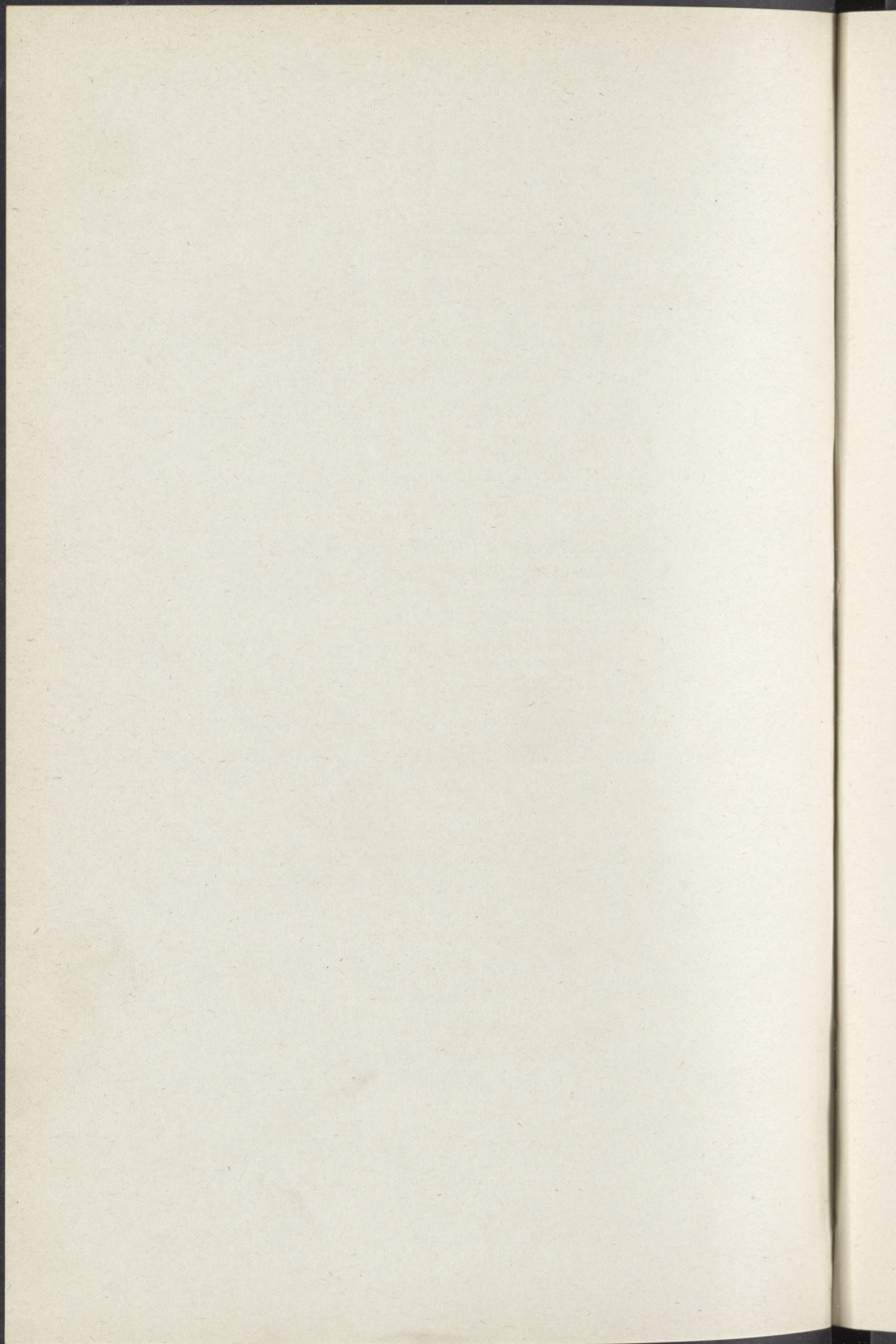


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New Jersey Court of Errors and Appeals

CHARLES E. W. EBE, *et al.*,

Complainants-Appellants,

vs.

LOUIS FEURSTEIN, *et al.*,

Defendants-Respondents.

10

On Appeal
from
Chancery.

STATE OF CASE.

20

On May 25th, 1927, the complainants herein filed the usual bill to foreclose a mortgage given by the defendants Louis Feurstein and Ella Feurstein, his wife, to the complainants.

On June 20th, 1927, Samuel W. Garrison was appointed receiver to collect the rents from the premises in question and as such receiver he now has in his possession the sum of \$480.00, representing eight months' rents, at \$60.00 per month, beginning with July, 1927, and ending with February, 1928. 30

On January 16th, 1928, a final decree was made in the Court of Chancery, as follows:

40

FINAL DECREE.

