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Notice of Appeal.

In Chancery of New Jersey.

83-683

Between

PASSAIC NATIONAL BANK AND
TRUST COMPANY, trustee,
Complainant,

and

JOHN B. OWENS, *et als.*,
Defendants.

On Bill, etc.

Notice of
Appeal.

10

The defendant, Old Citizens National Bank hereby appeals from the final decree made in the above entitled cause, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Honorable John O. Bigelow, one of the Vice Chancellors of said Court on Monday, December 21, 1931, and from the whole and as part thereof to the Court of Errors and Appeals in the Last Resort in All Causes.

20

Dated: December 26, 1931.

30

EDWARD R. McGLYNN,
Solicitor for and of Counsel with
Defendant, Old Citizens National Bank.

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

EDWARD R. McGLYNN,
Of Counsel with Defendant,
Old Citizens National Bank.

40

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	PASSAIC NATIONAL BANK AND TRUST COMPANY, trustee, Complainant-Appellee, vs. JOHN B. OWENS, <i>et als.</i> , Defendants-Appellants.	} On Appeal of } Old Citizens } National } Bank from } the Court of } Chancery. } Petition of } Appeal.
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*To the Honorable the Court of Errors and Appeals
in the Last Resort in All Causes:*

20 The petition of the Old Citizens National Bank,
the appellant in the above entitled cause, respect-
fully shows that:

1. Petitioner finds it is aggrieved by final de-
cree made in the Court of Chancery by his Honor
Edwin Robert Walker, Chancellor of the State of
New Jersey (advised by the Honorable John O.
Bigelow, Vice Chancellor) bearing date, Decem-
ber 21, 1931, in a certain cause in said Court of
30 Chancery wherein the said Passaic National Bank
and Trust Company, trustee, was complainant, and
the said John B. Owens, Old Citizens National
Bank, and Metuchen National Bank, were defend-
ants in this respect, to wit:

That the said decree adjudges that the mort-
gaged premises described in the Bill of Complaint
be sold to raise and satisfy;

In the second place to pay to the defendant,
40 Metuchen National Bank, \$19,144.98, with lawful

Petition of Appeal.

interest to be computed, with costs to be taxed, and

In the third place to pay to the defendant, Old Citizens National Bank, \$35,793.12, with lawful interest and costs to be taxed, and

Petitioner appeals from the decree of the Court of Chancery which decrees as aforesaid upon the ground that the same is erroneous in that the claim of the defendant, Old Citizens National Bank should have been paid secondly and the claim of the defendant, Metuchen National Bank should have been paid thirdly, and the grounds of the appeal are as follows:

(1) The alleged chattel mortgage or assignment by the defendant, John B. Owens to the defendant, Metuchen National Bank, of Owens' right, title and interest in certain bonds secured by the mortgage described in the Bill of Complaint, does not make the claim of the Metuchen National Bank entitled to payment secondly and ahead of the claim of appellant, which claim was based on an attachment and a judgment entered thereon.

First, because the attachment of the appellant was prior in point of time to the so-called assignment held by the Metuchen National Bank, and

Secondly, the defendant, Owens' right of redemption in the bonds covered by the assignment was wiped out by sale of the bonds, held on April 21, 1931, by complainant herein, and

Thirdly, the only consideration for the assignment by the defendant Owens to the Metuchen National Bank, dated September 10, 1930, was the security of a pre-existing debt, and this did not give to the Metuchen National Bank, the legal

Petition of Appeal.

10 status of a bona fide purchaser of the bonds, or of Owens' right of redemption in the bonds, and so that between Owens and the Metuchen National Bank, inasmuch as their equities were of an equal status, the equity of appellant should have been held to have been prior to that of the Metuchen National Bank, because the attachment of the appellant precedes the assignment in point of time.

20 Fourthly, because the bonds in question described in the assignment held by the Metuchen National Bank were bonds made by the defendant, Owens, and secured by a mortgage on his own property, which bonds had been delivered by Owens to the Passaic National Bank, as security for the indebtedness, which is now the decree of complainant, and the attempted assignment by Owens of his right, title and interest in the bonds so held by the complainant, was void against the attachment of appellant levied on the real estate of Owens described in the mortgage; said attachment having been made prior in point of time to the alleged assignment.

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

EDWARD R. McGLYNN,
Solicitor for and of Counsel with
Appellant, Old Citizens National Bank.

Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

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

The complainant, Passaic National Bank and Trust Company, a national banking corporation, having its place of business in the City and County of Passaic, and State of New Jersey, respectfully shows: 10

1. That on April 15, 1922 John B. Owens, of the City, County and State of New York, executed and delivered to Passaic Trust and Safe Deposit Company, a corporation of the State of New Jersey, to be certified as provided in the mortgage hereinafter mentioned, 240 bonds in the aggregate sum of One Hundred and Twenty Thousand Dollars (\$120,000), each bond being of the denomination of Five Hundred Dollars (\$500), said bonds being numbered consecutively from No. 1 to No. 240, both inclusive, twelve of which bonds in consecutive numerical order, beginning with bond No. 1, to become due as to payment of principal on the first day of July, 1924, and twelve of said bonds in consecutive numerical order to become due as to payment of principal semi-annually on the first days of January and July thereafter, with interest at the rate of six per cent per annum, payable on the first days of January and July, all of said bonds being dated April 15, 1922, and to have interest coupons payable to bearer thereto attached for the payment of said interest on the first days of January and July in each year; said bonds to be coupon bonds payable to bearer, with the privilege of registration of the principal thereby secured to be paid, at the option of the holder, 20
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Petition of Appeal.

which said bonds were in the form as follows, to wit:

No. \$500

First Mortgage Six Per Cent Gold Bond

John B. Owens, Sole Owner

10 of the Factory Plant, in the Borough of Metuchen,
New Jersey, occupied and operated by
The Empire Floor & Wall Title Company

Know All Men By These Presents, that I, John B. Owens, acknowledge myself to be indebted to, and for value received, promise to pay to bearer (or, if registered, to the registered holder hereof) the sum of

20 Five Hundred Dollars (\$500), in Gold Coin
of the present standard of weight and fineness, or
its equivalent, on the First day of July, Nineteen
Hundred and Twenty-Four, at the office of

Passaic Trust and Safe Deposit Company,
(referred to herein as the "Trustee"), in the City
of Passaic, New Jersey, with interest thereon in
like gold coin, at the rate of six per cent per an-
num, from the date hereof, payable semi-annually
at the office of said Trust Company, on the first
30 day of January and July in each and every year,
on the presentation and surrender of the proper
interest coupons hereto annexed, as they severally
mature, each of which is for six months' interest
on this bond, except No. 1 which is for eight and
one half months' interest.

Both principal and interest of this bond are pay-
able without any deduction for any tax or taxes
which the obligor herein, or the Trustee under the
indenture hereinafter mentioned may be required
40 to pay thereon, or to retain therefrom, under any

Bill of Complaint.

present or future law of the United States, or of any State or County or municipality therein.

This bond is one of a series of 240 bonds of like amount, tenor and date, amounting in the aggregate to the sum of One Hundred and Twenty Thousand Dollars, numbered from No. 1 to No. 240, both inclusive, all equally secured by a deed of trust or mortgage of even date herewith, duly executed and delivered by the said obligor herein named, to the said. 10

Passaic Trust and Safe Deposit Company, as Trustee, covering all the lands, buildings, machinery, equipment, railroad sidings, privileges, franchises, appurtenances and fixtures of the said obligor's factory plant in the Borough of Metuchen, New Jersey, whereof the said obligor is now seized, or possessed of, or entitled to, or which he may at any time hereafter become seized, or possessed of, or entitled to, either at law or in equity, as part or parcel of the said factory plant, all as described in said mortgage or deed of trust. 20

If default shall be made in the payment of principal, or of any installment of interest on any of the said bonds, the principal thereof may be made due and payable and be collected by the Trustee as provided in said mortgage or deed of trust. 30

This bond, until registered, shall pass by delivery: this bond may be registered in the books to be kept for that purpose at the office of the said Trustee, and if so registered, will thereafter be transferable only upon said books at the office of such Trustee by the owner, in person, or by attorney thereunto in writing authorized, unless the last preceding transfer shall have been to bearer, 40

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and the transfer by delivery thereby restored. And it shall continue to be susceptible to successive registration and transfer to bearer at the option of holder, but such registration shall not affect the negotiability by delivery of the annexed coupons.

10 This bond shall not be valid until the certificate endorsed hereon shall have been authenticated by the Trustee under said mortgage or deed of trust.

20 2. In order to secure payment of the principal and interest of such of the said bonds as might at any time be issued and outstanding under said mortgage according to their tenor and effect, and the performance of the covenants and conditions thereafter contained, said John B. Owens executed a mortgage to said Passaic Trust and Safe Deposit Company of even date with said bonds, and thereby conveyed to it in fee the land and premises hereinafter described, but in trust under and subject to the conditions and provisions set forth therein, and for the equal and proportionate benefit and security of every present or future holder of the bonds and interest obligations issued and to be issued under and secured by said mortgage, and for the enforcement of the payment of
30 such bonds and interest obligations when payable in accordance with the provisions of said bonds and interest obligations, and of said mortgage, without preference, priority or distinction as to lien or otherwise of any one bond over any other bond by reason of priority in the issue or negotiation thereof, or by reason of any other cause: and as security for the performance of the covenants on the part of the said John B. Owens therein contained, and upon the further trusts therein set
40 forth; upon the express condition that such con-

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veyance should be void upon the payment unto the holders of said bonds and coupons to be issued as aforesaid, the principal and interest to become due thereon at the time and in the manner stipulated therein, and upon the performance of all and singular the covenants and provisions in said bonds and in said mortgage expressed; which said mortgage, having been first duly acknowledged by said John B. Owens, and the certificate of acknowledgment duly endorsed thereon, was recorded in the office of the Clerk of the County of Middlesex on May 5, 1922 in Book 387 of Mortgages, page 145.

3. The mortgaged premises are described as follows:

All that tract or parcel of land and premises, together with the buildings thereon erected, hereinafter particularly described, and all the lands, buildings, machinery, equipment, railroad sidings, privileges, franchises, appurtenances and fixtures of the said obligor's factory plant in the Borough of Metuchen, New Jersey, whereof the said obligor is now seized or possessed of or entitled to or which he may at any time hereafter become seized or possessed of or entitled to, either at law or in equity, as part or parcel of the said factory plant, situate, lying and being in the Borough of Metuchen in the County of Middlesex and State of New Jersey.

Beginning on the northerly side of Essex and Middlesex Turnpike Road, in a corner of land formerly owned by John Hampton; thence North 35 degrees, 50 minutes West 425.7 feet to a Hickory tree; thence North 18 degrees, 30 minutes west 410.1 feet; thence North 15 degrees, 35 minutes west 558 and 2/3 feet to the westerly line of the land of the Easton & Amboy Railroad;

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thence 50 feet from and parallel with the centre line of said railroad and in a southeasterly direction 1265 feet to the northerly line or side of the Middlesex & Essex Avenue; thence along the line of said Avenue or Turnpike, South 50 degrees, 30 minutes west 268.3 feet to the Beginning.

10 Being the same premises conveyed to the aforesaid John B. Owens by deed of George W. Litterst and wife, dated October 31, 1913, and recorded in the Clerk's Office of the County of Middlesex in Book 534 of Deeds, page 372.

20 Also the second tract; Beginning at a point in the division line between the property of E. V. Connett and the property of J. B. Owens, and which point according to a recent survey is distant 425.7 feet northerly from the northerly line of Middlesex Avenue, measured along the division line between said properties and which said division line according to said survey runs from Middlesex Avenue on a course North 32 degrees, 36½ minutes west and from said beginning point running (1) along the said line produced northerly in a straight line and on the same course North 32 degrees, 36½ minutes west 590 feet, more or less to the most northerly line of the property of the said E. V. Connett and in line of lands of Ralph B. Powell; thence back to the beginning point and from said beginning point running (2) according to said survey North 16 degrees, 30 minutes west and along the line of lands of the said Connett, 409.86 feet to a point; thence (3) still according to said survey North 13 degrees, 20½ minutes west and continuing along the line of lands of the said Owens 130 feet, more or less, to lands of said Powell; thence (4) westerly and along said Powell's lands about 172 feet, more or

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less, to the end of the first course. Containing 1.09 Acres.

Being the same premises conveyed to said John B. Owens by deed of Eugene V. Connett and wife recorded in said office in book 568 of Deeds, page 543.

Together with all and singular the rights, franchises, hereditaments and appurtenances to the said premises by this instrument granted or conveyed belonging or in any wise appertaining. 10

4. The said mortgage further provided that the said party of the first part thereto, namely, the said John B. Owens, should make and execute the said bonds in the manner indicated therein, and should deliver the same to the said Trustee to be authenticated and certified by the said Trustee, and that the coupons to be attached to said bonds should be authenticated by the printed or engraved signature of the said party of the first part; and that the said Trustee, having authenticated and certified said bonds, should return them to the party of the said first part for sale or other disposition, and that only such bonds as should bear thereon the certificate of said Trustee, duly signed, should be secured by said mortgage or entitled to any lien or benefit thereunder, and that such certificate of said Trustee upon such bonds of the party of the first part, should be conclusive evidence that the bonds so authenticated had been duly issued thereunder, and entitled to the benefit of the trust thereby created. 20 30

5. The said mortgage contains a covenant that the party of the first part will promptly pay the interest and principal of every bond issued thereunder and secured thereby, at the dates, and in the 40

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places, and in the manner mentioned in such bonds, or in coupons thereunto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest for any tax or taxes which the said party of the first part, or the said Trustee, might be required to pay or retain therefrom, under or by reason of any present or future law of the United States, or of any state or county or municipality therein.

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6. The said mortgage further contains a covenant that the said party of the first part will promptly, punctually and regularly pay and discharge all taxes and assessments lawfully imposed, or which might be imposed upon the said mortgaged premises and property at any time subject to said mortgage, or upon any part thereof, or upon the income or profits thereof so that the lien and priority of said mortgage in respect of such premises and property shall be fully preserved.

