the 5th of January, 1872, (the will was executed on the 2d of that month), she told him that she had had three doctors examine the testator, and that they said he could make a will, and that she "had made him make a will," so that if they, the executors, took him to Baltimore, they would be disappointed. He says that on a previous occasion, she had accused him of conspiring with Mr. and Mrs. Linthicum to take the testator to Baltimore, to get him to make a will in favor of them and their children. It further appears in the evidence, that about a week before the will was made, she told Mr. Kirkpatrick that the testator was coming to his office and wanted him to draw his will, thus making the

arrangement for the drawing and execution of the will, about the time when she obtained the certificates of the physicians. The testator had not signified to that gentleman any intention to make a will. The will was executed on the 2d of January, 1872, two weeks after the examination of the physicians.

The testimony in the cause leads to the conclusion that the paper in question is not the will of the testator, but that by undue influence on the part of the principal legatee, his free agency was virtually overborne. The testator was, according to the testimony of the physicians whom she employed to certify to his condition, a semi-imbecile. He was subject to her control and influence, and she is shown to have exerted a malign influence over him against his sister, who had equal claims with her to his estate. She appears to have greatly interested herself in the making of the will, as is evidenced by her declaration that she had "made him make a will," and she appears to have provided herself in advance with the means, as she supposed, of sustaining the will against the objection of incompetency, which was obviously to be expected, by obtaining the certificates of physicians on that head. The testator resided with her from the death of their father, in December, 1871, until February, 1873, when she married and left Newark, and went to reside in Philadelphia. From the time when she left Newark up to his death, which occurred in December following, she was in constant correspondence with him. She says she received, on an average, two or three letters a week, and various postal cards, and that he visited her in Philadelphia twice in that time, and would have paid her more frequent visits, but that she was called away from that city. She appears to have kept up constant communication with him, and her influence over him seems not to have diminished. Her testimony, instead of relieving her from the imputation of undue influence, only makes it the more clear that she, in fact, did exert it. The instrument ought not, under the circumstances, to be admitted to probate as his will. The law secures the right of testamentary disposition, neither hedging it about with

unnecessary regulations, nor restricting it by unreasonable limitations or conditions, but it requires that the will shall be, as its name imports, the voluntary, free act of the testator, not coerced by restraint nor induced by fraud or extreme or unreasonable influence. The decree of the Orphans Court will be reversed.*

HOLCOMBE, appellant, and HOLCOMBE'S Executors, respondents.

1. A decree of the Orphans Court which, in a case where, by will, a fund was given for life to one, with remainder to another, directed the executor to set aside, out of other moneys of the remainder-man, a fund to pay the taxes on the first-mentioned investment, reversed.

2. Where a fund is given for life to A, with remainder to B, the former is bound to pay the annual taxes.

Appeal from decree of Hunterdon Orphans Court.

Mr. G. A. Allen, for appellant.

Mr. J. T. Bird, for respondents.

THE ORDINARY.

Jacob H. Holcombe, deceased, late of the county of Hunterdon, by his will, gave to his daughter, Mrs. Sharp, the interest, for life, of certain investments, with provision that if she should have living issue, the principal should go to her, but otherwise, on her death, it was to be equally divided between his sons, Christopher and Josiah. He appointed Christopher and Hiram Holcombe, executors. On the settlement of the accounts of Hiram Holcombe as one of the executors, in the Hunterdon Orphans Court, it appeared that the money to be invested for Mrs. Sharp amounted to $16,427.15, of which one-half was held by Christopher, and the other by Hiram Holcombe. That court, among other

* Decree affirmed, 2 *Stew.* 649.

things, decreed that the latter should retain out of the other money given to Josiah by the will, $2000, to be invested as a fund for the payment of the taxes on the investment for Mrs. Sharp, in the hands of Hiram Holcombe. From that part of the decree, Josiah appealed to this court. It is quite clear that the decree is, in this respect, erroneous. The court had no right to sequester any of the money of Josiah to pay the taxes on the investment for Mrs. Sharp, or any part of it, notwithstanding his interest therein. It is alleged, and for the purposes of this decision it may be assumed, that there is no possibility of issue of Mrs. Sharp, and that Josiah, therefore, has a vested remainder in the last-mentioned fund, which is practically not liable to be defeated. According to the rule by which the duties and liabilities of tenants for life of real property are fixed, Mrs. Sharp is bound to pay the taxes assessed upon the fund, during her life. That rule is applicable to the investment. *Hill on Trustees* 395; *Perry on Trusts*, § 554; *Atwood* v. *Lamprey, in note to East* v. *Thornbury*, 3 *P. W.* 126; *Currie* v. *Goold*, 2 *Madd.* 163, 426; *Holmes* v. *Taber*, 9 *Allen* 246. In the last case the annual state, county and town tax was assessed against the trustee of a fund in the lifetime of the life-tenant, who died within a month thereafter, and before the tax had been paid. Apportionment between the estate of the life-tenant and the remainder-man was refused. The assessment was made under the tax law of Massachusetts, which provided that the tax on such funds should be paid out of the income, by the trustee if resident in the state, but if not, then by the person entitled to the income. To require the life-tenant to pay the annual tax assessed upon the fund, is in accordance with the maxim, *Que sentit commodum, sentire debet et onus.* The reason for requiring of a life-tenant of land the payment of the taxes, applies with equal force to the life-tenant of a fund. By the sixty-ninth section of the act of 1866, (*Nix. Dig.* 952, § 7,)* the trustee is liable to be assessed for the fund. He will retain the tax out of the interest. The part of the decree of the Orphans Court appealed from will be reversed, with costs payable out of the estate.†

* *Rev., p.* 1153, *sec.* 66. † Decree affirmed, 2 *Stew.* 597.

RINEHART, appellant, and RINEHART, respondent.

1. All of the next of kin of intestate agreed that administration should be granted to the eldest of them, if he could find security. Being unable to do so, the surrogate, at his request, within fifty days after the death of the intestate, granted administration to one not of kin to the intestate, without ascertaining whether some of the next of kin would not administer, and without citing any of them for the purpose of ascertaining. The letters were declared null and void.

2. The Prerogative Court has jurisdiction, by appeal, over a controversy as to the right of administration, (granted by the surrogate,) unless the controversy has already been taken by appeal into the Orphans Court.

The argument was had upon the petition of appeal, and answer of the respondent, and depositions taken in pursuance of the order for that purpose.

Mr. Wykoff, for appellant.

Mr. Demott, for respondent.

ZABRISKIE, ORDINARY.

The appeal is from the action of the surrogate of the county of Morris in granting administration of the personal estate of Hannah Rinehart, deceased, to the respondent.

Hannah Rinehart died on the 1st day of April, 1872, leaving the appellant and seven other children her next of kin, all, but one, of full age. They all met, and agreed that administration should be granted to Peter L. Rinehart, the oldest son, if he could find security. Peter was not able to procure security, and requested the surrogate to grant administration to the respondent, Samuel Rinehart, who was not of kin to the intestate. The surrogate granted administration to the respondent, on the 26th of April, 1872, without any notice or citation to the children of the intestate, and without the knowledge or consent of any except Peter.

The respondent proceeded immediately with the administration, made and exhibited an inventory, and took possession of the assets. On the 3d of June, William, one of the sons of the intestate, commenced proceedings in the Orphans Court of Morris county to have the letters revoked as improperly granted. The court, upon hearing the parties and their evidence, refused to revoke them. After that, this appeal was taken by Jacob from the proceeding of the surrogate.

By the statute, (*Nix. Dig.* 303, § 7,)* administration must be granted to the next of kin, or some of them, if they, or any of them, will accept the same; and if none will accept it, to such proper person as will accept.

The first section of the act of 1784, (*Nix. Dig.* 307, § 25,)† provides, that if any person shall die intestate, and leave no relations entitled to administration, or, if entitled, they shall not claim the same within fifty days after the death of such person, administration shall be granted to any fit person applying therefor.

The administration was granted in this case within fifty days, and without ascertaining whether some of the next of kin were not willing to administer, and without citing any of them for that purpose. The surrogate, as between the children, could have granted administration to Peter, or any of them who would accept and give security. He had discretionary power to grant it to any one or more of them, but not at the request of any one to grant it to a stranger.

The sixteenth section of the Orphans Court act of 1846 gives an appeal to this court in cases where the controversy as to the right of administration has not been brought before the Orphans Court by citation, as there provided, and administration granted by the surrogate, as in this case. The right of appeal to the Orphans Court, given by the second section of the act of 1855, (*Nix. Dig.*, § 50,)‡ does not interfere with the right of appeal to this court, except when the proceedings have been removed into that court by such appeal. In this case, no such appeal was taken. The proceedings in the Orphans Court were not by way of appeal, but it was a pro-

* *Rev., p.* 758, *sec.* 28. † *Rev., p.* 397, *sec.* 9. ‡ *Rev., p.* 791, *sec.* 173.

ceeding instituted after the right to appeal to that court had expired, to have the letters revoked by the Orphans Court. The Orphans Court have no power to revoke letters granted and issued by the surrogate, except when his proceedings are brought before them by appeal, and in certain cases provided for by statute. This case is not one of them. That court properly refused to revoke those letters, and their determination on that application can be of no avail in the decision of this appeal.

The action of the surrogate in granting administration to the respondent must be reversed, and the letters declared null and void. The costs must be paid by the respondent, out of his own funds.

CASES ADJUDGED

IN THE

COURT OF ERRORS AND APPEALS

OF THE STATE OF NEW JERSEY,

ON APPEAL FROM THE COURT OF CHANCERY.

MARCH TERM, 1875.

GUEST, appellant, and HEWITT, respondent.*

SAME APPELLANT, and HEWITT and WARD, respondents.

A party coming into a case by petition, by force of the forty-first section of the chancery act, is no further bound by the previous orders and proceedings in the cause, than the party whose interest he has acquired would have been bound.

The opinion of the Chancellor is reported in 10 *C. E. Green* 100.

Mr. Linn, for appellant.

Mr. Cortlandt Parker, for respondents.

The opinion of the court was delivered by
THE CHIEF JUSTICE.

The appellant, William A. Guest, became the purchaser of the road of the Montclair Railway Company, at a sale by a receiver, and immediately thereupon applied by petition to

* Cited in *Davis* v. *Sullivan*, 6 *Stew.* 573.

be made a defendant in two foreclosure suits that were pending at the time of such purchase. One of the suits had then gone to a final decree; and in the other, a decree *pro confesso* had been taken. In the former of these cases the Chancellor refused the application, and in the latter, granted it, allowing the petitioner to be made a defendant in the cause, but restricting him from filing an answer, plea or demurrer, and from setting up any defence to the bill. The petitioner has appealed from each of these orders.

This application to be let in as a defendant, was made by virtue of a supplement to the chancery act, passed in 1870; this provision is embodied in the forty-first section of the act respecting the Court of Chancery, as contained in the late revision. Its purpose is to furnish an easy mode of letting in persons as parties to the suit, who have acquired an interest after its inception. The form thus devised is by a verified petition. This step being taken, the statute then contains this direction: "And the Chancellor may thereupon, if it appear that such person is entitled to be made a party to the cause, and has acquired his interest from some party to the same, order that he may be made a party thereto; but such person shall be bound by all orders and proceedings in the cause against the party whose interest he has acquired, and the cause shall not be delayed by the admission of such party," &c.

From the opinion sent up with this case, it seems to have been the view of the Chancellor that a person being made a party under this statute, could not be permitted to call in question any of the antecedent proceedings in the cause. According to this interpretation, the words of the act declaring that the party newly added "shall be bound by all orders and proceedings in the cause against the party whose interest he has acquired," became absolute and peremptory. But we think this is not the proper meaning of this law. The object was to offer an easy access to the person who had acquired the interest of one of the litigants, and to do this upon the equitable condition that he should take the place of such superseded party upon the record; he should stand in the suit in his stead,

and be bound by all the anterior proceedings to the same extent as such original party was bound. It could not have been the intention to impose upon the incoming party the obligation to submit to an order previously made, if he could show to the satisfaction of the Chancellor that such order had been obtained in violation of the rules of practice, or the principles of equity. In such respects, it would seem that his right to ask the court to interfere and set things right, would be precisely the same as would have been the right of him whom, as a party, he superseded.

But although this appears to be the true meaning of the statutory provision in question, still we see no reason to call in question the order which has been made in either of these cases. In the suit in which a final decree has been made, it does not appear how it would advantage the appellant to be joined to the proceedings as a defendant. The grounds disclosed in the evidence, it is certain, would not enable him to ask that this final decree should be opened. Such an application would not deserve to be listened to. Taken at their strongest, the proofs made by the petitioner may be said to show that there is a possibility that some of the bonds, the moneys secured by which are embraced in the decree, have not been legally issued. But decrees are not opened on such an unsubstantial ground. If there has been any fraud or mistake in the case, the petitioner has his remedy without being a party to the record. He has lost no appreciable right by the refusal of the Chancellor to admit him.

With respect to the other application, it is sufficient to say that it is destitute of every semblance of merit. The Chancellor's order is that, in this case, the petitioner be admitted as a party, but that he shall be bound by the decree *pro confesso* already taken. Why is this a hardship? Not a particle of evidence has been taken to show that any reason exists why this decree should not stand.

We think both orders appealed from should be affirmed, with costs.

Orders unanimously affirmed.

BEATTY and others, appellants, and DE FOREST, respondent.

After a sale in a foreclosure suit, and the purchaser has got his deed, a writ of assistance will go *ex debito justitiæ*, to put him in possession.

Appeal from an order of the Court of Chancery. The opinion of the Chancellor is reported in 10 *C. E. Green* 343.

Mr. Cortlandt Parker, for appellants.

Mr. John A. Miller, Jr., and *Mr. Williamson*, for respondent.

The opinion of the court was delivered by
THE CHIEF JUSTICE.

There was a sale in a foreclosure suit, and the appellee became the purchaser of the property at the sale, and subsequently the sheriff executed to him a deed in due form. He then filed a petition for a writ of assistance to enable him to get possession of the premises. This application was resisted by the appellants, who were the defendants in the foreclosure suit, on the ground that the sale made by the sheriff was not a fair one. The Chancellor ordered the writ of assistance to issue, and from this order the present appeal is taken.

I can see no legal ground for the controversy that seems to have been superadded to the legitimate proceedings in this case. While the decree of foreclosure and the deed by the sheriff remain unimpeached, there is no propriety in permitting a party against whom such decree has passed, to ask the court not to help to put them into effect. If a defendant has any just and prevalent objections to make, either to the decree or the sheriff's deed, the law has provided a method in which he can have a hearing. But here no attempt is made to open the decree or set aside the deed; the whole effort being to solicit the court to withhold its hand and leave the party, whom it has divested of all title, in possession of the premises

sold by its own order. What equity is there in driving the purchaser to his ejectment? The only effect is to put upon him the costs of such a proceeding, and subject him to a loss of the profits of the property during the pendency of such suit. The appellants could have no defence to that action, for in the eye of the law they are mere trespassers on the land, and liable for all damages resulting from holding the possession. In my opinion a purchaser under a decree, having a sheriff's deed, has as much right to the assistance of the court to be put in possession, as a plaintiff in a court of law has to an execution after judgment. In the case of *Blauvelt* v. *Smith*, 7 *C. E. Green* 31, the writ of assistance is stated to be an "extraordinary relief." But I see no reason to so regard it. It is true that it is of comparatively recent use in this state. In the year 1853, in the case of Grant *v.* Quinn, being solicitor in the cause, I applied to Chancellor Williamson for this process, and after looking into the New York authorities, it was ordered to be issued. This was the first occasion in which the proceeding was resorted to in our practice; the antecedent and ancient remedy being the action of ejectment. The new method immediately superseded the old one, and has been in constant use ever since its introduction. This remedy is founded on the general principle that a court of equity will, when it can do so justly, carry its own decrees into full execution, without relying on the co-operation of any other tribunal. The consequence is, it cannot refuse its aid to one of its suitors in this respect, except on some reasonable ground of equity. When, therefore, as in the present case, there is nothing more than a prayer on the part of a defendant to be left in possession of the premises which have been sold and conveyed, such prayer is simply a request that the court will not execute its own decree, but will leave it to a court of law to do that duty in a more dilatory form. It seems to me such an application should not be entertained.

I think the Chancellor was right in ordering the issuing of the writ in question, and that such order should be affirmed, with costs.

Order unanimously affirmed.

CRANE and others, appellants, and THE HOMEOPATHIC MUTUAL LIFE INSURANCE COMPANY, respondents.*

A plea or answer setting up usury as a defence, must state specifically the facts of the bargain.

Appeal from decree in accordance with the opinion of the Vice-Chancellor, reported in 10 *C. E. Green* 418.

Mr. W. J. Magie, for appellants.

Mr. W. H. Arnoux, for respondents.

The opinion of the court was delivered by
THE CHIEF JUSTICE.

In this case I have not found it necessary to consider the merits of the matter in controversy. The answer is radically defective, so that the defence, which is usury, cannot be presented to the court under it. Nor is it necessary to discuss this question of pleading, for the subject is *res adjudicata* in this state. In the cases of *The New Jersey Patent Tanning Co.* v. *Turner*, 1 *McCarter* 326, and *Taylor* v. *Morris*, 7 *C. E. Green* 606, the latter decision being made by this court, the doctrine was conclusively settled that a plea or answer setting up the defence of usury, must state specifically the facts of the bargain. It is not possible to hold that this has been done in the present record. The defendants' averment here is, that it was agreed that the complainants should reserve and take, for the sum of $11,000, loaned for one year, the sum of $1004.69 as a bonus, in addition to lawful interest. But the proof is that this was not the bargain, but that for the sum so withheld, there was given to the complainant a policy on the life of his son. The agreement to give this policy was a part of the bargain, and therefore, by force of the established rule, could not be omitted. To permit this

*Cited in *Cox* v. *Westcoat*, 2 *Stew.* 552.

would be, very plainly, to abolish the rule. This was the view of the Vice-Chancellor who heard the case in the Court of Chancery, and in that view I entirely concur. The decree should be affirmed, with costs.

Decree unanimously affirmed.

JOHNS and others, appellants, and NORRIS and others, respondents.*

1. A scheme was entered into by the widow and the administrator of decedent to procure a foreclosure sale of the intestate's lands, at which the administrator was to buy them in at an inadequate price by giving out at the sale that he was purchasing for the widow, and thus dissuade others from bidding. Under these circumstances, the administrator purchased the lands at the sheriff's sale, and agreed to convey them to the widow for the price at which they were struck off to him. On his refusal, subsequently, to do so, the widow and the intestate's only child filed a bill to redeem. *Held*, that the widow, having participated in the fraud, was not entitled to relief, but that as to the child, the administrator would be regarded as a trustee, holding the property for her benefit.

2. Actual possession by the *cestui que trust* is constructive notice to a purchaser that there is some claim, title, or possession of the property adverse to his vendor, and this is sufficient to put him upon his inquiry.

Appeal from a decree of the Court of Chancery. The opinion of the Chancellor is reported in 7 *C. E. Green* 103.

Mr. James B. Vredenburgh, for appellants.

Mr. Ransom, for respondents.

The opinion of the court was delivered by

VAN SYCKEL, J.

Thomas W. Morehouse died September 27th, 1855, intestate, seized in fee of three parcels of land in Jersey City, known as the York street, Greene street, and Grove street

* See, further, *Johns* v. *Norris*, 1 *Stew.* 149; cited in *Cooke* v. *Watson*, 3 *Stew.* 352.

lots, each covered by a mortgage. Ann Maria Morehouse and his only child, Theresa, survived him. Administration of his personal estate was granted to his widow, and subsequently the letters to her were revoked, and administration *de bonis non* granted to Noah Norris, February 17th, 1857. After this, the mortgages were foreclosed and the real estate of the decedent sold at foreclosure sales by the sheriff. Noah Norris purchased the Greene street property November 19th, 1857, for $1325, and the Grove street property January 7th, 1858, for $2550. The total surplus arising from these sales, above the mortgages, was $65.98, which Noah Norris received as administrator, and with this and the proceeds of sale of the personalty, paid the creditors of the intestate a dividend of twelve per cent., leaving the residue of their claims unsatisfied. In May, 1867, Ann Maria Morehouse and Theresa, with Hiram C. Johns, her husband, filed their bill in chancery, charging that these foreclosure sales were procured by the contrivance of Noah Norris, who advised the widow not to pay the interest on the mortgages so that they would be foreclosed, and that he promised her that at the foreclosure sales he would buy in the properties at a low price, by making it known that he was bidding for her benefit, and that he would advance the money and take the titles, and permit her, afterwards, to redeem by paying him the amount of his bid and interest. That in pursuance of this arrangement, Noah Norris dissuaded others from bidding at the sheriff's sales, and secured the lots on Greene street and Grove street at prices much below their actual value. The bill prays for a conveyance of these lots to the complainants upon payment, by them, of the amount bid by Noah Norris, with interest. The evidence in the cause satisfactorily establishes the truth of these allegations in the bill, and that Noah Norris, by giving out at the sheriff's sale that he would buy the lots for the benefit of the widow, acquired title to them for an inadequate price. This scheme was manifestly in fraud both of the creditors of the estate of Thomas W. Morehouse, and of the rights of his infant daughter. If consummated, its

effect was to deprive her of her inheritance, and vest the whole estate in her mother. The widow, having participated in the fraud, is not entitled to relief, but the infant, who, at the time of the sheriff's sale, was only thirteen years old, occupies a different position, and as to her, the administrator will be regarded as a trustee, holding the property for her benefit. A contract of this character cannot be enforced, either at law or in equity. It was conceived in fraud, so that neither party to it can be permitted to derive any advantage from it; its fruits must be applied to the benefit of the innocent party, whose substantial rights have been injuriously affected by it. It does not involve the consideration of the statute of frauds; it rests upon the simple rule that one who has fraudulently deprived another of his rights, shall be compelled to make restitution. On the 17th of February, 1865, Noah Norris conveyed the Greene street property to his brother, John D. Norris, and on the 13th of April, 1858, the Grove street property to his son, Brainard T. Norris, who are made defendants to the bill of complaint. If John D. and Brainard can be charged with notice, actual or constructive, of the fraud of their grantor, they took their title subject to the execution of the trust with which it was burdened in the hands of Noah Norris. John D. Norris denies that he knew anything of the unlawful arrangement between Noah and the widow, but the evidence shows that the consideration he paid for the Greene street lot was much less than its value, and that he was present at the sheriff's sale, where it was made known, as a number of witnesses testify, that Noah Norris had agreed to buy the property in for Mrs. Morehouse, as an inducement to bidders to refrain from buying. It is highly improbable that this information was not communicated, at that time, to John D. Norris. But, if actual notice is not conclusively established, it is admitted that Noah Norris permitted the widow to occupy the Greene street property after the sale without rent, and that at the time of the conveyance to John, she was still in possession. Actual possession by the *cestui que trust* is constructive

notice to a purchaser that there is some claim, title, or possession of the property, adverse to his vendor. This rule was recognized by Lord Eldon, in *Daniels* v. *Davison*, 16 *Vesey* 249, and since that time it has become so firmly established that it is necessary only to refer to a few authorities on the subject. *Perry on Trusts*, § 223; *Le Neve* v. *Le Neve*, 2 *L. C. in Eq.* *23; *McDavit* v. *Pierrepont*, 8 *C. E. Green* 42. This fact should have put John upon his inquiry, and if he had inquired, he would have ascertained the equitable claim which Mrs. Johns set up to the estate. By the conveyance, therefore, to John D. Norris, the Greene street property is not discharged from the trust.

The Grove street lot did not remain in the possession of Mrs. Morehouse, and therefore, as to that lot, Brainard must be charged with actual notice of the vicious undertaking, or with such information as should have put him upon inquiry which would have led to its discovery. He asserts that he had no knowledge of it, but the circumstances of the case, and his own testimony, persuade me that he is mistaken. He purchased the property for an inadequate price, in part payment of a claim which he had against his father, and his statement on the witness stand that he allowed $3500 for it, when it appears by the bill and answer, and also by his deed, that the consideration was $2500, does not add to the credibility of his testimony, so far as it is in his own favor. He admits that in 1861, and again in 1863, prior to his purchase, his father told him that Mrs. Morehouse wished to redeem, and requested him to prepare a statement showing the amount to be paid by her on redeeming this property. These estimates were made by Brainard, charging the widow with the price at which the lot was struck off to Noah at sheriff's sale, and containing items which could not have been ascertained from mere memory. They show conclusively that such an account must have been kept by Noah as would have been kept by a person charged with a duty or obligation to convey to Mrs. Morehouse. These accounts were unquestionably in the hands of Brainard when he made up the statements. This

fact, together with the circumstance that his father requested him to make up the account, not only in 1861, but again after the lapse of two years, if not evidence of actual notice of the trust, was at least sufficient to put him upon his inquiry before he took the title. He does not, therefore, occupy the position of a *bona fide* purchaser for value without notice. The result is that, as to the Greene street and Grove street properties, the decree of the Chancellor should be reversed. Theresa Johns will be entitled to redeem the Greene street property, upon paying the amount at which it was sold at sheriff's sale, with interest. Since the conveyance of the Grove street lot to Brainard, he has expended considerable sums in the erection of buildings, and in making permanent improvements upon it. The delay of the complainants in prosecuting their remedy may have induced him to believe that they did not intend to avail themselves of their equitable right to redeem, and under these circumstances it would be just to give him a fair and reasonable allowance for his improvements to the freehold. The case should be remitted to the court below, that an account may be taken under the direction of the Chancellor, and Theresa permitted to redeem upon equitable terms.

Costs in this court and the court below should be allowed to Johns and wife, but no costs to Mrs. Morehouse.

The whole court concurred.

GILLETTE, appellant, and BALLARD, respondent.

1. An agreement resulting from an offer made by B, and accepted by G, in the following terms: "I will lend you $5000, without interest, and will aid you in every way possible; will attend to your finances and books, and help you all I can, if you will give me the choice of rooms and board for myself and family," &c., *held* to be not usurious, either on its face or upon the testimony.

2. A chattel mortgage given to secure the $5000, and calling for interest thereon, while B was receiving compensation for its use under the original agreement, *held* not to be usurious, it appearing that the mortgage had been so drawn through inadvertence, and not as the result of a corrupt agreement.

Appeal from a decree made in accordance with the opinion of the Vice-Chancellor, reported in 10 *C. E. Green* 491.

Mr. McCarter, for appellant.

Mr. Pitney, for respondent.

The opinion of the court was delivered by
WOODHULL, J.

The complainant below, who is the appellant in this court, filed his bill to restrain the enforcement of a chattel mortgage executed by him to the respondent, alleging that it had been given to secure a usurious loan. The cause having been heard by the Vice-Chancellor, upon the pleadings and the oral testimony of witnesses, the complainant's bill was dismissed, the Vice-Chancellor holding in his advisory opinion that the complainant's suit could stand only on the ground of a usurious agreement, and that the evidence in the case failed to show any agreement of that character. It is insisted on the part of the appellant. that all the terms of the alleged usurious bargain are contained in a letter sent by Ballard to Gillette, December 17th, 1870, in response to a contemplated purchase by the latter of the furniture and fixtures of the Continental Hotel, in Newark. Gillette and Ballard were at that time, and had been for several years, on terms of intimate friendship. Gillette, who was keeping a hotel in Buffalo, had recently visited Ballard at his home in Newark. While there, the matter of this purchase had been talked over between them, and either at that time or afterwards, by letter, Gillette had proposed a partnership in the hotel between himself and Ballard. The letter referred to, after stating the terms on which the hotel could be obtained, proceeds as follows: "As to my going into the thing as a partner, why, I would rather not do so; I am satisfied that there is a splendid chance for one to make money out of it, but it would not be as well for either of us to split it up and divide the profits. I'll tell you what I will do. I will lend you five thousand dollars, without interest, and will aid you in every way possible; will attend to your

finances and books, and help you all I can, if you will give me the choice of rooms, and board for myself and family. And if it also becomes necessary to get more furniture for other rooms, (and of course it will,) why, I'll go security for them; in fact, you know enough of me to know what I would do for you when required. This, I think, will make much more money for you than if I was a partner. Don't look at this in anything but a business point of view, and decide according to your convictions."

It is insisted for the appellant, that the offer made by Ballard in this letter was accepted by Gillette, precisely in the form in which it was made, and that the contract or agreement thus concluded between the parties is, on its face, necessarily usurious.

Conceding to the appellant's counsel the first part of his insistment, and assuming that the terms of the final agreement were in no respect different from those which appear in the letter of December 20th, I am still as far as possible from assenting to the proposition that the agreement thus disclosed is, *per se*, usurious.

The argument advanced in support of this proposition seems to me to involve substantially a begging of the question. It proceeds upon the assumption that the plain, if not the self-evident, intention of the parties to this agreement was, that Gillette should furnish, and that Ballard should receive, the board, lodging, &c., of himself and family, simply and only by way of compensation for the use of the $5000; whereas, in truth, the agreement was that for the board, &c., furnished by Gillette, he was to have as his compensation, not merely the use of the $5000, but in addition to that, was to receive from Ballard certain specified services, which, for anything we can possibly know to the contrary, may have been worth more to Gillette than the board, lodging, and entertainment furnished to Ballard and his family would have amounted to at the ordinary rates.

It was further insisted for the appellant, that even if the original loan was not usurious, still the mortgage must be held

to be so, because it calls for interest on the $5000, while Ballard was receiving compensation for its use under the original agreement. It appears clearly from the testimony, however, that this was not the result of a corrupt agreement, nor of any contrivance to evade the statute. It was not the intention of anybody to reserve illegal interest on this mortgage. See *Muir* v. *The Newark Savings Institution and others, 1 C. E. Green* 537. The mortgage was not drawn so as to carry interest, with the consent, nor by the procurement of Ballard. Instead of claiming, or desiring to obtain any advantage from this interest clause, he repudiates it as the result of inadvertence on the part of Gillette's agent, who drew the mortgage. The decree ought not to be reversed on this ground.

With respect to the true character of the arrangement between these parties, and the advantages shown by the testimony to have accrued from it to the appellant, I fully concur in the conclusions reached by the Vice Chancellor.

The decree appealed from is affirmed, with costs.

Decree unanimously affirmed.

SALISBURY, appellant, and COLT, respondent.

COLT, appellant, and SALISBURY, respondent.

1. An order of reference, directing a master to state an account between a legatee and testator's executor, allowing seven per cent. for interest during all the time that executors received interest on the legacy at and above that rate, (the legal rate then being six per cent.,) does not authorize charging seven per cent. because the executors received more than that rate in dividends upon stocks in which the bulk of the testator's estate was invested at his death, and so remained at the accounting; it appearing that the stock was worth, all that time, one hundred and fifty per cent. premium, and the dividends thereon amounted to less than seven per cent. upon the money value of the shares.

2. When executors have failed for several years, against the testator's intention, to separate a legacy from the estate and invest it, it is such a violation of trust as justifies charging them with compound interest.

Appeal from an order of the Court of Chancery in the matter of exceptions by Edward Salisbury and wife to master's report, re-stating an account of the surviving executor of Roswell L. Colt, deceased; and cross-appeal by the executor. (10 *C. E. Green* 203.) The appeals were argued by

Mr. Wm. Pennington and *Mr. B. Williamson,* for Mr. and Mrs. Salisbury.

Mr. R. Wayne Parker and *Mr. Cortlandt Parker*, for the executor.

The opinion of the court was delivered by

KNAPP, J.

These are cross-appeals from an interlocutory decree of the Chancellor, made upon the report of William Paterson, esquire, as master, in a cause in that court between De Grasse B. Fowler and wife, complainants, and Morgan Colt and others, defendants. The two appeals were heard, and will be decided together.

The cause in the Court of Chancery had respect to the will and codicil of Roswell L. Colt, deceased, by which Maria Theresa Colt, afterwards the wife of Edward Salisbury, had bequeathed to her a legacy of $20,000, which was directed to be held by the executors upon certain trusts. In December, 1872, Mr. Salisbury and wife filed their petition in that court, praying that a certain decree theretofore made be set aside, and reference had to a master to state an account of the principal and interest due to Mrs. Salisbury upon her legacy, above the payments made to her. Morgan G. Colt, the surviving executor, answered the petition, and on the 18th day of March, 1873, the Chancellor made an order that the said interlocutory decree of September 15th, 1868, be vacated and set aside, and that it be referred to William Paterson, esquire, one of the special masters, to take and state an account of the amount due for principal and interest upon said legacy to said Maria Theresa Salisbury, "and that he allow her interest

after the rate of seven per cent. per annum for all the time during which said executors received interest at that rate upon said moneys in their hands belonging to said Maria Theresa, and for all other time after the rate allowed by law at that time, and that he do credit said executors in said account, with all moneys paid for or to said Maria Theresa."

On the 3d of May, 1873, the master filed a report of the account made and stated by him, with the evidence taken before him on the reference. He allowed interest from November 22d, 1856, to November 22d, 1859, at the rate of six per cent. per annum; from November 22d, 1859, for the remainder of the time, after the rate of seven per cent. per annum, with calculations of interest upon annual rests throughout the whole time.

The master further reported that the estate of the testator, Roswell L. Colt, principally consisted in shares in the Society for Establishing Useful Manufactures, the par value of which was $100 per share; that all the income received by the executors from the estate of the testator was derived from dividends on those shares; and that as the legacy had to be paid out of that stock, the executors should be charged seven per cent. upon the legacy for each year that seven per cent. or upwards had been received by the executors in dividends upon the stock, taking the yearly dividends made upon the stock at par, as the rate per cent. which the executors had received in those years as interest on the legacy: and in accounting upon that method, the master found that for the years 1860, 1861, 1863, 1864, 1865 and 1866, during which period the lawful rate of interest was six per cent., the executor should be charged after the rate of seven per cent., because the dividends on the stock paid in each of those years had equaled or exceeded seven per cent., and the account was made and stated, charging the executor upon that basis, the master having in his interpretation of the order of reference, regarded it as permitting that method of accounting.

The executors excepted to this part of the report, substantially upon the ground that they had received, during

those years, less than seven per cent. per annum upon the value of the estate in their hands; that the receipts of the executors in dividends upon the stock, although more than seven per cent. upon the par value of the stock, was much less than seven per cent. upon the actual value or upon the money of the estate invested in the stock; that nothing was received by them *as* interest on the legacy, and that, under the order of reference, the charge should have been for no more than lawful interest. The Chancellor sustained the exception, and by his decretal order of October 19th, 1874, set aside so much of the master's report, and referred it back to him with directions to re-state the account and charge interest for those years at the rate of six per cent. per annum.

The executors also excepted to the manner of stating the account in making yearly rests in the computation of interest. This exception was overruled by the Chancellor.

Both parties appeal from the decree of the Chancellor, and the question presented is whether the decree upon the matters excepted to in the report is in accordance with the directions of the first-mentioned order of reference. That order was not appealed from, and whatever accounting is had in the case must be regulated and controlled by the terms of that order.

The substantial direction of that order, so far as is important here, is that the master, in stating this account, shall charge the executor, in any event, with not less than lawful interest upon the legacy, nor more than seven per cent., and if, while the rate of interest by law was less than seven per cent., the executors received interest upon the money in their hands at that rate, then, for such time as they received interest at that rate, they shall be charged seven per cent.

The decree of the Chancellor upon the rate of interest to be allowed by the master is obviously correct, unless it appears in the case that the executors, during some of the years from 1855 to 1866, received interest on this legacy at the rate of seven per cent. per annum, or more.

The case clearly shows that this legacy was never severed from the bulk of the estate, or in any manner invested as a separate fund, and the executors therefore cannot, in any proper sense, be said ever to have received any money *as* interest upon the legacy in their hands.

But, on behalf of the legatee, it is insisted that because the money to pay this legacy, with the other moneys of the testator, was invested, at the time of the testator's death, in the stock of this corporation, and the executors have allowed it so to remain, they must be considered as having received interest upon the legacy after the rate of the dividends paid upon the stock at par; in other words, should be charged for dividends received, as if the legacy had been invested in the stock at par value.

It seems by no means clear, that such is the interpretation of the order of reference, or that it calls for or permits any such rule for the ascertainment of the interest received on the legacy. If the money of the legacy had been invested in this or other stock, at a known price, it might have been easy to determine, from the dividends paid, what the executor received as interest, but such is not the case. It was admitted, on the argument, that the stock in this corporation was worth $250 per share, at the least. The dividends on two hundred shares of this stock, it is claimed, should be taken to represent the interest received on the legacy. But two hundred shares of the stock, represent $50,000 of this estate. It is not apparent upon what just principle is based the claim to have the dividends on $50,000 worth of the stock considered as the interest which the executors received on $20,000 invested in the stock. If these dividends are to represent and determine the interest received by the executors on this legacy, it must be dividends on such amount of stock as the legacy would purchase—that would not exceed eighty shares —and the dividends received by the executors on that amount of stock did not, in any of those years, equal seven per cent. upon the legacy. The Chancellor was clearly right in his conclusion that no evidence is found in the case showing that

the executors had received, during any of the years mentioned, such interest on the money in their hands belonging to the legatee, as would, under the order of reference, justify a charge for more than the legal rate of interest, and his decree is in accordance with the order of reference.

The executor appeals from that part of the Chancellor's decree which overrules his exception to the mode of computing interest with yearly rests. The decree, in that respect, is right: the circumstances of the case fully justify the compounding of interest upon the legacy.

The decree of the Chancellor is affirmed, but without costs in either case.

Decree, on appeal, affirmed by following vote:

For affirmance—BEASLEY, C. J., CLEMENT, DALRIMPLE, DEPUE, KNAPP, LATHROP, LILLY, SCUDDER, VAN SYCKEL, WALES, WOODHULL. 11.

For reversal—DODD and GREEN. 2.

Decree, on cross-appeal, unanimously affirmed.

HUMMELL and wife, appellants, and THE CLINTON STATION GENERAL MERCHANDISE AND MANUFACTURING COMPANY, respondents.

THE CHIEF JUSTICE.

The bill was filed by judgment creditors, the object being to have a house and lot, the title to which stood in the name of the wife of the defendant in execution, subjected to the judgment. The question was as to the *bona fides* of the claim of the wife to this property. Upon the argument here, this claim of the wife appeared to be so entirely destitute of all

merit, that the counsel of the respondents were not heard. It is not necessary to review the facts of the case; the evidence has been fully discussed by the Chancellor, and for the reasons stated in his opinion, (10 *C. E. Green* 45,) I think the decree should be affirmed, with costs.

Decree unanimously affirmed.

STICKLE, appellant, and VAN DOREN, respondent.

Decree unanimously affirmed for the reasons stated in the opinion of the Chancellor, reported in 9 *C. E. Green* 331.

JUNE TERM, 1875.

GULICK and others, appellants, and GULICK'S Executors, respondents.*

1. A bequest of the income of personalty, without limit as to time, is equivalent to a gift of the principal.

2. Where an absolute gift is made in the first instance, followed by a limitation over on the death of the first taker, the absolute gift is not defeated unless the gift over takes effect.

3. Though, by the application of such rule in this case, had the first taker died childless, her husband would have taken the gift absolutely as her administrator, notwithstanding testator's direction that the fund was not to be subject to the control of her husband, the rule must still govern where the guard against the husband's interference was only an incident to the accomplishment of testator's purpose to preserve the interest of the fund, and to keep the body of the bequest intact to meet the limitation over.

4. Though a will must be construed as an entirety, yet the legal construction of one section cannot be controlled by guesses as to the intent of the testator, arising from the disposition of his property in the remaining sections.

---

* Cited in *Huston* v. *Read*, 5 *Stew.* 596.

Appeal from a decree of the Court of Chancery. The opinion of the Chancellor is reported in 10 *C. E. Green* 324.

Mr. James Wilson, for appellants.

Mr. Barker Gummere, for respondents.

The opinion of the court was delivered by

REED, J.

This is an appeal from a decree of the Chancellor on a bill filed for a construction of the will of William Gulick, deceased, relative to a bequest of $10,000 to Abby Maria, his child. Upon the death of Abby Maria, a question arises concerning the direction of the bequest. Her executors claim that she had an absolute interest in it, and on her death it comes to them as her representative. The appellants, however, insist that she had only a life interest, and on her death it fell into the residuum of William Gulick's estate.

The body of the will is set out in the opinion of the Chancellor. The fifth section is as follows: "I give and bequeath to my daughter, Abby Maria, the sum of $10,000, to be placed out at interest on bond and mortgage, so soon as my estate can be collected without sacrifice; the bonds and mortgages to be taken in the names of my executors, or the survivor of them, in trust for my said daughter, Abby Maria, and the interest to be paid annually to her by my said executors, or the survivor of them, for her sole and separate use, and in no wise liable for the debts, or subject to the control of any man she may marry; should she marry and have a child or children, then, after her death, I give the said $10,000 to such child or children." She died, having never married. The testator, it is perceived, first provides for a gift of the fund itself, and then the method of its enjoyment by the legatee. The last is equivalent to a gift of the interest of the fund. It is perceived also, that until we meet the words "should she marry and have a child," &c., there is no limitation, express or implied, of the time of enjoyment of this

interest. The rule is well established that a bequest of the income of personalty, without limit as to time, is equivalent to a gift of the principal. *Craft* v. *Ex'rs of Snook*, 2 *Beas.* 122, and cases cited. And the rule applies whether given directly or through intervention of trustees. *Haig* v. *Swiney*, 1 *Sim. & Stu.* 487. This absolute bequest was subject to the concluding clause of the section, "should she marry and have a child or children, then, after her death, I give the said $10,000 to such child or children." The legatee never married. The event, upon the happening of which the interest was limited over, never occurred. The rule, therefore, governs that where an absolute gift is made in the first instance, followed by a limitation over on the death of the first taker, the absolute gift is not defeated unless the gift over takes effect. *Harrison* v. *Forman*, 5 *Vesey* 207; *Jones' Ex'rs* v. *Stites*, 4 *C. E. Green* 325. The following are some of the cases where this rule has been applied to similar bequests: *Whittell* v. *Dudin*, 2 *Jac. & W.* 279; *Mayers* v. *Townsend*, 3 *Beav.* 443; *Hulme* v. *Hulme*, 9 *Sim.* 644; *Campbell* v. *Brownrigg*, 1 *Phill.* 301; *Jackson* v. *Noble*, 2 *Keen* 590; *Alston* v. *Davis*, 2 *Head* (*Tenn.*) 266.

Construing this section as an absolute bequest limited over upon the happening of an event which has failed, the executor of Abby Maria is entitled to the fund. But it is insisted that this construction is inconsistent with the intention of the testator. It is said that by this construction, had Abby Maria died childless, leaving a husband, he would have taken this bequest absolutely, as her administrator. It is therefore urged that inasmuch as the testator preserved the fund from any control of a husband during the life of the legatee, he could not have intended that the fund should reach a husband in any event.

I think it is obvious that the object of the entire trust was to preserve the interest of the fund to the legatee during her life, and, further, to keep the body of the bequest intact to meet the limitation over. The vesting of the fund in the executors, and the guards against the husband's interference,

were only incidents to the accomplishment of this purpose. When the legatee died and the limitation over failed, the object of the trust was served, and the reason for the guards against the husband's control ceased. In Whittell *v.* Dudin, and other cases already cited, almost identical words were used, and it was not contended that they modified the absolute character of the bequest. It is also noticeable that the share of Abby Maria in the residuum would take the same course upon her death, yet no effort is made by the testator to prevent that result.

The appellants further insist that the intent of the testator, gathered from the entire will, was the equal distribution of his estate, and that such intent is defeated by this construction. It is clear, however, that the testator nowhere expresses such an intent. Nor is it to be absolutely implied. It does not appear that the devises to William A. and Alexander are equal to each other, or to the several bequests to the daughters. While we must construe the will as an entirety, yet we cannot control the legal construction of one section by guesses as to the intent of the testator arising from the disposition of his property in the remaining sections. The principle is stated in *Roper on Leg., Vol. II., p.* 1462. See also, *Hayes' Ex'r* v. *Hayes*, 6 *C. E. Green* 267.

Even if such intent was clearly expressed, it is not clear but that the testator's idea of accomplishing that result is effected better by this than any other construction.

I think there is nothing in the context to alter this construction of the section, and that the decree of the Chancellor should be affirmed.

Decree unanimously affirmed.

CARPENTER and wife, appellants, and CARPENTER'S Executors, respondents.*

1. Actual fraud is necessary to invalidate a voluntary conveyance made by one free from debt.

2. A wife's separate estate will not be charged with her husband's debt, merely because she stood by in silence while her husband represented himself to be the owner of such estate, as an inducement to the creditor to give the credit, and by such representation deceived the creditor.

Appeal from a decree of the Court of Chancery. The opinion of the Chancellor is reported in 10 *C. E. Green* 194.

Mr. Lewis Cochran, for appellants.

Mr. John W. Griggs, for respondents.

The opinion of the court was delivered by

DIXON, J.

The bill in this cause was filed by George Carpenter to set aside, as fraudulent and void against him, two deeds, by which John S. Carpenter conveyed a farm in Sussex county to his wife, Mary Ann. These deeds were delivered and recorded in November, A. D., 1866, and were voluntary. The complainant became a creditor of John S., in March, A. D., 1869. At the time of the conveyance, John S. was not only solvent, but so far as the case shows, entirely free from debt, except upon his bond, which was secured by mortgage upon this farm.

It is well established that, to enable a subsequent creditor to impeach a conveyance made under these circumstances, it must be shown to have been *mala fide;* its fraudulent character must be proved as a fact. And if the evidence does not lead to the conviction that there was a present purpose to contract future indebtedness, the payment of which was to be evaded or hindered, or some other fraudulent design to the injury of creditors or purchasers, then the conveyance will stand.

* Cited in *Cort* v. *Skillin*, 2 *Stew.* 72.

"There is nothing inequitable or unjust in a man's making a voluntary conveyance or gift, either to a wife or child, or even to a stranger, if it is not at the time prejudicial to the rights of any other persons, nor in meditation of any future fraud or injury to other persons." *Story's Eq. Jur.*, § 356. The principle is recognized in *Lush* v. *Wilkinson*, 5 *Ves.* 384; *Reade* v. *Livingston*, 3 *Johns. Ch.* 481; *Sexton* v. *Wheaton*, 8 *Wheat.* 229; *Cook* v. *Johnson*, 1 *Beas.* 51; *Belford et al.* v. *Crane*, 1 *C. E. Green* 265; *Mellon* v. *Mulvey*, 8 *C. E. Green* 198; *Winchester* v. *Charter*, 102 *Mass.* 272.

The question in this cause is then, whether this fact of fraud is made out; fraud at the time of the conveyance? In the judgment of the Chancellor, it is. I am constrained to say, in my judgment it is not. While the law requires that one should be astute in ferreting out the evidences of fraud, yet the law will not presume actual fraud. The evidences, when produced, must satisfy the judgment that it exists. It is not necessary here to narrate all the circumstances which attended the transactions now under review; they are quite fully stated in the Chancellor's opinion. It suffices to say that, when considered, they leave my mind unsatisfied of fraud.

It is contended that, even if the conveyance before spoken of was valid, still the decree subjecting this farm to the complainant's debt may be sustained upon the ground that, as an inducement to the complainant to become a creditor of John, John represented himself at the time as being the owner of this farm, and his wife, Mary Ann, stood by silent, and permitted the complainant to act in the belief that this representation was true. The remark attributed to John is, that *his property at home* was worth double his indebtedness. Whether the wife heard this remark, admits of grave doubt. Whether she comprehended it as referring to the farm, is perhaps still more dubious. But if the strongest inferences of fact against her be drawn, they would not accomplish the end which the complainant seeks. Here was no actual pledge of the property to the payment of the debt about to be contracted; no benefit accrued to the wife's estate from the credit given; nothing

that she did, or omitted to do, added credibility to her husband's statement. If the complainant was, as he says, ignorant of the transfer to the wife, then her silence did not enter into the motives that induced his action. It was the husband whom he believed, and he would have believed him equally had the wife been absent. She was in the presence, and, in contemplation of law, under the power of her husband. Under these circumstances, she subjected neither herself nor her estate to any liability at law or in equity. It would be strange if, when the law has so carefully guarded the wife's land from the husband's control and influence, a court of equity should decree that it could be wrested from her because, under such influence and control, she merely had been silent when she might have spoken. Even under the enabling legislation of New York, a wife is not liable for the tort of her husband in which she does not participate as an actor, and by which she is not profited or her separate estate benefited. She is presumed to be *sub potestate viri*. *Vanneman* v. *Powers*, 56 *N. Y.* 39. The decree should be reversed.

For reversal—DEPUE, DIXON, DODD, GREEN, REED, SCUDDER. 6.

For affirmance—BEASLEY, C. J., CLEMENT, VAN SYCKEL, WOODHULL. 4.

CLOSE, appellant, and CLOSE, respondent.

Decree unanimously affirmed for the reasons stated in the opinion of the Vice-Chancellor, reported in 10 *C. E. Green* 434.

NOVEMBER TERM, 1875.

CASSEDY and others, appellants, and BIGELOW, respondent.

1. The power to grant re-arguments should be but sparingly exercised and perhaps in no case, unless the court itself intimates a desire for the argument to be repeated.

2. On a second appeal in the same cause, the points already decided by this court are not open to debate, unless by the special order of this court.

Mr. Gilchrist, for appellant.

Mr. Cortlandt Parker, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

This is an appeal from a decree in chancery, entered in pursuance of a reversing decree of this court on a former appeal between the same parties. (11 *C. E. Green* 557.)

In that primary controversy, there were two subjects of dispute: First, whether the appellants were entitled to an assignment of the bond and mortgage held by the respondent; and second, whether the tender of principal and interest due on said mortgage, which had been made before suit brought, stopped the running of interest thereon. Both these questions were, on the former appeal, decided against the appellants. The record being remitted, and a decree being entered in the Court of Chancery, such latter decree is now before us on this appeal.

In this condition of the case, the counsel of the appellants moved for permission to re-argue the two points above stated, which have heretofore been decided by this court. Permission to do this would, I think, establish a dangerous precedent. In the case of *King* v. *Ruckman*, 7 *C. E. Green* 554, in the opinion read, it is stated that the power of granting re-argu-

ments was one which ought to be used but sparingly, and it was suggested that it should never be exercised, unless the court, *ex mero motu*, intimated a desire to have the argument repeated. This seems to be the sound rule. But the present application is peculiarly objectionable. It presents itself in this guise rather of an appeal from the decree of this court than of a re-argument. There must be an end to litigation, and yet it is not easy to say where that end will be if a decision of a court of the last resort can be again brought into debate in the course of the same proceeding. In the present instance, the questions which are now attempted to be a second time mooted, were carefully considered by this court, and they were decided, as it was deemed, in strict conformity to the decisions both in England and in this country, and no member of this court appears to have expressed the least doubt as to the legal correctness of that decision. Under these circumstances, it would be, in my opinion, a wide departure from the settled practice of the court to entertain the motion to open the case for another argument on the points in question.

Irrespective of the matters thus disposed of, there are two objections urged against the present decree. The first is, that the decree imposes a personal obligation on the appellants to pay the moneys mentioned in it. But I do not so understand it. The clause in question, properly interpreted, confers a favor instead of imposing a burthen on the appellants; it gives the privilege of paying the money, and thus saving a sale of the property. The second objection is well taken. It is admitted that the decree is for too large an amount, and, consequently, it must be reversed in order to be amended. The error in question arises from an erroneous calculation of interest; it would have been corrected, on motion, in the court below, and, consequently, the reversal of the decree should be without costs.

Reversed accordingly.

WOODWARD, appellant, and BULLOCK, respondent.*

1. An order refusing to set aside a sale on foreclosure of a mortgage in chancery, is appealable.

2. The right of the Court of Chancery to set aside sales made by its officers, cannot be doubted upon a proper case made by petition.

3. Where a cause has been defended below and comes up for review and a point is made which was overlooked, and which could not be obviated in the court below by proof or amendment, the court on appeal, will not refuse cognizance of such point and send it back to the Chancellor for a rehearing, but will hear and decide it.

4. Where the purchaser and sheriff stated to bidders the amount of certain legacies charged on the lands, at fixed amounts, when the payment was contingent, and the sums not apportioned between different parcels of land, the sale will be set aside.

5. A judicial sale will be set aside where there is surprise or misapprehension created by the conduct of the purchaser, or of the officer who conducted the sale.

On petition to the Chancellor by the appellant, to set aside the sale of a farm, made by the sheriff of Monmouth county, March 31st, 1874, under decree of foreclosure of mortgage and sale, in an action wherein Mary J. Bullock, Anthony Bullock, and George Sykes, executors of William W. Bullock, deceased, were complainants, and the appellant and others the defendants, and that said sheriff be restrained from executing and delivering a deed therefor to said Anthony Bullock, the purchaser; it was ordered and decreed that the prayer of the petitioner be denied, and his petition dismissed. 10 *C. E. Green* 279. From this decree, an appeal is taken to this court.

Mr. W. H. Vredenburgh and *Mr. B. Gummere*, for appellant.

