

Court of Errors & Appeals.

JAMES H. LEEDS, Appellant, and LIVINGSTON GIFFORD and others, Respondent.	} On Appeal from Chan- cery.
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BRIEF OF APPELLANT'S COUNSEL.

This matter came before the Court on petition to correct the Master's report, and it was expressly stated by counsel that they desired that the questions submitted to the Court should be decided on their merits, without regard to form.

The facts out of which these questions arise are simply these.

There existed against the property under foreclosure five mortgages. The first was held in the name of Livingston Gifford, either for his own benefit or in the interest of the estate of George Gifford, deceased, of which he is one of the executors. The second was held by Livingston Gifford, George Gifford and Eleanor C. Gifford, executors, &c., of George Gifford, deceased. The third was held by James H. Leeds, the complainant. The fourth and fifth were held by the said executors of George Gifford, deceased.

On January 31st, 1885, the executors of George Gifford, deceased, were put in possession of the

mortgaged premises by Uriah Allen the owner of the fee, in pursuance of a written agreement between them, a copy of which is exhibited in these proceedings.

From that time until the sale under foreclosure they were mortgagees in possession, receiving and accountable for the rents and profits of the premises.

They received during that time to the date of the Master's report rents to the amount of \$1141.65. The rents received since that time to the time of the sale have been duly accounted for, so that the only question before the Vice-Chancellor was, and now is, how should the rents received to the time when the Master made his report be appropriated.

By a clause in the agreement under which they took possession as mortgagees it was stipulated "that the net income from said property shall be applied by the said party of the first part (the executors) to the payment of their said mortgages and interest, or of the taxes or water rents due or to become due upon said property, or alterations, repairs or insurance premiums, as they may think best, *and in such order as they may elect.*"

By virtue of this agreement these executors claim that they had a right to apply the rents received, upon their last mortgage, in total disregard of any claim which the complainant might make to have them applied upon one of the mortgages antedating his.

The rents which they received were paid to them in the following manner :

May 1st, 1885, of L. C. Allen, \$250.

Augt. 1st, 1885, of L. C. Allen, \$250.

Oct. 1st, 1885, of J. McCollum, \$75.

Nov. 1st, 1885, of L. C. Allen, \$16.65.

Feb. 1st, 1886, of L. C. Allen, \$250.

April 15th, 1886, of Pulman Car Co., \$50.

May 1st, 1886, of L. C. Allen, \$250.

May 15th, 1886, of Pulman Car Co., \$50.

June 15th, 1886, of Pulman Car Co., \$50.
 July 15th, 1886, of Pulman Car Co., \$50.
 Aug. 15th, 1886, of Pulman Car Co., \$50.
 Sept. 15th, 1886, of Pulman Car Co., \$50.
 Aug. 1st, 1886, of L. C. Allen, \$250.

The bill was filed in this case January 7th, 1886. Before that time application was made in behalf of the complainant to the executors to redeem and pay off their first two mortgages. This application was renewed after the suit had been commenced. But no satisfaction whatever could be obtained from them, and the complainant had no means of ascertaining the amount due, or what they claimed to be due upon those two mortgages, until the matter came before the Master to make his report in May, between the 6th and the 15th of May, 1886. The Master's report bears date on the 15th day of May, 1886.

At the time when the counsel of the respective parties came together before the Master, it was stated by the counsel of the executors that \$662.91 was the net amount of rents received by them to that date. No question was made as to this amount before the Master, it being assumed that the statement made was correct.

The counsel for the executors claimed that these rents must be applied upon the last mortgage held by them, as appeared by endorsement thereon under date of May 6th, 1886, the same day when the counsel appeared before the Master.

The counsel for the complainant insisted that the rents should be applied upon one of the executor's mortgages, being prior to the complainant's mortgage.

The question then for the Court to determine is whether, under the circumstances of this case, equity requires the rents received to be applied upon one of the mortgages held by the executors of older date than that of the complainant's, or whether the execu-

tors have a right to require that it be applied upon their last mortgage subsequent to the mortgage of complainant.

The executors insist that they had the right to the appropriation in the manner claimed by them, by virtue of their agreement with Uriah Allen. The agreement made with him may bear such interpretation, but it is extremely doubtful whether Mr. Allen ever so understood it. The complainant insists, on the other hand, that being mortgagees in possession they could make no contract with Mr. Allen which would authorize or protect them in doing anything inconsistent with the character they assumed or the position they occupied, and that therefore they never had any right, while occupying the property as mortgagees in possession, to apply the rents towards the payment of the incumbrances upon the property in any other way than in the regular order of their priority.

But if they had the right as they claim, not having made any appropriation until more than four months after the complainant had proffered himself ready and willing to pay their first two mortgages, and after they had virtually declined to accept such payment, and after the complainant had commenced his suit to foreclose and redeem, and after an interlocutory decree by default against them, and a reference to a Master to compute the amounts due upon the several incumbrances upon the property, it was then too late to exercise such right, and the Court will make the application according to the established principles of equity.

Upon this question the language of Chancellor Williamson in *Terhune v. Colton*, 1 Beasley, 233, is pertinent and directly in point. He says: "These payments not having been appropriated by either party *at the time they were made*, and a third party being interested in their appropriation, if any equities attached on behalf of the third party, it was not in

the power of the debtor, and creditor, at a subsequent period, to make an appropriation affecting the equities of such third party."

It is true that this language is criticized in one particular by Judge Elmer in his opinion in the Court of Error and Appeals in the same case on appeal. But the decree of the Chancellor was unanimously affirmed. Judge Elmer says: "The well established rule is, with some exceptions not affecting this case, where a debtor owing several debts makes a payment to a creditor, he has a right to apply it to what debt he pleases; if he makes no specific appropriation, the creditor may apply it as he pleases; and where neither party appropriates it, the law will apply it *according to its own notion of the intrinsic justice of the case*. All the cases in which the Court has made the application, so far as I am aware, are cases where neither party had appropriated it *before a controversy arose*. The opinion has been expressed, that the creditor must do it soon or within a reasonable time; but no case limits the right of either party to *the precise time when the money was received*."

The principle which lies at the bottom of all this, and which is clearly to be inferred from what the Court of Chancery and the Court of Appeals have said, is that where a third party is interested in the appropriation of a payment made by a debtor to a creditor, and neither the debtor nor the creditor have made any appropriation until after a controversy has arisen, and the equities of such third party have clearly intervened, they will not be allowed then to make any application affecting the equities of such third party.

This seems to be absolutely conclusive against the claim of the executors in this case to have these rents appropriated towards the payment of their last mortgage, even if it had been in their power to do so before any controversy arose about it.

But we insist that as mortgagees in possession they never had any right as against the complainant to make such appropriation.

"A mortgagee in possession whether in person, by trustees, receiver, or by a tenant, is in equity accountable for the rents and profits of the estate, and is bound to apply them in reduction of the mortgage debt."

2 *Jones on Mortgages*, page 1114.

In *Charles v. Dunbar*, 4 Metcalf, 502, the following language is used by the Court: "The second mortgagee may take the possession as against that of the mortgagor, if the latter hold it in his own right, and thus exclude him and take the rents and profits to his own use. If such second mortgagee should be prevented from making such entry by the previous entry and actual occupation of the first mortgagee, or by his claiming to exclude the second mortgagee by virtue of the superior title conferred by the first mortgage and the occupation under it, then he would be held to account, in favor of the second mortgagee for the rents and profits."

"If the senior mortgagee is in possession he must apply the rents in satisfaction of his debt, and cannot permit the owner of the equity of redemption to receive them to the prejudice of a junior mortgagee. In that event he might justly be postponed to a junior mortgagee to the extent of the rents and profits that he has improperly permitted the owner of the equity to receive."

Hitchcock v. Fortier, 65 Ill. 244.

In *Gibson v. Crehore*, 5 Pickering, 159, this language is used by the Court: "The case of *Saunders v. Frost* determined in this Court at the last term for Hampden county, proceeded on a similar principle.

The parties were tenants in common of a mortgage, the defendant holding a prior mortgage of the same estate, and the bill was brought for the purpose of redeeming the prior mortgage. *The defendant insisted on his right to retain the profits under the mortgage held in common, but he was required to account for them as received under the first mortgage*, by which he held the legal estate, which was paramount to his right in common. This case comes clearly within the same principle. And it may be added that in every case, when nothing to the contrary appears in evidence, *the possession will follow the legal estate.*"

The Vice-Chancellor has undertaken to settle this case by invoking a rule of law which has no just application to the facts of this case, and which as applied to these facts is utterly without right and has not a single equitable principle in its favor.

He says "a mortgage, which does not by its terms pledge the rents and profits of the mortgaged premises for the payment of the mortgaged debt, creates no lien on them, and gives the mortgagee no right to them. The mortgagor, while he remains in possession, may take them and apply them to his own use, without being liable to account for them."

Now it is doubtless true that where the rents and profits are not pledged for the debt, the mortgagee in law has no lien upon them. But then has he no right to them? If he has not upon what principle does the practice of the Court of Chancery rest when it again and again, in proceedings for foreclosure, sequesters the rents and profits and applies them to the reduction of the mortgage debt, and even with its strong arm compels the mortgagor to pay rent for the house which he owns, or summarily turns him out of possession and puts somebody else in who will pay rent? Has this Court for years been laying its hand upon property which the mortgagor had not pledged, and to which the mortgagee had no right, and wrongfully, against the will of the debtor, applied it to the payment of his debts?

Again the Vice-Chancellor seeks to liken this to a case where a debtor makes a payment to his creditor without appropriating it to either one of several distinct claims, and if neither debtor or creditor has exercised the right of appropriation, the Court, he says, will apply the payment to the debt which is least secured. This is all very well where the debtor and creditor are alone concerned. But when third parties are interested and have rights, equitable rights, which intervene, the whole thing is changed. The equities of the third party are to be considered and protected as well as those of the debtor and creditor.