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7. The said mortgage further contains an agreement, among other things, that in case of default in the payment of any installment of interest on any bond secured by the said mortgage, and any such default shall continue for a period of three months; or in case default shall be made in the due and punctual payment of the principal of any bond thereby secured, then and in each and every such case of default, during the continuance of such default, the said Trustee personally, or by agent or attorney, with or without entry, in its discretion (a) may sell to the highest and best bidder, all and singular the mortgaged premises and property, and all right, title, interest, claim and demand therein, and right of redemption thereof; or (b) may proceed to protect and enforce the

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rights of the said Trustee, and of the bondholders under said mortgage by a suit or suits in equity or at law, either for the specific performance of any covenant or agreement contained therein, or in aid of the execution of any power therein granted, or for the foreclosure of said mortgage, or for the enforcement of any appropriate legal or equitable remedy, as the said Trustee, being advised by counsel, may deem most effectual to protect and enforce any of its rights or duties thereunder; and the said mortgage contains a further agreement that in case any of the bonds issued and outstanding thereunder shall not be paid at maturity, and such default shall continue for ninety days, then all of the bonds then issued and outstanding shall become immediately due and payable. 10

8. Said mortgage further contains an agreement that in the event of any sale, whether made under the power of sale thereby granted, or under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale, the whole of the premises and property thereby mortgaged shall be sold in one parcel and as an entirety, unless such sale as an entirety is impractical by reason of some statute or other cause, or unless the holders of a majority in interest of the bonds thereby secured then outstanding shall, in writing, request the Trustee to cause said premises and property to be sold in parcels, in which case the sale shall be made in such parcels as shall be specified in such request or petition. 20 30

9. The said mortgage also contains an agreement that in case of any such sale, whether made under the power of sale thereby granted or pursuant to judicial proceedings, the whole of the 40

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principal sums of the bonds thereby secured, if not previously due, shall at once become due and payable; and that the purchase money or proceeds of any such sale, together with any other sums which then may be held by the said Trustee under any of the provisions of said mortgage, as part of the trust estate, or the proceeds thereof, shall be applied as follows:

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First: to the payment of the costs and expenses of such sale, including a reasonable compensation to the Trustee, its agents, attorneys and counsel, and of all expenses, liabilities or advances made or incurred by the Trustee in managing and maintaining the premises and property thereby conveyed, and to the payment of all taxes, assessments or liens prior to the lien of said mortgage, except any taxes, assessments or other superior liens to which such sale shall have been made subject.

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Second: to the payment of the whole amount then owing or unpaid upon the bonds and coupons thereby secured for principal and interest, with interest on the principal and the overdue installments of interest at the same rates respectively as were borne by the respective bonds whereof the principal or installments of interest may be overdue, and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then ratably to the payment of such principal and interest, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest.

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Third: to the payment of the surplus, if any, to the said party of the first part, his heirs, legal

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representatives or assigns, or those who may be lawfully entitled to receive the same.

10. The said mortgage further contains the following agreement:

In case of any sale hereunder, any purchaser, for the purpose of making settlement or payment for the property purchased, shall be entitled to turn in any bonds and any matured and unpaid coupons hereby secured, in order that there may be credited as paid thereon the sums payable out of the net proceeds of such sale to the holder of such bonds and coupons as his ratable share of such net proceeds, after allowing for the proportion of the total purchase price required to pay the costs and expenses of the sale, or otherwise, and such purchaser shall be credited on account of the purchase price of the property purchased, with the sums payable out of such net proceeds on the bonds and coupons so turned in; and at any such sale any bondholders may bid for and purchase such property, and may make payment therefor as aforesaid, and upon compliance with the terms of sale, may hold, retain and dispose of such property without further accountability therefor. The party of the first part covenants with the Trustee that in case a sale be made by the Trustee under the power herein contained and such sale shall not realize a net sum sufficient to pay in full all bonds then outstanding hereunder, the party of the first part will pay to the Trustee on demand the amount of such deficiency, and that in case any proceeding be begun in law or equity for the foreclosure of this mortgage the party of the first part will pay to the Trustee on demand the full amount principal and interest of all bonds then outstanding hereunder. All moneys paid to or

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10 recovered by the Trustee pursuant to this covenant shall be applied by it, first to the payment of its reasonable compensation for services rendered and its disbursements made or liabilities incurred in and about the collection of such moneys and for the performance of its other duties under this mortgage, and then to the payment of principal and interest of outstanding bonds without preference of principal over interest or of interest over principal, or of one bond or coupon over another.

20 11. The said mortgage further contains an agreement that the said Trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts thereby created, and that the said party of the first part will pay such compensation, as well as all other expenditures necessarily incurred or disbursed by the said Trustee thereunder, and that the said Trustee shall have a lien therefor on the property thereby mortgaged or conveyed in priority to the lien of bonds and interest coupons.

30 12. The said mortgage further contains a covenant that the said party of the first part shall and will keep the buildings erected and to be erected upon the said premises insured against loss or damage by fire to an amount not less than the amount of said mortgage, and that the loss under all such policies of insurance shall be made payable to the said Trustee, as mortgagee, and the policy shall be delivered to the said Trustee; and that in default thereof it shall be lawful for the said Trustee to effect such insurance and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises added to the amount
40 thereby secured to be paid.

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13. The said mortgage also provided that the Trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts thereby created, and that the said John B. Owens will pay such compensation, as well as all expenditures necessarily incurred or disbursed by the Trustee thereunder, and that the Trustee shall have a lien therefor on the property thereby mortgaged or conveyed in priority to the lien of the said bonds and interest coupons.

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14. The said Passaic Trust and Safe Deposit Company accepted the trust in said mortgage declared and provided and agreed to perform the same upon the terms and conditions therein set forth; and subsequently said Passaic Trust and Safe Deposit Company was consolidated with Passaic National Bank under the name of Passaic National Bank and Trust Company, the complainant herein, and the said complainant thereby succeeded said Passaic Trust and Safe Deposit Company as Trustee under the said mortgage.

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15. Said 240 bonds having been executed by the said John B. Owens as aforesaid were thereupon certified by the said Trustee and delivered to him to be sold or otherwise disposed of as provided in the said mortgage.

30

16. On February 16, 1929 Empire Floor and Wall Tile Company, Inc., a corporation, made and delivered to the complainant, Passaic National Bank and Trust Company, its promissory note for \$39,000 payable on demand at Passaic National Bank and Trust Company; which said note was endorsed by said John B. Owens, and as collateral security for the payment of said note he deposited with the said Passaic National Bank and Trust Company the said 240 bonds secured by the afore-

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said mortgage, under the terms of a certain written agreement signed and delivered simultaneously with his said endorsement, by which said agreement, among other things, he waived notice of presentation, demand and protest of said note.

10 17. On January 1, 1931 payments aggregating \$13,000 had been made on account of the principal of the aforesaid note, and on January 19, 1931 a further payment of \$999 was made on account of said principal, leaving a balance of \$25,001 then due thereon.

20 18. On April 1, 1931 said Passaic National Bank and Trust Company demanded of said Empire Floor and Wall Tile Company, Inc. payment of the balance due on said note amounting to the said sum of \$25,001, with interest on \$26,000 from January 1 to January 19, 1931, and on \$25,001 from said last mentioned date; and notice of such demand was given to said John B. Owens notwithstanding such notice had been waived by the terms of his aforesaid agreement.

30 19. The said note has not been paid, and the sum of \$25,001 is due thereon to the complainant, with interest on \$26,000 from January 1 to January 19, 1931, and on \$25,001 from the last mentioned date; and the complainant now holds the aforesaid bonds as collateral security for the payment of said note and interest thereon.

20. On August 28, 1930 a writ of attachment was issued out of the New Jersey Supreme Court at the suit of Old Citizens National Bank, a national banking association, against the said John B. Owens directed to the Sheriff of the County of Middlesex.

40 Any interest which said Old Citizens National

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Bank may have in the said mortgaged premises is subject to the lien of the aforesaid mortgage.

21. By written assignment dated September 10, 1930 said John B. Owens, in consideration of the renewal of a note of the Empire Floor and Wall Tile Company, Inc., for \$13,500, endorsed by the said John B. Owens, and discounted or to be discounted by The Metuchen National Bank of Metuchen, in the State of New Jersey, sold, assigned, transferred and set over unto the said The Metuchen National Bank as security for the payment of the indebtedness aforesaid, all his right, title and interest in and to the aforesaid bonds which it was stated in said assignment were then held by the said Passaic National Bank and Trust Company as security for the payment of a loan or loans, it being expressed in said assignment that the same was made upon condition that if the above first mentioned note, and any and every renewal and/or renewals thereof, and any credit extension whatsoever founded thereon, in whole or in part, and that likewise any other indebtedness of the said Empire Floor and Wall Tile Company, Inc. and/or to the said John B. Owens to the said The Metuchen National Bank, then or thereafter by them, or either of them, incurred, be fully paid according to the terms thereof, then the said assignment should be void, which said assignment was recorded in the Passaic County Register's Office September 27, 1930 in Book A-8 of Chattel Mortgages, page 439.

Any interest which said The Metuchen National Bank may have in said bonds, or in or under the aforesaid mortgage securing the same, is subject to the prior right or lien of said Passaic National Bank and Trust Company.

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22. Taxes assessed by the Borough of Metuchen upon the said mortgaged premises for the year 1929 amounting to \$6137.82, and for the year 1930, amounting to \$7499.42, are unpaid, and a sewer assessment, which is a lien upon the said premises, amounting to \$820.66, is also unpaid.

10 23. The said mortgaged premises are now in the possession of the said Empire Floor and Wall Tile Company, Inc. under lease from said John B. Owens.

Any interest which said Empire Floor and Wall Tile Company, Inc. may have in the said premises, as lessee or otherwise, is subject to the lien of the aforesaid mortgage.

24. Said John B. Owens is married. His wife's name is Gertrude.

20 Any claim or interest she may have in the nature of an inchoate right of dower, or otherwise, is subject to the aforesaid mortgage.

25. None of the said bonds which fell due on July 1, 1924, and semi-annually thereafter, have been paid, and by reason of the default in the payment thereof all of said 240 bonds are now due and payable.

30 26. The said mortgaged premises have always been in the possession of the said John B. Owens or of said Empire Floor and Wall Tile Company, Inc., or one of them.

40 27. The whole amount of the said principal of said bonds, to wit, the sum of \$120,000, with interest thereon from January 1, 1931, is due upon the said mortgage; and there is due to the complainant upon the bonds securing the balance of principal owing to it upon the aforesaid note of Empire Floor and Wall Tile Company, Inc. the aforesaid sum of \$25,001, with interest on \$26,-

Bill of Complaint.

000 from January 1 to January 19, 1931, and on \$25,001 from the said last mentioned date.

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That John B. Owens and Gertrude Owens, his wife, Empire Floor and Wall Tile Company, Inc., Old Citizens National Bank and The Metuchen National Bank, who are the defendants to this suit, may answer this bill of complaint and each statement therein made. 10

2. That an account may be taken of the amount due upon the bonds secured by the aforesaid mortgage, and particularly of the amount due to the complainant thereon.

3. That the defendants, or one of them, may be decreed to pay the amounts so found due, with interest and costs, by a short day, to be appointed by this court; and that in default of such payment they and each of them, be debarred and foreclosed of all equity of redemption in said lands; or 20

4. That a decree may be made for the sale of the mortgaged premises to raise and pay the amounts so found due on the said bonds secured by the said mortgage, and particularly the amount so due to the complainant, with interest and costs. 30

5. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint, and to abide by such decree as this court may make in the premises.

CORBIN & HARTY,
Solicitors and of Counsel
with the Complainant. 40

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30

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On Bill to
Foreclose.
Order
Amending
Bill.

**Answer of Defendant Old Citizens National
Bank.**

IN CHANCERY OF NEW JERSEY.

83-683

Between PASSAIC NATIONAL BANK AND TRUST COMPANY, Complainant, and JOHN B. OWENS, <i>et als.</i>, Defendants.	}	On Bill, etc. 10 Answer of Defendant Old Citizens National Bank.
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The defendant, Old Citizens National Bank, a National Banking Association, located in the City of Columbus, State of Ohio, answering the complaint filed herein, says that: 20

1. It admits the facts alleged in paragraphs 1 to 19 inclusive.

2. It admits the facts alleged in paragraph 20 and states there is due to it on said attachment, the sum of \$35730.12. This defendant therefore desires its encumbrance reported upon, both as to the amount and its respective order of priority. 30

3. It admits paragraph 21, but denies that by virtue of the facts therein alleged, the defendant, The Metuchen National Bank of Metuchen, acquired any interest in the bonds described in said paragraph or in the mortgage securing the same.

4. It admits the facts alleged in paragraphs 22 to 26 inclusive. 40

Answer of Defendant Old Citizens National Bank.

5. It denies that the whole amount of said principal of said bonds, to wit, the sum of \$120,000.00, with interest thereon from January 1st, 1931, is due upon the said mortgage and that there is anything due upon the said mortgage. It denies there is anything due to the complainant upon the bonds held by it, or that it has any interest in the mortgage described in the bill of complaint.

FIRST SEPARATE DEFENSE

This defendant, further answering the bill of complaint, says that:

1. Complainant herein, having acted as trustee under the mortgage described in the bill of complaint, was charged with notice that the bonds in question had been executed by the within named John B. Owens without any consideration, and it was also charged with notice of the fact that after said bonds were authenticated by it as trustee, the said John B. Owens became the owner and holder thereof, and therefore, as a matter of law, when said bonds were delivered to it by the said John B. Owens as collateral security for his accommodation and endorsement of a note of the Empire Floor and Wall Tile Company, Inc., the same had been issued without consideration, and that there was nothing due thereon.

SECOND SEPARATE DEFENSE

This defendant, further answering the bill of complaint, says that:

1. Subsequent to the filing of the bill of complaint herein, the bonds described therein were sold

Answer of Defendant Old Citizens National Bank.

by the complainant at public auction and purchased by it, and the complainant cannot, under any circumstances, claim more to be due on the mortgage described in the bill of complaint than the amount of its indebtedness allegedly secured by the deposit of the bonds described in said bill of complaint.