(Filed January 16th, 1928.)

This cause coming on to be heard in the presence of Melosh, Morten & Melosh, solicitors and of counsel with the complainants, and it appearing that the complainants' bill having been heretofore taken as confessed against Louis Feurstein and Ella Feurstein, his wife, the defendants, whereupon and upon reading a report on file made by Philip F. Sauer, Esquire, one of the Masters of this Court, bearing date on the nineteenth day of December, in the year of Our Lord One Thousand Nine Hundred and twenty-seven, by which it appears that there was due to the complainant on the day of making of the said report, for principal and interest on mortgage, the sum of Fourteen Thousand Eight Hundred Eighty-seven (\$14,887.00) Dollars; and no cause being shown or appearing to the contrary,

It is thereupon, on this 16th day of January, in the year of Our Lord One Thousand Nine Hundred and twenty-eight, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor doth by virtue of the power and authority of this Court, hereby order, adjudge and decree that the said report, and all the matters and things therein contained, do stand ratified and confirmed, and that the said mortgaged premises be sold to raise and satisfy the several sums of money due to the said complainants, that is to say, to the said complainants the aforesaid sum of Fourteen Thousand Eight Hundred Eighty-seven dollars and interest thereon, to be computed from the

Final Decree

nineteenth day of December, in the year of Our Lord One Thousand Nine Hundred and Twenty-seven, being the date of the Master's Report, with the costs in this cause to be taxed; and to the complainant a counsel fee of \$174.00 and that a writ of *feri facias* do issue for that purpose out 10
of this Court, directed to the Sheriff of the County of Hudson commanding him to make sale, according to law, of the said mortgaged premises, and that out of the money arising from such sale, he pay, to the complainants or to their solicitors, said debt, interest and costs; and in case more money should be raised by the said sale than shall be sufficient to answer such several pay-
ments, that such surplus be brought into this 20
Court, to abide the further order of the Court, unless otherwise previously disposed of by the order of this Court; and that the said Sheriff make return without delay of his proceedings by virtue of the said writ.

And it is further Ordered, Adjudged and Decreed that the defendant stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, when sold as aforesaid by virtue of 30
this decree.

E. R. WALKER,
C.

On February 4th, 1928, execution issued out of the Court of Chancery upon the foregoing decree, which execution has not been returned to the Court.

*Petition for Discharge of Receivers and Payment
of Moneys*

On February 10th, 1928, defendants made and executed a deed to one of the complainants, namely, Charles E. W. Ebe, for which he paid the defendants the sum of \$125.00.

10 The subsequent proceedings were as follows:

**PETITION FOR DISCHARGE OF RECEIVER AND
PAYMENT OF MONEYS.**

(Filed June 18th, 1928)

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

The petition of Charles E. W. Ebe, one of the above named complainants, respectfully shows that:

1. On January 16th, 1928, a final decree was made in the above entitled cause in favor of the complainants and against the defendants, directing that the lands and premises described in the
30 bill of complaint herein, be sold, to pay and satisfy to the complainants the sum of \$14,887.00 and interest from December 19th, 1927, together with costs of court.

2. Previous to the making of the final decree herein and on June 20th, 1927, Samuel W. Garrison was appointed receiver of the land and premises described in the bill of complaint and as such receiver, he now has in his hands the sum of
40 \$650.00.

*Petition for Discharge of Receiver and Payment
of Moneys*

3. On February 10th, 1928, the defendants Louis Feurstein and Ella Feurstein, his wife, conveyed to the complainant Charles E. W. Ebe, all their right, title and interest in and to the lands described in the bill of complaint herein, which deed was recorded in the Hudson County Register's office on February 21st, 1928, in Book 1679 of Deeds for Hudson County, on page 136, etc. Annexed hereto, made part hereof and marked Exhibit 1, is a copy of said deed. 10

4. Petitioner avers that he paid a good, sufficient and valuable consideration to the said Louis Feurstein and Ella Feurstein for said conveyance and that he is now entitled to all of the rents in the hands of said receiver. 20

5. Petitioner therefore prays that an order may be made by this Honorable Court, directing said receiver to pay over to this petitioner or his solicitors, the amount of moneys remaining in the hands of such receiver, after deducting therefrom his disbursements, commissions and such other allowances as may be by the rules and practice of this court deductible therefrom. 30

6. And petitioner will ever pray, etc.

MELOSH, MORTEN & MELOSH,
Solrs. for Petitioner.

