

NEW JERSEY

Court of Errors and Appeals

Between

AGNES H. LIPPINCOTT,

Complainant,

and

SAMUEL C. SMITH, et ux., et al.,

Defendants.

DANIEL V. SUMMERILL, JR.,

Appellant,

and

RACHEL BURROUGH,

Respondent.

} Appeal from
Chancery.

Brief for Appellant.

Samuel C. Smith died May 7th, 1872, leaving real estate to his six children, of whom Mary Anna Burrough, wife of Samuel L. Burrough, was one.

On March 24th, 1897, Rachel Burrough recovered a judgment in New Jersey Supreme Court against Mary Anna Burrough, on bond and warrant, for \$4,004.50 (page 17, lines 30 to bottom). The bill, which is taken as confessed against the defendants, alleges that the bond on which this judgment was entered was given by Samuel L. Burrough and Mary Anna Burrough, his

wife, for a debt of Samuel L. Burrough, the husband (page 4, lines 7 to 13).

Executions issued on the Rachel Burrough judgment, but no levy was ever made on the land (page 12, lines 18 to 22).

Mary Anna Burrough died December 15th, 1897, intestate, her husband having previously died. They left one child, Joseph A. Burrough (page 16, lines 16 to 20).

Daniel V. Summerill, Jr., recovered a judgment in New Jersey Supreme Court on March 1st, 1904, against Joseph A. Burrough, for \$882.12 damages and \$30.12 costs (page 21, lines 13 to 20).

Execution on the Summerill judgment was issued and delivered to the Sheriff March 4th, 1904. On the same day the Sheriff made a levy on the land in question (page 18, lines 20 to 30, and page 20, lines 1 to 3).

A bill for partition of the land was filed April 22, 1904. The land has been sold and the proceeds distributed with the exception of the Joseph A. Burrough share, which has been paid into court.

Senator Honner, as Special Master, reported that the Summerill judgment, by obtaining a prior levy, became "a first and prior lien upon the estate and interest of the said Joseph A. Burrough in the premises mentioned and described in the bill of complaint, and entitled to priority over the judgment of the said Rachel Burrough" (page 11, lines 24 to bottom).

Vice Chancellor Grey refused to confirm the report, and sustained the exception taken thereto (page 33, lines 8 to 11).

Mr. Summerill appeals from this determination, and insists that the report should be confirmed.

I. As a general creditor of the ancestor, Rachel Burrough's lien is subject to the judgment against the heir.

At common law decedent's debts were not a lien on land; obligations in which the heir was specially bound

created a *personal liability* on the part of the heir, but were not a lien on his land.

N. J. Insurance Co. v. Mecker, 8 Vr. 282-295.

See cases cited in note, 16 Stew. 209.

The present heirs' and devisees' act, which is substantially a copy of the English act, created no lien on land Griffith criticised it for this reason.

4 Griffith's Law Register, page 1289.

In 1825 debts were made a lien on land for one year, with a provision that after that time whatever interest remains in the heir may be sold to pay debts.

Warrick v. Hunt, 6 Halst. 10.

2 Gen. Stat. 2370, secs. 70 and 77.

Laws of 1898, page 743, secs. 81 and 94.

This court has held that under this act the debts continue a lien after the year until the heir or devisee has aliened the property.

Haston v. Castner, 4 Stew. 697-699.

After the year is up a mortgage made by the heir is a prior lien to decedent's debts.

Skillman v. Van Pelt, Saxton 511-517.

McMahon v. Schoonmaker, 6 Dick. 95.

Den. v. Hunt, 6 Halst. 1.

After the year a judgment or attachment against the heir is ahead of decedent's debts.

Bank v. Thompson, 16 Dick. 203-4.

Bockover v. Ayres, 7 C. E. Gr. 13-15.

In this court it has been held that a conveyance by the heir, "or a judgment recovered against him after his title vests, will displace an unrecorded mortgage given by the ancestor."

Voorhis v. Westervelt, 16 Stew. 642-644.

Here the ancestor had been dead over six years before judgment was entered against the heir. Decedent's debts are clearly subject to the Summerill judgment.

II. *The lien of Rachel Burrough is no greater than if she had no judgment and had presented her claim to the executor.*

The statute makes decedent's debts a lien. Presentation to and allowance of a claim by the executor fixes the amount which is a lien on the land as conclusively as a judgment would.

Haston v. Castner, 4 Stew. 697-701.