10

STEIN, McGLYNN & HANNOCH,
Solicitors of Defendant,
Old Citizens National Bank.

Answer.

IN CHANCERY OF NEW JERSEY.

83/683

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Between PASSAIC NATIONAL BANK AND TRUST COMPANY, Complainant, and JOHN B. OWENS, <i>et als.</i>, Defendants.	}	On Bill to Foreclose. Answer.
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The answer of the defendant, The Metuchen National Bank, a body corporate under the laws of the United States of America, having its place of business, in the Borough of Metuchen, Middlesex County and State of New Jersey.

This defendant, The Metuchen National Bank, answering the bill of complaint, says that

40

Answer.

1. Paragraphs 1 to 19, both inclusive, and 22, 23, 24, 25, 26 and 27, of the bill of complaint, are admitted.

10 2. Paragraph 20, of the bill of complaint is admitted, as there-stated and that any interest which said Old Citizens National Bank may have in the said mortgaged premises is subject to the lien of the aforesaid mortgage, being the mortgage sought to be foreclosed by the complainant and in which also this defendant, The Metuchen National Bank, has an interest, as hereinafter stated.

20 3. As to Paragraph 21 of the bill of complaint, this defendant admits that its lien by virtue of the agreement, referred to in this paragraph, dated Sept. 10, 1930, with the said John B. Owens, of the nature of a chattel mortgage of all the bonds mentioned in Paragraph 16 of the complaint, is in fact subsequent and subject to the complainant's lien on the said bonds as set forth in Paragraph 16 of the complaint; the remainder of the said Paragraph 21 of the complaint is admitted, except that by inadvertance or otherwise, the words contained in said agreement,—“Otherwise to be in full force and effect,” are omitted, after the word “void”.

30 4. On Sept. 10, 1930, the defendant, John B. Owens, by written agreement in the nature of a chattel mortgage, in consideration of the renewal of a note of the Empire Floor and Wall Tile Company, Inc., for \$13,500, endorsed by the said John B. Owens, and discounted by the defendant The Metuchen National Bank, and other valuable consideration therein expressed, sold, assigned, transferred and set over to said The Metuchen National
40 Bank, all his equity, right, title and interest, in

Answer.

all the bonds mentioned in Paragraph 16 of the complaint, subject to the prior lien of the complainant in said bonds, as security for the payment of a loan or loans made by complainant. Said agreement was duly executed and acknowledged by the said John B. Owens, and recorded September 27, 1930, in Book A-8 of Chattel Mortgages in Passaic County, page 439. Said agreement was made upon condition, however, that if the above mentioned note, and any and every renewal and/or renewals thereof, and any credit extensions whatsoever founded thereon, in whole or in part, and that likewise any other indebtedness of the said Empire Floor and Wall Tile Company, Inc. of New Jersey and/or the said John B. Owens, to the said The Metuchen National Bank, now or hereafter by them, or either of them incurred, be fully paid, according to the terms thereof then this agreement is to be void, otherwise to be in full force and effect.

5. At the present time the defendant, The Metuchen National Bank, holds the following notes, under discount, in due course, the payment of all of which said notes is secured by and under said agreement, to wit:

(a) Note of the Empire Floor & Wall Tile Co. Inc. of N. J. endorsed by said John B. Owens, dated Jan. 2, 1931, due April 2, 1931 for \$13,500., with interest thereon from April 2, 1931 and protest fee \$2.10, and now unpaid.

(b) Note of C. C. Milligan, endorsed by said John B. Owens, dated Jan. 30, 1931, due April 30, 1931 for \$2,000. with interest thereon from April 30, 1931 and protest fee \$2.10, and now unpaid.

Answer.

(c) Note of the Empire Floor & Wall Tile Co. Inc. of N. J. to order of James Stilo, with his endorsement and likewise endorsed by John B. Owens, dated Feb. 28, 1931, due Aug. 28, 1931 for \$2291.97, and now unpaid.

10 (d) Note of Fabius & Ciofalo, Inc. to order of the Empire Floor & Wall Tile Co. Inc. of N. J. and endorsed by it, payment guaranteed by John B. Owens, dated April 2, 1931, due June 2, 1931 for \$800. and now unpaid.

20 6. The defendant, The Metuchen National Bank, joins with the complainant in its prayer for relief, in the complaint, that an account be taken of the amount due upon the bonds secured by the aforesaid mortgage, and particularly of the amount due the complainant thereon, and likewise the amount due this defendant, thereon, and that the defendants, or one of them, may be decreed to pay the amounts so found due, with interest and costs, by a short day, to be appointed by this court, and that in default of such payment they and each of them, be debarred and foreclosed of all equity of redemption in said lands; and that a decree may
30 be made for the sale of the mortgaged premises to raise and pay the amounts so found due on the said bonds secured by the said mortgage, and particularly the amount so due to the complainant, and likewise the amount so due to this defendant, with interest and costs.

GEO. W. LITTERST,
Solicitor and of Counsel
with the Defendant.

Stipulation.

IN CHANCERY OF NEW JERSEY.

Between PASSAIC NATIONAL BANK AND TRUST COMPANY, Complainant, and JOHN B. OWENS, <i>et als.</i>, Defendants.	}	On Bill to Foreclose. Stipulation.	10
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It is, on this 26th day of October, 1931, stipulated and agreed by and between Messrs. Corbin & Harty, solicitors of the complainant, and Messrs. Stein, McGlynn & Hannoeh, solicitors of defendants Old Citizens National Bank and James A. O'Connell, Receiver of Empire Floor and Wall Tile Company, Inc., as follows:

First: It is admitted that the bonds mentioned in the first paragraph of the bill were duly and legally issued and are now legally outstanding, and that the mortgage securing said bonds, mentioned in the second paragraph of the bill, is a valid first lien upon the lands and premises therein particularly described.

Second: It is admitted that there is due to the complainant, Passaic National Bank and Trust Company, upon the note of Empire Floor and Wall Tile Company, Inc., mentioned in paragraphs 16, 17 and 18 of the bill, for which the complainant holds the said bonds, the sum of \$25,001., with interest on \$26,000 from January 1st to January

Stipulation.

19th, 1931, and on \$25,001 from the said last mentioned date, and that the complainant is entitled to a decree in this cause for the said amount of principal and interest.

10 Third: It is agreed that the complainant has paid a premium for fire insurance upon the mort-
gaged premises for the year commencing August
5, 1931 amounting to \$1344, and that the amount
of said premium shall be included in the decree;
and that the complainant has also paid the wages
of watchmen for guarding the said mortgaged
premises at the rate of \$60 per week, amounting,
up to October 20, 1931, to the total sum of \$1560,
and that an additional expense for said watchmen
will be incurred at said weekly rate until the mort-
gaged premises have been sold, and that said total
20 expense shall also be included in the decree.

Fourth: It is agreed that upon the cause coming on to be heard by Vice Chancellor Bigelow, to whom the same has been referred, the said defendants will consent to a decree in accordance with the foregoing provisions of this stipulation; that is to say, for the aforesaid sum of \$25,001 and interest, together with the amount of said insurance premium and said watchmen's wages, as here-
30 inbefore mentioned, in favor of the complainant.

CORBIN & HARTY,
Solrs. of Complainant.

STEIN, McGLYNN & HANNOCH,
Solrs. of defendants, Old Citizens
National Bank and James
A. O'Connell, Receiver, etc.

Testimony.

IN CHANCERY OF NEW JERSEY.

Between

PASSAIC NATIONAL BANK,
Complainant,

and

JOHN B. OWENS, *et als.*,
Defendants.

On Bill, &c.

83/683.

Transcript.

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Transcript of the testimony taken in the above stated cause, on final hearing, at the Chancery Chambers in Paterson, on Monday, November 2, 1931, before his Honor JOHN O. BIGELOW, Vice Chancellor. 20

APPEARANCES:

MESSRS. CORBIN & HARTY (WILLIAM A. SUMNER), for the Complainant.

MR. EDWARD R. MCGLYNN, for Defendant Old Citizens National Bank.

MR. GEORGE W. LITTEREST, for Defendant Metuchen National Bank.

30

WALTER H. GARDNER, sworn in behalf of complainant, testified as follows:

Direct-examination by Mr. Sumner:

Mr. Sumner: I offer in evidence mortgage dated April 15, 1922 between John B. Owens of the City of New York and the Passaic Trust and Safe Deposit Company, to secure 40

Walter H. Gardner—Direct.

the issue of bonds mentioned in the bill of complaint.

(Admitted and marked Exhibit C-1).

Mr. Sumner: I also offer in evidence the bonds, I offer them as a whole—Mr. Gardner, what are they?

10 The Witness: 240 bonds of \$500, totalling \$120,000; I have one here (indicating).

The Court: Are the bonds alike, except for serial numbers and for the amount?

The Witness: All alike except for the maturity dates and numbers.

The Court: I would suggest that one bond be put in evidence and marked.

20 Q. What is that bond? A. Bond number one.

(Admitted in evidence and marked Exhibit C-2.)

Q. Will you present the note held by the Passaic National Bank? (Witness produces note.)

Mr. Sumner: I offer that in evidence—dated February 6, 1929 for \$39,000. How much is due on that note, Mr. Gardner?

30 A. Now due on \$25,001 plus interest, on \$26,000 from January 1, 1931 and interest, on \$25,001 from January 19, 1931.

(Note admitted in evidence and marked C-3.)

Mr. Sumner: I offer the collateral agreement in evidence.

(Agreement admitted in evidence and marked C-4.)

40 The Court: What is the total?

Walter H. Gardner—Direct.

The Witness: \$26,274.87.

Q. Up to date? A. Up to date.

Q. Has the Passaic National Bank and Trust Company an insurance on the mortgaged premises? A. It has.

Q. The mortgage contains a provision for that; will you point that out? A. \$1344 being premium on \$120,000 on fire insurance. 10

Q. When made? A. Payment made October 2, 1931, paying premium for the period August 5, 1931 to August 5, 1932.

Q. Since this foreclosure suit has been instituted, has the bank incurred expense hiring watchmen? A. It has.

Q. How much was the payment on that account? A. We have two watchmen each serving 12 hours and pay them \$30.00, a total of \$60.00 a week. We have had these watchmen since April 21 and have paid them the total sum of \$1440. 20

Q. When was the last payment made? A. Last payment made October 10th and paid them to that date.

Q. How much would that make the total to date? A. To the end of the month \$1620.

Q. Are these watchmen still in your employ at the rates you mention? A. They are and will have to be continued or else the insurance will be cancelled. 30

Q. I think you stated that these bonds were in default? A. They are in default.

Cross-examination by Mr. McGlynn:

Q. By the terms of this collateral agreement which is in evidence, exhibit C-4, did you in pur- 40

Walter H. Gardner—Cross.

suant to that agreement advertise the bonds held by the bank for sale? A. I did not advertise.

Q. You held the sale in pursuant to the collateral agreement? A. I did.

Q. What date? A. The final date of the sale was April 21 I believe, I will confirm that. April 21, 2 P. M., 1931.

10

Q. Were the bonds sold on that day? A. They were.

Q. To whom? A. The Passaic National Bank.

Q. For the amount due at that time? A. At \$25,469.16.

Q. That was the amount due on that day? A. Amount of note plus interest and protest fees to that date.

20

Q. Was there a representative of the Metuchen Bank present at that sale? A. There was.

Q. I was present representing the Old Citizens National Bank of Ohio? A. You were.

Cross-examination by Mr. Litterest:

30

Q. Was there any objection made by any one at that sale as to the sale being held? A. I didn't hear if there was any objection to the sale, but there were statements made by you and Mr. McGlynn.

Q. Did you take a stenographic report? A. I did.

Q. Have you those? A. I have.

The Court: Where did the sale take place, at a broker's board, at public auction?

The Witness: At the bank.

The Court: Did you advertise the sale in the newspaper?

40

Walter H. Gardner—Cross.

The Witness: I did not.

The Court: As I understand the rule under collateral agreements, unless there is something contained in the agreement itself, the holder of the collateral cannot buy it in himself at the sale, does not get title.

Mr. McGlynn: There is a provision in this agreement. 10

The Court: Under certain circumstances which have not been proved.

Q. Have you the statement made by myself? A. I have.

Mr. Litterest: Have you any objection to the reading of it? (To Mr. McGlynn).

Mr. McGlynn: No, I have no objection.

A. This is the statement of Mr. Litterest: (reading) 'Answer. I represent the Metuchen National Bank who is the holder of a duly executed chattel mortgage executed by John B. Owens to the Bank covering all his right, title, and interest in \$120,000 of the bonds mentioned today held by the Passaic National Bank and Trust Company as security for the payment of a loan made by said bank to Empire Floor and Wall Tile Company, Inc. which chattel mortgage the Metuchen bank claims is subject to the prior loan existing at that time and vested in the Passaic National Bank and Trust Company to the extent of some \$26,000. Representing the Metuchen National Bank, we have no objection at this time to a sale of the bonds that are being offered for sale to the Passaic National Bank and Trust Company if only as incident to and as a step in the orderly foreclosure in Chancery of New Jersey of the trust mortgage to secure 20 30 40

Walter H. Gardner—Cross.

the bonds. We maintain that any sale to any outside third party is made against our objection and protest of the Metuchen National Bank on the following grounds: 1. That 157 or more of the bonds in question are now past due and in default for non-payment of principal and interest. 2. All the other bonds under the terms of the mortgage by reason of this default are likewise due and payable. 3. All the bonds which are now in the hands of the Passaic National Bank and Trust Company are impressed with a trust set out in the mortgage and that being so a foreclosure against Owens or the Metuchen National Bank by a sale to an outside party under any power given in the note which is the evidence of indebtedness or any other proceeding except in the orderly procedure in Chancery to accomplish such an objective and result is ineffective, inequitable, and will be set aside as such by the Court of Chancery. 4. The present mortgage we maintain is only good to the extent of and no more than the actual debt to the Passaic National Bank and Trust Company in the first place; the actual debt due to the Metuchen National Bank as stated in this chattel mortgage, in the second place, and in the third place, the debt due to the Old Citizens National Bank of Columbus, Ohio under its attachment proceedings and in applying creditors for any that may come in under such proceedings. 5. We maintain that any outside purchaser other than the Passaic National Bank and Trust Company of the bonds takes them with notice of all existing equities. There was a question asked me to you: 'Do you refer in your statement as to outstanding equities, to the equities arising prior or subsequent to bond being deposited with the Passaic National Bank and

Walter H. Gardner—Cross.

