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AMENDED NOTICE OF APPEAL.

Filed December 23, 1926.

In Chancery of New Jersey

62/397

Between JACOB MACHLIN, *Complainant,* *and* ESSEX PARK REALTY CO., a corporation, *et als., Defendants.*	*On Bill, etc.* *Amended Notice of Appeal.*

To Jacob Machlin, complainant, or A. Milton Jacobs, his solicitor:

TAKE NOTICE that the defendant, Essex Park Realty Co., hereby appeals from the order appointing receiver made by the Chancellor on the advice of Vice-Chancellor Alonzo Church in the above-entitled cause on the fourteenth day of December, 1926, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in all causes.

Dated December 21, 1926.

CORN & SILVERMAN,
Solicitors for and of Counsel with
Defendant Essex Park Realty Co.

Amended Notice of Appeal.

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

JOS. J. CORN,
Of Counsel with Defendant
Essex Park Realty Co.

Service of the within Amended Notice of Appeal is hereby acknowledged this 22nd day of December, A. D. 1926.

A. MILTON JACOBS,
Solicitor of Complainant.

Petition of Appeal.

PETITION OF APPEAL.

Filed January 8, 1927.

IN CHANCERY OF NEW JERSEY.

62/397

Between JACOB MACHLIN, *Complainant,* *and* ESSEX PARK REALTY CO., a corporation, *et als.*, *Defendants.*	*On Appeal from the Court of Chancery.* *Petition of Appeal.*

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Essex Park Realty Co., the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds itself aggrieved by an order appointing Receiver made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, (on the advice of his Honor, Alonzo Church, Vice-Chancellor), bearing date December 14, 1926, in a certain cause in said Court of Chancery wherein said Jacob Machlin was complainant and the said Essex Park Realty Co., was one of the defendants in this respect, to wit, that the said Order adjudges that:

(a) A receiver be appointed to take charge of the mortgaged premises and collect the rents thereof.

(b) The tenants attorn to the receiver.

(c) The tenants pay the receiver all rent which may be in arrears.

(d) Petitioner refrain from collecting and receiving any of the rents.

And petitioner appeals from the Order of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous, in that:

(1) Petitioner was given no notice of the application for the Order.

(2) Petitioner was afforded no opportunity to be heard as to whether or not the Order should be granted.

(3) Petitioner was afforded no opportunity to present proof of facts which might warrant the refusal to grant the Order.

(4) Complainant submitted no proof that the mortgaged premises were insufficient security for the debt secured thereby.

(5) Complainant submitted no proof that the mortgagor was insolvent.

(6) Complainant submitted no proof of default under the terms of the mortgage.

(7) At the time of the making of the Order petitioner had filed an answer in this cause, yet nevertheless an injunction issued against petitioner without giving it any notice of the application therefor, and without any circumstances appearing to make it proper to dispense with such notice.

(8) The Order directed rent in arrears to be paid to the receiver.

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

CORN & SILVERMAN,
Solicitors and Counsel of Appellees.

Service of the within Petition of Appeal is hereby acknowledged this 7th day of January, A. D. 1927.

A. MILTON JACOBS,
Solicitor of Complainant.

ANSWER TO PETITION OF APPEAL.

Filed January 15, 1927.

New Jersey Court of Errors and Appeals

Between JACOB MACHLIN, *Complainant-Respondent,* *and* ESSEX PARK REALTY CO., a corporation, *et als.*, *Defendants-Appellants.*	*On Bill, etc.* *Answer to Petition of Appeal.*

The answer of Jacob Machlin, the above-named respondent, to the petition of appeal of the above-named appellant, Essex Park Realty Co.

This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, notwithstanding, says and admits that a decree was made and entered in the Court of Chancery, in the cause for that purpose mentioned in the petition of appeal, as is therein stated, but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced, and this respondent is advised and believes that the said decree in the respect to which appellant, Essex Park Realty Co., appeals, is agreeable to equity, and he prays that the same may in such respect be confirmed with costs to be adjudged to this respondent.

A. MILTON JACOBS,
Solicitor for Complainant-Respondent
Jacob Machlin.

NAT KESSLER,
Of Counsel with Complainant-Respondent,
Jacob Machlin.

BILL OF COMPLAINT.

Filed November 22, 1926.

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

Complainant, Jacob Machlin, of the City of Newark, County of Essex and State of New Jersey, complaining, shows:

1. That on the 13th day of November, 1925, Daniel S. DeCozen, single, being indebted to A. Milton Jacobs in the sum of $2,000.00, by his bond, dated on that day, became bound to the said A. Milton Jacobs, in the sum of $2,000.00, to be paid to him, his heirs or assigns, should, in two years from the date thereof, pay to the said A. Milton Jacobs, his heirs, executors, administrators and assigns, the said sum of $2,000.00, with interest at the rate of six per cent. per annum, payable semi-annually, then that bond should be void.

2. That to secure the payment of the said $2,000.00, with interest, the said Daniel S. DeCozen, by deed of mortgage therein dated on the same day as the said bond, conveyed to A. Milton

Jacobs, his heirs, executors, administrators and assigns, forever, in fee simple, all that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex, and State of New Jersey.

BEGINNING in the northerly line of Parkhurst Street 203 feet 6 inches westerly, from the northwesterly corner of the same and New Jersey Railroad Avenue; thence running north 30 degrees 55 minutes east 104 feet 8⅜ inches thence north 59 degrees 5 minutes west 25 feet; thence south 30 degrees 55 minutes west 105 feet, 1⅞ inches to the northerly line of Parkhurst Street; and thence south 60 degrees 11 minutes east 25 feet to the place of BEGINNING.

Being lot No. 29 on William Shugard Map, made June, 1848, and the strip of land lying in front of the same between the present northerly line of Parkhurst Street and the northerly line of Old Parkhurst Street on the William Shugard Map aforesaid.

Being the same premises conveyed to Daniel S. DeCozen by deed dated October 21, 1925, and recorded in the Essex County Register's Office of Essex County, in Book T-72 of Deeds for said County, on page 368.

3. That the said mortgage was on the 13th day of November, 1925, duly recorded in the Office of the Register of the County of Essex, in Book D-56 of Mortgages for said County on pages 142-144, the execution of the same having been first duly acknowledged, and said acknowledgment certified thereon as required by law.

4. The said mortgage contained a proviso that it should be void upon the payment of the

said sum of $2,000.00 with interest, according to the condition of the said bond.

5. That the said mortgage was on the 13th day of November, 1925, assigned by the said A. Milton Jacobs to Jacob Machlin, the complainant herein, by assignment of mortgage duly recorded on the 13th day of November, 1925 in the Register's Office of the County of Essex, in Book 176 of Assignments of Mortgages for said County, on page 296, the execution of the same having been first duly acknowledged, and the said acknowledgment certified thereon as required by law.

6. That in the said mortgage and bond accompanying the same, it was declared to be agreed between the parties thereto, and both have the following provisions:

"That if default be made in the payment of any of said taxes, water rents, or other municipal or government rate, charge or imposition * * * on any day whereon the same shall became due and payable, and should the same remain unpaid and in arrears, for the space of thirty days * * * the aforesaid principal sum of money, with all arrearages of interest thereon, and any other charges paid by the holder of this mortgage, shall, at the option of the mortgagee, and assigns, become and be due and payable immediately thereafter, although the time first above limited for the payment thereof may not then have expired, anything hereinbefore contained in the contrary hereof in anywise notwithstanding."

7. That on the 1st day of June, 1926, the first half of the 1926 taxes became due and were a

lien upon the said premises, which the defendant has neglected and refused to pay, although requested by the complainant so to do.

