W. S. Sharp Printing Co., 21 West State St., Trenton, N. J.

COURT OF ERRORS AND APPEALS

ERWIN DAVIS
vs.
JENNIE M. FLAGG.

Mr. Cortlandt Parker

~~*Brief*~~ *for Appellants.*

The doctrine established by the order from which appeal is taken to this court is this, that a Court of Chancery will take notice of the motions with which a contract is sought to be enforced, and that while it will abstain on principle and authority from any such thing as ordering a man to assign his mortgage, it yet will decree that if he does not, he shall not have his money.

This, upon the high moral principle that it is right for a court to do indirectly what it has no right to do directly.

And the court in carrying out this judicial morality goes farther. It forgets to give the creditor whose motives it impugns, any *locum penitentiæ*. It says do this within ten days, or you shall lose the remedy provided by law. To-day, Mr. Davis cannot, through any action of the court, have the remedy of foreclosure. He cannot

go on with the suit he has brought. It is indefinitely stayed.

"The LEGISLATURE shall not pass * * * * any law impairing the obligation of contracts or depriving a party of any remedy for enforcing a contract which existed when the contract was made." N. J. Constitution Article IV., Section VII., Pl. 3.

But the Court of Chancery may deny the acknowledged obligation arising upon a contract, and may "*stay*" the remedy for enforcing it, because "the evidence shows beyond all doubt that the mortgage in suit was purchased and suit brought thereon for some other purpose than collecting the money due on it."

It is respectfully submitted that the motive with which a party takes or acquires or enforces a mortgage is a matter with which a court has nothing to do, that to inquire into such motive is no part of its office, that its only office is to enforce whatever civil rights, through contract or otherwise, are asserted before it, and that the refusal of that duty on the ground that the plaintiff has some ill motive is assuming a censorship as to private morals, which has not been conferred upon it.

Before looking into authority, let us consider the matter on principle.

May 21st, 1877, the two defendants, to secure a debt of $4000, made a bond to the Mutual Life Ins. Co. of New York, conditioned to *pay* that sum to said company or its *assigns* in one year, with interest; and, to secure it, conveyed certain property to said company and its *assigns* in fee, with a proviso, however, that if the defendants should pay the money according to the condition then the estate granted should become void.

The complainant is the *assignee* with whom this contract was made. There is no pretence but that it was a lawful contract nor that it was not assigned for lawful consideration.

But the defendant says an offer has been made to buy

this contract of the complainants, and he would not sell it. He bought it in the interest of a second mortgagee. Nay, it is the second mortgagee really who bought it. *Ergo*, a new feature is added to this contract, to wit, that at the request of the defendant or of some friend of hers, the mortgage must be assigned on demand or else chancery will stay the suit.

It is immoral, or at least inequitable, to help a second mortgagee, or for a second mortgagee to help himself. But it is not immoral or inequitable for any one to help one who defends against a second mortgagee. Chancery will favor the third party who helps the defendant, but will frown on him who helps the complainant, nay, will absolutely say to him, assign your security or lose its value.

Suppose the proposed assignee had been gratified and that Mr. Davis had taken his money and assigned. And then suppose that new asignee had sought to go on with the suit, and had conspired as he might have done, to oppress the second mortgagee by procuring a sale at an unpropitious time or in some other way in which a first mortgagee may attain advantage, what would the court do then?

Upon what unknown ocean does not the court enter, when it undertakes to decide, according to the morals, the *bonos mores* of litigants?

The circumstances recited in this case suggest, without difficulty, the motives which might underlie the conduct of the complainant and of Mr. Baldwin, the second mortgagee.

Suppose the defendants who gave the second mortgage, as they say, to help them gamble, have acted as gamblers do. Suppose they have neglected the house which they mortgaged, and which they have left. Supthat its taxes are unpaid, that the interest on the first mortgage is neglected, that the property has been suffered to go down, and that to carry out their scheme of

petty annoyance and vengeance they set up a bogus defence, and protract it with all the ingenuity which a professional party may adopt, would there any be want of equity in a party who should procure a friend to buy and foreclose a first mortgage so as to drive the litigation to an end? Or would there be any inequity in that friend who, seeing his money safe, would help the unfortunate second mortgagee in such a controversy?