The principle which underlies this whole question of the appropriation of payments, and the disposition of rents and profits of mortgaged real estate, is purely one of equity. Whenever the Court is called upon to exercise its power it will do, and require to be done, just what, under the circumstances of the case, equity and fair dealing require should be done.

The Vice-Chancellor seems entirely to have overlooked the most important facts to be considered in this case.

Consider for a moment what they are.

The bill in this case was filed on the 7th of Jan. 1886. The executors of Gifford were then in possession and had been for nearly a year. The complainant before he filed his bill, by his counsel, applied to them to redeem and pay off their first two mortgages. He could not make a legal tender, because he did not know the amount due, and had no means of ascertaining. They declined to give him any satisfaction. He was then obliged to file his bill to foreclose his mortgage and redeem as against their first two mortgages. Still hoping to pay off those two mortgages at once, he applied again to them for the purpose, but with like result. He could not ascertain the amount due upon their mortgages. The fact is very patent that they did not intend to let him redeem. Their first two mortgages were seven per cent. mortgages and were well secured. Their last two mort-

gages were not secured at all. They intended to hold on to the possession under their first mortgages, allow the seven per cent. interest to accumulate, keep all they could from the rents of the property and apply them on one of their last mortgages.

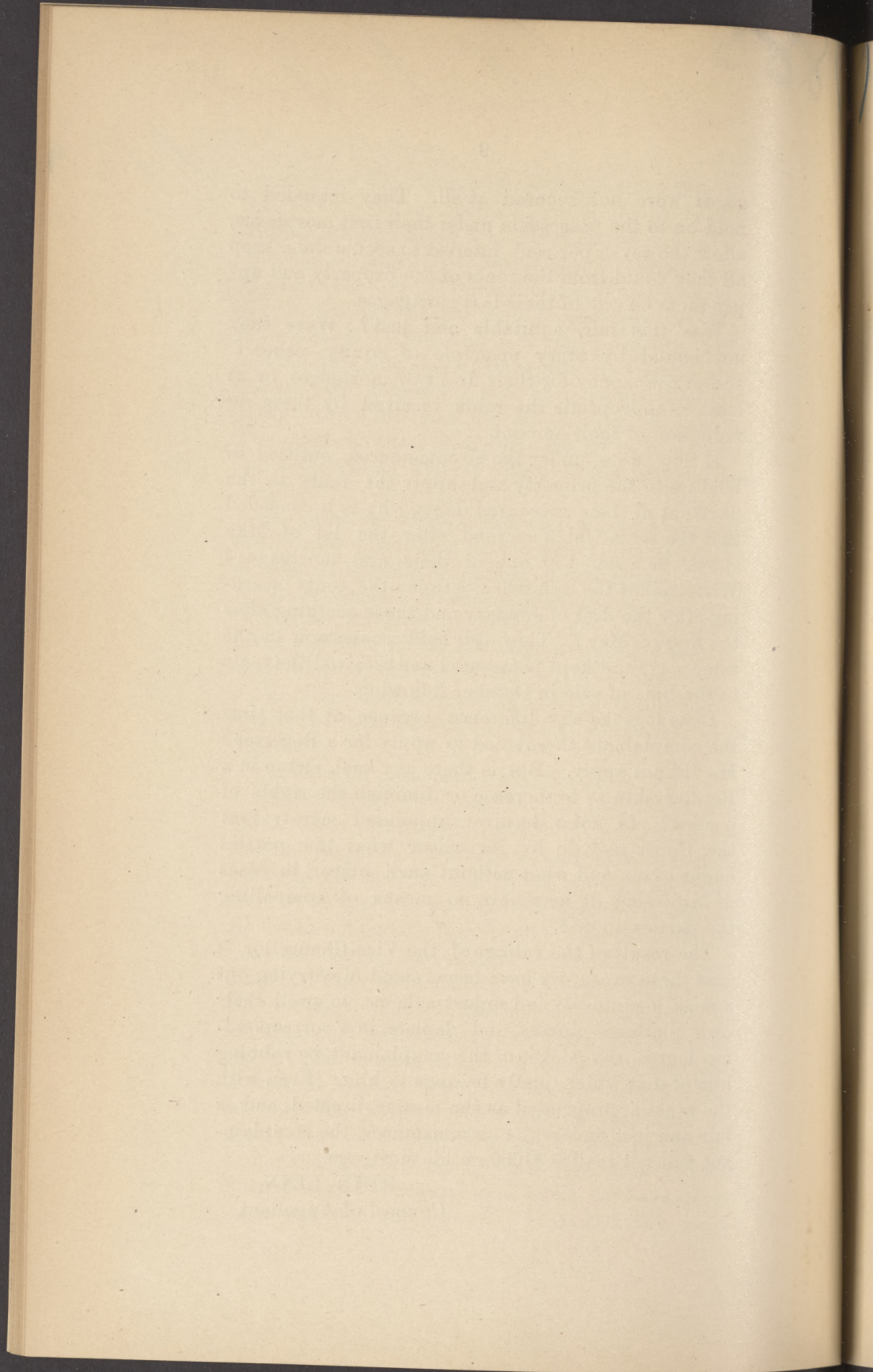
Was this fair, equitable and just? Were they not bound by every principle of equity either to accept the money for their first two mortgages, or at least to appropriate the rents received by them in reduction of their amount.

If they were, under the circumstances, entitled to hold on to the property and apply the rents to the payment of their unsecured debts, why is it conceded that the rents which accrued after the 1st of May should be applied on one of their first mortgages? What makes the difference between the rents accruing after the first of January and those accruing after the first of May? They still held possession in the same way, and kept possession and received the rents to the time of sale in October following.

Does it make any difference because at that time the complainant threatened to apply for a Receiver? He did not apply. But is there any such virtue in a Receivership as to increase or diminish the rights of parties? Is not a Receiver appointed merely that the Court may do by its officer what the parties ought to do, and what without such officer, in cases of insolvency, it may have no means of compelling the parties to do?

The result of the ruling of the Vice-Chancellor is that these executors have been aided in carrying out a most inequitable and unjust scheme to swell their own plethoric purses, and deplete, in a corresponding degree, the pocket of the complainant, by robbing him of that which justly belongs to him. Even with the rents appropriated as the master directed, and as fair and just under the circumstances, the complainant will not realize \$1000 on his mortgage.

JOHN LINN,
Counsel of Appellant.



In Chancery of New Jersey

Between

JAMES H. LEEDS,
Complainant,

and

URIAH ALLEN AND WIFE ET ALS.,
Defendants.

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On Bill, &c.

Notice.

To JOHN LINN, Esq.,
Solr. for Compl't.

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Take notice, that on Monday, August 9 inst., I shall apply to the Chancellor, at the office of the Vice Chancellor, on Broad street, in the City of Newark, in the State of New Jersey, at the hour of 11 o'clock in the forenoon of that day, or as soon thereafter as I can be heard, for an order vacating the enrollment and opening the Master's report and decree in above³⁰ cause, and for such other and further relief as prayed for in the petition hereto annexed; and that upon the hearing of said motion I shall read the petition and affidavits hereto annexed.

Jersey City, Aug. 2d, 1886.

Yours respectfully,
WM. BRINKERHOFF.

IN CHANCERY OF NEW JERSEY.

10 	Between JAMES H. LEEDS, Complainant, and URIAH ALLEN AND WIFE et als., Defendants.	} On Bill, &c. } } Petition.
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To his Honor, THEODORE RUNYON, Chancellor of the State of New Jersey :

- 20 Your petitioners, Livingston Gifford, of Jersey City, in the County of Hudson and State of New Jersey, and Livingston Gifford and George Gifford, executors, and Eleanor C. Gifford, executrix of George Gifford, late of Jersey City aforesaid, deceased, humbly complaining, respectfully show that George Gifford, late of Jersey City, in the County of Hudson and State of New Jersey, departed this life on or about the second day of July, in the year eighteen hundred and eighty-four, leaving a last will and testament which was in the same month admitted to
- 30 probate by the Surrogate of the County of Hudson, and letters testamentary thereon and thereunder were issued to Livingston Gifford and George Gifford as executors and Eleanor C. Gifford as executrix, being the executors and executrix named in said will, and that said executors and executrix took upon themselves the burthen of said estate ; that among the personal estate of which said George Gifford died possessed, and which at the present time form a part
- 40 of his estate, were the following mortgages, with accompanying bonds, to wit :

SUSANNAH E. ALLEN
and husband.

to

GEORGE GIFFORD.

Dated October 19th, 1863.
Recorded November 3d, 1863.
Book 30 of Mtgs., p. 319, &c.
Principal, \$1085.
Interest due from May 30th, 1882,
less \$92 75-100, recd. on account.

SUSANNAH E. ALLEN
and husband.

to

GEORGE GIFFORD.

Dated March 31st, 1875.
Recorded March 31st, 1875.
Book 116, p. 514, &c.
Principal, \$1500.

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MORRIS S. ALLEN,

to

SUSANNAH E. ALLEN,

Dated October 29th, 1877.
Recorded November 7th, 1877.
Book 132, page 466, &c.
Assigned to George Gifford.
Principal due \$2275, interest from
Nov. 7th, 1877, less rents as ap-
plied as hereinafter stated.