Complainant has elected that the whole principal sum, with all unpaid interest, shall be now due.

8. That the complainant has requested that the defendant, Essex Park Realty Co., a corporation of the State of New Jersey, pay to him the said principal and interest so due on the said bond and mortgage, and with which request, it has refused and neglected to comply.

9. That your complainant has never had possession of said mortgaged premises, or received any of the rents or issues thereof.

10. That on the 8th day of January, 1926, the said Daniel S. DeCozen conveyed to Model Plan Agency, a corporation of the State of New Jersey, by deed which was duly recorded in the Register's Office of Essex County, in Book V 73 of Deeds for said County, on page 25, the premises in question.

11. That on the 8th day of January, 1926, the said Model Plan Agency, a corporation of the State of New Jersey, did execute a mortgage to Daniel S. DeCozen, to secure the sum of $400.00, which mortgage was duly recorded in the Register's Office of the County of Essex in Book P-56 of Mortgages for said County, on page 287, which said mortgage was on the 29th day of March, 1926, assigned by the said Daniel S. DeCozen to The Broad & Market National Bank, a corporation of the State of New Jersey, by assignment of mortgage recorded on the 31st day of March, 1926, in the Register's Office of

Essex County in Book 179 of Assignments of Mortgages for said County on page 131.

Any interest which the said Daniel S. DeCozen and The Broad & Market National Bank, a corporation of New Jersey, have in said land, and buildings thereon, is subject to the lien of complainant's mortgage.

12. That on the 10th day of March, 1926, the said Model Plan Agency, a corporation of New Jersey, conveyed to Essex Park Realty Co., a corporation of the State of New Jersey, by deed which was duly recorded in the Register's Office of Essex County in Book A-74 of Deeds for said County page 226, the premises in question.

Any interest which the said Essex Park Realty Co. a corporation of New Jersey has in said land, and buildings thereon, is subject to the lien of complainant's mortgage.

In consideration whereof, and inasmuch as your complainant is remediless in the premises in the Courts of Law, and can only have adequate relief in the Courts of Equity, and to the end:

1. That Daniel S. DeCozen, The Broad & Market National Bank, a corporation of the State of New Jersey, and Essex Park Realty Co., a corporation of the State of New Jersey, who are the defendants to this suit, may answer, without their respective oaths or affirmations, this Bill of Complaint and each statement herein made.

2. That an account may be taken under the direction of this court, of the amount due on complainant's said mortgage.

3. That the defendants may be decreed to pay complainant the amount so found due with interest thereon, and complainant's costs in this suit, by a short day appointed by this court; and that in default thereto, they do stand debarred and foreclosed of all equity of redemption in said mortgaged premises.

4. That the said premises may be sold by the order of this court, and out of the proceeds of sale, complainant may be paid the amount so found due, upon his said mortgage, with interest thereon, and his costs of this suit.

5. May it please your Honor, to grant complainant the State's Writ of Subpoena, issuing out and under the seal of this court, to be directed to the said defendants, Daniel S. DeCozen, The Broad & Market National Bank, a corporation of New Jersey, and Essex Park Realty Co., a corporation of New Jersey, commanding them to appear before your Honor in this court, then and thereto answer the premises and to stand to, abide by and perform such order and decree as your Honor shall make therein.

A. MILTON JACOBS,
Solicitor for Complainant.

MICHAEL N. CHANALIS,
Of Counsel with Complainant.

ANSWER OF DEFENDANT, ESSEX PARK REALTY CO.

Filed December 13, 1926.

IN CHANCERY OF NEW JERSEY.

Between JACOB MACHLIN, *Complainant,* *and* ESSEX PARK REALTY CO., a corporation, *et als.,* *Defendants.*	*On Bill, etc.* *Answer of Defendant Essex Park Realty Co.*

Defendant, Essex Park Realty Co., a corporation of New Jersey having its principal office in the City of Newark, answering separately the Bill of Complaint filed in this cause, says that:

1. It admits Paragraphs 1 to 6.

2. It denies Paragraph 7.

3. This defendant will, at or after the trial, move to dismiss the Bill of Complaint, on the ground that it discloses no cause of action as against this defendant.

CORN & SILVERMAN,
Solicitors of Defendant,
Essex Park Realty Co.

PETITION FOR APPOINTMENT OF A RECEIVER, ETC.

Filed December 14, 1926.

IN CHANCERY OF NEW JERSEY.

Between JACOB MACHLIN, *Complainant,* *and* ESSEX PARK REALTY CO., a corporation, *et als.*, *Defendants.*	*On Bill, etc.* *Petition for Appointment of a Receiver to Collect Rents, etc.*

The petition of Jacob Machlin of the City of Newark, Essex County, New Jersey, respectfully shows:

1. That on the 22nd day of November, 1926, the petitioner filed a bill of complaint in the above-entitled cause to foreclose a mortgage held by him.

2. That the said mortgage is in the sum of $2,000, and is dated November 13, 1925, and is recorded in the office of the Register for Essex County, in Book D-56 of Mortgages for said County, on page 142-144; the said mortgage covers premises in the City of Newark, Essex County, New Jersey, which premises are commonly known and designated as No. 100 Parkhurst street, and was made by Daniel S. DeCozen, single, to the said Jacob Machlin, the petitioner herein.

3. That the said mortgage held by your petitioner, and the bond accompanying the same, both have the following provision:

> "That if default be made in the payment of any of said taxes, water rents, or other municipal or governmental rate, charge or imposition * * * on any day whereon the same shall become due and payable, and should the same remain unpaid and in arrears for the space of thirty days * * * the aforesaid principal sum of money, with all arrearages of interest thereon, and any other charges paid by the holder of this mortgage, shall, at the option of the mortgagee, and assigns, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained in the contrary hereof in anywise notwithstanding."

4. That on the 1st day of June, 1926, the first half of the 1926 taxes became due and were a lien upon the said premises, which the defendant has neglected and refused to pay, although requested by your petitioner so to do.

5. That your petitioner has requested that the defendant, Essex Park Realty Co., a corporation, pay to him the said principal and interest so due on the said bond and mortgage, and with which request, they have refused and neglected to comply.

6. That your petitioner has never had possession of the said mortgaged premises, or received any of the rents or issues thereof.

7. That the said mortgage held by your petitioner has the following provision:

> "The mortgagee, his heirs, administrators and assigns, shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of right, as security for the amounts due the mortgagee, his heirs, administrators and assigns, without consideration of the value of the mortgaged premises, or solvency of any person or persons liable for the payment of such amounts."

Your petitioner therefore prays that the said defendant, Essex Park Realty Co., a corporation, the owner of the said premises, be restrained from collecting or receiving any of the said rents and profits of the said mortgaged premises, and that a receiver be appointed to collect such rents now due or hereafter to become due, and with such other powers that this Court may deem necessary.

And your petitioner will ever pray, etc.

A. MILTON JACOBS,
Solicitor for Petitioner.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

JACOB MACHLIN being duly sworn according to law, on his oath deposes and says:

I am the petitioner in the annexed petition. I have read the said petition and the same is true, except as to the matters alleged on information and belief, and as to these matters, I believe them to be true.

JACOB MACHLIN.

Subscribed and sworn to before me,
this 14th day of December, 1926.

FRANK I. A. KENT,
An Attorney-at-Law of New Jersey.

Order Appointing Receiver.

ORDER APPOINTING RECEIVER.

Filed December 14, 1926.

IN CHANCERY OF NEW JERSEY.

Between

JACOB MACHLIN,
Complainant,

and

ESSEX PARK REALTY CO., a corporation, *et als.*,
Defendants.

On Bill, etc.