State of New Jersey, }
County of Hudson. } ss:

I am a member of the firm of Melosh, Morten & Melosh, solicitors of the above named com- 40

*Petition for Discharge of Receiver and Payment
of Moneys—Exhibit I*

plainants. I am familiar with the facts contained
in said petition and know that the same are true.

LOUIS G. MORTEN.

10 Subscribed and sworn to before me,
this 22nd day of May, A. D. 1928.
Ada Depew,
Notary Public of New Jersey.

EXHIBIT I.

20 (Annexed to Petition for Discharge of Receivers
and Payment of Moneys.)

This Indenture, made the 10th day of Febru-
ary, A. D., Nineteen Hundred and twenty-seven,
between Louis Feurstein and Ella Feurstein, his
wife, the grantors, of the City of Jersey City,
County of Hudson and State of New Jersey, and
Charles E. W. Ebe, of the City of Jersey City,
County of Hudson and State of New Jersey, the
grantee, Witnesseth, that the grantors in consid-
30 eration of the sum of One (\$1.00) Dollar and
other good and valuable consideration, lawful
money of the United States, to them paid by the
grantee the receipt whereof is acknowledged, do
by these presents grant, bargain, sell and convey
unto the grantee and their heirs and assigns for-
ever,

All that certain lot, tract or parcel of land and
premises, hereinafter particularly described, situ-
40 ate, lying and being in the City of Jersey City,

*Petition for Discharge of Receiver and Payment
of Moneys—Exhibit I*

in the County of Hudson and State of New Jersey.

BEGINNING at a point in the southeasterly line of Garrison Avenue, distant Northeasterly two hundred and thirty-five feet and ninety-nine one hundredths (235.99) feet from the corner formed by the intersection of the Northerly line of Stuyvesant Avenue, with the Easterly line of Garrison Avenue, thence running (1) southeasterly at right angles with Garrison Avenue eighty-two feet and three inches (82 ft. 3 in.) thence northerly twenty-six feet and eighteen one hundredths (26 ft. 18/100) of a foot to a point thence northwesterly parallel with the first course eighty-two feet and three inches (82 ft. 3 in.) to the southeasterly line of Garrison Avenue, thence (4) southwesterly along Garrison Avenue, twenty-five feet to the point or place of beginning.

Subject to mislocation of fences and to encroachments in the northeasterly corners of said lot and to all other facts that an accurate survey will show. Subject to all tenancies, municipal liens and encumbrances of record whatsoever.

Being the same premises conveyed to the grantors herein by deed dated June 1st, 1926, and recorded in Book 1604 of Deeds for Hudson County on page 491, &c.

Together with the appurtenances, and also all the right, title and interest, dower and right of dower, of the grantor of, in or to the same.

*Petition for Discharge of Receiver and Payment
of Moneys—Exhibit I*

To have and to hold the same unto the grantee,
his heirs and assigns, to his and their own use
forever.

10 IN WITNESS WHEREOF, the grantors have here-
unto set their hands and seals the day and year
first above written.

LOUIS FEURSTEIN (L. S.)
ELLA FEURSTEIN (L. S.)

Signed, sealed and delivered
in the presence of
Stephen P. Piga.

20

State of New Jersey, }
County of Hudson. }ss:

Be it remembered, that on this 14th day of
February, in the year of our Lord One Thou-
sand Nine Hundred and twenty-eight, before me,
the subscriber, an attorney at law of New Jer-
sey, personally appeared Louis Feurstein and
Ella Feurstein, his wife, who I am satisfied are
30 the grantors mentioned in the within instrument,
to whom I first made known the contents thereof,
and thereupon they acknowledged that they
signed, sealed and delivered the same as their
voluntary act and deed for the uses and purposes
therein expressed.

STEPHEN P. PIGA,
Attorney at Law of New Jersey.

40

AFFIDAVIT.

Louis G. Morten, of full age, being duly sworn on his oath, deposes and says:

I am a member of the firm of Melosh, Morten & Melosh, solicitors for the above named complainants.

10

The taxes levied and assessed against the premises described in the bill of complaint herein for the year 1927, were not paid by the defendants and the complainants were advised to pay the same, which they did on February 27th, 1928; the amount paid being the sum of \$343.83.

The water rents levied against the said premises by the said Jersey City, were in arrears on June 21st, 1927, to the amount of \$8.91, and the water rents assessed against said premises from June 21st, 1927, to March 19th, 1928, amounted to \$21.36.

20

The amount of water rents which the complainant had to pay and which were due from said premises on March 19th, 1928, was \$30.27.