That said mortgages are a lien on the same prem-²⁰
ises, consisting of a lot of land with a building
thereon erected, situated on the southerly side of
Exchange Place in Jersey City aforesaid; that your
petitioner, Livingston Gifford, is the owner of a cer-
tain mortgage (with accompanying bond) on the
same lot of land, which mortgage was made by Wil-
liam A. Durrie and wife to the Jersey Associates to
secure the sum of forty-seven hundred dollars, with
interest, dated April 17th, 1860, and was recorded
August 1st, 1860, in Book 22 of Mortgages for said³⁰
county, page 665, &c., which said mortgage was as-
signed to said Livingston Gifford by assignment
dated March 20th, 1885, he paying therefor the sum
of seven thousand and thirty-two dollars; that the
mortgage of the complainant referred to in his bill of
complaint, is the lien upon the identical premises
covered by the foregoing mortgages and bears date on
the first day of April in the year eighteen hundred
and sixty-seven, and was made to secure the principal
sum of twenty-five hundred dollars, with interest,⁴⁰
and recorded in said Register's office in Book of

Mortgages, page &c., and is third in order of priority of liens; that the Master's report in the above cause bears date of the fifteenth day of May, in the year eighteen hundred and eighty-six, and the decree in said cause was filed on the first day of June following; that a writ of execution thereunder in the ordinary form was issued and directed to the sheriff of the County of Hudson aforesaid, commanding him to sell said mortgaged premises to satisfy the sums of money named in the Master's report, and to pay the proceeds of the sale in the order named therein; that the said sheriff has advertised said sale to take place on Thursday, August 19th, 1886; that your petitioners were made defendants in the above case, and upon receipt of copies of the subpoenas ad respondendum in said cause, and before the return day named therein, your petitioners Livingston Gifford and George Gifford, by and with the consent of Eleanor C. Gifford called upon William Brinkerhoff their counsel, and requested him to take charge of their interests in said cause and to cause the amount of rents received by them from said mortgaged premises to be applied on the mortgage of the estate of George Gifford, deceased, subsequent to the complainant's mortgage dated October 29th, 1877, as they had already made the application on account and in reduction of the amount due on said mortgage, which had in fact been done by your petitioners; that the bond marked Exhibit 10 by Blair, then and now contains the following memoranda signed by your petitioner Livingston Gifford, "May 6th, 1886, applied on account of interest on above bond six hundred and sixty-two $\frac{91}{100}$ ($662\frac{91}{100}$) dollars, being balance of rents collected to date after deducting disbursements. LIVINGSTON GIFFORD, Exr." That your petitioners were then, have been and are now mortgagees in possession of said mortgaged premises by authority and in virtue of a certain agreement, a copy of which is hereto annexed and marked "Schedule A." The original agreement bond and mortgage having been

at the same time delivered to said Brinkerhoff; that John A. Blair the Master in Chancery to whom had been referred the complainant's bill of complaint to ascertain the amount due upon complainant's mortgage and your petitioner's mortgages, and to report the order and priority of said mortgages, notified said Brinkerhoff to appear before him and prove the mortgages of your petitioners and the amounts due thereon; that said Brinkerhoff called at the office of said Blair, and left with him the agreement "Schedule A"¹⁰ and all the bonds and mortgages belonging to your petitioners, also a statement in writing of said mortgages, a copy of which is hereto annexed and marked "Schedule B," and informed him of the amount of rent received from the mortgaged premises and of the appropriation and application made by your petitioners as aforesaid, and requested said Blair in making his report to apply the amount of rent on hand in reduction of the mortgage held by²⁰ said estate subsequent to the complainant's mortgage dated October 29th, 1877, to which no objection was made; that said Brinkerhoff again called upon said Blair prior to the making of his said report, and asked him if he had allowed the said rents as directed; when he called to his office John Linn, counsel for the complainant, and told him that Mr. Brinkerhoff insisted upon the application of rents in hands of your petitioners to a mortgage subsequent to the complainant's mortgage;³⁰ whereupon said Linn, addressing himself to Mr. Brinkerhoff, said "Do you think that would be right?" to which Brinkerhoff replied, "here is the authority for it," at the same time handing to said Linn the original agreement "Schedule A." Linn then said, "What do you propose to do with the rents from this time?" to which Brinkerhoff replied "Apply them as heretofore." Linn then said, "I shall apply for the appointment of a Receiver." The said Blair then wrote in lead pencil on the memo-⁴⁰ randa, "Schedule B," the following, "As to applica-

tion of rent see 5th page of agreement (meaning "Schedule A") produced by Mr. Brinkerhoff." Said Brinkerhoff then left, said Blair having again stated to him the mortgage upon which he desired the application made, being the mortgage dated October 29th, 1877, to which no objections were made by either said Blair or Linn; that on May 13th, 1886, a notice was served upon said Brinkerhoff a copy of which is hereto annexed, marked "Schedule C," and on May 15th, 1886, a notice was served upon Brinkerhoff, a copy of which is hereto annexed marked "Schedule D;" that no affidavits were taken pursuant to said notice, but it was understood by Brinkerhoff that said Linn and Brinkerhoff had agreed that the rents in hand should be applied as directed by Brinkerhoff to Blair as aforesaid, and that all rents due after May 1st, 1886, should be applied to the mortgage of the estate prior to complainant's mortgage; that said Brinkerhoff informed said Blair of the said arrangement before his report was forwarded to the clerk of said court; that the said Brinkerhoff informed your petitioners that the application and appropriation had been made as requested of Blair, and that said Brinkerhoff believed the statement to be true; that on the twenty-sixth day of July, in the year eighteen hundred and eighty-six, your petitioners were for the first time informed and on that day first acquired knowledge that the said Blair in making his report, had deducted the rent on hand on the day of the date of his report, from the mortgage held by your petitioner Livingston Gifford, amounting to the sum of six hundred and sixty-two dollars and ninety-one cents, to which your petitioner Livingston Gifford, objects and protests; that no testimony was taken before said Master, but he acted upon his own responsibility and in disregard of the agreement "Schedule A" and the implied understanding had with said Brinkerhoff, and the expressed understanding between Brinkerhoff and Linn communicated to him by

Brinkerhoff as aforesaid; that neither said Blair or Linn gave any notice or intimation of the intention to make the report as aforesaid, or of filing said report; that said Blair returned said bonds and mortgages, statement and agreement to said Brinkerhoff without comment; that said Blair by his report dated May 15th, 1886, reported amounts due as follows:

1. Decree for Livingston Gifford.....\$6739 20¹⁰
Int. from May 15, 1886.
2. Decree for Geo. Gifford, Exrs..... 2145 14
Int. from May 15, 1886.
3. Decree for compl't Leeds 3396 85
Int. from May 15, 1886.
- Costs of compl't taxed at..... 84 83
Int. from May 20, 1886.
4. Decree for Geo. Gifford Exrs..... 3667 95
Int. from May 15, 1886.
5. Decree for Geo. Gifford Exrs..... 3631 62²⁰
Int. from May 15, 1886.

That the statement "Schedule B" correctly states the amount due on the mortgages therein referred to except that interest is due on the mortgage of \$1085 from May 31st, 1872; that the said report and decree as made are complete surprises to your petitioners and they charge and insist that the appropriation of rent in their hands or in the hands of either of them at the time of making said report should be made on the said mortgage of Oct. 29th, 1877, and³⁰ that because of the refusal of said Linn to cause said application to be made that all rents due after May 1st, 1886, should be apportioned as your petitioners may elect. Your petitioners therefore pray that the enrollment may be vacated and the Master's report and decree be opened in the above cause, and that the Master amend his report by applying the rents received by the petitioners from the mortgaged premises prior to May 1st, 1886, in reduction of the amount due on the said mortgage made by Morris S. Allen,¹⁰ dated Oct. 29th, 1877, and allow to the petitioner Liv-

ingston Gifford the full amount due on the bond and mortgage held by him, made by Durrie to the Jersey Associates, and for such other and further relief in the premises as may be agreeable to your Honor.

LIVINGSTON GIFFORD.

LIVINGSTON GIFFORD,

Ex. of GEO. GIFFORD, decd.

WM. BRINKERHOFF,

Solr. for and of Counsel

with petitioners.

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STATE OF NEW JERSEY. }
HUDSON COUNTY. } ss.

Livingston Gifford, being duly sworn according to law, on his oath saith, that he is one of the petitioners named in the foregoing petition; that the mat-
20 ters and things set forth in said petition so far as relates to the acts and deeds of said petitioner are true, and so far as relates to the acts and deeds of others, he believes them to be true.

LIVINGSTON GIFFORD.

Subscribed and sworn to before }
me at Jersey City, this 3d day }
of A. D. 1886. }

WM. BRINKERHOFF,

Master in Chancery

of New Jersey.

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STATE OF NEW JERSEY, }
HUDSON COUNTY. } ss.