Order Appointing Receiver.

This matter being opened to the Court by A. Milton Jacobs, solicitor for the above-named complainant, and upon reading and filing the petition of said complainant and the affidavit thereunto annexed; It is, on this 14th day of December, 1926,

ORDERED, that Louis N. Freeman of Newark, New Jersey, be and he is hereby appointed receiver in this cause, to take charge of the mortgaged premises in said petition and in the bill of complaint in this suit mentioned, and to manage the same, with power to sue for, collect and receive the rents, issues and profits thereof; to let the said premises, or any part thereof from time to time; and to agree concerning the rents to be paid therefor; to do all things necessary for the proper care and management of said premises; and he is to account for and pay what he shall so receive, as this Court shall direct; and it is further

Order Appointing Receiver.

ORDERED that the tenants occupying the said mortgaged premises, shall attorn to the said receiver, and pay all rents which may be in arrears, and which are to grow due, to him, and it is further

ORDERED that Essex Park Realty Co., a New Jersey corporation, the owner of the said premises, refrain from collecting or receiving any of the said rents and profits of the said mortgaged premises; and it is further

ORDERED, that before entering upon his duties the said Louis N. Freeman give a bond to the Chancellor for the faithful performance of his duties, in the sum of Five Hundred Dollars, and with such surety or sureties as may be approved by George B. Astley, Esq., one of the Special Masters in this Court, said bond to be filed with the Clerk of this Court.

E. R. WALKER,
C.

Respectfully advised.

ALONZO CHURCH,
V.-C.

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

New Jersey Court of Errors and Appeals

JACOB MACHLIN,
Complainant-Respondent,
vs.
ESSEX PARK REALTY CO.,
Defendant-Appellant.

On Appeal from Chancery Court.

BRIEF OF APPELLANT.

Facts.

This appeal is from an interlocutory order appointing a receiver and restraining tenants and owner of mortgaged premises. The default alleged was non-payment of first half of 1926 taxes. Appellant (the owner of the fee) filed its answer denying default. Subsequently on respondent's verified petition, without notice to appellant, the Court made the order appealed from.

ARGUMENT.

The grounds of appeal are: (1) Appellant was given no notice of the application for the order. (2) Appellant was afforded no opportunity to be heard as to whether or not the order should be granted. (3) Appellant was afforded no opportunity to present proof of facts which might warrant the refusal to grant the order. (4) Complainant submitted no proof that the mortgaged premises were insufficient security for the debt secured thereby. (5) Complainant submitted no proof that the mortgagor was insolvent. (6) Complainant submitted no proof of default under the terms of the mortgage. (7) At the time of the making of the order appellant

had filed an answer in this cause, yet nevertheless an injunction issued against appellant without giving it any notice of the application therefor, and without any circumstances appearing to make it proper to dispense with such notice. (8) The order directed rent in arrears to be paid to the receiver.

Point 1. Appellant was given no notice of the application for the order.

An application for appointment of a receiver of rents can be made only on due notice to adversaries.

> As a general rule, in order to give a court of equity jurisdiction of a motion for the appointment of a receiver, notice of such motion must be served upon all the parties adversely interested.
>
> *Jones on Mortgages* (7th Ed.) sec. 1526a.

In this State five days' notice of such application is required.

> The motion for the appointment of a receiver must be denied. Due notice of the application has not been given. It is a special motion, of which the defendant is entitled to notice. The circumstances stated in the affidavit do not amount to an excuse for the omission.
>
> *Tibbals* v. *Sargeant* (Chanc. 1862) 14 N. J. Eq. 449.

> Chancery Court Rule 165. Five days' notice of all motions shall be given, unless the court shall otherwise order.

Nor should an application for an injunction order be entertained *ex parte*.

> It is undoubtedly, however, the better practice to require notice, enjoining, in the meantime, so far as may be necessary to preserve the *status quo*.
>
> *Thomas Iron Co.* v. *Allentown Mining Co.*, (Chanc. 1877) 28 N. J. Eq. 77.

Point 2. Appellant was afforded no opportunity to be heard as to whether or not the order should be granted.

The provision of the mortgage (State of Case, p. 16) as to the appointment of a receiver, is of no legal effect.

> A stipulation is a mortgage that, in case foreclosure proceedings are instituted, a receiver may be appointed to take the rents, profits and crops, and apply them on the debt, has been held not to enlarge, in any degree, the mortgagee's rights as to the appointment of a receiver, for the court will appoint a receiver, in a proper case, without any stipulation, and, in any other case, it will not appoint one, whatever the parties may have agreed.
>
> 19 *R. C. L.*, sec. 370.

In any event the Court cannot, by implication, enlarge the meaning of this provision to include a waiver by the mortgagee and those claiming under him of:

(a) Notice of application for appointment of receiver;

(b) Proof of waste and misapplication of rents, which, in addition to insufficiency of security and insolvency, is or may be required before a receiver will be appointed;

(c) Notice of application for injunction;

(d) Proof of facts warranting the making of an injunctive order;

(e) Objection to the receiver to be named for bias, irresponsibility, or other just cause; or

(f) Proof of default in the terms of the mortgage.

Point 3. Appellant was afforded no opportunity to present proof of facts which might warrant the refusal to grant the order.

The order was entered *ex parte*. Appellant was given no opportunity to prove its allegation set forth in its answer: viz, that no default had occurred, nor of any other facts, nor to raise the question of the legal sufficiency of the petition and affidavit.

Uncerimoniously, without notice or hearing, appellant was deprived of the enjoyment of its property, its tenants alienated, its right to trial swept aside—and on what grounds: a disputed charge of non-payment of tax. Nothing more. For all the petition shows there may be a large equity in the property, the mortgagor may be highly responsible, the tenants may be many and the rents considerable.

Point 4. Complainant submitted no proof that the mortgaged premises were insufficient security for the debt secured thereby:

A receiver will not be appointed if it is not shown that the security is insufficient.

> The right of a mortgagee to sequester the rents of the mortgaged premises through the medium of a receiver emanates primarily from the inadequacy of the security.
> *Land Title & Trust Co.* v. *Kellogg* (Chanc. 1907), 73 N. J. Eq. 524.

The order is fatally defective as the affidavit annexed to the petition is in the common form.

> Additional emphasis is given to the impropriety of the order, in the fact that the affidavit annexed to the bill is in the common form, and without that specification of detail substantiating *seriatim* the material allegations of the bill, which requirement

> has been the invariable practice in equity in this jurisdiction, and without which neither an injunction can properly be issued, nor a receiver appointed.
> *Guangione* v. *Guangione* (E. & A. 1925) 97 N. J. Eq. 303.

Furthermore, the affidavit is not direct, but includes information and belief. How much of the petition is true to deponent's knowledge and how much does he only believe to be true? Are the terms of the mortgage correctly stated? Were the taxes really due?

Point 5. Complainant submitted no proof that the mortgagor was insolvent.

To justify the appointment of a receiver, it should be shown that not are only the mortgaged premises inadequate security, but the mortgagor will not respond in damages for deficiency.

> Application for appointment of a receiver denied where the only ground advanced for this extraordinary remedy is the claim that the property has deteriorated in commercial value.
> *Horner* v. *Dey* (Chanc. 1901) 61 N. J. Eq. 554.

> It is now the established rule that, where the security is uncertain or precarious, and the mortgagor cannot be made to respond to any deficiency that may arise at the foreclosure sale, the court has power to appoint a receiver.
> *Broad & Market Natl. Bank* v. *Larsen* (Chanc. 1917) 88 N. J. Eq. 245.

Formerly our courts required proof of further necessity, as the committing or permitting of waste or refusal to apply rents to payment of encumbrances, before appointing a receiver.