Is not the *morale* of the party who is supposed to intervene, to be settled by his opinion of the *morale* of the controversy? And if so, can chancery assume to try that question.

The second mortgagee, acceding to the decision appealed from, has no lawful right to acquire the first mortgage, and that, although the order of securities was preserved. In old times, there was a doctrine of equity which went farther—the doctrine of *tacking*, viz.—described by Lord Hardwicke in Wortley *v.* Brickhead 2 Ves. 573—as to which see 1 Story Eq. Jur., § 415.

No immorality was ever charged upon this doctrine. It has been disapproved as part of our system of law. But that is all. It permitted and encouraged what the learned Vice-Chancellor regards as an abuse of power, the purchase by an innocent third mortgagee of a first mortgage with intent to "squeeze out" the second mortgage. But here in New Jersey (is it not so adjudged?) however necessary for the interests of a second mortgagee to obtain the legal title, he cannot do it except with the consent of the owner!

What is the equity of the man who owes a debt secured by mortgage? To pay it, that is all. Equity makes him hold the land in trust to do so. Equity says to him, "Manage this property so as to pay all encumbrances. If you can, discharge the first mortgage, and so strengthen the security of the second." But the learned Vice-Chancellor says, if you think you have a defence to the second mortgage I will see to it that you are

not molested by the first. Get that mortgagee to hold on and give you time. If he will not, find a friend who will buy that mortgage and hold it. Or, if he gets by any accident into unfriendly hands, I will not let the owner refuse to assign to your friend. If he does, he shall not have his money.

The second mortgagee holds the equity of redemption. He has the right to go to the first mortgagee and pay the mortgage. And if he does, equity will subrogate him to the rights of the first mortgagee, though it will not compel him to assign.

Bigelow *v.* Cassedy, 11 C. E. Green. 559–562.

Now, if Baldwin had paid the first mortgage without assignment, equity would subrogate him to the rights of the insurance company, although he got no assignment. That being so, will equity say that when he has an assignment he shall use it only to get his money back and not so as to help his junior security?

Smith *v.* Green, 1 Coll. 555.
Peaver *v.* Morris, L. R. (8 Eq.) 217.
Ellsworth *v.* Lockwood, 42 N. Y. 89.
Lamson *v.* Drake, 105 Mass. 564.
Saunders *v.* Frost, 5 Pick. 266.
Lamb *v.* Montague, 112 Mass. 352.
Hamilton *v.* Dobb, 4 C. E. G. 227.
Dunstan *v.* Patterson, 2 Phil. 341.
McKinstry *v.* Curtis, 10 Paige 503.

[Are all cases in point showing that no equity calls on the holder of a mortgage to assign it.

We call especial attention to the language of Lord Cottenham in Duncan *v.* Patterson. There were two suits by two sisters for the redemption of two mortgages for £500 each, but upon which they allege that a small part of that sum only had been advanced. The bills charged the defendant as solicitor with various other acts of dopression and imposition, among others with fraudulently inserting a power of sale in default of payment within six months, of which power he was about to avail himself.

Less than £400 in all was found to be due. The parties consented to an immediate decree. On a hearing for further direction it was ordered that plaintiff should pay defendant within one week, and that thereupon the defendant should transfer, re-convey or re-assign the mortgage debt. From this and other parts of the order defendant appealed. The Lord-Chancellor: "The rights of mortgagor and mortgagee depend, first, upon the contract between the parties, and second, on the practice of the court concerning them. Now I have asked in vain for any authority to show that a mortgagor has a right to require the mortgagee to assign the mortgage debt when he is paid off. That is a departure from the contract beyond all doubt, and not justified by the law and practice of the court."

But why should the holder have the right to keep the mortgage when tendered the money due upon it? Only that he may enforce it when and as he pleases by common law suit or foreclosure. Yet the learned Vice-Chancellor holds that if he chooses a time unpropitious to the debtor, or proceeds with the view to help a junior security, it is inequitable that the gates of chancery shall be shut against him, and that if he will not take his money, his action shall be stayed! For all his order says, he may lose it.

If Baldwin owned this debt and sued at law, would the learned Vice-Chancellor restrain him by injunction? Clearly yes, if his doctrine be sound.