In or about the month of January, 1928, it was suggested by the defendants that they would be willing to save the complainants the expenses incident to the placing of the writ of *feri facias* herein in the hands of the sheriff for execution and finally as a result of such negotiations, I told Mr. Stephen P. Piga who was then acting as counsel for the defendants that if the defendants would save the complainants the expenses which would be payable to said Sheriff on said writ, the complainant Charles E. W. Ebe, would give them the sum of \$125.00.

30

40

Affidavit

The defendants accepted this offer of \$125 and made and executed the deed, a copy of which is annexed to the notice dated June 7th, 1928, herein. By oversight, the deed is dated February 10th, 1927, but this was intended for February 10th, 1928; the deed being acknowledged on February 14th, 1928, and recorded in the Hudson County Register's Office in book 1679 on page 136. This deed is not made to the complainants but to Charles E. W. Ebe alone, who is one of the complainants.

At no time have the defendants ever made any claim to any part of the rents now in the hands of the receiver.

By inadvertence, and due to the fact that I was engaged in another matter when the deed was presented, I neglected to take from said counsel for the defendants, an order directing the receiver to pay over to the complainants the rents in question.

On February 29th, 1928, I drafted an order and sent it to Mr. Stephen P. Piga, Counselor at Law, 15 Exchange Place, Jersey City, who had negotiated with me regarding this matter, asking him to consent thereto, but he has not done so, and the first intimation that I had that the defendants were going to make any claim to these rents was on June 18th, 1928, when I made application to the Court for an order directing the receiver to turn over to the complainant the moneys which he had in his hands.

LOUIS G. MORTEN.

Subscribed and sworn to before me
this 6th day of August, A. D. 1928.

Ada Depew,

Notary Public of New Jersey.

Affidavit

State of New Jersey, }
 County of Hudson. } ss:

Samuel W. Garrison, of full age, being duly sworn on his oath, says: By an order made in this case on June 20, 1927, I was appointed receiver to collect the rents, issues and profits of premises described in the bill of complaint herein known as 36 Garrison Avenue, Jersey City, New Jersey. 10

Thereafter I collected the following rents from said premises:

| | | |
|--------------------|---------|----|
| July 9, 1927 | \$60.00 | |
| August 5, 1927 | 60.00 | |
| September 21, 1927 | 60.00 | 20 |
| October 8, 1927 | 60.00 | |
| November 5, 1927 | 60.00 | |
| December 19, 1927 | 60.00 | |
| January 17, 1928 | 60.00 | |
| February 14, 1928 | 60.00 | |

I am informed that by deed dated February 10, 1928, and recorded in the Hudson County Register's office in book 1679 of deeds for Hudson County on pages 136 etc., the defendants herein conveyed their interest in said lands and premises to Charles E. W. Ebe, one of the complainants herein, and while I have continued to collect rents from said premises since that time, such collection has been as agent for the said Charles E. W. Ebe. 30

SAMUEL W. GARRISON.

Subscribed and sworn to at Jersey City,
 this sixth day of August, A. D., 1928, 40
 Before me, Ada Depew,
 Notary Public of N. J.

ORDER.

(Filed July 16th, 1928.)

This matter being opened to the court by Melosh, Morten & Melosh, Louis Morten of Counsel, solicitors for the complainants, on notice to
 10 and in the presence of Levitan, Levitan & Auerbach, Sigmund Auerbach of Counsel, solicitors for the defendants, and the Court having read and considered the arguments of counsel and being satisfied that the order prayed for in said petition should not be granted,

It is, on this 16th day of July, 1928, Ordered that the order prayed for in the petition be and is hereby denied.

20

Respectfully advised,

E. R. WALKER,
 C.

JNO. J. FALLON,
 V. C.

**PETITION FOR PAYMENT OF MONEYS IN THE
 HANDS OF THE RECEIVER.**

30

(Filed August 6th, 1928.)

The petition of Louis Feurstein and Ella Feurstein, the above named defendants, respectfully shows that:

1. On or about the 26th day of May, 1927, complainants Charles E. W. Ebe and Ida L. Ebe
 40 filed their bill to foreclose a mortgage given by

*Petition for Payment of Moneys in the Hands
of the Receiver*

the defendants to the complainants for the sum of \$14,000.00 covering premises known as #36 Garrison Avenue, Jersey City, N. J.

2. On or about the 20th day of June, 1927, 10
an order was made by this Honorable Court appointing Samuel W. Garrison, receiver, to take charge of the mortgaged premises and to manage the same, with power to sue for, collect and receive the rents, issues and profits thereof. In accordance therewith, Samuel W. Garrison, after duly qualifying, proceeded to collect the rents, and at the present time there is in his possession the sum of \$650.