Mr. G. S. Cannon and *Mr. F. Kingman*, for respondent.

* Cited in *Hayes* v. *Stiger*, 2 *Stew.* 197.

The opinion of the court was delivered by

SCUDDER, J.

It is said by the appellee, that this is not an appealable order or decree, and that the appeal should be dismissed for want of jurisdiction in this court. Our statute enacts that "all persons aggrieved by any order or decree of the Court of Chancery, may appeal from the same, or any part thereof, to the Court of Errors and Appeals," &c. *Rev.* 1874, *p.* 82, § 114.* The appellant is surely aggrieved by this order, if, as he claims in his petition, his homestead farm is sold from him by an illegal sale and for an inadequate price, caused by mistake and misrepresentations, and all relief is denied. It reaches the merits of the controversy between him and the purchaser, and affects his substantial rights in the cause. It is thus within the reasoning of the opinion of this court in *Camden and Amboy R. R. Co.* v. *Stewart*, 6 *C. E. Green* 484; and the facts agree with the case of *National Bank* v. *Sprague*, 6 *C. E. Green* 458, where there was an appeal from an order to set aside a sale in chancery, because it was illegal. It was there decided that such order was appealable, and not merely discretionary. A full consideration of the principles involved will be found in these cases, which rule this, and determine that the order is appealable.

The right of the Court of Chancery to set aside sales made by its officers, and restrain the delivery of the deeds to purchasers, cannot be doubted upon a proper case made. Where such sales are conducted contrary to the requirements of law, or when, through fraud or mistake, injustice has been done, they will be set aside. And this is done even when the purchaser is not a party to the suit, for, by such purchase under a legal sale, he becomes subject to the jurisdiction of the court by whose judgment and execution it is made. See *National Bank* v. *Sprague*, *supra*. Here the purchaser, Anthony Bullock, as one of the executors of William W. Bullock, deceased, was a complainant in the suit for foreclosure under which the sale was made. There is, therefore, no difficulty because proper parties are not before the court.

* *Rev. p.* 125, *sec.* 114.

The main point relied upon in the case presented to the Chancellor, was that the facts show that all the bidders excepting William W. Conover and Anthony Bullock, the purchaser, up to the time the property was struck off, believed it was sold subject to a mortgage held by Edward Black, amounting, with interest, to about $5000. For this reason, some refrained from bidding after Bullock raised his bid, at one offer, from $1400 to $4000. These facts are carefully reviewed by the Chancellor in his opinion, and he comes to the conclusion that there was no improper or unfair conduct imputable to the sheriff or his deputy, and that the purchaser, so far from interfering to prevent competition, gave information before and at the sale, to induce others to buy. We think his conclusions on these facts were correct.

But there is a point that was not in the brief of the counsel who argued the case before the Chancellor, nor presented for his consideration, which so seriously affects the parties interested in this sale, that it demands the careful scrutiny of this court. This point was not purposely withheld, otherwise it would be instantly rejected; but it was overlooked until suggested here during the argument.

It is sometimes said that this court, on appeal, will not permit parties to raise objections which they did not present to the court below, not only in justice to that court, but also to prevent surprise and abuse by reserving points expressly for further litigation. These results should always be guarded. But where the entire proceedings are before the appellate court for review, there can be no reason, where there is no intentional omission, and the parties have acted in good faith, why the whole case should not be examined and determined on appeal. It would cause needless delay and expense to send the cause back to the Chancellor for re-hearing upon the same pleadings and facts, when the result might be that the cause would be returned here for the further consideration of this court.

In *Beekman* v. *Frost*, 18 *Johns.* 544–559, the reasoning

on this subject is clearly stated. See also *Murray* v. *Costar*, 20 *Johns.* 604. Where a cause has been defended below, and comes up for review, and a point is made here which could not be obviated in the court below by proof or amendment, this court ought not to refuse cognizance of such point. This court loses the benefit of the reasoning of the court from which the appeal is taken; but the more careful and repeated preparation of the cause for re-argument here, gives the appellate court great advantages in reaching the full merits of the controversy between the parties. It cannot therefore consist with sound reason or a regard for justice, that this court should refuse to hear and consider a point which may decide a cause, because it has not been before observed. A fuller and more exact examination of a cause in all its bearings, than is often possible on its first presentation, is the most important office of the higher court on appellate proceedings, and for this they have great advantages, both in the constitution of the court where several judges may confer, and from the previous discussion and preparation in the former arguments and decision. The same reasoning above given is conclusive in this case, for no additional proof or amendment would change the matter to which reference is made. This court may, therefore, consider and decide the omitted point, and need not send it back to the Chancellor for re-hearing.

It appears that, at the sale, and prior thereto, the legacies to Emily Woodward, amounting to $10,000, and to Mary B. Woodward, amounting to $4000, given to them by the last will and testament of Robert Woodward, deceased, and charged upon the farms devised to Edward B. Woodward and Robert Woodward, the petitioner, were estimated as fixed and absolute encumbrances charged on these lands, and to be paid in the proportion of one-half by the purchaser of this farm. The course of the bidding is thus stated by the witnesses. It was first, apparently, the understanding that the farm was being sold subject to the Edward Black mortgage of about $5000.

This, with the one-half of the two above legacies, and the interest thereon, in all $7450, made the encumbrances, $12,450. The farm was bid up to $1400 above these supposed encumbrances, by Dr. James M. Bean, who was an eager bidder for it. After an interval of about five minutes the bidding continued, and Anthony Bullock, the purchaser, bid $4000. He clearly understood that the Edward Black mortgage was not to remain on the property. William W. Conover also bid with the same knowledge, alternating bids with Bullock until he bid $5050. Bullock bid $5100, and the property was struck off to him. Others did not bid, they say because they supposed the Edward Black mortgage was on the property, and the bidding, with that included, was higher than they were willing to go. This mistake on the part of the bidders, arising from their carelessness or ignorance, where the sale was fairly conducted in the presence of the complainants in the suit, and the owner of the property, would not be sufficient, as the Chancellor has decided, to set aside the sale. But Anthony Bullock, the purchaser, says that James M. Bean, one of the bidders, came to him before the farm was sold, to see what liens were on the property, so that he might know how to bid, and he gave him the liens and instructed him how to bid. He also says that he charged him that on the large farm, No. 2, of one hundred and sixty acres, that he would bid on top of the legacies or liens in the will. He told him that they amounted to $7450. This sum included the interest. He told him also that he received his information about the arrear of interest from Emily Woodward and Robert Woodward, and that he was willing to take an affidavit that the interest was $450. He was thus particular in making the statement of the amount of legacies and interest charged on the farm. He also says that, while the property was selling, he stepped back into the crowd and told them (the bid being then $4600) that it was then being cried at $12,100, with the legacies; that he had a paper in his hand and kept the amount of the bidding. He says that when he bid $5100 he added $7500 to it, and $40 for sheriff's fees,

and $170 for expenses, and found it came to about $12,750, and made up his mind to bid no more. William W. Conover, the highest bidder next to the purchaser, says he understood the one hundred and sixty acres were sold subject to a legacy of about $7000; that he obtained this information that it was so sold, from Sheriff Hendrickson; that he bid for the property with that understanding, and declined to advance his bid beyond $5050. Bullock bid $5100, and it was struck off to him.

It thus appears that both the officer entrusted with the sale of the property, and the purchaser made representations to bidders at the sale relative to the amount of these legacies that were charged on this farm, and their bids were affected by such information. Both the sheriff and Mr. Bullock doubtless spoke what they believed to be true. The sheriff probably derived his information from Bullock. But the statement was not true. The legacies had never been apportioned upon the respective farms devised to Robert Woodward and Edward B. Woodward, except by a parol arrangement that each should pay one-half the interest. But more important still, Emily Woodward was only to receive the interest of her legacy of $10,000 during her life, and at her death, if she left no lawful issue, the legacy was to revert back to Robert Woodward's estate, and his residuary legatees were to be forever exempt from paying the same. She was fifty-three years old at the time the property was sold, and unmarried. It was almost a certainty that she would have no issue, and the residuary legatees would not be charged beyond the payment of the annual interest of her legacy during her life.

The legacy to Mary B. Woodward of $4000 was with the same conditions, but as she was only seventeen years old, there was a greater probability that she would marry and have issue, so that the legacy would become absolute. The residuary legatees were Edward B. Woodward and Robert Woodward. These legacies were charged on their farms, and if either Emily or Mary died without issue, the farms were

discharged from payment. The purchaser of Robert Woodward's farm took it upon these conditions, and may never be obliged to pay any proportion of the principal of these legacies. The value of these legacies was not equal to the amount stated to the bidders by the purchaser at and before the sale.

In *Marlatt* v. *Warwick and Smith*, 3 *C. E. Green* 121, one of the purchasers had a paper stating the amount of encumbrances, which made them $3000 more than the actual amount. The Chancellor said that if the paper were shown by him, the fact that the encumbrances were overstated would be sufficient to set aside the sale. Such a misrepresentation made by the person who became the purchaser, whether innocently or fraudulently, should set aside the sale.

A judicial sale will be set aside where there is surprise or misapprehension created by the conduct of the purchaser or of the officer who conducted the sale. *Lefevre* v. *Laraway*, 22 *Barb.* 167; *King* v. *Platt*, 37 *N. Y.* 155; *Collier* v. *Whipple*, 13 *Wend.* 224; *Seaman* v. *Riggins*, 1 *Green's Ch.* 214; *Campbell* v. *Gardner*, 3 *Stockt.* 423; *Cummins* v. *Little*, 1 *C. E. Green* 48.

There has been such misapprehension in this case, and the order refusing to set aside the sale should be reversed, but without costs to either party in this court or in the court below.

For reversal—BEASLEY, C. J., DEPUE, DIXON, GREEN, KNAPP, LATHROP, LILLY, REED, SCUDDER, VAN SYCKEL. 10.

For affirmance—CLEMENT, WALES, WOODHULL. 3.

REDDISH and OHLEN, appellants, and MILLER'S Administrator, respondent.

1. Where A makes a contract with B and C for the sale to them of his real estate, and dies before the deed is to be executed, and on the day the deed is to be delivered the heir-at-law and the widow refuse to join in executing the conveyance, a decree will not be made to compel specific performance by the purchasers, on a bill filed by the administrator of A, for the benefit of the widow, (creditors not being interested in the litigation,) after the land has depreciated in value.

2. *Quere:* Has the widow any remedy against the heir-at-law? The bill dismissed only as to appellants, and retained as to the other parties, in order that she may raise that question.

Appeal from a decree of the Court of Chancery. The opinion of the Chancellor is reported in 10 *C. E. Green* 355.

Mr. McCarter, for appellants.

Mr. Vanatta, Attorney-General, for respondent.

The opinion of the court was delivered by
VAN SYCKEL, J.

John B. Miller, being the owner in fee of a tract of about fifty acres of land in Morris county, on the 10th day of June, 1872, entered into a contract in writing with Jehiel K. Hoyt, by which, for the consideration of $39,000, he agreed that he would convey the said premises, on or before the 1st day of September then next, to said Hoyt, his heirs and assigns, or to such person or persons as Hoyt might appoint, by deed containing full covenants of warranty, clear of all encumbrances. Hoyt paid $100 of the consideration money at the time the agreement was signed, and stipulated for the payment of $4900 on the delivery of the deed, and the execution of a mortgage upon the premises conveyed for the residue of the purchase money, payable at the expiration of seven years from

its date, with interest thereon, payable annually, and to begin to run six months after the delivery of the deed. In the latter part of August, Miller and Hoyt agreed to extend the time for the delivery of the deed to the 1st day of October then next, before which last-mentioned day Miller died intestate, leaving a widow and one child, the defendant David L. Miller, his sole heir-at-law. There was a prior agreement in writing, signed by John B. Miller on the 25th of April, 1872, by which he undertook to convey said premises to Hoyt on or before the 1st day of June, 1872, on substantially the same terms, which conveyance Hoyt had the option of refusing to accept. In order to avail himself of the benefit of this latter contract, Hoyt, on the 28th day of May, 1872, entered into an agreement with Henry E. Reddish, Henry C. Ohlen, and Charles T. B. Keep, by the terms of which the title to the said lands was to be conveyed by Miller to said Reddish and Ohlen as joint tenants, and providing a scheme by which, in the course of seven years, the premises were to be re-sold in lots for the benefit of the several parties thereto, in the proportion therein specified.

On the 28th day of September, 1872, Hoyt gave notice in writing to David L. Miller, the heir-at-law, that on the then approaching 1st of October, he, Hoyt, would be ready to perform his part of the agreement of June 10th, and desired said Miller to convey the premises to said Reddish and Ohlen on that day. On the 1st day of October, 1872, Reddish and Ohlen tendered to David L. Miller so much of the purchase money as was to be paid on the delivery of the deed, and also a bond and mortgage in due form for the balance thereof, and demanded a deed. David L. Miller thereupon offered to convey the property to them if the money and bond and mortgage were delivered to him, and offered a warranty deed, with full covenants, duly executed by himself and wife, but they refused to accept the deed unless Miller would deliver with it a release of dower, executed by the widow of his father, and also procure to be satisfied of record a number of judgments outstanding against him. David L. Miller offered to indem-

nify them as to the judgments against his father out of the money to be paid by them, but they refused to take the deed without the widow's release. On the same day last mentioned, the solicitor of the complainant, to whom letters of administration of the estate of John B. Miller had been granted, gave notice to the solicitor of Reddish and Ohlen that they must not make the payment called for by the contract of June 10th, 1872, to David L. Miller; that said Miller was merely a trustee; that the widow was entitled not only to dower, but to a share of the personalty of her husband, and that they would be held responsible for any payment of the purchase money to David L. Miller, which imperiled her rights.

From this time forth until after the filing of the bill in this cause, no communication, verbal or otherwise, passed between the parties to this suit, or any of them, respecting this transaction, except that on the 13th of December, 1872, the widow gave notice in writing to the complainant, that she would execute a release of her dower to Reddish and Ohlen, provided the purchase money was paid to the complainant as administrator of her husband, but, that she would not do so if it was paid to the heir-at-law.

In this condition of affairs, the administrator of John B. Miller, on the 20th day of December, 1872, filed his bill against Hoyt, Reddish, Ohlen, David L. Miller, and the widow, praying that the contract of June 10th, 1872, might be specifically performed by Reddish and Ohlen, and particularly that it might be decreed that David L. Miller was seized of the legal title as trustee for the purchasers; that he be required to convey to them; that it might be decreed that the widow was not entitled to dower in the lands, and that her rights in and to the purchase money be ascertained and paid to her under the direction of the court. It is admitted that the estate of John B. Miller, other than this real estate, was ample to pay his debts; that the bill was not filed on behalf of creditors, and that they had no special interest in it. David L. Miller has been in possession of the lands in controversy ever since the death of his father. To this bill the defendant David

L. Miller answered, setting up that the contract of June 10th, 1872, was fraudulently obtained by imposition upon his father, who had reached the age of eighty-six years and was much enfeebled in body and mind, and that therefore it was inequitable and unjust to enforce it against him.

The defendants Hoyt, Reddish and Ohlen, in their answer, insisted that it was highly important to the success of their scheme to have a conveyance at the time agreed upon, and that it could not justly be enforced against them at the time the bill was filed. The Chancellor, on the 24th day of April, 1875, made a decree that Reddish and Ohlen should execute the contract, and pay $4900 of the purchase money with interest from the 20th day of December, 1872, the day on which the bill was filed, and secure the balance with interest, as if the deed had been delivered to and accepted by them on that day. From this decree the defendants Reddish and Ohlen have appealed, but the defendant David L. Miller has not appealed.

Under the circumstances stated I think the case is not different in its legal aspect, so far, at least, as the defendants Reddish and Ohlen are concerned, from what it would be if the bill had been filed by the widow. The complainant is a mere trustee, seeking to recover the purchase money for the widow and heir, who alone had the power to make such a title as the purchasers were bound to accept. Unless they united in executing their part of the contract, the vendees could not be placed in a position where they, or any one on their behalf, could call upon them to perform. For the want of such concurrent action on their part, the purchasers were unable to procure a good title at the stipulated time, although they were ready and offered to perform on their part. The widow and heir-at-law assumed a hostile attitude towards each other, and not only failed and neglected to offer the requisite title on the due day, or at any other time, but the heir persistently refused to recognize the validity of the agreement into which his father had entered. Conceding that on the day the bill was filed, Reddish and Ohlen should have ac-

cepted a good title if it had been offered, that they were bound to perform on that day if the other party was ready to execute the contract, it is obvious that by no fault of their own, but on account of the default of the other party, they could not have obtained a title, if they had been not only ready but anxious to do so. It is true that the heir, and not the widow, was mainly, if not wholly, in fault; but for his action the purchasers cannot be held responsible. Their entire engagement was to pay the purchase price on delivery or tender of the deed; they never assumed any liability for the conduct of those through whom the conveyance was to come to them.

The inability of the purchasers to obtain a conveyance was not removed until the final decree of the Court of Chancery was rendered, in April, 1875, during all which time the heir-at-law strenuously resisted the right of the purchasers to a conveyance. It is manifestly, therefore, not a question whether the purchasers were in equity bound to accept a title and perform on their part on the day the bill was filed, because they could not have acquired a good title at that time, or at any other time before the rendition of the final decree in the court below. If they had offered to consummate the contract on the day the bill was filed, or at any time before final decree, their offer would not have been accepted. It is not equitable, therefore, to regard the filing of the bill as the offer of a deed, because the parties who should have conveyed would not do so on that day, or at any time before, and equity could not compel a conveyance until the case was ripe for final decree. The filing of the bill did not enable the purchasers to obtain possession of the land, nor give them any control whatever over it for the purposes of the plan which they had adopted to dispose of it. For any useful purpose whatever, it was wholly unavailable and absolutely beyond their reach. The filing of the bill cannot be regarded in any just sense as an offer to make the title; on the contrary, one of the principal questions at issue in the litigation was, whether the purchasers were entitled to have a conveyance, and until that was judicially

determined, it could not be known whether an offer of a conveyance would be made.

The decree required Reddish and Ohlen to pay interest on the cash portion of the purchase money from the time of filing the bill, and on the residue thereof at the expiration of six months from that date, the possession of the premises having been in the heir-at-law during the entire period of the litigation.

In *King* v. *Ruckman*, 9 *C. E. Green* 556, it was held by this court that when a vendor refuses to convey real estate according to his agreement, and keeps the vendee out of possession, and the rents and profits are less than the interest on the purchase money, the vendor will not be allowed such interest; under such circumstances, the vendee will not be required to pay interest on the purchase money. The circumstances of this case bring it fairly within this rule, and the decree, so far at least as it requires the payment of interest, is erroneous. The purchasers, therefore, upon the rendition of the decree, were not bound to accede to it and accept a conveyance upon such terms. It thus appears that from the time the contract was entered into until the present day, it has not been in the power of the purchasers to procure a proper title upon terms to which they should be held, and the case therefore resolves itself into the question whether they should be compelled to accept a conveyance tendered now for the first time.

Since the bill in this case was filed there has been so much depreciation in the value of real estate, that it is quite clear that a heavy loss would fall upon the vendees if they are required to take the property now. After the lapse of so much time it would not be equitable to impose such burden upon them, unless they have caused, or, at least, materially contributed to the delay which has ensued. It is said that although they tendered the purchase money and demanded a conveyance, they did not expect their tender would be accepted, and did not really desire that it should be; but the law did not require them to be anxious for the execution of

their bargain; they might even repent it, provided they were ready to abide by it, and did all they were under legal obligation to do. Neither was it their duty to pursue the widow and urge her to join in the conveyance, nor are their rights to be impaired or affected in this contention because of their failure to do so. It must be conceded that up to the time of filing the bill the purchasers had never refused to perform, and were in no fault whatever. After the bill was filed they put in their answer, stating facts which, in their view, rendered it inequitable to compel a specific performance. They did not decide the question for themselves, and by refusing to accept the offer of a deed, assume the responsibility of an error in judgment. No proper conveyance was ever offered to or obtainable by them, and they, therefore, had no opportunity to exercise their judgment in the premises. Being entitled to a deed, they were offered a lawsuit; and thus drawn into litigation without an opportunity to avoid it, they very properly submitted themselves to the judgment of the court.

The parties adverse to them occupy a different position. The heir-at-law, on the day the deed was to be delivered, refused to execute it except upon inadmissible terms; the widow voluntarily absented herself, and did not offer to join in the conveyance, and the administrator contented himself with giving notice to the purchasers not to pay the purchase money to the heir-at-law. Without further action on the part of either of the three, they resorted to a bill in equity to settle their own quarrels, and, after three years of strife, they seek to compel the purchasers to take what hitherto they had never offered and had been wholly unable to give them by reason of their own want of harmony. This cannot be done without imposing upon innocent purchasers the entire loss occasioned by the willful misconduct of the heir, and giving to him an advantage from his own wrong.

The apparent equity in favor of the widow to have the lands treated as personal estate as between herself and the heir, undoubtedly impelled the Chancellor to make the decree appealed from. Its error lies in the fact that it makes the

appellants liable for the misconduct of one over whom they had no control, for whom they made no engagement, and between whom and themselves no complicity has been charged or shown. If a loss falls upon the widow, it is not in consequence of any act or omission on the part of Reddish and Ohlen, or on the part of any one for whose action they can justly be held amenable. During the delay in obtaining a decree which would render performance possible on the part of the appellants, the circumstances of the case have so changed that time has become a material element in the transaction, so that it is now clearly too late to enforce the agreement. In the language of Judge Story, cited by this court with approbation, in *Merritt* v. *Brown*, 6 *C. E. Green* 406: "And even when time is not thus, either expressly or impliedly, of the essence of the contract, if the party seeking a performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has, in the intermediate period, been a material change of circumstances affecting the rights, interests, or obligations of the parties; in all such cases, courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust."

The widow has died pending these proceedings. Whether her representatives have any remedy against the heir-at-law is a question which I have not examined, and upon which this court intimates no opinion. But in order that they may have an opportunity of raising that question by filing a cross-bill, or by such other proceeding as they are advised is material, I am of opinion that the decree of the Chancellor should be reversed, with costs in this court and in the court below, and the bill dismissed only as to the defendants Hoyt, Reddish, and Ohlen, and retained as to the other defendants.

Decree unanimously reversed

RYNO'S Executor, appellant, and RYNO'S Administrator, respondent.*

1. Where probate of a married woman's will is granted, limited to her separate estate, and a grant of administration *cæterorum* issues to the husband, both the letters testamentary and of administration are valid and consistent with each other, and there may be a question for a court of construction, whether certain property in controversy is included in the probate or covered by the grant of administration.

2. But there cannot be two legal representatives of the same decedent, one claiming under general letters testamentary, the other under general letters of administration, both granted by the same tribunal having full jurisdiction in the premises. Such claims are totally inconsistent and irreconcilable, and cannot both be valid.

3. So long as a probate remains unrevoked, the seal of the Ordinary cannot be contradicted; neither can evidence be admitted to impeach it in a temporal court.

4. If the probate of a will is irregular or voidable for any cause, the remedy is by appeal to the Ordinary, or by proceeding for the revocation of the letters.

5. By a grant of probate, the power of the surrogate is exhausted and his jurisdiction over the subject matter at an end. His decree, until reversed, is both conclusive and final. A subsequent grant by him of general letters of administration respecting the same property is absolutely void, and confers no rights upon the administrator.

6. Consent of counsel cannot confer jurisdiction, neither can it warrant a decree in a matter dehors the record, especially in the absence of parties who have a right to be heard thereon.

This case is reported in 11 *C. E. Green* 161.

Mr. Gilbert Collins, for appellant.

Mr. J. A. Blair, for respondent.

The opinion of the court was delivered by
GREEN, J.

Sarah C. Ryno, a married woman, became entitled, during coverture, under the will of her uncle Hartman Vreeland, to a distributive share of his residuary estate. She died in May, 1869, before the legacy was paid, or any steps taken by her

*Cited in *re Evans' will*, 2 *Stew.* 575; *Oliva* v. *Bunaforza*, 4 *Stew.* 398; *Trustees* v. *Wilkinson*, 9 *Stew.* 143.

husband to reduce it to possession. A short time before her death she executed a will, by which she bequeathed all her personal property to her mother, Lucinda Vreeland, for life, and after her death, to her sisters. The will was admitted to probate by the surrogate of the county of Hudson, in May, 1869, and letters testamentary issued to Cornelius Vreeland, the executor therein named. In June, 1871, more than two years afterwards, the surrogate of the same county granted administration of the estate of Sarah C. Ryno to her husband, Addis E. Ryno. Counter-claims for the payment of the legacy being made by both parties, the executors of Hartman Vreeland filed a bill of interpleader, for the purpose of ascertaining by the decree of the Court of Chancery, whether Cornelius Vreeland, the executor of Sarah C. Ryno, or Addis E. Ryno, her husband and administrator, was entitled to receive her share of her uncle's residuary estate. Both defendants answered, admitting the allegations of the bill and setting up their counter-claims to the money. A formal decree was taken by consent, with a reference to a master to ascertain and report which of the defendants is entitled to receive the legacy. The master reported that, in his opinion, the legacy or distributive share should be paid to the executor of the wife. Exception to the report was taken by the administrator, and upon the hearing the exception was sustained, and a decree made that the money be paid by the complainants to the defendant Addis E. Ryno. From this decree an appeal was taken to this court.

The only question presented for consideration by the pleadings in this cause is, which of the contending parties, the executor or the administrator, is the legal representative of the wife, and entitled, as such, to administer upon her estate and to reduce to possession her choses in action. It is not the case of a wife having a separate estate, where probate of her will is granted, limited to the property over which she has the disposing power, and where a grant of administration *cæterorum* issues to the husband. In such case, both the letters testamentary and of administration are valid and consistent with

each other, and there may be a question for a court of construction to decide, whether certain property, the subject matter in controversy, is included in the probate or covered by the grant of administration. But here there are two parties, each claiming to be the legal representative of the wife, one holding general letters testamentary, the other general letters of administration, both granted by the same tribunal having full jurisdiction in the premises. Such claims are totally inconsistent and irreconcilable, and cannot both be valid.

All the books lay it down as a legal consequence of the exclusive jurisdiction of the ecclesiastical courts in granting probate and administration, that the sentence pronounced in the exercise of such exclusive jurisdiction should be conclusive evidence of the right determined. The probate of this will was granted immediately after the death of the wife, by the officer upon whom the law has conferred the exclusive power of granting probate and administration. It was a judicial act of a tribunal having competent authority, and is conclusive until repealed. So long as a probate remains unrevoked, the seal of the Ordinary cannot be contradicted; neither can evidence be admitted to impeach it in a temporal court. *Toller on Executors* 76; 1 *Williams on Executors* 450; 4 *Burns' Eccl. Law* 209.

The same principle is affirmed and carried to its legitimate results in a late case in our own courts. In *Quidort's Adm'r* v. *Pergeaux*, 3 *C. E. Green* 477, the Chancellor says: "The granting administration is exclusively with the Ordinary and his surrogates. The grant of administration constitutes the person to whom it is granted, the administrator, whether rightfully or wrongly granted. Like the acts of all other regularly constituted tribunals, the acts of the surrogate cannot be impeached collaterally; they can only be reviewed by appeal. The only question that can be made is whether he had jurisdiction. If the supposed intestate were not dead, or if letters lawfully granted to some one else were in existence, the grant would be void."

So universal and well settled in its application is this principle, that it has been decided that payments of money by an executor upon probate of a forged will is a discharge to the debtor of the decedent, notwithstanding the probate be afterwards declared void and administration be granted to the intestate's next of kin, for if the executor had brought an action against the debtor, the latter could not have controverted the title of the executor so long as the probate was unrepealed, and the debtor was not obliged to wait for a suit when no defence could be made against it. *Allen* v. *Dundas*, 3 *T. R.* 125; *Peeble's case*, 15 *Serg. & Rawle* 42.

If the probate of the will were irregular or voidable for any cause, the remedy of the husband was by appeal to the Ordinary, or by proceeding for the revocation of the letters. But two years after the grant of probate, when the time limited by law for an appeal had expired, the grant of administration was made by the surrogate, in direct contravention of his previous judicial sentence affirming the validity of the will *in granting the probate*, and this without notice to the executor, or order upon him to show cause why his letters should not be revoked. He might, with equal propriety, now grant letters to the next of kin of the wife, or to a creditor, or any other person having a colorable title thereto.

By the grant of probate, the power of the surrogate was exhausted and his jurisdiction over the subject matter at an end. His decree, until reversed, was both conclusive and final. The subsequent grant of administration was absolutely void, and conferred no right upon the administrator to prosecute this suit.

This result is reached without reference to the effect of the act of 1864, and leaves undecided the question argued by counsel, both in this court and in the Court of Chancery, as to the ultimate disposal of the fund. The probate of the surrogate does not decide upon or affect the rights of disposal. This question is not raised by the pleadings in the cause, and the consent of counsel can neither confer jurisdiction nor warrant a decree not authorized by the record, especially in the absence of parties who have a right to be heard on the

question. The fund must be paid by the complainant to the executor of the wife, to be administered and disposed of according to law, and the decree of the Court of Chancery be reversed, with costs of the appeal to be paid by the respondent.

Decree unanimously reversed.

JAQUI, appellant, and JOHNSON, respondent.

1. Words in a deed granting water from a pond and the easement of an aqueduct in grantor's land, construed.

2. Such easement, when described in the grant, will be limited to the defined locality. The owner of the dominant tenement cannot change it for convenience or necessity.

3. A substantial change in place or manner of enjoyment will be restrained by injunction.

Appeal from a decree made in accordance with the opinion of the Vice-Chancellor, reported in 10 *C. E. Green* 410.

Mr. Vanatta, Attorney-General, for appellant.

Mr. Pitney, for respondent.

The opinion of the court was delivered by

KNAPP, J.

The decree of the Chancellor made in this cause, and brought here for review by this appeal, is for an injunction against the appellant. The cause was heard by the Vice-Chancellor upon bill, answer and proofs, and he advised a decree restraining and perpetually enjoining the appellant from excavating and placing in the manner proposed by him, upon the lands of the appellee, an aqueduct, the purpose of which was to carry water from the mill-pond of the appellee, and across his lands, to the mill of the appellant. The parties own parcels of land situate in Morris county, and adjoining

each other. On each parcel is a mill and pond of water. The waters from the pond on the appellee's land formerly ran an old saw-mill, standing on the same lands, which was replaced by a cider-mill. On the lands of the appellant is a grist-mill, with its pond and appurtenances. The appellant derives title to his lands through a deed of conveyance dated January 18th, 1864, from Charles Johnson, the father of the appellant, who then owned both tracts, to appellant and another, whose title appellant afterwards obtained. The appellee has title to his lands through the will of his father.

Before the making of the above-mentioned deed, Charles Johnson had connected with the flume of the saw-mill pond, at a point elevated about five feet above the surface of the grist-mill pond, a wooden leader, seven by ten inches exterior measurement, and carried the same by a circuitous line over the intervening lands to the grist-mill pond, and through this leader the surplus water from the upper pond was passed to and discharged into the lower, at a point about three feet above its surface.

This arrangement was existing at the time the above deed was made by Charles Johnson, conveying the grist mill lot and appurtenances. The deed, amongst other things, conveyed the right to raise the dam of the appellant's pond three feet, and to flow such of the grantor's lands as would be flooded thereby. It contained also the following clause:

Also to have the water from the old saw-mill pond of said Charles Johnson, in rear of his dwelling, as now carried in the trunk or feeder that carries the water from said pond to the grist-mill pond above the dam, excepting only so much of said water as said Charles Johnson, his heirs or assigns, shall want for grinding apples at his cider-mill, near the old saw-mill, and to have the privilege at all times to enter upon all or any of the lands of said Charles Johnson, along and joining said trunk or feeder, to alter, repair or renew the same at their convenience, also to keep up the old saw-mill dam at its present height, and to take any gravel, stones or earth from the premises of said Charles Johnson, joining said pond, that

may, in their judgment, be needed to keep the same in good repair, or, if need be, to renew or rebuild the same. All or any repairs, or re-building said dam, to be at the proper costs and charges of said party of the second part, their heirs and assigns forever; and in no way to restrict the use of the water for the purpose of the said cider-mill and grinding apples by the said Charles Johnson, his heirs or assigns, as aforesaid.

For several years after the conveyance to Jaqui and Johnson, the water from the saw-mill pond flowed through the old feeder to the grist-mill pond, and continued its flow until the structure became useless by decay.

The appellant, to renew his enjoyment of the water grant, undertook to tap the saw-mill pond with a cylindrical tube about two feet in diameter, extending it thence across the appellee's lands, on a line different from that occupied by the old leader, to the mill of the appellee, a point many feet lower than the surface of the grist-mill pond. This tube or flume he proposed to bed in the appellee's land on the line selected for it, and commenced excavation on those lands for that purpose; from doing this the decree of the Chancellor enjoins him.

The purpose of the appellant is to substitute for the old pipe one of much greater capacity; to carry it from the saw-mill pond with greatly increased descent, and issuing at a much lower point than the grist-mill pond, by both of which means the water-flow will be greatly increased; to place the new pipe on a line materially variant from the course of the old, thereby occupying other lands of the appellee, and to place the new one beneath the surface, the old one having been mainly above ground. The appellant rests his right to make these alterations on what he insists is the true meaning, force and effect of the grant to him by the elder Johnson. The appellee, on the contrary, claims that each and every of the attempted changes impose burdens upon and injuries to his property, such as are not only unwarranted by the deed which is invoked to justify them, but are in conflict with the

express terms of that grant. Of this opinion was the Vice-Chancellor. The construction to be given to the clause quoted from the deed, must determine the correctness of the conclusions reached by the Vice-Chancellor, and the propriety of the decree for perpetual injunction against the appellant.

By the clause in question, two distinct rights are granted. The first is to have water from the pond lying in the rear of the grantor's house. Is he to have all the water except that for the cider-mill, or a part only? The language of the deed is, that he is "to have *the water from* the old saw-mill pond, *as now carried in the trunk or feeder* that carries the water," &c. The trunk or feeder was then in use, performing the service of carrying water from one pond to the other; its size, carrying capacity, grade, points of connection, and discharge, each affecting the quantity of flowage, were fixed, open to the observation of the parties, and with that existing as a practical method of determining the question of quantity, they, in giving expression to their intentions in that regard, chose that as the measure of the water grant. It was not all the water of the pond that was granted, but such of the water *from* the pond as could flow through that or an equivalent conduit, connected with the pond in the manner of its then connection, and carried in the same general grade, subject to no right to make substantial change in either which could render the right less advantageous to the grantee, or more injurious or burdensome to the grantor. This, as it clearly appears to me, is the extent of the water grant, unrestricted by the exception in the deed of "so much of said water as said Charles Johnson, or his heirs, &c., shall want for grinding apples at his cider-mill." Subject to this exception, out of the water granted the appellant may have, at all times, the water which will flow from the upper pond, through a pipe or other water-way of equal capacity and flowage with the old trunk, entering the saw-mill pond at the same level. Such water as will thus flow to him, he may have and use without question as to the manner of disposing of it on his own premises. But because the appellant was about to draw from the pond with the larger pipe,

and with much greater descent, the Vice-Chancellor rightly decided it to be clearly in excess of his grant, and the decree for injunction in respect to that was right. *Angell on Water-courses*, § 149, and cases cited.

The second right conveyed by the said clause in Johnson's deed to the appellant, is that of an easement in the lands remaining in Charles Johnson, and now owned by the appellee, for an aqueduct to convey the water which the deed entitled him to take from the old mill-pond, through and over those lands to the mill-pond conveyed to the appellant. The controversy as to this respects the location of this servitude, and the manner of resting or fixing it upon the servient tenement. The appellant purposes a material change in the location of the new pipe from the route occupied by the old one, and to bed the whole length over appellant's lands below the surface of the ground, claiming and insisting that by the fair construction of the deed he is permitted to do both; that the right given him "to alter, repair or renew" the old feeder, subjected the whole of the lands retained by the grantor to this easement, and made every part of it, whether retained by him or granted away to others, liable to have, at the mere will of the appellant, the burden of its occupancy imposed upon it, and that he may carry it above or sink it below the ground surface, and change from one to the other, as may seem to him best suited to his convenience; in effect, that his power over the lands in disposing of this water trunk is not more restricted in its exercise than it would be were he owner of the fee. A grant so large, so burdensome, and so unnecessary, should be supported by clear and unequivocal language.

In *Jennison* v. *Walker*, 11 *Gray* 423, there was a general and unlimited grant of an easement in plaintiff's lands, much like this. Under it, the parties had located the aqueduct on the servient estate, and it had remained there until its decay. The defendant sought to justify a trespass on other parts of the same close, committed in laying down a new aqueduct for the same service, but in a changed direction. Such change, it was alleged, was not more injurious to the owner than the

other, and was necessitated by the occupancy of the old route by a newly-constructed railroad. The court sustained a verdict for plaintiff, and held that where an easement is granted in general terms, without definite location, the grantee does not thereby acquire a right to use the servient estate without limitation as to plan or mode of enjoying the easement: when the right granted has once been fixed and exercised in a defined course, with the acquiescence of the parties, it cannot be changed at the pleasure of the grantee.

The decision rests upon principle and authority. If the easement should be regarded as in the class known as continuous, passing to the grantee of the dominant tenement by implication, as in *Watts* v. *Kelson*, 6 *Ch. Ap. Cas.* 169, it would still be limited to its visible location.

In this case the easement was located and described in fact, and by the terms of the deed. It needed no act to illustrate and interpret the meaning and intent of the parties to the deed: grantee was to have the water as then carried in the trunk or feeder from one pond to the other; the lands of the appellee, which he might enter on to "repair or renew," were those along and joining said trunk or feeder; the parties had the old structure before them; the grantor had used it, as it appeared to their observation; and the words used in the deed were appropriate to grant the easement as it existed, and to localize and define it; and the grantee is confined, in his enjoyment of it, substantially to that locality, unless other words are found in the deed, authorizing a change of place. Upon the argument, it was earnestly urged that the word "alter," used in connection with the right to repair and renew, confers authority to remove the easement to such other part of complainant's lands as the appellant shall desire. The language of the deed is that the grantees "have the privilege, at all times, to enter upon all or any of the lands of said Charles Johnson, along and joining said trunk or feeder, to *alter*, repair, or renew the same at their convenience." The words alter, repair, or renew stand in conjunction, and clearly relate to the trunk or feeder; to the aqueduct as a structure,

not to the easement in the land. The feeder was of board, and liable to rot and become leaky. The grantee could enter on the lands along and joining it, and repair it. It might be destroyed by decay or other forces. He was permitted to renew it, or he might alter it in its construction, shape, and in the material of which it was composed; or, to give to the word the largest meaning, he might substitute another and different appliance for transmitting the water; but the power to alter the pipe, or to substitute one for another, is very different, and distinguishable from that of changing its place on the land. Without altering the feeder, it might be removed to another place. It might be totally altered, and remain where it is placed by the grant. The appellant proposes to alter the feeder, and this he may do, limited only by its flowage capacity; but he asserts the right as well to change its location on the lands. I think there is neither expression in, nor implication to be drawn from the deed, to warrant it, and, therefore, he was rightly enjoined from doing this. It seems to me to be quite clear, also, that the right is wanting in the appellant, against the objection of the appellee, to bed the water pipes beneath the surface of the ground, where, before, they were above, or to make any substantial change in the relation of the pipe to the surface of the appellee's lands, from the manner of its use and position at the time of conveyance. It is no proper answer to his objection in such case, to say that it will injure him no more or less than the others, or benefit him. One may not invade the property of another, and justify or excuse the legal wrong because attended with no actual injury to such property, and especially so when the question of whether injurious or not rests only on the opinion of the trespasser.

It is the exclusive right of the owner of the servient tenement, suffering the burdens of an easement localized and defined, to say whether or not the dominant owner shall be permitted to change the character or plan of the servitude. It is doubtless true that the plan of the appellant to carry the aqueduct to the lower mill, shortens the route over the lands

of the appellee, but it involves a substantial departure from the line established by the deed, and as heretofore enjoyed, whereby lands of the appellee, never subjected to the privilege, are made to bear it. The decree in this case, and the writ of injunction issued under it, was to restrain the appellant from this departure, and from the unauthorized use of other lands of the appellee. Its effect is to confine the waterway, in its entire length over the servient tenement until it comes to the appellant's possession, to the course fixed and established by the parties to the deed.

In what manner the appellant may dispose of the water which he may rightfully draw from the pond, and to what uses he may devote it when it has come to his own lands and possession, are questions, although somewhat discussed on the argument, not presented by the case. Their solution, if the questions were before us, must depend upon the application of rules declared in the courts of England, in *Luttrel's case, Coke's R., part* 4, *p.* 84, and which, from that time to the present, in a multitude of cases, both in England and this country, have been uniformly accepted and applied.

No objection was made on the argument, to the form of the decree. In effect, it restrains and enjoins the appellant from excavating the lands of the appellee in the line proposed, and placing there the proposed new trunk or conduit, or any other trunk or conduit, for the purpose of transmitting the water from the saw-mill pond directly to the grist-mill, over a line other than that occupied by the old feeder.

Such decree was rightfully made and should be affirmed, with costs.

Decree unanimously affirmed.

WHEELER, GREEN and WHITNEY, appellants, and KIRTLAND, respondent.*

Lands were condemned by the Essex road board upon notice to the husband. The award was paid to a third person, to abide the order of the Court of Chancery. The award was partly for the value of the strip taken, and partly for damages to remaining portion of the tract. *Held*, the wife, by reason of her inchoate dower in the land, has an interest in the award which equity will secure to her.

Mr. B. Williamson, for appellants.

Mr. F. Adams, for respondent.

The opinion of the court was delivered by

REED, J.

This is an appeal from a decree of the Chancellor on the advice of the Vice-Chancellor. Catharine Kirtland is, and since 1836 has been, the wife of John Kirtland. On the 16th of December, 1869, her husband was the owner of about six acres of land in the township of Orange, in the county of Essex. On that day, Wheeler and Green entered a judgment against Kirtland, the husband.

On the 30th of May following, the Essex Public Road Board laid an avenue across the said tract, taking two and eighteen-hundredths acres. Damages were awarded to Kirtland, the husband, by reason of the taking and condemnation of the same, to the amount of $15,000. Wheeler and Green, who had the judgment lien upon the land, served a notice upon the road board, warning them not to pay the said award to Kirtland, and, by subsequent agreement, the fund remains in the hands of Cortlandt Parker, esquire. Afterwards, by a sale under the judgment, Stephen W. Whitney became the owner of the rights of Kirtland, the husband, in the premises, and entitled to the interest of the husband in the amount

*Cited in *Platt* v. *Bright*, 4 *Stew.* 86; *Bright* v. *Platt*, 5 *Stew.* 371; *Crane* v. *City of Elizabeth*, 9 *Stew.* 344.

awarded for the portion of the premises condemned. The wife, by her bill, now claims to have an interest in the award, by reason of her inchoate dower in the land so condemned.

Two questions are presented: *First.* Has the wife an interest in this award? *Second.* If so, what interest?

The character of inchoate dower has been the subject of much contrariety of opinion. It is said not to be an estate. It is not the subject of grant. It cannot be taken upon execution. Equity will not apply it to the satisfaction of the debts of the wife. As dower was a humane provision for the sustenance of the widow and younger children, some limit was imposed on the power to defeat its consummation. Yet, while not technically an estate, it cannot, at this day, be denied that inchoate dower is a valuable interest in land. It is an interest which the courts have repeatedly recognized. Its presence works a breach of the covenants against encumbrances. *Carter* v. *Denman*, 3 *Zab.* 260. Its relinquishment is a valuable consideration to support a conveyance by her husband to her, against his creditors: *Wright* v. *Stanard*, 2 *Brock* 311; or a promissory note given by a purchaser. *Nims* v. *Bigelow*, 45 *N. H.* 343.

A conveyance by the husband on the eve of marriage to defeat dower of the wife, will be set aside during the life of the husband. *Smith* v. *Smith*, 2 *Halst.* 515. And when, by judicial proceedings, land is converted into money, the wife's interest is still recognized and protected. The character of land is impressed upon the fund, and courts of equity will secure that portion of the money which represents her inchoate interest. *Matthews* v. *Duryea*, 45 *Barb.* 69; *Malloney* v. *Horan*, 49 *N. Y.* 116; *Vartie* v. *Underwood*, 18 *Barb.* 561. This principle has been recognized in this state, in the case of *Hays* v. *Whitall*, 2 *Beas.* 241. It seems, therefore, clear that the wife had a valuable interest in the strip of land condemned. It is equally clear that if the amount awarded represents the interest of both husband and wife, she has an interest in the award, which, upon general principles, equity is bound

to protect. It is insisted, however, that no portion of this award represents the inchoate dower of the wife in the lands. It is said that when lands are taken for public use, the mere exercise of the right of eminent domain in a proceeding against the interest of the husband, extinguishes this right of the wife without notice or compensation to her This is the doctrine undoubtedly enunciated by the text writers. *Dillon on Mun. Cor.*, §§ 459–496; *Scribner on Dower, vol. II., p.* 551. The two cases upon which these writers rely, are *Gwynne* v. *Cincinnati*, 3 *Ohio* 24, and *Moore* v. *City of New York*, 8 *N. Y.* 110. The first was an application of the rule to dedicated lands, and the latter to lands taken by condemnation.

While the conclusion is in conformity with the settled law in England and this country, the conclusion is reached, in the case of Moore *v.* The City of New York, by a general assertion that the inchoate interest of the wife was without value. Gardner, judge, says: "The wife had no interest in the land, and the possibility she did possess was incapable of being estimated with any degree of accuracy." This was said in the face of the fact that, years before, Chancellor Walworth had propounded and acted upon a rule for the computation of the value of this very interest. *Jackson* v. *Edwards*, 7 *Paige* 408; *Bartlette* v. *Vanzandt*, 4 *Sandf. Ch.* 396. The broad statement in Moore *v.* The City of New York, is not only opposed to the weight of authority elsewhere, but has been repudiated or modified in later cases in that state. *In the Matter of Central Park Extension*, 16 *Abb. Prac. R.* 68; *Simar* v. *Canaday*, 53 *N. Y.* 298, &c.

The extinguishment of dower by condemnation means no more than this, that, as against the state, no widow can claim dower in lands devoted to public use. It had its origin at a time when the sovereign power in the state could assume its right to the use of the property of the subject without compensation. The right was exercised by the removal from possession, of all parties whose occupancy was inconsistent with the object of the public use. No one thereafter could claim a possession

inconsistent with such user. The widow was merely in the same position as any other person claiming an interest in the land. The rights of all parties were subject to this dominion of the state, and were in abeyance while the state chose to exercise its privilege. Thus it was said by Coke, "Of a castle that is maintained for the necessary defence of the realm, a woman shall not be endowed, because it ought not to be divided, and the public shall be preferred before the private." "Here," says Scribner, "we see shadowed forth the principle upon which the courts at a later day have proceeded, in holding the inchoate dower of the wife extinguished in lands appropriated, according to the forms of law, to the uses of the public." *Scribner on Dower, vol. I., p.* 550. It is apparent that the doctrine arose, not because the inchoate dower was valueless, but because it, like all other interests, was servient to the power which inheres in every government, and is here styled eminent domain. As the interest is valuable, she is, under our law, entitled to compensation where those lands are taken for public use.

This conclusion does not conflict with the doctrine that where lands are condemned by proceedings to which the husband only is a party, the wife cannot thereafter assert a right in the land against the public. I think, for the purposes of condemnation and compensation, this interest of the wife's, not rising to the dignity of an estate, is represented in the fee of the husband. We know that in making compensation, the right taken is considered a perpetual easement, equivalent to the fee, and that damages are assessed for the value of the entire interest in the land.

It has never been hinted that a deduction for the wife's inchoate dower should be made. The value of her interest, therefore, passes into the award. In this view, the condemnation of the land, by notice to the husband, condemns and extinguishes the inchoate interest of the wife. The land is transmuted into money. It assumes a shape where she can claim her right without interfering with the public. Equity

will secure to her that portion of the award which represents her inchoate dower.

While this doctrine is expressly held in no preceding case, the court, *In the matter of the Central Park Extension*, 16 *Abb. Prac. R.* 69, speaking of the case of Moore *v.* The City of New York, says: "It might have been added to that case, that the right was transferred from the land to the money received from the land by the husband, if the wife survived him," Mr. Scribner, vol. II., p. 21, says, "It may be that after the value of the entire estate is ascertained, and the amount paid over to the proper legal authorities, particularly if she be a party to the proceedings, her right is transferred from the land to the money representing the land."

I think that by the practice in this state, of compensating for the entire value of the land, upon notice to the husband, the wife is represented by her husband, and is always a party to the proceedings, for the purpose of enabling her to assert her right to her interest in the award. Upon the first question, I think the conclusion of the Vice-Chancellor was correct. This being so, the parties desire a sum in gross, in preference to the securing of one-third of the principal, to await the event of her surviving her husband. In what portion of the award is the wife entitled to inchoate dower? The entire amount of damages awarded, was the sum of $15,000. The benefits were $1500. The benefits were properly deducted, leaving the balance $13,500. Of this sum, it is claimed that only $4800 were for the value of land taken, the remaining portion being for damages to the adjacent land of the husband. It is claimed that the wife has no interest in the damages.

It is true, generally, that the wife has no interest in damages resulting from injury to land. I think, however, in this instance, that the computation of the Vice-Chancellor upon the entire amount of $13,500 was correct. It represented the depreciation of the entire tract. Although she has still her right of dower in the remaining portion, yet by the sale under the Wheeler and Green judgment, before any improvements were

made, her right is limited to recover a third of the land at the time of the sale. *Vandorn* v. *Vandorn, Penn.* 513. She gets, therefore, what she would have recovered had the land not been taken.

I think the decree of the Chancellor should be affirmed, with costs.

Decree affirmed: eleven judges voting for affirmance; DIXON, J., for reversal.

CASES ADJUDGED

IN THE

COURT OF ERRORS AND APPEALS

OF THE STATE OF NEW JERSEY,

ON APPEAL FROM THE COURT OF CHANCERY.

MARCH TERM, 1876.

POST, appellant, and HERBERT'S Executors, respondents.*

1. A legacy to a person "at" a given age, or "when," or "from and after" his attaining a given age, is, *prima facie*, contingent; but when it appears that such postponement of the gift is for the convenience of the estate, the rule does not apply.

2. Where land was devised to an executor in trust to permit the testator's son-in-law to have the possession and use until his youngest granddaughter should attain the age of twenty-one, and then to sell it and distribute the proceeds, "share and share alike," among his grandchildren, *held*, that such grandchildren took a vested estate on the death of the testator.

3. *Held*, further, that the grandchildren took as individuals, and not as a class, by force of the direction to divide among them "share and share alike.

The will of John Herbert, late of the county of Somerset, contained the following clause:

"I give and devise to my said executors all that tract of land and premises situated in the county of Genesee and State of New York, now in the occupancy of Abraham

* Cited in *Van Blarcom* v. *Dager*, 4 *Stew.* 786; *Miller* v. *Colt*, 5 *Stew.* 23.

Post, being the same conveyed to me by the said Abraham Post, by deed dated the 6th day of November, 1838, and in said deed particularly described, as by reference to the same, recorded in the Genesee county clerk's office, in Book 51 of Deeds, page 200, will appear, to have and hold the same in trust for the use of the said Abraham Post, he, the said Abraham, to have and enjoy the possession of the same, and the rents, issues, and profits thereof, until the youngest child of my daughter Amy Eliza attains the age of twenty-one years; and in case it should be advisable at any time before the said child attains the age of twenty-one years to dispose of the said farm or tract of land, I hereby authorize, empower, and direct my said executors (the written assent of the said Abraham Post being first had and obtained) to sell the said tract of land and premises at public sale, and the net proceeds of said sale to invest in some safe security, and the interest arising thereon pay over, annually, to the said Abraham Post, until the youngest child of my said daughter Amy Eliza attains the age of twenty-one years. After the said youngest child attains the age of twenty-one years, I order and direct my executors to sell the said tract of land at public sale, (if the same is not already sold, as above directed,) and the net proceeds of said sale, or the said principal sum invested as aforesaid, as the case may be, be by them divided between the children of my said daughter Amy Eliza, share and share alike."

The testator's daughter, Amy Eliza, was the wife of Abraham Post. She was dead at the time when the will was made. She left six children, all of whom were living at the testator's death. The youngest then was under six years of age, and the oldest over twenty-one. The executors proved the will on the 24th of March, 1856. Abraham Post, who is still living, received the rents, issues, and profits of the farm up to the time when the youngest of Amy Eliza's children attained to the age of twenty-one. After that, and in the year 1871, the executors sold the property. One of the children, Martha A., died under the age of twenty-one, on the 26th of

February, 1861, having never been married. Her administrator claims one-sixth of the proceeds of the sale of the farm. Her brothers and sisters, on the other hand, claim the whole. The executors, by the bill, ask for directions as to the payment.