This matter has been carefully considered and decided in Morris *v.* Tuthill, 72 N. Y. 575, (1878.) It was a case of foreclosure. The answer alleged a conspiracy to prevent the defendants from raising the money to pay the two mortgages in suit, and to acquire the title to the premises, for half their value at a forced sale; that to pay the mortgages it was necessary for him to raise a large part of the money on the credit of the premises; that a savings bank had agreed to lend on these mortgages; that he had then applied to the holder of the

mortgages for an assignment on receiving the amount due; that the mortgagee had agreed to assign; but that the conspirators had supplanted him and by fraudulent and corrupt means procured the assignment to be made to the plaintiff, who, with intent to injure the defendant, afterwards kept himself, his place of business and residence unknown to the defendant for more than two months, so that defendant was unable to get control of the mortgages so as to raise the money on them; that the conspirators slandered the title of the defendant to the premises so that he could raise no money on them; and that the savings bank therefore refused to lend; and other matters.

PER CURIAM. "The facts stated, * * * unexplained and uncontradicted, might justify the inference that the plaintiff and the former holders have acted in concert, with a view unnecessarily to harass and oppress the appellant and to get the property for less than its value.

"But they do not tend to show that the mortgages have been satisfied, or that the full amount claimed is not due thereon. * * *

"The motives of the former owner of the mortgages in selling or of the plaintiffs in buying them are not material, and the appellant has no concern with the consideration of the assignment.

It is sufficient that the mortgage debt is due and is now owned by the plaintiff. He may have bought the mortgages from motives of malice toward the defendant, and solely with a view to sue upon them, and the former owner from a like motive may have transferred them without consideration, but this would not constitute a defence to the action. *The appellant can only arrest the action by paying the amount due*, or tendering the same and bringing it into court. *The facts stated do not constitute an equitable defence*, * * or impeach the plaintiff's title. They "are wholly irrelevant."

debt was kept alive, the existence of which was injurious to his interests, and the discharge of which he had a right to seek.

The Vice-Chancellor's opinion stands upon two cases, as to which, a word.

Lyon's Appeal, 61 Pa. St. 15.

A Mrs. Jermon owned property subject to a mortgage given by a former owner.

Lyon had a judgment recovered after Mrs. Germon got title against her husband, and Lyon disputed Mrs. Jermon's title, alleging fraud, and that the property belonged to the husband.

Instead of contesting this question by a sale under his judgment, Lyon bought the mortgage, and obtained judgment for a sale under it, and proposed, so it was averred, to sell the property, and contest Mrs. Jermon's title to any surplus over the mortgage.

She tendered Lyon the amount due upon the mortgage and required its assignment to a friend. The assignment was refused. The court decreed an injunction until Lyon accepted a tender and made asignment.

It is submitted that this case is not well considered. But the court treat it as exceptional. They said, in the conclusion of the opinion :

" We do not mean to be understood as deciding that in an ordinary case of conflict of interests, a party can come into equity and restrain a plaintiff from his right of execution of his judgment. It is only because of the peculiar circumstances of this case where the real purpose is not rightful but ulterior ; when the party to be protected is under disability and when the plaintiff in the judgment can be protected in his legal right of satisfaction by payment to him, on terms not prejudicial to his interest."

Can these things be said as to Mr. Davis? Admit that he is Baldwin and no one else ; had he not a rightful purpose when seeking to improve a junior security by compelling payment of a mortgage due ?

Was any party here protected under disability?

Satisfaction by payment would not be prejudicial to the interest involved, but if assignment was made, the

Two differences in this case are noticeable. First, Mrs. Jermon did not owe the debt. Nor did even her husband. It was an encumbrance upon her alleged property. But it was not her duty to pay it. Second, to allow the foreclosure sale might injure her, without helping the plaintiff. If the property brought its full value, the controversy as to the surplus remained. But if it did not, the plaintiff would simply injure her without benefiting himself.

And a third difference existed. At least such is the inference from the language of the cases, to wit, that the law of Pennsylvania permits the requisition of an assignment where a mortgage is discharged by a third party.

"Lyon's appeal" is reviewed in Bishop *v.* Ogden, 9 Phil. (Pa.) Rep. 524, (1872), Ludlow, J.

Bishop, a second mortgagee, filed his bill against Ogden, a first mortgagee, to compel him to assign his security to complainant.