Trust Company?" Mr. Litterst answered, 'Yes subsequent to the time the bonds were deposited with the Bank.' "

By Mr. McGlynn:

Q. Was this a private or public sale? A. I would say it was a semi-public sale.

Q. No objection to anybody being present and bidding? A. No, and I had notified certain parties, such as yourself—

Q. Mr. Litterst? A. Yes, sir.

Q. Mr. Owens? A. Mr. Owens, Mr. Seigel, Mr. Owens nephew.

The Court: What did you notify them?

The Witness: That there would be a sale of these bonds to satisfy these liens.

The Court: In writing?

The Witness: Some in writing, some by telephone.

The Court: Have you a copy of the written notice that you gave?

The Witness: I have a letter I wrote John Owens on April 1, 1931 and a letter I wrote the Empire Floor and Wall Tile Company.

Mr. McGlynn: I have no objection to that being read.

The Witness: (Reading) The letter on April 1, 1931 to the Empire Floor and Wall Tile Co., Inc., Metuchen, N. J., of which a copy was sent to the said company at 32 Snediker Avenue, Brooklyn, N. Y., states "In reference to your note dated February 6th, 1929, in the amount of \$39,000. payable on demand at the Passaic National Bank and Trust Company, which note is held by this

Walter H. Gardner—Cross.

10 bank, we hereby demand payment, immediately, of the balance due on this note amounting to \$25,001.00 plus interest from January 1st, 1931 to January 19th, 1931 on \$26,000 and interest from January 19th, 1931 to date on the balance of \$25,001.00. Very truly yours." The letter on the same date addressed to John B. Owens, Esq., Box No. 7, Station A, Homestead, Florida, "In reference to note of the Empire Floor and Wall Tile Co. Inc. dated February 6th, 1929 in the amount of \$39,000. payable on demand at Passaic National Bank and Trust Company, which note is held by this Bank and which note is endorsed by you, we hereby

20 notify you that we have this day made demand of the Empire Floor and Wall Tile Co. Inc. for the payment of the balance due on this note amounting to \$25,001.00 plus interest from January 1st, 1931 to January 19th, 1931 on \$26,000 and interest from January 19th, 1931 to date on the sum of \$25,001.00. We also hereby notify you that unless payment of the balance due on the said note is made in full by either the Empire Floor and Wall Tile Co., Inc., the maker

30 of the note or by you as the endorser of the note, on or before April 10th, 1931, that we will immediately sell the collateral pledged by you, consisting of \$120,000 par value First Mortgage 6% Gold Bonds issued by John B. Owens. Very truly yours, Walter H. Gardner, Vice President and Trust Officer."

40 The Court: You wrote him if he didn't pay by April 10th you would sell them and

Walter H. Gardner—Cross.

you accordingly sold them some ten days later?

The Witness: Yes, sir.

The Court: You sold them in your bank?

The Witness: Yes, sir.

The Court: What part?

The Witness: In the trust department, my office. 10

The Court: Did you have an auctioneer present?

The Witness: No, sir.

The Court: Did you ask for bids?

The Witness: I did.

By Mr. McGlynn:

Q. Were there any people present besides myself? A. Yes, sir. 20

Q. There were people besides Mr. Litterst? A. Mr. Carl, Mr. Seigel, Mr. Owens, Mr. Stallo, Mr. Lindstamer.

Q. The Mr. Owens who was present, wasn't the one who made the bond? A. No, sir.

By Mr. Sumner:

Q. What is your position in the bank? A. Vice president and trust officer. 30

Mr. McGlynn: I offer a certified copy of the record of the attachment suit in the New Jersey Supreme Court, Old Citizens National Bank of Ohio v. Owens. Judgment on June 9, 1931 for \$35,730.12 with costs of \$63.00. The attachment writ on which the judgment was entered was issued on August 28, 1930 on the property described in the mortgage.

(Admitted in evidence and marked D-1.) 40

Edward R. McGlynn—Direct.

EDWARD R. McGLYNN, sworn in behalf of Defendant Metuchen National Bank, testified as follows:

Direct-examination by Mr. Litterst:

10 Q. You issued your attachment on the 28th of August, 1931, to what county did you issue it? A. Middlesex County.

Q. Did you make a levy? A. Yes, sir, on Friday, August 29th at 1:30 in the afternoon the sheriff through his deputy Henry F. Smith and one N. De Lizer attached various personal property which the defendant had some right, title and interest and various tracts of land located in the Borough of Metuchen, County of Middlesex, State
20 of New Jersey included in which are the two tracks described in the mortgage.

Q. Is that the only levy that was made on the writ, did you issue any writ to any other county than Middlesex? A. No, sir.

Q. Did you know there was a mortgage on this property at the time? A. On this real estate?

Q. Yes. A. Yes, I searched the record.

Q. Did you make inquiry as to the stock? A. I
30 had.

Q. What did you find? A. Found there was a mortgage on record made by John B. Owens to the Passaic National Bank for \$120,000 and secured a bond issue of \$120,000 on which I understand there was a claim of \$25,000 or \$26,000 due.

Q. When did you discover there was a claim of \$25,000? A. I wouldn't want to say now it was before, I found it out before, I don't just want to say what date,—I knew of it.

40 Q. Did you make any inquiry at the Passaic

Edward R. McGlynn—Direct.

National Bank and Trust Company under that mortgage as to the bond? A. My recollection as to the course of the inquiry, Mr. H. Theodore Sorg of Newark, a lawyer, filed a notice of appearance in behalf of the defendant Mr. Owens and as a result of that he and I had met on several occasions and discussed this situation from a practical standpoint as to what we could do and he gave me two payments of \$4,000 each and asked me for time to refinance this property and he told me how much was due the Passaic Bank and how much to your bank. 10

Q. Did you apply to the Passaic National Bank as to the amount of bonds issued under that mortgage? A. I don't think I ever did.

Q. Therefore you knew nothing about the fact that the Passaic Bank had those bonds, the old issues, until later? A. Sometime later Mr. Owen's attorney informed me. 20

Q. You didn't know that until you had notice of a sale to be held in Passaic of these bonds under the collateral agreement? A. I think I knew it before that.

Q. You didn't levy on those bonds? A. No.

Mr. Litterst: I offer in evidence the chattel mortgage and the agreement. 30

(Mortgage and agreement admitted in evidence and marked exhibit M-1).

Mr. McGlynn: I assume my objection to the legal effect will be taken up later?

The Court: Yes.

Alexander C. Litterst—Direct.

ALEXANDER C. LITTERST, sworn in behalf of Defendant Metuchen National Bank, testified as follows:

Direct-examination by Mr. Litterst:

10 Q. Are you an officer of the Metuchen Bank? A. Cashier of the Metuchen Bank.

Q. It is one of the defendants in this suit? A. Yes.

Q. As such an officer you understand the business affairs of the bank, do you? A. I do.

Mr. Litterst: Under the terms of that agreement I propose to offer four notes. (Shows witness paper.)

20 The Witness: This is a note of the Empire Floor and Wall Tile Company to one James Stello endorsed by James Stello and John B. Owens dated February 28, 1931 at six months due August 28, 1931 for the sum of \$2225.28 with interest of \$66.75 making a total of \$2291.97. This note was discounted by the Metuchen National Bank and James Stello. It came due on August 28th of this year and was protested for nonpayment.

30 (Note admitted in evidence and marked M-2.)

In this there is interest from the maturity date to date of \$24.83 making the total claim at this time \$2316.80.

(Witness is handed another note.)

40 This is a note for \$13,500. with interest dated January 2, 1931 at three months which came due on April 2, 1931 and was protested for nonpayment in the amount due, \$13,500, with interest to date from the maturity date

Alexander C. Litterst—Direct.

of \$438.68 including the protest fee of \$2.10; the claim to date is **\$13,940.78.**

(Note admitted in evidence and marked M-3.)

(Witness is handed another note.)

This is a note made by C. O. Milligan endorsed by John B. Owens dated January 30, 1931 at ninety days due April 30, 1931 for **10** \$2,000; with interest not having been paid, the \$2,000 plus protest fee of \$2.10 with interest from the maturity date April 30, 1931 to date \$61.00, making the claim \$2,063.10.

(Note admitted in evidence and marked M-4.)

(Witness is handed another note.)

This is a note made by James G. Stallo Inc. of New York to Empire Floor and Wall **20** Tile Company, Inc., dated April 2, 1931 at two months due June 2, 1931 in the amount of \$800.00 with interest payable at the Irving Trust Company, 2-M Branch, Brooklyn, and protested on June 2, 1931. The amount due on this note is \$808, \$2.00 protest fee, interest from maturity date to day \$20.25 making the total \$830.25.

(Note admitted in evidence and marked **30** M-5.)

Q. Owned by the Metuchen bank? A. Yes, sir.

Q. Nothing paid on account since? A. Nothing paid on account.

Cross-examination by Mr. McGlynn:

Q. Do I understand these notes are all of the notes described in the agreement? A. Except that **40**

Alexander C. Litterst—Cross.

some of these notes are later, there are two notes which we have taken since that day.

Q. Some of these notes enter a new transaction not covered by the loan? A. I don't know about that, they have been discounted since that mortgage was executed.

10 Q. When you say discounted you mean new discounts? A. New discounts.

Q. Have any of the notes described in the mortgage held by your bank been paid? A. No, excuse me I will have to look at that. (Witness looking at book.) This note \$14,000. is now \$13,500. What is the next one?

Q. \$500. A. That has evidently been paid, because we haven't it.

Q. Dated August 5, 1930 to November 5, 1930?
20 A. Yes, sir.

Q. \$2,500. on the Lincoln— A. \$500. has been paid on that. It is for a \$2,000. note. Those are the two notes that were mentioned in here, the other two notes have been discounted.

Q. Since September, 1930? A. Since September, 1930.

Mr. Litterst: That is our case.

Opinion.

IN CHANCERY OF NEW JERSEY.

Between

PASSAIC NATIONAL BANK AND
TRUST COMPANY,

Complainant,

and

JOHN B. OWENS, *et als.*,

Defendants.

83/683.

Not to be
Published in
Official or
Unofficial
Reports.

10

December 3, 1931.

1. An instrument assigning as security for a debt an interest in bonds, need not be recorded as a chattel mortgage. 20

2. An agreement embodying the terms of a pledge of securities, authorized the pledge itself to purchase the securities if it sold them at public auction. *Held*, that an auction is not public unless the public is given a reasonable opportunity to attend and to bid.

3. *O* executed a mortgage securing coupon bonds made by him and aggregating \$120,000. Later, he pledged all the bonds with *P* as security for *E*'s note for \$39,000. Then a writ of attachment at the suit of *C* issued against *O* and became a lien on the mortgaged property. Lastly, *O* executed an assignment of his interest in the bonds to *M* as security. *M*, without knowledge of the attachment, accepted the assignment and on the faith thereof renewed one note of *E* and discounted others. *Held*, that the mortgage to the extent of the debt due by *E* to both *P* and *M*, was prior to the attachment. 30 40

Opinion.

APPEARANCES:

MESSRS. CORBIN & HARTY (WILLIAM A. SUMNER), for the Complainant.

MR. EDWARD R. MCGLYNN, for Defendant Old Citizens National Bank.

10 MR. GEORGE W. LITTERST, for Defendant Metuchen National Bank.

BIGELOW, V. C.

20 This is a suit to foreclose a mortgage made by John B. Owens to Passaic National Bank & Trust Company as trustee, to secure 240 coupons aggregating \$120,000 made by Owens payable to bearer and maturing between 1924 and 1933. The bonds were executed at about the date of the mortgage, April 15, 1922; were certified by the trustee and forthwith handed back to Owens. Nearly seven years later, namely, on February 16, 1929, the Empire Floor & Wall Tile Company (a company controlled by Owens and the lessee of the mortgaged premises) borrowed \$39,000 from the Passaic National Bank & Trust Company on its demand note. At the same time, Owens pledged to the bank as security for the note, all of the 240 bonds above mentioned. The terms of the pledge were embodied in a printed agreement signed by Owens empowering the bank, upon default in payment of the note, to sell the bonds at public or private sale, and further, if the bonds were sold at public auction, authorizing the bank itself to purchase at the sale free from any equity of redemption of the pledgor.

30 On August 28, 1930, a writ of attachment issued out of the New Jersey Supreme Court against Owens at the suit of the Old Citizens National

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Opinion.

Bank of Ohio. By virtue thereof, the sheriff attached the mortgaged premises. In the attachment suit, the Ohio bank has recovered judgment for \$35,793.12.

On September 10, 1930—two weeks after the attachment issued—Owens executed an agreement assigning to the Metuchen National Bank all his right, title and interest in the bonds held by the Passaic bank in order to secure a certain note of the Title Company, discounted by the Metuchen bank, or any renewal thereof, and any other indebtedness of the Title Company to the Metuchen bank then existing or thereafter incurred. This instrument was recorded as a chattel mortgage in the Passaic County Register's Office September 27, 1930. The Metuchen bank now holds four overdue notes of the Title Company dated in 1931, aggregating \$18,525.22. One of these notes, for \$13,500, is a renewal of the note expressly mentioned in the agreement.

The bill of complaint in the present cause was filed April 20, 1931. The following day, though before process issued, the Passaic bank went through the form of selling the bonds at auction to itself. The sale was conducted in an office of the Trust Department of the bank. Two or three officers of the bank were present, as were a very few other people. The Passaic bank does not, however, rely on this sale; it does not seek a decree for \$120,000 as it would if it were the owner of the bonds in the ordinary course. It asks a decree for \$29,222.23, being the amount remaining unpaid on its note with interest and expenses incurred for the preservation of the mortgaged premises, such as watchman's hire. Neither the priority nor the

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Opinion.

amount claimed by the Passaic bank is disputed. The controversy is between the Metuchen and Ohio banks.