William Brinkerhoff being duly sworn according to law, on his oath saith, that he has read the foregoing petition and so far as the same relates to his acts and deeds are entirely true. That prior to the
40 Master John A. Blair, making his report in the above cause, this deponent upon notice from Blair,

took the bond and mortgage made by Durrie and wife to the Jersey Associates and the bonds and mortgages belonging to the estate of George Gifford, deceased, and the original agreement "Schedule A," to the office of John A. Blair, Master in Chancery, and stated to him the true amounts due on each of said mortgages and referred to him the section of the agreement "Schedule A," regarding the appropriation of the rents received thereunder and told 10 said Blair that the petitioners had applied the rents on the mortgage subsequent to the complainant's mortgage, being the mortgage dated October 29th, 1877, and requested him to make the appropriation in the same manner in preparing his report and as appeared by memoranda of application on bond of same date; he Blair made no objections thereto, but his manner was such as to indicate his intention to do so; that at a subsequent interview with said Blair prior to making his report, this deponent asked 20 Blair if he understood the order of priority of the petitioners mortgages and if he had made the appropriation of rent as directed; he, Blair, then went for John Linn and in the presence of this deponent told said Linn "that Mr. Brinkerhoff insisted upon the application of rents in hand of the Gifford's to a mortgage subsequent to the complainant's mortgage." Whereupon said Linn said to this deponent, "do you think that would be right," to which this deponent replied, "here is the authority for it," at 30 the same time showing to him the original agreement, "Schedule A," which appeared to satisfy Linn that this deponent's demand upon Blair as Master was proper, and to which he made no further objection. Linn then asked what he, this deponent, intended to do with the rents from that time, to which this deponent replied, "Apply them as heretofore." Linn then said that if deponent insisted upon applying rents thereafter received in that way he would apply for the appointment of a Receiver. At that in-40 terview Blair wrote the following in lead pencil on

the statement, "Schedule B," which this deponent had theretofore given to him, "As to application of rent see 5th page of agreement (meaning "Schedule A") produced by Mr. Brinkerhoff." This deponent at that meeting, in the presence of said Linn, and as he, this deponent, was leaving Blair's office, again requested Blair to make the appropriation as before requested, to which no objection was made by either Blair or Linn. The notices, "Schedule C" and

10 "Schedule D," were served upon this deponent respectively, May 13th and May 15th, 1886; that upon receipt of the latter notice said Linn and this deponent agreed that the rents due after May 1st, 1886, should be applied on the estate mortgage next prior to complainant's mortgage, and it was understood between Linn and deponent that there was no further difference between them. This deponent in good faith believing that it was the understanding that the

20 rents then in hand should be applied in the manner he had requested the Master and this deponent so informed the Master before he made his report; that about May 16th, 1886, and after the date of the Master's report, this deponent informed Livingston Gifford and Geo. Gifford that the Master had or would apply the rent then on hand in reduction of the mortgage after the complainant's mortgage dated October 29th, 1877, and this deponent made said statement in good faith, believing the same to be true; that the said Mas-

30 ter mislead this deponent by his conduct and surprised and deceived this deponent and his clients by reporting the amount due on the mortgage held by Livingston Gifford, less the amount of rent then in hand, amounting to the sum of six hundred and twenty-two dollars and ninety-one cents, and that had this deponent suspected the intention of said Master to so report he would have sent to the Clerk of the Court for copy thereof and filed exceptions thereto, within the time required by the rules of

40 this Court; that no testimony was taken before said Master, that no notice was given by said Blair or

Linn of the filing of said report or of its contents, and this deponent believed that the application of rents had been made as he had requested, till Monday July 26th, 1886, when he was informed by the Sheriff of Hudson county, of the amounts endorsed on the execution; that this deponent then called upon said Blair of whom he asked. "Why did you report in the Leeds case in the manner as appears by the report." Blair replied. "Why, I didn't tell you that I would report any other way, that was the way Mr. Linn wanted," and declined to give any satisfactory reason for his conduct. This deponent asked said Blair, "if he did not understand his insistence regarding rents;" Blair replied, "Yes," this deponent said, "then why didn't you send me word that you were going to report differently." Blair said, "I don't know;" this deponent then called upon said Linn and demanded of him an explanation of said Blair's action, to which Linn replied, "that's the way I wanted him to report;" this deponent then said, "you had better consent to amend the decree and Master's report in the manner as agreed upon, if you do not, I propose to bring this matter to the notice of the Chancellor," Linn replied, "I cannot consent, but will agree to go before the Chancellor informally in the matter." And this deponent further says referring to "Schedule B," that the statement of the mortgage to George Gifford for the principal sum of \$1085, the words and figures May 30, 1882, should recite May 30, 1872, this being the correct time from which interest is due on said mortgage and as said Master correctly reported in his said report.

WM. BRINKERHOFF.

Subscribed and sworn to before }
me at Jersey City, this 3d day }
of A. D. 1886.

RYNIER J. WORTENDYKE,

Notary Public of N. J.

"SCHEDULE A."

Whereas Uriah Allen is the owner of a certain piece of property on Exchange Place in Jersey City, being the same conveyed to Susannah E. Allen by George C. Perry and others, by deed dated the 19th day of October, 1863, and recorded in Hudson County Clerk's office, in Book 104 of Deeds, page 222, and which in said deed is described as follows: All that certain lot of land and premises situate, lying and being in Jersey City, in the County of Hudson and State of New Jersey, on the south side of a court one hundred and twenty feet in width, laid out by the Associates of the Jersey Company between Hudson street and the Jersey City Ferry, in continuation of Montgomery street, known as Exchange Place, the south line of which court is forty feet south of the south line of Montgomery street extended. Beginning on the south side of said court at a point thirty-six feet six and one-half inches east of the northeast corner of the banking house of the Mechanics & Traders Bank, erected at the corner of said Hudson street and said Ferry Court, as said northeast corner now actually extends; thence to run southerly parallel with Hudson street, eighty feet; thence easterly parallel to said court eighteen feet and one-half of an inch; thence northerly parallel to Hudson street eighty-feet to south side of said court; thence westerly along the south side of said court, eighteen feet and one-half of an inch to the place of beginning. Together with the right of free access to the same with conveyances and vehicles of all kinds, at all times, without obstruction by the said parties of the first part or their assigns, over all and every part of the court, one hundred and twenty feet wide, now laid out in front of the same and paved and flagged from Hudson street to the ferry gates. The lot hereby conveyed being

bounded on each side by the centre line of the party walls now standing. Being the same lot of land and premises conveyed to William A. Durrie by the Associates of the Jersey Company by deed dated the 17th day of April, A. D. 1860, and recorded in the clerk's office of the County of Hudson on the first day of August in the same year, in Book 81 of Deeds, pages 550, &c., and conveyed by the said William A. Durrie and Emma A. his wife, to George C. Perry and Cornelius Brinkerhoff¹⁰ of the party of the first part hereto, by deed bearing date the 17th day of October, in the year one thousand eight hundred and sixty-two, and recorded in Hudson County Clerk's office in Book 98 of Deeds, pages 183, &c.

And whereas, Aaron P. Whitehead, is the owner by assignment, of a certain mortgage upon said property given by William A. Durrie for \$4700, upon which there are large arrearages of interest due and unpaid.²⁰

And whereas, Eleanor C. Gifford, George Gifford and Livingston Gifford representing the estate of George Gifford, deceased, late of Jersey City, in the County of Hudson and State of New Jersey, own three other mortgages on said property, one given by Uriah Allen and wife to George Gifford for \$1085, and one given by Susannah E. Allen and Uriah Allen to George Gifford for \$1500, and one given by Morris S. Allen to Susannah E. Allen, wife of Uriah Allen, for \$6000, upon which mortgages there are also large arrearages of interest due and unpaid.³⁰

And whereas, the said Eleanor C. Gifford, George Gifford and Livingston Gifford, representing said estate of George Gifford, deceased, at the request of said Uriah Allen are about to purchase and take an assignment of and hold said mortgage now held by said Aaron P. Whitehead, or cause the same to be purchased by said Livingston Gifford personally.

Now therefore, in consideration of the premises⁴⁰ and of other valuable considerations the parties here-

unto moving this agreement made this thirty-first day of January, eighteen hundred and eighty-five, between said Eleanor C. Gifford, George Gifford and Livingston Gifford party of the first part and the said Uriah Allen, party of the second part, witnesseth as follows :

1. The said party of the first part have agreed and hereby do agree to purchase and take an assignment of the said mortgage now owned by said Aaron P. Whitehead as above recited or to cause the same to be purchased by said Livingston Gifford personally.
2. The said Uriah Allen, party of the second part, hereby agrees to surrender and deliver to said party of the first part, on the thirty-first day of January instant, the full, complete and absolute possession of said property, and every part thereof, with the appurtenances, subject only to the rights of the tenants now occupying portions of the same, and will cause said tenants to attorn to said party of the first part and accept them as their landlords in place of said Allen, from January 31st, 1885.
3. It is agreed by and between said parties hereto that the said party of the first part may hold the absolute and undisturbed possession and control of said property until they shall receive from the net income thereof full payment and satisfaction of the four several mortgages above mentioned, with all interest due and to become due thereon. They may rent said property, or any part thereof, in such manner and upon such terms and for such purposes as in their judgment may seem best and most advantageous for the interest of all parties. They may make such alterations and repairs as they may think best. They may collect and receive all rents and income from the same, which may be due and unpaid at the time they take possession thereof, or which thereafter may become due during the continuance of their possession of said property. They may ob-

tain and hold such policies of insurance upon said property in the name of said Allen or otherwise, but for their benefit and security, as they may think best, and may in every respect hold and use and control said property as their own absolute property, for the purposes above mentioned, until they shall be fully paid and satisfied ; but they shall not be responsible for any neglect upon their part in the management or control of said property in any particular whatever. 10

4. It is further understood and agreed that the net income from said property shall be applied by said party of the first part to the payment of their said mortgages and interest, or of the taxes or water rents due or to become due upon said property, or alterations, repairs or insurance premiums, as they may think best, and in such order as they may elect; and they will keep or cause to be kept a careful and accurate account of their receipts and disbursements 20 on account of the same, and will allow the said Allen to inspect them at all reasonable times upon request.

5. Nothing in this agreement shall prevent the said party of the first, or said Livingston Gifford at any time foreclosing against said property on all or any of their said mortgages or assigning or selling said mortgages or either of them, if they shall think best so to do ; and they shall have the same right to proceed in that manner in every respect and to every extent, as if this agreement had not been 30 made.

6. As soon as said mortgages shall be fully paid off as above provided, in case no foreclosure shall have taken place against said property, then the said Allen shall be entitled to the full possession and enjoyment of said property as against said Giffords, and said mortgages shall be delivered up to be cancelled.