But there were three judgments between the first and the second mortgages, and the court denied relief.

The judge says, "In Lyon's appeal the object to be gained was an unjust one, the encumbrance was used for *a purpose really illegal*, and the case was decided under peculiar circumstances. Let the defendant in the *sci. fa.*, or some one for him, pay the first mortgage, and of course we will stay the sale.

Foster *v.* Hughes, 51 How. Pr. 23, is a Chambers decision by a single judge,—either overruled by or inconsistent with Morris *v.* Tuthill, 72 N Y. 575, already cited. In that case, too, there was no subsequent encumbrancer.

We cannot criticise the other authorities of the learn-

ed counsel for the defendant, because we have not been able with ordinary diligence to find any cases pertinent to this controversy, under the citations ("6 Ch. 40," &c.) furnished us by his courtesy.

On the defendant's own statements, the first mortgage is now in the hands of the only person who would be entitled on paying it to occupy the position of the mortgagee.

Under the authorities a second mortgagee stands in the position of a surety, as regards the first mortgagee. As such he is entitled, when, for his own protection or the enforcement of his own rights, he pays the over-due prior debt, to be subrogated to all the rights of the prior lienor.

In New Jersey, he is substituted, even against the will of the first mortgagee, in all the rights and remedies of the latter, by force of equity. In New York the court will compel an assignment to him.

This right of substitution never belongs to the principal debtor or to a remote encumbrancer. It belongs to no one but the second lienor; it is the exclusive right of the encumbrancer immediately subsequent to the first mortgagee. It is a mere incident of the right of subrogation and is for the protection of the surety alone. For this court to compel an assignment to any one but Baldwin would produce an absurd circuity of action. Baldwin would be entitled to pay the first lienor at once, receive from him his mortgage, uncanceled, and be substituted as complainant in his foreclosure. To decree substitution where there is no subrogation is always error.

These propositions are supported by unquestionable authority.

A second mortgagee occupies the position of a surety as regards the first mortgage, and has a surety's right to every remedy of the creditor.

Twombly *v.* Cassidy, 82 N. Y. (Court of Appeals) 155, (distinguishing Ellsworth *v.* Lockwood, 42 N. Y.)

The holder of a second mortgage is entitled to be subrogated to the rights of the holder of the first mortgage upon paying it.

He need not be otherwise a surety.

He has the disadvantages of a surety in being endangered by the failure of a third party to pay another's debt and is entitled to his advantages.

Miller, J., "The right of a junior encumbrancer to be subrogated in the place of a senior encumbrancer upon payment of the lien of the latter, rests upon the principle that justice and equity require that he should be entitled to the rights and securities of the senior encumbrancer." * * *

"*It seems but equitable and just that he should be allowed to control the lien which stands in the way* of obtaining the amount of his debt, (158.) * * * The doctrine of subrogation is generally and most frequently applied where the person advancing money to pay the debt stands in the situation of a surety, or is only secondarily liable for the debt, but it is also applicable to cases where a party is compelled to pay the debt of a third person to protect his own rights. * * *

"In the case cited (Cole *v.* Malcolm) the party was not a surety but occupied the position of one who was obliged to pay to secure himself.

"And such is exactly the situation in the case at bar."

Cole *v.* Malcolm, 66 N. Y. 363.
Patterson *v.* Birdsall, 64 N. Y. 294.
Hubbard *v.* Ascutney Mill Dam Co., 20 Vt. 402.
Bigelow *v.* Cassedy, 26 N. J. Eq. 557, (*supra.*)
Lidderdale *v.* Robinson, 12 Wheat. 594, 596.

"A surety who discharges the debt of the principal shall, in general, succeed to the rights of the creditor, as well direct as incidental.

"That such would be the effect of an actual assign-

ment made by the creditor to the surety, OR TO SOME THIRD PERSON FOR HIS BENEFIT, no one can doubt."

The right of substitution is an incident of the right of subrogation and belongs to the subsequent encumbrancer or surety and not to the principal debtor.