3. Defendants thereafter filed an answer which 20
was stricken out by order of this court, and on January 16, 1928, a final decree was made in the above entitled cause in favor of the complainants and against the defendants, directing that the premises in the bill of complaint be sold to pay and satisfy to the complainants the sum of \$14,887.00 and interest from December 19, 1927, together with costs of court.

4. On February 10, 1928, the defendants conveyed 30
to the complainants all their right, title and interest in and to the lands described in the bill of complaint, which deed was recorded in the Hudson County Register's Office on February 21, 1928, in book 1679 of deeds for Hudson County, on pages 136, etc. Among other things, the deed contained the following clause:

Subject to all tenancies, municipal liens, 40
and encumbrances of record whatsoever.

Conclusions

cause for the above named defendants. I am familiar with the facts contained in said petition and know that the same are true.

SIGMUND AUERBACH.

Sworn and subscribed to before me 10
this 30th day of July, 1928.

Irving Edelstein,
Attorney at Law of New Jersey.

CONCLUSIONS.

(Mailed Counsel September 22nd, 1928.) 20

The bill of complaint in the mortgage foreclosure proceedings in the above entitled matter was filed May 26, 1927. On June 20, 1927, a receiver was appointed for the collection of rents of the mortgaged premises. On January 16, 1928, a final decree was entered in favor of the complainants and against the defendants for \$14,887.00, plus \$302.46 costs. The court directed the mortgaged premises to be sold to satisfy said 30
decree. The receiver is in possession of \$480.00, representing rents collected from the tenants of the mortgaged premises. On February 10, 1928, the defendants as a result of negotiations had with them by complainants, executed and delivered to the complainant, Charles E. W. Ebe, their deed whereby they conveyed to him their equity of redemption in the lands which were the subject of the mortgage foreclosure proceedings. 40
Ebe paid to the defendants the sum of \$125.00 as

Order

consideration therefor. It is clearly manifest that when the decree was entered in complainants' suit that which before the entry of the decree was a debt of *specialty*, became a debt of *record*. See *Hudson Trust Co. v. Boyd*, 80 N. J. Eq. 267. Complainants, under a notice of motion dated June 18, 1928, sought an order directing the receiver to pay over to the complainants, or their solicitors, the aforesaid rent. On July 16, 1928, the court denied said motion. The matter *sub judice* is now before the court on the application of the defendants for an order directing the receiver to turn over to them the rents in question. They clearly are entitled thereto. I will advise an order requiring payment by the receiver to the defendants of the moneys in question.

Respectfully,

JNO. J. FALLON,
Vice Chancellor.

ORDER.

30

(Filed October 2nd, 1928.)

This matter being opened to the Court by Levitan, Levitan & Auerbach, solicitors for the defendants, on notice to and in the presence of Melosh, Morten & Melosh, Louis G. Morten of counsel, solicitors for the complainants, and the court having read and considered the oral arguments as well as the memorandums submitted in

40

Order

behalf of the complainants and the defendants by their respective counsel relating thereto, and being satisfied that the order prayed for in said petition should be granted.

It is on this 2nd day of October, 1928, on motion of Levitan, Levitan & Auerbach, solicitors for the defendants, Ordered: 10

That the order prayed for in the petition of the defendants be granted,

And it is further Ordered that the receiver Samuel W. Garrison, after service of a copy of this order upon him or his solicitors, turn over all the moneys remaining in his hands to the defendants or their solicitors, after deducting therefrom the sum of \$25.00 allowed to him as receiver for his commission; provided however, that if the complainants shall cause notice of appeal from this order to be served upon said receiver, within ten days from the date hereof, then no moneys shall be paid out by said receiver until the further order of this Court. 20

And it is further Ordered that the complainants pay to the solicitors for the defendants the costs to be taxed, 30

And it is further ordered that a copy of this order certified by the solicitors for the defendants be served upon Samuel W. Garrison, receiver, and also the complainants or their solicitors within five days from date hereof.

Respectfully advised,

JNO. J. FALLON, 40
V. C.

PETITION OF APPEAL.

(Filed October 28, 1928.)