7. This agreement shall apply to and bind the 40 heirs, executors, administrators and assigns of said

parties. In witness whereof said parties have hereto set their hands and seals this thirty-first day of January, eighteen hundred and eighty-five.

URIAH ALLEN, [SEAL.]

E. C. GIFFORD, [SEAL.]

GEO. GIFFORD, [SEAL.]

LIVINGSTON GIFFORD, [SEAL.]

Sealed and delivered in presence of,

WILLIAM BRINKERHOFF as to Uriah Allen.

10

I hereby agree that the said Eleanor C. Gifford, George Gifford, and Livingston Gifford, or any one or more of them who may have taken an assignment of the mortgages hereinafter referred to as being
 20 held by Aaron P. Whitehead, shall be or may be entitled to have and receive interest at and after the rate of six per cent. per annum on any interest paid by them to said Whitehead or other persons on receiving said assignment from the day of such payment, and shall be entitled to deduct the same from the rents of said premises and be allowed therefor upon final settlement by me or the Court under any foreclosure proceedings; this memoranda or supplement to above agreement to bind the respective heirs
 30 of all parties to the above agreement.

Witness my hand and seal this May 5th, A. D. 1885.

URIAH ALLEN. [L. S.]

Witness:

WM. BRINKERHOFF.

" SCHEDULE B."

1st. Mortgage to Durrie. 7 per ct.	
Prin.....	\$4700 00
Int. from Apl. 30, 1877, less \$300 on acct. of int.	
2d. Mtge to Geo. Gifford.	
Prin.....	\$1085 00 ¹⁰
Int. from May 30, 1882, 7 per ct., less \$92.75 on acct. int.	
3d. Leeds under-foreclosure.	
Prin.....	\$2500 00
Int. from Apl. 1, 1881.	
4th. Mtge to Geo. Gifford,	
To secure a note of.....	\$1500 00 ²⁰
Int. due from date, March 31, 1875.	
5th. Mtge. to Morris Allen.	
Amt. due as per agreement.	\$2275 00
But see copy of receipt allowing \$4325 to be the amount and int. from Nov. 7, 1877.	
Recd. rent from May 12, 1885, to May 1,	30
1886	\$1026 35
<i>Steven's Statement.</i>	
Less deficit.....	\$ 31 00
Deduct for water rents and repairs and ins.....	332 44
	363 44
	\$ 662 91
As to application of rent see 5th page of agree- ment produced by Mr. Brinkerhoff.	

"SCHEDULE C."

IN CHANCERY OF NEW JERSEY.

Between		} On Bill to Foreclose.
	JAMES H. LEEDS, Compl't,	
	and	
URIAH ALLEN AND WIFE and others, Defts.		

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SIR—

Please take notice, that I shall apply to the Chancellor at the State House in Trenton, on Tuesday, the eighteenth day of May instant, at ten o'clock in the forenoon, for an order appointing a Receiver to collect and take charge of the rents of the mortgaged premises in this suit, to be applied in such manner as the Chancellor may direct.

May 13th, 1886.

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Yours, &c.,

JOHN LINN,

Solr. of Compl't.

To

WM. BRINKERHOFF, Esq.,
Solr. of Defts.

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"SCHEDULE D."

IN CHANCERY OF NEW JERSEY.

Between		} On Bill to Foreclose.
	JAMES H. LEEDS, Compl't.	
	and	
URIAH ALLEN AND WIFE and others, Defts.		

SIR—

40 Please to take notice that affidavits will be taken at my office, No. 47 Montgomery street, Jersey City,

on Monday 17th day of May, instant, at four o'clock
in the afternoon, to be read on motion for the ap-
pointment of a Receiver to collect the rents of mort-
gaged premises in this case.

May 15, 1886.

Yours, &c.,

JNO. LINN,

Solr. of Complt.

To WILLIAM BRINKERHOFF, Esq.,

Solr. of Defts.

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IN CHANCERY OF NEW JERSEY.

10 	Between JAMES H. LEEDS, Com.pl't, and URIAH ALLEN AND WIFE et als., Def'ts.	} On Bill, &c.
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Please to take notice that the answer and affidavits, of which the annexed are copies, will be read on the hearing of the motion to vacate the enrollment and open the Master's report and decree in this case, in behalf of the executors of George Gifford, deceased.

September 9th, 1886.

Yours, &c.,

JNO. LINN,
Sol'r of Comp't.

To

WM. BRINKERHOFF, Esq.,
Sol'r of the Executors
of George Gifford, dec'd.

30

IN CHANCERY OF NEW JERSEY.

Between

JAMES H. LEEDS,
Complt.,

and

URIAH ALLEN AND WIFE and others,
Defts.

On Bill, &c.

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On petition,
&c., to open
decree.

The answer of James H. Leeds, the complainant and respondent to the petition of Livingston Gifford, George Gifford and Eleanor C. Gifford, executors, &c.,²⁶ of George Gifford, deceased, three of the defendants, the petitioners.

This respondent admits, upon information and belief, that George Gifford, deceased, departed this life about the time mentioned in said petition; that he left a last will and testament, appointing the petitioners executors thereof, and that they duly proved the same and took upon themselves the burthen of the administration of said estate.

This respondent further admits upon information³⁰ and belief, the existence of the mortgages mentioned in said petition as belonging to the estate of said George Gifford, deceased, and that said mortgages were a lien upon the lands mentioned in said petition, being the same premises covered by the respondent's mortgage.

This respondent also admits, upon information and belief, the existence of the mortgage mentioned in said petition as belonging by assignment to said Livingston Gifford individually. But as to the⁴⁰

amount paid by him for the same, this respondent has no knowledge except as stated in said petition.

This respondent also admits that his mortgage covers the same premises with the other mortgages named, and that it is third in order of priority of liens upon said premises, the mortgage made by William A. Durrie to the Jersey Associates for \$4700 and now claimed by said Livingston Gifford, being the first lien upon said premises, and the one
 10 given by Susanna E. Allen and husband to George Gifford, for \$1085, being the second lien upon said premises, and this respondent's said mortgage being the third lien thereon, while the other two mortgages held by the petitioners are respectively fourth and fifth liens upon said premises.

This respondent further admits that the Master's report bears date May 15, 1886, and that the final decree in said cause was made June 1st, 1886, and that an execution was issued in the usual form to the
 20 Sheriff of Hudson county, commanding him to sell said mortgaged premises to satisfy the sums named in the Master's report, and to pay the proceeds of the sale in the order named therein; and that said Sheriff advertised said property for sale on the 19th of August, 1886. But said sale, by consent of this respondent's solicitor, has been adjourned from week to week for four weeks, in order that, in case any error has been committed by the Master's report or
 30 the decree, the rights of the parties to the monies to be raised by said sale may be duly adjusted and determined by this Court before said sale takes place.

This respondent in further answering said petition says, that he has no knowledge, except as he is informed by said petition, as to what took place between said petitioners or either of them, and their counsel respecting their said mortgages, or what direction, if any, they gave to their counsel respecting the appropriation of rents of said premises received
 40 by them while they were mortgagees in possession, but this respondent submits that the statements con-

tained in said petition concerning the same, if true, show that a palpable fraud was attempted to be practised upon this respondent. This respondent submits, that the endorsement upon the bond marked Exhibit 10. as stated in said petition, shows that it was not true as therein alleged, that any appropriation of said rents had been made by said petitioners when they called upon their counsel before the return day of the subpoena in said cause. The subpoenas in said cause were returnable January 26th, 1886, an interlocutory decree by default against all of the defendants was made on the first day of April, 1886, and the indorsement upon said bond of the rents received by Livingston Gifford, executor, as shown by said petition, was not made until the sixth day of May, 1886, after the interlocutory decree and reference to the Master to report on the claims, the Master's summons having been returnable on the 17th day of April, and only a few days before the Master made his report. ¹⁰ ²⁰

This respondent admits that said petitioners have been, since January 31, 1885, and are still, mortgagees in possession of said premises. And this respondent humbly submits that even if said petitioners had a right, by virtue of their agreement with Uriah Allen at the time they were put in possession of said premises, to appropriate the rents received by them to any one of their mortgages against said property, yet not having made such appropriation until after the commencement of legal proceedings to foreclose and sell said mortgaged premises, it then became the duty of the Court, in ascertaining the amount due upon each mortgage, to make the appropriation, and that such appropriation must be made according to the well settled principles of equity applicable to such cases, without regard to the wishes of the petitioners. ³⁰

This respondent desires at this time and upon this proceeding that the Court shall make all such corrections in the Master's report, if any errors have ⁴⁰

been committed, as may be required by the principles of equity, and may do justice between these parties. And this respondent submits that for this purpose it is not necessary to open the enrollment or decree, or in any way change the record of the proceedings in this case, other than to make an order, if any change should be made, directing what amount of the proceeds of the sale of said property shall be applied to the first and second mortgages
 10 against the same.

This respondent has discovered since said petition was served upon his solicitor that in computing the amount due upon said second mortgage, the Master has failed to deduct a credit of \$92.75 endorsed on the same so that the amount of principal and interest due upon that mortgage at the date of said report instead of being \$2145.14 as reported by the Master, should, without any other deduction be \$2052.39. This respondent therefore prays that said correction
 20 may be made accordingly.

But this respondent humbly insists that the Master was correct in deducting said sum of \$662.91 from the first mortgage upon said property, or if there should be any reason for not deducting that sum from the first mortgage on account of that having been assigned to Livingston Gifford individually, then it should be deducted from the second mortgage which is held by the executors of George Gifford
 30 deceased. In either case the effect is the same upon the interests of this respondent, and if there is such antagonism between the claims of the said Livingston Gifford personally, and the said Livingston Gifford, George Gifford and Eleanor C. Gifford, executors of George Gifford, deceased, that they cannot adjust that matter between themselves, and it should be determined that the Master was in error in crediting said rents upon and deducting the same from the first mortgage upon said premises, then this respondent humbly submits that the same should be credited
 40 upon and deducted from the amount of said second mortgage.