Mr. John H. Post, for appellant.

Mr. John T. Bird, for respondents.

The opinion of the court was delivered by

THE CHIEF-JUSTICE.

It will be observed that by the legatory clause which prefaces this opinion, the testator, John Herbert, devises to his executors the farm in question, to hold the same in trust for the use of his son-in-law, Abraham Post, until the youngest child of the deceased daughter of the testator, the late wife of the said Abraham, should attain the age of twenty-one years. Accompanying this trust, is a power in the trustees, dependent on the written assent of the *cestui que trust*, to sell the land, putting the proceeds to the same use during the same interval. Then follows the paragraph which has given rise to this controversy, containing a direction to the executors, "after the said youngest child attains the age of twenty-one years," to sell the said tract, if the same be not then already sold, and to divide the proceeds between the children of the said daughter of the testator, share and share alike. Martha A., one of the children of this daughter, having survived the testator, but dying before the youngest of said children had attained the age of twenty-one, the question now is whether this deceased child acquired, by force of this testamentary disposition, any interest in this fund which is transmissible to her representatives. On the part of the appellant, it is insisted that the interest of this deceased legatee was conditional on her surviving to the period of distribution, which was the arrival of the youngest of the children to majority. Opposed to this, the respondents urge that the

interest of such legatee was vested at the death of the testator, that is, was not in anywise subject to the condition specified.

It is an observable feature of the clause to be here construed, that it does not contain, in express terms, any immediate gift of the reversionary interest in this fund. The only gift to the children is embodied in the order that it be divided among them, and that division is to be made on the happening of the future event of the youngest child reaching twenty-one. Such a disposition, standing by itself, could not pass a present interest, but would leave the legacy itself contingent. A bequest to A "at" a given age or marriage, or "when," or "from and after" his attaining a given age, is *prima facie* contingent. Nor does the circumstance that the gift is to a class, affect the result. In *Locke* v. *Lamb*, *L. R.*, 4 *Eq.* 373, a bequest of a sum of stock to be divided between all the children of B, as they should attain his or her age of twenty-one years, was adjudged to go only to such of the children as attained the prescribed age; and in the leading case of *Leake* v. *Robinson*, 2 *Merivale* 363, the rule was treated as unquestionable, that by a mere direction to transfer or divide "from and after" a given event, the vesting would be postponed until that event had happened. There are very many cases to the same purpose, but it would be altogether useless to refer to them, for admitting the rule to be as here stated, and which is putting the case in the aspect most favorable for the appellant, there are other considerations which I think must obviously control the result.

The rule first stated, that where a legacy is given to a person when a future event happens, the legacy will be contingent until the occurrence of such event, is, like all other similar rules applicable to wills, a mere judicial exposition of the natural meaning of a certain form of expression. It is not an artificial contrivance which, when present, is to have a supreme effect, but is a rule simply because the phrases in question, considered intrinsically, and without qualification *ab extra*, import a definite testamentary purpose. The phrase-

ology has received its accepted interpretation, because it is supposed that such interpretation will carry out the view of the testator. The consequence is, the rule is always subject to be modified or abrogated by the conditions of the case to which it is applied; and thus a number of admitted exceptions to it have supervened.

And it seems to me the present case is very clearly embraced in one of such exceptions. The rule and the exception to which I now refer, are very distinctly stated and explained by Vice-Chancellor Wigram, in the case of *Packham* v. *Gregory*, 4 *Hare* 398. His words are: "If there is a gift to a person at twenty-one, or on the happening of any event, or a direction to pay and divide when a person attains twenty-one, there, the gift being to persons answering a particular description, if a party cannot bring himself within it, he is not entitled to take the benefit of the gift. There is no gift in those cases, except in the direction to pay, or in the direction to pay and divide. But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the court has commonly expressed it, for the benefit of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed."

Now in the present case, it seems to me that the purpose of the testator in deferring the payment to the children of these legacies until the youngest should come of age, is perfectly manifest. It was to keep the family together and provide a home for all the children until the period of distribution. I am at a loss to perceive any other motive for this provision. The payment most evidently was not postponed on account of anything personal to the legatees. There were six children, and the eldest was over twenty-one and the youngest under six years of age when the testator died; so that the coming of age of the youngest was, as to the class, a disconnected event, which could not confer a personal qualification on them as individual legatees. Without looking for the intention in other parts of the will, I think, from this clause alone, the purpose

to postpone the payment of these legacies solely for the convenience of the estate, and to let in the interest deposited in the son-in-law, is unmistakably shown. It is seldom, indeed, that among the cases which have been adjudged, such intent has been so manifest. A large number of cases which exemplify this subject will be found in the ordinary text writers. 1 *Roper on Leg.* 572; *Hawkins on Wills* 232; 1 *Jarman on Wills* 763.

The doctrine has also been adopted and settled by several decisions in the courts of this state. *Fanly* v. *Klive*, 2 *Penn.* 754; *Wintermute* v. *Snyder*, 2 *Green's Ch.* 489; *Vandyke's Adm'r* v. *Vanderpool's Adm'r*, 1 *McCarter* 198; *Howell's Ex'rs* v. *Green*, 2 *Vroom* 570; *Thomas' Ex'r* v. *Anderson's Adm'r*, 6 *C. E. Green* 22; *Montgomery's Ex'r* v. *Beatty's Adm'r*, *Id.* 324.

My conclusion, therefore, on this point is, that by the paragraph of the will above quoted, an intent is shown to defer the time of the payment of these legacies to answer an obvious purpose, which was to vest an intermediate interest in the father of the legatees, and that the legal consequence of such an indication must be to convert the direction to divide the moneys at a future time, into an immediate gift that vested on the death of the testator.

Nor do I find any difficulty in the argument that in the present case the event on the happening of which the payment is made to depend being uncertain, the legacy itself must be considered contingent. This effect is produced only when the *time* when the contingent event, on the happening of which the payment is to be made, is to take place, is uncertain. In such case, it may well be presumed that the testator did not intend to make any gift, unless the event should happen and the time of payment should be thus fixed. Thus, if here the legacies had been made payable on the marriage, instead of at the majority of the youngest child, the time of payment as well as the event on which it was to be made would have been uncertain, and the legacies would not have vested antecedently to the occurrence of the marriage. But where a legacy is

given to A, payable to him at twenty-one, or when he arrives at twenty-one, there is no uncertainty as to the time when the money is to be paid, and the consequence is, if we consider such a case on the assumption that the legatee need not survive to the prescribed age as a condition precedent to his right to claim the money, it will be manifest that all uncertainty is removed from the affair. It is upon this theory that the cases have been founded. Mr. Hawkins, in his treatise on wills, page 225, says: "A bequest to A *at* twenty-one, and a bequest to A *payable* at twenty-one, do not much differ in expression; yet one is a vested, the other a contingent gift." The meaning of this is, that where the gift is immediate the interest vests at once; that is, the survival to the designated age is not a condition on which the legacy is founded; and this being so, the reference to the majority of the legatee operates as a mere notation of the time when the money is demandable. In the case of *Atkins* v. *Hiccocks*, 1 *Atk.* 500, Lord Hardwicke evidently points to this distinction. The bequest in that case was to Elizabeth Hiccocks of £200, *to be paid* at the time of her marriage or within three months afterwards, provided she married with the approbation of, &c. The legatee died unmarried, and the question was whether she took a vested interest transmissible to her administrator, and the answer was in the negative, the Lord Chancellor saying: "I am of opinion this was not a vested legacy; in the common cases of legacies to be paid at the age of twenty-one there is a certain time fixed, not to the thing itself but to the execution of it, and the time being so fixed, must necessarily come; but when the time annexed to the payment is merely *eventual*, and may or may not come, and the person dies before the contingency happens, I can find no instance in this court where it has been held that the legacy, at all events, should be paid." And further on he says, that it has always been held with regard to a legacy "given to be paid at twenty-one," that such a limitation of payment was *debitum in presenti, solvendum in futuro*. *Boraston's case*, 3 *Rep.* 19, is also a leading authority on this subject. In it the devise was to a man and

his wife for eight years, and after that term the lands were to remain to the executors of the devisor until such time as Hugh Boraston should accomplish his full age of twenty-one; the mesne profits to be employed by the executors towards the performance of the testator's will; and *when* the legatee should attain twenty-one, *then* that he should enjoy the estate to him and his heirs. Hugh died before twenty-one, and the Court of King's Bench decided that the remainder was vested in him on the death of the devisor, with a postponement of the possession until he completed the age of twenty-one. *Lane* v. *Goudge*, 9 *Ves.* 226; *Taylor* v. *Biddall*, 2 *Mod.* 289; and *Manfield* v. *Dugard*, 1 *Eq. Cas. Abridg.* 195, stand on the same footing.

It is plain from these cases and from a host of others that might be cited, that direction to divide a fund on the coming of age of the legatees, or of any of them, will not prevent the legacy from being considered to be vested on the death of the testator, if the intent to effect such purpose is otherwise shown. With respect to the further position that this bequest is to the children as a class, and not as individuals, and that, consequently, a joint tenancy was created, it is sufficient to point to the fact that the division is directed to be made between these legatees, "share and share alike." These are clear words of severance, denoting plurality of interests among the objects of the gift, and, therefore, the rule invoked is excluded. The authorities are clear upon this point. *Hawkins on Wills* 112; *Westcott* v. *Cady*, 5 *Johns. Ch.* 335; *Vreeland* v. *Van Ryper*, 2 *C. E. Green* 134.

The decree appealed from should be affirmed, with costs.

Decree unanimously affirmed.

MIDMER and others, appellants, and MIDMER'S Executors respondents.*

1. The bill in this case sought to establish a trust by virtue of an express agreement. The evidence was of a purely resulting trust in an entirely different person, originating almost two years earlier than that stated in the bill. *Held*, that the variance between the allegata and probata was fatal to relief.

2. *Held*, that an application to amend the pleadings was properly refused below; the evidence failing to convince the judgment of the court that the complainants were entitled to any relief.

The case in chancery is reported in 11 *C. E. Green* 300.

Mr. Collins, for appellants.

Mr. T. N. McCarter, for respondents.

The opinion of the court was delivered by

WOODHULL, J.

On the 12th day of July, 1873, the appellants filed their bill to enforce an alleged trust in certain land purchased by and conveyed to the respondents' testator, John H. Midmer, August 8th, 1853, and of which he died seized, September 17th, 1872. Their case, as disclosed by the bill, is that before the purchase of the land in question, the said testator, being the brother of the appellants Henry Midmer and Eliza Anderson, and of William Midmer, had in his possession money which had been realized from the sale of property owned in common in equal shares by the said three brothers and sister, and that before the said purchase it was agreed by them, among themselves, that the said John should purchase said land with the said money; should take the title thereto in his own name, and hold it as trustee for himself and his said brothers and sister in equal shares; and that, in pursuance of said agreement, he did so purchase and pay for the

* Cited in *Pasman* v. *Montague*, 3 *Stew.* 393.

said land, taking the title in his own name, and holding the same up to the time of his death as trustee for his said brothers and sister.

In support of the alleged trust, the appellants claim that they have established the following facts: That the consideration which passed for said land was certain stock in the Third Avenue Railroad Company; that this stock was derived from the sale of a house and lot in the city of New York; that the said house and lot were purchased by the said John H. Midmer with money given him by his mother to purchase the same for her, and in her name; and that the said John, without the knowledge and against the instructions of his mother, took and held the title to the said house and lot in his own name. It has been argued before us with much earnestness and ingenuity, that whether the money paid for the house and lot belongs to the mother or to the estate of her deceased husband is immaterial, as the four Midmer children were the only heirs-at-law and next of kin of each parent; that at the death of the mother, in 1852, a trust resulted in favor of the four children in the house and lot, afterwards in the stock, and finally in the land in question.

It is further insisted that the case made by the appellants on the evidence, substantially meets and satisfies the allegations of their bill. The bill proceeds upon the ground of a trust arising not by mere operation of law, but by virtue of an express agreement between the parties. This trust, so far as the bill discloses, had its inception at the date of the purchase of the land in question by John H. Midmer. There is not the slightest intimation in the bill of any other trust in land. The very groundwork of the appellants' case upon the evidence, is a purely resulting trust in the mother of the parties to the alleged agreement, originating almost two years earlier than that stated in the bill. It is manifest that upon such a case, assuming it to be established, the appellants can have no relief upon the pleadings as they stand. Such was the conclusion of the Vice-Chancellor.

An application to amend, made at the hearing before him, was refused, because the evidence in the case failed to convince his judgment that the complainants were entitled to any relief. Under the circumstances, the amendment was properly refused. Upon the merits of the case, also, we are satisfied that the conclusion reached by the Vice-Chancellor is correct. The alleged trust upon which the appellants found their claim to relief is not, in our judgment, satisfactorily proved. The decree is affirmed, with costs.

Decree unanimously affirmed.

JEWETT, Receiver of The Erie Railway Company, appellant, and KLEIN, respondent.

Held in this case, under the circumstances, that a person who, in passing from the depot to the train he was about to take, was obliged to cross an intervening track, was not guilty of contributory negligence in that he did not, before approaching the train, look up or down the track to see whether there was danger from an approaching train, and in that he approached the train diagonally from the platform of the station, and before his train had come to a full stop.

Mr. R. Wayne Parker, for appellant.

Mr. Moore, for respondent.

The opinion of the court was delivered by

DALRIMPLE, J.

The facts material to a decision of this case are fully and clearly stated in the opinion of the Vice-Chancellor. 11 *C. E. Green* 474. It is not, therefore, necessary to repeat them here. The ground of appeal is that the decision below is erroneous, because the plaintiff was guilty of contributory negligence on his part. No other point seemed to be much

relied on or discussed in this court. It was insisted that the plaintiff was negligent in that he did not, before approaching the passenger train which he was about to take, look up or down the track to see whether there was danger from an approaching train, and in that he approached the passenger train diagonally from the platform of the station, and before the passenger train had come to a full stop. It seems to me that in none of these particulars can it justly be said that the plaintiff was negligent. Upon the arrival of the train which he was about to take at the station at which he was waiting for it, he approached it in the usual and ordinary manner, so as to be ready to get on board as soon as permitted to do so after it had stopped. He was not bound to take the very shortest route from the platform of the station to that of the nearest or any other car of the train on which he desired to take passage, nor was he bound to look to see whether another train was approaching, or wait, before crossing the easterly track, till the passenger train had come to a full stop: because he was fully warranted, under the circumstances, in believing that no train would, at that time, pass over the track which he was obliged to cross in order to take one of the regular passenger trains of the road; and it might not be going too far to say that if he had looked and had observed an approaching train on the easterly track, he would have been fully warranted in proceeding on his way across the track to the passenger train, upon the reasonable supposition that the approaching train would stop before it reached a point opposite the passenger train. The company had provided no way of approach to the passenger train, except by crossing, on a level, the eastern track of the railroad, and, in my opinion, a passenger was fully justified in concluding that he would be safe from harm from a train on the track which he was thus obliged to cross in order to secure his passage. The company had, in effect, assured him that he would at that time be safe in going in the usual way from the station to the passenger train. Acting on such assurance, this plaintiff did no more or less than ordinarily prudent and careful

persons do almost every day under like circumstances, and may be expected and have a right to do. The principles applicable to this case, and to that of a traveler over the public highway crossing a railroad on the same level, are quite different.

I have said that the only point much discussed by the appellant in this court was the plaintiff's negligence. It is true that it was alleged among the appellant's points filed, that no negligence on the part of the defendant was proved, and that point was suggested in argument, though I do not understand that it was much pressed or relied on. However that may have been, I only think it necessary to state in answer to such point, that the plaintiff was injured by a locomotive attached to a freight train which was driven over the track which the plaintiff was, at the time of the injury complained of, crossing, in order to take a regular passenger train then at the station. If driving a train of cars at such place, and under such circumstances, does not constitute gross negligence, it would seem to be somewhat difficult to imagine what circumstances would render a railroad company liable for negligence in running down a passenger about to get on board a train at a railroad station. There is no error in the decree below, and it must be affirmed, with costs.

The case of Jewett, appellant, *v.* Mary Klein, respondent, was argued together with the case above decided. The result in both cases is the same, and for the same reason.

Decree unanimously affirmed.

JOHNSON, appellant, and JAQUI, respondent.*

The easement of an artificial water-way, which, by the terms of the instrument creating it, is established on a defined line over the servient tenement, cannot, without the consent of the land-owner, be changed in location to his other lands, either for the convenience of the owner of the servitude, or because of disturbance of the easement by the land-owner, or because the particular land subject to it has been taken by the public for a highway.

* Cited in *Johnston* v. *Hyde*, 6 *Stew.* 644.

The facts in this case appear in the opinion of the Vice-Chancellor, who heard the cause below, (11 *C. E. Green* 322,) and in the opinion delivered at the last term of this court, deciding an appeal from a decree of the Chancellor made in a cause between the same parties. *Ante, p.* 526. See, also, opinion of Vice-Chancellor Dodd. 10 *C. E. Green* 410.

Mr. Pitney, for appellant.

Mr. Vanatta, Attorney-General, for respondent.

The opinion of the court was delivered by

KNAPP, J.

The material questions involved in this cause, as appears by examination of the pleadings and proofs, are identical with those considered and settled at the last term of this court, on an appeal from the decree of the Chancellor in a cause between the same parties, but standing in reverse order.

The parties are at variance concerning the interpretation of certain clauses in a deed, the construction of which settled the rights in controversy in the first suit, and must do so in this. Johnson first filed his bill to enjoin Jaqui from excavating and placing upon lands of the former, a certain pipe for carrying water from his saw-mill pond to the property of Jaqui, asserting that the pipe was of much greater dimensions than the deed authorized; that the proposed location was on a line different from that which the deed had located the easement of an aqueduct upon, and that the purpose to carry the water to Jaqui's grist-mill, and not to his mill-pond, was the exercise of a right not granted by the deed.

Jaqui admitted his purpose, in locating the new pipe, to vary from the line of the old aqueduct; also to carry it directly to the grist-mill; and claimed authority under the deed to do both. He invoked the authority of the same instrument to permit the use of the larger pipe. The late Vice-Chancellor, on looking into the case and construing the relevant clause of the deed in question, found the complainant in the case enti-

tled to the relief sued for, and advised against the defendant, Jaqui, on all the points. The court decreed accordingly. The parties, at the last term of this court, were heard upon appeal from that decree, and it was sustained by the unanimous judgment of the court.

In this cause Jaqui filed his bill of complaint to enjoin Johnson from interfering to prevent his placing the same pipe upon the line successfully objected to in the former suit, and continuing it to his grist-mill pond by still further departure from the locality of the old feeder, asserting that Johnson, by obstructing him in the execution of his purpose, was depriving him of rights secured to him by the deed. The case was heard before the present Vice-Chancellor, and an injunction was ordered.

This court, in supporting the decree in the first case, denied the right of Jaqui to depart, in any substantial degree, from the line of location of the old aqueduct, holding that the easement granted him was established on that line. It also denied his right to make any material increase in size and flowage capacity of the aqueduct for conveying the water from Johnson's pond, and from altering its relation to the surface of the land, resting their conclusions on the construction given to that clause in the deed, upon which Jaqui reposes his claims in this suit.

The Vice-Chancellor, in this case, read the deed differently, and supported Jaqui's right thereunder to make the changes mentioned. The decree now comes here for review upon the appeal of Johnson, and it follows that as the decree in the cause is in direct conflict with the decision of this court on the same question in the other suit, it must be made to conform to that decision. The opinion of the Vice-Chancellor and the decree in this cause were rendered before the first case was heard and determined in this court; hence the conflict.

The circumstance that the pipe as now proposed by the respondent is to be continued from near the point where it left the lands of appellant, under the plan in the first case,

to the grist-mill pond, and to terminate at the place of terminus of the old trunk or feeder, does not vary the questions in the two cases, except that in this case the right to carry the water to the grist-mill is not asserted. The proposal in this case is to occupy with the new pipe nearly all the ground which the respondent unsuccessfully claimed right to in the former suit, and in addition thereto to make a further deviation from the line of location of the easement as it legally exists, and occupy other lands of appellant in reaching the pond. The difference in that respect in the two cases is, that in this the injury to appellant, identical in character with the other, is greater in its extent. The decision of this court, disallowing the lesser injury, applies with equal force to the greater.

It is equally against the ruling in that case to claim that the dimensions of the desired aqueduct are *substantially* the same as the old. The departure, in respect both to location and dimensions, is substantial and material. Any intentional change is substantial; that variance only is disregarded, which may occur where there is the intent and the exercise of an honest effort to reach identity. The law regards not trifles. The changes in question are neither minute nor accidental; they are admitted to be intentional, and the right to make them is claimed by the respondent, and sought to be enforced by this suit.

It appears in the case, and reference thereto was made on the argument, that appellant has erected, over a portion of the old line, a shed for a cider-press, and in doing so tore up a part of the old feeder; and it also appears that the public road which divides the property of the parties, has been widened by surveyors of the highways, and now includes about one hundred and fifty feet in length of the old aqueduct. I am unable to perceive that these facts vary in any degree the rights of the parties as they exist under the deed.

Their rights in respect to the location of the easement are reciprocal. The appellant may insist upon the enjoyment of it by the owner, substantially only where the deed places it;

the respondent may assert and enforce his right to such enjoyment, regardless of any consideration of convenience of the owner of the servient tenement. If the appellant has placed, or allowed to be placed, any structure that interferes with the full enjoyment of the grant, the respondent has the undoubted right, and is armed with ample remedies to abate the injurious disturbance, and enforce compensation therefor; but such obstruction will not justify or excuse deviation from the servitude as granted. A highway founderous or out of repair will justify the passenger, under certain circumstances, in going *extra viam* and passing the obstruction on adjoining lands. It is otherwise with a private way; that can be used only in the manner granted, and the same rule applies here. A disturbance will not warrant deviation in use. *Gale & What. on Easements* 229; *Goddard on Easements* 204, 207, and cases cited.

The taking of private property for public use, on which exists an easement inconsistent with such public use, whether taken by the owner's consent or *in invitum*, will not authorize the owner of the dominant tenement to take other lands of him on whose tenement the servitude was located. The question whether the laying out and opening of a public highway over a part of the line of the old aqueduct will be inconsistent with the further continuance of this private easement there, it is not necessary to consider. The proper parties are not before us to litigate that question, nor could its solution in any wise affect the rights of the parties in controversy here. If it be assumed that it destroys the use of so much of the aqueduct as lies within the limits of the highway, the act of laying the road was the taking or destruction of private property for public use; the respondent would not thereby be gifted with authority to take the use of other lands of appellant in its stead, not granted by him. For such taking of his property the respondent is entitled to have compensation of the public, if he has not had it or waived his right to have it. Whether he receives compensation for his loss from the public, or for any cause fails to receive it, it is manifest that he cannot, for

his property taken by the state, make reprisal upon the appellant.

It is insisted that the answer admits the respondent's right to all the water in the pond, and that is reason for the court placing that interpretation on the grant. The admission or opinion of the respondent as to the meaning of the deed, can from no guide to the court in giving construction to it, if construction be necessary. Besides, the admission referred to in the fourteenth clause of the answer, is of the right to have "all the water of the pond, to be conveyed by substantially the same conduits, located in the same place as that which existed at the date of the said deed."

Johnson, in the notice sent in reply to that of Jaqui, offers him a pipe ten inches in diameter. This is larger than the old one, but the offer was not accepted. Had it been accepted by Jaqui, a new agreement might have grown up between the parties; as it was not accepted, the offer has no force, either as a new bargain or in interpreting the old one.

The decree in this cause must be reversed, on the grounds taken by this court in affirming the decree of the Chancellor in Johnson v. Jaqui.

The bill should be dismissed, with costs.

Decree unanimously reversed.

RANDOLPH and another, trustees, appellants, and LARNED, receiver, &c., and others, respondents.

1. The supplement of March 13th, 1866, to the act to prevent frauds by incorporated companies, is remedial in its nature, and must be so construed as to suppress the mischief and advance the remedy.

2. That act provides that where the property of an insolvent corporation in the hands of a receiver, is encumbered with mortgages or other liens, *the legality of which is brought into question*, &c., the Court of Chancery may order the receiver to sell the same clear of encumbrances, &c. *Held*, that it was not intended by the words, "the legality of which is brought

into question," to confine the remedy to mischief arising from litigation of any particular character, but to all litigation between encumbrancers respecting the validity, extent or priority of their liens.

3. Although, technically speaking, franchises are property, they are property of a peculiar character, arising only from legislative grant, and are not, in ordinary cases, subject to execution, or to sale and transfer, even in payment of the debts of the corporation, without the assent or authority of the legislature.

4. Under the said supplement of March 13th, 1866, taken in connection with the twentieth section of the original act, (*Nix. Dig.* 409,) the Chancellor has discretionary power to order a sale of the franchises, as well as of the property of the insolvent company, clear of encumbrances.

5. A law which, by a revision, is repealed, and at the same time thereby re-enacted, does not, for a moment, lose its binding force.

6. As between trustees for first mortgage bond-holders of an insolvent corporation, whose debt under the mortgage under foreclosure by them is due and exceeds the whole value of the property of the corporation, and who apply to have the property delivered to them, and the receiver of said company, who applies for an order for sale of the property and franchises free from the lien of the encumbrances, the trustees were held to be entitled to the property, and to be permitted to operate the road, leaving the question as to the mode and manner of sale to be settled at the determination of those proceedings.

On appeal from an order of the Court of Chancery. The case is reported in 11 *C. E. Green* 270.

Mr. McGee and *Mr. Cortlandt Parker*, for appellants.

Mr. Abeel, for respondents.

The opinion of the court was delivered by

GREEN, J.

The controversy in this cause arises between the receiver of the New Jersey West Line Railroad Company, an insolvent corporation, and the trustees named in a mortgage given by the company on their property and franchises, to secure the payment of bonds amounting to $3,000,000. A bill by the trustees to foreclose the mortgage, and the bill to declare the company insolvent, and for the appointment of a receiver, were filed about the same time.

The order appealed from was made on the hearing of cross-petitions: the first, filed by the trustees, praying that they may be permitted to enter upon and take possession of the railroad and its appurtenances, and to operate and manage the same pursuant to the terms of the mortgage, and that the receiver may be directed to turn over to the trustees the railroad, with all the real and personal property of the company; the other, filed by the receiver, praying that the proceedings under the foreclosure suit may be stayed, and that the receiver may be authorized to sell the property and franchises of the company in such manner as might be deemed best for the interest of the creditors. These petitions were heard together, and an order made that the petition of the trustees be denied, and that the receiver sell, at public auction, all the property, rights and franchises of the company, free and clear from all liens and encumbrances of every kind, except a mortgage held by the commissioners of the school fund on the land under water at Jersey City.

The appellants object to this order, first, because it directs the receiver to sell free of the lien of their mortgage, and second, because it denies to the trustees the right to take possession of and manage the mortgaged premises. It is insisted on behalf of the trustees, that the order to sell clear of encumbrances is unauthorized by any statute existing at the time of the making and recording of the mortgage. If such authority exists, it must be found in the supplement to the act to prevent frauds by incorporated companies, approved March 13th, 1866, taken in connection with the twentieth section of the original act, (*Nix. Dig.* 409,)* both of which are re-enacted, substantially in the same language, in the revision of 1875, being sections 84 and 85 of the act concerning corporations. The supplement of 1866 provides that where the property of an insolvent corporation in the hands of a receiver, is encumbered with mortgages or other liens the legality of which is brought into question, and the property is of a character materially to deteriorate in value pending the litigation, the Court of Chancery may order the receiver to sell the same

* *Rev.*, *p.* 192.

clear of encumbrances at public or private sale, for the best price that can be obtained, bringing the money into court, there to remain subject to the same liens and equities of all parties in interest, and to be disposed of as the court shall order and direct. This is a supplement to a statute against frauds, is remedial in its nature, and should receive a liberal construction. In the language of the books it should be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy; or, as elsewhere stated, "everything is to be done in advancement of the remedy, that can be given consistently with any construction that can be put upon it." *Potter's Dwarris on Statutes* 73, 231, and cases cited.

The power to order a sale clear of encumbrances, depends upon two pre-requisites specified in the statute. The legality of the lien must be brought in question, and the property must be of a character materially to deteriorate in value pending the litigation. The counsel for the trustees would give to the phrase, "legality of the mortgage," a *narrow* and *limited* signification, entirely inconsistent with a liberal construction of the act, and totally destructive of its beneficent provisions. They seek to confine its operation to cases only where legal objections are raised to the validity of the mortgage itself, and to exclude all questions in relation to the equities arising as to the extent of the lien created by it, and its relative priority as to other encumbrances. A mortgage may be a legal lien upon the mortgaged premises; its legality, so far as the mortgagor is concerned, may be undoubted, but as against other parties, in a court of equity, it may be wholly inoperative, and may be entirely frustrated by equities arising in favor of subsequent liens.

The object of the legislature was the prevention of loss by the depreciation in value of the property, pending protracted litigation. The mischief and the remedy proposed are plainly apparent upon the face of the act. It was not intended to confine the remedy to mischief arising from litigation of any particular character, but to all litigation between encum-

brancers respecting the validity, extent, or priority of their liens. The act must be so construed as to suppress the mischief and advance the remedy.

It is farther urged that the franchises of the company are not within the words of the act; that they are not property, and cannot legally be sold by virtue of this order. All the elementary writers treat of franchises as real property, though incorporeal in their nature. Chancellor Kent, in his commentaries, says that an estate in a franchise and an estate in land rest upon the same principles. Although, technically speaking, franchises are property, they are property of a peculiar character, arising only from legislative grant, and are not, in ordinary cases, subject to execution or to sale and transfer, even in payment of the debts of the corporation, without the assent or authority of the legislature. If the act of 1866 stood alone, there might be great hesitation in defining property to include corporate rights and privileges, but it is to be construed in connection with the original act to which it is a supplement. Section 20 of that act authorizes the sale of the principal work for the construction of which the company was incorporated, together with all the chartered rights, privileges, and franchises of the company, appertaining to such principal work. The supplement was intended to extend and enlarge the remedy, and to give the Chancellor power to order the sale to be made clear of encumbrances. The principles of construction above mentioned are equally applicable here, and lead to the same result. We must hold that the order in question comes within the spirit and meaning of the act, and that the Chancellor has a discretionary power in this and similar cases, to order a sale, both of the property and franchises of the company, clear of encumbrances.

The further point was taken by the counsel of the appellants, that the act of 1866 was repealed in the revision of 1875; that by the repeal, its provisions ceased to operate, and that the re-enactment, in the revision, of the same provisions, cannot affect their rights and remedies under a pre-existing mortgage. In other words, they ask this court to

hold that a mere revision of the laws, designed for public convenience and public good, by which an existing law is repealed, and the same law re-enacted, both the repeal and re-enactment taking effect simultaneously, in a measure abrogates and annuls the provisions of the original act, instead of merely continuing them in force. Such construction of the effect of a revision of the laws is totally inadmissible. Upon this point, the reasoning of the Chancellor is conclusive, and is fully sustained by the language of Chief Justice Shaw, in *Wright* v. *Oakley*, 5 *Metc.* 400, and other cases cited in his opinion.

There only remains for consideration the second ground of appeal, viz., the denial to the appellants of their right to take possession of the premises as trustees under the mortgage. It appears by the case, that in the opinion of the receiver the probable value of all the property and estate of the company does not exceed $1,200,000, and that the amount now due in gold for principal and interest of bonds actually issued by the company, and secured by the mortgage in question, exceeds $2,200,000. A suit by the trustees for the foreclosure of the mortgage is now pending in the Court of Chancery, and they, by their petition, ask that the property may be sold under the foreclosure proceedings, and that, in the meantime, they may have possession of and operate the road for the benefit of the bond-holders, as provided in the mortgage. The debt now being due, they are entitled, as first mortgagees, to the possession of the mortgaged property, and to apply the income, if any, to the reduction of their debt, and a court of equity will not interfere with such legal right, unless the rights and equities of other parties are prejudiced by its exercise. Here no other creditor can be injured. The mortgage is claimed to be the first lien on all the property and franchises of the company, excepting the land under water at Jersey City. The mortgage debt very largely exceeds the value of the property. The appellants claim that the interests of the bond-holders can be better protected by a sale under the mortgage than in any other way. In the

foreclosure suit, all disputed questions as to the validity of the mortgage, the estate conveyed, and the extent of the lien created by it, can best be determined; and the property can probably be sold to better advantage if all these questions are first disposed of. If the mortgagees are willing to risk the further deterioration of the property pending the litigation, no one else, so far as shown in the case, has a right to complain of the delay, and no reason appears why the prayer of the appellants should not be granted.

On the hearing before the Chancellor, this part of the case was presented in a very different aspect. Counsel, alleged to represent the holders of almost all the bonds, were there present asking for the sale by the receiver, and, under such circumstances, there could be no objection to the order. But it is now alleged that such counsel were mistaken as to the extent of their authority, or as to the wishes of the bond-holders. They certainly do not appear here to resist the appeal or to sustain the order. No one is before this court except the receiver, who may be said to represent a single bond-holder, and the trustees under the mortgage, whom we must hold, in the absence of proof to the contrary, to be the representatives of all the other bond-holders.

Upon this last ground alone, the order of the Chancellor should be reversed, but without costs, and the record remitted to the court below, with directions that the prayer of the petition of the appellants be granted; that they be let into the possession of the railroad, its property and appurtenances, and be permitted to operate the same, and to proceed in the suit for the foreclosure of their mortgage, leaving the question as to the mode and manner of sale to be settled at the determination of those proceedings.

Order unanimously reversed.

WAKEMAN, appellant, and DODD, respondent.*

1. Where the bill alleges a parol contract to purchase land at a sheriff's sale for the benefit of the defendant in execution, an answer denying the contract will be good without setting up the statute of frauds. The bar to the complainant's suit is then complete, because no proof of the parol contract can then be admitted, such proof being illegal by the statute.

2. The jurisdiction of equity to enforce a parol contract of this kind, rests upon the ground of fraud. The cases wherein such contracts have been enforced, have been where the facts, aside from the contract, have been evincive of fraud on the part of the purchaser. When the parol contract has been made use of to mislead the complainant and deceive him out of his property, relief is afforded for that reason, and not by virtue of the contract.

3. The purchaser in this case having been, at the time of the foreclosure and sale, the complainant's confidential adviser in regard to the business and suit, was disabled by such fiduciary relation from becoming a purchaser for himself. He must be held to have acted as her trustee, and be decreed to account.

Appeal from a decree of the Court of Chancery, made in accordance with the opinion of the Vice-Chancellor, reported in 11 *C. E. Green* 485.

Mr. Coult, for appellant.

Mr. A. Q. Keasbey, for respondent.

The opinion of the court was delivered by

DODD, J.

At a foreclosure sale on the 23d of October, 1868, certain mortgaged premises belonging to the complainant, Laura S. Dodd, were purchased by the defendant, John P. Wakeman, for the sum of $3750. In the following March, Wakeman sold the premises for $6500. In July, 1873, the complainant brought suit to recover from Wakeman the difference between his disbursements and receipts, alleging in her bill a parol contract by which he agreed to purchase at the sheriff's sale,

* Cited in *McElroy* v. *Ludlum*, 5 *Stew.* 331.

hold the premises in trust until they could be re sold, and pay her whatever should be realized above his expenses.

The cause having been heard by the Vice-Chancellor, a decree was made in accordance with the prayer of the bill. Upon the argument of the appeal in this court, exception was taken to the ruling expressed in the advisory opinion, that a parol contract to purchase land at a sheriff's sale for the benefit of the defendant in execution will be enforced in equity even if free from fraud, unless the statute is properly invoked by the pleading to nullify the contract. The exception taken to this ruling is correct. Where the case is free from fraud, and the wrong on the part of the defendant consists solely in refusing to do what he agreed, an answer denying the agreement is a good answer to the bill. The bar to the complainant's suit is then complete, because no proof of the parol agreement can then be admitted, such proof being illegal by the statute. But where the answer admits an agreement, though only a parol one, the defendant must plead the statute in order to obtain its protection. In this respect, there is a wide difference between the statute of frauds and the statute of limitations, which it seems must in all cases be pleaded. *Fry on Spec. Perf.*, §§ 332, 336, 337; *Browne on the Statute of Frauds*, § 511, and the cases cited in note 3.

This rule of pleading was not drawn in question in the New Jersey cases referred to in the opinion below, viz., *Combs* v. *Little*, 3 *Green's Ch.* 310; *Marlatt* v. *Warwick and Smith*, 3 *C. E. Green* 109, and 4 *C. E. Green* 441; *Merritt* v. *Brown*, 6 *C. E. Green* 404. In *Walker* v. *Hill's Executors*, decided in this court, 7 *C. E. Green* 519, the correct rule of pleading, as above given, is distinctly declared. In all these cases the jurisdiction of equity to enforce the parol contracts was placed upon the ground that there were facts, aside from the contract, evincive of fraud on the part of the purchaser. When the parol contract is made use of as the means of misleading the complainant and deceiving him out of his property, relief is afforded in equity because of the fraud, and not by virtue of the contract. So far, therefore, as the evidence in this case

goes merely to the proof of the agreement set out in the bill, it is illegal and cannot support the decree.

It was further contended for the appellant that the decree could not be supported for fraud because the facts evincive of it were neither properly averred in the bill nor established by the proofs. The bill avers in substance and effect that the defendant is the brother-in-law of the complainant; that he took much interest in her affairs prior to the sale by the sheriff, acting as her adviser in regard to it and offering to purchase in her interest; that relying on his promise to do so she refrained from attending the sale and from procuring any one else to attend for her, and from taking any steps to raise the money to stop it; that the defendant attended and bought in the premises, and refused to execute the trust she had thus been induced to repose in him. These statements of the bill are sufficient allegations that the complainant was misled and deceived, and, if proved, would justify a decree founded upon intentional fraud. But the evidence in respect to these points is conflicting and inconclusive, and does not, in my judgment, establish such fraud. The complainant, at that time, had separated from her husband whose habits were bad, and was living with the defendant, where she lived prior to and at the time of her marriage, and was expecting to obtain a divorce, and to avail herself in the future of the defendant's aid and protection. After the sheriff's sale she changed her purposes and plans, and upon the death of her husband in 1872, asserted her present claim. It is unnecessary to review the circumstances leading to and following the purchase and sale by the defendant, as disclosed in the testimony of the parties themselves and the other witnesses in the cause. From the evidence as a whole, it is fairly to be inferred that neither of the parties regarded the transaction at the time it occurred, as they came to regard it after the four or five subsequent years, during which their mutual relations had changed. That the defendant did not consider his purchase, when made or at any time afterwards, as the result of or in pursuance of a contract with the defendant, and that his purpose in making the

purchase was quite the opposite of one to deceive and defraud, is clearly deducible, I think, from the proofs, and is, indeed, more consistent with the conduct and declarations of the parties themselves, than is the contrary belief. But while this is so, and while the imputation of intentional fraud may in this view be avoided, it is manifest from the evidence that the defendant was, at the time of the purchase, the complainant's confidential adviser. Standing in this fiduciary relation, the beneficial results of the purchase must be hers instead of his. The correctness of the decree upon this ground was so apparent at the close of the argument on behalf of the appellant, that further hearing was dispensed with.

The elementary principle of equity, by which a trustee is disabled to purchase for his own benefit the property of his *cestui que trust*, is too plainly applicable to the facts of this case to leave room for controversy or doubt. Without reference to fraudulent intent, and irrespective of the parol contract alleged in the bill, the facts, as they are pleaded and proved, conclusively evince that as to the property in question the defendant was the complainant's adviser, and, consequently, trustee. As such, he must be held to account. For cases illustrative of this equitable doctrine, reference need only be made to *Fox* v. *Mackreth*, with the accompanying notes in *Lead. Cas. in Eq., vol. I.*, 92, 209.

The decree should be affirmed, with costs.

Decree unanimously affirmed.

JENKINS, appellant, and MOORE, respondent.*

Decree of the Prerogative Court unanimously affirmed, for the reasons stated by the Ordinary in his opinion in the case reported (*sub nomine*, In the matter of the probate of the will of Gideon Humphrey, deceased,) in 11 *C. E. Green* 513.

* Cited in *Collins* v. *Osborn*, 7 *Stew.* 522.

JUNE TERM, 1876.

BOGERT, appellant, and CITY OF ELIZABETH, respondent.*

1. The charter of the city of Elizabeth directed the whole cost of the assessments for street improvements to be imposed on the property on the line of the street opposite such improvements, such assessment to be made in a just and equitable manner by the common council; it was *held* that such power could not be executed, and the provision was void.

2. A sale of land having been made by force of such provision, and the city becoming the purchaser, a bill filed by the land-owner to clear his title from the cloud thus created, was sustained by force of the statute to quiet titles, passed March 2d, 1870.

3. Delay in the land-owner in allowing the time for bringing a *certiorari* to pass, is no bar to the exhibition of such a bill.

This case stood on bill and demurrer. 10 *C. E. Green* 427. The complainant was the owner of a lot in the city of Elizabeth, which had been sold to raise an assessment imposed upon it in the laying of a wooden pavement in the roadway in front of it. The city, at this sale, became the purchaser, and the prayer of the bill is that the title of the complanant may be quieted against the lien thus asserted.

Mr. A. Dutcher and *Mr. George P. Smith,* for appellant.

Mr. Williamson, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The proceeding which resulted in a sale of the premises now in question was, conspicuously, a nullity. It is the product of the one hundred and fifth section of the act to revise the charter of the city of Elizabeth, passed March 4th, 1863, (*Pamph.*

* Cited in *Atwater* v. *West,* 1 *Stew.* 366; *Southmayd* v. *City of Elizabeth,* 2 *Stew.* 205; *Lembeck* v. *Jersey City,* 3 *Stew.* 555; *Jersey City* v. *Lembeck,* 4 *Stew.* 272; *McClane* v. *Newark, Id.* 472; *Ins. Co.* v. *Norris, Id.* 584; *Ludington* v. *Elizabeth,* 5 *Stew.* 161; *Schuh* v. *Newark, Id.* 466; *Newark* v. *Schuh,* 7 *Stew.* 265; *Ludington* v. *Elizabeth, Id.* 358; *State* v. *Elizabeth,* 11 *Vr.* 279; *Campion* v. *City of Elizabeth,* 12 *Vr.* 359; *Ins. Co.* v. *Elizabeth,* 13 *Vr.* 240; *Peckham,* v. *Newark,* 14 *Vr.* 577.

L., 1863, *p.* 149.) The language of the clause is this: "That the whole amount of the costs and expenses of regulating, grading, and paving any street, or section of a street, or grading, graveling, flagging, macadamizing, or otherwise improving any street, or section of a street, shall be assessed upon the owners of lands and real estate upon the line of said street, or section of a street, so improved; and whenever such improvement shall have been made under the provisions of this act, the city council shall ascertain the whole amount of the costs and expenses of such improvement in any street, or section of a street, and shall cause to be made a just and equitable assessment thereof upon the owners of lands and real estate on the line of such street, or section of a street, by the city surveyor, which shall be and remain a lien thereon from the time when said improvement shall have been made."

In view of the decisions heretofore made in this court, it is impracticable to give any effect to the authority here attempted to be granted to this municipal government. The provision just recited requires that the whole cost of the improvement shall be put on the property on the line of the street, in such proportion as may seem equitable to the common council. This order is so plain and definite, that it is impossible, by construction, to contract it within constitutional bounds. There is no hint in the clause, suggestive of the idea that the land on the line of the street is not to be burthened beyond the degree to which it is specially benefited. In the case of *The Village of Passaic* v. *State*, 8 *Vroom* 538, this court held that if the language of a municipal charter contained expressions which could be fairly intended to imply that the assessments authorized were to be restricted in amount so as to be commensurate with the charge imposed on the particular land, in such case such grant of power would be sustained. But in the present instance, no such implication is possible. The sum of the expense is ordered to be put on certain designated property, without regard to the proportion of benefit it has received from the improvement. The direction is perfectly clear; the entire burthen is to be borne by the land along the line of the

improvement, and the ratio of distribution among the respective lots is left to the judgment of the common council. Such a power, according to legal rules now at rest in this state, cannot be executed. The whole clause is nugatory and void, and all proceedings under it are not mere irregularities, but are nullities.

It is consequently clear that the sale of the complainant's land was an empty form, and passed no title to the city.

Therefore, the question arises, why, on this bill, should not the claim of the city to a lien on this land by virtue of this unauthorized procedure, be declared formally, by a decree, to be null?

The equity of the bill is that, although the sale is plainly void, it clouds the complainant's title. On this ground, the jurisdiction of the court is placed. Whatever doubts formerly existed, there can be none at the present time, that in cases where an instrument exists which, though really void, has an ostensible validity, and which throws a doubt over the title to real estate, a court of equity will interfere, and relieve against the injustice of such an illusion. The duty of the court to intervene on such an occasion, was derived from the fact that if an instrument could neither be used nor enforced, and was detrimental to the title of another, it was against conscience for the party holding it to retain it, since he could have none but an unworthy object for so doing. But although the general jurisdiction of the court over this subject became completely established in the time of Lord Eldon, and has not since been seriously questioned, nevertheless there has been great judicial dissension with respect to the extent of such jurisdiction; one point in doubt being whether it extends to the instance of an instrument void upon its face, and which being no better than blank paper, seems to be incapable of being turned to any vexatious purpose. In England, the decisions settle the rule that equity will not give aid in such cases, as the relief is adequate at law. But in *Hamilton* v *Cummins*, 1 *Johns. Ch.* 517, Chancellor Kent took the opposite view, maintaining that upon the reason of the thing,

an instrument clouding a title to land should be decreed to be void, whether or not it was fatally void on its face. But this opinion of the learned Chancellor has not prevailed in the courts of his own state, but the opposite view has so completely taken root, that in *Heywood* v. *City of Buffalo*, 14 *N. Y.* 534, a bill was dismissed that had been exhibited to set aside an illegal assessment which appeared to be a cloud upon the complainant's title, for the reason that it was not averred that the invalidity of such assessment did not appear on the face of the proceedings. That the adjudications are much arrayed against each other on this question, will be manifest to any one who will refer to the numerous cases cited by Judge Cooley in his valuable treatise on taxation, which has just been published. *Cooley on Taxation* 542, 543.

In the case now before this court the illegality of this sale and of all the proceedings leading to it is, at first view, so conspicuous, that if, in this state, the question of the jurisdiction of the court had to be decided from considerations derived from general principles, it is easy to see that a conclusion could not be reached without difficulty. But this is not the case, for the inquiry is controlled by the act to quiet titles, passed March 2d, 1870, (*Pamph. L.*, 1870, *p.* 20.) The first section of this act is in these words: "That when any person is in peaceable possession of lands in this state, claiming to own the same, and his title thereto, or to any part thereof, is denied or disputed, or any person claims or is claimed to own the same, or any part thereof, or any interest therein, or to hold any lien or encumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or encumbrance, it shall be lawful for such person so in possession to bring and maintain a suit in chancery to settle the title to said lands, and to clear up all doubts and disputes concerning the same."

The object of this enactment, I think, is obvious: it was to extend the jurisdiction of the court of equity over the class of cases embracing the present one. Unless this was the design, I am at a loss to assign to it any office, for the jurisdiction of

the court, to the extent of the English and New York rule, could not have been deemed in doubt. The act is plainly remedial, and its language is very comprehensive, and in my judgment it should be construed to give jurisdiction in every case in which any claim or lien upon real estate appears to be asserted, or to exist. It is highly desirable that land should be freed from every lurking and unsubstantial claim, for even the suspicion of such claim, no matter how ill-founded, affects the value of the property when on sale. The policy which the statute is designed to promote is beneficial and enlightened, and it should be received with favor. It provides adequate checks against abuse, for it declares that if the defendant shall suffer a decree *pro confesso* to be taken, such decree shall not carry costs; and if he shall deny that he claims any interest or encumbrance in the premises, he shall be entitled to costs. I cannot see why, under these safeguards against vexation, an owner of land should not have the privilege, in every imaginable case, of putting to the test everything which presents a suspicious appearance against his title. The sale in the present case was impressive by being made under a city ordinance, conducted by official authority, and in the course of a procedure presenting, to the unprofessional eye, the ordinary marks of legality. Its effect, I cannot doubt, would be to detract, in a considerable degree, from the market value of the land. In my opinion, the statute in question can have no more appropriate use than in its application to this situation.

Nor is this a case to which the doctrine that a party will lose his remedy by his own laches, is to be applied. Where the proceeding complained of is so entirely *ultra vires* that it could not in any way have been made available, delay in seeking relief is not objectionable. The reason is, it then produces no hardship and inflicts no loss. The complainant was not bound to remove these proceedings by *certiorari;* they were absolutely void, from beginning to end, and he had a right so to treat them; they could not grow, by lapse of time, into a right. The city can gain nothing by retaining the shadow of a right under this sale; if retained for half a cen-

tury, it would be nothing but a shadow still. It is, therefore, a gratituous injury to the complainant. He is, in my opinion, entitled to relief at the hands of the court.

The decree should be reversed.

Decree unanimously reversed.

THE HUDSON TUNNEL COMPANY, appellants, and the ATTORNEY-GENERAL, *ex rel.* The Board of Riparian Commissioners, respondents.*

1. Lands under water, granted by the state to a corporation under the eighth section of the riparian act, are not lands belonging to the state within the meaning of the thirty-sixth section of the general railroad act, although, in such grant, a rent payable to the state is reserved, and in the instrument of grant, power to re-enter for non-payment of rent is reserved. Such lands may be condemned and applied to other public uses, by proceedings to condemn against the corporation grantee.

2. A right to re-enter and re-possess for non-payment of rent, does not create an estate in reversion.

On appeal from an injunction order. The facts of this case appear in the report of the case before the Chancellor, *ante, p.* 176.

Mr. B. Williamson and *Mr. Henry S. White*, for appellants.

Mr. Vanatta, Attorney-General, for respondents.

The opinion of the court was delivered by

DEPUE, J.

By the decision of this court, in *The State, The Morris and Essex R. R. Co., pros.*, v. *The Hudson Tunnel Co.*, 9 *Vroom* 548, the legality of the organization of the tunnel company, and its power to condemn the title of the railroad company

* Cited in *National Docks R. Co.* v. *Central R. Co.*, 5 *Stew.* 764.

to such of the lands in controversy as lie between the original line of high-water and the exterior line of solid filling established by the Board of Riparian Commissioners, for the purpose of constructing a tunnel, were conclusively settled. The principle of that decision is applicable to the lands of the Jersey Shore Improvement Company, similarly situated.

This information charges that the tunnel proposed to be constructed, has been located from a point in Fifteenth street, in Jersey City, westerly of the original line of high water, across Hudson river, into the city of New York, and that it is contemplated to construct said tunnel between said points, under the surface of the land and under the waters of said river. It also charges that it is the purpose and intent of the tunnel company, on the conclusion of the proceedings for condemnation against the Morris and Essex Railroad Company and the Jersey Shore Improvement Company, to tender to said corporations the sums awarded as compensation for the lands required, and then to enter immediately into possession of said lands, and engage in and prosecute the construction of the said tunnel on, in, and through the said land of the state, from the original high-water mark in Jersey City, to the middle of the Hudson river.

The information further charges that neither the Board of Riparian Commissioners nor the Morris and Essex Railroad Company nor the Jersey Shore Improvement Company, has given consent to the construction of said tunnel.

The relief prayed for is that the tunnel company "be perpetually enjoined from possessing, entering upon, going, or being upon the said lands of the State of New Jersey, or any part of them, for the purpose of making said tunnel on or in said land, and from doing any work or act in or on said land for or towards making said tunnel, or any part thereof, and from condemning said land, or any part of it, and from doing any act or thing against any person or corporation whatsoever, in, or about, or towards, or for the purpose of condemning said land or any part thereof."

A preliminary injunction was granted, as comprehensive as the prayer of the information, to continue until the defendants should file an answer.

A motion was made to dissolve or modify the injunction for want of equity in the information, and the injunction was modified so far as to permit the defendants to proceed to condemn the said lands leased to the Morris and Essex Railroad Company and the Jersey Shore Improvement Company, as against the lessees and their assigns, but it was directed that "otherwise the said injunction should stand for the protection of the rights of the state." From this order, the tunnel company has taken this appeal.

Of the lands described in the information, that part which lies between the original line of high water and the exterior line of piers established by the commissioners under the riparian act, is held by the Morris and Essex Railroad Company and the Jersey Shore Improvement Company, under leases granted by the riparian commissioners by virtue of the act of March 31st, 1869. *Acts of* 1869, *p.* 1017. The proceedings for condemnation to which these two corporations were made parties, relate to that part of the premises.

The injunction, as modified, applies as well to the lands within the exterior line held by the railroad and improvement companies, as to lands outside of that line, the property in which is in the state. The modification of the injunction conferred upon the appellants the barren privilege of prosecuting the proceedings of condemnation. The interdict on the occupation of the lands, and their use in the construction of a tunnel after the condemnation should be concluded, was continued. This was done on the idea that the state retains in lands granted under the riparian act, an estate such as prohibited their condemnation under the provisions of the general railroad act.