10 Two objections to the claim of the Metuchen bank may be readily disposed of; first, that its mortgage was not promptly recorded as required by section 4 of "An act concerning mortgages on
20 chattels (Rev. of 1902), C. S. 463. The statute cited does not apply to the instrument executed by Owens in favor of the Metuchen bank. The bonds thereby assigned are not goods or chattels within the meaning of the act. Failure to record this instrument promptly does not affect the claim of the bank, since the bank was not required to record it at all as a chattel mortgage. *Williamson v. Railroad Co.*, 26 N. J. E. 398, 403. *Bleakley v. Nelson*, 56 N. J. E. 674, 39 A. 912.

30 Next, it is objected that the interest of the Metuchen bank in the bonds was cut off by the sale of the bonds under the terms of the pledge held by the Passaic bank. As a general rule, a pledgee cannot buy in at its own sale and if it attempts to do so, the sale is voidable. 49 C. J. 1006. The contract between Owens and the Passaic bank authorized the latter to purchase if the sale were at public auction. The Ohio bank says the sale was at
40 public auction, but to this I cannot agree. An auction is not public unless the public is given a reasonable opportunity to attend and to bid. No such opportunity was given in the present instance. The sale was not advertised; it was not held in a public place but in a private office; the attendance was limited to a few interested parties; no others were invited; it was not a public auction. The Passaic bank has never asserted an absolute title to the

Opinion.

bonds; it has continued to hold as pledgee. The Metuchen bank was not cut off by the sale.

I now come to the principal subject of investigation — the nature of the transaction between Owens and the Metuchen bank and its effect on the attachment of the Ohio bank. But first it is necessary to examine the situation at an earlier stage. Just before the bonds were pledged with the Pasasic bank, while they were still all held by Owens, nothing was due on the mortgage. The bonds in his hands were not evidence of indebtedness, nor were they property. They were of no significance at all. Owens could rightfully and effectively have demanded of the trustee cancellation of the mortgage if he had seen fit. Upon delivery of the bonds to the Passaic bank, the mortgage became effective as security for \$39,000 or such other sum as might be chargeable under the agreement of pledge between Owens and the bank. The nominal amount of the bonds and mortgage, \$120,000, was unimportant between the parties to the transaction except as limiting the sum for which the bank could look to the mortgaged property as security. As to third parties, acquiring an interest in the property subsequent to the recording of the mortgage, the record was notice that the amount due thereon might be as great as \$120,000.

When the Ohio bank issued its attachment, the lien of that writ immediately fastened on the property, second only to complainant's mortgage, not for \$120,000 but for about \$30,000, the sum then due complainant. So matters stood two weeks later, when the Metuchen bank acquired the interest on which it claims. There is some similarity between the situation so created and the one fre-

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Opinion.

10 frequently arising from a mortgage to secure future advances. An advance money mortgage is prior to subsequent liens to the extent of all advances made before actual notice of the subsequent liens. *Miceli v. Falduti*, 101 N. J. E. 103, 137 A. 92. The Metuchen bank had no actual notice of the attachment when it accepted from Owens the pledge of his equity in the bonds and in reliance thereon discounted the notes of the Title Company which it now holds. It is said by the Ohio bank that the Metuchen bank made no actual "advances" on the bonds and that it holds the bonds only as security for a pre-existing debt. It did, however, in consideration of the pledge, renew the Title Company's note for \$13,500, which it already held, and later it loaned additional sums to the Title Company.

20 If the present case is governed by the rule applied to advance money mortgages, then the Metuchen bank has priority over the Ohio bank.

But in ordinary cases, advances on the mortgage are made by the mortgagee, and the mortgagee is the party to whom the subsequent encumbrancer must give notice if he would prevent further advances taking priority over his lien. Here the advances were made by a stranger to the mortgage.

30 The Ohio bank had no means of knowing that the Metuchen bank would become interested in the premises and no reason to notify that bank of its attachment. This distinction is not, however, fatal to the case of the Metuchen bank. In *Central Trust Co. v. Continental Iron Works*, 51 N. J. E. 605, 28 A. 595, Mr. Justice Van Syckel for the Court of Errors and Appeals said of a corporate mortgage securing a bond issue, "It was made for the express purpose of securing money

40 to be advanced and differs only in the fact that the

Opinion.

future bondholders being unknown, the agreement to advance could not be made with them in person. It was in substance and effect made with the trustees named in the mortgage for the benefit of such bondholders and equity should so regard it." The court held that mechanics' liens which accrued after the mortgage was recorded but before any bonds were issued or sold, were subordinate to the rights of the bondholders under the mortgage. 10

The Metuchen bank seeks to strengthen its position on the theory that it is a bona fide holder for value of negotiable bonds without notice of any infirmity. The holder of bonds as collateral for an existing debt is a bona fide holder for value to the same extent as though he were a purchaser for cash. *Hoskins v. Seaside etc. Co.*, 68 N. J. E. 476, 59 A. 645. But the Metuchen bank has never been a holder of the bonds; it is merely the assignee of a secondary interest therein. Furthermore, when this interest was acquired, many of the bonds, having matured before 1930, were overdue. All the bonds, as I recall, still carry all interest coupons indicating defaults in the payment of interest. But even had there been an actual delivery of the bonds to the Metuchen bank before they matured, the bank would not be aided thereby. Since it derived title directly from Owens, who was himself the maker of the bonds, the bank is no better off than if the bonds were non-negotiable. If the bonds had been delivered to the bank by the Tile Company, the situation might be different, and the bank hold free from equities existing between prior parties. Again, this is not an action on the bonds, but a suit on the mortgage; the questions litigated are not raised by the maker or prior holders of the bonds, but by a stranger, the Ohio bank. 20 30 40

Opinion.

The Metuchen bank can have no benefit from the negotiable character which commonly attaches to corporate bonds.

10 The difficulty with this whole matter arises from the fact that the Passaic bank, the Metuchen bank and Owens were dealing in fictions. Each bond contained Owens' promise to pay to bearer \$500 at a certain date and to pay interest thereon semi-annually upon presentation of the coupon. The mortgage contained elaborate provisions for fore-
20 closure by the trustee at the request of the bondholders upon default in the payment of interest or principal of any bond. These provisions did not express at all the real agreements between the parties. The banks were not interested in the maturity or interest date fixed by the bonds and mortgage or the amounts which Owens thereby
20 promised to pay. They knew that those dates and amounts had not been observed in the past and had no reason to expect they would be in the future.

30 The Ohio bank argues forcibly that at the time of its attachment, the only people interested in the mortgage were Owens as mortgagor and the Passaic bank as mortgagee; that the situation is the same as if Owens had given to the Passaic bank an ordinary bond and mortgage. Owens, when he made his agreement with the Metuchen bank, had no interest in the mortgage which he could assign, any more than an ordinary mortgagor can assign an interest in his mortgage. An agreement between the mortgagor and a third party to extend to the latter the benefit and lien of the mortgage, is either a nullity or else the agreement, despite its form, is a new mortgage on the land.

Opinion.

As such, it is subordinate to all liens on the property acquired before it is made. Such is the view of the matter presented by the Ohio bank; it appeals strongly to me, but I think it is not the true view. All parties dealing with Owens since the record of the mortgage in 1922, did so at their peril with respect to any rights which might accrue in favor of any one under that mortgage. Owens could sell bonds pursuant to the terms of the mortgage to whom he pleased or could deposit the bonds as collateral security. If he had given some of the bonds to the Passaic bank and others to the Metuchen bank, the situation would be clearer but I see no reason why a third party can complain of his doing exactly what he did, namely, giving a first lien on all the bonds to one bank and a second lien to another. 10 20

I will advise a decree establishing the claim of the Passaic bank as a first lien, of the Metuchen bank as second, and of the Ohio bank as a third lien.

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Final Decree.

IN CHANCERY OF NEW JERSEY.

10	Between PASSAIC NATIONAL BANK AND TRUST COMPANY, Complainant, and JOHN B. OWENS, <i>et als.</i> , Defendants.	}	On Bill to Foreclose. Final Decree.
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20 This cause having come on to be heard in the presence of Messrs. Corbin & Harty, of counsel with the complainant, Edward R. McGlynn, Esquire, of counsel with the defendant Old Citizens National Bank and the defendant James A. O'Connell, Receiver of Empire Floor and Wall Tile Company, Inc., and George W. Litterst, Esquire, of counsel with defendant, Metuchen National Bank, the complainant's bill having been heretofore taken as confessed against the defendants John B. Owens and Gertrude Owens, his wife, and upon

30 reading the pleadings and taking the proofs, and the arguments of the respective counsel having been heard, and the Court having considered said pleadings, proofs and arguments, and it appearing that the complainant holds the bonds secured by the mortgage upon the lands and premises described in the bill of complaint as collateral security for the payment of the note of said Empire Floor and Wall Tile Company, Inc. mentioned in the bill of complaint, and that there was due to

40 the complainant on November 2, 1931 for principal

Final Decree.

and interest on said note, including certain expenses incurred for watchmen and fire insurance premiums, pursuant to the terms of the said mortgage, the total sum of Twenty-Nine Thousand, Two Hundred Ninety-Eight Dollars and Eighty-Seven Cents (\$29,298.87), and that the complainant is first entitled to be paid; and it further appearing that the defendant Metuchen National Bank likewise holds an interest in said bonds under the assignment mentioned in the bill of complaint as collateral security for the payment of four certain notes, that is to say, note of \$13,500 of Empire Floor & Wall Tile Co. dated January 2, 1931, payable to the order of the Metuchen National Bank on April 2, 1931; notes of \$2,225.22 of Empire Floor & Wall Tile Co. dated February 28, 1931 payable to the order of James Stilo on August 28, 1931, and endorsed by John B. Owens; note of \$2,000 of C. O. Milligan dated November 1, 1930, payable to the order of J. B. Owens on January 29, 1931, and endorsed by John B. Owens; note of \$800 of Fabris & Ciofolo, Inc. dated April 2, 1931, payable to the order of Empire Floor & Wall Tile Co. on June 2, 1931, and endorsed by said Empire Floor & Wall Tile Company; and that there was due to the said Metuchen National Bank on November 2, 1931 for principal, interest and protest fees on said notes the aggregate sum of Nineteen Thousand, One Hundred Forty-Four Dollars and Ninety-Eight Cents (\$19,144.98), and that said defendant is entitled to be secondly paid; and it further appearing that there was due to the defendant, Old Citizens National Bank on November 2, 1931 on its judgment recovered against said John B. Owens in the New Jersey Supreme Court in the

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Final Decree.

10 attachment suit mentioned in the bill, the sum of Thirty-Five Thousand, Seven Hundred Ninety-Three Dollars and Twelve Cents (\$35,793.12), and that said Old Citizens National Bank is entitled to be thirdly paid; and that it is necessary and advisable that the whole of the mortgage premises should be sold to raise and pay the moneys so due as aforesaid:

20 It is thereupon, on this 21st day of December, 1931, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the said Chancellor doth, by virtue of the power and authority of this court, hereby ORDER, ADJUDGE and DECREE that the said mortgaged premises be sold to raise and satisfy the said several sums of money due to the said complainant and the said defendants, that is to say, in the first place to the said complainant the aforesaid sum of
30 Twenty-Nine Thousand, Two Hundred Ninety-Eight Dollars and Eighty-Seven Cents (\$29,298.87), together with lawful interest thereon to be computed from the second day of November, 1931, with costs to be taxed, and in the second place to pay unto the said defendant, Metuchen National Bank the aforesaid sum of Nineteen Thousand, One Hundred Forty-Four Dollars and Ninety-Eight Cents (\$19,144.98), with lawful interest thereon to be computed from the said last mentioned date, with its costs to be taxed; and in the third place to pay unto the said defendant, Old Citizens National Bank the aforesaid sum of Thirty-Five Thousand, Seven Hundred Ninety-Three Dollars and Twelve Cents (\$35,793.12), with lawful interest thereon to be computed from said last mentioned date, with its costs to be taxed; and that a
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Final Decree.

writ of fieri facias do issue for that purpose out of this Court directed to the Sheriff of the County of Middlesex commanding him to make sale according to law of the said mortgaged premises, and that out of the money arising from such sale he pay to the complainant, or to its solicitors, said debt, interest and costs; and also to the aforesaid defendants, or their solicitors, their said respective debts, interest and costs, in manner aforesaid; and in case more money should be raised by the said sale than shall be sufficient to answer such several payments, that such surplus be brought into this court, to abide the further order of the court, unless otherwise previously disposed of by the order of this court; and that the said Sheriff make return, without delay, of his proceedings by virtue of the said writ. 10

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 the said mortgaged premises, when sold as aforesaid, by virtue of this decree. 20

And it is further ORDERED, ADJUDGED and DECREED that the sum of Three Hundred and Sixty-Five Dollars (\$365) be allowed and paid the solicitors 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. 30

E. R. WALKER,
C.

Respectfully advised,
JOHN O. BIGELOW,
V. C.

Exhibit M-1.

Know All Men by These Presents,

10 That I, John B. Owens, of the City, County and State of New York, for and in consideration of the renewal of a note of the Empire Floor and Wall Tile Company, Inc. of New Jersey for \$13,500. endorsed by me the said John B. Owens, and dis-
counted or to be discounted by The Metuchen Na-
20 tional Bank, of Metuchen, in the State of New Jersey, and the payment of the sum of One Dollar, lawful money of the United States, to me paid before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have sold, assigned, transferred, and set over, and by these presents do sell, assign, transfer, and set over unto the said The Metuchen National Bank, a body cor-
porate of the United States of America, transact-
ing business in the Borough of Metuchen, County of Middlesex and State of New Jersey, its succes-
sors and assigns, as security for the payment of the indebtedness aforesaid

30 All my equity, right, title and interest in and to all those certain bonds aggregating the sum of \$120,000. dated April 15, 1922 made and delivered by me, the said John B. Owens to the Passaic National Bank and Trust Company, and now held by the said Passaic National Bank and Trust Com-
pany as security for the payment of a loan or loans by them made

40 This assignment is made upon condition, however, that if the above first mentioned note, and any and every renewal and/or renewals thereof, and any credit extension whatsoever founded thereon, in whole or in part, and that likewise any other indebtedness of the said Empire Floor and Wall Tile Company, Inc. of New Jersey and/or the said

Exhibit M-1.