There is some question as to whether her lien is as good as if she had presented a claim. The judgment could not have been enforced except by *scire facias*. The practice in the King's Bench in such cases was as follows:

"Upon the return of *nihil* to a writ of *scire facias* against the personal representatives, the plaintiff may have a *scire facias* against the heir of the defendant, either alone or jointly with the ter-tenants, or tenants of the lands whereof the defendant was seized at the time of the judgment or at any time afterwards. But where judgment is had against one who dies before execution, a *scire facias* will not lie against his heir or ter-tenants, until a *nihil* be returned against his executors or administrators; and as the heir in this case is charged as ter-tenant, the plaintiff can only have execution of a moiety of his land even where he pleads a false plea."

2 *Tidd's Practice*, page 1034.

III. *Authority of Muldoon v. Moore.*

Counsel for respondent in the court below rested his case largely upon *Muldoon v. Moore*, decided in the Supreme Court, in 26 *Vr.* 410.

In *Muldoon v. Moore*, judgments against the heir for his individual debts were obtained and levied on the land about two months before judgment was recovered against the heir upon the debt of the ancestor.

All of the judgments were recovered more than two years after the death of the ancestor. The court, in its opinion, complains of the condition of the record and refuses to decide many of the questions raised. It says:

"The contention principally made and which will alone be considered, is this, that a judgment against an heir, upon his individual debt, and a levy under an execution thereon, constitute an alienation within the meaning of the act for the relief of creditors against heirs and devisees." It holds that a judgment and levy thereon are not an alienation, and therefore reaches the conclusion that the judgment for the debt of the ancestor is ahead of the prior judgment and levy for the debt of the heir.

Muldoon v. Moore has been frequently cited upon questions of practice in heir and devisee cases, but I cannot find that it has ever been approved or followed upon the point that a judgment and levy for a debt of the heir is superceded by a subsequent judgment for a debt of the ancestor.

The Vice-Chancellor did not cite *Muldoon v. Moore* in his opinion. A judgment recovered against the heir for the debt of the ancestor more than two years after the death of the ancestor, ought not to be a prior lien to a previous judgment and levy for the individual debt of the heir.

Justice Van Syckel, speaking for this court in *Voorhis v. Westervelt*, 16 *Stew.* 642-644, says: "I cannot see that it makes any difference whether the heir after his title vests, executes the conveyance himself, or permits his estate in the lands to be transferred by a judicial sale under such a judgment as the one in question."

If the plaintiff in the judgment against the heir could follow up his levy by making a sale which would be an alienation, he acquires upon making the levy a right to the *fruits thereof*, which no subsequent judgment can take away from him.

3 *Gen. Stat.* 2981, sec. 9.

The Court of Chancery has held that after a year both judgments and attachments against the heir are ahead of debts of the ancestor.

Bockover v. Ayres, 7 *C. E. Gr.* 13-15.

Bank v. Thompson, 16 *Dick.* 203-4.

And this Court has held that a judgment against the heir recovered after the death of the ancestor is ahead

of the debt represented by a bond and unrecorded mortgage given by the ancestor.

Voorhis v. Westewelt, 16 Stew. 642-644.

It is to be noted that the reasoning in *Muldoon v. Moore*, as to the effect of a special judgment, can only be applied in a case against heirs and devisees where the conduct of the heir determines the kind of judgment entered against him. If the heir does nothing, or pleads falsely, the judgment against him is general. It is only the special judgment and execution which he can obtain by properly pleading that is held to have the retroactive effect.

In view of these facts and the fact that neither at common law nor under our Heir and Devisee act were decedent's debts a lien on land—the liability being merely a *personal* one on the part of the heir—I doubt if this Court would want to affirm the doctrine declared in *Muldoon v. Moore*.

IV. *The junior judgment, by making prior levy, become a prior lien.*

At common law, judgments were not a lien on land.

1 *Black on Judgments*, sec. 397.

For the extent of the lien and the priorities, we must look entirely to the statute.

1 *Black on Judgments*, sec. 400.

The first section of the act concerning judgments (2 Gen. St., 1840) provides that all lands are liable to be levied upon and sold by executions to be issued on judgments.

The second section is negative in form. It provides that no judgment shall affect or bind lands prior to its actual entry.