The tunnel company was authorized under the general railroad act of 1873. *Acts of* 1873, *p.* 88.* By the thirty-sixth section of that act, it was provided that the corporation formed under that act should not take any lands under water

* *Rev., p.* 925.

belonging to this state, until the consent of the riparian commissioners should first be had and obtained, and, further, that no corporation organized under the act should be authorized to take, use or occupy, by condemnation, any lands belonging to the State of New Jersey.

The only question necessary to be considered at present is, whether these provisions are operative on lands in private ownership, held under grants from the state. In other words, whether lands which have been granted by the state under the riparian act, are lands belonging to the state within the meaning of the general railroad act.

The eighth section of the riparian act of 1869 * enacts "that if any person or persons, corporation or corporations, or associations, shall desire to obtain a grant for lands under water, which have not been improved, and are not authorized to be improved under any grant or license protected by the provisions of this act, it shall be lawful for any two of the said commissioners concurring, together with the Governor and Attorney-General of the state, upon application to them, to designate what lands under water, for which a grant is desired, lie within the exterior lines, and to fix such a price, reasonable compensation, or annual rentals, for so much of said lands as lie below high water mark as are to be included in the grant or lease for which such application shall be made, and to certify the boundaries and the price, compensation, or annual rentals to be paid for the same, under their hands, which shall be filed in the office of the Secretary of State; and upon the payment of such price or compensation or annual rentals, or securing the same to be paid, to the treasurer of this state, by such applicant, it shall be lawful for such applicant to apply to the commissioners for a conveyance, assuring to the grantee, his or her heirs and assigns, if to an individual, or to its successors and assigns, if to a corporation, the land under water so described in said certificate; and the said commissioners shall, in the name of the state, and under the great seal of the state, grant the said lands in manner last aforesaid, and said conveyance shall be subscribed by the Gov-

* *Rev., p.* 984, *sec.* 14.

ernor and attested by the Attorney-General and Secretary of State, and shall be prepared under the direction of the Attorney-General, to whom the grantee shall pay the expenses of such preparation; and upon the delivery of such conveyance, the grantee may reclaim, improve and appropriate to his and their own use, the lands contained and described in the said certificate, subject, however, to the regulations and provisions of the first and second sections of this act; and such lands shall thereupon vest in said applicant."

The information alleges that the two corporations named, have leases for the lands lying between the original line of high water and the line fixed by the commissioners for the exterior line of piers, for certain yearly rents reserved. It states that such leases are upon express condition "that if it should happen that the yearly rent reserved in and by the said lease should, at any time thereafter, be behind and unpaid for the space of sixty days next after the same should become due, it should be lawful, without demand for said rent, for the state, by its officers or agents, to enter said demised premises, not only to distrain and to make distress for the arrears of rent, but to re-enter into said demised premises, and the same, and every part thereof, to have, possess and enjoy."

It further alleges that the state has, in the lands so demised, an annual rent issuing thereout, and a reversion therein; and "that said tunnel, when constructed, and during the course of its construction, will be a purpresture and a nuisance in the said lands of the state of New Jersey, and will impair the value of said lands, and will endanger and diminish the revenues of this state from said lands."

The grantees are corporations possessed of the attribute of perpetual existence. The language of the grant is such as is appropriate in a conveyance to a corporation to create a fee. It is not alleged in the information that the donation of the estate is limited in express terms. By force of such a grant, whether made by an individual or by the state, every particle of the estate of the grantor is transmitted to the grantee. No

residue of the estate in the lands, such as is essential to an estate in reverson, remains in the grantor.

The use for which the lands were conveyed, is unqualified. The grantees might appropriate them to use in the construction of a tunnel, or convey them to another corporation having the capacity to execute such a work, without violating the terms of the grant, or putting the lands to a use inconsistent with the purposes for which they were granted.

The interest which the state has in the premises is not an actual estate. It consists merely in a charge to secure the payment of the rent reserved, by distress and re-entry and taking possession. On a grant of the whole estate in fee simple, reserving a certain rent, with a clause for distress and re-entry for non-payment of the rent, the owner of the rent has neither seigniory nor reversion. 2 *Stephen's Comm.* 25; *Litt.*, §§ 217, 218. A right of entry is not a reversion or estate in the land. *Nichol* v. *N. Y. & E. R. Co.*, 2 *Kernan* 121. Nor is a mere possibility of reverter for condition broken, which may or may not happen, an estate in reversion. 4 *Kent* 354; 2 *Washb. on Real Prop.* 390.

It is manifest that lands in which the state has no rights other that those specified, are not lands belonging to the state within the meaning of that section of the general railroad act which limits the power of corporations created under that statute, to condemn lands for the uses contemplated by the act.

Nor can the injunction be retained in its present form, on the ground that the appropriation of the lands of the two corporations to the proposed use will diminish the revenues of the state.

It was not argued in behalf of the respondents, that the consummation of the proceedings for condemnation will discharge the lessees from the payment of rent, or cause an apportionment of the rent reserved. Nor is it charged in the information that the proposed use of the premises by the appellants will impair the value of the lands as security for

the rent, or hazard the ability of the state to collect it of its lessees.

The injunction should be dissolved entirely so far as regards that portion of the lands which is held by the Morris and Essex Railroad Company and the Jersey Shore Improvement Company.

It was further contended by the appellants that the injunction should also be dissolved with respect to the lands of the state under water beyond the exterior line, for the reason that it did not appear that the appellants intended to enter upon such lands without first obtaining the consent of the riparian commissioners.

Inasmuch as the injunction was merely temporary, to continue until answer filed, and its continuance, with respect to the lands beyond the exterior line, will not interfere with the present operations of the company, no injury can result from retaining the injuntion, so far as such lands are concerned. Relief, on the ground that the appellants do not purpose to enter upon such lands, may, if necessary, be obtained in the Court of Chancery.

To the extent above indicated, the order appealed from should be reversed.

For reversal—BEASLEY, C. J., DALRIMPLE, DEPUE, DIXON, GREEN, VAN SYCKEL, WALES, WOODHULL. 8.

For affirmance—KNAPP, SCUDDER. 2.

ENGLISH, appellant, and ENGLISH, respondent.*

1. A divorce *a mensa et thoro*, for extreme cruelty, will be granted where there is a gross abuse of marital rights.

2. A separation is not decreed as a punishment for past misconduct only, but mainly as a protection against future probable acts of cruelty; this

* Cited in *O'Neill* v. *O'Neill*, 3 *Stew.* 123; *Black* v. *Black*, *Id.* 221; *State, English* v. *English*, 4 *Stew.* 545; *Coles* v. *Coles*, 5 *Stew.* 557.

probability being based upon the former conduct, and the character and disposition of the parties.

3. Where there is no reasonable apprehension of a continuance of such cruelty, such divorce will not be granted.

On appeal. See facts of case in proceedings in chancery and opinion of Chancellor, *ante, p.* 71.

Mr. B. Williamson and *Mr. Gilchrist,* for appellant.

Mr. J. Weart and *Mr. I. W. Scudder,* for respondent.

The opinion of the court was delivered by

SCUDDER, J.

Upon a bill filed by Abby L. English for divorce *a mensa et thoro,* on the ground of the extreme cruelty of her husband, John English, a decree has been made that they be separated from bed and board forever; provided, however, that the parties may, at any time thereafter, by their joint and mutually free and voluntary act, apply to the Court of Chancery for leave to be discharged from that decretal order. The custody of the infant son and daughter of the parties was given to the complainant; and it was further adjudged and decreed that the defendant pay to the complainant $25, in weekly payments, for the support of herself and their children, From this decree an appeal has been taken to this court.

Our statute (*Rev.,* 1874, § 5, *p.* 255,) enacts that for extreme cruelty in either of the parties, the Court of Chancery may decree a divorce from bed and board forever thereafter, or for a limited time, as shall seem just and reasonable.

In *Moores* v. *Moores,* 1 *C. E. Green* 279, it is stated that a gross abuse of marital rights, resulting in injury or suffering to the wife, may constitute "cruelty" in the eye of the law, and justify the wife in separating herself from her husband. The law, at the time of this opinion, did not differ from the present statute, and the learned Chancellor meant that such conduct would constitute "extreme cruelty" within the terms of the statute.

This is the charge made in the complainant's bill, which has been proven in the judgment of the Court of Chancery; and upon the authority of the above-cited case, this decree of perpetual separation has been made, unless the parties shall voluntarily apply for a discharge. So far as the action of the court is concerned, it is a separation of this husband and wife forever.

The act of separation is so important in its consequences to the parties and to their children; it is so contrary to the policy of the law, which rather seeks to "set the solitary in families," and keep them thus united for their own good and for the welfare of society, that it is important in every case to examine carefully whether those cogent reasons are to be found which constrain the court to allow and order such separation.

We shall adopt the specific definition of extreme cruelty which has been approved in this case, and inquire whether there has been a gross abuse of marital rights. Such abuse must be attended with suffering, injury to the health, and be against the will of the wife.

The case shows that from the time of the marriage, on August 21st, 1867, to June, 1873, there is no complaint that she was abused in this respect. But from that date up to the 6th day of November, 1875, when she left her husband's house, taking with her their two little children, she says that he has thus injured her. On June 3d, 1873, the third child was born, and in the long and difficult delivery, which was effected with instruments, she sustained such hurt that she was a sufferer until after she left her home, and may be so still. She so testifies, and although her husband denies all knowledge of any disorder, she is corroborated by two physicians, who have examined her since the separation, and describe her condition. Since June 3d, 1873, the husband had access to her frequently, when he must have known that she suffered, and was weakened by his acts. It is not requisite to give the particulars. Much of the case on this point depends, necessarily, upon her own evidence, which is sustained by the

family physician to the extent that she needed rest for her recovery from the delivery, the disorder that followed it, and a subsequent miscarriage in November, 1874. The wife made no complaint to any one excepting her husband, and continued to occupy the bed with him until within three days of her leaving. The evidence of Theodore G. Thomas, a physician who has made women's diseases a specialty, is that while in the situation in which he found her, soon after the separation, moderate indulgence would not damage her, yet that excessive indulgence would. He further says, although there would be pain, that a large proportion of married women assent under exactly those circumstances.

It is obvious that there should be an affectionate forbearance on the part of the husband when the wife is thus affected, and a selfish, lustful persistence, without regard to consequences, is unkind, even where no decided objection is made. But, in this case, it is charged that objections have been made, and considerable rudeness, if not force, used at times, to effect the purpose. This is the wife's statement; but it is denied by the husband, who says that the complaints were that she did not wish to have more children. She is a woman of a nervous and rather delicate constitution, and while her account may be exaggerated, we are satisfied that it is substantially correct. This evidence does not stand upon the wife's testimony alone: it is corroborated by other facts in the case, founded mainly on the defendant's own qualifications and denials of her statements.

On the night of November 3d, 1875, she complains that he was persistent and violent in his efforts, and as she arose from the bed, after his failure to succeed, he struck her in the back with his fist. She says that her cries awoke the children, and were heard by the servant. The children are too young to be examined as witnesses, and the servant, although in the employment of the complainant, is not produced. The brother of the complainant, however, testifies that the defendant told him, soon after the separation, that on that night she cried out, and left the bed. The wife remained home on

Wednesday, Thursday, and Friday following this November 2d, during which time they were separated at night, and spoke to each other but little through the day. On Saturday, November 6th, she left, taking with her the two little children, and went to her father's house, where she has since remained. These facts are a general statement of the complainant's case.

It is important to consider the relations of the parties during their marriage, and some facts since their separation, to arrive at a just conclusion in this peculiarly delicate and painful case.

It appears that the parents of the wife objected to the marriage because of the difference in their religion. He is a Catholic, and she is a Protestant. But this difference did not, apparently, cause any trouble after their marriage, for she went to church with him, or elsewhere, as she pleased. The parents also objected to some inequality in their station in life, but this was based mainly on the fact that she had received a better education, while he, working at his trade of tinsmith, was comparatively unlearned, but, by prudent management, had accumulated a moderate fortune.

After the marriage he was always kind and affectionate, with the exception of the matters of this complaint. He provided a good home for her, and gave her every reasonable indulgence and allowance, excepting in two or three unimportant particulars, about which there is conflicting testimony. The relatives, friends and servants who have been called as witnesses, all testify that they were fond in their endearments, even in the presence of others, and that they were remarkably affectionate. The wife says that she loved him until the day after November 2d, when he was morose and sullen in his conduct. His affection for her appears to have been always strong, and continues, so that he describes himself as miserable in his separation from his wife and children, and he says he is willing to make any reasonable concessions if she will return. That he is sincere, appears from the fact that after his wife

left on Saturday afternoon while he was at his work, on Sunday morning he went to see her at her father's house, asked her forgiveness and begged her to return home with the children. He continued to call afterwards, repeatedly, with the same requests. November 10th, he sent her a letter, asking her to return, describing his pain at her leaving him, avowing his love for her, his only happiness to be with her and the children, and promising that every trouble, so far as it depended on him, should be removed; that he was willing to leave the only complaint she had ever made against him to their doctor. He is not a scholar, but this letter is a most tender appeal to a wife, under any circumstances. In the same month of November, he requested Spencer M. Rice, a Protestant Episcopal clergyman, whose church his wife had sometimes attended, to see her, and endeavor to get her to come back to her home. Mr. Rice went and had a long conversation with the wife and her mother. He says the wife gave no decided answer, but her mother told him to say that the result of the interview was unsatisfactory.

On November 10th, 1875, Mrs. English was examined by the family physician, Dr. Latkins, at her father's house. The bill of complaint for the divorce was sworn to by her and filed the same day. This action was promptly begun while the husband was attempting to arrange for a settlement of the family troubles. He has used no threats, nor has he been offensive in his efforts to secure the return of his family; on the contrary, he has used entreaties for forgiveness, and promises of self-denial and forbearance. After this suit was commenced, on the day before Christmas, he sent the usual presents to his wife and children, with a most pathetic letter, in which he says that no Christmas present would be so good to him as to see them all back in their home again. This letter would, ordinarily, have little or no effect in a cause that had been already commenced, but in determining the character of the man, in connection with all the facts of the case, it has significance, and if it be a true expression of his feeling, will go far

to satisfy a court that the wife will not be unsafe if within the power of such a husband.

The point for determination is not whether the husband, in his rudeness, has injured his wife without sufficient thought or care of her physical health, while doing an act which, in ordinary cases, is not unlawful, injurious or dangerous, for it must be conceded, under the facts of this case, that he has thus abused his marital rights; but the true inquiry is whether the conduct of the husband has been such as to raise a reasonable apprehension that further acts of the same abuse will be committed if the wife should return to him. The court must be satisfied that the wife is in danger of bodily harm if she go back to him, or, to use the language in *Close* v. *Close*, 10 *C. E. Green* 529, that he has done and will continue to do such acts as will endanger her health, or render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife. It is not the question whether she will live more comfortably at her father's house, with a liberal allowance for alimony, but whether she is released from her duty as a wife by the extreme cruelty of her husband, and the reasonable apprehension that it will continue. The principle which must decide this case does not affect these parties alone: it is of the utmost importance to all, that these bonds should not be lightly severed.

A separation from bed and board is not decreed only as a punishment for past misconduct, but mainly as a protection against future probable acts of cruelty; this probability being based upon the former conduct, and the character and disposition of the parties. *Bishop's Mar. and Div.*, § 719, &c.

In *Shaw* v. *Shaw*, 17 *Conn.* 189, it was stated by the court that the wife had just reason to fear that her husband would compel her to occupy the same bed with him, regardless of the consequences to her health, and yet the divorce was refused. It is not necessary, if we were disposed, to go so far in this case, for we see no reasonable ground to apprehend that this defendant, whose disposition appears to be affectionate towards his family, and who has been already subjected to distress, exposure and expense, as the consequences of his misconduct,

will again transgress, with the certainty that he will, with such aggravation, be perpetually separated from his wife.

The health of the wife has also been considered. By the testimony of both physicians who have been examined, the ailment from which she has suffered is curable with proper medical treatment, and she may be in her usual good health at this time. But if it were otherwise, it is not believed that, with the knowledge he now has of her condition, he would attempt to treat her cruelly.

In conclusion, it must be clearly stated that the action of the court is not based upon any approval of the acts of this husband, of which his wife complains, nor upon his requests for her return, nor upon any formal security that he can offer for his future good behavior. Our action is founded on the history of the married life of these parties, the affection this husband has always manifested for his wife, and his repentance for his misconduct; so far as we can judge of human conduct he is sincere, and looking at the entire case, with its own peculiar circumstances, we are of the opinion that this divorce should now be refused.

The decree is reversed, and the bill will be dismissed without prejudice, so that the facts urged in this complaint may be used if the case should again be brought before the court.

For reversal—DALRIMPLE, DEPUE, DIXON, LATHROP, LILLY, SCUDDER, VAN SYCKEL, WALES, WOODHULL. 9.

For affirmance—BEASLEY, C. J., CLEMENT, DODD, KNAPP, REED. 5.

JAMISON and others, appellants, and MILLER, respondent.

1. An unwritten contract for the conveyance of lands, made between a debtor, who has only an equitable estate in the lands, and a third person, who, under the contract, is put in possession of the lands by the debtor, with consent of the owner of the legal estate, will give to the third person

equitable rights superior to those of the debtor's subsequently attaching creditors.

2. The attaching creditors of a merely equitable owner, cannot set up claims which, at the time of the attachment, it would have been inequitable for him to advance.

3. An express trust, although by parol only, may prevent a resulting trust.

4. An express trust actually created before the issuing of an attachment against the trustee, may be lawfully declared by him afterwards, so as to defeat the attaching creditors.

5. An express trust may be lawfully manifested by an answer in chancery, though, in that regard, not responsive to the bill; but in such case the fact of the trust must be proved against the complainant, *aliunde*.

Appeal from a decree of the Court of Chancery. The case is reported in 11 *C. E. Green* 404.

Mr. Kingman and *Mr. Cortlandt Parker,* for appellants.

Mr. P. L. Voorhees, for respondent.

The opinion of the court was delivered by

Dixon, J.

On March 18th, 1865, Henry Tilge, being the owner of a cottage at Cape May, conveyed it to James S. Dungan. The purchase money, $5800, was paid by Charles B. Dungan, the father of the grantee. At that time, Charles B. Dungan was indebted to the complainant, Waters B. Miller, and to others, and on September 2d, 1865, one of his creditors sued out against him, from the Supreme Court, a foreign attachment, under which, on September 13th, this cottage was attached as his property. Afterwards the complainant came in as a creditor under this attachment, and upon judgment rendered in the cause, June Term, 1868, this cottage was sold to the complainant by the auditors, May 15th, 1869. On November 6th, 1865, James S. Dungan conveyed the cottage to Harriet Jamison, and on September 27th, 1870, Mrs. Jamison mortgaged it to Mary A. Scattergood for $2500. Mrs. Jamison and Mrs. Scattergood both had actual notice of the

attachment at the time it was levied. The bill of complaint alleges that James was trustee for his father, Charles; that by the attachment and sale the complainant got the beneficial title to the premises; that the claims of Mrs. Jamison and Mrs. Scattergood are clouds upon his title; and he prays that his title may be decreed to be good, and that Mrs. Jamison's deed from James and her mortgage to Mrs. Scattergood may be decreed to confer no title on either.

The first objection interposed to this claim is, that upon the complainant's own showing, the interest of Charles in the cottage was merely equitable, and therefore not subject to attachment under our law, and hence that the complainant has acquired no rights whatever to the property. That the facts already stated do show merely an equitable interest in Charles, is clear. He had not, by virtue of these facts, any legal estate. They would constitute him, at most, *cestui que trust*, for whom, at the time of the levy, James was trustee. Whether this fact forms a sufficient legal objection to the attachment of Charles' interest in the land, may be regarded as a question not yet well settled in this state, but the conclusion reached by the court upon other points renders its decision, at present, unnecessary.

Conceding, for the purposes of this case, that the writ of attachment seized upon whatever equitable rights Charles had in the Cape May cottage, it still would remain to be determined whether, at the time of the levy, he had any as against Mrs. Jamison.

The pleadings and testimony, in my judgment, establish the following additional facts: that Mrs. Jamison had, before 1865, occupied the cottage as a summer residence, and had, therefore, become desirous of buying it; that early in that year, she requested her brother-in-law, Duncan White, to negotiate with Mr. Tilge, the owner, for its purchase; that Mr. White did so, and learned that the price was $6000; that meeting Mr. Charles B. Dungan, Mrs. Jamison's brother, and knowing him to be acquainted with Mr. Tilge, he informed Mr. Dungan of Mrs. Jamison's desire, and asked

whether he could not probably negotiate the purchase for her on better terms; that Mr. Dungan was then indebted to Mrs. Jamison to the amount of over $12,000, and replied to Mr. White that he wanted to pay Mrs. Jamison, and he would purchase the cottage for her; that an understanding was then reached between Mr. Dungan and Mrs. Jamison that he should purchase the cottage for her, and should pay for it, and should be credited with the amount paid, upon his indebtedness to her; that accordingly he bought the cottage for $5800, which he paid, and took title in his son James, and at once wrote to Mrs. Jamison that he had closed the bargain; what the terms were; that the cottage was hers, and she might go and do as she pleased with it; that accordingly she went into the actual occupancy of it, repaired it, and treated it in all things as her own; that credit was immediately given by her to Charles, on her book, for the $5800; that before the attachment was issued, and while Charles B. Dungan was on a visit to Mrs. Jamison, at the cottage, she surrendered to Charles certain stocks, &c., which she had held as collateral security for his indebtedness to her; that she did not learn that the legal title was not in herself until the attachment levied on the cottage, which she was then occupying, roused her to inquiry; that on ascertaining where the legal title was, she at once insisted on its conveyance to herself; that James S. Dungan had, from the first, known that his father had bought the cottage for Mrs. Jamison, had, all along, regarded himself as holding it for her, and accordingly, at her request, and with his father's consent, on November 6th, 1865, made a deed of it to her, which she forthwith placed on record; and that Mrs. Jamison has ever since dealt with and regarded the property as her own. The Chancellor was not satisfied of these facts. Some circumstances led him to the conclusion that the transaction was fraudulent—designed to cover up the property of Charles B. Dungan from his creditors. The reason for placing the title in the name of James, is indeed not very obvious, but I think it arose from some desire on the part of Charles and

James to have Mrs. Jamison loan James $2500, by executing and negotiating a mortgage on the cottage for that sum, and they considered it preferable that James should make such mortgage rather than Mrs. Jamison. Of this purpose Mrs. Jamison was not apprised, or, if apprised, she discountenanced it, and communication with her on the subject did not go so far as to inform her that James had the title. She believed she had it. The evidence does not leave me in any doubt of the good faith of Mrs. Jamison. To doubt it, the honesty, under oath, of herself, Mrs. Scattergood, Mr. White, Charles and James Dungan, must be impugned, and I think the inherent probabilities of the case must be disregarded, and that, too, on some circumstances which, at most, engender only suspicious inquiry. Accepting, then, these facts as established, had Charles Dungan any equitable rights in the cottage, as against Mrs. Jamison, when the attachment issued? I think clearly he had not. These facts, viewed in more then one aspect, make this plain. Admitting that his creditors have the right to insist that, as against James, there was a resulting trust in the land to Charles, because he had paid the purchase money, yet, under the facts, Charles held his trust estate and James his legal estate, subject to the agreement between Charles and Mrs. Jamison that she should have the whole estate, legal and equitable, for $5800 of credit, which she was to give Charles on account. This agreement, if in writing, would have been specifically enforceable by her against them both. And when, under Charles' direction, she took possession of the cottage, and improved it as her own, and gave credit for the $5800, and surrendered the collaterals, she had become equally entitled to its enforcement by the part performance. Her possession had every element necessary to give her an equitable right to complete performance: it was notorious, exclusive; it embraced the whole property; it was taken in pursuance of the contract, with the knowledge of both James and Charles, and has been so retained ever since. *Browne on Statute of Frauds*, (3*d ed.*,) 460–468, and cases cited.

This equitable claim was complete before the writ of attachment issued, and has since, by James' conveyance, been fortified by the legal title, while the complainant's claim has, at best, remained only equitable. A court of equity will certainly not disturb a combined legal and equitable title, for the purpose of aiding a later equity.

Again, when Charles obtained from Mrs. Jamison the stocks she had held as collaterals, he knew that she was surrendering to him those stocks because she had been induced by him to believe that she was the absolute owner of the cottage, and in possession as such. Now to aid him or any one who merely stands in his shoes, to oust her from that possession, without the restoration of those stocks, or the payment of the debt they secured, would be to assist in the perpetration of a plain fraud. Neither he nor those who claim under him, can be allowed in a court of equity, and without restitution to her, to say that he induced her to believe a lie.

Again, the facts show that there was no resulting trust in favor of Charles Dungan, arising from his payment of the purchase money. Such a trust results only because it is presumed to be accordant with the intention of the parties. Where the evidence clearly shows that such was not their intention, the trust does not exist, and such evidence may be by parol. "An express trust, although by parol only, will prevent the resulting trust; because resulting trusts are left by the statute of frauds and perjuries as they were before; and previously to the act, a bare declaration by parol would prevent any resulting trust. Besides, an equitable presumption may be rebutted by parol evidence, for, as Lord Mansfield has observed, an equitable presumption is only a kind of arbitrary implication, raised to stand until some reasonable proof brought to the contrary. Therefore, parol evidence will be admitted to prove the purchaser's intention." *Sugd. on Vend. and Pur.* *911.

Now here the intention of Charles was, not that he himself should have the estate, but that Mrs. Jamison should have it. There was an express trust in her favor, and that prevented any resulting trust inconsistent with that express trust. Doubt-

less, if the express trust had been one which he had no right to create against creditors, they might insist on its being disregarded, and on having enforced the trust which, in its absence, would result. But as against creditors, Charles had a right to discharge his debt to Mrs. Jamison, either by actually paying it in cash or by creating an express trust in her favor. Such a trust he did create by buying the cottage under the arrangement with Mrs. Jamison, and vesting the legal title in James and directing him to hold it for Mrs. Jamison, and directing her to take possession and use it as her own.

And lastly, the express trust in favor of Mrs. Jamison is itself established according to the statute, which requires that it should be manifested by writing, signed by the party enabled to declare the trust. The case develops abundant written evidence of its existence. The parties able to create the trust were Charles and James Dungan, in whom, except for this trust, the whole legal and equitable estate vested at the time this trust was created. Charles, under whom the complainant claims, declared the trust in his letter to Mrs. Jamison, before the complainant's alleged rights attached. Since that time, James has evidenced the trust by executing it; and Charles and James have both united in a manifestation of it by their joint answer in this cause. The fact that these later writings were signed after the complainant's claims intervened, does not rob them of their efficacy under the statute. The writings are but evidence; the trust is anterior and independent; and the rights which the court regards are those that spring from the creation, not the mere proof of the trust. There is no inequity in permitting the trustee of an express trust to make evidence upon which the courts can recognize and effectuate it, in order that the expectations of his creditors, who attempt to enforce their remedies against the trust estate, may be disappointed. In *Gardner* v. *Rowe*, 2 *S. & S.* 346, Wilkinson, after he had committed an act of bankruptcy, executed a declaration of trust in favor of Rowe. His assignees in bankruptcy claimed the estate, insisting that after bankruptcy, he could not declare the trust. On an issue ordered, the jury found that the trust

existed before the bankruptcy, and thereupon, Vice-Chancellor Leach held the declaration valid and dismissed the bill. On appeal, Lord Chancellor Eldon affirmed this decree. *S. C.*, 5 *Russ.* 258.

Some expressions in the case of *Hutchinson* v. *Tindall*, 2 *Green's Ch.* 357, may seem to give color to the idea that an answer in chancery cannot be regarded as a sufficient declaration of trust under the statute, unless such declaration be responsive to the bill. But the true interpretation of the decision is, that as against a complainant who claimed a title superior to that of the defendant and his alleged *cestuis que trust*, such an answer would not *prove* the trust. If the *fact* of the trust be proved by evidence competent to establish it against the complainant, I see no reason, either in principle or the authorities, to doubt that an answer signed would be a sufficient manifestation of the trust to satisfy the statute, whether responsive to the bill or not. In the present case, the testimony of witnesses fully proves the trust which the answer manifests, and if Mrs. Jamison were seeking to enforce that trust against James and Charles Dungan and the complainant, the court would doubtless aid her. *A fortiori*, the trust being executed, the court will refuse to interfere with her.

The decree of the Chancellor should be reversed and the bill dismissed.

For reversal—BEASLEY, C. J., DALRIMPLE, DEPUE, DIXON, DODD, GREEN, KNAPP, LILLY, REED, SCUDDER, VAN SYCKEL, WOODHULL. 12.

For affirmance—WALES.

MACKNET, appellant, and MACKNET, respondent.*

1. The twenty-fourth section of the will of C. S. M. was, in part, as follows: "My will is, and I do direct, that during the minority of my daughter Hattie, the income of the estate which I have hereinbefore bequeathed to her and to her use, shall be paid to her mother, she remaining my widow and unmarried, for the support, maintenance and education of said daughter," &c. *Held*, that under this clause alone, upon fulfillment of the trust, no account can be demanded of the widow.

2. The ninth section of the will, however, provides "that all provisions made for the benefit of my wife, are to be in lieu and satisfaction of her right of dower and all other interest she may have in my estate, her acceptance of such provision by her to be determined by her relinquishment of dower in three months after my decease." She did not relinquish her right of dower. *Held*, that the widow's right to receive the income under the twenty-fourth section, was substantially a gift to the mother, subject to a charge for the support, maintenance and education of the child, and her right to the surplus is defeated by the ninth section.

Mr. John W. Taylor, for appellant.

Mr. C. S. Titsworth, for respondent.

The opinion of the court was delivered by

REED, J.

This is an appeal from a decree of the Chancellor upon a petition of Hattie Macknet, an infant child of Charles S. Macknet, deceased. 11 *C. E. Green* 259. Charles S., the fatner of the petitioner, died in the year 1872, leaving property amounting to about a half million of dollars in value. He left a widow, a son Theodore, a daughter Caroline, by a former marriage, and a daughter, who is the present petitioner, the fruit of his last marriage. He provides for his children so as to leave the shares of his daughters about equal, except in that the income of Hattie's share, during her minority, is payable to her mother, by the twenty-fourth section of the will. Under this section, Mary S., while remaining the widow of the deceased, and during the minority of Hattie, receives each

* Cited in *Macknet* v. *Macknet*, 2 *Stew.* 56.

year, in half-yearly payments, the income of all the property given to Hattie, for the support, maintenance and education of the said Hattie.

The petitioner represents that the amount of income received each year is not less than $10,000, and that the amount required for the support, maintenance and education of the minor does not exceed $2000. The question involved is relative to the disposition of the balance of about $8000 of the yearly income. The question arises in this way: The ninth section of his will is as follows: "All provisions in this my will, made for the benefit of my wife, or her son George, are to be in lieu and satisfaction of her right of dower, and all other interests she may have in my estate, her acceptance of such provision by her to be determined by her relinquishment, to be made by her in writing, of such dower and interest within three months after my decease." The widow did not indicate her acceptance of such provisions by relinquishing her right to dower. By the ninth section, therefore, she forfeited the advantage of all provisions made for her benefit in the will. The question is whether her right to receive the income of Hattie's share, subject to a charge for the support, maintenance and education of Hattie, is such a provision for the benefit of the widow.

There were certain express provisions in the will for her benefit, to wit, a life policy of $2000, $600 in household goods, the use of a pew, the use of house, and an interest in $500 provided for mourning apparel. The entire yearly value of such express provisions would not exceed $2500. It is contended that the widow, by failing to relinquish her dower right, lost her interest in these only, and that she still has the right to receive the income without liability to account. The clause by which she is to receive the income of Hattie's share is this: "*Twenty-fourth.* My will is, and I do direct, that during the minority of my daughter Hattie, the income of the estate which I have hereinbefore bequeathed to her and to her use, shall be paid to her mother, she remaining my widow unmarried, for the support, maintenance and education

of said daughter; and in case of the death of her said mother, or her marriage, then so much of said income as may be necessary for the liberal support and education of said daughter Hattie shall be paid by said executors, who, in case of the death or marriage of my said wife, Mary, I appoint to be guardians of Hattie. I also direct that the income of the stocks and bonds which I have directed to be paid to my wife and daughter Caroline, shall be paid half-yearly, as also the sum directed to be paid for the support and education of my said daughter Hattie."

Here is a direct gift of the income to the mother, for the support, maintenance and education of her child. The facts are within a line of cases which establish the doctrine that where property is given to a parent, or one standing *in loco parentis*, with directions to educate or maintain their children, upon the fulfillment of the trust no account can be demanded. *Hadow* v. *Hadow*, 9 *Simons* 438; *Leach* v. *Leach*, 13 *Simons* 306; *Hora* v. *Hora*, 33 *Beav.* 88. Standing alone, therefore, the force of this clause is to render the mother, so long as she performs the trust, independent of any judicial supervision over her disposition of the surplus. Whether the doctrine arose from the idea that the legal or moral liability for the infant was upon the parent, and that anything which totally or partially relieved the parent of that liability was a provision for the parent's benefit, or it had its origin in a policy designed to preserve the family relations and establishment intact, is immaterial. Whatever the origin of the doctrine, it has resulted in placing such dispositions of property among a class of bequests which are considered as gifts to the first taker, coupled with a duty.

In *Hammond* v. *Neame*, 1 *Swanst.* 34, there was a gift to one Gibbs upon trust to pay and apply the interest into the hands of Mary H. Hammond, for the maintenance, bringing up, and education of the children of said M. H. Hammond, until their majority. Sir Thomas Plumer, master of the rolls, held that although Mary had no children, she was entitled to the income; that the terms were absolute; that the

children were no direct objects of bounty, but were only the occasion of bounty to the mother.

In *Berkeley* v. *Swinburne*, 6 *Simons* 613, there was a gift of a residuary estate to trustees, with directions that they should pay the interest of shares given to certain nieces of the testator, to their mother, or, in case of the death of their mother, to the guardian of the children, to be applied to their maintenance and support. The father of the children was able to maintain them. There was no need of any part of the fund for the execution of the trust, and the question was, whether the mother was entitled to the income of the nieces' share. The Vice-Chancellor held that the testator had used language which showed that he intended to give the mother a beneficial interest in the income.

In the subsequent case of *Browne* v. *Paull*, 1 *Simons N. S.* 92, the Vice-Chancellor, in commenting upon the result in Berkeley *v.* Swinburne, says: "It evidently proceeded upon the ground that where, during the minority of a child, the interest of such child's legacy is directed to be paid to the parent, to be applied for or towards its maintenance, there the direction as to the application is a mere charge for the benefit of the child, on what is substantially a gift to the parent, subject to such charge." In this case of Browne *v.* Paull, a trustee was directed to pay the income of minors' property to their mother, or otherwise apply it for the maintenance, education, and advancement of the children. It was held that the mother took the income subject to the charge.

Mr. Roper, after enunciating the rule that trustees cannot apply the interest of the property of infants to the maintenance of the infants with parents, because the duty of maintenance is upon the parent, says that the rule is subject to two exceptions. The second exception is where the interest is given to the father himself, for the maintenance of the legatee; in this case it being considered a gift to the parent. *Roper on Legacies, vol. II., p.* 1295.

We have seen, by cases already cited, that the rule is not limited to the father. The right of the mother in the present

case, therefore, is this: the will gives her the entire income as a beneficial interest, subject to a charge for the support, maintenance, and education of her daughter Hattie.

Regarding this as an interest vested in her under the terms of this clause, the conclusion seems irresistible that she abandoned it by her refusal to request her dower right according to the terms of the ninth clause. Nor is there anything in the clause which displays an intent on the part of the testator that this result should not follow. The concluding sentence of that clause does not indicate that the father considered the payment of this income to the mother as entirely beneficial to the daughter. It is true that, in designating the terms of payment, he mentions separately the income from other property payable to the mother and this income payable for the support of the daughter. It was proper. The gifts were different: one was absolute and the other coupled with a duty. It was natural he should mention both, and that he should allude to the last in the terms of the bequest employed at the beginning of the clause. It has no significance beyond a repetition of the first sentence, the legal effect of which was to give the widow a beneficial interest. It was urged that the words, "in case of the death or marriage of her mother, then so much of said income as may be necessary for the liberal support, &c., of Hattie, should be paid by the executors," raised an implication that upon no other contingency would the right of the widow to the entire income be defeated.

If the right to receive the entire income is an interest, and that interest is defeated by the express provision of the ninth section, it is difficult to see how such express provision can be annulled by an implication.

The conclusion then is that the decree that the executors pay over to Mary H. Macknet the entire income of Hattie, without liability on her part to account, must be reversed.

This leaves the other questions propounded in the infants' petition, in the Court of Chancery. For their determination, the cause will be remitted

For reversal—BEASLEY, C. J., DEPUE, DIXON, GREEN, KNAPP, LILLY, REED, SCUDDER, VAN SYCKEL, WALES. 10.

For affirmance—CLEMENT, DALRIMPLE, WOODHULL. 3.

FOSTER, appellant, and DEY and others, respondents.*

Where a purchaser from a trustee is not bound to see to the application of the purchase money, his title to a mortgage can be defeated only by evidence showing that at the time of the assignment he knew that the trustee contemplated a breach of trust, and intended to misappropriate the money, or was, by the very act, applying it to his own private purpose.

On appeal from a decree of the Chancellor. The case is reported in 11 *C. E. Green* 182.

Mr. Joel Parker and *Mr. Isaac W. Scudder*, for appellant.

Mr. Charles Borcherling and *Mr. James Richards*, (of New York,) for respondents.

The opinion of the court was delivered by

REED, J.

James R. Dey and James C. Dey were trustees under a deed made by Richard Dey, dated October 1st, 1845. A mortgage for $7000, made by William H. and Edward W. McClave, was assigned to one Gilbert, and by Gilbert to these trustees. James C. died December 13th, 1865, leaving James R. the sole surviving trustee. As such, he assigned this McClave mortgage in January, 1868, to the appellant, James T. Foster. A bill was filed to compel an account from James R. Dey, the trustee, and also to compel Foster to deliver up the said mortgage for the benefit of the

* Cited in *Ross* v. *Fitzgerald*, 5 *Stew.* 842.

trust estate, and to account for the interest received by him thereon. A decree was made in accordance with the prayer of the complainant.

Foster appeals from the decree against himself. The decree against Foster was made upon the ground that the assignment of this mortgage to him by Dey was fraudulent, and that he was a party to the fraud.

The authority of the trustee under the deed of trust was general and comprehensive. He could sell or lease lands; he could pay off encumbrances; he could make improvements; he could invest moneys on bond and mortgage, and could pay legacies, &c. That James R. Dey had authority to sell this mortgage is clear; indeed, it is admitted in complainant's bill. It is clear that he misapplied the moneys received from the sale. He placed the money into two houses, erected on his own land. This was a disposition of the money entirely foreign to the object of the trust. It was a palpable misappropriation of the funds. But that fact does not in itself invalidate Foster's title. The law did not in this case impose upon him the obligation to see to the application of the purchase money. *Perry on Trusts*, § 795. Foster's title can only be defeated by evidence showing that, at the time of the assignment, he knew that the trustee contemplated a breach of trust, and intended to misapply the money, or was, by the very transaction, applying it to his own private purposes. *Field* v. *Schieffelin*, 7 *Johns. Ch.* 150.

The bill is framed upon the idea that the trustee was, by the very transaction, applying the mortgage to his private purpose. The allegation is that Dey, the trustee, was personally indebted to Foster in the sum of $15,000, and that for the payment of that sum, the trustee assigned, with other securities, this mortgage. There is nowhere in the bill an allegation that money was received at the time and in consideration of the assignment, that such money was misapplied, and that Foster had fraudulent knowledge of the intended misappropriation. The only issue raised is, did the trustee assign the mortgage for the payment of an antecedent personal debt owing

by him to Foster? That the assignment was not made for such purpose is clear. The three checks for the sums of $3081.30, $300, and $2700, respectively, with the testimony of Foster as to the calculation of discount, and method of payment, together with the testimony of Dey, places this question beyond controversy. Indeed, it was not made a question in the argument, nor is it an element in the Chancellor's opinion. Upon the issue raised in the pleadings, therefore, the title of Foster is valid.

The bulk of the evidence taken, the argument, the opinion of the Chancellor, are concerned in establishing or discussing questions of fact entirely beyond the scope of matters pleaded. As a matter of principle, this evidence could be rejected as irrelevant.

The good sense of pleading and the language of the books both require that every material allegation should be put in issue by the pleadings, so that the parties may be duly apprised of the essential inquiry, and may be enabled to collect testimony and form interrogatories in order to meet the question. Without the observance of this rule, the use of pleadings becomes lost, and parties may be taken at the hearing by surprise. *Moores* v. *Moores,* 1 *C. E. Green* 278; *Burnham* v. *Dalling,* 3 *C. E. Green* 134, and cases cited.

How the aspect of the cause would have shifted had the issue decided been raised, can only be conjectured, and it is unfair to conclude parties by adjudicating upon an issue first made by the evidence, and not technically within the limits of inquiry. As, however, no objection was made to the testimony as irrelevant in this particular, and as I am forced to the conclusion that the complainant below stands in no better position upon the case made by the evidence, I will consider the cause as here presented.

The facts which below induced the Chancellor to a conclusion that Foster had a fraudulent knowledge of the intended misappropriation of the funds received from this assignment, were these: *First.* That, according to the statements of Dey and Foster, the latter was indebted to the former in the sum

of $51,045, on advances secured by fertilizers, and $4500 secured by mortgage; that Foster does not produce his books to show his dealings, and does not recollect what other mortgages, if any, he held upon Dey's property at the time of this assignment. *Second.* That Dey's clerk collected the interest and receipted for it in the name of Dey, after the assignment. *Third.* That Foster did not inquire concerning the use by the trustee of the money received, nor about the value of the mortgaged premises; and *Fourth.* That Dey sold the mortgage at a discount of fourteen per cent. The answers of both Dey and Foster, and their testimony, are to the effect that, during the period of these transactions, both occupied the same office, and that Dey was a manufacturer, and Foster a dealer, in fertilizers; that Dey advanced fertilizers, and Foster advanced money, and upon their sale deducted his commissions. At the time of this assignment the advance of money to Dey, and, of course, of fertilizers to Foster, amounted to $48,861. Dey says that at that time he was solvent; that subsequently his poudrette works were indicted. He was compelled to tear down his kilns, erected at great expense, and his business, the source of revenue, was suspended. This, with a failure of a creditor, resulted in bankruptcy in the fall. While his business was heavy, and he was a large borrower, the evidence does not convince me that he supposed himself insolvent at the beginning of the year 1868. It certainly does not show that Foster had any knowledge of his insolvency. Every cent Foster had advanced to Dey was secured by property owned by Dey, either personal or real. There is nothing to show that he had knowledge of any other indebtedness of Dey which he was unable to pay or secure. Nor would the fact that the trustee was borrowing large sums of money, and that his property was mortgaged, be sufficient, in my opinion, to advertise the purchaser of a trust security, of an intention on the part of the trustee to misapply the proceeds of the assignment.

Again, the interest was collected subsequently to the assignment, by checks drawn in the name of Mr. Dey, as they had been drawn previously. Mr. Woodruff was a clerk

of Mr. Dey; he was known as his clerk; he was accustomed to collect and receipt for him; he was in the office occupied by Foster. After the assignment, Foster requested him to receive this money. He did so, and paid it to Foster. He took checks and receipted, as the McClaves evidently knew he was authorized to do, in the name of Dey. I think it was done to avoid the trouble of a notice of the assignment and the execution of a new power from Foster to collect and receipt. This circumstance does not impress me as very significant upon the fact of Foster's knowledge of Dey's intention to defraud the estate by his misappropriation of trust funds, while insolvent. On the other hand, it strikes me that if a man as cautious as Foster, had been privy to such a design on the part of Dey, he would not have imperiled his title to this mortgage by so open and provable a transaction, if it could, in any degree, be construed into evidence of his participation in the fraud.

Again, that Foster did not inquire into the value of the mortgaged premises, cannot affect the present question. He certainly paid the amount of the mortgage, less the discount. The effect of any doubt about the security would be to account for a low or inadequate consideration paid for the mortgage. Beyond that it has no force.

Lastly, the rate of discount is relied upon to show, not a doubt of the freehold security, but that the discount was so great that it should have warned Foster that Dey was necessitous, and that he had pressing need for money at the time of the assignment; that the fact of such necessity should have raised in Foster's mind a conviction that the purpose of the sale was illegitimate and fraudulent. If the consideration received for this mortgage was strikingly below the market value of such securities, it would certainly be a strong circumstance to warn a purchaser of the improbability of a trustee making such a ruinous sacrifice for the purposes of the trust estate. But was the rate of discount in this instance excessive? The mortgage was a six per cent. security. It did not mature until 1870 and '71, one-half in October of each year.

The legal rate was seven per cent. The mortgage at par was worth only $6985. Foster paid $6081. The discount was a trifle less than thirteen per cent. This was at the beginning of the year 1868. I think no person conversant with the sale of mortgages at that time, particularly in the section of the state where this was negotiated, can say that it was an unusual transaction. If not unusual in itself, then it cannot become so by the fact that the sale was made by a trustee. Under this trust deed, the need of money for the purposes of the trust estate might easily, before the maturity of that mortgage, become imperative. The trustee so having the power of sale, and it having been made in what I conceive to be no unusual manner, or at no obvious sacrifice, I do not think any knowledge can, from it, be charged upon Foster of the intended disposition by Dey of the trust fund received from the sale.

My conclusion upon the whole case is, that the evidence is insufficient to show that "at the time of the assignment he knew that the trustee contemplated a breach of trust, and intended to misapply the money."

The decree made against the said Foster should be reversed.

For reversal—BEASLEY, C. J., CLEMENT, DEPUE, DIXON, DODD, GREEN, LATHROP, REED, SCUDDER, WALES. 10.

For affirmance—DALRIMPLE, KNAPP, VAN SYCKEL, WOODHULL. 4.

JACOBUS, appellant, and THE MUTUAL BENEFIT LIFE INSURANCE COMPANY and others, respondents.*

1. A mortgage executed and acknowledged and put upon record by the mortgagor in pursuance of a prior contract for a loan on such security, and afterwards delivered to the mortgagee when the mortgage money is advanced, will have priority in equity over liens of mechanics and

---

* Cited in *Gerard* v. *Birch*, 1 *Stew.* 319; *Demott* v. *Paper Ware Mfg. Co.*, 5 *Stew.* 132; *Cutter* v. *Kline*, 8 *Stew.* 551; *Conover* v. *Ruckman*, 9 *Stew.* 496; *James* v. *Van Horn*, 10 *Vr.* 363.

materialmen for work and materials furnished after the mortgage is recorded, for the erection of a building on the mortgaged premises, built by the mortgagor, which was commenced between the recording of the mortgage and its delivery; the mortgagee having no knowledge of the commencement of the building when he parted with his money. In equity the mortgage, when delivered, will have relation to the agreement for the loan.

2. A judgment under the mechanics lien law against the owner of the land, is conclusive as respects a subsequent mortgagee.

3. Within the meaning of the mechanics lien law, a building is commenced when the permanent work upon the ground, whether of excavation or construction, has progressed so far as to inform reasonable observers that it is designed for the erection of a building.

4. An instrument in form of a mortgage does not become a mortgage by the mere fact of its being recorded, if it has not been delivered between the parties. Per DIXON, J.

5. Where a mortgagee has, in his pleading, claimed priority for his mortgage, on the ground that it was delivered to him on a certain day to secure a debt then existing, he cannot, at the hearing, entitle himself to such priority, on the ground that, although the debt was actually created and the mortgage was actually delivered after that date, yet, by reason of other circumstances, not disclosed in the pleading, his lien should, in equity, relate to the day named. Per DIXON, J., (a minority of the court concurring.)

6. A judgment for the plaintiff upon a mechanics lien claim is not conclusive against a mortgagee of the realty whose mortgage was created and recorded after the building commenced and before the claim was filed, and who was not made a defendant in the suit. It is, notwithstanding the judgment, competent for such a mortgagee to show, in a contest for priority between himself and the lien claimant, that the claim filed is not according to the statute, and hence the debt is not a lien. Per DIXON, J.

7. Where an owner of land has commenced the erection of a building, and then given a mortgage on the premises which is duly recorded, and then conveyed the property subject to the mortgage, if, afterwards, the claimant of a mechanics lien files his claim, making only the last purchaser defendant as owner, the mortgagee's estate is unaffected by the lien. Per DIXON, J.

This case in the Court of Chancery is reported in 11 *C. E. Green* 389.

Mr. R. S. Green and *Mr. Cortlandt Parker*, for appellant.

Mr. C. F. Hill, *Mr. E. S. Atwater*, *Mr. W. P. Wilson* and *Mr. Williamson*, for respondents.

DEPUE, J.

I concur in the opinion of the Chancellor that the excavation for the foundation, when so far progressed with as to make it apparent on the ground that the building is to be erected, is the "commencement of the building" within the meaning of the mechanics lien law. If the work of erecting the structure is proceeded with thereafter, with such diligence as to make it apparent that the original intention to build has not been abandoned, the lien of persons furnishing labor or materials for the construction of the building will relate to the time of such commencement. In this respect, I agree fully with the views of Mr. Justice Dixon in his opinion.

I also concur in the opinion of the Chief Justice that a judgment recovered on a lien claim has the same quality of conclusiveness as an ordinary common law judgment, when put in issue in a collateral proceeding; that it may be avoided for fraud, but cannot, in such proceeding, be set aside for imperfections in the lien claim, or irregularities in the prosecution of the suit.

The reasoning of Mr. Justice Dixon on the first of these propositions, and of the Chief Justice on the second, is so thorough and satisfactory that no further discussion of those matters is necessary.

The contest is between Jacobus, the mortgagee, and the lien claimants, Thompson, Warner, and Purdy & Co., with respect to the priority of the Jacobus mortgage for $60,000 over the mechanics lien.

The loan for which this mortgage was given was negotiated by one Butterfield with Dimock. The bargain was concluded the latter part of April or the 1st of May, 1870. It was for a loan of $80,000, for which a mortgage for $60,000 was to be given, and the residue to be secured by a pledge of stock. The mortgage was directed to be made out to Jacobus, and in pursuance of this arrangement, Dimock and his wife made and executed the mortgage in question. It bears date on the 2d of May, 1870, and was acknowledged on the 4th, and duly recorded in the clerk's office of the county of Union,

on the 13th of that month. After the mortgage had been recorded, Dimock took it from the clerk's office and carried it to New York city, and on the 7th of June, 1870, delivered it to Jacobus, together with the stock to be pledged for the additional $20,000, and received Jacobus' check for the $80,000.

Butterfield was a partner in business with Jacobus. Whether he was his agent in negotiating this loan, does not appear. Nor is it necessary, in order to give Jacobus such rights as arise from the original contract for a loan, that Butterfield should have had authority, at that stage, to act in the premises as his agent. The contract with Dimock was for a loan to be made by Jacobus, and the security for it was directed to be made to him. By accepting the security and making the loan upon it in execution of the precedent agreement, Jacobus ratified the act of Butterfield. The subsequent adoption of an act of agency relates back to the original transaction, and is the same in law for all purposes as if the authority had previously been conferred. *Lawrence* v. *Taylor,* 5 *Hill* 107; *Sheldon* v. *Smith,* 28 *Barb* 593.

The first work in the excavation for the foundation was done on the 28th of May, 1870.

The contention of Jacobus is, that in equity his mortgage will have relation as an encumbrance, to the time when the mortgage was recorded. On the other hand, the lien claimants insist that the mortgage cannot be considered as an encumbrance, except from the time of delivery to Jacobus and the actual advance of the money upon it, and that by force of the provisions of the mechanics lien law they are entitled to priority over the mortgage.