This respondent in further answering says that since this matter has been brought to his notice by serving a copy of said petition upon his solicitor and counsel, he has for the first time learned that said petitioners have not only received as rent for said premises, while being mortgagees in possession, said sum of \$662.91 but they have received up to the first of May, 1886, the sum of \$1116.65 and the further sum of \$200 to Sept. 1, 1886, and that there is now due for rent since that time the further sum of \$250, which the tenants are ready and willing to pay to whoever may be entitled to the same, all of which money this respondent humbly insists should be credited upon and deducted from the first or second mortgage upon said premises. ¹⁰

This respondent in further answering says, that before the commencement of this suit he instructed his counsel to ascertain from said petitioners the amount actually due upon said first and second mortgages held by them, in order that he might pay off and redeem the same, and himself obtain possession of said property and receive the rents and profits thereof, and he is informed by his counsel that he did make application for that purpose to said Livingston Gifford before the bill filed in this cause, and that he also applied to said Livingston Gifford and to William Brinkerhoff, Esquire, the counsel of said petitioners, for the same purpose, after said suit was commenced, and tendered himself ready and willing to pay whatever might appear to be due upon said first and second mortgage, upon being informed of the amount due thereon, and having the same delivered to this respondent with the possession of said property, but that he could obtain no satisfaction from either said petitioners or their counsel, and that they put him off without giving him any information as to the amount claimed until just about the time the said Master made his report. ²⁰
³⁰
⁴⁰

This respondent, therefore, humbly submits and insists that it is against the plainest principles of justice and equity, and contrary to the well settled practice of this Court, that said petitioners should be allowed to continue in the receipt of the rents of said property as mortgagees in possession after a tender by this respondent of his readiness and desire to redeem, without appropriating said rents to
 10 the reduction of their mortgages, which are prior encumbrances to the mortgage of this respondent.

This respondent does not know, except as he is informed by his counsel, what took place before the Master, who reported upon the claims of the respective parties in this case, or what was the understanding of counsel in regard to the appropriation of said rents, but he is informed by his counsel that he, in presence of said Master, expressly insisted that they should all be applied upon the mortgages antedating
 20 the mortgage of this respondent, and that he never, directly or indirectly, expressly or impliedly, consented to their application in any other way.

The respondent therefore prays that all of said rents may, by order of this Court, be appropriated towards the payment and reduction of one of the mortgages of said petitioners, which are prior liens upon said premises to the mortgage of this respondent, and that the residue only of the amount due upon said two mortgages, after making such appropriation and reduction, may be directed to be paid
 30 to said petitioners out of the proceeds of the sale of said mortgaged premises prior to the payment of the mortgage of this respondent.

JNO. LINN,
 Sol'r of Respondent.

NEW JERSEY, S.S.

40 John Linn being duly sworn, on his oath saith, that before the commencement of the suit of fore-

closure in favor of James H. Leeds against Uriah Allen and others, he made application to Livingston Gifford, one of the petitioners in this case, to ascertain the amount due upon the first and second mortgage held by said petitioners against said property, with a view of paying off and redeeming the same, and having the said James H. Leeds put in possession of the property during the pendency of the foreclosure proceedings. Deponent distinctly stated to said Livingston Gifford and to William Brinkerhoff,¹⁰ Esquire, the solicitor of said petitioners, that if said petitioners would not pay and take an assignment of the mortgage held by said complainant, he, the said complainant, would pay off their first two mortgages upon said property, and that he was ready and willing and anxious to do so, if they would make out a statement of the amount due, and allow him to take possession of said property and receive the rents in their stead. For this purpose deponent called upon said Livingston Gifford and upon Mr. Brinkerhoff,²⁰ their counsel, more than once, both before and after the commencement of said foreclosure proceedings, and urged them either to pay off the complainant's mortgage or to allow him to take up and pay off the first two mortgages which they held against said property. Deponent has in his possession a letter received by him from Livingston Gifford, of which the following is a copy :

32 PARK PLACE, NEW YORK, Jan. 4, 1886. ³⁰

JOHN LINN, Esq.,

Dear Sir :—

I find it will be necessary for me to look up some matters and papers relating to the Exchange Pl. property before I can intelligently give you an ultimate estimate what we would take for our claim. I will lose no time in doing so.

Yours truly,

LIVINGSTON GIFFORD. ⁴⁰

Deponent says that after this he called upon Mr. Gifford once or twice, stating the willingness and desire of the complainant to pay off their first two mortgages, and be put in possession of said property, but was then informed that he wanted to see his counsel, Mr. Brinkerhoff, and deponent was never able to obtain from the petitioners, or their counsel, any more definite information as to the amount of their claim than that contained in said letter, until
 10 the matter came before the Master to make his report upon the claims of the respective parties in said suit.

Deponent says it is very doubtful if said property can be sold for enough to pay off said first two mortgages held by the petitioners and the mortgage of said complainant, even after allowing all of the rents received by the petitioners to be applied upon their first two mortgages. The taxes in arrear upon said property
 20 amount to \$5000 or more. The petitioners counsel expressly states that he advises his clients not to take the property by bidding up to the amount of the complainant's mortgage, as it is not worth that amount, and he advises them to lose the last two mortgages held by them, amounting to about \$6000, rather than bid enough upon the property to cover the complainant's claim.

Deponent says that no sworn testimony was taken before the Master, who made the report in this case,
 30 but the statements made by the counsel of the respective parties in presence of each other and before the Master, which statements were not questioned by either party, were accepted by him as true.

The only question before the Master upon which the counsel did not agree was as to the appropriation of the rents received by the petitioners, while mortgagees in possession. Mr. Brinkerhoff, the petitioner's counsel, claimed that they should be applied to one of the junior mortgages of the petitioners,
 40 subsequent to the mortgage of complainant. Deponent, in behalf of the complainant, claimed that un-

der the circumstances of this case that would not be right, but that they should be applied upon one of the older mortgages of the petitioners, prior in point of time to the complainant's mortgage.

Deponent does not recollect all that was said before the Master, but he does recollect distinctly that he explicitly claimed, in behalf of said complainant, that the rents received and to be received by the petitioners should be applied to the reduction of the petitioners' mortgages, antedating the mortgage of the complainant, and that he did not then or at any other time intend to say or do anything whatever which would lead the Master or the petitioner's counsel to believe that he in any way consented to anything to the contrary. Deponent did speak of applying for the appointment of a Receiver to collect the rents subsequently accruing, and afterwards gave notice to that effect to the petitioner's counsel, but he did not pursue said notice for two reasons, first, because he did not consider it necessary in order to protect his client's interests, inasmuch as the petitioners, who were mortgagees in possession, were amply responsible for all rents received, which would be as safe in their hands as in the hands of a Receiver, and that the Court would order the appropriation by them in the same manner as if in a Receiver's hands, and secondly, because Mr. Brinkerhoff expressly stated that the subsequently accruing rents should be applied upon one of the petitioner's first two mortgages.

Deponent does not know what there was in his manner from which the petitioner's counsel was authorized to draw the inference that deponent was satisfied that the demand made for the appropriation of said rents upon one of said petitioners' last two mortgages was proper. Deponent did not intend to express any such consent or acquiescence by word or action, but he knows that he did then and there expressly and explicitly claim that all of said rents should be applied to one of said first two mortgages.

Deponent says that there was never any understanding between him and the petitioners' counsel, that after it had been agreed that the subsequently accruing rents should be applied to, one of said first two mortgages, there was no further difference between them. Deponent does not know upon what the petitioner's counsel bases his statement that such was the understanding of counsel, but he does know that he never so understood it, nor did he ever, intentionally, by act or word, convey to Mr. Brinkerhoff the idea that he did so understand it.

Deponent says that when this matter was recently brought to his attention by the petitioners' counsel, who expressed his dissatisfaction with the Master's report, it is true that deponent refused to consent to such change or amendment of said report as the counsel desired, because that would be in direct violation of what deponent has always claimed and insisted on in regard to the appropriation of said rents, but deponent expressed his willingness to have the matter presented to the Court in an informal manner and to consent that the Court should make just such order as would have been made if exceptions had been duly filed to said Master's report. It was not deponent's intention or desire to take or hold any advantage over the petitioners or their counsel, but allow them to have all the errors corrected, if the Court should be of opinion that any error had been made, in the most expeditious and least expensive and troublesome manner possible. For that reason only deponent suggested that the counsel go before the Court at once in an informal way to have these matters settled and adjusted.

Deponent has since discovered, what he did not know until very recently, that said Master had made a mistake in computing the amount due upon the mortgage of \$1085 held by the petitioners, in not deducting a payment endorsed thereon of \$92.75.

This appears to have been an oversight on the part

of the Master, and this amount should be deducted from the amount due on said mortgage.

JOHN LINN.

Subscribed and sworn Sept. }
9th, 1886, before me, }

CLARENCE LINN,

Master in Chancery of N. J.

10

NEW JERSEY, SS.