> It has not been the practice in this court to appoint a receiver in a mortgage case

simply on the ground of inadequacy of the mortgaged premises to pay the debt and the mortgagor's being insolvent.—The power should be exercised with great caution by the court, and only in cases where there appears a necessity for it.

Cortelyeu v. *Hathaway* (Chanc. 1855) 11 N. J. Eq. 39;

Frisbie v. *Bateman* (Chanc. 1873) 24 N. J. Eq. 28.

Neither should a receiver be appointed nor preliminary injunction issue except upon showing of urgent necessity and on proof of threatened irreparable injury.

Preliminary restrain should not be ordered unless upon the pressure of urgent necessity.

Pappas v. *Meyer* (Chanc. 1925) 98 N. J. Eq. 18.

A preliminary injunction will never be ordered, unless from the pressure of a present urgent necessity, and the damage threatened to be done, and which it is legitimate to prevent during the pendency of the suit, must be, in an equitable point of view, of an irreparable character.

Kearny v. *Bayonne* (E. & A. 1921) 92 N. J. Eq. 627.

The order appealed is further supported by another rule, and in full vigor at this time, viz, that to justify a preliminary injunction it must appear that its denial threatens an irreparable injury to complainant.

Feld v. *Kantrowitz* (E. & A. 1926) 132 Atl. Rep. 657 (not yet officially reported).

An injury is irreparable when it cannot be adequately compensated in damages or when there exists no certain pecuniary standard for the measurement of the damage.

Scherman v. *Stern* (E. & A. 1922) 93 N. J. Eq. 626.

For the same reason that a preliminary injunction will not issue, a receiver *pendente lite* ought not to be appointed.

Aldrich v. *Union Bag* (Chanc. 1913) 81 N. J. Eq. 244.

Point 6. Complainant submitted no proof of default under the terms of the mortgage.

The alleged default is non-payment of first half of 1926 taxes.

The mortgage (State of Case, p. 15) provides that if the taxes become due and payable, and remain unpaid and in arrears for thirty days, at the mortgagor's option the mortgage shall become due. The affidavit states that on June 1, 1926, taxes for first half of 1926 (amount of tax not given) became due and were a lien. There is no allegation that the taxes became payable, or remained unpaid or in arrears, nor that the mortgagor exercised the option to declare the mortgage due.

Even if the tax were unpaid, it is doubtful if the mortgage is in default for such reason. Certainly taxes for the first half of any year do not become liens on June 1st of such year, and are not liens until December 1st of such year.

Liens are of purely statutory origin; without a statute there can be no lien, and unless taxes are declared by positive law to be a lien upon the land against which they are assessed, no such effect can be claimed for them.

Morrow v. *Dows* (E. & A. 1877) 28 N. J. Eq. 459.

P. L. 1918, p. 847, sec. 6. All unpaid taxes on lands, with interest, penalties and costs of collection, shall be a lien on the land on which they are assessed on and after

the first day of December of the year in which they fall due.

The statute providing for semi-annual payment of taxes merely declares the first half payable on April 1st, and if not paid by June 1st same becomes delinquent. There is a distinction between "due," "payable" and "in arrears"; if the parties intended these words to have the same meaning, it is difficult to understand why they were all used and connected by "and's" instead of "or's." From our Tax Act it is evident that the first half of taxes is "payable" on April 1st, is "due" on December 1st and is "in arrears" on January 1st next following.

> P. L. 1918, Chap. 236, p. 872. Taxes shall be payable one-half of the amount thereof on the first day of April, which if not paid on or before the first day of June will become delinquent on that date.
>
> P. L. 1918, p. 886, sec. 16; as amended P. L. 1919, p. 283. When any municipal lien, or part thereof, on real property remains in arrears on the first day of July in the calendar year following the calendar year when the same became in arrears, the collector— —shall enforce such lien.

Inasmuch as complainant's right to foreclose was, to say the least, doubtful, the order should not have been made.

> It is perfectly well settled that, whenever the complainant's case is doubtful on the law or the facts, a preliminary injunction will not issue. To doubt is to deny.
>
> *Allman* v. *United Brotherhood* (Chanc. 1911) 79 N. J. Eq. 150; affirmed 79 N. J. Eq. 641.

Point 7. At the time of the making of the order appellant had filed an answer in this cause, yet nevertheless an injunction issued against appellant without giving it any notice of the application therefor, and without any circumstances appearing to make it proper to dispense with such notice.

Appellant having filed an answer (State of Case, p. 13) the Court erred in issuing the injunction *ex parte.*

> Chanc. Rule 208. No injunction shall issue after answer filed, without giving five days' notice of the application therefor, unless it shall be made to appear to the court that the circumstances of the case are such as to make it proper to dispense with notice.

The order does not recite any circumstances such as to make it proper to dispense with notice nor does petition or affidavit (State of Case, pp. 14-17) set forth any facts to warrant such abrupt action.

The order in question is a preliminary injunction and not a restraining order. The distinction was made in the case of *Allman* v. *United Brotherhood, supra,* in that the former runs until superseded by a final decree unless sooner modified or dissolved, while the latter requires the party restrained to show cause at some future date why the restraint should not be continued. It would seem that a preliminary injunction should not be used where the desired object can be accomplished by a restraining order. In the instant case there were no urgent circumstances requiring an injunction, and from the meager facts disclosed by the petition an ordinary order to show cause would have answered the purpose. The amount of taxes in

arrears or rent payable may have been so trivial as not to warrant the exercise of the extraordinary force of injunction.

Point 8.—The order directed rent in arrears to be paid to the receiver.

In this State it is well settled that rent accrued prior to the appointment of a receiver belong to the owner and not the receiver.

> It follows therefore, when, as here, a mortgage does not expressly pledge the rents, issues and profits of the mortgaged premises as further security for the payment of the debt, the rents accrued prior to the appointment of a receiver in a foreclosure proceeding belong to the mortgagor or the owner of the fee, and such receiver will not be directed to collect and apply them in payment either of unpaid taxes or interest on the mortgage.
>
> *Stewart* v. *Fairchild* (E. & A. 1919) 91 N. J. Eq. 86.

> The appointment of a receiver in foreclosure does not relate to the commencement of the suit. The receiver is not entitled to rents accruing, *pendente lite,* before his appointment. To entitle a mortgagee to rents accruing before he takes possession, or, what is its equivalent, the appointment of a receiver in foreclosure——there must be an express pledge of the rents; in other words, the mortgage must pledge the rents to accrue before default, during the mortgagor's possession.
>
> *Myers* v. *Brown* (Chanc. 1921), 92 N. J. Eq. 348.

Of course, in the instant case, there is no allegation, much less proof, of pledge of rents, etc.

It will be noticed that the order directs the tenants (a mandatory injunction) to pay the

rents. It does not name the tenants, and for all that may appear appellant may be one of the tenants or the tenant in entire possession, whereupon it is improper to direct the payment of rent to the receiver (*Williams* v. *Dube,* 4 N. J. L. J. 24). Furthermore, neither the petition nor the bill prays for any relief as against the tenants.

Briefly, appellant respectfully submits that the order appealed is in error in the following respects:

The petition on which it is based:

> (1) Sets forth no facts to warrant appointment of a receiver—no inadequacy of security, no insolvency of mortgagor, no waste, no misapplication of rents.
>
> (2) Sets forth no facts to warrant the issuance of an injunction order—no necessity (urgent or otherwise), no threatened injury, no irreparable damage.
>
> (3) Sets forth no default—no allegations of taxes being "payable" or "in arrears," or of exercise of option to declare mortgage due, or of the character or amount of the taxes.
>
> (4) Affidavit annexed is in common form, on information and belief, without particularity.