There are numerous cases in which, in courts of law, effect has been given to common law conveyances, such as deeds and mortgages, as of a time antecedent to the time of the complete performance of all the acts which are necessary in law to perfect the title. This is done in order to give effect to the intention of the parties. How early this equitable doctrine was adopted by courts of law, will appear from a

citation from Mr. Viner's abridgment: "Where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other acts shall have relation." *Vin. Abr., Relation, E* 8, *vol. XVIII., p.* 290. Mr Cruise also states the doctrine with distinctness, in the following words: "There is no rule better founded in law, reason, and convenience, than this: that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." 5 *Cruise on Real Prop.* 510. This passage is quoted with approbation, by Catron, J., in *Landes* v. *Brant,* 10 *How.* 348–372, in which case it was held by the Supreme Court of the United States, that a patent to a debtor holding a defective Spanish title enured, by relation, to the benefit of a purchaser at a sale under execution made prior to the issuing of the patent. Where several acts are necessary to make a complete conveyance, *as between the parties to it,* if justice requires it, the conveyance will be regarded as having been made at the first act, to which all the subsequent acts will have relation. *Pratt* v. *Potter,* 21 *Barb.* 589. A deed may, in its operation, be made to relate back to the time of the contract for the purchase of the land, as between the same parties, where such relation is in furtherance of justice. *Jackson* v. *Bard,* 4 *Johns. Ch.* 230; *Jackson* v. *Bull,* 1 *Johns. Cas.* 81. If a bargain and sale be enrolled within six months, it relates to the time of its date, and passes *ab initio.* Though the bargainor or bargainee die after the indenture executed, and before enrollment, the estate passes. *Com. Dig., Bargain and Sale, B* 9. In *Doe* v. *Knight,* 5 *B. & C.* 671, a mortgage sealed and executed by the mortgagor, and declared by him to be his deed, in the presence of a witness, was held by the court—Bayley, J., delivering the opinion—a valid conveyance at law as against a devisee in trust for the payment of debts, although it was kept by the mortgagor in his own possession, and did not come to the hands of the mortgagee until after the death of the mortgagor. In *Rogers* v. *Potter,* 3 *Vroom*

78, a widow to whom dower was assigned was allowed to recover damages for waste on the premises assigned to her, which had been done pending her application for dower, and before her estate in dower had become consummated by actual assignment. Other instances of the application of the doctrine that deeds of conveyance, when once delivered, shall have operation, by relation, as of a time prior to delivery, if it be necessary to effect the intention of parties and be required for the advancement of justice, will be found in the following citations: *Com. Dig., Bargain and Sale, B* 9, *B* 10; *Jacob's Law Dictionary, Title Relation; Shelley's case,* 1 *Coke* 99; *Johnson* v. *Stagg,* 2 *Johns.* 510; *Heath* v. *Ross,* 12 *Johns.* 140; *Jackson* v. *Dickenson,* 15 *Johns.* 309; *Jackson* v. *Ramsay,* 3 *Cow.* 75; *Fuller* v. *Van Geisen,* 4 *Hill* 171–174; *Barncord* v. *Kuhn,* 36 *Penn.* 388; 4 *Kent* 454; 2 *Washb. on Real Prop.* 619.

Whatever difficulty may be encountered in giving effect to this legal principle in a court of law, because of the rigidity of its forms of procedure, no embarrassment whatever will be experienced in giving it full scope, under the more flexible procedure of a court of equity. As was said by Ventris, J., "Relations are fictions of law which are always accompanied with equity" (2 *Ventris* 200.) It is a maxim of equity that what has been agreed to be done, and what ought to be done, shall, for the advancement of justice, be regarded as done. 1 *Story's Eq.,* §§ 64 *g,* 69. In the application of this principle to executory contracts, a court of equity will regard the contract as if executed as soon as made, so far as the rights of the parties *inter sese* are concerned, especially if such relation be necessary to carry into effect the intention of the parties to the contract. An apt illustration of the practical administration of this rule will be found in the doctrine of the court with respect to the specific performance of contracts for the conveyance of lands. The contract itself determines the rights and obligations of the parties *inter sese,* and is regarded as if it had been specifically executed. *Haughwout* v. *Murphy,* 7 *C. E. Green* 531; 1 *Sugden on Vendors* (175) 270.

The negotiations between Butterfield and Dimock resulted in a contract for a loan upon a security to be given. That the contract was for a mortgage on the premises, as they were at that time, is manifest. The sum loaned was large, and there is no proof that either Butterfield or Jacobus consented to accept anything less than the security of the title as it then was, or that they knew that Dimock proposed to erect a building on the mortgaged premises, or that they were aware, when the money was advanced, that he had commenced its erection, and that the mortgaged premises might thereby become subject to liens having priority over the mortgage bargained for. As between him and Dimock, Jacobus was entitled to have the title that he bargained for as the security for the loan. *Lounsberry* v. *Locander*, 10 *C. E. Green* 554. The mortgage was executed, acknowledged, and recorded. Everything necessary to make it a complete instrument had been done, except delivery. There can no doubt that as against Dimock, or a grantee under him by a voluntary conveyance unknown to the mortgagee, the mortgage when delivered would, in equity, have relation to the time when it was deposited for record, if not to the time when the contract to loan was concluded.

But the doctrine of relation being a fiction of law adopted for the advancement of justice, will never be resorted to where it would occasion wrong to third parties. *Butler and Baker's case*, 2 *Coke* 25; *Jackson* v. *Bard*, 4 *Johns.* 230.

The inquiry then arises whether the lien claimants have such rights as forbid the application of this doctrine in this case.

The lien claimants have no equities superior to the equity of the mortgagee. The lot, without improvements, was worth $60,000. The building projected was of palatial dimensions. In its unfinished condition, $125,000 had been expended on it. The work of excavation which had been done before the 7th of June, when the mortgage was delivered, amounted to the insignificant sum of $61.50. The entire work of the building was done "by the day," by persons employed by Dimock.

No part of it was put out under contract. The services for which Thompson filed his lien claim, are stated therein to have been performed between the 1st of June, 1870, and the 1st of October, 1873, Warner's claim is for work done between July 1st, 1871, and December 23d, 1872, and Purdy & Co.'s for work done between May 1st, 1872, and May 1st, 1873. Before any of the services for which the liens were filed were rendered, with the exception of the services of Thompson as architect and superintendent between the 1st and 7th of June, the money for which the mortgage was given was advanced, and the mortgage had been delivered. If the registry took effect from the delivery of the mortgage, it became operative as constructive notice before any of the services were performed for which the liens are claimed, with the exception of those of Thompson between the 1st and 7th of June.

If the lien claimants are permitted to occupy a position of advantage, they do not acquire it in virtue of any equity which can countervail the strong equity of the mortgagee. They claim that position under the eleventh section of the mechanics lien law of 1853, as amended by the first section of the supplement of 1863.

By these sections provision is made for a special *fieri facias* upon the judgment on a lien claim; and it is provided that the deed of the sheriff to the purchaser shall convey the estate in the lands and building which the owner had at, or at any time after, the commencement of the building, "subject only to all mortgages and other encumbrances created and recorded, or registered, prior to the commencement of the building." *Nix. Dig.* 574, 581, §§ 11, 66; *Revision* (1874) 456, § 23.*

The object the legislature had in view in this enactment, was to make the public records the repository of information to those who proposed to do work or furnish materials in the erection of buildings, of the encumbrances which should have priority over their liens. The appellant's mortgage was executed and acknowledged ("created") and recorded before the building was commenced. The lien claimants do not pretend

* *Rev., p.* 673, *sec.* 23.

that they were misled by the condition of the record. If they had examined the records they would have obtained the information which the act provides for. Two of the claimants did no work until long after the mortgage, in the strictest sense, had become in all respects perfect. The third had performed comparatively little service before that event. Under these circumstances, to give them priority over the appellant's mortgage would be inequitable.

In my judgment, the appellant is entitled in a court of equity to priority with respect to this mortgage over the lien claimants.

Nor am I willing to yield to the notion that the appellant is debarred of this relief on the ground of supposed defects in his answer. No objection on that ground was made by counsel, either in the Court of Chancery or in this court.

The decree should be reversed in so far as the appellant's mortgage for $60,000 was postponed to the judgments of the lien claimants.

Beasley, C. J.

My conclusions in this case are as follows, viz.:

First. That the building in question was begun, within the meaning of the lien law, before the delivery of the Jacobus mortgage. On this point, I agree with the view expressed in the opinion of Judge Dixon.

Second. I dissent from the doctrine of that opinion touching the effect to be given to a judgment obtained by force of the mechanics lien law. It seems to me that such a judgment rendered against the owner of the land, is final as against a subsequent mortgagee. It is true that according to the principles of the common law, a judgment binds only the defendant and his privies; but the mechanics lien law imparts to its judgments a greater efficacy than this. This act provides that the suit to enforce the lien shall go against the owner and builder; no other person can be joined as a party; and it makes the judgment so obtained, a lien on the land from the commencement of the building, and it declares that a sale thereunder

shall pass the title of such owner, clear of all subsequent encumbrances. To this purpose, I think the language of the act very clear. It says that the sheriff's deed shall convey the premises, "subject to all prior encumbrances or estates created by or obtained against such owner afterwards, and from all estates and encumbrances created by deed or mortgage made by such owner, or any one claiming under him, and not recorded or registered in the office of the clerk of the county at the commencement of said building." (*Nix. Dig.* 574, § 11.)*

In the suit against the owner the court, by force of this act, is required to pass upon the regularity of the proceedings of the lien claimant, and to adjudge whether his claim constitutes a lien. After the rendition of such judgment, and in view of the statutory provision just cited, declaring that a sale under it shall pass the title free from the claims of subsequent encumbrances, it is difficult to see how it can be plausibly contended that in a collateral proceeding such judgment can be superseded, on the plea that the proceedings on which it is founded were irregular or informal. That such judgment, like all other judgments, can be impeached by any person affected by it, on the ground of fraud, cannot be questioned; but it would appear to be invincible against all other assaults. And it is obvious that it must have this force against all the world, or it has no force whatever against any one but the owner. If the subsequent encumbrancer is not conclusively bound, he is not bound at all, for the judgment must be effective against him under the statute, or it is *res inter alios acta*, and cannot even be offered in evidence against him, except for the single purpose of showing the transfer of the title of the owner to the purchaser at the sheriff's sale. If these judgments are, in truth, possessed of no greater force than this, then the act of purchasing property under them is an act of simple folly, for the title so acquired must be in doubt, so long as a mortgage dating subsequent to the commencement of the building remains unsued on, or until the statute of limitations has granted the title. A legislative act thus leading in its

* *Rev., p.* 673, *sec.* 23.

orderly operation to the sale of contestable titles, would be a marvel of unwisdom, and the intention to produce such a result is not to be imputed to the framers of this law, unless from reasons entirely demonstrative. It may not be a perfect scheme which permits a judgment against one man to have any effect in concluding the rights of another who is no party to it, but it is to be remembered that by giving to the lien claimant's judgment the force I attribute to it, the person holding the junior encumbrance is subjected to the inability to object only to irregularities and informalities, because if the judgment so entered be for a sum greater than what was dues or for a claim which was, in truth, not lienable, a case of fraud would be presented, and thus the transaction, notwithstanding the judgment, would be open to invalidation. It is, perhaps, no great hardship to a mortgagee to say to him that he cannot have the right to set up against the lien claimant errors in form or mistakes in procedure; but, at all events, he takes his mortgage with full knowledge that the question, whether the claims of workmen and materialmen are liens or not, and the amount of such claims, will be settled in a suit, not against himself, but in one against the owner of the building, who, for this purpose, will be his representative. Whether it would not be well in such a suit, to bring in as parties all person, claiming an interest in the property, is a question not necessary to consider, as the subject falls exclusively within the domain of legislation.

My conclusion under this head is, that the judgments in question are conclusive, both with regard to the amount due upon them and as to the fact of their being valid liens upon the premises.

Third. I likewise think that the recording of the $60,000 mortgage, under the circumstances disclosed in the proofs, operated as a notice, putting lien men and all subsequent encumbrancers on inquiry, and that, therefore, by the effect of the doctrine of relation, the mortgage in question, after delivery, related back to the time of such recording; and with respect to this question, I concur with the views expressed in the

opinion of Judge Depue. But, in the fourth place, I agree with the conclusion of Judge Dixon, that this doctrine of notice and of relation cannot be invited to help the appellant, as there is no such case made in his answer. Consequently I vote to affirm the decree appealed from.

Dixon, J.

The bill of complaint in this cause was filed by The Mutual Benefit Life Insurance Company, to foreclose a first mortgage upon property in Elizabeth. The appeal arises out of a dispute between defendants as to the priority of their respective claims. The defendant appealing, Lyman A. Jacobus, claims as mortgagee under two mortgages, made by Anthony W. Dimock and Helen W., his wife, to him, one dated May 2d, acknowledged May 4th, and recorded in the Union county clerk's office, May 13th, 1870, securing a bond of the same date for $60,000, due December 31st, 1870; the other, dated March 18th, 1871, and acknowledged and recorded shortly afterwards, securing a bond for $20,000. The defendants responding, E. F. Purdy & Co., Thomas Thompson, and Wyllys H. Warner, claim mechanics liens upon the mortgaged premises, by reason of their having furnished materials and labor for the construction of a building thereon. These respondents insist that their claims attach as of the "commencement of the building," by force of the act known as the mechanics lien law, and that the "commencement of the building" there intended, is, in this case, the beginning of the excavation for the cellar, which occurred May 28th, 1870; and that the appellant's $60,000 mortgage did not become a lien until June 7th, 1870, the time of the actual advance of the money loaned upon it; and that his $20,000 mortgage did not become a lien until March 18th, 1871, which last position is not disputed.

The appellant, on the contrary, insists that the evidence fixes the commencement of the excavation for the cellar at a date between June 6th and June 13th, 1870; that the true "commencement of the building" is not the beginning of the

excavation, but the beginning of erection or construction on the ground, which was on June 16th, 1870; and that his $60,000 mortgage must be regarded as relating to a date at least as early as May 13th, 1870, the date of its record.

Mrs. Dimock, one of the mortgagors, was the owner of the property while the building was being constructed, and continued to own it until May 1st, 1873, when she and her husband conveyed it to Joseph T. Rowand.

I think the evidence fairly establishes the fact that the excavation of the cellar commenced on May 28th. The only witness on the subject is Thomas Sulzer, a gardener in the employ of the owner, who had charge of the work. He bases his evidence as to the time upon a memorandum, the honesty of which is not impugned, contained in a book in which he was accustomed, at the close of each week, to enter his weekly transactions in the service of his employer. His entries were designed to show, generally, the number of men and teams he had under him, the places where they worked, the wages due them, the amount of money expended by him, and other matters of like nature. The entry relied on is substantially as follows, referring to the year 1870, May 28th to June 4th:

THE NEW CELLAR.

Eighteen days' work, at $1.75, - - - -	$31 50
Twelve days' work, horse and cart, at $2.50 a day,	30 00
	$61 50

This new cellar, he says, was the cellar of the house in question, on the corner of Broad and South streets, in Elizabeth, and the work was done in digging that cellar; and he swears that the entry was made on June 4th, although the fact that his subsequent entries as to this cellar, June 6th to June 13th, and June 13th to June 18th, describe it as "cellar, corner Broad and South streets," and the fact that his evidence is given nearly four years after the transaction, make it quite possible that he may be mistaken; yet, I think, the strong

probability, on the testimony as it stands, is that between May 28th and June 4th, these thirty days of labor were expended on this cellar. The Chancellor regards this as the "commencement of the building," and correctly. While it would not be safe to say that, in the view of the legislature, the commencement of the building was the first work done upon the ground toward the erection of the structure, it is both consistent with the language of the statute, and accordant with its evident purpose, to hold that when the permanent work upon the ground, whether of excavation or of construction, has progressed so far as to inform reasonable observers that it is designed for the erection of a building, then the building has commenced. It would be employing language in no unnatural sense for one to say he was engaged in building his house while in fact he was only digging his foundation or cellar. Even in strictness, the foundation is an essential part of the house, and the cellar belongs to it as completely as does the parlor, and the work necessary to make the cellar or foundation is work done in the progress of the building. True, when the excavation is complete, there is no building on the ground, but there is there, formed by art, that which, when the edifice is finished, will constitute an important part of it. On the other hand, it must be remembered that the legislature has attached to the commencement of the building extensive rights, notice of which is necessary for the protection of those dealing with the land and as to which there are no means of information provided, except the fact itself. Under such circumstances, the court will not construe the language of the legislature with such strictness as to deprive that fact of its utility. The fact was intended to be notice. The fact must therefore be of such a character as will give notice. The removal of the sod, the turning over of the soil or such other equivocal acts as would not fairly indicate the purpose to build, do not constitute "the commencement of the building." To satisfy the law, so much must be done, of a permanent character, as will apprise observers that building is in progress. To this extent the work upon this cellar must have progressed before

June 7th. Laborers expending eighteen days of labor, assisted with a horse and cart for twelve days, honestly intending to dig out a cellar for a house, must have so changed the appearance of the ground as to show the purpose of their work. I conclude, therefore, that the building commenced before June 7th.

The next question is as to when the lien of the $60,000 mortgage attached. It bears date May 2d, was acknowledged May 4th, and was recorded in the Union county clerk's office May 13th, 1870, and purports to secure a bond of the same date, May 2d, for $60,000, payable December 31st, 1870. The bond and mortgage, together with other securities, were delivered by the mortgagor, Mr. Dimock, to Mr. Butterfield, for the mortgagee, Mr. Jacobus, on June 7th 1870, and at the same time, Mr. Jacobus' check for $80,000, of that date, was given by Butterfield to the mortgagor. Mr. Dimock is uncertain as to the date of the delivery. Mr. Butterfield, a witness on the part of the appellant, testifies, "at the time I received them (the bond and mortgage) I gave to Mr. Dimock, to the best of my knowledge and belief, a check of Mr. Jacobus for $80,000." Mr. Jacobus himself testifies, "I think it was Mr. Butterfield handed me the mortgage; we negotiated the loan, and when he handed me the mortgage and stock I handed him a check for $80,000; I now produce the check, dated June 7th, 1870." So that the date of the delivery of the bond and mortgage, and of the advance of the money upon them, is clearly established as being not earlier than June 7th, 1870, that is, after the commencement of the building. It was indeed recorded before that time, but the mere fact of record cannot constitute that a mortgage or contract which would not be a mortgage or contract without it. Its delivery is the creation of it. Recording may be some evidence of a previous delivery, or the delivery to the officer for record may, by arrangement between the parties, be the delivery to the grantee. *Thayer* v. *Stark*, 6 *Cush.* 11; *Hedge* v. *Drew*, 12 *Pick.* 141; *Parker* v. *Hill*, 8 *Metc.* 447; *Barns* v. *Hatch*, 3 *N. Hamp.* 304.

But in the case before us it is beyond dispute, that until June 7th Dimock had and intended to have entire control of the instruments which he had signed. He placed the mortgage with the clerk for record, and for record merely, and when it was recorded he received it again, and retained it until the check was handed to him. So that it is not possible to infer a delivery to the mortgagee, or any one for him, before that time. Having been recorded before its delivery, it is to be considered as if the mortgagee had procured its record at the date of delivery. *Jones* v. *Roberts*, 1 *L. and Eq. Rep.* 583, (*Maine.*)

But the appellant insists that the lien attached before the delivery of the mortgage and advance of the money loaned, upon the ground that there was a prior arrangement, or at least negotiation for such a mortgage and loan, of which the recording of the instrument was notice to the world, and that, in equity, nobody, after such constructive notice, should be allowed voluntarily to step in and defeat the just expectations of one who had invested his money on the strength of such facts. The validity of such a claim it is not necessary to consider in this cause, for the reason that it is nowhere set up in the pleadings, but is, in fact, inconsistent with the case upon which Jacobus has based his rights in his answer, and to the reality of which he has there sworn. His allegation there is that the bond secured by this mortgage was, on May 2d, 1870, made, executed and delivered to him to secure money then owing to him, and he nowhere suggests that prior to the actual incurring of the indebtedness and delivery of the instruments, any other circumstances existed from which he could derive any equitable rights. A mortgage given to secure money owing, is one thing; a negotiation, accompanied by peculiar conditions, which may entitle a mortgagee to rights prior to his advances and to the delivery of the mortgage, is quite a different thing. Parties must stand upon the case made by their pleadings. Evidence relative to matters not stated in the pleading, nor fairly within its general scope, is impertinent, and cannot be made the foundation of a decree.

The rule is well established, that the court cannot notice matter in support of a case for relief, however clearly proved, of which there is no allegation in the pleadings. *Marshman* v. *Conklin*, 6 *C. E. Green* 546. A defendant who seeks to impeach the prior right of his co-defendant, by reason of some superior equity of his own, can stand in no better position in this regard than if he were complainant seeking the same advantage by his bill. His answer must disclose the foundation upon which he rests his claim. In *Vansciver* v. *Bryan et al.*, 2 *Beas.* 434, a defendant, Asay, claimed, in his answer, that his mortgage, subsequent in date to Bryan's judgment, was prior in equity, because it was prior to the issue of execution on the judgment. On the hearing, he insisted that he had a superior equitable claim to one-third of the land, because he had advanced one-third of the purchase money with which the judgment debtor had bought it, and that the judgment creditor, Bryan, had known that fact; of the latter claim, however, the learned Chancellor said, even if fully proved, he could not have the benefit under the pleadings in the cause. For this reason, therefore, this claim of the defendant Jacobus must be discarded. I invoke the rule the more willingly, because my investigation of the claim itself has failed to satisfy me of its justice.

I conclude, therefore, that the appellant's $60,000 mortgage is to have effect from June 7th, 1870. His $20,000 mortgage, admittedly, became operative March 18th, 1871.

And it follows that if the lien claimants have taken the proper steps to keep alive their liens, which attached as of an earlier date, between May 28th and June 4th, 1870, the appellant's mortgages must be postponed to them.

The statute creating such liens expressly declares (§ 12), that no debt shall be a lien by virtue thereof, unless a claim is filed as therein provided.

In examining the steps taken to keep alive these liens, it appears that on March 23d, 1873, the respondents, E. F. Purdy & Co., filed in the office of the clerk of Union county, a claim for $47,979.71 against the building and curtilage,

averring Helen W. Dimock to be the builder and owner, and alleging as follows:

"4. The following is a bill of particulars of the materials furnished and labor performed by E. H. P. & Co., exhibiting the balance justly due them thereon from the said H. W. Dimock:

"NEW YORK, Dec. 31, 1872.

"Mrs. H. W. DIMOCK,

"Bought of E. W. Purdy & Co.

"*Observatory.*

Trimming 4 double windows,	$310 00	
90 feet wainscoting, - -	360 00	$670 00
"*3d Floor, North Side.*		
14 window trims., 11 door do., all the base this side, -	375 00	
30 feet shelving, - - -	36 00	
112 shelf bracket mouldings,	10 08	
Blinds and shutters for 14 windows, - - - -	285 00	
11 doors, walnut, - - -	330 00	
Front room, 1 case of drawers,	15 50	
100 feet of Harrad moulding, -	12 00	
2d room, 1 washstand and back,	30 00	
1 case of drawers, - - - -	36 00	
3d room, 1 washstand and back,	30 00	
1 mantelpiece, - - - -	100 00	
		$1259 58."

And so continuing with a list of articles without date, footing up $47,979.71. Among the articles are:

"Putting up work, - - - - -	$4227 71
Voorhis' bill, stepping stairs, - - - -	1154 75
D. N. Smith, embossing glass included, -	494 00
Noel, Samet & Antoine, window plate, - -	2550 00
Russell & Ervin Mfg. Co., hardware, - -	3991 52
Cash paid polishing, after up, - - - -	575 00."

And concluding as follows:

"All the above labor was performed and materials were furnished between the first day of May, eighteen hundred and seventy-two, and the first day of May, eighteen hundred and seventy-three."

The affidavit made March 20th, 1873, states that the claim is for labor performed and materials furnished since the 1st day of May, 1872.

By a decision in this court, rendered November Term, 1860, it is *res adjudicata* that such a bill of particulars is radically defective: first, in not stating the times when the labor was performed, or any of it, or the times when the different materials were furnished; second, in not showing the amount of labor performed, neither how many days' work were done, nor how much the labor was all worth in gross. *Associates of the Jersey Co.* v. *Davison*, 5 *Dutcher* 415, 421. Clearly then, these creditors have failed to do that, without which, the law expressly declares their debts shall not be a lien.

It is, however, insisted that because, upon this lien claim, judgment has been entered in the Circuit Court, its validity is conclusively established, so long as that judgment stands unreversed. It is one of the principles of the law, "that judgments are conclusive by way of estoppel. 1. Between the parties. 2. Between their privies. 3. On the same subject matter where the proceeding is *in rem;*" and "that privies are: 1. In blood, as heirs. 2. In law, as administrators. 3. In estate, as lessee to lessor." And by force of this principle, it is claimed that Jacobus is estopped from inquiring into and disputing the validity of a lien claim upon which Purdy & Co. have recovered a judgment against Helen W. Dimock. Jacobus is not a party to that judgment. Is he a privy to the defendant Helen W. Dimock? He is not a privy in blood nor in law. Is he in estate? In one sense, he is—he is her mortgagee. But those privies in estate who are bound by a judgment, are not all privies, all persons claiming an estate which was once owned by the party to the judgment; they are only those whose claims

arise after the litigation, that results in the judgment, begins. *Foster* v. *Derby*, 1 *A. & E.* 783.

To extend the class beyond these, would result in the grossest injustice. At the time Jacobus' mortgages were made, not only had the litigation on this lien claim not commenced, but even the debt on which it rests had not been contracted. Jacobus, therefore, is not privy in estate, or otherwise, to the parties in that judgment. Nor was the proceeding *in rem*, so as to conclude all persons by the adjudication therein. The statute provides only for a suit *inter partes*. There are to be plaintiffs and defendants, and upon the defendants is to be served a summons in which are to be designated the individuals who are to appear and defend the suit, and no persons other than those so designated have any right to defend. Such is not the character of proceedings *in rem*. There, notice is given, or, at least, attempted to be given to the world, and everybody is called upon to intervene for the defence of his right, for that the court, which holds in its actual custody the thing to be disposed of, is about to determine concerning that very thing. Its manual possession of the thing is notice to all that have interest in it, and its monition warns all such of its purpose. As the court says, in *Woodruff* v. *Taylor*, 20 *Vt.* 65: "It is just as essential to the validity of a judgment *in rem*, that constructive notice, at least, should appear to have been given, as that actual notice should appear upon the record of a judgment *in personam;* a proceeding professing to determine the right of property, where no notice, actual or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

Says Chief Justice Hornblower, in *N. J. Turnpike Co.* v. *Hall et al.*, 2 *Harr.* 337: "No principle or rule of action is better settled, at the common law, than that whenever a court, or any person acting under legal authority, is to act judicially, or to exercise a discretion in a matter affecting the

rights of another, the party thus to be affected is to have reasonable notice of the time and place when and where such act is to be done, to the end that he may be heard in defence or for the protection of those rights."

Mr. Justice Trimble, in an opinion which the judges of the Supreme Court of the United States unanimously approved and adopted, (*Hollingsworth* v. *Barbour*, 4 *Pet.* 466,) says: "It is an immutable principle of natural justice, that no man's rights shall be prejudiced by the judgment or decree of a court, without an opportunity of defending the right."

In *Hess et ux.* v. *Cole*, 3 *Zab.* 116, the plaintiffs brought an action of dower *unde nihil habet*, to recover dower of the wife, as widow of S. S. The defendant pleaded a previous assignment of dower by the Orphans Court through commissioners, pursuant to the statute, upon notice to the wife, and alleging, as excuse for want of notice to Hess, that he had then abandoned his wife, and was living apart from her, out of New Jersey, in some place unknown. The plaintiff demurred, and the court held the assignment void as to Hess, for want of notice to him, and the plea therefore bad, Chief Justice Green saying, in delivering the opinion: "In every proceeding of a judicial nature, it is essential that the person whose rights are to be affected, should be a party to the proceeding, and have an opportunity of making defence."

Upon the same principle, where the land of A was sold, on March 1st, under an execution at the suit of B against A, and on March 10th, a mortgagee of the land filed his bill against A and B, to foreclose the mortgage, and on March 19th, the sheriff executed a deed to the purchaser under the execution, it was held that the deed related back to the time of the sale, and that the purchaser was not precluded by the decree in foreclosure, from contesting the validity of the mortgage in an action of ejectment at law, he not being a party to the bill, and his title having been acquired before the suit began. *Jackson* v. *Dickenson et al.*, 15 *Johns.* 309.

But further references need not be made to maintain this axiom in the administration of justice, whether by courts of

law or equity, that upon no man's rights shall judgment be conclusively rendered until he have opportunity, or at least permission, to be heard thereon. If the legislature could compel the judiciary to administer the law regardless of it, at least the courts should never decide that the legislature has intended so to do, until it has so expressed itself that no other meaning can possibly be attached to its language. Under our lien law, no notice is contemplated except to the persons designated in the lien claim as builders or owners, and no notice to any other persons would be of any avail, since no others are required or could be permitted to defend in the suit. And the act nowhere declares that the judgment to be rendered in the suit shall be conclusive upon any others, as to the existence of a lien, and it therefore seems to me indisputable that the legislature did not intend to give, and did not give, to the judgment any such effect. Nor do the decisions upon this or similar statutes warrant such an interpretation.

Under the mechanics lien law of Maryland, provision is made for summons to the defendants named, and also for public notice, by advertisement, to all concerned. In a suit under that act, the giving of the latter notice was waived by counsel of plaintiffs and defendants, and judgment was recovered by the plaintiffs. Afterwards, on foreclosure of mortgage, the plaintiffs insisted that their judgment was *in rem*, and concluded the mortgagees as to the validity and effect of their liens; that as the county court had jurisdiction to render the judgment, and the omission to give the notice was a mere irregularity, no court, in a collateral proceeding, could, for that reason, refuse to give it full effect. The Chancellor said, however: "The question is not whether the judgment shall have effect against the parties who were notified of the proceeding, but whether it shall conclude persons who had no notice, either actual or constructive, and who consequently have had no opportunity of defending their rights. It appears to me quite plain that the legislature never intended, in passing these laws, to affect the interests of parties who had no notice, actual or constructive, of the proceedings under them;

and I am by no means prepared to say, that if the person claiming the lien chooses to limit his remedy to the defendant and the person in possession of the building, he may not do so. Surely, it would be everywhere, and with one voice, denounced as violative of the plainest principles of justice, that the rights of parties should be concluded by a judgment, when they were not only not summoned to resist it, but where they had not, and were not intended to have notice. * * * It cannot be allowed to conclude the rights of strangers to it. * * * The proceedings under the lien law, though in the nature of proceedings *in rem*, are not purely of that character. The suit is *inter partes*, and must be confined to such parties. * * * It cannot, with any propriety, be said that the judgment is an adjudication affecting the mortgagee's title to the property." *McKim et al.* v. *Mason et al.*, 3 *Md. Ch.* 186.

The statute of California requires the lien claim to be filed within sixty days after the completion of the work. In *Horn* v. *Jones et al.*, 2 *Cal.* 194, the mechanic had filed his claim against the owner after the sixty days had expired, and upon that claim judgment had been entered by him, and execution issued, and the property sold. It was held that a mortgagee whose mortgage had been made and recorded after the work commenced, and before the claim was filed, had a right superior to that of the purchaser at the execution sale, and that he was not bound by the judgment, although if the lien proceeding had accorded with the statute, he would have been cut off.

So, in *Cornell* v. *Matthews*, 3 *Dutcher* 522, Whelpley, J., speaking of a special judgment under our lien law, says: "The judgment can bind the estate of no one not a party to it."

To the same effect is the opinion of Chancellor Green, in *The Morris County Bank* v. *The Rockaway Manufacturing Co.*, 1 *C. E. Green* 150, where he says: "The claim was not filed according to the statute, and constitutes, therefore, under the provisions of the law, no encumbrance upon the premises. Nor does the fact that judgment at law is entered upon the lien, the lien claim not having been filed pursuant to the statute, give it any priority in payment, or advantage over

liens upon which judgment has not been rendered. The order of priority of encumbrances is in no wise affected by the judgment to enforce the lien."

It was mainly by reasoning upon the same fundamental principle, that this court reached the conclusion in *Derrickson* v. *Edwards*, 5 *Dutcher* 468, that the owner who is to be made defendant to suits under our lien law, is he who stands in that relation, not when the building begins, but when the lien claim is filed, when first a record is made to which the subsequent proceedings to enforce the claim must conform, and after which there may be said to be *lis pendens*. *Robins* v. *Bunn*, 5 *Vroom* 322. From this premise, one logical conclusion seems to me to be that all those persons who, as mortgagees, at that time own any interest in the land which the lien claimant desires to subject to his lien, must be made defendants, as owners, else their estate will stand exonerated from the lien. The statute says that the claim shall designate the name of the owner of *the estate in the land* upon which the lien is claimed; and by what course of reasoning can it be asserted that he who owns the mere shell, as it were, of the estate, must be afforded opportunity of contesting the claim, before it is conclusively established, but that he who owns the kernel, the substance of that estate, may be passed by unnoticed, unheard? As in the case before us, before all the lien claims in controversy were filed, Dimock and his wife, who were the owners of the land when the building began, had conveyed to Jacobus, by way of mortgage, all that they had of value in the property (for it doubtless is not worth the mortgage money), vesting in him that which courts of law long regarded as the legal estate, and afterwards had transferred to Rowand their equity of redemption, a mere shadowy remnant of interest; and yet it is said the legislature has required that Rowand shall be solemnly called to answer before judgment can be pronounced against his rights, but has considered Jacobus' interests as not worth the trouble of asking or permitting him to appear for their defence. Such a scheme may form part of some theory for administer-

ing law, but it ignores those rules without which practical justice would be generally thwarted, and cannot, in my opinion, be drawn out from either the enactments of the legislature or the decisions of the courts.

It is not, however, now necessary to decide that the lien which Purdy & Co. once had against the estate of Jacobus as mortgagee, is absolutely lost by reason of their failure to file a claim against him as owner within the year allowed by the statute; it is enough to hold that he is not prevented, by the judgment against others, from averring that no claim, according to that statute, has been filed against anybody, and that, therefore, as to him, by force of the express provisions of the law, the lands and building are free from the lien. And this position, be it noticed, he is assuming, not against one who, on the strength of that judgment, has bought the land and paid his money for it, but against the lien claimants themselves, by whose own fault their own rights are affected. The claim of Purdy & Co. must, I think, be postponed to the Jacobus mortgages.

The two other lien claims in the case, that of Thompson and that of Warner, were filed against only Joseph T. Rowand, as owner, after the property was conveyed to him. The conveyance to him was made by Mr. and Mrs. Dimock after they had executed both Jacobus' mortgages. Without adverting to defects apparent on the face of their lien claims, I think their status as to Jacobus may be satisfactorily determined upon other considerations. The portions of the act which describe the estate to be affected by sale under the special judgment and execution, are the eleventh section of the original act and the first section of the supplement of March 14th, 1863. These sections provide that on such sale, the sheriff's deed shall convey to the purchaser the estate of the owner in the building and lands, subject to all mortgages or other encumbrances created and recorded or registered prior to the commencement of the building, and free from all encumbrances or estates created by or obtained against such owner afterwards, and from all estates and encumbrances, by deed

or mortgage, made by such owner or any claiming under him, and not recorded or registered at the commencement of the building. This is the extent to which the lien can be made available, even in favor of a purchaser, and doubtless, therefore, in behalf of the claimant himself, the lien has no wider reach. It embraces only the estate of the owner named in the judgment, cutting off only encumbrances obtained against him, and estates by deed or mortgage made by him or those claiming under him, after the commencement of the building. In the Warner and Thompson claims and judgments, the owner named is Rowand, and all the estate which can be reached thereunder is the estate which he owned at some period contemplated by the statute. But he never owned that estate which Jacobus has under his mortgages. Nor is Jacobus' estate or encumbrance one created by or obtained against Rowand, or existing under deed or mortgage made by him or any claiming from him. It is not included within any terms of the act used to describe the property subjected to sale under a judgment against Rowand. Had Helen W. Dimock been the defendant, as owner, and the proceedings been according to the statute, some color might be found in these terms for holding that the estate of Jacobus could be sold, because she owned that estate at the commencement of the building, but not as the matter now stands. When the lien claimant is selecting the owner against whom he will prosecute his claim, he must take care that he chooses one whose estate is or has been extensive enough to satisfy that claim. These claimants, having elected to proceed against the estate of Rowand only, can ask no more than such estate as Rowand had, and therefore, they also must be postponed to the Jacobus' mortgages.

So much of the decree below as adjudges the lien claims and judgments of Purdy & Co., Thompson, and Warner, to be prior to the mortgages of Jacobus, and provides for their payment accordingly, should be reversed; in other respects, the decree should be affirmed.

VAN SYCKEL, J.

My conclusions in this case are as follows:

1. I agree with the opinion of Judge Dixon as to what constitutes the commencement of a building.

2. That the evidence shows that the building was commenced before the 7th of June, 1870.

3. The mortgage to Jacobus was executed and put on record by the mortgagor before the 6th of June, but it was not delivered to Jacobus, nor was the money advanced upon it, until after that date. Under these circumstances, it did not take effect as a mortgage to Jacobus until it was delivered, and the doctrine of relation cannot be invoked to give it priority over the lien claims. The fact that the mortgagor had the mortgage recorded before its delivery, was notice to any subsequent encumbrancer that, when delivered, the mortgagee would take it according to its legal effect, that is, as a mortgage from the date of its delivery to him; while in the hands of the mortgagor it constituted no lien. The building having been commenced before the delivery of the mortgage, the mortgagee was charged with full notice, before he advanced the money on the mortgage, that if he did so advance his money, he would take a mortgage of a date subsequent to the commencement of the building, and be postponed to any lien claims which might accrue in the erection of the building.

4. Even if the mortgagee could claim a superior equity by relation, in this case, he cannot now be permitted to set it up, having claimed priority, in his sworn answer, on an entirely different ground.

5. The judgment at law upon the lien claim, in the absence of fraud or collusion, is conclusive against all encumbrancers subsequent to the commencement of the building. It is contrary to the common law rule that a judgment binds only parties and privies. A mortgagee, of a date subsequent to the commencement of the building, has notice in the express terms of the statute, not only that he will be postponed to every lien claim, but that he will be concluded by a judgment in a suit on the claim, to which he is not to be made a party.

The result is that, in my opinion, the decree of the Chancellor should be affirmed.

Decree reversed by the following vote:

For reversal—DEPUE, DIXON, GREEN, KNAPP, LILLY, WOODHULL. 6.

For affirmance—BEASLEY, C. J., CLEMENT, REED, SCUDDER, VAN SYCKEL. 5

MITCHELL, appellant, and MARSH, respondent.*

Decree unanimously affirmed, for the reasons stated by the Vice-Chancellor in his opinion, reported in 11 *C. E. Green* 498.

NOVEMBER TERM, 1876.

THE ATTORNEY-GENERAL, appellant, and THE DELAWARE AND BOUND BROOK RAILROAD COMPANY, respondent.†

1. The Attorney-General has the right, where the property of the sovereign or the interests of the public are directly concerned, to institute suit for their protection by an information at law or in equity, without a relator.

2. In a conveyance, by the sovereign, of property which is usually the subject of private ownership, the extent of the thing granted is to be ascertained by the rules of construction applicable to private deeds.

---

*Cited in *Mutual Life Ins. Co.* v. *Marshall*, 5 *Stew.* 109; *Schenck* v. *Hart*, *Id.* 789.

† Cited in *Long Branch Com'rs* v. *West End R. R. Co.*, 2 *Stew.* 568; *State* v. *Mutchler*, 13 *Vr.* 464.

3. The bed of the Delaware river above tide-water, from the easterly bank *ad filum medium aquæ*, passed by the grant from Charles II. to the Duke of York, dated March 12th, 1664, and is private property.

4. The general railroad law, approved April 2d, 1873, provides for conferring the franchise of bridging the Delaware, so far as the authority of New Jersey can avail for that purpose.

5. When Pennsylvania has authorized one of its railroad corporations to bridge the Delaware so as to connect with any New Jersey road, and New Jersey has authorized one of its railroad companies to bridge the Delaware so as to connect with any Pennsylvania road, the states have exercised concurrent jurisdiction under the treaty of 1783, in such manner as to give mutual consent to the erection of a bridge by the New Jersey and Pennsylvania companies jointly, each from its own bank to the centre of the stream.

The case in the Court of Chancery is reported *ante, p.* 1.

Mr. Vanatta, Attorney-General, and *Mr. Cortlandt Parker*, for appellant.

Mr. B. Williamson and *Mr. Browning*, for respondent.

The opinion of the court was delivered by

Dixon, J.

The Attorney-General filed an information in the Court of Chancery for the purpose of restraining the Delaware and Bound Brook Railroad Company from completing a bridge which it was constructing over the waters of the river Delaware, and of abating the piers and abutments which it had already erected, upon the ground that the bridge, piers and abutments were and would be a purpresture and public nuisance. Upon a rule to show cause why the prayer in the information should not be granted, the defendant filed its answer, and at the hearing the Chancellor discharged the rule and dismissed the information. From this order the Attorney-General presents his appeal to this court.

Both below and here the defendant urged that the information is at least irregular for want of a relator, and should not be permitted to stand, unless amended by the insertion of the

name of a proper person as such. But this objection must not prevail. In equity as in the law court, the Attorney-General has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit, by what may be called civil information, for their protection. The state is not left without redress in its own courts because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility and to whom, therefore, it has given the right of appearing in its behalf and invoking the judgment of the courts on such questions of public moment. The same point was lately raised in the Supreme Court, (*Attorney General* v. *Del. & B. B. R. R. Co.*, 9 *Vroom* 282,) and there decided in accordance with the views of the Chancellor and this court in the present case.

The first position taken by the Attorney-General in support of his prayer is, that the bridge in controversy stands upon the land of the state, to the occupancy of which the defendant has no title. The want of title from the state is conceded; but that the land is the property of the state, the defendant denies. The bridge is being erected across the Delaware river from a point in the township of Ewing, Mercer county, New Jersey, to a point in the township of Lower Makefield, Bucks county, Pennsylvania, and rests upon piers standing in the bed of the river. This part of the river is above the ebb and flow of the tide, which does not pass beyond the falls of Trenton, some few miles below; and the claim on behalf of the state is, that before the revolution, the crown, and since the revolution, the state, as sovereign, has been proprietor of this and all other portions of the bed of the Delaware river.

Both parties admit that prior to March 12th, 1664, the title was in the King of England. On that day, Charles II. issued to his brother James, Duke of York, letters patent, by which he granted unto the duke, his heirs and assigns, to be held of the king, his heirs and successors, in free and common socage, a large territory in America, one tract of which is therein described as " the said river called Hudson's river, and all the

lands from the west side of Connecticut to the east side of Delaware bay, * * * together with all the lands, * * * rivers, * * * waters, lakes, * * * and all other royalties, * * * to said several * * * lands and premises belonging and appertaining." These letters also conferred upon the duke, his heirs and assigns, certain powers of government, to be exercised over said territory and its inhabitants, reserving, however, the sovereignity of the king. *Leaming & Spicer, p.* 3.

Under this grant, it is insisted that the easterly margin of the Delaware bay and river throughout its entire length, is the westerly boundary of the land conveyed; that the words, "the east side of Delaware bay," especially in a grant from the crown, cannot, by construction, be extended below high-water mark; that their use shows the intention of the king to reserve all the land under water in the bay and river.

Several suggestions seem to me pertinent to the proper interpretation of this grant.

While these letters patent were indeed issued to a subject, that subject was the chief subject of the realm, and the heir presumptive to the throne. The purpose of the king was not the mere grant of private interests, but the establishment of a commonwealth, with ample powers of local government and defence. That no special reason existed in the royal mind for not parting with the ti le to the bed of streams, so far as that title could legally be separated from sovereignty, is made clear enough by the fact that the great Hudson river is expressly granted, as also all the other rivers within the territory described; and I think no motive can be suggested for the retention of the bed of the Delaware, which would not apply with equal force to the Hudson and Raritan. Indeed, prior to 1648, letters patent had been issued, embracing the whole of this river and bay, in the province of New Albion. There is, therefore, no antecedent presumption against the grant of the river.

And looking at the very words of the conveyance, "the east side of Delaware *bay*," what is observable? A bay is an

arm of the sea, distinct from a river. And it is certain that in 1664, Charles and his advisers could not have been under the impression that the whole of the Delaware was a bay. In 1648, persons interested in the encouragement of emigration to New Albion had published in England a circular embracing a letter from Robert Evelyn, in which he describes a trip up the Delaware, or Charles river, to a point about thirty miles above the falls, which, he says, were about sixty-five leagues from the sea. He writes that no part of Delaware bay extended as far as the fortieth degree of north latitude, but that a ship of one hundred and forty tons might go up to the falls. *Smith's History of New Jersey, p.* 28, *note.*

For years before the date of these letters patent, the shores of the southerly portions of the Delaware had been inhabited by English, Swedes, and Dutch, and doubtless the adventurous spirit of the times had carried many others besides Evelyn among the Indian kings that hunted along its northerly banks; and it would be difficult to believe that, in spite of the curiosity about the American settlements which pervaded all classes of Europeans, in spite of the peculiar interest which the King and his councillors would feel regarding them, not only while he was upon the throne, their actual possessor, but while he lingered about the courts of the continent, pondering upon the extent and value of those realms he owned but could not occupy, the royal advisers were ignorant of the existence of a river north of, and emptying into Delaware bay.

It seems to me, therefore that although the very words might limit the grant to the east side of Delaware bay, so far as it is a bay, yet beyond that, the westerly boundary, even as the whole of the northerly boundary of this tract, is matter of inference, not of expression.

The words, then, being inconclusive as to the boundary along the river, much light may, I think, be thrown upon the subject by ascertaining the practical interpretation which, in those early times, was placed upon the grant.

By lease and release, dated June 23d, 24th, 1664, less than four months after the king's patent, the Duke of York con-

veyed to Carteret and Berkeley, their heirs and assigns, a tract of land which they regarded as included in the king's letters, and which they described as "bounded on the east, part by the main sea, and part by Hudson's river, and hath upon the west Delaware bay or river, and extendeth southward to the main ocean, as far as Cape May at the mouth of Delaware bay; and to the northward, as far as the northernmost branch of the said bay or river of Delaware, which is forty-one degrees and forty minutes of latitude." *Leaming & Spicer, p.* 8.

These deeds do not limit the territory by the *side* of the river; and although James was the grantee, not the grantor, of the original conveyance, yet he was expecting the inheritance of the grantor's estate, with all its rights and prerogatives unimpaired, and he does not stand in history as a prince wont to abate any jot of regal claim, either before or after his own coronation. In these deeds, it is provided that the tract of land granted shall thereafter be called New Cæsarea, or New Jersey; and Charles, in a letter of December 9th, 1672, to the deputy governor of the province of New Jersey, speaks of his having granted the propriety thereof to Berkeley and Carteret, obviously referring to and approving the title to the entire territory derived through the Duke of York. *Leaming & Spicer, p.* 38.

I refer, also, to the following instruments, as indicating the Delaware river, and not the east side of the river, as the westerly boundary of the province of New Jersey, and recognizing as valid the title of the proprietors to the whole province so bounded: the lease and release of July 28th, 29th. 1674, from the Duke of York to Carteret, (*Leaming & Spicer, p.* 46); the king's letter of June 13th, 1674, for the encouragement of the settlement of the province, (*Leaming & Spicer, p.* 49); the quinquepartite deed between Carteret, Penn, Lawry, Lucas and Billings, dated July 1st, 1676, dividing the province into East and West New Jersey, (*Leaming & Spicer, p.* 61); the grant from the Duke of York to Penn and others, for West Jersey, dated August 6th, 1680, (*Leaming & Spicer, p.*

141); the Duke of York's release to the twenty-four proprietors of East Jersey, dated March 14th, 1682–3, and the king's confirmation of this release, dated November 23d, 1683, (*Leaming & Spicer, p.* 151.) And it may be affirmed of the memorials preliminary to the surrender to Queen Anne in 1702, of the surrender itself, and of the instructions thereupon issued to Lord Cornbury, that they all, without nicer specification, refer to the grant of the Duke of York as being fully warranted, so far as territory was concerned, by the letters patent of the king.

I think, therefore, that to restrict the king's grant to narrower limits that those indicated by the lease and release of the Duke of York, is sticking in the bark, and ascribing to the conveyance a meaning which neither of the parties to it, nor any, in early times, claiming under either of them, considered or acted upon as a just interpretation.

The question then arises as to the effect of a grant by the king of lands bounded upon a river. As early as the second year of Henry VII. it was resolved that the king's grant should pass nothing by implication. 2 *Henry VII.* 13. And in the case of the *Royal Fishery of the Banne*, (*Davies* 149,) the Chief Judges of the Privy Council, applying this principle, considered that letters patent, granting the territory of Rout adjoining to the river Banne, and all fisheries in or within said territory, except three parts of the fishery of the river Banne, did not convey to the patentee the fourth part of this fishery below tide-water, for they said, the Banne is a navigable stream where the tide ebbs and flows, and the fishery in it is a royal fishery, which is not appurtenant to land, but is a fishery in gross, and parcel of the inheritance of the crown by itself, and general words in the king's grant shall not pass such special royalty. But the same judges in the same case also resolved that in every river where the tide did not ebb and flow, and in the fishery of such river, the ter-tenants on each side have an interest of common right; and every such river appertains to the owners of the soil where it hath its course, and if such river runneth between two manors and is

the boundary between them, the one moiety of the river and fishery belongs to one lord, and the other moiety to the other.

Lord Hale, in his treatise de jure maris, (of which it is said that, "in England, the courts scan his words with as much care as if they had been found in Magna Charta; and the meaning once ascertained, they do not trouble themselves to search any further,") says, (*ch.* 3,) "There be some streams or rivers that are private, not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or public use, for carriage of boats and lighters; and these, whether they are fresh or salt, whether they flow and re-flow or not, are prima facie, *publici juris*, common highways for man or goods, or both, from one inland town to another. Fresh rivers, of what kind soever, do, of common right, belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the property of the soil, and consequently the right of fishing, *usque ad filum aquæ;* and the owners of the other side, the right of soil or ownership and fishing unto the *filum aquæ* on their side." (*ch.* 1.)

The same principle was declared in *Carter* v. *Murcot*, 4 *Burr*. 2163, where it was said, "In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides, and it generally extends *ad filum medium aquæ*. The cases cited prove this distinction, 'that navigable rivers or arms of the sea belong to the crown, and not (like private rivers) to the land-owners on each side.'"

In *Tyler* v. *Wilkinson*, 4 *Mason C. C.* 397, Story, speaking of the Pawtucket above tide-water, says: "Prima facie, every proprietor on each bank of a river is entitled to the land covered with water in front of his bank, to the middle thread of the stream."

In *Arnold* v. *Mundy*, 1 *Halst.* 1, Chief Justice Kirkpatrick declares the law to be "that a grant of land *to* a subject or citizen, bounded upon a fresh water stream or river where

the tide neither ebbs nor flows, extends to the middle of the channel of such river.

In *Cobb* v. *Davenport*, 3 *Vroom* 369, the notion that actual navigability was the criterion of public or private ownership in the bed of waters was distinctly repudiated, and the doctrine that the ebb and flow of the tide furnished such criterion was expressly adopted as a principle of the common law so well settled that a citation of authorities was deemed unnecessary.

Inasmuch, then, as upon this principle of the common law, which was established in England at the time of the king's grant to James, and which was brought to and adopted in this state, the bed of non-tidal waters was a species of private property, and not a royalty of the crown, it seems to me that the question, whether by that grant the bed of the Delaware above tide was conveyed or not, is to be resolved by the application of those rules of construction which ordinarily discover to courts the meaning of persons dealing with such property. Among those rules, none, I think, is more firmly settled than this, that grants of land bounded upon or along rivers above tide-water carry the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. 3 *Kent* 427; *Winter* v. *Peterson*, 4 *Zab.* 524; *Railroad Co.* v. *Schurmeir*, 7 *Wall.* 272, 287. As to these letters patent of the king there is nothing, either in the words of the grant, the evident purpose which induced it, or the policy of the law that controlled it, to indicate such intention, and therefore, I think, that under those letters, the Duke of York and his grantees took the ownership of the bed of the Delaware above tide-water to the thread of the river, as private proprietors. They have received the same construction in the highest court of the land. In *Rundle* v. *Delaware and Rar. Canal Co.*, 14 *How.* 80, Justice Grier, delivering the opinion of the court, said: "The river Delaware is the well-known boundary between the States of Pennsylvania and New Jersey. Below tide-water the river,

its soil and islands, formerly belonged to the crown; above tide-water, it was vested in the proprietaries of the co-terminous provinces, each holding *ad medium filum aquæ.*"

In the following, among many other American cases, the same rule of construction has been applied to grants by the sovereign: *Ex parte Jennings*, 6 *Cow.* 518, (*note*;) *Middleton* v. *Pritchard*, 3 *Scamm.* 510; *Jones* v. *Soulard*, 24 *How.* 41, where counsel cites a long array of apposite cases.

Upon this theory of private title to the bed of the stream, the proprietors and the riparian owners under them doubtless acted from a very early period. By the instrument called "The concessions and agreements of the proprietors, freeholders, and inhabitants of the province of West New Jersey, in America," dated March 3d, 1676–7, it was granted that "all the inhabitants within the said province of West Jersey have the liberty of fishing in Delaware river." *L. & S.* 390. If the bed of the river had remained the property of the crown the right of fishing therein would have been common. and no grant from the proprietors would have been needed or effectual; but if the title to the bed were vested in private owners, then the fishery would have become several (2 *Black. Comm.* 39), and could be lawfully enjoyed by the public only after some such act of dedication as these concessions contain. Upon this grant, I think, rests the claim which the people of the commonwealth have always maintained to regulate and control the fisheries of the river above tide-water.