John A. Blair being duly sworn on his oath saith that after the order of reference in this cause was served upon him, and the counsel of the complainant, James H. Leeds, and of the defendants, the petitioner in this matter, had left with him the bonds and mortgages of their respective clients, he caused the said counsel to come personally before him at the same time, in order that he might hear and understand fully what were their respective claims against said mortgaged premises. No sworn testimony was taken before deponent, but the statement of facts made by the counsel was accepted as true. They did not disagree as to the facts upon which their respective claims were based. The only dispute between the counsel was as to the appropriation of the rents received by the petitioners, while mortgagees in possession. It was admitted that these defendants were mortgagees in possession. It was admitted that they held four mortgages against the premises, two of them antedating and being liens upon the premises prior to the complainant's mortgage, and two of them being subsequent to the mortgage of complainant. It was stated by the defendant's counsel that rents had been received by them to the amount of \$662.91, which, under date of May 6th, 1886, had been indorsed upon one of the junior mortgages of the defendants. The complainant's counsel claimed that

these rents should be applied upon one of the older mortgages of the defendants, prior to the complainant's mortgage. The defendant's counsel claimed that by virtue of their agreement with Uriah Allen, which was exhibited to deponent they had a right to apply those rents to whichever mortgage they pleased. The complainant's counsel insisted that they had no right to make this application, at least of the rents accruing after an offer on the part of the complainants to redeem their first two mortgages, which application to redeem it was stated was made before the commencement of this suit. Deponent says that he expressed no opinion, nor did he give any intimation whatever as to his opinion upon the matter in dispute between the parties, either when both counsel were before him, or at any other time to either of the counsel separately, until he had actually made out his report, and then his opinion was only expressed by being embodied in his report. Deponent was at first not at all certain what he should do in reference to the appropriation of said rents, and only after an examination of some authorities and a consideration of the facts as agreed upon by counsel did he conclude that equity required that they should be applied upon one of the first two mortgages of the defendants. Deponent applied the rents upon the first mortgage because, as he understood, all four of the mortgages held by these defendants were in the same interest, representing the estate of George Gifford deceased, and under the circumstances it seemed immaterial to deponent whether they were applied upon the first or second mortgage.

JOHN A. BLAIR.

Subscribed and sworn, Sept. 9th, }
1886, before me.

CLARENCE LINN,
Master in Chancery of N J.

HUDSON COUNTY, ss.

Lewis C. Allen, being duly sworn, on his oath saith that he and his partner are tenants of a part of the property of Uriah Allen, being the building known as No. 7 Exchange Place, Jersey City. Deponent has paid the following sums for rent of the premises so occupied, to Livingston Gifford, one of the executors of George Gifford, deceased : On or about May 1, 1885, he paid \$250 for three months rent in advance ; on or about August 1, 1885, he paid \$250 for three months rent in advance ; on or about November 1, 1885, he paid \$16.65 which with the amount of a note which he held against said Allen, made \$250, three months' rent in advance ; on or about February 1, 1886, he paid \$250 for three months rent in advance ; on or about May 1, 1886, he paid \$250 for three months' rent in advance, making in all \$1016.65, which he has paid to said Livingston Gifford ; on the first day of August, 1886, there was due the further sum of \$250 for three months' rent in advance, which he has not paid, but which he is ready and willing to pay to whoever may be entitled to receive the same.

LEWIS C. ALLEN.

Subscribed and sworn September
seventh, 1886. }

JOHN A. BLAIR,

Master in Chancery of N. J.

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HUDSON COUNTY, ss.

John Linn, being duly sworn, on his oath saith, that he is informed that the two floors of the building No. 7 Exchange Place, being the building under foreclosure at the suit of James H. Leeds against Uriah Allen and others, are occupied by the Pull-⁴⁰man Palace Car Company as tenants of the executors

of George Gifford, deceased. Deponent has been informed by James H. Sims, Assistant Superintendent of said company, and by Frank Stevens, agent of said executors in renting and collecting the rent of said premises, that said company has occupied said two floors since March 1st, 1886, at fifty dollars per month, and have paid rent for the same to September 1st, 1886, amounting to \$300, and that said rent is paid on or about the last of each month.

Deponent has requested said Sims to embody such statement in his affidavit, which he declines to do for fear of offending said company, and deponent has also made the same request of said Stevens, but he declines to make such affidavit for fear of offending said executors or their counsel.

JOHN LINN.

Subscribed and sworn Sept. }
9th, 1886, before me, }

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CLARENCE LINN,

Master in Chancery of N. J.

OPINION.

30

JAMES H. LEEDS, }
v. }
LIVINGSTON GIFFORD. }

On hearing on petition and affidavits, and answer and affidavits.

Mr. WILLIAM BRINKERHOFF, for application.

Mr. JOHN LINN, contra.

40

VAN FLEET, V. C.—This is a foreclosure suit, and the question on which the parties are at variance is.

what are their respective rights in certain rents of the mortgaged premises. The premises are subject to five mortgages. The first two and the two last are held by the defendant. The complainant holds the third, being the one standing midway between the defendant's two first and two last. The defendant took possession of the mortgaged premises, under all four of his mortgages, on the thirty-first day of January, 1885, pursuant to an arrangement with the mortgagor. The premises were at that time in the possession of tenants under demises made by the mortgagor. The arrangement under which the defendant took possession, was, so far as it is material to the question now before the Court, to the following effect; the tenants were to attorn to the defendant, he was to collect the rents, make new demises, if necessary, and out of the rents pay taxes, insurance and the cost of necessary repairs, and apply the balance to the payment of his mortgage debts in such order as he might elect. He was given power to apply the balance of the rents to either or all of his debts as he saw fit. The complainant filed a bill to foreclose his mortgage January 7, 1886, and on the first of April following, took a decree *pro confesso* against all the defendants. with an order of reference to a Master. On the thirteenth of May following, he gave the defendant notice that he would, on the eighteenth of the same month, apply for the appointment of a receiver, but the Master, to whom the reference had been ordered, having, on the fifteenth of May, made his report, crediting the balance of the rents remaining in the hands of the defendant, on the first of May, 1886, against the amount due on the defendant's first mortgage, the notice was not pursued and no application was made. The defendant, as was natural under the circumstances, such being the dictate of his interest, elected that the balance of rents remaining in his hands should be applied to his last mortgage, and he, accordingly, on the sixth of May, 1886, credited the same on the

bond accompanying his last mortgage. The rents accruing since May 1, 1886, he concedes should be credited on his first mortgage. The complainant's mortgage does not give him a lien on the rents of the mortgaged premises, nor pledge them for the payment of the debt secured by it.

The defendant applies for an order reversing the action of the Master, by changing the credit of the rents from his first mortgage to his last.

10 The rule is settled that a mortgagee, who takes possession of the mortgaged premises, thereby renders himself liable to be charged with their rental value, and this liability attaches to him whether he actually receives rent or not, for by taking possession he assumes the position of owner, and is, in consequence, chargeable with the profit a prudent owner could have made. *Dawson v. Drake*, 3 Stew. 601; *S. C. on appeal*, *Ib.* 733. And it has also been held,
20 that where a mortgagee, after having taken possession, suffered the mortgagor to take the profits, without requiring him to keep down interest, that although in such case he could not be charged with rents and profits, yet, inasmuch as his conduct had resulted in favor to the mortgagor and in prejudice to the subsequent encumbrancers he should not, as against them, be permitted to recover interest on his mortgage debt during the period he had allowed the mortgagor to take the profits of the mortgaged premises.
30 *Renthum v. Haircourt*, *Prec. in Chan.* 30; *S. C. Eq.*, *Ali.* 320; *Loftus v. Swift*, 2 Sch. & Lef. 655; *Demarest v. Berry*, 1 C. E. Gr. 481. But even in such a case, Lord Ecclesdale says, there must be something of contrivance in the conduct of the mortgagee or some positive misconduct on his part to justify the Court in depriving him of interest. *Loftus v. Swift*, 2 Sch. & Lef. 656.

A mortgage, which does not by its terms, pledge the rents and profits of the mortgaged premises for
40 the payment of the mortgaged debt, creates no lien on them, and gives the mortgagee no right to them.

The mortgagor while he remains in possession may take them and apply them to his own use, without being liable to account for them. And he may also make a valid assignment of them in favor of a subsequent encumbrancer, as against a prior encumbrancer. This was expressly decided by Chancellor Halstead in *Best v. Schermier*, 2 Hal. Ch. 154. There the mortgagor made a mortgage to one Ballantine on lands which were also subject to prior mortgages and judgments, and also assigned the rents of the mortgaged premises to Ballantine, with authority to collect and apply them in discharge of his mortgage debt. A prior mortgagee subsequently filed a bill, alleging that the rents assigned to Ballantine should in equity, be applied to the satisfaction of the prior mortgages, and praying that Ballantine be restrained from collecting them, and that a receiver be appointed in order that they might be applied as the Court should thereafter direct. An injunction was granted and a receiver appointed. Ballantine, after filing his answer, moved the discharge of both orders, and they were discharged, the Court holding that a mortgagor, while he remains in possession, either by himself or by his tenants, is entitled to the rents and profits of the mortgaged premises, and that inasmuch as in this case the mortgagor himself could not have been restrained neither would the Court be justified in restraining his assignee. It is obvious, that this case, as to the rents which accrued subsequent to the appointment of the receiver was not correctly decided, according to the principal which now controls the action of the Court in such cases. According to the rule now in force, a prior encumbrancer has an unquestionable right, as against the mortgagor and subsequent encumbrancers, in case his security is uncertain or precarious, to have the rents of the mortgaged premises, accruing subsequent to the appointment of a receiver, sequestered for his benefit. The case, however, in other respects is well decided,

and stands in perfect accord with the present course of judicial decision.