To the Honorable the Court of Errors and Appeals, in the Last Resort in All Causes:

The petition of Ida L. Ebe, the appellant in
10 the above entitled cause, respectfully shows that:

1. Petitioner finds herself aggrieved by an order made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 2nd day of October, 1928, in a certain cause in said Court of Chancery wherein the said Charles E. W. Ebe and your petitioner were complainants and the said Louis Feurstein and others were defendants,
20 in this respect, to wit, that the said order directs that the order prayed for in the petition of the defendants be granted;

And also in that it directs that the receiver Samuel W. Garrison, after service of the order upon him or his solicitors, turn over all moneys remaining in his hands to the defendants or their solicitors, after deducting therefrom the sum of \$25.00 allowed to him as receiver, for his com-
30 mission.

And petitioner appeals from the order of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that it should have directed that the petition of the said defendants be dismissed, with costs and in that it should not have directed that the receiver, Samuel W. Garrison, to turn over any moneys remaining in his hands to the defendants, or their
40 solicitors.

Notice of Appeal

Petitioner therefore prays that the said decree of said Chancellor may be, in the particulars aforesaid, wholly reversed, set aside and for nothing holden, and that the petitioner may have such other relief in the premises as to this court shall seem proper. 10

MELOSH, MORTEN & MELOSH,
Solrs. for and of Counsel with Appellant.

NOTICE OF APPEAL.

(Filed Oct. 12, 1928.)

The complainant, Ida L. Ebe, hereby appeals from so much of the order made in the above entitled cause on October 2nd, 1928, by the Chancellor on the advice of Vice Chancellor John J. Fallon, as directs that the order prayed for in the petition of the defendants be granted and from so much of the said order as directs that the receiver Samuel W. Garrison turn over all moneys remaining in his hands to the defendants or their solicitors after deducting therefrom the sum of \$25.00 allowed to him as receiver for his commission, to the Court of Errors and Appeals in the last resort in all causes. 20 30

Dated October 9th, 1928.

MELOSH, MORTEN & MELOSH,
Solrs. for and of Counsel with
Complt. Ida L. Ebe.

I conceive there is good cause for appeal in the above entitled cause. 40

LOUIS G. MORTEN,
Of Counsel with Complt. Ida L. Ebe.

ANSWER TO PETITION OF APPEAL.

(Filed Oct. 31, 1928.)

To the Honorable, the Court of Errors and Appeals in the Last Resort in All Causes:

10 The answer of Louis Feurstein and Ella Feurstein, the above named defendants-respondents, to the petition of appeal of the above named appellants, respectfully shows:

1. These defendants-respondents not admitting the truth of any or all of the matters in the petition of appeal contained for answer thereto, nevertheless, admit that an order was, on the second day of October, 1928, made and entered
20 in the Court of Chancery of New Jersey in the above entitled cause, for the purposes in said petition mentioned and as therein set forth.

2. These defendants-respondents are advised and believe that the said order is agreeable to equity; and they pray that the same may be confirmed with costs to be taxed in favor of said defendants-respondents.

30 **LEVITAN, LEVITAN & AUERBACH,**
Solicitors of Defendants-Respondents.

ABRAHAM LEVITAN,
Of Counsel.

New Jersey Court of Errors and Appeals

Between:

CHARLES E. W. EBE, *et al.*,

Complts.-Appellants,

and

LOUIS FEURSTEIN, *et al.*,

Defts.-Respondents.

On Appeal &c.

BRIEF FOR APPELLANTS.

The facts in this case are all admitted, and therefore it would not seem to be necessary to repeat them in the brief.

It is true that in paragraph 4 of the petition filed by the defendants in the Court of Chancery on August 6th, 1928 (p. 13), the defendants aver that on February 10th, 1928, they conveyed to the *complainants* the lands described in the bill of complaint. However, this is only a typographical error, as it is not denied that the defendants did not convey to both of the complainants and that their deed was to only one of the complainants, namely Charles E. W. Ebe. This appears from an inspection of the deed itself (Exhibit 1, p. 6) and the affidavit annexed to petition appearing in printed case (p. 10, paragraph 1.)

There are only two questions involved in this case, both of which are pure questions of law, namely:

1. If a mortgage is given to two or more persons, as mortgagees, and foreclosure proceedings are afterward brought on the mortgage resulting in a final decree and execution in favor of the mortgagees, can one of the mortgagees by obtaining a deed from the mortgagors and paying the mortgagors a valuable consideration therefor, defeat the right of his co-mortgagees to have rents accruing pending the foreclosure proceedings, held under the control of the Court, to be applied to the payment of moneys due under the final decree if, after a sale under the execution, the proceeds realized are insufficient to satisfy the amount of moneys due under the decree?