In McKinstry *v.* Curtis, 10 Paige 503 (Walworth. Chancellor,) an application by the owner of land that had been conveyed to him, subject to a mortgage, to compel the mortgagee to assign to him, was denied. This was on the ground that he had become the principal debtor, the land being primarily liable for the mortgage, and that the mortgagor, by conveying the premises to him had become a surety. See Cherry *v.* Monro, 2 Barb. Ch. 618, (Walworth.) On the other hand, when, by such a conveyance, the mortgagor has ceased to be the principal debtor, and become a surety, and there is no subsequent incumbrance, the mortgagor is entitled to substitution.

Marsh *v.* Pike, 10 Paige Ch. 595. Johnson *v.* Zink, 51 N. Y. 333.

Substitution will not be granted to an encumbrancer against encumbrancers superior to him; a third mortgage will not be substituted on payment of a first mortgage.

Bishop *v.* Ogden, 9 Phila. Rep. 524.

Much less will a mortgagor be substituted to the prejudice of an encumbrancer.

In Avery *v.* Petten, 7 Johns. Ch. 211, Chancellor Kent denied an application for substitution, on the ground that if it were granted another party would have a right at once to make the same motion against the applicant.

The assignment has proceeded thus far on the implied admission that the allegations of the defendants against Baldwin, McCoon and Davis are true. But this is not admitted. There is no proof that Davis had any other motive that investment and getting his money, or that McCoon's motives were as stated. Nor is Davis

chargeable with notice of McCoon's knowledge or intent.

It is unnecessary, however, to argue these questions of fact by printed brief.

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COURT OF ERRORS AND APPEALS.

Between

ERWIN DAVIS,

Appellant,

and

JENNIE M. FLAGG et al.,

Appellees.

Statement and Points for Defendants.

This is an appeal from the order of the Chancellor, December 19th, 1881, directing that if the complainant (in the foreclosure suit in which the order was made), on tender to him of the principal, interest, and costs due upon his mortgage sought to be foreclosed, shall refuse to assign the bond and mortgage to such person or corporation as the complainant (the mortgagor) shall designate, all

further proceedings in his foreclosure suit shall be stayed, provided that such tender should be made to the complainant's solicitor within ten days, and that the complainant, on receiving the money and making the assignment, should enter an order dismissing his bill. This order is on page 66 of the case.

FACTS.

1. The defendant, Mrs. Flagg, gave a second mortgage on her home at Summit, N. J., to Abram H. Baldwin, to secure certain advances from Baldwin to her husband, in certain speculative stock accounts, in which Baldwin was broker, and which account had been, for a short time, carried on in Mrs. Flagg's name.

On the 5th of April, 1881, Mrs. Flagg brought a suit in the Court of Common Pleas of New York city, to compel the surrender and cancellation of the same (second mortgage.) See pages 87, 88, 89, 91, &c.

2. March 17th, 1881, Baldwin commenced a foreclosure suit in New Jersey, on his second mortgage, and applied for a receiver, which was refused, and issued an attachment on Mrs. Flagg's furniture, in a suit on the bond. See pages 88, 91, 103.

3. March 31st, 1881, James H. McCoon, who had a desk in Baldwin's office, and was on terms of intimacy with him (pages 67, 68), having

procured an assignment in his (McCoon's) name, from the Mutual Life Insurance Company, of the first mortgage (the same on which this case is founded), commenced foreclosure and also an ejectment suit. Pages 67, 68, 70, 71, 88.

4. On the 14th of May, the defendant, by petition, stated that McCoon's action, though in form to collect a mortgage debt against her estate, was in reality brought in the interest of Baldwin, and she thereupon obtained a rule from the Chancellor, calling upon McCoon to show cause why his foreclosure suit should not be restrained. The testimony taken under that order to show cause is made an exhibit in these proceedings, and is the matter in the record, on page 67, to line 18–110, exclusive, although it is so printed as to make it appear part of the testimony taken in this matter.

On that proceeding, Mr. McCoon swore (page 70) that he took an assignment of the mortgage at Baldwin's request; that he had received an offer of principal, interest, and costs, from the Mutual Life Insurance Company, for a re-assignment to them (page 73); that he would not reassign to that company, because he desired to keep the mortgage to help Baldwin (page 74); the Chancellor having ordered him to produce his account with Baldwin, he refused to produce it (pages 108 to 110), but assigned the mortgage to Erwin Davis, the complainant here, and discontinued his foreclosure suit (page 112) July 9th, 1881.