Section 9 of our Sale of Land act (Gen. Stat., 2,981) was originally passed with part of our Execution act, and is construed as if it were still part of the Execution act. After reciting that "other judgments" "might affect the lands" and that "the persons who have not

taken, or will not take out executions," ought not to hinder or prevent such as do take out executions from having the proper effect and fruits thereof," it enacts that the purchaser shall hold the land purchased at an execution sale "free and clear of all other judgments and recognizances, whatsoever, on or by virtue of which no execution has been taken out and executed on the lands."

The word "executed," as used in this section, means "levied."

Den. v. Young, 7 Hal. 300.

The mere issuing of execution on the senior judgment and delivery thereof to the sheriff will not preserve its priority. There must be an actual levy on the land.

Lovejoy v. Lovejoy, 4 Stew. 55.

B. & L. A. v. Murphy, 9 Atl. 590.

Larison v. Dilts, 32 Atl. 1059.

Bank v. Ross, 13 Atl. 18.

Rammel v. Watson, 2 Vr. 281.

Bogert v. Lydecker, 16 Vr. 314.

Wills v. McKinney, 12 Vr. 120.

In the following cases the statute has been applied to judgments against the same defendant:

Clement v. Kaighn, 2 McCart. 47-58.

(Approved in this Court, 6 Stew. 552-561.)

Lovejoy v. Lovejoy, 4 Stew. 55.

Larison v. Dilts, 32 Atl. 1059.

Rammel v. Watson, 2 Vr. 281.

Bogert v. Lydecker, 16 Vr. 314.

Close v. Close, 1 Stew. 472-476.

Williams v. Gilbert, 10 Stew. 84-86.

Canfield v. Browning, 55 Atl. 101.

It has been applied to a judgment against a grantor and a judgment against a grantee.

Lambertville Nat. Bank. v. Boss, 13 Atl. 18.

The statute on its face applies to all judgments. It matters not who is the defendant. If the judgment "affects the land" the statute applies to it.

The Vice-Chancellor, after citing the case of *Haston v. Castner*, reasons the statute away in the following manner :

"In view of this declaration of our highest court, that the estate in lands of a deceased debtor is bound for his debts to his creditor without a judgment, it would be absurd, indeed, to hold that because the creditor of an ancestor had entered a judgment against him in his lifetime, but did not levy, the creditor should lose his lien for the benefit of the levying judgment creditor of the heir-at-law.

"The trend of the whole policy of all statutory enactment on the subject is to compel the application of the property of decedents to the payment of their debts. The heir takes what is left after the debts of the ancestor have been paid out of his estate. As this is all the heir receives from the ancestor, it is all that the heir's creditors can seize."

This argument will be sufficiently answered by quoting from the opinion of this Court in the case of *Voorhis v. Westewelt*, 16 Stew. 642-644. Justice Van Syckel, speaking for the Court there, said :

"The learned Vice-Chancellor, in his opinion in this case says : "That as a general rule a judgment creditor can take nothing for the satisfaction of his debt, which his debtor cannot himself sell, and make a good title to, as against his creditors. That the statute has changed this rule and given a judgment creditor, in a certain contingency, a right to sell property for the satisfaction of his debt, which his debtor could not himself sell, and to sell the same free from the lien of a prior unregistered mortgage, executed thereon by his debtor. But in order to possess this right he must be a judgment creditor of the person who executed the prior unregistered mortgage, and not a judgment creditor of some person who may, at some future time, after entry of his judgment, become the owner, by descent, of the mortgaged premises."

"This qualification of the rule 'that the judgment creditor must be a judgment creditor of the person who executed the unregistered mortgage,' is not accurate. It is obvious that a purchaser of the heir-at-law, after the inheritance falls to him, is upon a just and reasonable interpretation, within the protection of the registry law, where the unregistered mortgage is executed by the ancestor. The principle must be the same where the purchaser of the heir's estate acquires title through a judicial sale made under a judgment like the adversary judgment in this case."

This reasoning applies with equal force to the ninth section of the sale of land act. A judgment creditor of the heir is upon a just and reasonable interpretation entitled to the protection of the statute as much as a judgment creditor of the ancestor.

All the estate that any owner holds is an estate subject to the lien of existing judgments. The nature of the estate of the heir is no different from that of the ancestor after a judgment against the ancestor. A junior judgment in either case by making prior levy becomes a prior lien.