2. If mortgagors, owners of the lands involved, convey such lands to one of several co-mortgagees, are the mortgagors entitled to the immediate payment to them of rents collected by a receiver pending the foreclosure proceedings, notwithstanding the fact that there has been no sale under the execution issued in the final decree and the mortgagees have not and there is no proof that they ever will receive the moneys due to them under their decree by virtue of a sale under the execution issued on such decree?

ARGUMENT.

The appellant, Ida L. Ebe, has at no time negotiated with the defendants for a deed. She has at no time waived any of her rights to the real estate and to the rents to obtain moneys due to her.

The execution issued out of the Court of Chancery is still waiting delivery to the sheriff, and she is entitled to proceed on that execution to recover the moneys due to her, and until these moneys are paid to her, the defendants are not entitled to any of the moneys in the hands of the receiver.

It seems too elementary to require any citation of authority that one of several complainants cannot, by any act of his, prejudice the rights of any or all of his co-complainants, and therefore, the mere fact that Charles E. W. Ebe sought to avoid the expense of the proceedings under the execution, and that he took a deed, cannot prejudice in any way the rights of Ida L. Ebe.

For example, we might have a case where a mortgage is jointly owned by ten complainants. To argue that one complainant, by taking a deed from the defendant-mortgagors, could defeat the other nine complainants in their action and from enforcing all their rights under an execution not only as against the premises described in the mortgage but also as against any rents that may have accrued pending foreclosure, should the premises realize an amount insufficient to satisfy the decree, is too absurd to be worthy of consideration.

The appellant, Ida L. Ebe, has the right to proceed on her execution to sale and if the real estate does not bring sufficient to pay the amount of moneys due to her, she may resort to the moneys in the hands of the receiver, and if there is still a deficiency, she can resort to an action to secure a judgment or decree for the deficiency.

It would therefore seem to necessarily follow that the appeal in this case should be sustained and that the order of the Court of Chancery should be reversed and an order made directing the Court of Chancery to dismiss the petition filed by the defendants in that Court on August 6th, 1928, praying for an order directing the receiver to pay to said defendants the moneys in his hands.

MELOSH, MORTEN & MELOSH,
and of counsel
Solrs. for Compls-Appellants.

New Jersey Court of Errors and Appeals

| | | |
|---|---|----------------|
| Between : CHARLES E. W. EBE, <i>et al.</i> , Complts.-Appellants, and LOUIS FEURSTEIN, <i>et al.</i> , Defts.-Respondents. | } | On Appeal, &c. |
|---|---|----------------|

BRIEF FOR RESPONDENTS.

The essential facts in this case are briefly as follows:

On the 26th day of May, 1927, complainant Charles E. W. Ebe and appellant Ida L. Ebe filed a bill to foreclose a mortgage made by the respondent covering premises known as No. 36 Garrison Avenue, Jersey City, N. J. On the 20th day of June, 1927, an order was made appointing a receiver to take charge of the mortgaged premises and to collect and receive the rents, issues and profits thereof. In accordance therewith, Samuel W. Garrison was appointed and duly qualified as receiver. At the present time there is now in his hands the sum of \$480.00. On the 16th day of January, 1928, a final decree was entered in favor of the complainant and the appel-

lant and against the respondents. On the 10th day of February, 1928, defendants-respondents conveyed to the complainants all their right, title and interest in and to the lands described in the bill of complaint, said deed containing the following clause, "*Subject to all tenancies, municipal liens and encumbrances of record whatsoever.*" (See page 7, State of Case, lines 29 and 30.)

On the 18th day of June, 1928, the solicitors for the complainants served notice upon the solicitor for defendants that they would move for an order directing the receiver to pay over to the complainants the moneys remaining in the hands of the receiver. On the 16th day of July, 1928, an order was made by the Honorable Court of Chancery, denying said motion of the complainants.

On August 6th, 1928, defendants-respondents made application for an order directing the receiver to turn over to them the rents in his possession and on October 2nd, 1928, an order was entered by the Honorable Court of Chancery granting the petition of the respondents and directing the receiver to turn over to them the moneys in his possession. From this order the complainant-appellant now appeals.

POINT I.

Appellant, Ida L. Ebe, by her own acts, acquiesced and consented to the acceptance of the deed in question by her husband, the other complainant, and is accordingly bound thereby.

There are two complainants in this case, Charles E. W. Ebe and his wife Ida L. Ebe, the latter being the appellant herein, both of whom have been and still are represented by the same solicitors, Melosh, Morten and Melosh.