5. July 14th, 1881, five days after McCoon thus discontinued, Erwin Davis—who had his office with, and is the uncle of Mr. Root, Baldwin's New York counsel (page 96)—commenced proceedings in this suit. Baldwin, in the meantime, delayed his cause on the second mortgage, although the issue had long been joined.

6. On the 24th of September, 1881, Mrs. Flagg filed her petition, similar to the petition filed in the McCoon suit, upon the ground, as before, that the proceedings of Erwin Davis, though in form to collect a mortgage debt against her estate, were in reality, as in the case of McCoon, brought in the interest of Baldwin, to expose her property to risk at sheriff's sale, &c., and embarrass her in her defence against Baldwin.

Mrs. Flagg obtained a like rule as in the McCoon case, requiring Davis to show cause why his proceedings should not be restrained.

The testimony taken under this order is not arranged in the proper order in the record. It is to be found on pages 26 to 66, and from line 18, page 110, to page 119, and embraces *Exhibit A* and McCurdy's letter, page 121.

The evidence shows that Davis knew nothing of the property covered by the mortgage, except what Root, Baldwin's lawyer, had told him, that the offer of the Mutual Life to take a re-assignment of the mortgage had been renewed to him, and that he had refused to make a re-assignment. Pages 28, 29, 114, 115.

He testifies on pages, 58, 60, 64, that he bought the mortgage at the request of Mr. Root, Mr. Baldwin's New York lawyer, because Mr. Root wanted him to do so, and that he desired that whatever object he had in view in the proceedings should be carried out. Page 64.

7. On the hearing, the Vice-Chancellor made the order from which this appeal is taken. Page 66.

POINTS.

1. This is not an appealable order. It is a mere interlocutory order in a foreclosure suit staying the proceedings, in the discretion of the court, and for reasons satisfactory to the court. Another foreclosure was pending at the same time when this was begun, and it was shown to the Chancellor that this foreclosure and the pending suit were substantially one proceeding, and brought in the same interest and with the one object.

The Chancellor, for reasons shown, thought it unnecessary that both should proceed together, and therefore stayed the last suit until further directions; but, in order to do no possible injustice by delaying the complainant in the collection of his money, if he desired to collect it, and was not using the proceeding merely to help the complainant in the other suit, he directed that the suit should not be stayed, unless the whole amount due on the mortgage, with costs of suit, should be tendered and refused by the complainant.

This order merely delayed the proceedings in one of two foreclosure suits of mortgages on the same property, after the refusal of payment, which is the sole legitimate object in the suit, and is not a subject of appeal.

The case is similar to that of Stevens *v.* Stevens, 9 C. E. Gr. 574. There it was held that an order staying proceedings under the original bill until a cross-bill has been answered, was not appealable, though in that case it was insisted that the delay was very injurious to the complainant. Here no such effect can be pretended, because the stay could only take place upon the refusal of the complainant to receive at once the only possible remedy which he could procure by his suit, viz., the collection of a debt.

See Morgan *v.* Rose, 7 C. E. Gr. 594.
C. & A. R. R. Co. *v.* Stewart, 6 C. E. Gr. 487.
Coryell *v.* Holcombe, 1 Stockt. 650.
In re Anderson, 2 C. E. Gr. 536.
Butterfield *v.* Third Ave. Savings Bank, 10 C. E. Gr. 533.
Cronkright *v.* Haulenbeck, March Term, 1882.

8 Stew. Eq. —

Where the court dismissed an appeal from an order making allowances in a partition case, on the ground that it was a discretionary order and not appealable.

2. The order made by the Chancellor is founded upon the power of courts of equity to restrain acts prejudicial to conscience and contrary to equity.

Stockdale *v.* Ullery, 37 Pa. St. (1 Wright) 486.

Courts of equity, in granting injunctions, are not confined to acts contrary to law, but must restrain acts contrary to equity. Lyon's Appeal, 61 Pa. 15. The case was this: The parties had judgment against a husband; they wished to collect out of the wife's estate; they bought a mortgage against her husband and proceeded to foreclose it.

On application in equity the court enjoined the creditors from proceeding until they should execute an assignment to the wife on payment of her debt, interest and costs, upon the mortgage.