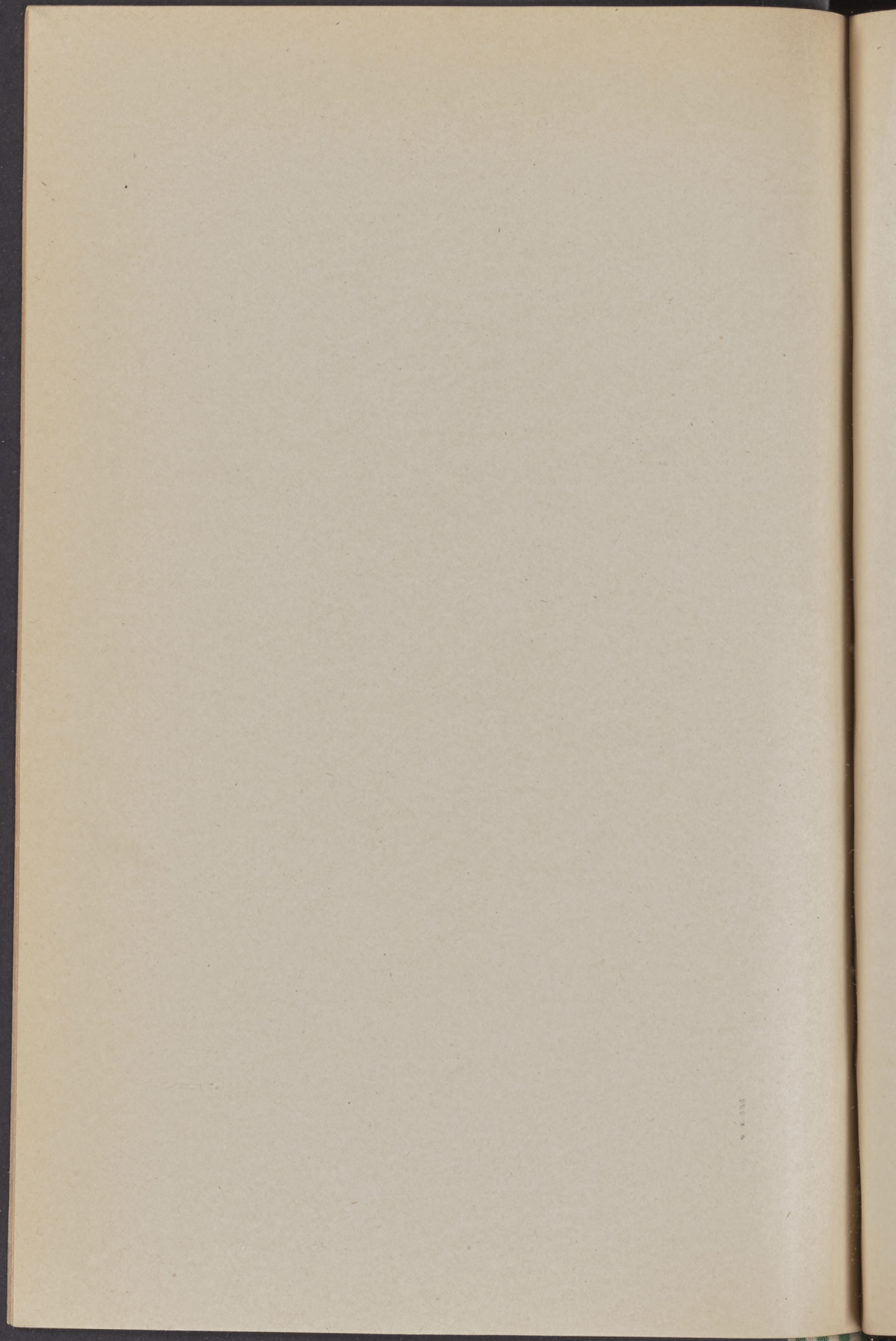
In this case, by the charges of the bill, which is taken as confessed against the defendants, it appears that the ancestor was a married woman and the judgment was on a bond given by herself and husband for the debt of the husband (page 4, lines 7 to 13).