It would seem then to be entirely clear that the complainant, at the time the balance of the rents remaining in the hands of the defendant were applied by the defendant towards the satisfaction of his last mortgage, had no right to or interest in the money in controversy. It was as absolutely free from all
 10 lien or other claim on the part of the complainant as it would have been if the mortgagor had derived it from some other source than the mortgaged premises. As between the complainant and the mortgagor, the money was the property of the mortgagor as completely and unconditionally as it would have been, if the relation of mortgagor and mortgagee had not existed between them. I regard it as entirely free from doubt that if the defendant had taken possession under either of his last two mortgages, the
 20 complainant could not have deprived him of the rents, except by the appointment of a receiver. And so too, if the mortgagor had collected the rents himself and paid them over to the defendant, either with direction to apply them to his last mortgage, or without direction, leaving the defendant free to make such application of them as his interest might dictate, there can be no doubt, that the defendant would have had an unquestionable right, not only as against the mortgagor, but also as against the complainant,
 30 to apply them to his last mortgage.

This case is unlike any previous case, which has come under my observation, in this respect; the defendant holds mortgages both prior and subsequent to that of the complainant, and took possession under both. In all the previous cases, which I have examined, the contest has been between a subsequent encumbrancer out of possession, and a prior encumbrancer, in possession, and not as here, where an intermediate encumbrancer is seeking to charge an in-
 40 cumbrancer who took possession under liens standing both prior and subsequent to his. The rule is

well settled, that a prior encumbrancer who has had possession of the mortgaged premises, must account to the subsequent encumbrancer, but the converse is not true. A subsequent encumbrancer in possession is not bound to account to the prior encumbrancer. So that the case stands thus : if we treat the defendant as in possession under his first two mortgages, he is bound to account, but if we treat him as in possession under his last two, he is not. But being in under all four, the case, so far as I am¹⁰ aware, is without a precedent. And yet, I think the question in dispute may be satisfactorily decided by the application of a familiar rule. Taking possession is simply a method of payment. It is one of the remedies a mortgagee may resort to to obtain payment of his debt. It is, in its essence, a means of payment. As already remarked, if the mortgagor had remained in possession and collected the rents himself, and then paid them over to the defendant,²⁰ he would have had a right to control their appropriation, and if he failed to exercise such right, the right of appropriation would then have belonged to the defendant, and he might have exercised it in such manner as would best protect his security. A debtor who makes a payment to his creditor, to whom he owes two or more debts, has a right to direct to which debt the payment shall be applied ; if he simply hands the money over to his creditor, without direction as to its application, his creditor³⁰ may apply the money as he pleases ; and if neither party has exercised his right of appropriation, and a dispute subsequently arises, the Court will make the appropriation, and, in doing so, will, as a general rule, apply the payment to the debt which is least secure. *Terhune v. Colton*, 1 *Beas.*, 232 ; *S. C. on Appeal*, *Ibid*, 312. And the reason this course is pursued is that the law intends that all men shall be honest and fully perform their just obligations. The Court, therefore, in making the appropriation,⁴⁰ does that which an honest man would do. In this case,

however, the mortgagor did retain possession, collect the rents and pay them over to the defendant—the mortgagor went out and the defendant entered, but the same object precisely was accomplished by that course, which would have been accomplished if the other had been pursued. The rent of the mortgaged premises was applied to the payment of the mortgage debt, and to that debt which the parties desired should be first discharged. The cases do
 10 not differ in a single essential point, and the legal rule which would control the one, should, in my judgment, be applied to the other. In legal substance, the rents were paid to the defendant, under authority from the mortgagor, and with permission from him to the defendant to apply them as he saw fit, and the complainant, at the time the defendant made an appropriation of them, having neither a lien on them, nor any right to them, has no right to
 20 have such appropriation changed. The Master's report should be corrected, by changing the credit of the rents from the defendant's first mortgage to his last.

IN CHANCERY OF NEW JERSEY.

Between

JAMES H. LEEDS,

Com'pt,

and

URIAH ALLEN and Wife and others,
Def'ts.On Bill to
redeem and
Foreclose.On applica-10
tion to cor-
rect Master's
Report.

This matter coming on to be heard before the Honorable A. V. Van Fleet, Vice Chancellor, in presence of William Brinkerhoff, counsel for the petitioners, and John Linn, counsel for the respondent, and the petition and affidavits on the part of the pe-²⁰ tioners, and the answer and affidavits on the part of the respondents, having been read and considered, and the arguments of counsel heard thereon, and all objections as to form having been waived, and the Court asked to make such order or decree in the premises as the rights of the parties and equity and justice may require: and it appearing to the Court that the petitioners were mortgagees in possession of the mortgaged premises holding the first and second, also the fourth and fifth mortgages upon³⁰ said premises, and that the respondent held the third mortgage thereon, and that the said petitioners had received for rents of said premises prior to May first, eighteen hundred and eighty-six, eight hundred and forty-one dollars and sixty-five cents, out of which they had made certain disbursements for insurance and repairs, and that the Master in computing the amount due upon the first mortgage of the petitioners had deducted therefrom the sum⁴⁰ of six hundred and sixty-two dollars and ninety-one cents for rents received over and above repairs; and

the Court being of the opinion that said petitioners had a right, as they claimed, to appropriate said rents towards the payment of their fourth mortgage upon said premises ; and it further appearing that the said Master in computing the amount due upon the second mortgage of the petitioners omitted to deduct a payment of ninety-two dollars and seventy-five cents, which should have been deducted from the gross amount thereof ; and it further appearing
 10 that there have been rents received for said property by said petitioners since the first day of May, eighteen hundred and eighty-six, and prior to the sale of said property by the sheriff under said foreclosure proceedings, the sum of eight hundred dollars, which it is conceded by the petitioners, should be applied in reduction of their first mortgage.

It is, therefore, on this 14th day of June, eighteen hundred and eighty-seven, by Alexander T. McGill, Jr., Chancellor of the State of New Jersey, ordered,
 20 adjudged and decreed that the amount due to said petitioners upon their first said mortgage, as reported by said Master, be increased by adding thereto the sum of six hundred and sixty-two dollars and ninety-one cents, which was deducted by him for the net amount of rents received prior to May, eighteen hundred and eighty-six, and that the amount then be diminished by the deduction therefrom of the sum of eight hundred dollars for
 30 rents received since May, eighteen hundred and eighty-six ; and it is further ordered, adjudged and decreed that the amount due to said petitioners upon their said second mortgage as reported by said Master be diminished by deducting therefrom the sum of ninety-two dollars and seventy-five cents, for a payment made on account of the same which the said Master had omitted to deduct.

ALEX. T. MCGILL, C.

Respectfully advised :

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A. V. VAN FLEET,

V. C.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

JAMES H. LEEDS,	}	Petition of Appeal.	10
Appellant,			
and			
LIVINGSTON GIFFORD, GEORGE GIFFORD and ELEANOR C. GIFFORD, Execu- tors of GEORGE GIFFORD, dec'd. Respondent.			

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

The humble petition of James H. Leeds the appel-
lant in the above stated cause, respectfully shows
that your petitioner finds himself aggrieved by a
decree made in the Court of Chancery by his Honor
Alexander T. McGill, Jr., Chancellor of New Jersey,
bearing date the fourteenth day of June, eighteen
hundred and eighty-seven, wherein your petitioner
was complainant, and Uriah Allen and wife, Living-
ston Gifford, George Gifford and Eleanor C. Gifford,
executors of George Gifford, deceased, were defend-
ants, in this respect, to wit, that the said decree or-
ders and decrees that the amount due to said execu-
tors upon their first said mortgage, as reported by
the Master, be increased by adding thereto the sum
of six hundred and sixty-two dollars and ninety-one
cents which was deducted by him for the net amount
of rents received prior to May eighteen hundred and
eighty-six ; and your petitioner humbly appeals
from that part of the decree of the Chancellor which
decrees as aforesaid, upon the ground that the same 40

is erroneous, for that the report of the said Master in this respect was correct and the said executors had no right in equity to have said sum of six hundred and sixty-two dollars and ninety-one cents appropriated or applied in any other way than in reduction of this said mortgage. Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particular aforesaid, reversed, set aside and for nothing holden.

And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

JNO. LINN,
Solr. and Counsel of Appellant.

IN CHANCERY OF NEW JERSEY.

Between—

JAMES H. LEEDS,

and Compl't,

URIAH ALLEN and wife et als,

Def'ts.

On Bill to redeem
and foreclose.On application
of Executors of
George Gifford to
have Master's Re-
port and decree
corrected.

The following is a correct statement of the rents received by Livingston Gifford, one of the executors of George Gifford, deceased, and of the rents which have accrued since said executors have been mortgagees in possession of said mortgaged premises.

20

RENTS RECEIVED.

May 1, 1885, of L. C. Allen.....	\$ 250 00
Aug. 1, " " "	250 00
Nov. 1, " " "	16 65
Feb. 1, 1886, " "	250 00
May 1, " " "	250 00
Apl. 15, " of Pullman Palace Car Co.,	50 00
May 15, " " " " "	50 00
June 15, " " " " "	50 00
July 15, " " " " "	50 00 ³⁰
Aug. 15, " " " " "	50 00
Sept. 15, " " " " "	50 00
Oct. 1885, of J. McCollum.....	75 00

\$1391 65

Aug. 1, 1886, Due from L. C. Allen but
not paid (now on deposit
with John Linn, subject to
the further order of this
Court).....

250 00 40\$1641 65

STATEMENT OF NEW BELMONT

That the undersigned, being duly sworn, depose and say that the within and foregoing is a true and correct statement of the facts and circumstances as the same have come to the knowledge of the undersigned, and that the same are true and correct to the best of the undersigned's knowledge and belief.

Subscribed and sworn to before me this 1st day of January, 1901, at New Belmont, New Jersey.

Notary Public for New Jersey.

Witness my hand and seal this 1st day of January, 1901, at New Belmont, New Jersey.

Notary Public for New Jersey.