The order:

> (5) Was issued without notice, after answer filed.
>
> (6) Ordered tenants, without naming them, to pay receiver rent in arrears, although petition set forth no assignment of rent nor asked for such relief.

Wherefore appellant prays that the order be set aside.

CORN & SILVERMAN,
Solicitors and Counsel of Appellant.

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

New Jersey Court of Errors and Appeals

JACOB MACHLIN, *Complainant-Respondent,* *vs.* ESSEX PARK REALTY CO., *Defendant-Appellant.*	*On Appeal from Chancery. Court.*

BRIEF OF RESPONDENT.

Facts.

This is an appeal from an order appointing a receiver for the collection of rents of the mortgaged premises under process of foreclosure and restraining the tenants of said premises from paying the rents to any person other than the receiver and also restraining the owner from collecting any rents. The mortgage under process of forecloseure and under which the order appointing the receiver was made, contains the following provision:

"The mortgagee, his heirs, administrators and assigns, shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of right, as security for the amounts due the mortgagee, his heirs, administrators and assigns, without consideration of the value of the mortgaged premises, or solvency of any person or persons liable for the payment of such amounts."

The order appointing the receiver was made without notice to appellant, the owner of the mortgaged premises.

After the order appointing the receiver was made, the following events took place.

1. A stipulation was entered into between the attorney for the appellant and the attorney for the respondent in which it was agreed that any rents to be collected by the receiver would be applied to the payment of the building and loan dues and interest, taxes and maintenance of the mortgaged premises.

2. On motion made by the attorney for the complainant-respondent, the defendant-appellant's answer was stricken out on the ground that it disclosed no defense and was sham and frivolous.

3. A decree *pro confesso* was entered against the defendant-appellant and a writ of *fi. fa.* issued, under which the mortgaged premises were sold by the Sheriff of Essex County for the full amount due to complainant under his mortgage, leaving no surplusage for appellant.

(See supplemental state of case.)

ARGUMENT.

POINT ONE.

In replying to Points 1, 2, 3, 4, 5 and 7, advanced by appellant, it would perhaps be sufficient to say that appellant's brief deals with the general question of appointment of receivers for corporations. In the cases cited by appellant where receivers were appointed for the collection of rents of mortgaged premises during the process of foreclosure, the situation differs from that

in the case at bar because in the cases cited, there was no stipulation in the mortgage designating upon what terms the mortgagee was entitled to the appointment of a receiver. Under the terms of the mortgage in the present case, the mortgagee was entitled to the appointment of such receiver as a matter of right as security for the amounts due the mortgagor, without consideration of the value of the mortgaged premises or insolvency of any person or persons liable for the payment of such amounts. Such provision in a mortgage has been held to entitle a mortgagee to the appointment of a receiver without any notice whatsoever to the owner.

"Notice is not required when mortgage expressly provides that a receiver may be appointed without notice, especially if the owner is in default at the time of filing the application." *Jones on Mortgages* (7th Edition), Section 1526 A. This doctrine has been followed in New York State in the case of *Conroy* v. *Polsteira,* 150 App. Div. 832.

This provision in the mortgage is in effect an assignment of the rents to the mortgagee after default, and provides by which means said rents should be collected after said default, namely: Through the instrumentality of a receiver to be appointed by the Court of Chancery. At common law the mortgagee is entitled to the rents, issues and profits of the mortgaged premises after default. This doctrine of the common law is fully explained in the case of *Stewart* v. *Fairchild* (E. & A. 1919), 91 N. J. Eq. 86. This provision in the mortgage is a reiteration of the common law and merely designates the receiver as a person who shall collect the rents for the mortgagee.

Point 6 in appellant's brief alleging that there was no default in the mortgage on account of the first half of the taxes of the mortgaged premises not having been paid on or before June 1, 1926, can be readily answered by the provision of the Pamphlet Laws of 1918, Chapter 236, page 872, which provides as follows: "Taxes shall be payable half of the amount thereof on the first day of April, which, if not paid on or before the first day of June, become delinquent on that date." The case of *K. S. S. Realty Co., Inc.* v. *Ostroff, et al.* (Chancery, 1927), 135 Atl. Rep. 869 (not yet officially reported), holds that under this provision of the statute, taxes become a lien after June 1st.

It was also under this provision of the statute in the present case that the Vice-Chancellor, on motion by the solicitor for the complainant-respondent, struck out the answer of the defendant-appellant, on the ground that it disclosed no defense and was sham and frivolous.

In answering Point 8 of appellant's brief, it is hereby submitted that under the terms of the stipulation heretofore mentioned, the receiver paid over the rents as they were collected by him to the building and loan association. It is further submitted that there were no back rents due and therefore the provision in the order directing the receiver to collect back rents, was mere surplusage and was harmless to the appellant.

POINT TWO.

Assuming, however, for the purpose of argument, that the order appointing the receiver was improvidently made, the appeal from said order should, nevertheless, be dismissed because this Court can give the appellant no redress.

The supplemental state of the case discloses the fact that the defendant's answer was stricken out and that a decree *pro confesso* was entered and a writ of *fi. fa.* issued, under which writ the Sheriff of Essex County sold the mortgaged premises for the full amount due to complainant on his mortgage, leaving no surplusage for the defendant-appellant. It also discloses the stipulation entered into between the attorneys for the respective parties directing the receiver to apply the rents to be collected by him to the payment of the dues on the building and loan mortgage, a prior mortgagee, and to the maintenance of the mortgaged premises. This, the receiver did. He collected the rent of said premises amounting to $50 a month and paid that amount over to the building and loan association on its mortgage.

Under these circumstances no relief whatsoever can be afforded by this Court to the appellant.

The subject matter of the order has been disposed of and nothing can be turned back to the appellant by a reversal of the order appointing the receiver. The appellant has not been harmed, because the rents collected by the receiver were disposed of in accordance with the stipulation entered into between the attorney for the appellant and the attorney for the respondent. The appellant cannot recover back its property because that has been sold under the foreclosure,

nor is there any surplusage under said sale from which the appellant can recover any money.

A reversal of the order at this time would be a nugatory act and no useful end would be accomplished. The law in this State is well settled, that where this Court can afford the appellant no redress, it will not entertain the appeal.

"If this appeal should be maintained, and the order appealed from set aside, the appellants can derive no benefit from the judgment of this Court. The object of the order has been attained. The order has been executed. There is no redress which this Court can give to the appellants." *Coryell, Ex.* v. *Holcombe* (E. & A. 1854), 9 N. J. Eq. 650. This doctrine was also followed in the case of the *Mayor and Common Council of Gloucester City* v. *Green, Exrx.* (Prerogative Court, 1889), 45 N. J. Eq. 747, wherein it was held, "In this condition of affairs, it is obvious, that a reversal of both the decree of February 24, 1888, and of the order refusing to vacate that decree would be an entirely nugatory act. An act of that kind no judicial tribunal can be required to do."

"Courts exercising appellate jurisdiction sit to administer justice in matters of substantial interest, not to gratify the passions of the litigants, nor to foster a spirit of vexatious litigation." *Id.*

In the case of *Black* v. *Delaware & Raritan Canal Co.* (E. & A. 1873), 24 N. J. Eq. 455, at page 489, the following was stated: "The Court should refuse to do the act asked for, not because anybody is in fault, but because it does not seem becoming in a judicial tribunal to do any act which must be, there is every reason to suppose, empty and profitless."