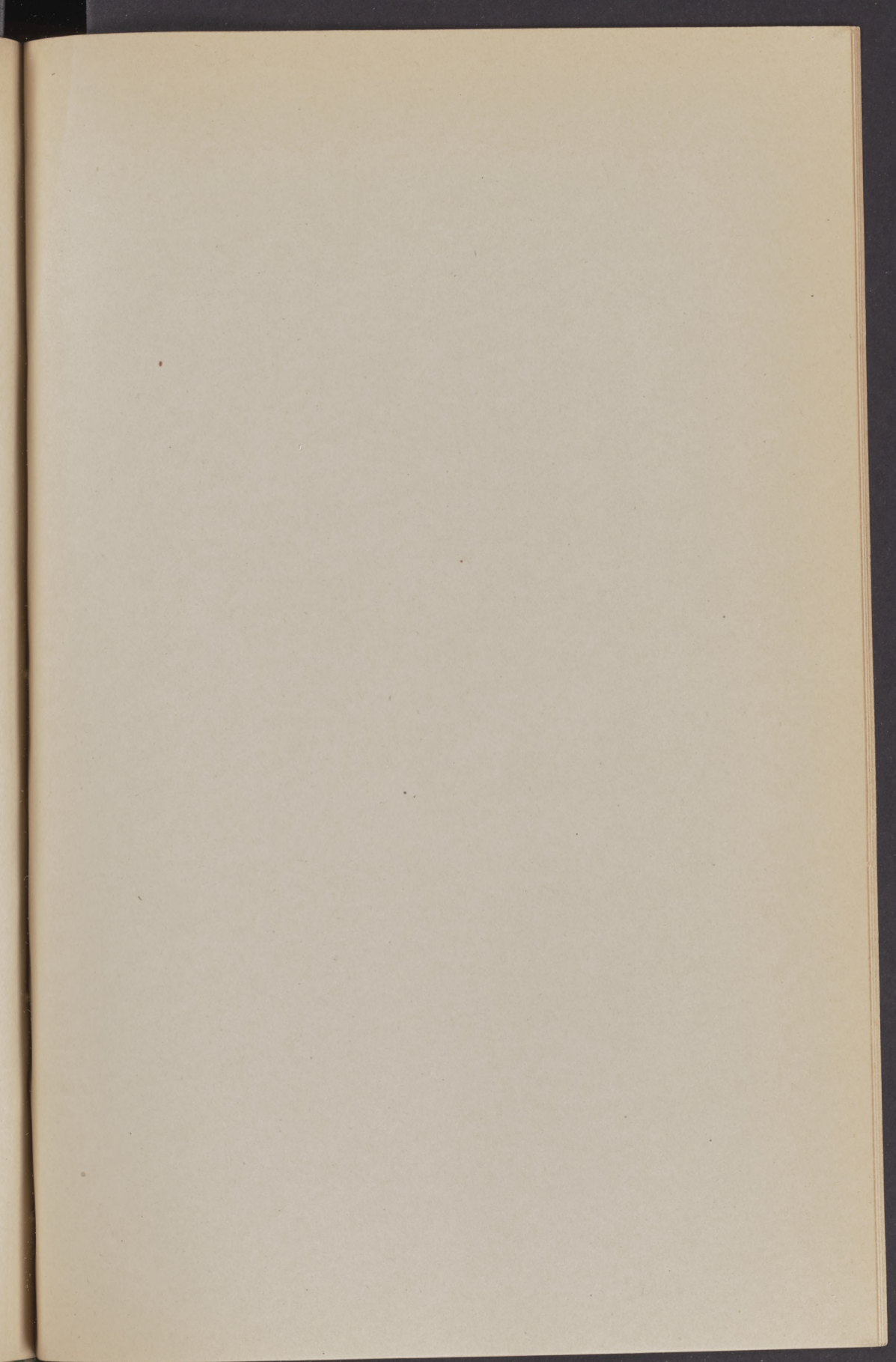
The ancestor never had her day in court. The court should not make an effort to except from the statute a case like the present where the debt is admittedly not the debt of the ancestor.