The court held that although the party had a right to an execution on the mortgage, yet equity would look at the use to be made of the power, and if it be aside from the right to have satisfaction, will restrain the improper use.

That the whole right of the party was to receive the money secured, the mortgage being only the means of obtaining it, and if another object was evident, equity would relieve on such terms as would enable the party to collect his debt.

So in Foster *v.* Hughes, 51 How. Pr. 20. It appeared that the whole object of a foreclosure suit was not to procure satisfaction of the debt, but to assist a husband to coerce his wife, who owned the fee, to settle litigation between them.

The court ordered the suit to be stayed, if the plaintiff, who was a friend of the husband, and held the mortgage, should refuse to assign upon tender of the amount due and costs.

The court said that a court exercising equity powers will always prevent the improper use, even in a legal way, of their process. This was held in

spite of the plaintiff's denial that he had any other object than to collect his debt.

This case is clearly within the principles laid down in these two cases in Pennsylvania and New York. In fact, the circumstances here are such as to render the exercise of this power of the court of equity to stay its own proceedings in the highest degree equitable. No possible harm is done to the complainant. The only legitimate object of his proceedings is the collection of his money. He is not, indeed, bound to assign his mortgage, but if he refuses to take his money and make the assignment, the court simply postpones the proceedings in his case until those in a former case pending when he took the assignment shall have resulted in a decree which can provide for the satisfaction of both mortgages out of the estate covered by them. He had full notice of these proceedings, as well as the proceedings in the McCoon case, at the time he took his mortgage. He admits that he took it for the purpose of helping Baldwin, and cannot complain if the court shall refuse to permit the expense and complication of two foreclosures at the same time, upon the same premises, carried on in the interest of the party holding one of them.

5. The only object of the proceedings of McCoon and of Davis, in the foreclosure of this first mortgage, was to secure for Baldwin subrogation to the rights of the prior encumbrancers. If Baldwin has the right to such subrogation, there is the recognized practice of the Court of Chancery for him to obtain it, to wit, by bill showing that his

second mortgage is doubtful, and that it is necessary, for his security, that he should be subrogated to the right of the first mortgagee—he is not entitled to it otherwise.

Sheldon on Subrogation 20.

Jenkins *v.* Continental Ins. Co., 12 How. Pr. 66.

In this case, a second mortgagee, not yet due, filed a bill to redeem the first mortgage, and be subrogated to it.

Judge Woodruff refused, saying that it was inequitable. He said that the premises being in one parcel, the plaintiff sought to place himself in the position to compel payment of his own mortgage before it was due, by obtaining control of the first. This the court would not aid him in doing. He had a right to redeem, but not necessarily to subrogation. That depends on the relations of the parties to each other and the circumstances.

Here the holder of the second mortgage, which is disputed, has obtained, through a friend, the control of the first. He seeks to foreclose it, while he delays his own suit—afraid to meet the defence. This is the same thing, in effect, as was souhgt in the case last cited. The court refused it there, and here the Chancellor has denied it, simply by staying the suit if he refuses to take his money.

6. Similar relief to this was granted by the Court of Chancery in the case of Stanford *v.* Thomas, where the bill was filed June 6th, 1866. The facts

were these: Thomas brought a suit for the foreclosure of a mortgage upon which Stanford had an estate for life. The Chancellor had been advised by Chief Justice Beasley, sitting as master, to make a decree for foreclosure and a sale of the mortgaged premises, which was accordingly made.

A bill was filed by Stanford in which he prayed that Thomas might be decreed to receive from him, or some other person in his behalf, the principal, interest and costs due upon the decree, and to execute an assignment of the bond and mortgage, and decree to him, or such person in his behalf, on receiving such payment, to the end that the mortgage might be held as an encumbrance upon the mortgaged premises, and that he might be enjoined from proceeding to sell the premises if he refused to receive the money and assign. A tender of the principal, interest and costs had been made, and assignment requested and refused.

Upon this appeal the Chancellor directed an injunction, which was duly issued.

No further steps were afterwards taken in the case.

The appeal should be dismissed, on the ground that the court's order is one from which no appeal lies, and, if entertained, the orders should be affirmed, for the reasons stated.

June 20th, 1882

A. Q. KEASBEY,
Of Counsel with Appellee.