John B. Owens, to the said The Metuchen National Bank, now or hereafter by them, or either of them incurred, be fully paid, according to the terms thereof, then this assignment is to be void, otherwise to be in full force and effect.

The bonds above mentioned are my personal bonds, and are secured by a trust deed or mortgage for \$120,000. to the said Passaic National Bank and Trust Company, dated April 15, 1922, of record in Middlesex County, New Jersey. 10

In Witness whereof I have hereto set my hand and seal this 10th day of September, 1930.

JOHN B. OWENS (L.S.)

In Presence of

State of New Jersey,)
County of Essex) ss.: 20

Be it Remembered, that on this 13th day of September, 1930, before me the subscriber, a Notary Public of New Jersey personally appeared John B. Owens, who, I am satisfied, is the person named in and who executed the within instrument, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, 30
for the uses and purposes therein expressed.

DOROTHY PERKINS,
Notary Public of New Jersey.
(Notarial Seal)

Exhibit M-1.

State of New Jersey,)
 County of Middlesex,) ss.:

10 Alex. C. Litterst, of full age, being duly sworn, on his oath deposes and says, that he is the Cashier of the Metuchen National Bank, the mortgagee in the foregoing mortgage named, and that as such he is familiar with the business affairs of the said
 10 The Metuchen National Bank, and of his own knowledge knows the facts herein stated; that the true consideration of said mortgage is as follows:

20 The note of the Empire Floor & Wall Tile Company, Inc. of New Jersey, for \$14,000. endorsed by the said John B. Owens, now past due, under discount in due course by the said The Metuchen National Bank, and the proceeds of the said discount credited to the account of the said Empire
 20 Floor & Wall Tile Co. Inc. of New Jersey, upon which note payment on account has been made of \$500. and said past due note and the renewal note of \$13,500 to be given in payment thereof, and likewise any renewal of credit extension of the same in whole or in part, and likewise any other indebtedness of the said Empire Floor and Wall
 30 Tile Company, Inc. of New Jersey and/or of the said John B. Owens, to the said The Metuchen National Bank, now or hereafter by them, or either of them incurred.

And deponent further says that there is due on said mortgage at the present time the sum of \$13,500. with interest from July 2, 1930 as above stated, and likewise the further sum of \$500 from the Empire Floor & Wall Tile Company, Inc., of N. J. as endorser of a note of \$500, dated Aug. 5, 1930, with interest, due Nov. 5, 1930, and likewise the further sum of \$2500 from said John B. Owens

Exhibit M-1.

as endorser, of a note of C. O. Milligan for said amount which note is due Oct. 22, 1930.

All of which said amounts are secured to be paid by the within mortgage.

ALEX. C. LITTERST.

Sworn to and subscribed before me
at Metuchen, N. J. this 23 day of
September, 1930.

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Geo. W. Litterst,
Master in Chancery
of New Jersey.

Received in the Register's Office of the County
of Passaic, N. J. on the 27th day of September, A.
D. 1930 at 8:00 A. M. and recorded in Book A-8
of Chattel Mortgages on page 439.

JOHN R. MORRIS,
Register.

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**Abridgement of Certain Exhibits with Consent
of All Parties.**

Statement with regard to certain exhibits which,
instead of being printed in full, are, with consent
of all counsel, described herein:

The mortgage held by the complainant to secure
the issue of bonds described in the bill. Mortgage
dated April 15, 1922 made by John B. Owens, un-
married to the Passaic Trust and Safe Deposit
Company, described in said mortgage as "Trustee".
This mortgage was recorded in the Clerk's office
for the County of Middlesex on May 5, 1922 in
Book 387, page 145, etc.

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The description of the real estate in said mort-
gage was practically the same as the real estate
attached by the Sheriff of Middlesex County in

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Exhibit M-1.

connection with the attachment proceedings commenced by the Old Citizens National Bank. The Passaic Trust and Safe Deposit Company, by various changes of name, became the Passaic National Bank and Trust Company, the complainant in the within litigation.

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Abridgement of Attachment Proceedings

(Exhibit D-1).

Statement with regard to attachment proceedings.

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There was introduced in evidence in this case a certified copy of the attachment proceedings described as follows: New Jersey Supreme Court, Middlesex County—Old Citizens National Bank, a National banking institution, plaintiff, v. John B. Owens, defendant.

A writ of attachment was issued on the twenty-eighth day of August, 1930 in the sum of \$40,892.10.

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On August 29, 1930 the Sheriff of Middlesex County attached in accordance with the practice in such case made and provided, certain lands belonging to defendant, John B. Owens, a detailed description of which real estate was attached to the Sheriff's return and this description includes the same land described in the mortgage recorded in Middlesex County in Book 387, page 145. A final judgment was entered on June 9, 1931 in favor of the plaintiff and against the defendant for the sum of \$35,730.12 damages and \$63.00 costs.

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New Jersey Court of Errors and Appeals

THE NATIONAL BANK

CHIEF JUSTICE

JUSTICE

JUSTICE

JUSTICE

JUSTICE

JUSTICE

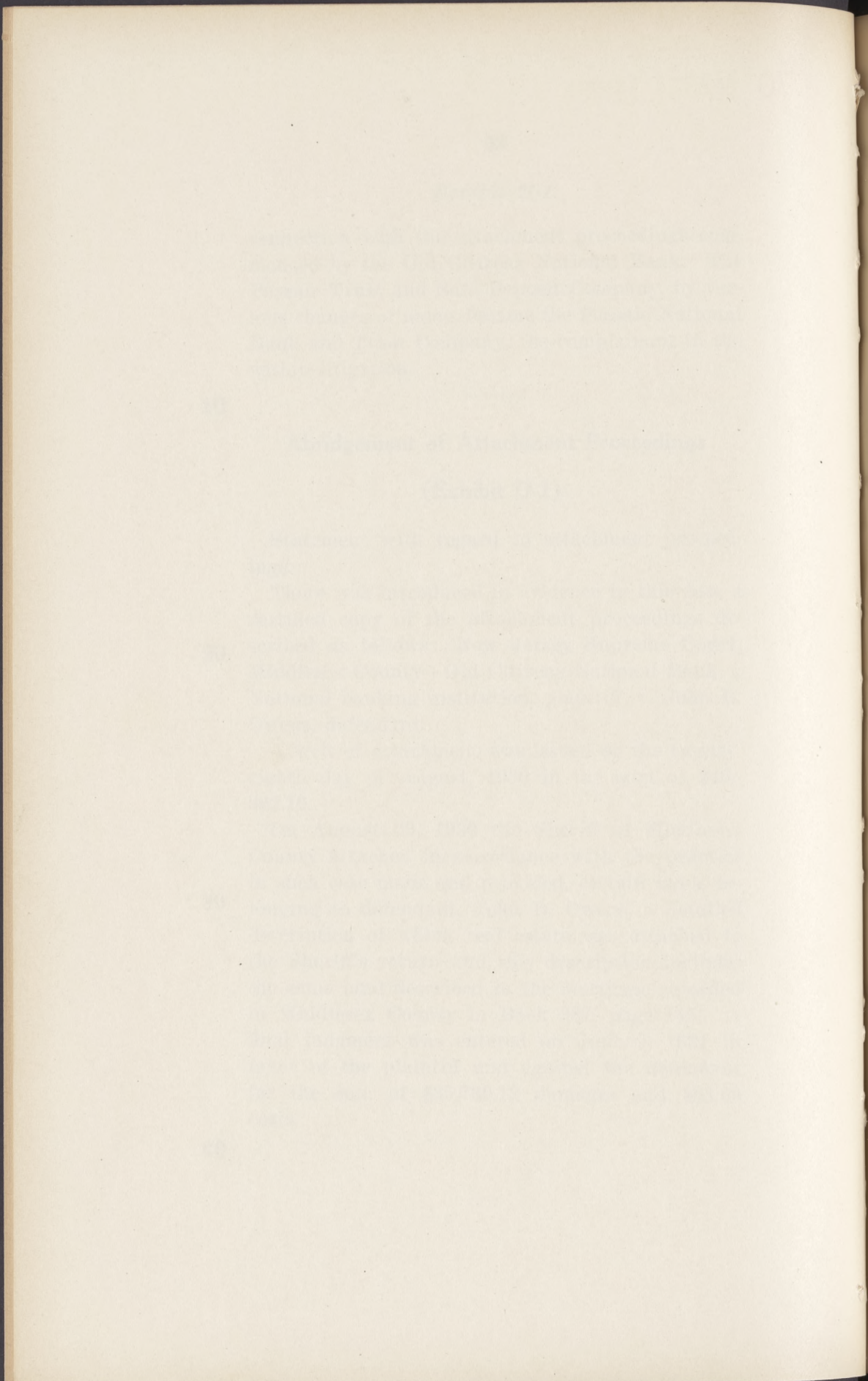
JUSTICE

REPORT OF APPELLANT OLD CITIZENS NATIONAL BANK.

The report of the appellant, Old Citizens National Bank, is as follows: The bank was organized in 1854, and has since that time been engaged in the business of banking.

The bank has a capital of \$1,000,000, and a surplus of \$250,000. It has a total of \$1,250,000 in assets, and a total of \$1,250,000 in liabilities. The bank has a total of \$1,250,000 in assets, and a total of \$1,250,000 in liabilities.

The bank has a total of \$1,250,000 in assets, and a total of \$1,250,000 in liabilities. The bank has a total of \$1,250,000 in assets, and a total of \$1,250,000 in liabilities.



70 MAY.T.1932

New Jersey Court of Errors and Appeals

PASSAIC NATIONAL BANK AND
TRUST COMPANY, trustee,
Complainant-Appellee,

vs.

JOHN B. OWENS, *et als.*,
Defendants-Appellants.

On Bill, &c.,
On Appeal
from the
Court of
Chancery.

BRIEF OF APPELLANT, OLD CITIZENS NATIONAL BANK.

This is an appeal from a final decree in the Court of Chancery, advised by Honorable John O. Bigelow, Vice Chancellor.

The bill in this case was filed for the foreclosure of a mortgage covering property of the defendant, John B. Owens, located in Metuchen, New Jersey. There is no dispute as to the amount or priority of the complainant's claim which was fixed at the sum of Twenty-nine thousand two hundred ninety-eight dollars and eighty-seven (\$29,298.87) cents.

The one and only dispute is as to the question of priority between the appellant's judgment and the claim of the Metuchen National Bank. The decree under review fixed the claim of the Metuchen National Bank as second in order of priority at the amount of Nineteen thousand one hundred and forty-four dollars and ninety-eight (\$19,144.98) cents and appellant's judgment as third in order of priority and fixed the amount at Thirty-five

thousand seven hundred ninety-three dollars and twelve (\$35,793.12) cents. Appellant's contention is that it should be second in order of priority and that the Metuchen National Bank, if it has a claim at all, should be third in order of priority.

Once the facts are clearly understood, the solution and determination of the question of priorities is capable of being determined by the application of elementary and fundamental principles.

The facts were clearly stated by the learned Vice Chancellor in his opinion (See State of the Case, pages 46 to 53) and are set forth in full as taken from the opinion:

"This is a suit to foreclose a mortgage made by John B. Owens to Passaic National Bank & Trust Company as trustee, to secure two hundred and forty coupons aggregating One hundred and twenty thousand (\$120,000.) dollars made by Owens payable to bearer and maturing between 1924 and 1933. The bonds were executed at about the date of the mortgage, April 15, 1922; were certified by the trustee and forthwith handed back to Owens. Nearly seven years later, namely, on February 16, 1929, the Empire Floor & Wall Tile Company (a company controlled by Owens and the lessee of the mortgaged premises) borrowed Thirty-nine thousand (\$39,000.) dollars from the Passaic National Bank & Trust Company on its demand note. At the same time, Owens pledged to the bank as security for the note, all of the two hundred and forty bonds above mentioned. The terms of the pledge were embodied in a printed agreement signed by Owens empowering the bank, upon default in payment of the note, to sell the bonds at public or private sale, and further, if the bonds were sold at public auction, authorizing the bank itself to purchase at the sale

free from any equity of redemption of the pledgor.

On August 28, 1930, a writ of attachment issued out of the New Jersey Supreme Court against Owens at the suit of the Old Citizens National Bank of Ohio. By virtue thereof, the sheriff attached the mortgaged premises. In the attachment suit, the Ohio bank has recovered judgment for Thirty-five thousand seven hundred ninety-three dollars and twelve (\$35,793.12) cents.

On September 10, 1930—two weeks after the attachment issued—Owens executed an agreement assigning to the Metuchen National Bank all his right, title and interest in the bonds held by the Passaic bank in order to secure a certain note of the Title Company, discounted by the Metuchen bank, or any renewal thereof, and any other indebtedness of the Title Company to the Metuchen bank then existing or thereafter incurred. This instrument was recorded as a chattel mortgage in the Passaic County Register's office September 27, 1930. The Metuchen bank now holds four over-due notes of the Title Company dated in 1931, aggregating Eighteen thousand five hundred twenty-five dollars and twenty-two (\$18,525.22) cents. One of these notes, for Thirteen thousand five hundred (\$13,500.) dollars is a renewal of the note expressly mentioned in the agreement.

The bill of complaint in the present cause was filed April 20, 1931. The following day, though before process issued, the Passaic bank went through the form of selling the bonds at auction to itself. The sale was conducted in an office of the Trust Department of the bank. Two or three officers of the bank were present, as were a very few other people. The Passaic bank does not, however, rely on

this sale; it does not seek a decree for One hundred and twenty thousand (\$120,000.) dollars as it would if it were the owner of the bonds in the ordinary course. It asks a decree for Twenty-nine thousand two hundred twenty-two dollars and twenty-three (\$29,222.23) cents being the amount remaining unpaid on its note with interest and expenses incurred for the preservation of the mortgaged premises, such as watchman's hire. Neither the priority nor the amount claimed by the Passaic bank is disputed. The controversy is between the Metuchen and Ohio banks."