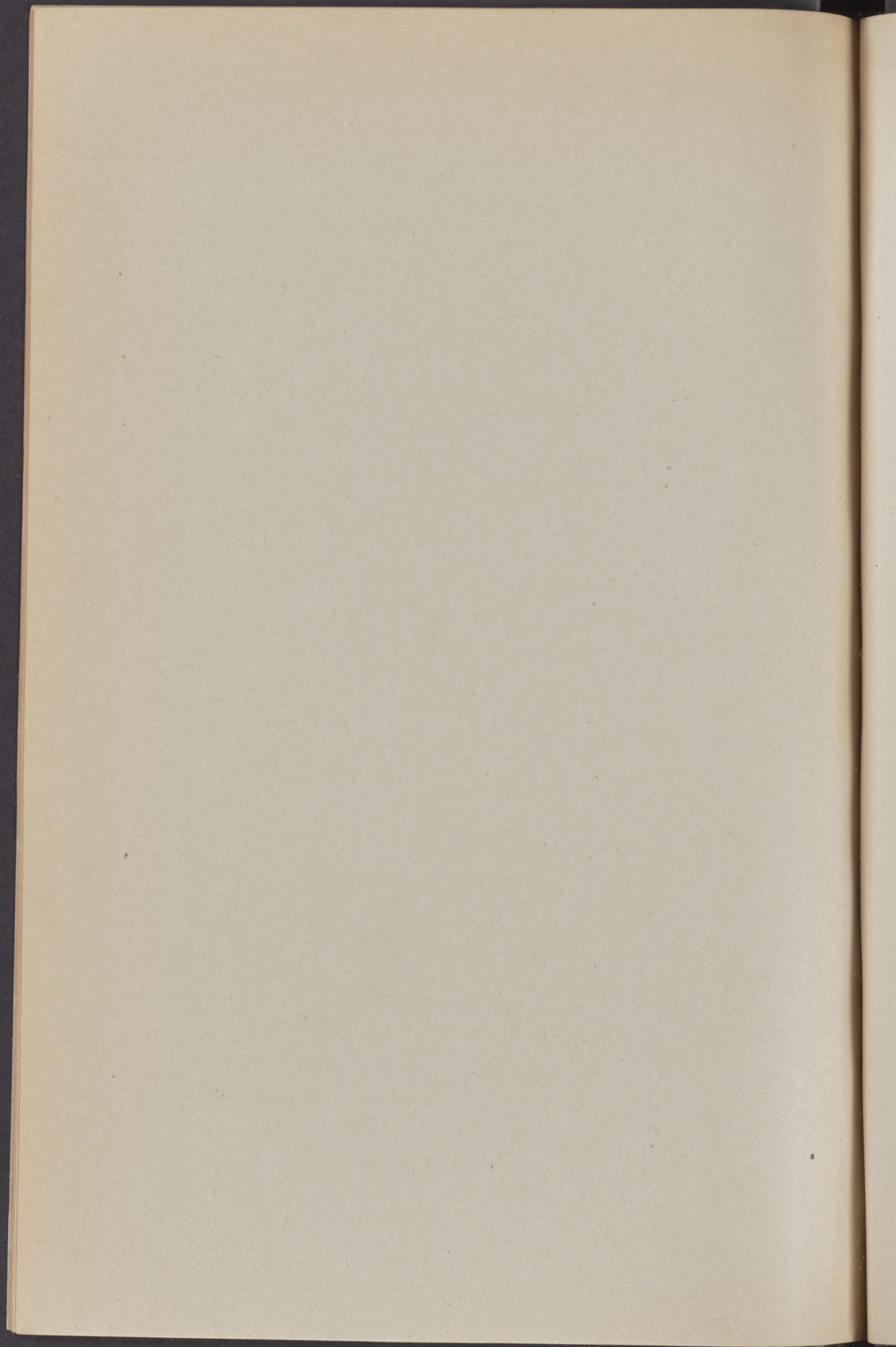
It is submitted that the order made by the Vice-Chancellor should be reversed, and the report of Senator Honner confirmed.

SAMUEL H. RICHARDS,

For Appellant.







NEW JERSEY COURT OF ERRORS AND APPEALS.

No. 44. JUNE TERM, 1905.

Between

AGNES H. LIPPINCOTT,

Complainant,

and

SAMUEL C. SMITH, ET UX., ET

AL.,

Defendants.

APPEAL FROM
CHANCERY.

DANIEL V. SUMMERILL, JR.,

Appellant,

and

RACHEL BURROUGH,

Respondent.

APPEAL FROM
CHANCERY.

BRIEF OF RESPONDENT.

The question to be decided is as to which of two judgment creditors is entitled under the law to receive the proceeds of a sale of real estate.

The circumstances of the case are these: Mary Anna Burrough was seized of an undivided interest in the real estate in question as devisee under the last will and testament of her father, Samuel C. Smith. On January 23d, 1873, she, with the other devisees under said will, conveyed a life estate in said lands and premises to their mother, Ann W. Smith, but remained seized of the title to an undivided interest in said premises subject to said estate for life. She became indebted to Rachel Burrough, who recovered a judgment for such indebtedness in the Supreme Court of this State in March, 1897. and execution was issued on this judgment but no specific levy was made thereunder on this land, because her attorneys were not apprised of Mary Anna Burrough's title thereto.