On February 10th, 1928, when the defendants executed the deed for the premises in question, there were present Ida L. Ebe, Charles E. W. Ebe, and their counsel Louis G. Morten, of the firm, Melosh, Morten and Melosh, and the defendants. The appellant Ida L. Ebe was informed and advised by her counsel concerning the acceptance of the deed by her husband and allowed him to take same without any objection on her part, thus constituting her husband as her agent.

It is a well-settled rule of law that where a wife is present and permits her husband to do any act which would in anywise affect her interest or property, she is bound by the result of his act, in the same way and manner as if she had done it herself. This appellant went a step further and requested the defendants to sign a statement directing the moneys in the hands of the receiver to be paid over to her and her husband, but that the defendants refused to do, saying: "If complainants wanted the property, they must take it as it is, with all the encumbrances thereon." The deed specifically contains the clause: "*Sub-*

ject to all tenancies, municipal liens and encumbrances of record whatsoever." (See page 7, State of Case, lines 29 and 30.)

This appellant not only consented to the acceptance of the deed, but even went so far as to pay the taxes on the property on February 27th, 1928, which was seventeen (17) days after the execution of the deed. The affidavit of Louis G. Morten, solicitor for the appellant, says as follows:

"The taxes levied and assessed against the premises described in the bill of complaint herein for the year 1927, were not paid by the defendants and *the complainants were advised to pay the same, which they did on February 27th, 1928; the amount paid being the sum of \$343.83.*" (See page 9, State of Case, lines 10-16.)

The appellant at all times was present and suggested to the defendants that if the latter would save the appellant the expenses of foreclosure, then the deed would be accepted. In the affidavit of Louis G. Morten, on page 9, line 30, in the State of Case, we find that it specifically says the following:

"In or about the month of January, 1928, it was suggested by the defendants that they would be willing *to save the complainants* the expenses incident to the placing of the writ of *fieri facias* herein in the hands of the sheriff for execution and finally as a result of such negotiations, I told Mr. Stephen P. Piga who was then acting as counsel for the defendants, that if the defendants would save *the complainants* the expenses which would be payable to said Sheriff on said writ, the complainant Charles E. W. Ebe, would give them the sum of \$125.00."

In further corroboration of the fact that the appellant acquiesced in the acceptance of the deed, we also find that the appellant took possession of the premises and has occupied same until the present date.

It is therefore respectfully urged that the acceptance of the deed by the husband not only was acquiesced in by the appellant, but that same was also a waiver and an abandonment of the entire foreclosure proceedings by this appellant.

POINT II.

The appellant is estopped at this time from making any claim for the moneys in the hands of the receiver as she has already made her election.

It is a well-settled rule of law that "Equity favors the vigilant and not the sleepy." After the entry of the final decree, an execution thereon was issued on the 4th day of February, 1928. At no time did the appellant ever intimate that she intended to issue execution and continue with the foreclosure proceedings until the order was made by the Court of Chancery on the 2nd day of October, 1928, directing the receiver to turn over the moneys in his possession to the defendants. In other words, this appellant waited until eight months after the execution was issued and after a decision was made against her, to proceed with her execution. At no time has this appellant ever made an application to the Court of Chancery for an order directing the receiver to pay the moneys over to her. If this appellant desired to proceed with the execution as she now contends,

why did she wait eight months until the order was made directing the moneys to be turned over to the defendants, to make up her mind to proceed with the execution? Why didn't she proceed with the execution immediately after the deed was accepted by her husband, the co-complainant? Surely, there was plenty of time between February 4th, 1928, and October 2nd, 1928, to proceed with the execution if she ever had any intentions of doing so.

This appellant treated the defendant as the legal owners of the property until February 10th, 1928, the date of the execution of the deed. She has already taken possession of the premises and now occupies same. She has paid the property and water taxes in the past as well as the current ones, notwithstanding the order of the Court of Chancery directing the receiver to turn over the moneys in his possession to the defendants-respondents, bearing out the fact that she intended to abandon the foreclosure proceedings and accept the deed.

POINT III.

It therefore follows that the appeal in this case should be dismissed and that the order of the Court of Chancery be affirmed with costs to be taxed in favor of the said defendants-respondents, for the reasons filed herein and below.

It is therefore respectfully urged that the appeal should be dismissed with costs taxed in favor of the defendants-^{RESPONDENTS}appellants, firstly, because the appellant, by her own acts during the entire transaction, acquiesced and consented to the acceptance of the deed by her husband, thus constituting him her agent; and lastly, because of the fact that she is now estopped from making any claim for the moneys in the hands of the receiver.

Respectfully submitted,

SIGMUND AUERBACH,
Solicitor for the Defendants-Respondents.

ABRAHAM LEVITAN,
Of Counsel.

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