POINT I.

The alleged chattel mortgage of the Metuchen National Bank is void as against appellant.

A mere reading of the Statute found in Section 4, of the Chattel Mortgage Act, Volume 1, C. S. 463-4, especially that part which reads:

"Any chattel mortgage shall be absolutely void as against the creditors of the mortgagor, unless it be recorded forthwith."

is a conclusive argument in favor of this point.

It will be observed that the learned Vice Chancellor disposed of this point below by his finding that the Statute in question did not apply to the instrument executed by Owens in favor of the Metuchen Bank. The positing taken by the Court below was that the bonds which were attempted to be assigned by Owens in that instrument were not goods and chattels within the meanings of the Statute in question.

It is conceded by appellant that the Metuchen

National Bank was not, under any obligation to record the agreement of September 10, 1930 (Exhibit M-1, State of the Case, page 58-61), but inasmuch as it did record that paper as a chattel mortgage and in view of the fact that it took the position in its answer (State of the Case, page 25-28) that it relied upon that paper as a chattel mortgage in order to sustain its contention, to wit, that its claim was second in priority to that of the complainant, appellant insists that the position so taken was not in accordance with the statute and that the position of priority given to the Metuchen National Bank by the final decree under review should be reversed.

POINT II.

If the so-called chattel mortgage (Exhibit M-1) is construed as an assignment by Owens of his right, title and interest in the bonds held by the complainant, appellant's judgment is prior to the claim of the Metuchen National Bank because:

(a) Appellant's attachment was prior in point of time to Exhibit M-1.

(b) Defendant Owens' right of redemption, if one existed, in the bonds described in the alleged assignment, was extinguished by the sale of the bonds on April 21, 1931.

(c) Exhibit M-1 secured a pre-existing debt and therefore did not give to the Metuchen National Bank the status of a bona fide purchaser, so that the judgment of appellant was prior to the claim of the Metuchen National Bank because the attachment preceded the so-called assignment in point of time.

(a) It is conceded that the attachment of appellant was regularly issued August 28, 1930 and that on August 29, 1930 the Sheriff of Middlesex County attached certain lands belonging to the defendant, John B. Owens and that a detailed description of the real estate was attached to the Sheriff's return of the writ so issued and that the land contained in that description included the same land described in complainant's mortgage. Also that a final judgment was entered on June 9, 1931 in favor of appellant against the defendant, John B. Owens, for the amount fixed in the final decree, to wit, Thirty-five thousand seven hundred ninety-three dollars and twelve (\$35,793.12) cents, (See State of the Case, page 62).

It is also conceded that on September 10, 1930 the Metuchen National Bank held a note of the Empire Floor and Wall Tile Company, Inc. in the sum of Fourteen thousand (\$14,000.) dollars, upon which note a payment of Five hundred (\$500.) dollars was made and that a renewal note of Thirteen thousand five hundred (\$13,500.) dollars was given in payment thereof. Metuchen National Bank also held, at that time, a note of Five hundred (\$500.) dollars dated August 5, 1930 and another note of Two thousand five hundred (\$2,500.) dollars, which note became due October 22, 1930 and those notes, together with any renewal of credit extension, or of any other indebtedness of the Empire Floor and Wall Tile Company, Inc. and/or John B. Owens were to be secured by the agreement (Exhibit M-1) which, as has been stated herein, was dated September 10, 1930, acknowledged September 13, 1930 and contained an affidavit of consideration dated September 23, 1930 and was recorded in the Passaic County Register's office on the twenty-seventh day of September, 1930 (See State of the Case, page 60 and 61).

It is also conceded that on November 2, 1931 the date of the final hearing in the Court of Chancery, the Metuchen National Bank held the following notes, which it contended were secured by the agreement (Exhibit M-1). See State of the Case, page 42 and 43).

1. Note of Empire Floor and Wall Tile Company to one James Stello, dated February 28, 1931 in the sum of Two thousand two hundred twenty-five dollars and twenty-eight (\$2225.28) cents which with interest of Sixty-seven dollars and seventy-five (\$67.75) cents, amounted to Two thousand two hundred ninety-one dollars and ninety-seven (\$2,291.97) cents, with additional interest of Twenty-four dollars and eighty-three (\$24.83) cents, or a total of Two thousand three hundred sixteen dollars and eighty (\$2,316.80) cents.

2. Note of Thirteen thousand five hundred dollars dated January 2, 1931, which with interest amounted to Thirteen thousand nine hundred forty dollars and seventy-eight (\$13,940.78) cents.

3. Note of C. L. Milligan, endorsed by John B. Owens, dated January 30, 1931 for Two thousand (\$2000.) dollars, which with interest and protest fees amounted to Two thousand sixty-three dollars and ten (\$2,063.10) cents.

4. Note made by James G. Stello to Empire Floor and Wall Tile Company dated April 2, 1931 in the sum of Eight hundred dollars, which with interest and protest fees amounted to Eight hundred thirty dollars and twenty-five (\$830.25) cents.

The last described notes were the notes upon which the decree in favor of the Metuchen National Bank was entered.

It will be observed from the facts herein set forth, that there is no question about the attachment of appellant being prior in point of time to the agreement under which the Metuchen National Bank claimed to be entitled to a decree in this suit.

The Attachment Act found in Volume 1, C. S., 138 Section 8, reads as follows:

“The writ, from the time of its issue, is issued from the Supreme Court, becomes and remains a lien on the real estate of the defendant throughout the state and if issued from the Circuit Court or Common Pleas, on his real estate in the county, and he cannot thereafter assign, transfer or convey the same or any interest therein.”

Therefore there can be no escape from the argument that if the defendant, Owens, had given to the Metuchen National Bank a mortgage on his real estate, dated September 10, 1930, the attachment and the resulting judgment of the appellant would have been prior to the lien of the mortgage thus given.

(b) The Passaic National Bank in its capacity as a bank, as distinguished from its capacity as trustee, under the mortgage described in the bill of complaint, held two hundred and forty bonds, totalling One hundred and twenty thousand (\$120,000.) dollars, belonging to the defendant, Owens, under the terms of an agreement admitted in evidence and marked C-4 (State of the Case, page 32).

Pursuant to the terms of that agreement, the Passaic National Bank and Trust Company, in its banking capacity, held a sale of these bonds on April 21, 1931, at which sale there was present a representative of the Metuchen National Bank and

a representative of the appellant, Old Citizens National Bank.

It is conceded that there was no advertising of this sale in a newspaper and that the sale was held in the Trust Department of the Passaic National Bank and Trust Company. A representative of the bank purchased the entire issue of bonds at that sale for the sum of Twenty-five thousand four hundred sixty-nine dollars and sixteen (\$25,469.16) cents, which was the amount due Passaic National Bank and Trust Company on the note held by it at that time. Appellant's position is that this sale wiped out and extinguished any interest that John B. Owens had in the two hundred and forty bonds, so that there was nothing on which the Metuchen National Bank could rest its claim for security in accordance with the agreement (Exhibit M-1).

The learned Vice Chancellor, in his opinion, took the position that the sale was not advertised, was not held in a public place, but in a private office; that the attendance was limited to a few interested parties and that the Metuchen National Bank was not cut off by this sale. Appellant's answer to this line of reasoning by the Court below, is that the Metuchen National Bank could not collaterally question the validity or the effect of this sale in the foreclosure suit under review. It had notice of the sale and attended it and was given an opportunity of protecting its interest, if it had any, in the bonds by bidding the same in at that sale; that it was an assignee of Owens, who had made the agreement, giving the bank the right to sell the bonds and if Owens' interest in the bonds was wiped out and cut off by this sale, then likewise, any interest of the Metuchen National Bank in the bonds was extinguished by the sale.

(c) It is apparent from the facts which have been recited in this brief, with regard to the obligations held by the Metuchen National Bank, which were purported to be secured by the execution of the agreement (Exhibit M-1 and by a recital of the facts testified to at the final hearing, with regard to the notes held at that time by the Metuchen National Bank and purported by it to be secured by the exhibit in question, that the only effect of the execution and delivery of Exhibit M-1, was to secure pre-existing debts. The Metuchen National Bank gave up no rights, parted with no property and did not, in any sense of the word, change its position. This distinction is important, material and pertinent, because it clearly establishes the fact that the Metuchen National Bank did not occupy the legal status of a bona fide purchaser of the bonds, nor of the defendant, Owens' right of redemption in the bonds and that therefore, as between appellant and Metuchen National Bank, inasmuch as their equities were of an equal status, the equity of the Old Citizens National Bank, appellant, should have been held to have been prior to that of the Metuchen National Bank, because its attachment preceded the execution and delivery of Exhibit M-1, in point of time.

To support this argument appellant refers to the following quotation taken from Pomeroy's Equity, Volume 2, paragraph 748, 749, which reads as follows:

"Whether an antecedent debt can *ever* be a valuable consideration has been denied by able courts; but this general subject has been further complicated by the various modes in which such a debt may be dealt with—secured, discharged, postponed, and the like—and the various questions thence arising which have caused the greatest conflict of judicial

opinion. In very many, and perhaps a majority of the states, it is settled that the transferee of negotiable paper as security for an antecedent debt may be bona fide holder by the law merchant; but this rule cannot be a precedent in determining the meaning of valuable consideration within the equitable doctrine of bona fide purchase.

A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a bona fide purchaser, since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before. The rule has been settled therefore, in very many of the states that such a transfer is not made upon a valuable consideration, within the meaning of the doctrine of bona fide purchase. In some states, on the contrary, even the securing a pre-existing debt is held to be valuable consideration. Whether the complete satisfaction or discharge or the definite forbearance of an antecedent debt, without the surrender or cancellation of any written security by the creditor, will be a valuable consideration is a question to which the Courts of different states have given conflicting answers; but the affirmative seems to be supported by the numerical weight of authority."

This distinction was pointed out in a recent decision of this Court, to wit *Perry v. Mand*, 107 N. J. Eq. 102, distinguishing the facts in that case from those of the earlier case of *Tate v. Security Trust Company*, 63 N. J. E. 559.

Appellant desires to point out to the Court that the greater part of the opinion of the learned Vice Chancellor in the Court below, commencing at the top of page 49, almost to the end of the opinion, on page 53 of the State of the Case seems to uphold

the contention of appellant and as was said by the Vice Chancellor on page 53 of the State of the Case:

“Such is the view of the matter presented by the Ohio bank; it appeals strongly to me, but I think it is not the true view.”

It will be observed in the portion of the opinion just referred to, that the learned Vice Chancellor was in error when he took the position that there was a similarity between the situation created in this case by the facts which have already been referred to and that frequently arising from a mortgage to secure future advances.

It was not necessary for the Metuchen Bank to have actual notice of the attachment of the appellant when it accepted from the defendant, Owens, his agreement of September 10, Exhibit M-1. As has already been pointed out, if Owens, instead of executing and delivering the agreement, Exhibit M-1, had executed on that date his own mortgage covering the same land described in complainant's mortgage and appellant's levy under the attachment, his mortgage would have been subject to and not prior to the lien created by appellant's writ of attachment. Surely, it is most inequitable, unfair and unjust that Owens should be able to accomplish by the agreement, Exhibit M-1, the result which he would not have been able to accomplish if he had been forced to secure his indebtedness by the execution of a mortgage to the Metuchen National Bank.

This is not a case of a sale, transfer or pledge of negotiable bonds to a bona fide purchaser or holder for value. In the opinion of appellant, it was a clumsy and ineffectual attempt on the part of Owens to secure a pre-existing, unsecured debt by

an assignment of "all his equity, right, title and interest in and to all those certain bonds, aggregating the sum of One hundred and twenty thousand (\$120,000.) dollars, dated April 15, 1922 made and delivered by Owens to the Passaic National Bank and Trust Company, then held by that institution as security for the payment of a loan or loans made by it." Appellant's contention is that Owens' only right on September 10, insofar as the bonds was concerned, was to pay the indebtedness then due the Passaic National Bank and Trust Company, in which event that institution would have delivered to him the bonds. That would have created a merger and the writ of attachment of appellant would have been a first lien on the premises and unless the Metuchen National Bank could have shown that it had entered into a definite forbearance of some antecedent debt or surrendered or cancelled some security or in some way changed its position, it could not have occupied, under those circumstances, the position or status of a bona fide purchaser and the rights of appellant as an attaching creditor would have been prior to that of the Metuchen National Bank.

Appellant desires to point out as forcibly as words can possibly do so, that nowhere in Exhibit M-1 is there any mention of an assignment of any interest in the mortgage securing the bonds in question. Therefore the Metuchen National Bank took not the bonds themselves, but the equity of redemption of the defendant, Owens, in those bonds. The mortgage was not a security in the hands of Owens. It could not be regarded as security for an equity of redemption. It is by its nature a security of an obligation. Hence, when the Metuchen National Bank took an assignment of Owens' equity to redeem the bonds, it could not legally have expected

to secure the protection of the mortgage, but only such rights as Owens himself had. In this respect the situation is radically different from that which is created or which arises when one purchases bonds with the natural expectation that the mortgage will secure the obligation created by the bonds.

The bonds were simply Owens' promise to pay. They did not represent his interest in the land. Consequently when Owens assigned whatever interest he had in the bonds then in the possession of the Passaic Bank, he simply assigned his own promise to pay, totally disconnected from any interest in the land itself.

If the agreement, Exhibit M-1, was intended to pledge an equity of redemption in the real estate of Owens, it was a mortgage on real estate and should have been recorded in Middlesex County and not Passaic County. If it had been so recorded, as has already been pointed out, it would have been subject to the lien created by appellant's writ of attachment.

Appellant therefore respectfully contends that the decree under review should be reversed with a direction to the Court below that appellant's judgment should be decreed to be second in priority to the amount due the complainant on its mortgage under foreclosure.