Mary Anna Burrough died intestate December, 1897, seized of the undivided interest in the lands in question, which were then subject to the life estate of her said mother, and also subject to the judgment recovered against her by the said Rachel Burrough, leaving her surviving her only son, Joseph A. Burrough, to whom said interest descended subject as aforesaid.

Ann W. Smith, the life tenant, died December 12th, 1902; the life estate was thus extinguished and Joseph A. Burrough became seized of this undivided interest in the said lands, subject to the debt of record existing against his mother, Mary Anna Burrough, from whom he inherited the said lands.

In March, 1904, Summerill recovered a judgment against Joseph A. Burrough, the heir of Mary Anna Burrough, issued execution thereon, and claims that a levy was made thereunder upon so much of said real estate as Joseph A. Burrough inherited from his mother,

Mary Anna Burrough, and by virtue of such judgment and levy claims that he is entitled to priority of lien and payment out of the moneys received from the sale of said real estate.

The theory of the law is, that whatever a person has of property at the time of death must be first used for the payment of debts; they are a first lien, and property cannot be alienated so as to defeat them. In this case the law cast the estate upon the heir, and he must take it *cum onere* subject to such burdens as existed against it while in the ownership of the ancestor.

Mary Anna Burrough, in her lifetime, after the recovery of the Rachel Burrough judgment, could not have conveyed her interest so as to defeat such judgment. How much less, then, can her son, who received only his mother's interest, do that which she could not have done. He only, as heir, succeeds to such right as she had at the time of her death, which is the title burdened with her debt, and his creditor can recover no more under a judgment against the heir from a particular piece of real estate than the heir received from the ancestor, which was the title subject to the judgment against, or debt of, the ancestor.

At common law judgments were not liens upon lands, they were only debts of record; the lien upon lands is solely the creature of the statute.

The first act authorizing the sale of real estate under judgment in New Jersey was passed at Perth Amboy in 1743 (*Nevill*, 279). This enacts that the real estate of every person in the province shall be subject to the payment of his or their debts. This act remained in substance unchanged until the revision of 1846, when it was

divided, a part was then included in the act respecting executions, and a part making lands liable to be sold for the payment of debts.

Under the Execution Act (2 General Statutes, page 1418, Secs. 18 and 19), showing what can be sold under the writ where various executions have been issued, distinctly refers to where they are against "*the same person.*" The Judgment Act (2 Genl. Stat., page 1841, Sec 2,) shows that judgments bind from their actual entry—and the act for the sale of land (3 Genl. Stat., page 2981, Sec. 9,) uses the words "*the sale aforesaid,*" referring back to the act on executions. These acts are all of the same date and must be construed together or as one act.

Justice Depue, speaking for the Court of Errors in *Blatchford vs. Conover* (13 Stewart, 217), says: "The judgment being the foundation of title, the statute determines the actual entry of judgment as the commencement of the lien."

The judgment in this case was against the ancestor and bound the land before it descended to the heir. (*Haston vs. Castner*, 4 Stew., 697, *Court Errors and Appeals.*)

The case of *Clement vs. Kaighn* (2 McCarter, 47), and all other cases in our books where subsequent judgment creditors were allowed preference over existing judgments, because of prior execution and levy, are where the judgments are against the same person, and do not apply to this case. Here we have the creditor of the heir attempting to defeat the creditor of the ancestor. Undertaking to do as the agent of the heir what the ancestor could not have done with the lands while living; claim-

ing the heir inherited a greater power than the ancestor was seized of.

Under the law land descends to the heir subject to the debt of the ancestor, and it can only be divested of such burden by actual bona fide alienation. This means an actual transfer of the title. A mortgage is not an alienation (*Den vs. Jacques*, 5 Hal., 259), as reviewed by the Court of Errors (*Hal's. Digest*, 634). Neither is a judgment, execution and levy (*Muldoon vs. Moore*, 26 Vr., 418). In this case William Moore died seized of certain lands leaving John C. Moore his only heir at law; Mary Muldoon had a claim against the ancestor at the time of his death; creditors of the heir brought suit against him and recovered a judgment in March, 1892, issued execution thereon and caused a levy to be made thereunder. Afterwards and in May, 1892, Mary Muldoon recovered judgment against John C. Moore, as heir of William Moore, for the debt she had against the ancestor at the time of his decease. Her judgment, execution and levy were subsequent in time to the judgments against the individual, John C. Moore; a sale of the lands which descended from the ancestor was made by the Sheriff under the executions issued on all these judgments, and as the proceeds were not sufficient to satisfy all the judgments, a rule to show cause was issued why the Muldoon judgment was not entitled to priority of payment, and the Supreme Court, speaking by Justice, now Chancellor, Magie, held that Mary Muldoon was entitled to priority of payment over the other judgment creditors. This case is exactly similar to the one in hand, except here the claim had been exalted to judgment before the death of the ancestor, thus making it stronger than the