"A refusal of the order at this time would be a nugatory act and no useful end would be accomplished by retaining the appeal." *The Camden & Atlantic R. R. Co.* v. *Elkins* (E. & A. 1883), 37 N. J. Eq. 273. This doctrine of the law was followed in the State of New York in the case of *Trustees of Huntington* v. *Nicoll,* 3 Johns Report 566, 598, wherein the learned Chancellor Kent, while Chief Justice of the Supreme Court of New York, said: "To reverse an order, which has long since expired, it is absurd. It would be doing an idle act, which does not comport with the gravity of a court of justice. It is one of the maxims of the common law, and which is a dictate of common sense, that the law will not attempt to do an act which would be vain, or to enforce an act which would be frivolous. *Lex nil frustra facit.*"

It is therefore respectfully submitted that the appeal in this matter should be dismissed with costs to the respondent.

A. MILTON JACOBS,
Attorney for Complainant-Respondent.

SAMUEL RUSINOW,
Of Counsel with Complainant-Respondent.

INDEX

NOTICE TO STRIKE OUT ANSWER.

In Chancery of New Jersey

Between JACOB MACHLIN, *Complainant,* *and* ESSEX PARK REALTY CO., a corporation, *et als.*, *Defendants.*	*On Bill, &c.* *Notice to Strike out Answer.*

To Corn & Silverman, Esqs., solicitors for the defendant, Essex Park Realty Co., a corporation:

PLEASE TAKE NOTICE, that on Tuesday, December 28, 1926, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancery Chambers, in the City of Newark, I shall apply to the Chancellor for an order to strike out the answer heretofore filed herein by the defendant, Essex Park Realty Co., for the following reasons:

1. That said answer is sham and frivolous, and filed for the purpose of delay, in that:

(a) The first half of the 1926 taxes became due and were payable on the 1st day of June, 1926.

(b) That the defendant has neglected and refused to pay the said taxes, although requested by the complainant so to do.

(c) That the same have remained unpaid and in arrears for more than thirty days.

A. MILTON JACOBS,
Solicitor for Complainant.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

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

I am the complainant in the within entitled cause of action; that before the filing of the bill of complaint herein for the foreclosure of the mortgage described in said bill of complaint, I did request of the defendant, Essex Park Realty Co., a corporation, by its agent, to pay the taxes, which they refused to do.

JACOB MACHLIN.

Sworn and subscribed to before
me this 18th day of December,
1926.

FRANK I. A. KENT,
Attorney at Law of New Jersey.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

HOMER J. VAN DUYNE, being duly sworn according to law, on his oath deposes and says:

I am the Receiver of Taxes for the City of Newark; that I have examined the records of the Receiver of Taxes of the City of Newark, and find that the taxes for the first half of the year 1926, charged against the premises No. 100 Parkhurst street, Newark, New Jersey, were not paid on the 1st day of June, 1926, and remained unpaid for more than thirty days thereafter.

H. J. VAN DUYNE.

Sworn and subscribed to before
me this 21st day of December,
1926.

CHARLES P. GRIFFITH,
Notary Public of N. J.

ORDER STRIKING OUT ANSWER.

IN CHANCERY OF NEW JERSEY.

Between JACOB MACHLIN, *Complainant,* *and* ESSEX PARK REALTY CO., a corporation, *et als.*, *Defendants.*	*On Bill, &c.* *Order Striking out Answer.*

This matter coming on to be heard in the presence of A. Milton Jacobs, solicitor of the complainant, Jacob Machlin, and Joseph J. Corn, of Corn & Silverman, solicitors of the defendant, Essex Park Realty Co., and the Court having heard the arguments of the said solicitors, and being of the opinion that the answer filed herein discloses no defense and is sham and frivolous;

And it appearing that due notice of the said complainant's motion to strike out the said answer for the causes aforesaid, has been given to said defendant;

It is thereupon on this 28th day of December, 1926, ORDERED, ADJUDGED and DECREED, that the defendant's said answer be and the same is hereby stricken out.

E. R. WALKER,
C.

Respectfully advised,

MAJA LEON BERRY,
V.-C.

DECREE PRO CONFESSO AND ORDER OF REFERENCE.

Filed January 7, 1927.

IN CHANCERY OF NEW JERSEY.

Between JACOB MACHLIN, *Complainant,* *and* ESSEX PARK REALTY CO., a corporation, *et als.*, *Defendants.*	*On Bill, &c.* *Decree Pro Confesso and Order of Reference.*

This cause being opened to the Court by A. Milton Jacobs, solicitor for complainant, and it appearing that process of subpoena and ticket attached was duly served on the defendants, Essex Park Realty Co., a corporation, Broad & Market National Bank, a corporation and Daniel S. DeCozen;

And it further appearing that the defendant, Essex Park Realty Co., filed an answer to the said bill within the time limited by law, but which said answer was ordered stricken out on the 28th day of December, 1926, and the defendant, Broad & Market National Bank, by Koehler & Augenblick, its solicitors, in lieu of an answer setting up its encumbrance, gave notice, pursuant to law, and the rules and practice of this court, that it desires to have its mortgage reported upon by the Master to whom this cause is referred; and the defendant, Daniel S. DeCozen, by Koehler & Augenblick, his solicitors, in lieu of an answer setting up his encumbrance,

gave notice, pursuant to law, and the rules and practice of this court, that he desires to have his mortgage reported upon by the Master to whom this cause is referred:

It is, therefore, on this 7th day of January, 1927,

ORDERED, ADJUDGED and DECREED, that said bill of complaint be taken as confessed against the said defendants, Essex Park Realty Co., a corporation; Broad & Market National Bank, a corporation, and Daniel S. DeCozen, and that it be referred to William F. Nies, Esq., one of the Masters of this court, to ascertain and report the amount due the complainant for principal and interest upon the mortgage held by him upon the premises mentioned and described in the said bill of complaint, and also the amount due, if anything, to the said Broad & Market National Bank and Daniel S. DeCozen, upon their mortgage, and to report accordingly; and also to ascertain and report the order and priority of the said mortgages, and whether they embrace the same premises, and that the said Master do make his report with all convenient speed.

And all further equity is reserved until the coming in of the said Master's report.

E. R. WALKER,

C.

FINAL DECREE.

Filed January 25, 1927.

IN CHANCERY OF NEW JERSEY.

Between JACOB MACHLIN, *Complainant,* *and* ESSEX PARK REALTY CO., a corporation, *et als.*, *Defendants.*	*On Bill, &c.* *Final Decree.*

This cause being opened to the Court by A. Milton Jacobs, solicitor for complainant, and it appearing that process of subpoena and tickets thereto attached have been duly issued and returned served on the defendants, Essex Park Realty Co., a corporation; the Broad & Market National Bank and Daniel S. DeCozen;

And it further appearing that on the 7th day of January, 1927, a decree *pro confesso* was duly made and filed in this cause directing that the bill of complaint be taken as confessed against the said defendants;

Whereupon, and upon reading and filing the report made in this cause by William F. Nies, one of the Masters of this court, bearing date the 10th day of January, 1927, whereby it appears that there is due to the complainant for principal and interest on his bond and mortgage, the sum of $2,068.98 on the 10th day of January, 1927;

And it further appearing that there is due to the defendant, the Broad & Market National

Bank, on the mortgage assigned to it by Daniel S. DeCozen, which was reported upon, for principal and interest, the sum of $1,482.03, on the 10th day of January, 1927, and that the balance amounting to $3,052.91, of the said mortgage, is due to the defendant, Daniel S. DeCozen, on the 10th day of January, 1927, and no cause being shown or appearing to the contrary, it is on this 25th day of January, 1927, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey;