Respectfully submitted,

EDWARD R. McGLYNN,
Solicitor for and of Counsel
with Defendant-Appellant,
Old Citizens National Bank

NEW JERSEY

Court of Errors and Appeals

PASSAIC NATIONAL BANK AND
TRUST COMPANY, trustee,

Complainant-Appellee,

vs.

JOHN B. OWENS, *et als.*,

Defendants-Appellants.

On Bill, etc.
On Appeal
from the Court
of Chancery

BRIEF OF APPELLEE, THE METUCHEN NATIONAL BANK

FACTS

Defendant, John B. Owens, owning in his own name at the time the factory plant in Metuchen, Middlesex County and in this State, described in the mortgage under foreclosure, on April 15, 1922, executed 240 bonds of the denomination \$500 and of the aggregate amount of \$120,000, the payment of which bonds he secured by a trust mortgage to the Passaic Bank, as trustee for the bondholders. The bonds were delivered to the Passaic Bank and were properly authenticated by the trustee.

(State of Case, page 17, line 25, etc.)

On February 16, 1929, John B. Owens delivered to and pledged with the Passaic Bank all the said bonds to secure a loan of \$39,000.

On August 28, 1930, the Ohio Bank issued a writ of attachment out of the New Jersey Supreme Court against John B. Owens to Sheriff of Middlesex County, and attached the lands mortgaged, as aforesaid.

On September 10, 1930, John B. Owens executed an agreement assigning to the Metuchen Bank all his right, title and interest in the bonds held by the Passaic Bank (subject to the latter's prior lien therein), to secure a certain note for \$13,500 of the Empire Floor and Wall Tile Company, discounted by the Metuchen Bank, or any renewal thereof, and any other indebtedness of the said Tile Company, or of the said John B. Owens, to the Metuchen Bank, then existing or thereafter incurred. This agreement was recorded in Passaic County Register's office, on September 27, 1930.

(State of Case Exhibit M-1 pp. 58-59-60-61.)

At the date of the hearing, in the Court below, the Metuchen Bank held four overdue notes of the said Tile Company, aggregating, with interest, \$19,144.98, and made proof thereof. One of these notes, for \$13,500, was a renewal of a note expressly mentioned in said agreement.

(State of Case, p. 55, lines 10 to 40; pp. 42-43-44.)

By stipulation and agreement between the Passaic Bank and the Ohio Bank, made October 26, 1931, and filed at or before the hearing in the Court below, the issues raised by the Ohio Bank in its answer have been modified, so that, among other things, the Ohio Bank has thereby admitted:

1. That all the Owens' bonds aforesaid were duly and legally issued and are now legally outstanding, and that the mortgage securing said bonds, is a valid first lien upon the lands and premises therein described.

2. That the Passaic Bank is entitled to a decree on its note in suit, secured by said bonds, and likewise to cover disbursements for insurance premium and watchmen's wages, etc.

(State of Case, pp. 29 and 30.)

When Owens delivered the 240 bonds to the Passaic Bank as a pledge, 120 bonds were already past their date of maturity. However, the other 120 bonds were still not yet past due—more than enough to cover the loan of \$39,000, then made by said bank. Likewise, when Owens assigned his equity of redemption in the bonds to the Metuchen Bank, there were, in fact, 84 of the bond issue that had not yet reached the date of maturity, more than enough to cover the total loans made by the Metuchen Bank.

(State of Case, Complaint, p. 5, lines 10 to 30.)

POINT I.

The bonds, secured by the mortgage here under foreclosure, are of the type, known as first mortgage coupon bonds, and are privileged to registry.

As to corporate bonds of this type, local usage in the Metropolitan district of New York City and adjacent territory, extending into New Jersey, their quality of negotiability is firmly established and no longer questioned.

Corpus Juris, subject Bonds, Vol. 9, page 47;

Cyc., Vol 5, page 778;

Am. & Eng. Enc. of Law, Vol. 8, pages 3-4-5;

See also—

Renwell vs. Newark, 55 N. J. E. 260.

As to individual coupon bonds, the rule is stated by Corpus Juris, Vol. 9, page 47, as follows:

"It has been held that this rule (as to negotiability) applies to coupon bonds executed by individuals, as well as corporations."

Citing in support in Note 59:

In re Leland—

15 Fed. Case No. 8229; 6 Ben. 175, 177.

Referring to the case of, *In re Leland*, Case No. 8229, 6 Ben. 175, 15 Federal Cases, p. 278, Blatchford, District Judge, says:

"I think that, on the authority of the decisions of the highest courts of this State and of the United States, the bonds and coupons in question are negotiable instruments, although issued by an individual, under his seal, and not by a corporation, and are not specialties, so as to make them subject, in the hands of their assignee, to equities against their assignor, although under seal, they were issued, as they show on their face, to secure the payment of money on time, and they contain, on their face, expressions showing that they are expected to pass from one person to another by delivery. Therefore the attributes of commercial paper attach to them. Their character cannot be controlled or varied by the mere fact that their maker put a seal after his name.

Brainerd vs. N. Y. & H. R. Co., 25 N. Y. 496;

White vs. Vermont & M. R. Co., 21 How. (62 U. S.) 575;

Mercer vs. Hackett, 1 Wall (68 U. S.) 110.

Such bonds and their coupons pass by delivery. A purchaser of them, in good faith, is unaffected by want of title in their vendor, and the burden of proof, on a question as to such good faith, lies on the party who assails the possession."

It is to be noted, that this decision has stood unchallenged, since October, 1872.

POINT II.

The bonds having been legally pledged, were thereby put into circulation, in other words, were legally negotiated.

The Ohio Bank, by its stipulation made and filed in the Court below has admitted that the bonds were duly and legally issued and are now legally outstanding, and that the mortgage securing said bonds, is a valid first lien upon the lands and premises therein described.

(State of Case, pp. 29 and 30.)

The bonds in question are of the class, commonly known in the financial world as First Mortgage Convertible Coupon Bonds, which we hold in this territorial financial district, under the authorities cited and by universal usage obtaining therein and by the law merchant, if that term is here permissible, to be not alone negotiable, but to have an additional quality, namely, that each one of the said bonds participates equally and concurrently in the lien of the mortgage given as security and held for purposes of convenience and for commercial reasons, by the trustee.

That this lien, due to the negotiability of the bonds intrinsically and by recitals in the bond itself as well as in the mortgage which secures it, likewise is an incident to each bond and gives it its marketability and additional value.

No possible lien can intervene, after the record of the mortgage, between the ownership of the bond and its accompanying mortgage lien, which in truth are welded together, once the bonds are legally issued and put into circulation and reach the hands of a holder for value and in good faith.

Were it otherwise, its commercial value would drop, instantly, since it would necessitate a search of the records where the mortgage was recorded, before a bond is purchased.

Millions in value of corporate bonds of this type are sold monthly on the exchanges; and not alone this, but corporate bonds of this type are frequently, under the terms of the mortgage, issued in series, some of the later series being marketed and sold a year or more after the record of the mortgage and issue of the first series, yet no one ever doubts, that every one of the series issued participates equally with the first series in the mortgage lien.

Central Trust Co. vs. Continental Iron Works,
51 N. J. E. 605.

POINT III.

The attempted sale of the bonds by and to the Passaic Bank is invalid in equity; the Metuchen Bank was not cut off by the sale.

The evidence taken shows that on April 21, 1931, the day after the bill of complaint was filed, the Passaic Bank held a sale in its offices, at which time it offered for sale all the 240 bonds in question. Notice of said sale had been given to both the Metuchen Bank and the Ohio Bank, who were present represented by their respective attorneys. The Metuchen Bank, by its attorney protested against this attempted method of cutting out its interest in the said bonds, and the protest made, was read in evidence in the Court below. All the bonds were sold to the Passaic Bank. The sale was held without giving the public any notice thereof, by advertisement. The sale took place in a private office of the purchaser. The purchaser was charged with certain trusts under its trust deed.

(State of Case, p. 37, line 30; pp. 38 and 39.)

By taking the attitude that it does, the Ohio Bank is contending that a perfectly valid property right of the Metuchen Bank was forfeited, when the Passaic Bank sold to itself the bonds in question, notwithstanding pro-

test made; inadequate notice to the public of such sale; that the sale took place in a private office of the purchaser; that foreclosure proceedings in the court below had already been started by the filing of the bill; that the complainant has never asserted an absolute title to said bonds under said sale.

As to such a proposition, the answer is that penalties or forfeitures are repugnant to Equity and its courts will not lend their aid, under circumstances such as above recited, to enforce them, which is so fundamental that citations are unnecessary.

POINT IV.

The assignment of J. B. Owens to Metuchen Bank, of his rights in the bonds, is not a chattel mortgage, within the meaning of the Chattel Mortgage Act.

The Chattel Mortgage Act (1 Comp. Stat. pages 463-465, par. 4) the pertinent section of which, correctly quoted, reads as follows:

Par. 4. "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage * * * be recorded as directed in the succeeding section of this act."

The Agreement in question was not required to be recorded at all, as the thing mortgaged was not goods and chattels, neither did Owens retain possession of the thing mortgaged, since the bonds were already in the possession of the Passaic Bank and have remained there.

Intangible property rights may be mortgaged, or even future rights therein, and are good and valid in equity.

Williamson vs. Railroad, 26 N. J. E. 398;

Bacon vs. Bonham, 27 N. J. E. 209; *affd.*, 33 N. J. E. 614;

Bleakly vs. Nelson, 56 N. J. E. 674.

POINT V.

The Metuchen Bank is a bona fide holder, and for a valuable consideration, of the Owens' assignment of his rights in the bonds.

The pre-existing debt referred to in the brief of the Ohio Bank [page 6, point II., subsection (a)] is in fact the debt of a third party, the Empire Floor & Wall Tile Co., evidenced by its note for \$14,000, which had matured, and about to be paid by a cash payment of \$500 and the discount of a new note for \$13,500 secured by J. B. Owens' endorsement, further secured by assignment of his interest in the bonds. In other words, an extension of credit to a third party, on a new note, constituting a change of position, obviously a valid consideration, for any deed of conveyance, or any assignment of interest in anything, or any mortgage whatsoever.

And even if the pre-existing debt referred to were in fact the debt of J. B. Owens (which it is not), the giving of further time for its payment, by a valid new agreement, for any period however short, though it be for a day only, is a valuable consideration and is sufficient to support a mortgage or a conveyance, as a purchase for value.

Doucetourc vs. Humber, 85 N. J. E. 89, 92.

POINT VI.

The Ohio Bank's attachment is not a lien on the bonds, because no actual levy was made in attachment on them.

Owens, having an equity of redemption in the bonds pledged with the Passaic Bank, accordingly had such an interest therein as could be reached by execution, and likewise by attachment. In either case in order to fix the lien the sheriff would be obliged to make an actual levy in the hands of the pledgee.

Having actual knowledge of the mortgage by the record that it secured a bond issue, what more natural and imperative, than that inquiry should be made of the Trustee named in the mortgage, concerning the outstanding bonds, and having thus located them, then to issue again the writ to the Passaic sheriff to attach Owens' interest in the bonds.

All of this the Ohio Bank neglected to do—a plain and aggravated case of laches.

(State of Case, pp. 40, 41.)

Not having made such a levy in attachment, it is not a lien on the bonds at all.

In speaking of the execution of the writ, the Court says:

“In attaching personal property he must seize it and take possession; and in attaching rights and credits he must go to the garnishee and give notice of the attachment.”

Tomlinson vs. Stiles, 29 N. J. L. 426.

See also—

Altshuler, et al., vs. Porter Judge, 146 Atl. 308, 105 N. J. L. 557.

POINT VII.

The Passaic Bank is a bona fide holder of the bonds for value, and the mortgage is a paramount first lien.

Upon the delivery to and pledge of the bonds with the Passaic Bank, to secure a demand note of \$39,000, all of the bonds were thereby lawfully put into circulation, and the said bank became bona fide holder thereof, for value.

Hoskins vs. Seaside, etc., Co., 68 N. J. E. 476.

(State of Case, page 17, par. 16.)

That it was, in fact, a holder for value, has been admitted, by inference, if not specifically so by the Ohio Bank; and likewise that the mortgage under foreclosure is a first lien.

(State of Case, pp. 29 and 30.)

The Passaic Bank did not demand payment of its note, which had been reduced by payments on account, until April 1, 1931.

(State of Case, p. 18, par. 18.)

So that, when, on September 10, 1930, Owens assigned his interest in the said bonds, he was not yet in default on his note to the Passaic Bank. Accordingly, he had a perfect legal and equitable right to make said assignment, and by doing so he thus transferred in equity, property rights in the bonds, including every and all advantages, trusts and benefits, as set forth in both the bonds and the mortgage to secure them, of the same character and quality, accruing to any other bondholder.

The recorded mortgage in question is notice of all that it contains to the world, and actually and by implication did, in fact, express a part or portion of the real agreements between the parties, that is to say, Owens, the Passaic Bank and the Metuchen Bank.

Finally, we beg leave to quote the terse and epigrammatic words of the learned Vice-Chancellor, in concluding his opinion, in the Court below, wherein he says, as follows :

"All parties dealing with Owens since the record of the mortgage in 1922, did so at their peril with respect to any rights which might accrue in favor of any one under that mortgage. Owens could sell bonds pursuant to the terms of the mortgage to whom he pleased or could deposit the bonds as collateral security. If he had given some of the bonds to the Passaic Bank and others to the Metuchen Bank, the situation would be clearer, but I see no reason why a third party can complain of his doing exactly what he did, namely, giving a first lien on all the bonds to one bank and a second lien to another.

"I will advise a decree establishing the claim of the Passaic Bank as a first lien, of the Metuchen Bank as second, and of the Ohio bank as a third lien."

And, therefore, with all due respect to this Court, we submit and contend, that the decree under review here be affirmed, with costs and counsel fee to the Metuchen National Bank.

Respectfully submitted,

GEO. W. LITTERST,
Solicitor for and of Counsel
with defendant-appellee,
The Metuchen National Bank.