As early as 1683, the assembly of West Jersey provided for treating with the proprietary of Pennsylvania in regard to the rights and privileges of the province to or in the Delaware river, (*L. & S.* 480); and on December 21st, 1771, (*Allinson* 347), an act was passed concurrently with a similar Pennsylvania statute, which declared the Delaware to be a common highway for the purposes of navigation, and provided for improving the navigation between Trenton and Easton, by removing obstructions and widening and deepening the channel, but also provided for the preservation of

Hoop's dam on the Pennsylvania side, and such other dams as had been theretofore erected. This legislation thus, while it declared that the river above tide belonged to that class of streams which Hale describes as of common or public use as highways, though private in propriety or ownership, yet refrained from interfering with those private structures which had been placed upon the bed before such authoritative declaration was made.

Of this class, then, is the Delaware river above the tide: the title to the bed is in the private owner, but is subject to the paramount public right to use the river as a common highway, in which is included the right to so control and change the bed as to preserve and improve the navigability of the water.

Against the conclusion which I thus reach, stands, it is said, the opinion of the crown lawyers, Raymond and Yorke, both afterwards Chief Justices of England. This opinion was given in 1721, upon a question as to whether the title to the islands in the Delaware had passed from the crown under the provincial charters of Pennsylvania and New Jersey. They answered that it had not. They give no reasons, nor in any way indicate how they arrived at that decision. *Chal. Col. Op.* 90. The islands in dispute were probably islands in tide-water, since so early as 1721, the islands above Trenton were hardly worth contending for; and this extra-judicial opinion is certainly not entitled to more force than the decision of a court would receive—force within the class of subjects to which it relates; it cannot be viewed as an authority on the title of the islands above the tide.

Nor is *Den* v. *White*, *Coxe* 94, such an authority. The court there held only that the lessor of the plaintiff, who claimed under neither the king nor the proprietors, had not shown any other title. Some expressions of the Chief Justice to the jury indicate, indeed, that the defendant's contention, that at all events the plaintiff must fail because the title was in the crown, had met with his acquiescence, but that was not

a deliberate conviction upon a point litigated and necessary to or involved in the decision of the cause.

There is also pressed upon our attention the opinion of Richard Stockton, given in 1828, in reference to the right of New Jersey to make a canal without obtaining the consent of Pennsylvania to use the waters of the Delaware. In that opinion he states this position as believed to be undeniable: "The river Delaware was not included in the ancient grants of the King of England and the Duke of York, either to the proprietors of New Jersey or to William Penn, the proprietor of Pennsylvania, but the property therein and its islands remained in the crown of England until the Revolution. The rights of private property claimed by individuals on either side of the river, had no other legal foundation but occupation or possession." It is evident that this proposition, as distinct from the idea that the title of the bed above tide was in private owners, was in no wise relevant to the inquiry before him, whether the consent of the sister state was necessary to the lawful use of the water. Pennsylvania would have no more control of the water running over lands of private proprietors than if it ran over the public lands of New Jersey. And his assertion that the position he assumed on that point was undeniable, may be contrasted with the common sentiment of the legal profession, prior to the case of Arnold *v.* Mundy, that the entire bed was private property, (*Griffith's Law Reg.* 1291 ; *Gough* v. *Bell*, 2 *Zab.* 441, 490,) and with the statement of the New Jersey commissioners, in their communication to the Pennsylvania commissioners, in 1817 : "The soil of the river, to the midway thereof, at least at and above the falls of Trenton, if not below, is vested by law in the owners of the adjoining land." His distinguished ability as a lawyer does not justify us in regarding this obiter dictum as conclusively settling the law on so important a matter. An examination of the opinions of our most eminent jurists, as contained in our state reports, shows that neither that assertion, nor scarcely any other in reference to the public and private rights to the land flowed by the waters

of the Delaware, can be regarded as undeniable, except so far as they have been the subject of direct adjudication. Upon almost all these points, the views of judges and lawyers have been extremely variant.

Nor can we yield to the construction placed by the courts of Pennsylvania upon the rights of that state and its citizens in this river. Their decisions are confessedly not in accordance with the common law, but rest upon peculiar considerations of state policy, more closely akin to the civil law. They are not limited to the Delaware nor dependent on the interpretation of the king's grant to Penn, but are applied as well to the Susquehanna and other rivers clearly within the state boundary.

I conclude, therefore, that the piers and bridge of the defendant are not erected upon the lands of the state and are not a purpresture.

It is insisted, in the next place, that they are a public nuisance, and as such ought to be restrained and abated by the Court of Chancery, because they stand in a river where there is a public right of navigation, and are not authorized by law. This absence of legal authority is asserted first, upon the claim that the general railroad law, passed in 1873, under which the defendant derives its franchises, does not permit the construction of a bridge in the Delaware river; and secondly, upon the ground that there has been no such concurrent action by the State of Pennsylvania as is necessary to justify interference with the river as a common highway, under the agreement with that state made in 1783.

The defendant is incorporated under the "act to authorize the formation of railroad corporations and regulate the same," * approved April 2d, 1873, upon articles of association filed by its incorporators, in which "the places from and to which the road is to be constructed or maintained and operated" are described as follows: "Its beginning point, at the boundary line between the States of Pennsylvania and New Jersey, in the middle of the Delaware river, in the township of Ewing, in the county of Mercer, in the State of New Jersey, some-

* *Rev.*, *p.* 925.

where between an island in said river called Slack's Island, northward of Yardleyville, in the State of Pennsylvania, and another island in said river called White's Island, southward of said Yardleyville; and its termination point, in the southerly line of the railroad of the Central Railroad Company of New Jersey, at or near the village of Bound Brook, in the township of Bridgewater, in the county of Somerset, in the State of New Jersey." The scope of this statute is *prima facie* co-extensive with the limits of the state, and must be so regarded unless its terms fairly require narrower boundaries. The first section provides that the articles of association shall mention the *places* from and to which the road is to be constructed. This word *places* is sufficiently indefinite to indicate any locality within the state. The eleventh section* authorizes the construction and operation of the railroad between the *points* named in the articles of association, commencing at or within and extending to or into any *town, city or village* named as the *place* of the termini of such road. It is urged that by force of these words, each terminus of the road must be confined to some town, city or village. Perhaps if this clause stood alone, as designating the limits of construction, such an interpretation would be entitled to prevail; but the twenty-third section enacts that companies whose roads shall be constructed under the provisions of the act, shall have the right to connect their roads with any railroads within this or any other state, and the duty of the courts is so to interpret every portion of the statute as that all of it may have effect. Now evidently, by this section, the legislature did not undertake to authorize the construction of roads beyond the limits of the state's jurisdiction, nor intend to authorize foreign corporations to build railroads within our territory. The purpose must have been to empower companies organized under the act, to carry their roads (within the limits laid out in their articles of association,) to the state line, and there to connect with the road of the foreign corporation. But it is equally obvious that they did not mean to restrict this power of connection to those places where some town, city or village actually runs up

* *Rev.*, *p.* 927, *sec.* 99.

to the state line, for such a restriction would render the power practically nugatory without any good cause for the limitation, since, if it be desirable to connect our state railroads with foreign roads, no reason appears for making such connection only within some town, city or village. For the purpose, then, of exercising the rights plainly intended to be conferred by this twenty-third section, the legislature, in my judgment, empowered corporations to locate and construct railroads between places designated in their articles of association, other than towns, cities or villages.

I find nowhere else in the act, any language which can be so construed as to exclude the Delaware river from its operation. On the contrary, several considerations appear to me to indicate that the legislature must have contemplated a connection with railroads out of the state, across that river. In that direction existed the great demand for railroad transportation through New Jersey to the sea, in compliance with which, mainly, this law was enacted. The need for such transportation over our northern boundary was comparatively unimportant. Before this law was passed, there stood on our statute books an act passed March 30th, 1869, (*Pamph. L.*, *p.* 807,) entitled "An act to prevent accidents on railroads," the second section of which provided "that hereafter no railroad shall be laid upon any bridge across the Delaware river intended for public travel, unless special authority for that purpose be given by legislative act, particularly designating the bridges to be subjected to such use." This general railroad law, in its thirty-eighth section,* enacted that the provisions of that second section of the act of 1869 should not be considered to extend to, or to affect, in any way or manner, corporations which might be formed thereunder. Certainly the legislature would not thus have expressly removed this prohibition against crossing the Delaware on existing bridges, if it had been intended not to authorize the crossing of that river at all. And it seems to me manifest, that if the purpose had been to confine this power of crossing to existing bridges, such purpose would have been expressly averred. The only

* *Rev.*, *p.* 935, *sec.* 126.

reason that can be imagined for such restriction is regard for the navigability of the river; and if that interest be so important as to require that the courts should be called on to imply the restriction, it should seem that it was sufficiently important and obvious for the courts to expect that the legislature would have expressly guarded it. But, in fact, no such importance pertains to the stream above the tide. At the time of the passage of the act there were already thirteen bridges over the river between Trenton and Easton, a distance of not over sixty miles, each one of which interfered with navigation as much as might be expected of any railroad bridge likely to be built, and more than does the bridge now complained of; and the proof shows that none, even of these, has interposed any appreciable obstacle to the craft which have been wont to navigate the waters. And, surely, if the legislature intended to exclude such a stream from the general provisions of this act, in order to preserve its navigability, an examination will show that they have been equally cautious with other rivers and bays of the state which, in truth, afford useful avenues for commerce. But what do we find? The thirty-sixth section* enacts "that it shall be lawful for any company incorporated under this act, in addition to the power hereinbefore given, to build viaducts over any navigable or other rivers, streams, or bay of water which said railroad may cross." Since then, the legislature has thus plainly expressed the idea that all the other waters of the state can be bridged under this act, without obstructing navigation more than is warranted by the usefulness of the object to be attained, I do not think that it intended or expected the courts to imply that the Delaware alone must be excluded from its provisions.

A further argument in favor of the restriction contended for, is based upon the language of the thirty-sixth section* just quoted. It is urged that the words, "rivers, &c., which said railroad may cross," exclude the Delaware, because "to cross" means "to go from bank to bank;" and as the legislature could not confer the power so to cross the Delaware,

* *Rev., p.* 934, *sec.* 124.

therefore that river is not intended. Even if this interpretation were conceded, the result would be only to exclude the river from this section; and there would still remain the necessity of finding sufficient reason to except it from the other provisions of the act which seem to embrace it. But the suggested interpretation is not the fair one. The evident purpose of the section was not to limit the power of building viaducts to waters over which the railroads should wholly cross, but to confer the power of building them over any waters, so guarded as that the interests of navigation would be protected, and their protection was not at all enhanced by continuing the viaduct to the further bank. The idea expressed by this word is therefore merely incidental to the main object in view, and should not so control the interpretation as to strip the provision of a large share of its utility. But even if we are to resort to a critical examination of terms, I think it will be found that we are not justified in saying the legislature could not have included the Delaware among rivers which it might say its railroads should *cross*. By the compact between New Jersey and Pennsylvania, ratified May 27th, 1783, (*Nix. Dig.* 967),* it is declared that this river, from the northwest corner of New Jersey to the circular boundary of the State of Delaware, in the whole length and breadth thereof, is, and shall continue to be and remain a common highway, equally free and open for the use, benefit and advantage of the contracting parties, and that each state shall enjoy and exercise a concurrent jurisdiction within and upon the water between the shores of said river. In reference to this compact, Chancellor Green, in the case of *President, &c.,* v. *Trenton City Bridge Co.,* 2 *Beas.* 46, said: "It may, perhaps, be held that each state might, without a violation of the contract, authorize the erection of a bridge to the centre of the river within its own territory; and yet such is not the practical construction which has been given to its terms. Neither state has ever attempted to make such a grant; on the contrary, it is believed that in the charters of the numerous bridges which now span the river from the north

* *Rev., p.* 1181.

station point to tide-water, each state has invariably granted the privilege of building the bridge, not only within its own territory but from shore to shore, thus exercising, in the language of the agreement, concurrent jurisdiction between the shores of the river." The practice thus mentioned shows that the legislature has usually, when exercising its concurrent jurisdiction under the inter-state agreement with the view of providing for the construction of bridges over this river, employed language that imported an authority to cross the river from shore to shore. And justly, too; for though its authorization was not alone sufficient, as it has not exclusive jurisdiction, yet, as it possessed jurisdiction of some sort over the whole of the waters for the purpose of guarding the common highway, its permission was needed throughout by whomsoever claimed the right to interfere at all with this public privilege. Hence it is a perfectly proper use of language to speak of the railroads of New Jersey as *crossing* the Delaware under the sanction of her laws.

I find, therefore, in the act no reason to doubt, and ample reason to believe, that the legislature intended to confer the franchise of bridging the Delaware, so far as its authority could avail for that purpose. It remains to consider whether the necessary concurrence of Pennsylvania to the erection of this viaduct is shown.

It should here be observed that no complaint of the want of such concurrence is made by or on behalf of the sister state, and that her rights will not be at all affected by our judgment in this cause; nor do I doubt that, if her officers see reason to complain, she has herself ample means to redress her wrongs. New Jersey, moreover, has no interest to be subserved by the withholding, on the part of Pennsylvania, of consent to such structures as the legislature of this state has authorized. Under these circumstances, we are not called upon to use extreme vigilance, or draw very nice distinctions, for the purpose of finding flaws in those evidences of her consent which may be produced; nor are we at liberty to go beyond the compact itself, in order to prescribe any particular form in which the

mutual consent of the states to an interference with the common highway must be expressed. This state of facts, then, is shown: It appears that the defendant and The North Pennsylvania Railroad Company are constructing the bridge in question, for the purpose of connecting their respective railroads, each building the half from the centre line to its own state's shore; that the last named company has, under the constitution and laws of Pennsylvania, full, express and specific power to connect its main line between Philadelphia and Bethlehem, by a branch railroad to, and a bridge across the Delaware river, with any railroad in this state, and for that purpose has located such branch road from its main line to the point in the centre of the river where the defendant's railroad begins. This being true, then Pennsylvania has given express authority to its corporation to bridge the Delaware, so as to connect with the New Jersey company; and New Jersey has given like authority to its company to bridge the river, so as to connect with the Pennsylvania corporation. The powers so granted are not indeed the same power, but they are concurrent powers, and the consent which underlies these powers is one consent, the consent of both states, on the part of each, express to its own corporation, and implied to the other, that these two companies may construct a bridge in the Delaware, so as to connect their railroads. This is an exercise of concurrent jurisdiction, such as was contemplated by the agreement of 1783. It may not be so specific as has been usual; but that arises from the fact that the states now, for the first, concur in granting, under general laws, franchises which hitherto this state gave only by special charters. The compact is equally observed by either mode.

I therefore conclude that there is lawful authority for the construction of the bridge in question.

No complaint is made in the information as to any impropriety in the mode of building the bridge, or that it creates any more impediment to public rights in the river than necessarily attends the use of the franchise granted.

Under these circumstances, the Chancellor rightly refused

the injunction asked for. He also decreed that the information be dismissed. Upon the hearing in this court it was suggested, scarcely urged, that this portion of the decree was erroneous, even if in other respects it was correct. But I cannot yield to this suggestion. No replication seems to have been filed, although the time for so doing had long elapsed when the decree was made. No facts are alleged to be in dispute, nor are any undisclosed facts said to be important for the decision of the cause. In the brief of counsel presented to the Chancellor and to this court, the hearing is said to be equivalent to a final one. The dismissal was doubtless the result of an impression that no further contest, except by appeal, was intended, and no effort has been made to remove that impression. Nor are we informed on what basis further litigation can be deemed advisable.

I think, therefore, the decree as made should be affirmed.

Decree unanimously affirmed.

CROWELL, appellant, and THE HOSPITAL OF SAINT BARNABAS, respondent.*

1. A stipulation in a deed of conveyance inter parties, that the grantee shall assume and pay a prior mortgage on the premises, is a contract with the grantor simply for his indemnity, and will not be regarded, either at law or in equity, as a contract with the mortgagee or for his benefit.

2. The right of the mortgagee to a personal decree for deficiency against a subsequent purchaser whose deed contains such a stipulation, does not result from any fixed or vested right in the mortgagee, arising either from the acceptance of the conveyance of the mortgaged premises by the grantee, or from his obligation to pay the mortgage debt as between himself and his grantor. It rests merely on the doctrine of courts of equity, that a creditor may have the benefit of all collateral obligations for the payment of the

*Cited in *Price* v. *Trusdell*, 1 *Stew.* 205; *Bull* v. *Titsworth*, 2 *Stew.* 74; *Wise* v. *Fuller*, *Id.* 261, 266; *Cordts* v. *Hargrave*, *Id.* 449; *Arnaud* v. *Grigg*, *Id.* 486; *Trusdell* v. *Price*, *Id.* 624; *Trustees* v. *Anderson*, 3 *Stew.* 368; *Norwood* v. *De Hart*, *Id.* 414; *Campbell* v. *Campbell*, *Id.* 417; *Heid* v. *Vreeland*, *Id.* 593; *Youngs* v. *Trustees*, 4 *Stew.* 298; *Commissioners* v. *Peter*, 5 *Stew.* 114; *Mount* v. *Van Ness*, 6 *Stew.* 265; *Terhune* v. *White*, 7 *Stew.* 99; *Fireman's Ins. Co.* v. *Wilkinson*, 8 *Stew.* 163.

debt which a person standing in the situation of surety for others holds for his indemnity, and that he may proceed directly against the person ultimately liable, in order to avoid circuity of action.

3. If the liability of the subsequent purchaser to his grantor to indemnify him against the mortgage debt, be extinguished as between themselves by a re-conveyance before bill for foreclosure filed, the contract of indemnity being thereby put an end to by the act of those who were parties to it, the mortgagee will not be entitled to a decree for a deficiency against such purchaser, founded on such a stipulation in his deed.

4. C conveyed to H certain mortgaged premises, subject to the payment of the mortgage. The deed contained a stipulation that H should assume and pay the mortgage, the amount thereof having been deducted from the consideration money. H re-conveyed to C, subject to the mortgage, which he assumed to pay. On bill subsequently filed by the mortgagee for a foreclosure, *held* that by such re-conveyance, the obligation of H to C to pay the mortgage debt in exoneration of his liability therefor was extinguished, and that the mortgagee was not entitled to a decree against H for deficiency.

On appeal from the Court of Chancery. The case is reported *ante, p.* 152.

Mr. T. N. McCarter, for appellant.

Mr. E. Q. Keasbey, for respondent.

The opinion of the court was delivered by

DEPUE, J.

The bill in this case was filed by the appellant to foreclose a mortgage made by John A. Currier to William D. Voorhees and James M. Andrews, bearing date March 13th, 1872, to secure the payment of $5,000 on the 13th of March, 1874, with interest payable semi-annually. The mortgagees assigned the mortgage to the complainant on the 4th of March, 1873. On the first of April, 1873, Currier conveyed the mortgaged premises to "The Hospital of Saint Barnabas." In the deed of conveyance it was expressed 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. On the 21st of October, 1873, the respondent re-conveyed to Currier the same premises, subject to the mortgage, which he, by the deed of re-conveyance, assumed and agreed to pay.

The re-conveyance to Currier was made before the mortgage became due, and its fairness is not called in question.

The bill to foreclose was filed against Currier and the respondent, and contained a prayer that if the proceeds of the sale of the mortgaged premises should be insufficient to pay the mortgage, Currier and the respondent might be decreed to pay to the complainant the deficiency thereof. The relief prayed for against the respondent was denied. From the denial of such relief this appeal was taken.

The ground on which the liability of the respondent for the deficiency is sought to be maintained, is stated in the bill to be that by virtue of the stipulation in the deed to the respondent, it became bound at law to Currier, and in equity to the complainant, to pay the mortgage debt.

It is not disputed that the obligation of the respondent to Currier to pay the debt in exoneration of his liability therefor, was extinguished both at law and in equity, before the bill was filed, by the re-conveyance to him. Under these circumstances, the complainant cannot hold the respondent for the mortgage debt, unless, by force of the stipulation in its deed, a contract was made with him to pay him the debt, enforceable either by action at law or by suit in equity.

The only contract of the respondent was that which arose from the acceptance of the deed from Currier.

A deed inter parties whereby an estate is conveyed, if accepted by the grantee, although signed only by the grantor, is, in law, the deed of both parties, and an action of covenant may be brought by the grantor against the grantee for a breach of the covenants in it on his part. *Finley* v. *Simpson*, 2 *Zab.* 311; *Patten* v. *Heustis*, 2 *Dutcher* 293; *Harrison* v. *Vreeland*, 9 *Vroom* 366. A prior mortgagee is a stranger to that contract and the consideration on which it was founded. He is not in privity with the grantee, either with respect to the contract or the estate granted. In some cases on simple contract, an action of *assumpsit* may be maintained on a promise made by the defendant to a third person for the benefit of the plaintiff, without any consideration moving from the plaintiff to the

defendant. *Joslin* v. *New Jersey Car Spring Co.*, 7 *Vroom* 141; *Lawrence* v. *Fox*, 20 *N. Y.* 268. But for technical reasons that need not now be stated, it is settled law that a stranger to the contract cannot sue at law upon a deed such as that now before the court, which contains no contract with him in express terms. *Mellen* v. *Whipple*, 1 *Gray* 317; *Millard* v. *Baldwin*, 3 *Gray* 484; *Inhabitants of Northampton* v. *Elwell*, 4 *Gray* 81.

In equity, a stipulation of this kind is regarded as a contract simply to indemnify the grantor against the mortgage debt. As such, it is operative between the parties to the deed, but does not make the mortgage debt a personal debt of the grantee. This is clearly shown in cases where the controversy is between the heir or devisee and the personal representatives, with respect to the payment of assumed mortgages out of the personal estate, in exoneration of the lands.

If the ancestor has purchased the estate, and thereby contracted a debt, and given a mortgage to secure it, the debt will be a personal debt, for the payment of which the personal estate will be the primary fund. But if the estate, when purchased, was already under the mortgage, and the ancestor took title subject to the mortgage, and simply covenanted with his grantor to pay the mortgage debt, this will not make the mortgage debt his personal debt, and, consequently, the land will be the primary fund, and the personal estate only the auxiliary fund for its payment. His covenant to pay is considered only as an indemnity of the vendor. It does not create a debt as between his personal representatives and the heir or devisee, or as between himself and the mortgagee. *Parsons* v. *Freeman*, *Amb.* 115; *Tweddell* v. *Tweddell*, 2 *Bro. C. C.* 10[illegible]; *Woods* v. *Huntingford*, 3 *Ves.* 128, 131; *Butler* v. *Butler*, 5 *Ves.* 535; *Waring* v. *Ward*, 7 *Ves.* 337; *The Earl of Oxford* v. *Lady Rodney*, 14 *Ves.* 417, 423; *Barham* v. *Earl of Thanet*, 3 *M. & K.* 607; *Barry* v. *Harding*, 1 *Jones & La Touche* 485; *Cumberland*

v. *Codrington*, 3 *Johns. Ch.* 229; 1 *Sugd. on Vend.* 195, 216; *Coote on Mort.* 476.

The doctrine of the Court of Chancery is that, as a general rule, as to strangers to the contract, who are also strangers to the consideration, the parties may, at their pleasure, abandon it, and mutually release each other from its performance; and upon such rescission and abandonment, the contract is completely at an end, and thereafter cannot be enforced. 2 *Spence's Eq. Jur.* 280; *Hill* v. *Gomme*, 1 *Beav.* 540; *S. C.*, 5 *Myl. & Cr.* 255.

In this state, an exception to this rule has been adopted with respect to general assignments for the benefit of creditors, which, when executed and delivered, will be established and enforced in favor of creditors, though the assignor revokes it with the assent of the assignee, before acceptance by the creditors. *Scull* v. *Reeves*, 2 *Green's Ch.* 131.

There is another class of cases in which a declaration of trust in favor of a third person, has been held to be sufficient to give such third person, who was a stranger to the contract, a standing in court to enforce the trust; and also a third person, in whose behalf a legal, existing stipulation has been exacted from another in his favor, and for which the party exacting it has given a valuable consideration, with a view to benefiting such third person, has been decreed to be entitled to the benefit stipulated for in the contract to which he was not a party. *Cumberland* v. *Codrington*, 3 *Johns. Ch.* 261; *Van Dyne* v. *Vreeland*, 3 *Stockt.* 370; *S. C.*, 1 *Beas.* 142. But these are cases in which the trust was unrevoked, and the contract uncanceled and in force, and are rather exceptions to the rule that a court of equity will not aid a mere volunteer. The English cases are cited and commented on by Mr. Spence in 2 *Spence's Eq. Jur.* 281, and notes. This learned writer, on an examination of the English decisions, writing in 1849, says, that "the general law as to strangers in blood, strangers to the contract, is the same at this day, to this extent, at least, that the parties to the contract may, at their pleasure, abandon

the contract, and mutually release each other from its performance." 2 *Spence's Eq. Jur.* 280.

The right of a mortgagee to enforce payment of the mortgage debt, either in whole or in part, against the grantee of the mortgagor, does not rest upon any contract of the grantee with him, or with the mortgagor for his benefit.

If the purchaser buys the mere equity of redemption, he is liable to the extent of the lands purchased, and no further, and he will be discharged on releasing the lands; and if, by the terms of purchase, the mortgage money 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. *Stevenson* v. *Black, Saxton* 338; *Hartshorne* v. *Hartshorne,* 1 *Green's Ch.* 349; *Tichenor* v. *Dodd,* 3 *Green's Ch.* 454.

The purchaser of lands subject to mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor, as between the parties, is that of a surety. *Klapworth* v. *Dressler,* 2 *Beas.* 62; *Hoy* v. *Bramhall,* 4 *C. E. Green* 563. If the vendor pays the mortgage debt, he may sue the vendee at law for the moneys so paid. *Bolles* v. *Beach,* 2 *Zab.* 680.

In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others, holds for his indemnity. *Maure* v. *Harrison,* 1 *Eq. Cas. Abr.* 93; *Moses* v. *Murgatroyd,* 1 *Johns. Ch.* 119; *Phillips* v. *Thompson,* 2 *Id.* 418; *Pratt* v. *Adams,* 7 *Paige* 615; *New London Bank* v. *Lee,* 11 *Conn.* 112. It is in the application of this principle that decrees for deficiency in foreclosure suits have been made against subsequent purchasers, who have assumed the payment of the mortgage debt, and thereby become principal debtors as between themselves and their grantors. *Curtis* v. *Tyler,* 9 *Paige* 432, 436; *Halsey* v. *Reed, Id.* 446; *Blyer* v. *Monholland* 2 *Sandf. Ch.* 478; *Garnsey* v. *Rogers,* 47 *N. Y.*

233. In Klapworth *v.* Dressler, Chancellor Green expressly grounds his decision on this principle.

But the right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent purchaser of the conveyance of the mortgaged premises, or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor. Though the assumption of the mortgage debt by the subsequent purchaser is absolute and unqualified in the deed of conveyance, it will be controlled by a collateral contract made between him and his grantor, which is not embodied in the deed. *Flagg* v. *Munger*, 5 *Seld.* 483. And it will not in any case be available to the mortgagee, unless the grantor was himself personally liable for the payment of the mortgage debt. *King* v. *Whitely*, 10 *Paige* 465; *Trotter* v. *Hughes*, 2 *Kern.* 74.

Recovery of the deficiency after sale of the mortgaged premises, against a subsequent purchaser, is adjudged in a court of equity to the mortgagee not in virtue of any original equity residing in him. He is allowed, by a mere rule of procedure, to go directly as a creditor against the person ultimately liable, in order to avoid circuity of action, and save the mortgagor, as the intermediate party, from being harassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him, and upon whom the liability will ultimately fall. The equity on which his relief depends is the right of the mortgagor against his vendee, to which he is permitted to succeed by substituting himself in the place of the mortgagor. In this respect the mortgagee occupies an entirely different position from that of a surety. The latter, in virtue of his position as surety, acquires in himself a legal right of subrogation to all securities for the debt which come to the possession of the creditor.

The mortgagee being the representative of and standing in the place of the mortgagor to enforce the rights of the latter against the purchaser, and having no greater or other equity in himself, is entitled to such remedy only as the mortgagor

himself had against the purchaser when the bill was filed. In other words, being a stranger to the contract of the purchaser with the mortgagor, and to the consideration whereon it was founded, it will be competent for those who were parties to it to rescind and extinguish it at their pleasure; and after such rescission and extinguishment, the contract becomes utterly incapable of enforcement.

In all the cases which were cited by the appellant's counsel, the collateral security which the creditor sought to enforce was an outstanding and subsisting security, and in the language of Mr. Spence, "a legal existing stipulation." In these instances, nothing more was involved than the right of the creditor to be subrogated to an existing remedy of his debtor for the same debt.

In *Garnsey* v. *Rogers*, 47 *N. Y.* 234, the grantee of a mortgagor, who had assumed and promised in the deed of conveyance to pay the mortgage, was held to be discharged from liability to the mortgagee by a re-conveyance to the mortgagor before suit brought. By such re-conveyance, it was held that the stipulation for the payment of the mortgage was extinguished. The judge, in delivering the opinion of the court, founds his conclusions on the fact that the conveyance to the purchaser was shown by parol evidence to have been by way of a mortgage, merely. In the course of his opinion he says that "it must be considered that where such assumption is made on an absolute conveyance of land, it is unconditional and irrevocable; the grantor cannot retract his conveyance, or the grantee his promise or undertaking." This expression was a mere obiter dictum. With due respect to the learned judge, I fail to see any ground on which a distinction between an absolute deed of conveyance and a mortgage, in this respect, can be maintained. The undertaking must receive the same legal construction in both instruments, and the consideration is of the same nature. The obstacle in the way of a recovery by the mortgagee in both cases is fundamental, where the agreement is canceled and discharged by the parties to it. He has no contract with the grantee of the mortgagor. His

equity is only to stand in the place of the mortgagor, to be substituted in his place to a remedy which the mortgagor might have if he paid the mortgage debt.

There may be circumstances in the dealings of the subsequent purchaser with the mortgagee, or with the mortgaged premises, which will give to the mortgagee an independent equity to have his mortgage paid by the grantee of the mortgaged premises. But where, as in this case, no such circumstances appear, and the mortgagee stands exclusively on the promise of the grantee to the mortgagor, he is not entitled to relief if the contract has, in good faith, been released by those who were parties to it.

The decree should be affirmed, with costs.

Decree unanimously affirmed.

THE RECEIVERS OF THE NEW JERSEY MIDLAND RAILWAY COMPANY, appellants, and WORTENDYKE and others, respondents.*

1. Conventional subrogation can only result from an express agreement either with the debtor or creditor. It is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he should be subrogated to the rights of the creditor.

2. The right of subrogation cannot be enforced until the whole debt is paid. And until the creditor be wholly satisfied, there ought and can be no interference with his rights or his securities, which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim.

3. The ordinary duties of a receiver in a foreclosure suit are in aid of the mortgagee, by collecting the rents and preserving the property from loss and decay. In railway foreclosures, his duties, though more extensive, are primarily the same; the appointment is presumed to be for the benefit of the mortgagees and for the protection of their interests.

4. Parties claiming an equitable lien upon rolling stock furnished to an insolvent corporation, by virtue and to the extent of advancements made on account of the same, will not be entitled to be heard upon petition,

---

*Cited in *Coe* v. *N. J. Midland Railway Co.*, 4 *Stew.* 135; *Van Dyke* v. *Van Dyke*, *Id* 178.

pending foreclosure proceedings upon a mortgage covering the rolling stock and all other property of the corporation, upon which rolling stock other liens are set up by answer, claimed to be paramount to the mortgage of the complainants.

This case in the Court of Chancery is reported *ante, p.* 110.

Mr. Gilchrist, for appellants.

Mr. J. Linn, for respondents.

The opinion of the court was delivered by

GREEN, J.

This appeal is taken from an order of the Court of Chancery, made on the petition of Cornelius A. Wortendyke, late president of the New Jersey Midland Railway Company, in a suit commenced for the foreclosure of the first mortgage on the real and personal property of that company. The bill was filed by Coe and Opdycke, trustees of the bond-holders, in March, 1875, and on the 2d of April following, receivers were appointed to take charge of the property and to operate the road for the benefit of all parties interested, during the pendency of the foreclosure suit. The company had previously been declared insolvent on a creditors' bill filed for that purpose, and a receiver appointed in that suit. The appeal is prosecuted in the name of the receivers, by certain bondholders allowed to come in for that purpose, the trustees under the mortgage not appearing.

The petition was filed August 9th, 1875, and alleges that the company, before it was declared insolvent, being in an embarrassed condition, purchased or rather leased, a large amount of locomotives and rolling stock, to be paid for by monthly instalments, and to remain the property of the vendors until the whole amount of the purchase money should be paid. That in order to preserve the property for the benefit of the company and its creditors, the petitioner and eight others named in the petition, then directors and officers

of the company, advanced and paid, on account of said rolling stock, to the several owners thereof, about $17,000, with the understanding that they should, upon the payment of the balance due thereon, themselves become the owners of the stock, and hold the same for the benefit of the company until their advancements were re-imbursed to them by said company. The petitioner asks that he and his associates may be subrogated to the rights of the vendors of the rolling stock, to the extent of the advancements made by them on account of the same, and that the receivers should pay to the petitioner and others the amount of money by them respectively advanced, with interest.

The case, as here presented, does not entitle the petitioners to a decree for subrogation. They do not, in their petition, claim to stand as guarantors on the contract, or that they were in any way held or bound for its performance. They only allege that they made the advances with the understanding that they should be subrogated to the right of the owners of the rolling stock, to the extent of such advancements. I have been unable to find, either in the petition or evidence, anything to show an agreement with the original debtor or creditor, that these parties should be entitled to subrogation or to stand in the place of the vendors of the stock. It is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he should be subrogated to the rights of the creditor. Conventional subrogation can only result from an express agreement either with the debtor or creditor. *Dixon on Subrogation, pp.* 1, 10, 167; *Bouvier's Law Dic., title Subrogation; Sandford* v. *McLean,* 3 *Paige* 116; *Shinn* v. *Budd,* 1 *McCarter* 234.

There are other serious objections to a decree for subrogation as the case now stands. It appears by the evidence, that contracts for the purchase of cars and engines were made by the Midland Railway Company with five different parties, amounting in the aggregate to a very large sum; that the money advanced by the petitioners was passed into the treasury of the railway company, and paid by the checks of that company

to the owners of the rolling stock. It is not shown upon what particular contract or contracts these moneys were paid, nor in what proportions on the different contracts, if more than one. The first witness, one of the parties claiming under the petition, thinks payments were made on all the contracts; the other witnesses speak of payments on the contracts and payments for rolling stock, without attempting to specify on what contract, or to what owner of stock, the advances were made.

The whole evidence upon this point is vague and indefinite, and fails to establish the essential facts upon which a decree for subrogation must be founded.

It is, however, insisted on behalf of the petitioners, that the advances were made by the directors and officers of the company for the protection and preservation of the property entrusted to their care; that they occupied the position of trustees, and are entitled to an equitable lien on the trust property, and to re-imbursement out of the trust fund produced by its use or realized from its sale. If such lien were created, the application and order for its enforcement are prematurely made and cannot be sustained.

Whatever equitable rights these parties may have, they are subordinate to those of the owners of the rolling stock. The payments to be made by the company upon these contracts extended through different periods of time, from two to five years. The final payment on the contract printed in the state of the case, is not payable until December 23d, 1876, and on the Adams contract, not until June, 1879. During all that time the vendors remain the owners of the stock, with power, in case of default on the part of the railway company, to take possession of and remove the property; and only upon full and final payment was the title to vest in the company.

The right of subrogation cannot be enforced until the whole debt is paid; and until the creditor be wholly satisfied, there ought and can be no interference with his rights or his securities, which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim. *Dixon on Subrogation* 123; *Kyner* v. *Kyner*, 6 *Watts* 227;

Neptune Ins. Co. v. *Dorsey,* 3 *Md. Ch.* 338 ; *Swan* v. *Patterson,* 7 *Md.* 167. The same principle applies to the claim of the petitioners, as now presented.

The order appealed from not only gives the right of subrogation, but also directs the receivers that if, in their judgment, it is for the interest of the creditors that said receivers retain the possession of the rolling stock in the operation of the railroad, then that they pay out of the first moneys which may come into their hands as such receivers, to the petitioners, the amount of their advances, with interest. Whatever money comes to the receivers' hands in the management of the road, must arise from the earnings of the rolling stock, and constitutes the only fund out of which the monthly payments to the owners are to be made. To appropriate any part of such earnings to the payment of these petitioners' claims, or to give them any lien upon, or right to the rolling stock, concurrent with the rights of the owners, or subject thereto, would be a direct interference with their rights and securities, and might greatly prejudice them in the collection of the residue of their claims, and in the enforcement of their right to the control of the property which constitutes their only security. The order, in effect, places the petitioners in a better position than the owners of the stock, by giving them a prior right to the only fund out of which payment can be made to either party.

These proceedings are prematurely taken in another point of view; they are had in a foreclosure suit. The advances were made, and the petitioners' rights accrued, long before the filing of the bill. The payment of these claims by the receivers is in no wise necessary for the preservation of the property, or to the protection of the rights of the complainants or other creditors. The petitioners stand in a different position from the owners of the rolling stock. They have no power to embarrass the receivers by removing the property. Their rights, if any they have, can only be established by the aid of a court of equity.

The ordinary duties of a receiver in a foreclosure suit are in aid of the mortgagee, by collecting the rents and preserving

the property from loss and decay. In railway foreclosures, his duties, though more extensive, are primarily the same. The appointment is presumed to be for the benefit of the mortgagees, and for the protection of their interests. In this case, it is claimed that the mortgage covers the rolling stock, and that upon full and final payment by the company, or by the receivers to the owners of the stock, the title thereto will vest in the company, or their mortgagees, and enure to the benefit of the bond-holders. The petitioners seek, at this early stage of the foreclosure suit, and in this irregular mode, to enforce a lien alleged by them to be superior or prior to that of the complainants. In this view, it is simply a contest for priority between parties claiming liens upon the mortgaged premises. Two of these claimants are trustees under a chattel mortgage covering a large part of the rolling stock of the road, and have, by answer, set up that mortgage as a lien prior to that of the complainants. There may be, and probably are, other parties claiming liens upon the property. They may have or claim equities prior or superior to those of the petitioners. They all have a right to be heard on this question. Upon the hearing of the cause, or at other proper time, the court will settle and adjust the respective rights and priorities of all parties claiming liens upon the mortgaged premises. There is no necessity, or apparent propriety, for the settlement of this question at this time.

The order appealed from should be reversed, but without costs, and without prejudice to the right of the petitioners to be heard on a proper case at a future time.

For reversal—BEASLEY, C. J., DEPUE, DIXON, DODD, GREEN, LATHROP, SCUDDER, VAN SYCKEL, WOODHULL. 9.

For affirmance—KNAPP, LILLY. 2.

BLACK, appellant, and BLACK, respondent.

In laying acts of adultery in a bill for a divorce, the name of the person, if known, with whom the offence was committed, the city or county, and state, and the month and the year, should be stated.

Demurrer to bill for divorce. The facts of adultery were thus charged in the bill, viz.:

And your orator further showeth unto your Honor, that the said Carrie E. Black, since her said marriage with your orator, and on different days of the months of May, June, July, August, September, October, and November, in the year 1872, and in the year 1873, *and at divers other times*, at the township of Mansfield aforesaid, in the county of Burlington and State of New Jersey; at the city of Trenton, in said state, and at the city of Philadelphia, in the State of Pennsylvania, wickedly disregarding the solemnity of her vows, and the sanctity of the marriage state, hath committed adultery with one J. C., of the county of Burlington and State of New Jersey.

And your orator further showeth unto your Honor, that the said Carrie E. Black, since her said marriage with your orator, and on different days of the months of July, August, September, October, November, and December, in the year 1873, and on different days of the months of January, February, March, April, May, June, July, August, September, and October, in the year 1874, *and at divers other times*, at the townships of Mansfield and Springfield, in the county of Burlington aforesaid; at the city of Philadelphia, in the State of Pennsylvania, and in the city and State of New York, in like manner wickedly disregarding the solemnity of her vows and the sanctity of the marriage state, hath committed adultery with one H. B., then of the county of Burlington, in the State of New Jersey aforesaid.

The opinion of the Chancellor is reported in 11 *C. E. Green* 431.

Mr. S. D. Dillaye and *Mr. A. Browning*, for appellant.

Mr. G. S. Cannon and *Mr. J. Wilson*, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The rule with respect to the particularity requisite in the statement of the acts of adultery in a bill for divorce, was stated with precision by Chancellor Green, in the case of *Marsh* v. *Marsh*, 1 *C. E. Green* 391. The formula there prescribed is that the pleading should state the time when, the place where, and the person, if known, with whom the offence was committed, and that in laying the time, the month and year should be stated, but that the day need not be particularized. With regard to place, the judgment cited shows that it need not be further described than as a city within a designated state.

This method of description accords, I think, with that adopted in most of the courts of this country, and is also in harmony with the practice as it has generally prevailed in this state. Its requirement in point of specification is, at least, as ample as the present rule of practice in the English ecclesiastical courts. All that is stated in this respect, in that tribunal, in the petition to the Ordinary, is that the defendant, on a day and year named, "and other days between that day and" a day named, did, "at , in the county of , commit adultery" with a person described by name, if known. 2 *Bishop on Mar. and Div.*, § 783.

It is manifest that to exact of the pleader greater circumstantiality than that in laying the offence in the bill, would result in no practical advantage to the defendant. If the days were required to be stated, still there could be no restriction as to their number; and by a mere enumeration of each day in each month, the requisition would be, for all practical purposes, nullified. Nor is there, when we take into account the mode in which, in this state, testimony is taken in a suit in equity, any danger that the defendant, owing to this gen-

eral statement of the misconduct charged upon him, will be put to inconvenience or taken by surprise. In our practice, the complainant makes his case by his witnesses, and when he has finished, ample time is afforded the defence to meet the case so advanced. The rule as above stated has the attestation of authority and experience in its favor.

It will then, from this point of view, be perceived that most of the charges of criminality contained in this bill are described with sufficient fullness and precision. They are particularized by a reference to the month, year, place, and person. This, as has been above shown, is all that is required. But, among these charges are interplaced others which are not, in any respect, circumscribed with respect to time. The charge, in these instances, is that the defendant committed the offence at "divers other times." It is obvious, therefore, that this class of criminations is not limited in time, and the consequence is, they cover the whole of the married life of the parties. Such a generality of averment falls within the condemnation of the case of Marsh *v.* Marsh, already cited, and if the demurrer had been confined to these particular charges, I should have thought it sustainable. But such is not the case, for it applies not only to these particular allegations, but to all the other allegations of misconduct, and in its last clause is directed even against the entire equity of the bill The demurrer, therefore, is too broad; it embraces that which is good in pleading, as well as that which is bad, and, according to the established rule, being bad in part, it is bad *in toto*, and cannot be sustained.

The decree should be affirmed, with costs.

Decree unanimously affirmed.

INDEX.

ABANDONMENT.

See Desertion, 1, 2.

ACCOUNT.

See Adopted Child, 3.
Certificate of Indebtedness, 3.
Interest, 1.
Specific Performance, 5.
Trust and Trustee, 9.
Will, 25.

ACQUIESCENCE.

See Award, 2.

ADMINISTRATION.

1. All of the next of kin of intestate agreed that administration should be granted to the eldest of them, if he could find security. Being unable to do so, the surrogate, at his request, within fifty days after the death of the intestate, granted administration to one not of kin to the intestate, without ascertaining whether some of the next of kin would not administer, and without citing any of them, for the purpose of ascertaining. The letters were declared null and void. *Rinehart* v. *Rinehart*, 475

2. The Prerogative Court has jurisdiction, by appeal, over a controversy as to the right of administration, (granted by the surrogate,) unless the controversy has already been taken by appeal into the Orphans Court. *Ib.*

See Probate, 1, 2, 5.

ADOPTED CHILD.

1. In the case of an adopted child, while on the one hand, so long as that relation continues, the person who stands *in loco parentis* is not entitled to pay for support, on the other hand, the person adopted can have no claim for services. *Brown* v. *Welsh's Ex'r*, 429

2. Where, as in this case, the money of the person taken into the family is applied, with her knowledge and consent, to her own use, after she had obtained her majority, it cannot be recovered from the person standing *in loco parentis*. *Ib.*

3. Settlements between a person standing *in loco parentis*, and one towards whom he occupies such relation, of the accounts of the former of expenditures made by him out of the latter's estate in his hands, made when the latter was of full age, and competent to make the settlements, can only be impeached by fraud or mistake; and to do this, the impeachment, and the ground thereof, must be set up in the bill. *Ib.*

ADULTERY.

See Pleading, 23.

AGREEMENT.

See Contract.
Usury, 2, 3.

ALIMONY.

Permanent alimony, for wife alone, fixed at $1000 a year, that being a sum which would provide for her

a support and maintenance equal to what she would have had a right to expect if living with her husband. *Boyce* v. *Boyce*, 433

AMENDMENT.

1. An application to amend a sworn answer, on the ground of mistake discovered at the time the answer was read to the party making it, made more than two years after the discovery and filing of the answer, without excuse for the delay, and upon feeble and unsatisfactory proof of the alleged mistake, refused. *Wilson* v. *Wintermute*, 63

2. Complainant's title, stated in the bill, not being complete, he was permitted, at the hearing, to amend his bill by setting up his title proved in the cause, to the mortgage, as administrator; his title, though questioned on the hearing, not being questioned by the answer. *Terhune* v. *Taylor*, 80

See PLEADING, 12, 22,
PRACTICE, 5, 23.

ANSWER.

1. An answer filed by one of several judgment creditors, joining with him therein his co-plaintiffs in the judgment, filed in time as to himself, but out of time as to them, sworn to by him but not by them, was permitted to stand as filed in time by him, and as his answer, though purporting to be the answer of his co-plaintiffs also. *Young* v. *M'f'g Co.*, 67

2 So much of the answer as set up he defence of usury, was stricken ut as to such co-plaintiffs. *Ib.*

See PAROL CONTRACT, 1.
PLEADING, 20.
PRACTICE, 25.

APPEAL.

See RE-HEARING.
REVIEW.

APPEALABLE ORDER.

An order refusing to set aside a sale on foreclosure of a mortgage in chancery, is appealable. *Woodward* v. *Bullock*, 507

ARBITRATION.

See AWARD.

ASSESSMENT FOR STREET IMPROVEMENTS.

1. The charter of the city of Elizabeth directed the whole cost of the assessments for street improvements to be imposed on the property on the line of the street opposite such improvements, such assessment to be made in a just and equitable manner, by the common council; it was *held* that such power could not be executed, and the provision was void. *Bogert* v. *City of Elizabeth*, 568

2. A sale of land having been made by force of such provision, and the city becoming the purchaser, a bill filed by the land-owner to clear his title from the cloud thus created, was sustained by force of the statute to quiet titles, passed March 2d, 1870. *Ib.*

3. Delay in the land-owner in allowing the time for bringing a *certiorari* to pass, is no bar to the exhibition of such a bill. *Ib.*

See BONA FIDE PURCHASER.

ASSIGNEE AND ASSIGNOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.
MORTGAGE, 1, 6.

ASSIGNMENT.

Bill by creditor, under attachment proceedings, to reach and apply to the payment of creditor's claims, certain money alleged to be due their debtor under contract for labor, and under an assignment by him to his co-partner of all his tools and implements, his interest in the contract, and the money due and to become due thereon, on the ground that the assignment was merely colorable, and for the purpose of protecting his interest and property against his creditors. *Held*, that the assignment was *bona fide* and absolute, and necessary to protect his co-partner, who had advanced the debtor large sums of money, and without which he would have been entirely without security. *Stamets* v. *Quinn*, 383

See LEGACY, 9, 10.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. The cancellation or destruction of a deed by consent of parties, will not divest the grantee of an estate thereby granted to him and vested in him by virtue thereof, and re-vest it in the grantor; and this is equally true as to a deed made under the "act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors," as to any other. *Alpaugh* v. *Roberson*, 96

2. By a conveyance made under that act, the real and personal estate of the assignor passes to the assignee and continues in him, notwithstanding the destruction of the deed. *Ib.*

3. The execution of such a conveyance is the creation of a trust which exists, notwithstanding the destruction of the instrument, and which the Court of Chancery will establish and execute. *Ib.*

4. Upon a renunciation by the assignee of his trust, under such a conveyance, application should be made to the Court of Chancery to appoint a trustee in his stead. *Ib.*

5. Where, after the destruction of a conveyance made under the act "to secure to creditors an equal and just division," &c., the grantor made an assignment to other assignees, such assignees were enjoined. *Ib.*

6. In such a case, declared, that if consent be given, the trust under the original assignment will be established by decree of the court, and a new trustee or trustees appointed under it; otherwise, a receiver will be appointed. *Ib.*

ASSISTANCE, WRIT OF.

After a sale in a foreclosure suit, and the purchaser has got his deed, a writ of assistance will go, *ex debito justitiæ*, to put him in possession. *Beatty* v. *De Forest*, 482

ATTORNEY IN FACT.

See PURCHASER, 8, 9.

AWARD.

1. Where, under a submission to arbitration, a third arbitrator is called in by them, who hears simply the statements of the other two, in the absence of the parties, and without any notice to one of them, their award made under such circumstances will not be sustained, as against the party who received no notice. *Wheaton* v. *Crane*, 368

2. Such party was held not to be barred from relief against the award, on the ground of acquiescence, by the fact that after the award had been delivered to him he continued for two weeks to settle the business of the late firm, and made up a statement in accordance with the award, and delivered it to his late partner, the other party to the award; it appearing that he was dissatisfied with and

complained of it, and that the only reason why he did not take steps to set it aside was that he supposed the award was conclusive against him, and could not be litigated. *Ib.*

See CONDEMNATION OF LANDS.

BAR.

See PRACTICE, 36.

BENEFICIAL INTEREST.

See TRUST AND TRUSTEE, 13.

BILL TO REDEEM.

A scheme was entered into by the widow and the administrator of decedent, to procure a foreclosure sale of the intestate's lands, at which the administrator was to buy them in at an inadequate price, by giving out at the sale that he was purchasing for the widow, and thus dissuade others from bidding. Under these circumstances, the administrator purchased the lands at the sheriff's sale, and agreed to convey them to the widow for the price at which they were struck off to him. On his refusal, subsequently, to do so, the widow and the intestate's only child filed a bill to redeem. *Held*, that the widow, having participated in the fraud, was not entitled to relief, but that as to the child, the administrator would be regarded as a trustee, holding the property for her benefit. *Johns* v. *Norris*, 485

See MORTGAGE, 12.
SHERIFF'S SALE, 6.
TRUST AND TRUSTEE, 7.

BONA FIDE PURCHASER.

The defendant purchased the interest of the city of Elizabeth in a certain alley and other lands, which interest had been purchased by the city at a sale under the charter for the non-payment of assessments for municipal improvements. He then commenced the erection of a building on and across the alley. The alley had been an open private way for forty years, and was the only means of access to the rear of the complainant's lots, except through their dwellings. Neither of the assessments was made upon, nor was any notice given to, any one as the *owner* of the property, as required by the charter. Upon bill filed to restrain the erection of the building on the alley, the defendant being a *bona fide* purchaser for valuable consideration, *decreed* that upon the complainants' paying to him the amounts paid by him for the tax titles, with lawful interest from the time of purchase, the injunction would be made perpetual. *Kean* v. *Asch*, 57

See PLEDGE.

BRIDGE.

See DELAWARE RIVER, 12, 13, 14, 16, 17.

BUILDING AND LOAN ASSOCIATION.

See MORTGAGE, 9.

BURDEN OF PROOF.

See EVIDENCE, 2.
WILL, 18.

CANCELLATION OF DEED.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

CERTIFICATES OF INDEBTEDNESS.

1. While negotiations were pending between two gas companies for their consolidation, upon a certain basis of indebtedness, one of the companies passed a resolution, without the knowledge of the other, declaring a scrip dividend of ten per cent. on the amount of their

capital stock, with interest, payable at the option of the company, thus increasing their indebtedness to that amount. Certificates of indebtedness were issued in accordance with the resolution. Consolidation was effected between the companies without any knowledge of the other company as to such resolution and such increased indebtedness. Upon bill filed for that purpose, the scrip was declared void, and the company issuing it was restrained from recognizing the scrip as a valid obligation, and from permitting its transfer. *Bailey* v. *Gas Light Co.*, 196

2. Such certificates should have put the purchaser thereof upon inquiry, and they are not, therefore, within the rule applicable to negotiable paper. Though purchased without knowledge of its character on the part of the purchaser, and without inquiry, they were ordered to be delivered up to be canceled. *Ib.*

3. In view of the delay in seeking relief against such scrip, and of the possible hardship, the parties who had received interest on the scrip being numerous, and most of them having no knowledge of any wrong in the creation of the scrip, and having received the interest as their just due, no account of the interest was ordered. *Ib.*

See RECEIVER, 1, 2.