ORDERED, ADJUDGED and DECREED, that the said bill be taken as confessed, and that the said Master's report in all matters and things therein contained, stand confirmed, and that complainant is entitled to have the said sum of $2,068.98, with lawful interest thereon to be computed from the date of said report, to wit, January 10, 1927, together with his costs of this suit, and secondly the defendant, the Broad & Market National Bank, whose mortgage is second in priority to complainant's mortgage, is entitled to the sum of $1,482.03, on the mortgage assigned to it by Daniel S. DeCozen, with lawful interest thereon to be computed from the date of said report, to wit, January 10, 1927, together with its costs of this suit, and that the defendant, Daniel S. DeCozen, is entitled to the balance of the said mortgage amounting to $3,052.91, with lawful interest thereon from the 10th day of January, 1927, being the date of the said Master's report, together with his costs of this suit, raised and paid out of the mortgaged premises; and it is accordingly further

ORDERED, ADJUDGED and DECREED, that all of the said mortgaged premises as will be sufficient to raise and satisfy the said debts, interests

and costs be sold; and that a writ of *Fieri Facias* do issue for that purpose out of this court, directed to the Sheriff of the County of Essex, commanding him to make sale according to law, of all of the said mortgaged premises as will be sufficient to pay the said debts, interests and costs, and that he pay the same to the complainant or to his solicitor, and secondly to the defendants, the Broad & Market National Bank and Daniel S. DeCozen, or their solicitors; that in case more money shall be raised by the sale than shall be sufficient to answer such payments, such surplus money be brought into this court and deposited with the clerk to abide the further order of this court, unless otherwise previously disposed of by order of the court. And the sheriff is to make the return to this court of his proceedings by virtue of the said writ; and it is further

ORDERED, ADJUDGED and DECREED, that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to all of the said mortgaged premises as shall be sold as aforesaid by virtue of this decree; and it is further

ORDERED, ADJUDGED and DECREED, that the sum of forty-one dollars and thirty-six cents, be allowed and paid to the solicitor of the complainant instead of the retaining fee now allowed to counsel by statute, and that the same be included in the taxed bill of costs and collected with the other items of said bill.

E. R. WALKER,
C.

WRIT OF FIERI FACIAS.

NEW JERSEY, *to wit:*

The State of New Jersey to the (SEAL) Sheriff of the County of Essex, GREETING:

WHEREAS, on the 25th day of January, in the year of our Lord one thousand nine hundred and twenty-seven, by a certain decree made in our Court of Chancery, before our Chancellor, at Trenton, in a certain cause therein depending, wherein Jacob Machlin is complainant, and Essex Park Realty Co., a corporation; Broad & Market National Bank, a corporation, and Daniel S. DeCozen, are defendants, it was ordered, adjudged and decreed that certain mortgaged premises, with the appurtenances, in the bill of complaint in the said cause particularly set forth and described, that is to say: All the following tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey.

BEGINNING in the northerly line of Parkhurst street 203 feet 6 inches westerly from the northwesterly corner of the same and New Jersey Railroad avenue; thence running north 30 degrees 55 minutes east 104 feet 8 3/8 inches; thence north 59 degrees 5 minutes west 25 feet; thence south 30 degrees 55 minutes west 105 feet, 1 7/8 inches to the northerly line of Parkhurst street; and thence south 60 degrees 11 minutes east 25 feet to the place of BEGINNING.

Being Lot No. 29 on William Shugard Map, made June, 1848, and the strip of land lying in front of the same between the present northerly

line of Parkhurst street and the northerly line of old Parkhurst street on the William Shugard Map aforesaid.

TOGETHER with all and singular the rights, liberties, privileges, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and remainders, rents, issues and profits thereof, and also all the estate, right, title interest, use, property, claim and demand of the said defendant of, in, to and out of the same, be sold, to pay and satisfy in the first place unto the said complainant the sum of $2,068.98, the principal and interest secured by his certain mortgage given by Daniel S. DeCozen, bearing date the 13th day of November, in the year one thousand nine hundred and twenty-five, together with lawful interest thereon from the 10th day of January, nineteen hundred and twenty-seven, until the same be paid and satisfied and also the costs of the said complainant; and in the second place to the defendant, Broad & Market National Bank, on the mortgage assigned to it by Daniel S. DeCozen, the sum of $1,482.03, together with lawful interest thereon from the 10th day of January, 1927, and to the defendant, Daniel S. DeCozen, the sum of $3,052.91, being the balance of the said mortgage, together with lawful interest thereon from the 10th day of January, 1927; also the costs of the said defendants, Broad & Market National Bank and Danied S. DeCozen; and that, for that purpose, a writ of *Fieri Facias* should issue, directed to the Sheriff of the County of Essex, commanding him to make sale as aforesaid; and that the surplus money arising from such sale, if any there be, should be brought into said court, subject to the further order of the said court, as by the said decree remaining as of record in our

said Court of Chancery, at Trenton, doth and may more fully appear. And Whereas, the costs of the said complainant have been duly taxed at the sum of one hundred eighty-two dollars and fifty-nine cents ($182.59).

Therefore, you are hereby commanded that you cause to be made of the premises aforesaid, by selling so much of the same as may be needful and necessary for the purpose, the said sum of $2,068.98, and the same you do pay to the said complainant, together with lawful interest thereon as aforesaid, and the sum aforesaid of costs, and the sum of $1,482.03, on the mortgage assigned to the defendant, Broad & Market National Bank, together with lawful interest thereon as aforesaid, and the sum aforesaid of costs, and the sum of $3,052.91, being the balance of the said mortgage, due to the defendant, Daniel S. DeCozen, together with lawful interest thereon as aforesaid, and the sum aforesaid of costs, and that you have these moneys before our said Chancellor, in our Court of Chancery aforesaid, at Trenton, on the 5th day of February next, to render to the said complainant, Jacob Machlin, and also the surplus money, if any there be, to abide the further order of our said court, according to the decree aforesaid. And you are to make return at the time and place aforesaid, by certificate under your hand, of the manner in which you have executed this our writ, together with this writ.

Witness, Edwin Robert Walker, Esq., our Chancellor, at Trenton aforesaid, the 5th day of February, in the year of our Lord one thousand nine hundred and twenty-seven.

THOMAS BARBER,
Clerk.

A. Milton Jacobs,
Solicitor.

ORDER CONFIRMING SALE.

IN CHANCERY OF NEW JERSEY.

Between Jacob Machlin, *Complainant,* *and* Essex Park Realty Co., a corporation, *et als.*, *Defendants.*	*On Bill, &c.* *Order Confirming Sale.*

Upon reading and filing a report made by Conrad Deuchler, Sheriff of the County of Essex, and State of New Jersey, dated the 30th day of March, 1927, and the affidavit to the said report annexed, whereby it appears that on the 29th day of March, 1927, the said sheriff sold at public vendue, at the sheriff's office in the Court House, in the City of Newark, County of Essex and State of New Jersey, after having first duly advertised the same, the lands and premises particularly described in the writ of execution issued out of this court in the above-entitled cause, and directed to him, to John J. Stamler, of the City of Elizabeth, County of Union and State of New Jersey, for the sum of twenty-six hundred dollars, said John J. Stamler being the highest bidder for said lands and premises, and that the said lands and premises were sold at the best price that they would at the time of said sale bring in cash, and no cause appearing to the contrary;

It is, on this 9th day of April, 1927, Ordered, that the said sale be and it is hereby ratified

Order Confirming Sale.

and confirmed, in all respects, as valid and effectual in law.

It is further ORDERED, that the said sheriff execute a good and sufficient conveyance to the said John J. Stamler, or his assigns, of said mortgaged lands and premises so sold to him.

E. R. WALKER,
C.

Notice.

NOTICE.

New Jersey Court of Errors and Appeals

Between	
JACOB MACHLIN, *Complainant-Appellee,*	*On Appeal from the Court of Chancery.*
and	
ESSEX PARK REALTY CO., a corporation, *Defendant-Appellant.*	*Notice.*

To: Jacob Machlin or A. Milton Jacobs, his solicitor:

TAKE NOTICE, that on Tuesday, the 1st day of February, 1927, at 11 o'clock in the forenoon or as soon thereafter as counsel can be heard we shall apply to the Court at the State House, Trenton, for an order to stay proceedings on appeal from the order appointing the receiver, dated December 14, 1926, on the ground that if further proceedings under said order be not stayed, it will be impossible to restore the appellant to its former position in case it is successful in its appeal for the reason that by the time appellant's appeal is heard by this court the receiver will have disbursed the rents, issues and profits of the mortgaged premises received by him by virtue of said order.

CORN & SILVERMAN,
Solicitors for and of Counsel
with Appellant.

Stipulation.

STIPULATION.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JACOB MACHLIN, *Complainant-Appellee,* *vs.* ESSEX PARK REALTY CO., a corporation, *Defendant-Appellant.*	*On Appeal from the Court of Chancery.* *Stipulation.*

It is hereby stipulated and agreed by and between A. Milton Jacobs, solicitor for appellee, and Corn & Silverman, solicitors for appellant, that further proceedings under the order of the Court of Chancery from which an appeal was taken to this court, be stayed only insofar that the receiver appointed by said court under said order shall not disburse any of the funds received by him except for the payment of the taxes, instalments of principal and interest under the first mortgage on the mortgaged premises or for other maintenance of the property, pending final decision of said appeal by this court.

Dated, January 29, 1927.

A. MILTON JACOBS,
Solicitor for Appellee.

CORN & SILVERMAN,
Solicitors for Appellant.

Filed after the Oral Argument by leave of Court.

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

New Jersey Court of Errors and Appeals

JACOB MACHLIN, *Complainant-Respondent,* *vs.* ESSEX PARK REALTY CO., *Defendant-Appellant.*	*On Appeal from Chancery Court.*

SUPPLEMENTAL BRIEF OF APPELLANT.

After this appeal was noticed and argued, respondent filed a supplemental state of case and a brief, with the object of bringing this case under the ruling in *Coryell* v. *Holcombe,* 9 Eq. 650.

Certain allegations of fact are made in respondent's brief, for which there is no authority in the original or the supplemental state of case. These are: (1) stipulation states that receiver is to apply rents to payment of the building and loan dues and interest (Resp. Brief, p. 2); (2) sale of mortgaged premises leaving no surplusage (Resp. Brief, p. 5); (3) receiver collected rent of $50 a month and paid that amount over to the building and loan association (Resp. Brief, p. 5); (4) there were no back rents due (Resp. Brief, p. 4).

Neither of the states of case show the prior mortgage to be held by a building and loan association. The decree for respondent was for $2,068.98 and costs $182.50 (Sup. State of Case, pp. 7 and 12) and the sale realized $2,600 (Sup. State of Case, p. 13), so that a surplus was created above respondent's mortgage. There is no report of the receiver in the record, so that it cannot be known what the receiver received

or disbursed. The record does not disclose whether or not there were any back rents due at the time the order appealed from was made.

But even if the facts alleged by respondent were true, the appeal should not be dismissed. Inasmuch as the notice of appeal in this case was filed on December 23, 1926, whatever may have happened since that date should not be considered by this Court. The supplemental state of case should have contained nothing filed after the date of appeal; in the instant case all of the record disclosed in the supplemental state of case was made after the filing of the notice of appeal. The object of such state of case should be to bring in matters which should have been in, but were omitted from, the original state of case. In *Black* v. *Delaware & Raritan Canal Co.,* 24 Eq. 455, this Court declared it had no power to receive evidence of facts occurring since the denial of the preliminary injunction, from which denial the appeal was taken, and further (at p. 479), "no case can be found in this country nor in England, where any purely appelate court has gone outside the record, and permitted new evidence to affect the rights of parties."

None of the cases cited by respondent, under "Point Two," are in point.

(1) *Coryell* v. *Holcombe, supra,* was an appeal from an order directing process to bring in appellants to answer for an alleged contempt. The Court stated, "it appears by the proceedings before us that process was issued upon this order —that the appellants were brought before the court, entered their appearance according to rules of the court, and actually answered interrogatories exhibited before a Master." This was done before the appeal was taken, as pointed out by this Court in *Perth Amboy Dry Dock Co.*

v. *Crawford,* 98 Eq. 692. In other words, appellants fully complied with the decree, before expressing their dissatisfaction by way of appeal.

(2) In *Gloucester City* v. *Green,* 45 Eq. 747, the record showed nothing on which the appeal could act. The appeal was taken from the discharge of an order to show cause why a decree should not be vacated which had directed an executrix to make sale. On the same day the order was discharged, the executrix's letters were revoked, an administrator *c. t. a.* appointed and the latter directed to make the sale, and from this last decree no appeal was taken. It was therefore evident that the executrix could not sell, and the decree appealed from directing her to sell was made of no effect by the later decree.

(3) Respondent's quotation from *Black* v. *Delaware & Raritan Canal Co., supra,* is from the only dissenting vote of affirmance, to seven for reversal. In that case, as above stated, the Court refused to receive any evidence as to occurrences after the entry of the decree appealed from.

(4) Likewise in *Camden & Atlantic R. R.* v. *Elkins,* 37 Eq. 273, the act was done before the appeal was taken. There the injunction order appealed from simply restrained interference with an election proposed to be held on the 22nd of February; the day was passed when the appeal was taken, and the injunction had then accomplished its whole purpose.

(5) The appeal in *Huntington* v. *Nicoll,* 3 Johns 566, was taken in February, 1808, from an order restraining the giving of testimony on June 30, 1807. The order had therefore long expired before registry of dissatisfaction, by appeal.

In the present case, however, appellant showed its dissatisfaction with the decree by appealing a week after its entry. It has not acquiesced in the decree.

The instant case presents many unfinished matters and undetermined liabilities. The receiver is yet to present his report; the report is to be acted on; his fees are to be fixed and paid; the balance in his hands, if any, disbursed; whether any back rents due at the time of his appointment belong to the appellant or the purchaser at the sheriff sale depends on the decision of this Court in this appeal; likewise the question of the return to appellant of any rents disbursed by the receiver. The stipulation (Sup. State of Case, p. 16) between counsel negatives the idea that there is no corpus to be affected by this appeal.

If the respondent proceeded with the execution of the decree appealed from, he did so at his own peril.

> "The party who proceeds with the cause in the Court of Chancery before the decision of the appeal to the interlocutory order will incur the hazard necessarily incident to such step; for, if the interlocutory order be reversed, and the error thus rectified shall have deprived the appellant of a right which would have benefited him on the final hearing, it is obvious that the final decree, under such circumstances, could not stand" *Barton* v. *Long,* 45 Eq. 160.

The record discloses nothing as to the execution of the decree, other than the stipulation between counsel as to what disbursements the receiver may make.

> "Nor does the fact that a decree is executed deprive the party of his right to appeal. It is in fact every day's practice to appeal from decrees after they have been executed. * * * The execution of the decree, either before or after the appeal, in nowise interferes with the right of appeal, or with the proceedings upon it." *Peer* v. *Cookerow,* 14 Eq. 361.

Appellant respectfully contends that its appeal should not be dismissed, and that the order appealed from should be reversed for the reasons set forth in its brief of which this is a supplement.

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