CERTIORARI.

See ASSESSMENT FOR STREET IMPROVEMENTS, 3.

CESTUI QUE TRUST.

See TRUST AND TRUSTEE, 5, 6.

CHAMPERTY.

See PURCHASER, 9.

COMPACT OF 1783 BETWEEN PENNSYLVANIA AND NEW JERSEY.

See DELAWARE RIVER, 6, 7, 13, 17.

CONDEMNATION OF LANDS.

Lands were condemned by the Essex road board, upon notice to the husband. The award was paid to a third person, to abide the order of the Court of Chancery. The award was partly for the value of the strip taken, and partly for damages to remaining portion of the tract. *Held*, the wife, by reason of her inchoate dower in the land, has an interest in the award, which equity will secure to her. *Wheeler* v. *Kirtland*, 534

See LANDS UNDER WATER, 4, 5.
MORTGAGE, 13.

CONFIDENTIAL COMMUNICATION.

1. A communication made by a husband to his wife, respecting trust property which it is their joint duty to carefully preserve and surrender to the lawful owner when lawfully entitled to it, is not confidential within the meaning of the statute relieving husband and wife from obligation to disclose any confidential communication made by one to the other, during coverture. *Wood* v. *Chetwood*, 311

2. Where, under a bill for an account against an executrix and her husband, the executrix produced in evidence, upon her examination before the master during her husband's absence from the country, certain letters, papers, and an account book of her husband's, which she found among his papers in their house during his absence, an application for an order suppressing the wife's testimony and the documents produced by her, and directing the documents to be returned to his solicitor, on the ground that their production was a breach of duty and a betrayal of confidence, was

refused; it not appearing but that the documents might be material to the issue, and if they related to the trust property the husband was bound to produce them. *Ib.*

CONTRACT.

1. The principle that if one person makes a promise to another for the benefit of a third party, that third person may maintain an action on it, applies to simple contracts, not to contracts under seal. *Crowell* v. *Currier*, 152

2. Where parties have made a contract which will, either directly or indirectly, benefit a mere stranger, they may, at their pleasure, abandon it, and mutually release each other from its performance, regardless of his interest, unless the parties, with knowledge that he is relying on the contract, suffer him to put himself in a position from which he cannot retreat without loss in case the contract is not performed; then he may ask to have the contract performed, so far as it touches his interests. *Ib.*

3. Two agreements made with different parties, giving them the refusal of the purchase of certain lands, held together to constitute a binding obligation on the defendant to convey to the complainant the lands in question in fee simple, for the price therein specified, if the offer were duly accepted within the time limited. The offer held to have been accepted by the complainant's making tender, and offering a deed for execution within the limited time. *Scott* v. *Shiner*, 185

4. An agreement by the Delaware and Raritan Canal Company, guaranteeing to A, his heirs and assigns forever, out of the feeder of the canal, sufficient water for three runs of stones at all times, and for a fourth run of stones at all times except when the water could not be taken without injury to the company, &c., in consideration of a grant of land by A to the company for its purposes according to its charter, and the release of damages awarded against the company in A's favor on proceedings in condemnation, and the relinquishment by A of valuable water rights in the Delaware river, *held* not to have been *ultra vires*. *Hoppock's Ex'rs* v. *United R. R. & Canal Co.*, 286

5. Defendants' testator sold fifty shares of stock of the Central Railroad Company of New Jersey, and loaned the proceeds thereof, $4981.25, to the complainants, taking their promissory note therefor, payable to his order, twelve months after date, with interest from date. Complainants allege that the note was not intended to be a part of the contract, but merely a memorandum and evidence of the indebtedness, and that the contract really was that defendants' testator should have the dividends on fifty shares of said stock, and should receive fifty shares of capital stock in repayment of the loan. They seek specific performance of this alleged agreement, and injunction to restrain defendants from parting with or suing upon the note. Relief refused. *Rittenhouse* v. *Tomlinson's Ex'rs*, 379

6. Evidence of a contemporaneous understanding and agreement between the parties, by parol proof merely, in the absence of any allegation or pretence of fraud, accident or mistake, is inadmissible to vary a contract in writing. *Ib.*

See SPECIFIC PERFORMANCE.

CONTRIBUTORY NEGLIGENCE.

Held, in this case, under the circumstances, that a person who, in passing from the depot to the train he was about to take, was obliged to cross an intervening track, was not guilty of contributory negligence, in that he did not, before approaching the train, look up or down the track to see whether there was danger from an approaching train, and in that he approached the train diagonally from the platform of the

station, and before his train had come to a full stop. *Jewett* v. *Klein*, 550

CORPORATION.

See INSOLVENT CORPORATION.
PLEADING, 1, 3.
VENDOR AND PURCHASER, 1, 2.
WILL, 1, 8.

COSTS.

1. In matters of purely public concern, as where the property of the state, owned by it in its political capacity, or where public rights in which no merely private interest is involved, are in question, the courts are open to the state without requiring security for costs. *Att'y-Gen.* v. *Del. & B. B. R. R. Co.*, 1

2. Costs will not be allowed, unless in an extreme case, to an unsuccessful party in contesting a will. *In re Wintermute's Will*, 447

3. Where testimony in opposition to the probate of a will has been protracted to a most extraordinary and unnecessary extent, and much of it is utterly incompetent, costs, which might otherwise have been given, will be denied. *Ib.*

4. Costs and counsel fees of caveator, disallowed. Decree for payment of proponent's costs by a caveator, refused. *Brokaw's Ex'rs* v. *Conover*, 462

5. An extra allowance of $225 to the Orphans Court, beyond legal fees, disallowed. *Ib.*

See PRACTICE, 34.

CREDITOR.

See ASSIGNMENT.
DEBTOR AND CREDITOR.
SEPARATE ESTATE.
TRUST AND TRUSTEE, 1.

CROSS-BILL.

See PRACTICE, 28, 30.

DAMAGES.

See PRACTICE, 29.

DEBTOR AND CREDITOR.

1. When a creditor comes into equity to reach the equitable interest of his debtor in land, he must show a judgment which would, in case the legal title to the property were in the debtor, be a legal lien thereon, and an execution returned unsatisfied. *Blue Stone Co.* v. *Magee*, 392

2. It is not necessary, in such case, to show a levy of an execution on the land which he seeks to reach. *Ib.*

See ASSIGNMENT.
LEGACY, 7, 8.
MORTGAGE, 7.
PRIMARY FUND.
TRUST AND TRUSTEE, 17, 18.

DECREE.

See LIEN, PRIORITY OF.
PARTIES, 3, 5.
PLEADING, 18.
PRACTICE, 7, 19, 25.

DEED.

1. Conveyances set aside, on the ground that at the time of their execution the grantor was in such condition as to subject him to the influence of those in whose favor they were made, to such an extent as to deprive him of his free agency, and that the deeds were not those of the grantor but of the grantees. *Yard* v. *Yard*, 114

2. There must be a person, either natural or artificial, *in esse*, to receive a conveyance of an immediate estate in land. *Methodist Church* v. *Conover*, 157

3. An unincorporated association or community is not competent to purchase, or to take title to land by deed. Capacity to take title must exist before a valid conveyance can be made. *Ib.*

See GRANT
GRANTEE AND GRANTOR.

DEFICIENCY, DECREE FOR.

See GRANTEE AND GRANTOR, 5–9.
MORTGAGE, 7, 8.

DELAWARE RIVER.

1. The Delaware river became, by conquest, the boundary between the States of New Jersey and Pennsylvania; and being such, and the original property being in neither of them, and there being no convention between them in regard to it, when, in 1783, the King of Great Britain relinquished all claims to government, proprietary and territorial rights in the United States, each state, by the rule of international law, had dominion to the middle of the stream. *Att'y-Gen. v. Del. & B. B. R. R. Co.*, 1

2. A river may be navigable below the ebb and flow of the tide in the sense of the common law and, in fact, navigable above; and the question of boundary in respect to lands adjoining it will be determined by one principle above, and by another below tide water. *Ib.*

3. New Jersey has no *jus privatum* in the soil of the Delaware river above tide water; that is in the riparian owners, subject to the public easement of navigation, and to such regulations by the legislature of the waters as the public right of navigation may require; as to the jurisdiction and power of the state over it, the river above tide water is to be regarded as a navigable stream. *Ib.*

4. The Delaware and Bound Brook Railroad Company, in erecting piers upon the land under water in the Delaware river, to the middle of the stream, for the erection of a viaduct for a railroad track to connect with the track of the North Pennsylvania Railroad Company, have not violated the 36th section of the general railroad law, prohibiting corporations formed under that law from taking any land under water belonging to the state, unless the consent of the riparian commissioners shall first have been obtained. *Ib.*

5. If it be merely doubtful whether there is a purpresture or not, an injunction asked for on the ground of purpresture will not be granted. To warrant an injunction in such case, it must be clear that there is a purpresture. *Ib.*

6. The provision of the compact of 1783, between Pennsylvania and New Jersey, on the subject of fisheries, relates to fisheries below the head of tide water, which were the subject of private ownership and individual occupancy. The right in the riparian owners, of several fishery in front of their lands, is distinctly recognized in this state. *Ib.*

7. The objects and purposes of that compact were merely to secure the administration of justice, and to secure to the contracting parties the use of the river as a public highway. The provision for concurrent jurisdiction had reference to the former only; it was a police regulation, merely. *Ib.*

8. The compact of 1783 gives no jurisdiction to Pennsylvania over the soil of the Delaware river within the territorial limits of this state, nor does it confer on her any right therein. It gives her a right to complain of, and to be relieved against, any structure or other occupation of the river on the soil of this state injurious to the free navigation of the river. *Ib.*

9. In an action to remove an erection in a public river, on the ground that it is an injury to the *jus publicum*, the common right of navigation, it must appear that a nuisance, in fact, exists; even though the erection be an encroachment on the soil of the state. *Ib.*

10. The viaduct built by the Delaware and Bound Brook Railroad Company, from the Jersey shore

to the middle of the river, to meet part of the same structure built by the North Pennsylvania Railroad Company from the Pennsylvania shore, held to be authorized by the 36th section of the general railroad law, conferring power upon corporations organized under it to build a viaduct "across any navigable or other river, stream or bay in this state." *Ib.*

11. That viaduct *held* not to interfere with the navigation of the river, and not to be a nuisance in fact. *Ib.*

12. That viaduct is not a toll bridge, but merely the railroad connection of two railroads; a highway by railroad, over the river. The company so operating it is not chargeable with a usurpation of a franchise to take tolls. *Ib.*

13. Pennsylvania gave authority to build this bridge by the act of incorporation of the North Pennsylvania Railroad Company, in 1852. New Jersey has acquiesced, by her silence, in the construction which Pennsylvania thus put upon the compact of 1783. *Ib.*

14. Authority to bridge the river has been given by both states. Long lapse of time between the giving of the consents does not affect it. *Ib.*

15. The bed of the Delaware river above tide-water, from the easterly bank *ad filum medium aquæ*, passed by the grant from Charles II. to the Duke of York, dated March 12th, 1664, and is private property. *S. C.*, 631

16. The general railroad law, approved April 2d, 1783, provides for conferring the franchise of bridging the Delaware, so far as the authority of New Jersey can avail for that purpose. *Ib.*

17. When Pennsylvania has authorized one of its railroad corporations to bridge the Delaware so as to connect with any New Jersey road, and New Jersey has authorized one of its railroad companies to bridge the Delaware so as to connect with any Pennsylvania road, the states have exercised concurrent jurisdiction under the treaty of 1783, in such manner as to give mutual consent to the erection of a bridge by the New Jersey and Pennsylvania companies jointly, each from its own bank to the centre of the stream. *Ib.*

DELAY.

See Assessment for Street Improvements, 3.
Certificates of Indebtedness, 3.
Injunction, 2, 13.
Practice, 35.

DEMURRER.

See Pleading, 1, 4, 19.

DESERTION.

1. To render the withdrawal of a wife from the house of her husband such an abandonment as to constitute a desertion in legal estimation, it must appear she left her husband, and remained away from him of her own accord, without his consent, and against his will, continuously, for the full period of three years. *Meldowney* v. *Meldowney*, 328

2. Abandonment is not voluntary, where it is compelled by personal violence, coarse language, and constant neglect. *Ib.*

3. Desertion brought about by the misconduct of the husband, cannot be made the ground of divorce on his application. *Ib.*

4. Language used by the petitioner, *held* to have given the defendant a right to infer the petitioner's consent to a separation. *Ib.*

DEVISE.

See TRUST AND TRUSTEE, 13.

DISCOVERY.

The Court of Chancery will take jurisdiction of a suit whose subject matter is properly cognizable at law, and though adequate relief may be given there, in order to a discovery; and in this case, under the circumstances, it was held that a suit in equity might be maintained for discovery of the party who should be sued at law, and as to the liability of the parties against whom the bill was filed. *Hoppock's Ex'rs* v. *Penn. R. R. Co.*, 286

See LEGACY, 8.

DIVORCE.

1. Decree of divorce from bed and board forever, on the ground of extreme cruelty, consisting mainly in gross abuse by the husband of his marital rights, rendering it unsafe for the wife to cohabit with him, or to be under his dominion or control; the parties left at liberty to apply by mutual, free and voluntary consent, to be discharged from the decree. *English* v. *English*, 71

2. Decree of divorce. The defence of insanity held not to have been established. *Hill* v. *Hill*, 214

3. A divorce *a mensa et thoro*, for extreme cruelty, will be granted where there is a gross abuse of marital rights. *English* v. *English*, 579

4. A separation is not decreed as a punishment for past misconduct only, but mainly as a protection against future probable acts of cruelty; this probability being based upon the former conduct, and the character and disposition of the parties. *Ib.*

5. Where there is no reasonable apprehension of a continuance of such cruelty, such divorce will not be granted. *Ib.*

See DESERTION.
JUDGMENT, 7.
PLEADING, 23.

DOWER, (INCHOATE.)

See CONDEMNATION OF LANDS.
LIEN, PRIORITY OF, 1, 3.

EASEMENT.

The easement of an artificial waterway, which, by the terms of the instrument creating it, is established on a defined line over the servient tenement, cannot, without the consent of the land-owner, be changed in location to his other lands, either for the convenience of the owner of the servitude, or because of disturbance of the easement by the land-owner, or because the particular land subject to it has been taken by the public for a highway. *Johnson* v. *Jaqui*, 552

See GRANT, 1–3.

EQUITABLE INTEREST.

See TRUST AND TRUSTEE, 17, 18.

EQUITABLE LIEN.

See PRACTICE, 40.

ESTOPPEL.

See PARTIES, 4.

EVICTION.

See PRACTICE, 22, 23.

EVIDENCE.

1. Matter in avoidance of complainant's claim, under proceedings to foreclose his mortgage, must be proved otherwise than by the an-

swer. The testimony *held* not to establish the defence. *Fey* v. *Fey*, 213

2. The burden of proof is on the defendant to show payments on account of the mortgage debt, claimed by the answer. *Hagan* v. *Ryan*, 236

3. As a general rule, testimony, which is merely incompetent or irrelevant, will not be suppressed before hearing, but if it has been elicited by leading interrogatories it may be suppressed before, so that the witness may be re-examined. *Wood* v. *Chetwood*, 311

4. The court will not stop to consider how papers material to the issue were obtained by the party offering them, whether lawfully or unlawfully; if they tend to elucidate the point in dispute, the court is bound to receive the light they give. *Ib.*

5. The proof of the loss of a deed, in this case, *held* to be sufficient to warrant the admission of secondary evidence of its contents. *Ketcham* v. *Brooks*, 347

6. Such secondary evidence *held* to establish the fact that the grantee took his deed with full knowledge that it contained a covenant of assumption of a mortgage upon the property conveyed, and with knowledge of the nature of the liability thereby assumed. *Ib.*

7. Where the object of the bill is not to prove title by a deed alleged to be lost, but to prove a covenant of the grantee contained therein, it is not necessary that the subscribing witness to the deed or the officer before whom the acknowledgment was taken, should be produced, or that there should be evidence of the impracticability of obtaining their testimony, other satisfactory evidence of the covenant being offered. *Ib.*

8. *Held*, in a suit to set aside or to reform a deed, on the ground of fraud, that the fraud was not proved. *Hoyt* v. *Hoyt*, 399

9. Statements of a third party, respecting his rights in property in controversy between complainant and defendant, and denying defendant's rights, not made in his presence, are not competent evidence against him. *Ib.*

10. Where one acting in a representative capacity, causes a levy to be made under an execution in his favor on property not subject thereto, in a litigation between him and the owner of that property in respect to the levy, the latter is not debarred from testifying in his own behalf, by the fact that the former is sued in a representative capacity. In such case, he is not sued in a representative capacity, within the meaning of the statute. *Holmes* v. *Chester*, 423

See CONFIDENTIAL COMMUNICATION.
GRANTEE AND GRANTOR, 3, 4.
JUDGMENT, 2, 3.
JURISDICTION, 1.
PAROL CONTRACT, 1.
PLEADING, 21.
TRUST AND TRUSTEE, 10, 21.

EXCEPTIONS.

See PRACTICE, 3.

EXECUTION.

See DEBTOR AND CREDITOR.
PRACTICE, 25.
TRUST AND TRUSTEE, 13.

EXECUTOR.

1. An executor who pays the debts and funeral expenses of his testator, for the discharge of which there is no personal estate, is entitled in equity to be re-imbursed therefor out of the real estate. *Clayton* v. *Somers' Ex'r*, 230

2. A man marrying a woman who is an executrix, by the marriage becomes an executor in her right,

and renders himself a trustee with her of the assets of the estate, and as such, may be compelled to account. *Wood* v. *Chetwood*, 311

3. When the husband of a woman who is an executrix or administratrix, survives her, he is liable for whatever assets came to her hands or his own, during coverture. *Ib.*

See Interest, 1, 2.
Jurisdiction, 1, 2.
Primary Fund.
Trust and Trustee, 8, 9.

FISHERY.

See Delaware River, 6.

FOREIGN JUDGMENT.

See Judgment, 7, 8.

FRANCHISE.

See Delaware River, 12, 16.
Insolvent Corporation, 3, 4.

FRAUD.

See Judgment, 5.
Jurisdiction, 1.
Pleading, 13.

FRAUDS, STATUTE OF.

See Trust and Trustee, 10.

GENERAL RAILROAD LAW.

See Delaware River, 4, 10, 16.
Lands Under Water, 3, 5.

GRANT.

1. Words in a deed granting water from a pond and the easement of an aqueduct in grantor's land, construed. *Jaqui* v. *Johnson*, 526

2. Such easement, when described in the grant, will be limited to the defined locality. The owner of the dominant tenement cannot change it for convenience or necessity. *Ib.*

3. A substantial change in place or manner of enjoyment, will be restrained by injunction. *Ib.*

4. In a conveyance, by the sovereign, of property which is usually the subject of private ownership, the extent of the thing granted is to be ascertained by the rules of construction applicable to private deeds. *Att'y-Gen.* v. *Del. & B. B. R. R. Co.*, 631

GRANTEE AND GRANTOR.

1. As between a mortgagor and his grantee by voluntary conveyance, with covenant against encumbrances and warranty general, the latter has a right in equity, in the absence of any facts which would disentitle him to the protection, to cast the burden of an encumbrance existing at the time of the conveyance, upon the land of the former, subject to the encumbrance. *Harrison* v. *Guerin*, 219

2. But where such mortgagor conveyed to a voluntary grantee (in this case his wife) subject to a mortgage, and the covenants were inserted without his directions, and he executed the conveyance in ignorance that they were in the deed, the burden of the encumbrance is not shifted. *Ib.*

3. Testimony of the grantor that his voluntary grantee understood that the land conveyed to her was subject to the mortgage, is admissible to rebut the equity which would otherwise arise under the deed to shift the burden of the mortgage to that part of the premises retained by himself. *Ib.*

4. The effect of such testimony would be to make that part of the premises conveyed to her, liable to the payment of its proper proportion of the mortgage debt. *Ib.*

5. A parol assumption by a grantee of mortgaged premises, made at the time of the conveyance to him, makes him liable to a personal decree for deficiency. *Ketcham* v. *Brooks*, 347

6. A stipulation in a deed of conveyance inter parties, that the grantee shall assume and pay a prior mortgage on the premises, is a contract with the grantor simply for his indemnity, and will not be regarded, either at law or in equity, as a contract with the mortgagee or for his benefit. *Crowell* v. *Hospital*, 650

7. The right of the mortgagee to a personal decree for deficiency against a subsequent purchaser, whose deed contains such a stipulation, does not result from any fixed or vested right in the mortgagee, arising either from the acceptance of the conveyance of the mortgaged premises by the grantee, or from his obligation to pay the mortgage debt as between himself and his grantor. It rests merely on the doctrine of courts of equity, that a creditor may have the benefit of all collateral obligations for the payment of a debt which a person standing in the situation of surety for others holds for his indemnity, and that he may proceed directly against the person ultimately liable in order to avoid circuity of action. *Ib.*

8. If the liability of the subsequent purchaser to his grantor to indemnify him against the mortgage debt, be extinguished as between themselves, by a re-conveyance before bill for foreclosure filed, the contract of indemnity being thereby put an end to by the act of those who were parties to it, the mortgagee will not be entitled to a decree for a deficiency against such purchaser, founded on such a stipulation in his deed. *Ib.*

9. C conveyed to H certain mortgaged premises, subject to the payment of the mortgage. The deed contained a stipulation that H should assume and pay the mortgage, the amount thereof having been deducted from the consideration money. H reconveyed to C, subject to the mortgage, which he assumed to pay. On bill subsequently filed by the mortgagee for a foreclosure, *held* that by such re-conveyance, the obligation of H to C to pay the mortgage debt in exoneration of his liability therefor, was extinguished, and that the mortgagee was not entitled to a decree against H for deficiency. *Ib.*

HEIR.

See LEGACY, 14.

HUDSON TUNNEL RAILROAD COMPANY.

See LANDS UNDER WATER, 3, 4.

HUSBAND AND WIFE.

When an estate in lands becomes vested in husband and wife, during coverture, the husband is entitled to the exclusive use and possession during their joint lives; during this period the wife has no interest in or control over the property, and the husband alone may make a valid lease or other transfer of the right of possession. *Bolles* v. *Trust Co.*, 308

See CONFIDENTIAL COMMUNICATION.
EXECUTOR, 2, 3.
SEPARATE ESTATE.

INFANT.

See ADOPTED CHILD, 1.
LEGACY, 3.

INFORMATION.

1. Where the suit immediately concerns the rights of the state, the information is generally exhibited without a relator. *Att'y-Gen.* v. *Del. & B. B. R. R. Co.*, 1

2. The Attorney-General has the right, where the property of the sovereign or the interests of the public are directly concerned, to institute suit for their protection, by an information at law or in equity, without a relator. *S. C.*, 631

INJUNCTION.

1. A doubt as to the authority of a corporation to do an act is fatal to an application for an injunction to restrain such act on the ground of want of authority. *Att'y-Gen.* v. *Del. & B. B. R. R. Co.*, 1

2. Where a party acting *bona fide* and upon its not unreasonable construction of a public grant, has been permitted to expend a large sum of money in the construction of a public work, in the confidence that it possessed all requisite legislative authority, without a word of protest or remonstrance till the work is practically completed, equity will refuse its aid, even to the state, leaving it to its remedy at law. *Ib.*

3. Where a railroad company would be entitled to protection in laying a track over lands condemned under their charter, from an overflow of water, their licensees to lay a track over the same lands are entitled to the same protection. *Longwood Valley R. R. Co.* v. *Baker*, 166

4. An injunction to restrain a defendant from raising the water from his mill-pond above a certain height, is not mandatory; but if it were strictly mandatory, that would not constitute a valid objection to it. *Ib.*

5. There is no general rule against granting relief by mandatory injunction, interlocutorily, where the damage has been completed before the filing of the bill; and there is no difference between the case of injury to easements and injury to other rights. *Ib.*

6. Equity will not interfere by mandatory injunction, unless extreme or very serious damage, at least, will ensue from withholding that relief; and each case must depend on its own circumstances. *Ib.*

7. It is a violation of an injunction restraining a defendant from disposing of property, to deliver the property, though sold previously to the service of the injunction. *Jewett* v. *Bowman*, 171

8. When an injunction has been granted upon a bill filed merely for discovery in aid of a defence at law, it will be dissolved as soon as the answer is perfected. But the rule does not apply to a case where the bill is filed for relief, and discovery incidental to the granting thereof. *Henwood* v. *Jarvis*, 247

9. Though this court will respect the intention of the legislature in providing for the institution of summary proceedings for the trial of rights, and, in all proper cases, leave parties to their remedy at law, yet it will not, in a proper case, refuse equitable relief because the legislature has, in its wisdom, made these proceedings summary. *Ib.*

10. Equity will not refuse to interpose when the remedy is more complete and perfect in equity than at law. *Ib.*

11. To restrain the assertion of doubtful rights in a manner productive of irreparable damage, and to prevent injury to a person from the doubtful title of others, are among the legitimate functions of a court of equity. *Ib.*

12. Where, upon a bill to restrain proceedings at law, the question is one of fraud, and the interests involved are of great magnitude, and the answers do not satisfy the mind of the court that injustice would not be done the complainant if he were not permitted to pursue his application for relief here, this court will not remit him

to a court of law, when the question can be better examined in equity, especially when the proceeding in the law court is of a summary character, and the injury which may be inflicted upon him if fraud be permitted to prevail, will be irreparable. *Ib.*

13. Whether the defendant has been prejudiced by delay in commencing suit against him, enters into the question whether the complainant has, by his delay, forfeited his claim to the consideration of equity. *Ib.*

14. Where the complainant has a distinct ground of equitable relief, aside from his defence at law, he will not be obliged to abandon his legal defence by confessing judgment, before equity will enjoin the suit at law. *Ib.*

15. The whole matter of terms on granting or continuing an injunction is in the discretion of the court. *Ib.*

16. Complainant's intestate planted oysters in Raritan bay, upon certain grounds which he had staked off, and the boundaries of which he had plainly marked. The defendants having taken large numbers of oysters, and threatening to continue doing so, under a claim of public right, were enjoined, on the ground that they were acting in concert, taking away for their own use the property of the complainant, and might wholly deprive him of it, and were, most of them, pecuniarily irresponsible and besides, a multiplicity of suits would be necessary to relief. The injunction was continued until the hearing, unless, in the meantime, the question between the parties should have been determined at law in favor of the defendants, in which case the defendants had leave to renew the motion to dissolve. *Britton's Adm'r* v. *Hill*, 389

See Bona Fide Purchaser.
Delaware River, 5.
Judgment, 4.
Laches.
Practice, 5, 10, 13, 16, 17, 18, 20.

INSANITY.

Depravity of character and abandoned habits, in themselves, are not evidence of insanity. *Hill* v. *Hill*, 214

INSOLVENT CORPORATION.

1. The supplement of March 13th, 1866, to the act to prevent frauds by incorporated companies, is remedial in its nature, and must be so construed as to suppress the mischief and advance the remedy. *Randolph* v. *Larned*, 557

2. That act provides that where the property of an insolvent corporation, in the hands of a receiver, is encumbered with mortgages or other liens, *the legality of which is brought into question*, &c., the Court of Chancery may order the receiver to sell the same clear of encumbrances, &c. *Held*, that it was not intended, by the words, "the legality of which is brought into question," to confine the remedy to mischief arising from litigation of any particular character, but to all litigation between encumbrancers respecting the validity, extent or priority of their liens. *Ib.*

3. Although, technically speaking, franchises are property, they are property of a peculiar character, arising only from legislative grant, and are not, in ordinary cases, subject to execution, or to sale and transfer, even in payment of the debts of the corporation, without the assent or authority of the legislature. *Ib.*

4. Under the said supplement of March 13th, 1866, taken in connection with the twentieth section of the original act, (*Nix. Dig.* 409,) the Chancellor has discretionary power to order a sale of the franchises, as well as of the property of the insolvent company, clear of encumbrances. *Ib.*

5. As between trustees for first mortgage bond-holders of an insolvent corporation, whose debt under the mortgage under foreclosure by them is due and exceeds the whole value of the property of the corporation, and who apply to have the property delivered to them, and the receiver of said company who applies for an order for sale of the property and franchises free from the lien of the encumbrances, the trustees were held to be entitled to the property, and to be permitted to operate the road, leaving the question as to the mode and manner of sale to be settled at the determination of those proceedings. *Ib.*

See RECEIVER.

INTEREST.

1. An order of reference, directing a master to state an account between a legatee and testator's executor allowing seven per cent. for interest during all the time that executors received interest on the legacy at and above that rate, (the legal rate then being six per cent.,) does not authorize charging seven per cent. because the executors received more than that rate in dividends upon stocks, in which the bulk of the testator's estate was invested at his death, and so remained at the accounting; it appearing that the stock was worth, all that time, one hundred and fifty per cent. premium, and the dividends thereon amounted to less than seven per cent. upon the money value of the shares. *Salisbury* v. *Colt*, 492

2. When executors have failed for several years, against the testator's intention, to separate a legacy from the estate and invest it, it is such a violation of trust as justifies charging them with compound interest. *Ib.*

See LEGACY, 2, 3, 13.

INTERROGATORIES.

See PRACTICE, 8, 9.

ISSUE AT LAW.

See PRACTICE, 38.

JUDGMENT.

1. Equity will relieve a party against a judgment at law when its justice can be impeached by facts, or on grounds of which the party seeking its aid could not have availed himself at law, or of which he was prevented from availing himself by fraud or accident, or the act of the opposite party unmixed with any fraud or negligence on his part. *C. and F. R. R. Co.* v. *Titus*, 102

2. If new testimony be relied on as a ground for equitable interference with the judgment, and such testimony could, with proper care and diligence, have been procured in time to have been available at law, it cannot be available in this court as the ground for such equitable interference. *Ib.*

3. Nor will equity interfere when the facts, though discovered since the trial, might have been established at the trial upon cross-examination. *Ib.*

4. It will not suffice to show that injustice has been done by the judgment against which relief is sought, but it must appear that this result was not caused by any inattention or negligence on the part of the person aggrieved, and he must show a clear case of diligence to entitle him to an injunction. *Ib.*

5. It is competent for a court of equity, upon an allegation that a judgment is founded in a fraud, to inquire whether the cause of action spread upon the record is wholly fictitious and groundless; and also, whether the plaintiff fraudulently withheld from the court pronouncing it, any fact which, if disclosed, would have shown he had no cause of action. *Doughty* v. *Doughty*, 315

6. In order to relieve from a judgment on the ground of fraud, the proof in demonstration of the fraud must

be so clear and strong as to render it certain the plaintiff knew, at the time he brought his suit, he had no right of action, and was without expectation of obtaining judgment unless he was successful in depriving the defendant of an opportunity of making defence. *Ib.*

7. A judgment of divorce obtained in Illinois, declared void, on the ground that the cause of action on which it purports to be founded was fabricated. *Ib.*

8. A judgment by a court of one of the states, divorcing a husband and wife domiciled in different states, is not entitled to extra-territorial recognition in case the party procuring it could have given the defendant actual notice of the suit, but refused or neglected to do so. *Ib.*

9. The right of every person accused, to have an opportunity to make defence, is secured by a rule of general law; a judgment pronounced in violation of it is not entitled to general recognition. *Ib.*

See Jurisdiction, 3.
Mechanics Lien Law, 1.
Mortgage, 11.
Partition.
Trust and Trustee, 4.

JURISDICTION.

1. The executor of A sued B and C jointly upon a joint and several promissory note, held by his testator at the time of his death, and recovered judgment. Subsequently B filed his bill in this court, alleging that he neither signed the note nor authorized any one to do so for him, and that he did not know of its existence until after A's death. It further alleged that C fraudulently signed complainant's name to the note, and that the executor sued the complainant and C jointly, so that the complainant, by reason of the executor's suing in a representative capacity, could neither testify himself, nor avail himself of C's testimony, to prove the fraud. It prayed an injunction against the executor and the sheriff, to restrain a sale. The executor pleaded the trial and judgment in bar, and answered the bill. *Held*, that the fact that the complainant was unable to avail himself, on the trial at law, of his own testimony or of that of C, was no ground for relief. *Grover* v. *Wyckoff's Ex'r*, 75

2. The Court of Chancery has concurrent jurisdiction with the Orphans Court in the settlement of the accounts of executors and administrators, and may assume exclusive jurisdiction at any time before decree of allowance and confirmation; but where the settlement is proceeding regularly and properly in the Orphans Court, and there is nothing in the conduct of the executor or administrator, or in the nature of the estate or in the questions growing out of its due settlement, making it necessary or proper that this court should take control, the settlement will be permitted to proceed in that tribunal. *Search* v. *Search*, 137

3. Where, in the exercise of its unquestioned power, the Orphans Court has pronounced a judgment in a proceeding in a matter over which the Court of Chancery has concurrent jurisdiction with that court, which proceeding was pending there before the institution of a suit in this court, that judgment, so far as it embraces the matters in controversy here, is conclusive against all persons unless removed by appeal, and is not open to review in this court except upon proof of fraud or mistake. *Ib.*

4. A claim, arising out of a single transaction, where it is alleged one person becomes a creditor and another a debtor, cannot be made the foundation of a suit in equity, especially where no discovery is sought. *Ib.*

5. The Court of Chancery will only assume jurisdiction over the settlement of intestate's estates, for cause. *Decker* v. *Decker's Adm'x*, 239

6. The Court of Chancery exercises concurrent jurisdiction with courts of law in cases where, though the rights are of a purely legal nature, other and more efficient aid is required than a court of law can afford, to meet the difficulties of the case and insure full redress. *Hoppock's Ex'rs* v. *Penn. R. R. Co.*, 286

7. A defendant to an action at law, who, by pleading therein, has subjected himself to the jurisdiction of the common law tribunal, does not thereby forfeit his claim to relief in equity. *Simon* v. *Townsend*, 302

8. Where the injury complained of is in its nature a continuing one, and the remedy at law must, therefore, be by successive suits, if the defendants persist in inflicting the injury, and an action for damages would be wholly inadequate for the protection of the complainant's rights, he will not be put to his remedy at law. *Shiner* v. *M. C. and B. Co.*, 364

9. Equity, in relieving against the loss of a bond payable to bearer, makes no discrimination against loss by theft. *Force* v. *City of Elizabeth*, 408

10. A court of equity is not ousted of any part of its original jurisdiction by the fact that a court of law exercises the same or a similar jurisdiction. *Ib.*

11. Consent of counsel cannot confer jurisdiction, neither can it warrant a decree in a matter dehors the record, especially in the absence of parties who have a right to be heard thereon. *Ryno's Ex'r* v. *Ryno's Adm'r*, 522

See INJUNCTION, 9–12.
JUDGMENT, 5.

LACHES.

An injunction, issued to restrain municipal authorities from increasing the debt of the city by contracting in its name and on its credit for municipal improvements, and for furnishing the city hall, &c., on the ground that the indebtedness of the city was thereby increased beyond the amount allowed by its charter, and that the proposed expenditures were not included within the appropriations for the year, was dissolved as to the furniture, on the ground of laches in filing the bill till after the contracts therefor had been made, and the parties had entered into bonds to perform them; those persons not being made parties to the bill, and the bill neither seeking to restrain them from performing the contract, or the city from compelling performance. *Collings* v. *Camden*, 293

See ASSESSMENT FOR STREET IMPROVEMENTS, 3.
PRACTICE, 35.

LANDS UNDER WATER.

1. The state has the reversion in fee in any lands leased by the Board of Riparian Commissioners, lying under the waters of the bay of New York, adjacent to the city of Jersey City, between the original line of high water and the line fixed for the exterior line for piers in the Hudson river. *Att'y-Gen.* v. *Hudson Tunnel R. Co.*, 176

2. It holds the fee simple absolute in lands under water between such exterior line of piers and the state line. *Ib.*

3. The act of March 21st, 1874, extending the time for the completion by the Hudson Tunnel Railroad Company of their proposed tunnel, did not confer upon that company, organized under the general railroad law, the right to construct their tunnel in the land of the state under the waters of the Hudson, without first obtaining consent of the Board of Riparian Commissioners. *Ib.*

4. The Hudson Tunnel Railroad Company were permitted to proceed to condemnation as against

the lessees of lands lying under the waters of the Hudson, leased to the Morris and Essex Railroad by the Board of Riparian Commissioners, but enjoined from taking possession of those lands, or the land between the exterior line of piers and the state line, until consent of the state should have been obtained. *Ib.*

5. Lands under water, granted by the state to a corporation under the eighth section of the riparian act, are not lands belonging to the state within the meaning of the thirty-sixth section of the general railroad act, although, in such grant, a rent, payable to the state, is reserved, and in the instrument of grant, power to re-enter for non-payment of rent is reserved. Such lands may be condemned, and applied to other public uses, by proceedings to condemn against the corporation grantee. *Hudson Tunnel Co.* v. *Att'y-Gen.*, 573

6. A right to re-enter and re-possess for non-payment of rent, does not create an estate in reversion. *Ib.*

See DELAWARE RIVER, 4.

LEGACY.

1. A gift of a fund, with limitation over in the contingency of the legatee's dying without leaving lawful issue, entitles the legatee to possession of the fund. *Hennion's Ex'rs* v. *Jacobus*, 28

2. The rule is settled, that interest begins to run on general legacies to which no time of payment is fixed, from the expiration of one year from testator's death. *Ib.*

3. The rule that a general legacy in favor of a child will draw interest from testator's death, when given for his maintenance, does not apply to a legacy to adults; nor where the maintenance of the child is otherwise provided for, either by the will or in any other mode. *Ib.*

4. A gift to A, "or to his heirs," "or to his representatives," is an absolute gift to A, on condition that he is alive on the death of the testator; but, if he dies in the lifetime of the testator, the gift takes effect in favor of the other persons described as substitutes of the primary legatee. *Brokaw* v. *Hudson's Ex'rs*, 135

5. In a gift of personal property, where the substitutes of the primary legatee are described by the word "representatives," those will take who have the right to represent the primary legatee as next of kin, under the statute of distribution, and not his executors or administrators. *Ib.*

6. If such next of kin have left a will, the legacy passed by that; if not, the rights of creditors, if he had any, take precedence of those of his next of kin. *Ib.*

7. A gift of a legacy by a creditor to his debtor, whether the debt arose before or after the making of the will, does not, in the absence of any expression showing that the testator intended the gift should have that effect, release the debt, but it may be applied in payment of the legacy. *Ib.*

8. A legacy in the hands of an executor upon no trust except to pay it over to the legatee, is not a trust within the meaning of the exception of a trust created by some person other than the debtor himself, and whose transfer to the debtor cannot, therefore, be prevented by proceedings for discovery against him under the supplement of March 20th, 1845, to the chancery act. *Bacon* v. *Bonham*, 209

9. A legacy expectant is assignable in equity, and such assignment for valuable consideration, without fraud, will be enforced. *Ib.*

10. An assignment by way of mortgage, of a legacy, need not be filed in accordance with the act concerning chattel mortgages. That

act does not apply to mortgages of choses in action. *Ib.*

11. A legacy to A when he arrives at the age of twenty-one years, is contingent on A's attaining that age. *Clayton* v. *Somers' Ex'r,* 230

12. A provision for the payment of such a legacy by the sale of real estate, does not change its character and vest the legacy. *Ib.*

13. Interest does not accrue on contingent legacies until the time for payment arrives. *Ib.*

14. Where land not otherwise disposed of by the will, is charged with legacies, if the heir furnish the money for the legacies, he will be entitled to the land. *Ib.*

15. A bequest of the income of personalty, without limit as to time, is equivalent to a gift of the principal. *Gulick* v. *Gulick's Ex'rs,* 498

16. Where an absolute gift is made in the first instance, followed by a limitation over on the death of the first taker, the absolute gift is not defeated, unless the gift over takes effect. *Ib.*

17. Though, by the application of such rule in this case, had the first taker died childless, her husband would have taken the gift absolutely as her administrator, notwithstanding testator's direction that the fund was not to be subject to the control of her husband, the rule must still govern, where the guard against the husband's interference was only an incident to the accomplishment of testator's purpose to preserve the interest of the fund, and to keep the body of the bequest intact to meet the limitation over. *Ib.*

18. A legacy to a person "at" a given age, or "when," or "from and after" his attaining a given age, is *prima facie,* contingent; but when it appears that such postponement of the gift is for the convenience of the estate, the rule does not apply. *Post* v. *Herbert's Ex'rs,* 540

See Interest, 2.
Will.

LEVY.

See Debtor and Creditor, 2.
Mortgage, 11.

LICENSEE.

See Injunction, 3.

LIEN, PRIORITY OF.

1. A agreed with B, at the execution of a mortgage by the former to the latter, that part of the amount for which it was given, should be applied to the payment of two mortgages, then liens upon the premises embraced in that mortgage, and certain other lands, and that the balance of it should be expended in building a house on the premises covered by B's mortgage. A had purchased the lands subject to the two mortgages. At the execution of the mortgage, A's wife was a minor. Afterwards, but before the registry of the mortgage, a building was commenced on the lot covered by the mortgage given by A to B. Mechanics liens for materials furnished in the construction of the building, are claimed to be liens prior to B's mortgage. *Held—*
1. B was subrogated to the rights of the mortgagee under the mortgages on the premises when he took his mortgage, to the extent of the money paid by him on account of those mortgages. To that amount, with interest, his lien is prior to that of the lien claimants, and has a preference over the inchoate right of dower of A's wife in the *land.*
2. B's mortgage is entitled to priority over the dower right of A's wife in the *building,* to the extent of the money advanced by B, which was actually expended in the construction of the building.

3. The priority of B's lien is not affected by the fact that the payment on account of the existing mortgages, was made after the building was begun.
4. A's wife has no interest in the building.
5. The lien of A's wife, by virtue of her inchoate right of dower, is next in order of priority in the *land*, after the lien of B, to the amount paid by him on account of the existing mortgages; next, the lien claims, and last, the balance of the amount due on B's mortgage. *Barnett* v. *Griffith*, 201

2. A mortgage executed, *bona fide*, to secure the payment of advances to be used in the construction of a building on the mortgaged premises, is a prior lien to claims for materials furnished in the construction of such building, with notice of the mortgage, to the full amount of the mortgage, if so much was advanced. That the agreement, under which the advances were made, was verbal and not in writing, does not affect the lien. *Platt* v. *Griffith*, 207

3. Nor does the claim of inchoate right of dower in the lands mortgaged, on the ground of the alleged minority of the mortgagor's wife when the mortgage was executed, set up in her answer, affect the lien; her answer having been filed after the bill had been taken as confessed, without consent or leave of the court. *Ib.*

4. The fact that a mortgagee joins with his mortgagor as surety in a bond given by the latter to a party taking the second mortgage on the property, gives the latter no lien upon the interest which the prior mortgagee had in the mortgaged premises. *Brant* v. *Clark*, 234

5. Nor would the insolvency of the prior mortgagee and the mortgagor, in such case, entitle the junior mortgagee to priority of payment, in the absence of fraud on the part of the prior mortgagee. *Ib.*

6. A *bona fide* mortgage, given after the entry of a personal decree of this court against the mortgagor for the payment of money merely, but before the filing of a statement or abstract of the decree in the Supreme Court, in accordance with the provision of the fifty-ninth section of the chancery act, is entitled to priority over the decree. *Jersey* v. *Demarest*, 299

7. A mortgage executed and acknowledged and put upon record by the mortgagor, in pursuance of a prior contract for a loan on such security, and afterwards delivered to the mortgagee when the mortgage money is advanced, will have priority in equity over liens of mechanics and materialmen for work and materials furnished after the mortgage is recorded, for the erection of a building on the mortgaged premises, built by the mortgagor, which was commenced between the recording of the mortgage and its delivery; the mortgagee having no knowledge of the commencement of the building when he parted with his money. In equity, the mortgage, when delivered, will have relation to the agreement for the loan. *Jacobus* v. *Life Ins. Co.*, 604

LIMITATIONS, STATUTE OF.

See TRUST AND TRUSTEE, 11.

LOSS OF BOND.

See JURISDICTION, 9.

MECHANICS LIEN.

See LIEN, PRIORITY OF, 1, 2, 7.

MECHANICS LIEN LAW.

1. A judgment under the mechanics lien law, against the owner of the land, is conclusive as respects a subsequent mortgagee. *Jacobus* v. *Life Ins. Co.*, 604

2. Within the meaning of the mechanics lien law, a building is commenced when the permanent work upon the ground, whether of excavation or construction, has progressed so far as to inform reasonable observers that it is designed for the erection of a building. *Ib.*

MERGER.

When an equitable and a legal estate unite in the same person, the equitable sinks or merges into the legal, provided the legal estate is as extensive as the equitable. *Bolles* v. *Trust Co.,* 308

MISJOINDER.

See PLEADING, 9.
PRACTICE, 31.

MISREPRESENTATION.

See SPECIFIC PERFORMANCE, 1.

MORTGAGE.

1. A mortgagor has the right to purchase a mortgage given by himself and wife on property belonging to her, and it is a valid security in his hands. It is no ground for declaring such mortgage satisfied in the hands of an assignee, that the consideration of the assignment was paid by the mortgagor, and that it was held by the assignee to the mortgagor's use. *Faulks* v. *Dimock,* 65

2. A mortgage free from usury in its inception, is not affected by a subsequent agreement to forbear suit in consideration of the payment of illegal interest. *Terhune* v. *Taylor,* 80

3. Interest paid in excess of the legal rate, under agreement for its payment in consideration of forbearance to sue, will be credited on the amount due on the mortgage. *Ib.*

4. A mortgagee of land, holding an assignment of stock as collateral to his mortgage, released the latter, with actual notice of the existence of a subsequent mortgage on the land; *held,* that the prior mortgage was, so far as the right of the subsequent one was concerned, satisfied to the extent of the value of the stock. *Loan Assoc'n* v. *Beaghen,* 98

5. A mortgagor who procures a third party to purchase a mortgage given by him and receives the whole proceeds, will not be permitted to assail its validity. *Bush* v. *Cushman,* 131

6. The assignee of a mortgage or any other chose in action, takes it subject to all equities and defences existing between the original parties at the time of the assignment. No rights accruing after the assignment, or defences springing from defaults, or even fraud of the assignor, committed subsequent to the assignment, and which had no existence, and were simply possibilities at the time of the assignment, can affect the assignee. *Ib.*

7. In ordinary cases, a mortgagee does not, by force of a contract of assumption of the mortgage, acquire a right of action against a purchaser of the mortgaged premises, but the benefit flowing to him from the contract is limited to a right to be subrogated to the rights of his debtor. He stands in his debtor's rights, and may appropriate to the satisfaction of his mortgage any security held by his debtor for its payment; he can, therefore, only have a personal judgment against the purchaser for his debt, when the mortgagor holds an obligation which will support such judgment. *Crowell* v. *Currier,* 152

8. A holder of a mortgage is not entitled to a decree for deficiency against a purchaser of the mortgaged premises, by virtue of his contract of assumption of the mortgage, where, before the mortgage fell due, the purchaser re-conveyed to the mortgagor, who, by his deed, assumed the mortgage; the holder

of the mortgage having become the owner of it before the covenant of assumption, without reliance upon it as part of his security, and his conduct not appearing to have been, in the slightest degree, influenced by it. *Ib.*

9. A mortgage given to a building and loan association by a holder of its stock, is not usurious, because it requires monthly payments of interest, besides fines and impositions, in accordance with the provisions of its constitution. *Loan Assoc'n* v. *Patterson,* 223

10. In such a case, as between the association and a second mortgagee of the mortgaged premises, the stock held by the association as collateral security, was ordered to be sold, and the proceeds applied to the payment of the amount due on the mortgage, before recourse was had to the mortgaged premises. *Ib.*

11. Stock assigned by a shareholder of a loan and building association as collateral security to a mortgage, (the first upon the mortgaged premises,) given by him to the association, will, as between the association and a second mortgagee of the land, be applied to the payment of the mortgage before recourse is had to the land; and this equity will not be defeated by a levy on the stock under a judgment against the mortgagor. *Loan Assoc'n* v. *Hawk,* 355

12. A horse railroad company entered upon land with the consent of the owner, (the land being subject to a mortgage,) and constructed thereon at great expense, an elevator to raise their cars from the bottom to the top of a hill. *Held,* that the elevator was subject to the encumbrance of the mortgage, and that the company would not be entitled to redeem the land on which they had constructed the elevator, by paying to the mortgagee the value of the land at the time when the company took possession. *Booraem* v. *Wood,* 371

13. The company, *pendente lite,* took proceedings to condemn the land under their charter, but caused the commissioners to appraise only the value of the land without the improvements, (the elevator.) *Held,* that the condemnation being *pendente lite,* could not avail the company as against the right of the mortgagee to the land and the improvements. *Ib.*

14. An alleged parol assumption of a mortgage upon the premises, claimed to have been made at the time of their conveyance, *held* not proved. *Wilson* v. *King,* 374

15. A mortgage conveying only an estate for the life of the mortgagee, will not be reformed to convey a fee, as against the rights of a *bona fide* purchaser of the mortgaged premises for valuable consideration, without evidence of actual notice on the part of the purchaser, more extensive than the record of the mortgage itself. *Ib.*

16. Mortgages of real estate are usually in fee, but constructive notice of the existence, merely, of a mortgage, with no notice as to the estate it is intended to mortgage, will not be notice that the mortgage is in fee, if its terms convey a life estate only. *Ib.*

See GRANTEE AND GRANTOR.
INSOLVENT CORPORATION, 2, 5.
LIEN, PRIORITY OF.
PRACTICE, 21, 23, 29, 32, 37.
PURCHASER, 2, 7.
TAXES, 1, 2.
USURY, 3.

MORTGAGEE AND MORTGAGOR.

See GRANTEE AND GRANTOR, 6, 9.
LIEN, PRIORITY OF, 4, 5.
MORTGAGE, 1, 4, 5, 7, 10, 11.
PRACTICE, 37.
PURCHASER, 5, 7.

MULTIFARIOUSNESS.

See PRACTICE, 31.

MUNICIPAL IMPROVEMENTS.

See ASSESSMENT FOR STREET IMPROVEMENTS, 1.

NAVIGABLE STREAM.

See DELAWARE RIVER, 2, 3, 9.

NE EXEAT.

1. A *ne exeat* obtained upon affidavits substantiating declarations and acts of the defendant as evidence of his intention to depart the state, will not be discharged upon a counter affidavit by the defendant denying the intention. *Houseworth's Adm'r* v. *Hendrickson.* 60

2. When, to a bill filed by an administrator against his intestate's copartner for an account, and for a writ of *ne exeat*, the answer, denying the right to an account, substantially admits the correctness of the allegations of the bill as to defendant's statement of the assets of the firm, and the amount of its indebtedness, but denies that the estimates were correct, and that defendant owes anything to the estate of the intestate—such denial cannot avail to discharge the writ. *Ib.*

3. Writ to be discharged, and the bond given under it canceled, on the defendant's giving bond, with security, in the sum for which bail was ordered. *Ib.*

See PRACTICE, 11, 12.

NON-JOINDER.

See PRACTICE, 14.

NOTICE.

See MORTGAGE, 15, 16.
VENDOR AND PURCHASER.

NUISANCE.

See DELAWARE RIVER, 9, 11.

ORAL ADMISSIONS.

See TRUST AND TRUSTEE, 10.

ORPHANS COURT.

1. The Orphans Court has no power to determine as to the validity of the claims of creditors of the estate, upon an application for an order for the sale of decedent's lands for the payment of his debts; they have such power only in the case of insolvent estates. *Smith* v. *Smith*, 445

2. The only examination which the Orphans Court can make on such an application, is as to whether the necessity for the sale of real estate does, in fact, exist; and on that head they are to accept the report of the administrator or executor, as to the amount of debts, unless the *bona fides* of his statement be assailed, and it be made a question whether the claims he reports have, in fact, been presented to him, or whether the amounts thereof be not mis-stated. In such case, they are not bound to accept his statement. *Ib.*

See JURISDICTION, 2, 3.

PAROL CONTRACT.

1. Where the bill alleges a parol contract to purchase land at a sheriff's sale, for the benefit of the defendant in execution, an answer denying the contract will be good without setting up the statute of frauds. The bar to the complainant's suit is then complete, because no proof of the parol contract can then be admitted, such proof being illegal by the statute. *Wakeman* v. *Dodd*, 564

2. The jurisdiction of equity to enforce a parol contract of this kind, rests upon the ground of fraud. The cases wherein such contracts have been enforced, have been where the facts, aside from the contract, have been evincive of fraud on the part of the purchaser. When the

parol contract has been made use of to mislead the complainant and deceive him out of his property, relief is afforded for that reason, and not by virtue of the contract. *Ib.*

3. The purchaser in this case having been, at the time of the foreclosure and sale, the complainant's confidential adviser in regard to the business and suit, was disabled by such fiduciary relation from becoming a purchaser for himself. He must be held to have acted as her trustee, and be decreed to account. *Ib.*

See GRANTEE AND GRANTOR, 5.
SPECIFIC PERFORMANCE, 4.
TRUST AND TRUSTEE, 17.

PAROL EVIDENCE.

See CONTRACT, 6.

PARTIES.

1. A foreclosure suit is not a proper proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor. *Wilkins* v. *Kirkbride*, 93

2. Remainder-men who have not joined in a mortgage in fee, made by the life tenant, are neither necessary nor proper parties to a foreclosure suit on the mortgage. *Ib.*

3. A decree in a foreclosure suit, where the prayer of the bill is that the mortgagor and holders of encumbrances subsequent to the complainant's mortgage, may be foreclosed of all equity of redemption in the mortgaged premises, will not bind parties who have not joined in the mortgage, holding estates in remainder created prior to the mortgage. *Ib.*

4. Remainder-men, in such case, will not be barred by estoppel, although the mortgage sought to be foreclosed assumes to convey an estate in fee, and they knew it, and were aware of the foreclosure proceedings. *Ib.*

5. Persons having a right to be heard on a vital question. must be made parties before a decree will be made. *Courter* v. *Stagg*, 305

6. To a bill against a woman as executrix, her husband is a necessary party. *Wood* v. *Chetwood*, 311

7. Where a sheriff has executed a deed to the purchaser at a sale under execution, and has received from the attorney of the plaintiffs in the judgment under which the land was sold, a receipt for the full amount bid, and delivered the deed to such attorney, he is not a necessary party to a suit by the purchaser against such attorney to compel the delivery of the deed. *Whitney* v. *Kirtland*, 333

8. A party who, though not a principal, but an agent merely, holds a deed to a purchaser at sheriff's sale, and also money equitably belonging to the purchaser, under agreement made at the time of the sale, and applicable under that agreement to the payment of the purchase money, is a proper if not a necessary party to a suit by the purchaser to compel the delivery of the deed. *Ib.*

See PRACTICE, 32.

PARTITION.

1. A voluntary partition between tenants in common, in all respects fair, equal and just, upheld, and a lien upon the lands held in common, under a judgment against one of the co-tenants, held to have been transferred to the lands conveyed in the partition to the judgment debtor. *Polhemus* v. *Empson*, 190

2. If a judgment debtor has committed waste of premises held by him and another person as tenants in common thereof, a purchaser at the sale of his interest in the property under execution on the judgment

must, in equity, accept the position of the debtor in respect to the partition; for partition in equity will be made on equitable terms and principles. *Ib.*

See PRACTICE, 1, 3.
TRUST AND TRUSTEE, 12.

PLEA.

See PLEADING, 20.
PRACTICE, 24.

PLEADING.

1. An objection to a bill filed by a corporation, that it does not aver that the complainants are a corporation, is an objection of form which cannot be raised under a general demurrer for want of equity. *Reformed Church* v. *Von Puechelstein*, 30

2. An averment of the corporate existence of the complainants is unnecessary. *Ib.*

3. A statement in the bill in reference to the execution of a mortgage by a corporation of the German Reformed Church that it was executed "through their trustees," under the "act to incorporate trustees of religious societies," *held* sufficient as a matter of pleading. *Ib.*

4. A general demurrer for want of equity overruled, with leave to file a new one, on the ground that the bill showed no title to a mortgage; unless complainants should amend. *Ib.*

5. An allegation that the purchase money of real estate sold by executors was not paid to or received by them "as executors," and that they, "as executors," received no consideration for the conveyance, is not equivalent to an averment that no consideration was, in fact, paid. *Barnes* v. *Gas Light Co.*, 33

6. If, by such allegation, the pleader intended to state that, although the consideration was paid to the executors, it was paid in such a way as that it ought not to be regarded as having been paid to or received by them in their representative or trust capacity, the facts should have been set forth so as to enable the court to determine the character of the payment. *Ib.*

7. A defendant in a suit in equity has a right to insist that he shall be distinctly and plainly informed of the nature and foundation of the claim made against him, and to be notified by the bill what he has said or done which gives his adversary a right of action against him. An assertion of a claim against the defendant, by way of inference arising out of a recital in the bill of the finding of a master under an order of reference on *ex parte* proceedings by the complainant on petition, is insufficient. *Search* v. *Search*, 137

8. No general rule defining what causes of action may be properly joined, and what cannot, can be laid down. The question is always one of convenience in conducting a suit, and not of principle, and is addressed to the sound discretion of the court. *Ferry* v. *Laible*, 146

9. Where it appears that the causes of action or claims are so dissimilar or distinct in their nature that they cannot be heard and determined together, but must be heard piecemeal, first one and then the other, a clear case of misjoinder is presented. *Ib.*

10. But where a complainant has two good causes of action, each furnishing the foundation of a separate suit, one the natural outgrowth of the other, or growing out of the same subject matter, where all the defendants have some interest in every question raised on the record, and the suit has a single object, they may be properly joined, and the objection of multifariousness or misjoinder will not be sustained. *Ib.*

11. An allegation of the bill that "a great part" of the principal of a mortgage is due, is not conclusive against complainant's claim that all of the principal is due. *Hagan* v. *Ryan*, 236

12. Such allegation is a mere averment of pleading, and is amendable. *Ib.*

13. In suits instituted for the purpose of impeaching transactions on the ground of fraud, reasonable distinctness and particularity in the averments and charges is required. *Jewett* v. *Dringer*, 271

14. The circumstances and facts constituting the usury, and not mere inferences, must be set forth is an answer setting up the defence of usury. *Leake* v. *Bergen*, 360

15. Where the defence of usury rests upon the laws of another state, the laws must be pleaded, and the pleading must set out what the laws are. *Ib.*

16. Where, in such case, an answer alleges violation of laws, the presumption is, in the absence of any averment to the contrary, that the laws are those of this state. *Ib.*

17. The parties are confined to the issues made by their pleadings in a court of equity, as much as in a court of law. *Hoyt* v. *Hoyt*, 399

18. Where the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the complainant is not, in general, entitled to a decree by establishing some one or more of the facts quite independent of fraud, which might, of themselves, create a case under a distinct head of equity from that which would be applicable to the case of fraud originally stated. *Ib.*

19. The complainant sought a decree against the holder of a bond and mortgage by assignment from the legal owner thereof, awarding them to him, on the ground of his equitable ownership of them. Demurrer to bill allowed, it not appearing thereby how complainant became entitled to the bond and mortgage, and there being no allegation that he was entitled to them at all, and it not appearing that he had not received the full benefit of the consideration of the assignment, and the allegations of fraud being general, and on information and belief merely. *Phillips* v. *Schooley*, 410

20. A plea or answer setting up usury as a defence, must state specifically the facts of the bargain. *Crane* v. *Life Ins. Co.*, 484

21. The bill in this case sought to establish a trust by virtue of an express agreement. The evidence was of a purely resulting trust, in an entirely different person, originating almost two years earlier than that stated in the bill. *Held*, that the variance between the allegata and probata was fatal to relief. *Midmer* v. *Midmer's Ex'rs*, 548

22. *Held*, that an application to amend the pleadings was properly refused below; the evidence failing to convince the judgment of the court that the complainants were entitled to any relief. *Ib.*

23. In laying acts of adultery in a bill for a divorce, the name of the person, if known, with whom the offence was committed, the city or county, and state, and the month and the year, should be stated. *Black* v. *Black*, 664

See Parol Contract, 1.
Trust and Trustee, 21.

PLEDGE.

1. *Held*, in this suit for the recovery of five hundred and fifty-eight shares of stock, pledged as collateral security for credit, that the holders were *bona fide* purchasers of the stock, without notice, for valuable consideration, to the extent of the indebtedness to them. The stock to be re-assigned only upon pay-

ment of their debt and interest, with costs of this suit. *Prall* v. *Tilt*, 393

2. In this case, the stock was the property of a deceased testator, and the executrix had power, under the will, to make advances to two of the testator's sons, by whom the pledge was made, on the representation that the stock had been assigned to them under that provision, for advances, and they accordingly presented to the pledgees the certificates of the stock and a letter of attorney to assign the stock in blank, executed by the executrix and delivered to them by her, to be delivered to the pledgees in pursuance of the agreement for credit; *held*, that the possession of the certificates and the letter of attorney were, under the circumstances, corroborations of the representations, the inquiry as to the truth of which, the pledgees had no means of pursuing. *Ib.*

POWER TO SELL.

1. A power to sell all or any portion of testator's residuary real estate, at the discretion of his executors, *held* not to be affected as to a share thereof, by a devise of that share, the testator having evidently intended that the share should be subject to the power. *Rudderow's Ex'x* v. *Nield*, 89

2. Testator authorized his executors, in their discretion, to sell all or any part of his real estate not devised by his will. He devised, and unmistakably intended to devise, all of his real estate, but he specifically devised his homestead, using the term *devise* in that connection alone, and devised all the rest of his real estate by the residuary clause, using, for the purpose, the word *give*. It was necessary to sell the real estate devised by the residuary clause, in order to execute the will and discharge the trusts thereby created. *Held*, that the power of sale was intended to apply to the real estate devised by the residuary clause. *Provost's Ex'r* v. *Provost*, 296

See Trust and Trustee, 14.

PRACTICE.

1. In partition proceedings, where an answer has been filed, the court usually determines on the hearing, on the evidence, as to the divisibility of the property. In case of default, it determines the question on the evidence and the report of a master. *Waln* v. *Meirs*, 77

2. If, on the hearing, there should be doubt as to the practicability of partition without great prejudice, the court may appoint commissioners to divide, and should they report against partition, may order sale. *Ib.*

3. An answering defendant to a bill for partition, who made no objection to an order of reference, and took part in the proceedings under the reference, *held* to have waived the irregularity, but on the day noticed for a motion to confirm the master's report, was given permission to be heard on the merits of the report, on exceptions thereto. *Ib.*

4. Where the complainant, under foreclosure proceedings, is the purchaser of the mortgaged premises, the sale may be set aside on petition; a bill is not necessary. *Meyer* v. *Bishop*, 141

5. Ordinarily, an injunction cannot be granted under a prayer for general relief; it must be the subject of a special prayer. But the bill may be so amended. *Methodist Church* v. *Conover*, 157

6. Where, on a bill for discovery and account, and general relief against an agent of the complainant and a third party, charging collusion between them, and an attempt fraudulently to obtain property of an estate held in trust by the complainant, (an officer of the court,

acting under its control and direction,) an injunction was issued against the third party, restraining him from disposing of the property sold to him by the agent, a motion to dissolve the injunction made on such third party's answer was denied, on the ground (among others) that the co-defendant, the agent, had not answered. *Jewett* v. *Bowman*, 171

7. A decree dated February 13th, 1873, and filed on that day, not being in accordance with the opinion of the court, it was ordered that it be taken from the files, and a new one was drawn under specific directions of the then Chancellor. It was presented not to him, but to his successor in office, by him signed, and then filed. Motion to take the latter decree from the files, as improvidenly signed, refused. An order should have been taken, directing the latter decree to be filed *nunc pro tunc*. Such order made, *nunc pro tunc*. *Ruckman* v. *Decker*, 244

8. An attachment as for contempt was discharged, where the complainant had failed to exhibit interrogatories within the time limited by the rule, and a long time had elapsed since the expiration of the period within which, according to the rule, the interrogatories should have been filed. *Jewett* v. *Dringer*, 271

9. An application for further time to exhibit interrogatories, not made until the making of a motion to discharge for non-observance of the rule, was, under such circumstances, refused. *Ib.*

10. The court will hold an injunction until the hearing, in its discretion. *Ib.*

11. Writ of *ne exeat* declared void for service on Sunday, and bond given thereon ordered to be canceled. *Jewett* v. *Bowman*, 275

12. A defendant is entitled to the benefit of his sworn answer to the charges of the bill upon which a *ne exeat* issued. *Ib.*

13. An injunction issued to restrain the defendant from in anywise interfering with land claimed by the bill to have been dedicated to public use, was continued to the hearing, the defendant showing no title to the property from any one in possession, nor under those in whom the title was vested. *Trustees* v. *Gray*, 278

14. An objection of non-joinder for want of a party defendant, taken at the hearing, will not lie where, so far as the complainant's rights are concerned, the interest of such party is represented by the defendants, and the presence of the absent party is not necessary to a decree against the objectors. *Swallow* v. *Swallow's Adm'r*, 278

15. A question of fact is not reviewable on the re-hearing of a decree advised by the Vice-Chancellor, unless he certify that it should be re-heard upon the evidence. *Ib.*

16. An injunction, issued to restrain defendant from taking advantage at law, of a release alleged to have been given at his own solicitation, and on what was substantially a promise that he would not seek to take advantage of it, was retained till the hearing, though the defendant had answered all the equity of the bill. *Cregar* v. *Creamer*, 281

17. An injunction will not be dissolved upon the hearing upon the bill and answer, when the answer is unsatisfactory as to any matter which is an essential part of the complainant's equity. *Gibby* v. *Hall*, 282

18. An injunction, issued on bill for account by a member of a dissolved firm against his late co-partner, restraining the latter from collecting partnership money or intermeddling with the partnership concerns, continued until the hearing; the defendant not denying

the statements of the bill, that he refuses to account, and it appearing, from written statements made by him and set out in the bill, that he has no interest in the assets, and the claims of his answer as to capital contributed by him, not being substantiated by those statements. *Large* v. *Ditmars*, 283

19. A decree of dismissal was, under the particular circumstances of this case, set aside. *Boone* v. *Ridgeway's Ex'rs*, 297

20. Though the equities of the bill be all denied, the court will, in its discretion, hold the injunction till the hearing. *Simon* v. *Townsend*, 302

21. An allegation that there is an outstanding paramount title will not enable the owner of the equity of redemption to arrest the enforcement of a purchase money mortgage. *Price's Ex'rs* v. *Lawton*, 325

22. If there has been an eviction by title paramount, or an action is pending by an adverse claimant to try the title to the mortgaged premises, the court will interfere. But where the aid of the court is sought on the ground of the pendency of such an action, the record must be produced or proof of its contents given, that the court may be advised that such is the nature of the action. *Ib.*

23. *Quære.* Whether leave would be given, on the hearing, to amend, or to file a supplemental answer to a suit for foreclosure of a purchase money mortgage, to set up a defense of eviction from the mortgaged premises. *Ib.*

24. The master having reported, in this suit for partition, that the lands could not be divided among the heirs without great prejudice to their interests, and the court being unable, upon the evidence, to reach the same conclusion, an order was made appointing commissioners to make partition among the owners, according to their respective interests, unless they should be of opinion that such partition could not be made without great prejudice, in which case they were to report to the court accordingly. *Waln* v. *Meirs*, 351

25. Motion to set aside an execution, and open decree and let in two defendants to answer, on the ground of want of legal service of subpœna upon them, and that they have lawful and equitable defences, refused as to one, because the service of subpœna upon her was substantially in accordance with the provision of the statute, and she was duly served with notice of the application for appointment of a guardian *ad litem* for her; it was allowed as to the other, because she had, in fact, no notice of the suit until after the property had been advertised for sale under the execution, in order that she might set up the defence of usury. *Wagner* v. *Blanchet*, 356

26. Stay of sale was discharged, and the proceeds of sale, after paying the principal of the complainant's mortgage (less the alleged premium) and sheriff's execution fees, were ordered to be brought into court, to abide the result of the litigation on the defence of usury. *Ib.*

27. Service of subpœnas upon defendants, by leaving copies of them with defendants' father, at work in a field near the house, on his farm where they lived with him, the defendants being both absent from home, and there being no one at the house on whom they could be served, *held* to be a substantial compliance with the requirements of the statute. *Ib.*

28. A defendant to a bill to foreclose a purchase money mortgage, set up in his answer that the complainant falsely and fraudulently represented to him at the sale, that the contents of the property were ninety-seven and forty-two hundredths acres, whereas, there were in fact only eighty-six and eighty-hundredths acres; that the price was fixed at $130 per acre, so that

the defendant was induced to agree to pay $1380.60 more for the property than he ought to have done; and further, that though the deed conveyed with full covenants, including covenants against encumbrances, there were at that time, and continue to be, two liens, under judgments, on the property. *Held*, that the question whether the defendant was entitled to deduction for the claims, could be tried under the answer, without prejudice to any right of the complainant, and without depriving him of any privilege or advantage to which he would otherwise be entitled; and hence, a cross-bill was not necessary. *Dayton* v. *Melick*, 362

29. A exchanged properties with B. Upon the property taken by B was a mortgage, from which A agreed, upon certain terms, to obtain a release. A bill was filed to foreclose the mortgage. B answered, setting up breach of the agreement by A, as a defence, alleging that he had sustained great damages by the breach, and that the mortgage should be held to be satisfied. It alleged, also, that he had complied with the terms, and tendered himself ready to do what the conduct of A had prevented his doing, in accordance with those terms. *Held*, the defence could not avail defendant, as it involved a question of damages which could only be ascertained by evidence, and in respect to which no proof had been offered. *Duryee* v. *Linsheimer*, 366

30. Substantive relief by way of specific performance of an agreement, cannot be afforded upon an answer; a cross-bill is necessary for that purpose. *Ib.*

31. Where two purchasers of different parcels of the same tract of land, joined in a bill in equity for relief against a judgment creditor seeking to subject their land to the payment of the judgment, the objection of misjoinder and multifariousness, which was not made until the final hearing, was not entertained. *Sanborn* v. *Adair*, 425

32. Where the holder of a mortgage of real estate, on which was a subsequent mortgage, brought suit on his mortgage, in this court, for foreclosure and sale of the mortgaged premises, and they were sold accordingly, but the holder of the subsequent mortgage was not made a party to the suit—*held*, that the holder of such subsequent mortgage might maintain a suit to foreclose it. *Chilver* v. *Weston*, 435

33. In such last-mentioned suit the purchaser at the former sale will be entitled to the rights of all the parties foreclosed in the former suit, and will be subrogated thereto accordingly. *Ib.*

34. He will not be allowed the costs of the former foreclosure and sale, the proceedings not binding the holder of the subsequent mortgage. *Ib.*

35. The fact that the holder of such subsequent encumbrance has waited seventeen years before bringing suit for foreclosure, will not bar him of his claim to relief. *Ib.*

36. A judgment creditor, whose claim was secured by a trust mortgage on the premises, the trustee under which was made a defendant to the suit, although the judgment creditor was not, is barred of his claim against the property by the foreclosure and sale. *Ib.*

37. Where, after such foreclosure and sale, the first mortgagee, who was the purchaser, has, at the request of the mortgagor, and to release him from liability on his bond, receipted the bond and mortgage and signed an acknowledgment of receipt of the amount of the decree, and authorized cancellation of the mortgage and decree, though the mortgage and decree were not, in fact, canceled of record, he will, nevertheless, in the subsequent foreclosure suit, be entitled to the benefit of the bond and mortgage. *Ib.*

38. On the trial of an issue at law under a bill to quiet title, it is in-

cumbent on the plaintiff (the defendant in the bill) to establish his title, as in an action of ejectment. And where the issue permits him to set up either of two different titles, his selection of one of them at the trial is binding on him, and he must abide by the result of his selection. *Powell* v. *Mayo*, 440

39. A party coming into a case by petition, by force of the forty-first section of the chancery act, is no further bound by the previous orders and proceedings in the cause that the party whose interest he has acquired would have been bound. *Guest* v. *Hewitt*, 479

40. Parties claiming an equitable lien upon rolling stock furnished to an insolvent corporation, by virtue and to the extent of advancements made on account of the same, will not be entitled to be heard upon petition, pending foreclosure proceedings upon a mortgage covering the rolling stock and all other property of the corporation, upon which rolling stock other liens are set up by answer, claimed to be paramount to the mortgage of the complainants. *Receivers, &c.,* v. *Wortendyke*, 658

See Answer.
Information.
Injunction, 8.
Ne Exeat.
Specific Performance, 7.

PREROGATIVE COURT.

See Administration, 2.

PRESUMPTION.

See Will, 19.

PRIMARY FUND.

Where a testator directs his executors to continue his business after his death, and they contract debts in its prosecution, so much and no more of the testator's assets as he has directed to be employed in the continuance of the business after his death, with the accumulations thereon, will stand charged in equity with all debts properly contracted in the prosecution of the business, and a creditor of such fund may look to it in the first instance for the payment of his debt, and before exhausting his remedy against the executors personally. *Ferry* v. *Laible*, 146

PRINCIPAL AND AGENT.

It was held, under the evidence, that the attorney was authorized to make the contract for the defendant. *Lewis' Adm'r* v. *Reichey*, 240

See Vendor and Purchaser, 1, 2.

PROBATE.

1. Where probate of a married woman's will is granted, limited to her separate estate, and a grant of administration *cœterorum* issues to the husband, both the letters testamentary and of administration are valid and consistent with each other, and there may be a question for a court of construction, whether certain property in controversy is included in the probate or covered by the grant of administration. *Ryno's Ex'r* v. *Ryno's Adm'r*, 522

2. But there cannot be two legal repsentatives of the same decedent, one claiming under general letters testamentary, the other under general letters of administration, both granted by the same tribunal having full jurisdiction in the premises. Such claims are totally inconsistent and irreconcilable, and cannot both be valid. *Ib.*

3. So long as a probate remains unrevoked, the seal of the Ordinary cannot be contradicted; neither can evidence be admttted to impeach it in a temporal court. *Ib.*

4. If the probate of a will is irregular or voidable for any cause, the remedy is by appeal to the Ordi-

nary, or by proceeding for the revocation of the letters. *Ib.*

5. By a grant of probate, the power of the surrogate is exhausted and his jurisdiction over the subject matter at an end. His decree, until reversed, is both conclusive and final. A subsequent grant by him of general letters of administration respecting the same property, is absolutely void, and confers no rights upon the administrator. *Ib.*

PROCESS, SERVICE OF.

See PRACTICE, 27.

PROMISE.

See CONTRACT, 1.

PURCHASER.

1. Where executors are authorized to sell the real estate of their testator at their discretion, and the sale is to be made with a view to the investment of the net proceeds on a special trust, the purchaser is not bound to see to the application of the purchase money. *Barnes* v. *Gas Light Co.*, 33

2. The rule in equity is well established, that where mortgaged premises are sold in separate parcels successively to different purchasers, with covenants against encumbrances, the parcels are liable to sale to satisfy the mortgage, in the inverse order of their sale. But the rule will not be applied in any case where its application would work injustice. *Hill's Adm'rs* v. *McCarter*, 41

3. A conveyance of part of mortgaged premises, expressly subject to existing mortgages, is an assurance to the subsequent purchaser of the other parts, that the property will be subject to its due proportion of the burden of such mortgages. *Ib.*

4. Where part of mortgaged premises is conveyed subject to mortgages thereon, and the rest of the property is sold and conveyed in fee in parcels to other persons, the part first conveyed is bound to pay its due proportion of the mortgages, according to the comparative value of the respective portions at the time of its conveyance. *Ib.*

5. A purchaser of part of mortgaged premises is not entitled to the benefit of a release by a prior mortgagee from the lien of his mortgage, of another part of the premises, when the mortgagee had not actual notice of the conveyance at the time of making the release. *Ib.*

6. As between a purchaser for value, holding under a deed with the usual full covenants, including warranty general, and a prior mortgagee, the right of such purchaser to require the mortgagee to have recourse for the satisfaction of the mortgage to the part of the mortgaged premises owned by the mortgagor, before looking to the part conveyed to him, is undoubted. *Harrison* v. *Guerin*, 219

7. If the mortgagee, in such case, with knowledge of the rights of the purchaser, and without his assent, releases from his mortgage any part of the mortgaged premises which is, in equity, liable for the mortgage debt before recourse can be had to the land of such purchaser, the mortgage will, as against the latter land, be discharged to the extent of the value of such released land at the time of the release; and if its value be equivalent to the whole amount of the mortgage, the land of the purchaser will be wholly discharged from the mortgage in consequence of such release. *Ib.*

8. An attorney in fact, who, under agreement with A's creditors to undertake at his own expense the collection of their respective claims against A for a contingent compensation obtained judgments upon the claims, and purchased the real estate of A at sheriff's sale under executions on the judgments, occu-

pies, in a suit to compel the delivery of the deed for the property under his agreement of purchase signed by him at the sale, the same position that any purchaser who was an entire stranger to the proceedings and claims would occupy, and has the right to maintain such suit accordingly. *Whitney* v. *Kirtland*, 333

9. Such party not asking the advantage of his bargain with the creditors, but merely acting upon his rights as a purchaser at the sheriff's sale, is not liable to the defence that he is guilty of champerty and maintenance. *Ib.*

10. A person who, without notice except from the record, purchases land of one who holds it, in fact, by a defeasible title, but whose title, according to the record, is indefeasible, is, as between him and a subsequent purchaser of another part of the property, entitled to the equity which charges lands consisting of different parcels, subject to a general encumbrance, with the payment of the encumbrance, in the inverse order of the alienation of the several parts. *Sanborn* v. *Adair*, 425

11. Where a purchaser from a trustee is not bound to see to the application of the purchase money, his title to a mortgage can be defeated only by evidence showing that at the time of the assignment he knew that the trustee contemplated a breach of trust, and intended to misappropriate the money, or was, by the very act, applying it to his own private purpose. *Foster* v. *Dey*, 599

See CERTIFICATE OF INDEBTEDNESS, 2.
MORTGAGE, 15.
PAROL CONTRACT.
PRACTICE, 33.
SPECIFIC PERFORMANCE, 6.
TRUST AND TRUSTEE, 15, 16.
VENDOR AND PURCHASER, 1 3.

PURPRESTURE.

See DELAWARE RIVER, 5.

RE-ARGUMENT.

See RE-HEARING.

RECEIVER.

1. An application by receivers of an insolvent railroad to issue certificates of indebtedness to cover certain expenses, and an order of the court thereon accordingly, does not bind the receivers or the trust fund to pay particular items of such expenses, the propriety of whose payment was not before the court. *Coe* v. *Midland Railway Co.*, 37

2. Application to compel the receivers of an insolvent railroad company to deliver to creditors certain certificates of indebtedness, which the receivers were authorized by this court to issue, and which they had offered to such creditors in payment of rolling stock, and which the creditors had accepted, refused; the creditors having had it in their power to retake their property at any time, and it appearing that it would have been to the disadvantage of the trust fund for the receivers to have paid the contract price. *Ib.*

3. Compensation of receivers of an insolvent railroad company. *McArthur* v. *Montclair R. Co.*, 77

4. The bill in this cause was filed for relief against alleged fraudulent acts of a board of directors, alleged to be unlawful, and to have existed merely by usurpation. The property of the company requiring to be preserved pending the litigation, and the conduct of the president and his associates in the direction, having been such that they could not be permitted to retain control of the affairs of the company, a receiver was appointed. *Avery* v. *Blees M'f'g Co.*, 412

5. The ordinary duties of a receiver in a foreclosure suit are in aid of the mortgagee, by collecting the rents and preserving the property from loss and decay. In railway

foreclosures, his duties, though more extensive, are primarily the same; the appointment is presumed to be for the benefit of the mortgagees and for the protection of their interests. *Receivers, &c.*, v. *Wortendyke*, 658

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 6.

RE-HEARING.

1. The power to grant re-arguments should be but sparingly exercised, and perhaps in no case, unless the court itself intimates a desire for the argument to be repeated. *Cassedy* v. *Bigelow*, 505

2. On a second appeal in the same cause, the points already decided by this conrt are not open to debate, unless by the special order of this court. *Ib.*

See REVIEW.

RELATOR.

See INFORMATION.

RELEASE.

See PURCHASER, 7.

REMAINDER-MAN.

See PARTIES, 2, 4.
TAXES, 3, 4.

RENTS.

Where several persons liable for rents permit one of their number to take sole actual possession of the property charged with the rents, and use it, all are chargeable. *Swallow* v. *Swallow's Adm'r*, 278

REPEAL.

See REVISION.

REVERSION.

See LANDS UNDER WATER, 1, 6.

REVIEW.

Where a cause has been defended below and comes up for review and a point is made which was overlooked, and which could not be obviated in the court below by proof or amendment, the court, on appeal, will not refuse cognizance of such point and send it back to the Chancellor for a re-hearing, but will hear and decide it. *Woodward* v. *Bullock*, 507

See PRACTICE, 15.

REVISION.

A law which, by a revision, is repealed, and at the same time thereby re-enacted, does not, for a moment, lose its binding force. *Randolph* v. *Larned*, 557

SALE OF LAND.

1. The "act relative to sales of land under a public statute or by virtue of any judicial proceeding," requires the first publication of the notice in the newspapers, to be made four whole weeks next preceeding the day appointed for the sale. *Parsons* v. *Lanning*, 70

2. Offers to pay more for property than it brought at a public sale, are, in themselves, no grounds for setting aside the sale. *Cline* v. *Prall*, 415

3. The right of the Court of Chancery to set aside sales made by its officers, cannot be doubted upon a proper case made by petition. *Woodward* v. *Bullock*, 507

4. Where the purchaser and sheriff stated to bidders the amount of certain legacies charged on the lands, at fixed amounts, when the payment was contingent, and the sums not apportioned between dif-

ferent parcels of land, the sale will be set aside. *Ib.*

5. A judicial sale will be set aside where there is surprise or misapprehension created by the conduct of the purchaser, or of the officer who conducted the sale. *Ib.*

See ASSESSMENTS FOR STREET IMPROVEMENTS, 2.
PURCHASER, 2.
SHERIFF'S SALE.

SCRIP.

See CERTIFICATES OF INDEBTEDNESS.

SEPARATE ESTATE.

A wife's separate estate will not be charged with her husband's debt, merely because she stood by, in silence, while her husband represented himself to be the owner of such estate as an inducement to the creditor to give the credit, and by such representation deceived the creditor. *Carpenter* v. *Carpenter's Ex'rs,* 502

SETTLEMENT OF ACCOUNTS.

See ADOPTED CHILD, 3.
JURISDICTION, 2.

SHERIFF.

1. A sheriff cannot constitute a special deputy to serve even an original writ, by a mere verbal command, without delivery of the writ. *Meyer* v. *Bishop,* 141

2. A special deputy of a sheriff is in no sense a public officer, but merely the private agent or officer of the sheriff, and neither his appointment nor his relation to the sheriff can be presumed from his acts. *Ib.*

SHERIFF'S SALE.

1. Equity will not give any aid not demanded by strict rules, to a party seeking to set aside a sheriff's sale under an execution issued out of this court, where, since such sale, he has procured a sale of the same premises to be made under a judgment recovered by himself, while he was disputing the validity of such prior sale, and without the slightest notice to any of the persons interested, except such as was given by adjournment from week to week for more than a year. *Meyer* v. *Bishop,* 141

2. A general verbal direction by a sheriff to an assistant in his office, to make the sales and adjournments necessary on a given day, confers no authority to make a sale, and a sale made under such a direction will be set aside. *Ib.*

3. In the absence of statutory provision, the general rule is that judicial sales shall be made in the presence and under the immediate supervision of the officer designated in the decree commanding the sale. The statute (*Revision* 767), however, held to be declaratory upon the subject. *Ib.*

4. Sheriff's sale set aside on the ground of surprise, upon terms. *Van Winkle* v. *Stearns,* 238

5. Sheriff's sale under foreclosure set aside upon terms, on motion of complainant in the same proceedings, on ground of gross inadequacy of price and surprise; the failure of himself or solicitor to be present and look after his interests, being satisfactorily accounted for. *Rea's Ex'r* v. *Wheeler,* 292

6. Sheriff's sale set aside on the ground of surprise, such as to entitle the petitioner (mortgagor) to the aid of equity, upon terms. He was permitted to redeem complainant's mortgages by paying the amount due thereon, with execution fees, and complainant's costs

of this application, within thirty days from the time of entering the order upon this decision. *Large* v. *Ditmars*, 406

7. Application to set aside sheriff's sale because of his alleged refusal to adjourn it, that the petitioner (a subsequent mortgagee) might have an opportunity to ascertain the amount of the encumbrances, subject to which the property was to be sold, refused; it appearing, by the affidavits submitted in opposition to the application, that such reason for adjournment was not given, and that a written statement of the exact amount due on those encumbrances was exhibited at the sale, and that pains were taken to give all desired information on the subject; the sale also appearing to have been conducted fairly, and every effort being made to make the property bring a good price, and the property appearing to have brought such a price. *Cline* v. *Prall*, 415

SPECIFIC PERFORMANCE.

1. To constitute a misrepresentation which will prevent a decree for specific performance, the statement in question must be so material to the contract built on it, that, if the statement be false, the contract becomes one which it would be unconscionable for the party who made the statement, to enforce. The misrepresentation must be shown to have operated to the prejudice of the defendant. *Scott* v. *Shiner*, 185

2. A description of property in a receipt, as follows: "Received, Newark, N. J., December 9th, 1874, of G. L., the sum of $500, in full for title to property held by H. R., on Bruce street and Thirteenth avenue, and South Orange avenue, in city of Newark, N. J., which said title is held by said R. by declaration of sale from mayor and common council of Newark," (signed) A. M. H., attorney for H. R., &c., was held sufficient to warrant a decree for specific performance, *Lewis' Adm'r* v. *Reichey*, 240

3. Where, from the nature of the relief sought, performance of a contract *in specie* will alone answer the ends of justice, equity will decree specific performance. *Shimer* v. *M. C. & B. Co.*, 364

4. Decree for specific performance of an oral agreement for the conveyance of lands, refused, for want of certainty in the agreement, and on the ground that the claims on which the complainant based his right to the relief were not substantiated by the evidence. *Clow* v. *Taylor*, 418

5. The defendant consenting to the stating of an account of the transactions between himself and the complainant, it was so ordered. *Ib.*

6. Where A makes a contract with B and C for the sale to them of his real estate, and dies before the deed is to be executed, and on the day the deed is to be delivered the heir-at-law and the widow refuse to join in executing the conveyance, a decree will not be made to compel specific performance by the purchasers, on a bill filed by the administrator of A, for the benefit of the widow, (creditors not being interested in the litigation,) after the land was depreciated in value. *Reddish* v. *Miller's Adm'r*, 514

7. *Quere:* Has the widow any remedy against the heir-at-law? The bill dismissed only as to appellants, and retained as to the other parties, in order that she may raise that question. *Ib.*

See CONTRACT, 2, 3, 5.

STALE CLAIM.

See TRUST AND TRUSTEE, 8, 12.

STAY OF SALE.

See PRACTICE, 26.

STOCK.

See MORTGAGE, 4, 10, 11.
PLEDGE.

SUBROGATION.

1. Equity will, as a matter of course, and without any agreement to that effect, substitute, in the place of a creditor, a person who advances money to pay the debt for which he is bound as surety. *Coe* v. *Midland R. Co.*, 110

2. A director of an insolvent railroad company is entitled to reimbursement out of the funds in the hands of a receiver, for advances made by him to save the property against an unquestionable lien. To the amount of such advances, his claim is paramount to that of mortgagees whose encumbrances are subordinate to the lien. *Ib.*

3. A person who pays a debt of a railroad company, incurred under contracts of purchase for rolling stock, which, if not paid, would entail serious loss and embarrassment to the company, under agreement with the company for security for repayment by subrogation to the rights of the vendors under the contract, is entitled to be subrogaged to the rights of the vendors to the amount of his advances. *Ib.*

4. That the whole debt has not been paid under the contract, is no objection to the subrogation of the party making such payment. Such subrogation is subject to the rights of the vendors under the contract, but is superior to any claim of the receivers upon the property, in respect to payments made by them under the same contract. *Ib.*

5. Conventional subrogation can only result from an express agreement either with the debtor or creditor. It is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he should be subrogated to the rights of the creditor. *Receivers, &c.,* v. *Wortendyke*, 658

6. The right of subrogation cannot be enforced until the whole debt is paid. And until the creditor be wholly satisfied, there ought and can be no interference with his rights or his securities, which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim. *Ib.*

See LIEN, PRIORITY OF, 1.
MORTGAGE, 7.
PRACTICE, 33.

TAXES.

1. In the absence of an express legislative declaration, that a tax levied against a mortgagor, on mortgaged premises, subsequent to the execution and registry of the mortgage shall be the primary lien and paramount against the mortgage, township authorities have no right, in a case where it is admitted the mortgaged premises are insufficient to pay the mortgage debt, to deprive the mortgagee of any part of his security. *Dows* v. *Drew*, 442

2. A township collector was restrained from selling, under a warrant issued under the thirty-fourth section of the act concerning taxes, any part of the standing timber on mortgaged premises, admittedly insufficient to pay the mortgage debt; the tax being levied subsequent to the registry of the mortgage. *Ib.*

3. A decree of the Orphans Court, which, in a case where, by will, a fund was given for life to one, with remainder to another, directed the executor to set aside, out of other moneys of the remainder-man, a fund to pay the taxes on the first-mentioned investment, reversed. *Holcombe* v. *Holcombe's Ex'rs*, 473

4. Where a fund is given for life to A, with remainder to B, the former is bound to pay the annual taxes. *Ib.*

TENANT IN COMMON.

1. A tenant in common is not chargeable to his co-tenant for the latter's share of the rental value of the premises, which are equally open to and may be occupied by both. *Buckelew* v. *Snedeker*, 82

2. A tenant in common who cultivates the land and receives the entire proceeds, is chargeable to his co-tenant for his share of the profits. *Ib.*

TENANT FOR LIFE.

See TAXES, 3, 4.

TESTAMENTARY CAPACITY.

1. A testator, sixty-seven years of age at the time of the execution of his will, and somewhat enfeebled by disease, was held, under the evidence in the cause, to have been possessed of testamentary capacity. *In re Wintermute's will*, 447

2. A failure of memory in stating, as a witness in a suit, nine months after the execution of the will, and when enfeebled with illness so severe as to endanger his life, that he had given his wife a part of his personal estate, when he had given her none, *held* to be no criterion of the condition of testator's mind at the time he executed the will. *Ib.*

See WILL, 20.

TITLE, ACT TO QUIET.

See ASSESSMENT FOR STREET IMPROVEMENTS, 2.

TITLE, CLOUD ON.

See ASSESSMENT FOR STREET IMPROVEMENTS, 2.

TRUST AND TRUSTEE.

1. A trust estate, held under a deed of conveyance not declaring the trust, protected against a creditor of the trustee. *Bunn* v. *Mitchell*, 54

2. Where a purchase is made by several persons representing a voluntary association of christians, for the common benefit of all the persons composing the association, and the purchase money is paid, and possession of the land given, equity raises a promise by the vendor to make a title, either to the persons making the payment, or to the corporation, if one be created. *Methodist Church* v. *Conover*, 571

3. In such case, the vendor, as to the title, becomes a trustee for the purchasers; and they being the mere agents of the voluntary association, the moment the association is incorporated, it has a right to a conveyance from the vendor. *Ib.*

4. Where, after a purchase of lands by a voluntary association, and after the registry of their deed, but before the incorporation of the association, a judgment is recovered against the vendor, any rights acquired under the judgment and levy are subject to the trust in favor of the association, and the judgment creditor will be perpetually enjoined from accepting a deed, or attempting to sell by virtue of his judgment. *Ib.*

5. A sale by a trustee to himself, of trust property, is always voidable at the option of the *cestui que trust.* *Romaine* v. *Hendrickson's Ex'rs*, 162

6. A trustee who has taken a conveyance of lands of his testator from a purchaser thereof at a sale, in the notice of which such trustee joined with his co-trustees, and declared with them, by their conditions of sale, the terms upon which it must be made (thereby accepting the trust), cannot relieve himself from liability to his *cestui que trust* for the profits which he made on a re-

sale of those lands, on the ground that he did not take out letters testamentary under testator's will. *Ib.*

7. An application to compel a trustee for mortgage bond-holders to redeem certain property, refused; the necessities of the trust estate not being regarded by the court such as to make it its duty to make the order, and an agreement, which was the foundation of the application, being held to be merely executory, essentially outside of the main issues in the cause, and practically for the benefit of only the parties who may enter into it, without regard to the interests of others interested in the trust estate. *Williamson* v. *N. J. S. R. R. Co.*, 225

8. A stale claim by the children of deceased executors against a surviving executor, sought to be enforced more than twenty years after the occurrence of the transactions out of which his alleged liability arose, and not till after the death of the executor, who was the only witness who, besides the defendants, could speak of the transactions which are called in question, is not favored in a court of equity. *Barnes* v. *Taylor*, 259

9. Upon such a claim there should be an offer to account for so much of the estate as came into the hands of the deceased executors. *Ib.*

10. Evidence of parol admissions by defendant that he had purchased certain lands for the benefit of the complainants, is insufficient under the statute of frauds, to create a trust as to such lands in their favor, without proof of an agreement made before the sale. *Ib.*

11. A trust *e malificio*, and therefore constructive, is barred by the statute of limitations. *Ib.*

12. A trust was sought to be decreed in favor of the complainants, in lands purchased by the defendant at a sale under foreclosure proceedings more than twenty years before the filing of the bill, and over which, during all that time, the defendant had openly exercised acts of exclusive ownership, in the knowledge, and without challenge on the part of the complainants. On the ground of the unsatisfactory evidence of an express trust, and of the absence of evidence of any trust from the relation of the parties, the relief was denied, except as to a certain part of the property, which proved not to have been covered by the sheriff's deed to the defendant. As to that part, a partition was decreed, and an account of the rents and profits for six years next preceding the filing of the bill. *Barnes* v. *Taylor*, 266

13. Where there is a devise to trustees, one of whom is to take a beneficial interest in the trust property, he takes a legal estate to the extent of such interest; and that interest may be seized and sold under execution. *Bolles* v. *Trust Co.*, 308

14. Such estate, where a power of sale is given by the will to the trustees, to be exercised in their discretion, is held subject to such power. *Ib.*

15. Where the trust under which property is held, prohibits the sale or mortgaging of the trust estate by the trustee, except for the benefit of the *cestui que trust*, it is incumbent on a purchaser or mortgagee from the trustee, to look to the application of the purchase or mortgage money. *Wagner* v. *Blanchet*, 356

16. But where the trustee holds the property in trust for his wife and her heirs, the fee of the land is hers in equity, and a conveyance by the trustee and his wife, either absolute or by way of mortgage, is in accordance with the trust, and devolves on the purchaser or mortgagee no obligation to see to the application of the purchase or mortgage money. *Ib.*

17. An unwritten contract for the conveyance of lands, made between a debtor, who has only an equitable estate in the lands, and a third

person, who, under the contract, is put in possession of the lands by the debtor, with consent of the owner of the legal estate, will give to the third person equitable rights superior to those of the debtor's subsequently attaching creditors. *Jamison* v. *Miller*, 586

18. The attaching creditors of a merely equitable owner, cannot set up claims which, at the time of the attachment, it would have been inequitable for him to advance. *Ib.*

19. An express trust, although by parol only, may prevent a resulting trust. *Ib.*

20. An express trust actually created before the issuing of an attachment against the trustee, may be lawfully declared by him afterwards, so as to defeat the attaching creditors. *Ib.*

21. An express trust may be lawfully manifested by an answer in chancery, though, in that regard, not responsive to the bill; but in such case the fact of the trust must be proved against the complainant, *aliunde*. *Ib.*

See WILL, 8.

UNDUE INFLUENCE

See WILL, 21.

USURY.

1. The laws of this state on the subject of usury, do not apply to a transaction having its whole inception and completion in another state. *Leake* v. *Bergen*, 360

2. An agreement resulting from an offer made by B, and accepted by G, in the following terms: "I will lend you $5000, without interest, and will aid you in every way possible; will attend to your finances and books, and help you all I can, if you will give me the choice of rooms, and board for myself and family," &c., *held* to be not usurious, either on its face or upon the testimony. *Gillette* v. *Ballard*, 489

3. A chattel mortgage given to secure the $5000, and calling for interest thereon, while B was receiving compensation for its use under the original agreement, *held* not to be usurious, it appearing that the mortgage had been so drawn through inadvertence, and not as the result of a corrupt agreement. *Ib.*

See PLEADING, 14, 15, 20.
PRACTICE, 25.

VENDOR AND PURCHASER.

1. The rule, that notice of facts to an agent is constructive notice thereof to the principal himself, has no application to a case of a sale to a corporation, by its president, of property purchased by him in his private capacity; in such a transaction, the officer, in making the sale and conveyance, stands as a stranger to the company. *Barnes* v. *Gas Light Co.*, 33

2. When an officer of a corporation is dealing with them in his own interest opposed to theirs, he must be held not to represent them in the transaction so as to charge them with the knowledge he may possess, but which he has not communicated to them, and which they do not otherwise possess, of facts derogatory to the title he conveys. *Ib.*

3. Actual possession by the *cestui que trust* is constructive notice to a purchaser, that there is some claim, title, or possession of the property adverse to his vendor, and this is sufficient to put him upon his inquiry. *Johns* v. *Norris*, 485

See TRUST AND TRUSTEE, 2-4.

VOLUNTARY ASSOCIATION.

Where certain members of Teutonia Lodge, No. 177, D. O. H., withdrew from the jurisdiction of the grand lodge of this state and surrendered their charter, and formed a new lodge, adopting the same name, and other members continued steadfast in their allegiance, and the charter was duly delivered to them as the lodge, that body which continued true to its allegiance and holds the charter, was, as to certain property of the original lodge, taken by the members who withdrew, adjudged to be Teutonia Lodge, No. 177, D. O. H., and as such, to be entitled to the property of the society. *Altmann* v. *Benz*, 331

See TRUST AND TRUSTEE, 2–4.

VOLUNTARY CONVEYANCE.

Actual fraud is necessary to invalidate a voluntary conveyance made by one free from debt. *Carpenter* v. *Carpenter's Ex'rs*, 502

WATER WAY.

See EASEMENT.

WAY, (PRIVATE.)

See BONA FIDE PURCHASER.

WILL.

1. Where a bequest was made to a Sunday school connected with an incorporated church, the amount to be placed at interest on bond and mortgage so that it might receive annually the interest for the purpose of procuring books for said school, the court appointed the church corporation trustee to receive the money bequeathed, on the trust declared in the bequest. *Mason's Ex'rs* v. *M. E. Church*, 47

2. A bequest to A, B and C and their heirs, with direction that the money be invested, and the interest "be divided equally between them forever," is a gift to A, B and C as tenants in common, and there is, therefore, no survivorship. The fact that the gift is to them and their heirs, would not limit their interest in the fund to a life estate, unless there were a clear expression of intention that the gift to them should be only a life estate. *Ib.*

3. The gift of the procedure of a fund, without limit as to time, or further disposition of the fund or interest, is a gift of the fund itself. *Ib.*

4. A bequest by codicil to a legatee named in the will "in full" of all bequests to such legatee, *held* to be "in lieu" of such bequests. *Ib.*

5. Where, after a gift by his will to A, B and C, absolutely, the testator, by a codicil, gives to A a legacy in full of all bequests to him, thereby revoking the bequest to A of his share in the original gift, such revocation, and the fact that that share is not otherwise disposed of, will not give to B and C the entire fund; they will each be entitled to one-third of it only. *Ib.*

6. A gift to A and her children of "$1000, to be invested on bond and mortgage of real estate, and the interest to be collected and paid over to them annually, and equally divided between them," is a gift of the fund absolutely, and the legatees take as tenants in common in equal shares, the children each taking an equal share with their mother. They are entitled to be paid at once, notwithstanding the direction to invest. *Ib.*

7. A bequest to two townships of a fund to be invested on bond and mortgage for the use and benefit of the inhabitants of those townships, the interest to be divided between the townships in proportion to the number of inhabitants in each, for the purpose of educating their poor orphan children, and in case the interest should not all be consumed for this purpose, the balance to be appropriated annually to the poor

widows of the township, is a charity which this court will sustain and effectuate. *Ib.*

8. The township corporations are not proper trustees of the fund. A trustee will be appointed by the court. *Ib.*

9. A gift of a fund to the New Jersey State Lunatic Asylum, the interest to be appropriated annually under the superintendence and direction of Dr. B., the superintendent of the institution, and his successors in office forever, for the purchase of books and papers for the benefit of the inmates, was directed to be paid to the treasurer of the institution. *Ib.*

10. Where a testator ordered his executors to pay, at his son's death, to the children of his son, if the latter should leave any children, a sum of money, the executors were ordered to invest the money, and to pay the interest, during the life of the son, to the residuary legatees. *Woodward's Ex'rs* v. *Dunster*, 84

11. Under a testamentary direction, "that if either of testator's sons should die without leaving lawful issue, the *widow of the decedent* should receive one-third of the rents of the real estate devised to him by the will," &c., *held*, that the benefit of the provision not being restricted to a wife living at the time of the making of the will, or at testator's death, that person who was the wife at the time of the son's death was entitled to the rents. *Swallow* v. *Swallow's Adm'r*, 278

12. The intention of the testator is the law of wills, and where that intention can be ascertained, if not in violation of the rules of law, it will prevail over technical rules, and words in their technical or even ordinary meaning. *Provost's Ex'r* v. *Provost*, 296

13. Testatrix devised her residence to her daughter, for her sole use and benefit, for so long a time as she might remain single and unmarried, or until such time as, in her judgment, she might deem it advantageous to sell and dispose of the same. The daughter is married. *Held*, upon bill filed for construction of the will, that the intention was that the daughter should have the residence until she either married or deemed it advantageous to sell, whichever should first happen; and the daughter having married, the executors have power to sell, and it is their duty to exercise it. *Courter* v. *Stagg*, 305

14. Plain, clear words, read in their ordinary sense, must always govern in searching for the intention of a testator, unless repugnant to other words, equally plain and clear, in another part of the same will. *Ib.*

15. Courts sometimes, in attempting to give effect to a testator's intention, displace "or" and substitute "and," and also put "or" where the testator has written "and," but such departures from the words of the will are never made except it is clear they are necessary to give effect to a clear purpose of the testator. *Ib.*

16. All doubts must be resolved in favor of the testator's having said exactly what he meant. *Ib.*

17. That testator made no provision for his wife, is no reason for refusing probate on the ground of unnaturalness, especially when it appears that she had been cruel and unkind to him, and driven him from the house, and had surreptitiously taken papers, notes, and other evidence of indebtedness, and was holding them, and refused to give them up to him at the time of the execution of his will. *In re Wintermute's will*, 447

18. The effect of the statement in the attestation, that the will was signed in the presence of the testator, is to throw the burden of proving that it was not so signed, upon the opponents of the will. *Tappen* v. *Davidson*, 459

19. Where it is, at most, doubtful on the evidence, whether the will was not signed in testator's presence, the presumption arising from the statement of the attestation clause is not overcome. *Ib.*

20. A testator, by his will, gave power to his son, a semi-imbecile, to make a testamentary disposition, under a certain restriction, of the property given to him by the will. *Held*, that this fact not only did not establish the testamentary capacity of the son, but was to be treated as the opinion, merely, of the father in regard to the son's competency to make a will. *Held* also, that the will of a person *non compos mentis*, could not be sustained as the execution of a power. *In re Alexander's will*, 463

21. The will under consideration *held* to have been the result of undue influence. *Ib.*

22. Though a will must be construed as an entirety, yet the legal construction of one section cannot be controlled by guesses as to the intent of the testator, arising from the disposition of his property in the remaining sections. *Gulick* v. *Gulick's Ex'rs*, 498

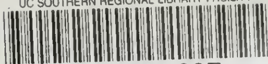
23. Where land was devised to an executor in trust to permit the testator's son-in-law to have the possession and use until his youngest granddaughter should attain the age of twenty-one, and then to sell it and distribute the proceeds, "share and share alike," among his grandchildren, *held* that such grandchildren took a vested estate on the death of the testator. *Post* v. *Herbert's Ex'rs*, 540

24. *Held*, further, that the grandchildren took as individuals, and not as a class, by force of the direction to divide among them "share and share alike." *Ib.*

25. The twenty-fourth section of the will of C. S. M. was, in part, as follows: "My will is, and I do direct, that during the minority of my daughter Hattie, the income of the estate which I have hereinbefore bequeathed to her and to her use, shall be paid to her mother, she remaining my widow and unmarried, for the support, maintenance and education of said daughter," &c. *Held*, that under this clause alone, upon fulfillment of the trust, no account can be demanded of the widow. *Macknet* v. *Macknet*, 594

26. The ninth section of the will, however, provides "that all provisions made for the benefit of my wife, are to be in lieu and satifaction of her right of dower, and all other interest she may have in my estate, her acceptance of such provision by her to be determined by her relinquishment of dower in three months after my decease." She did not relinquish her right of dower. *Held*, that the widow's right to receive the income under the twenty-fourth section, was substantially a gift to the mother, subject to a charge for the support, maintenance and education of the child, and her right to the surplus is defeated by the ninth section. *Ib.*

See PROBATE.


UC SOUTHERN REGIONAL LIBRARY FACILITY
D 000 551 687 7