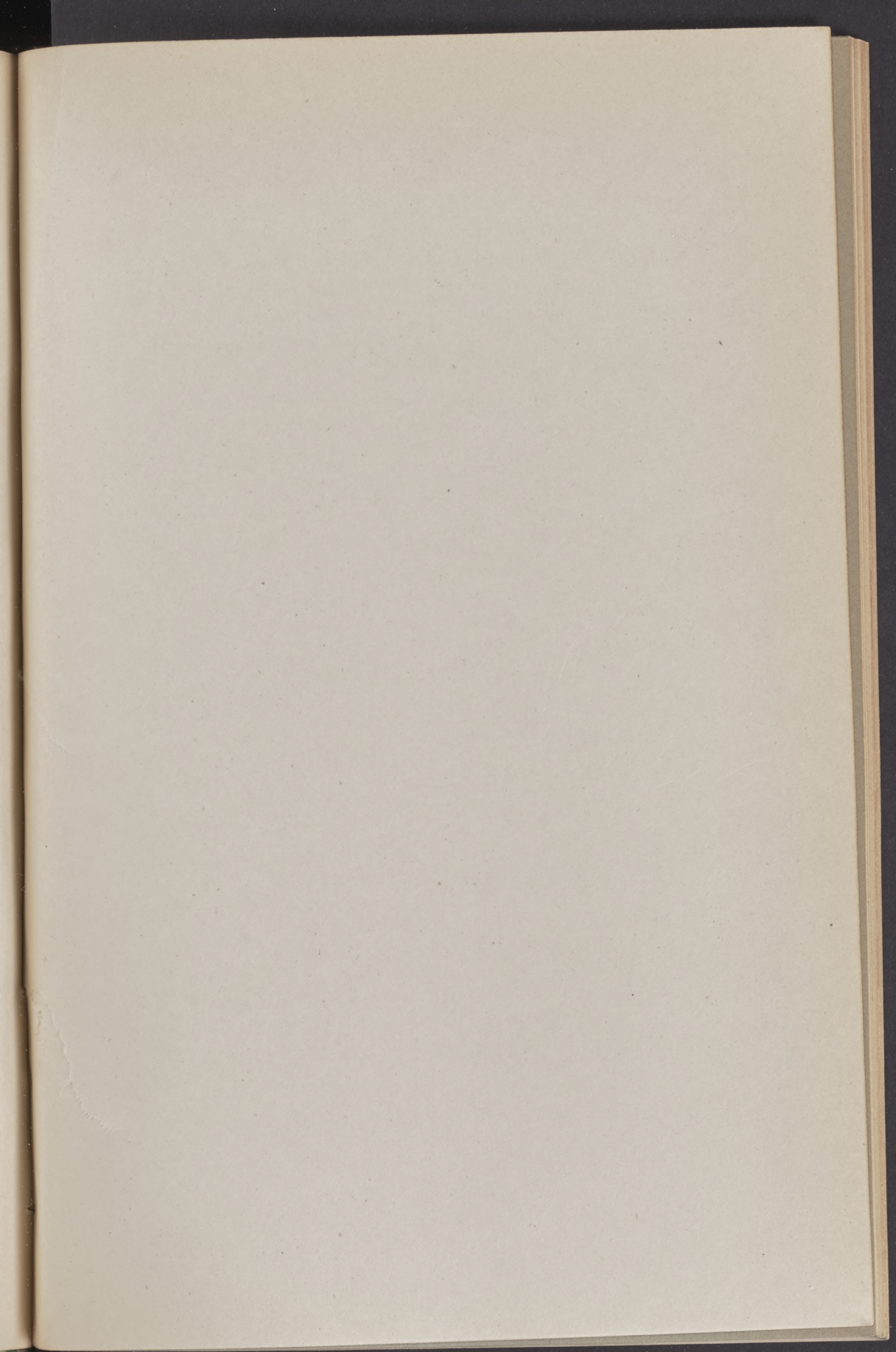
Muldoon case, which was only a claim and not a debt of record.

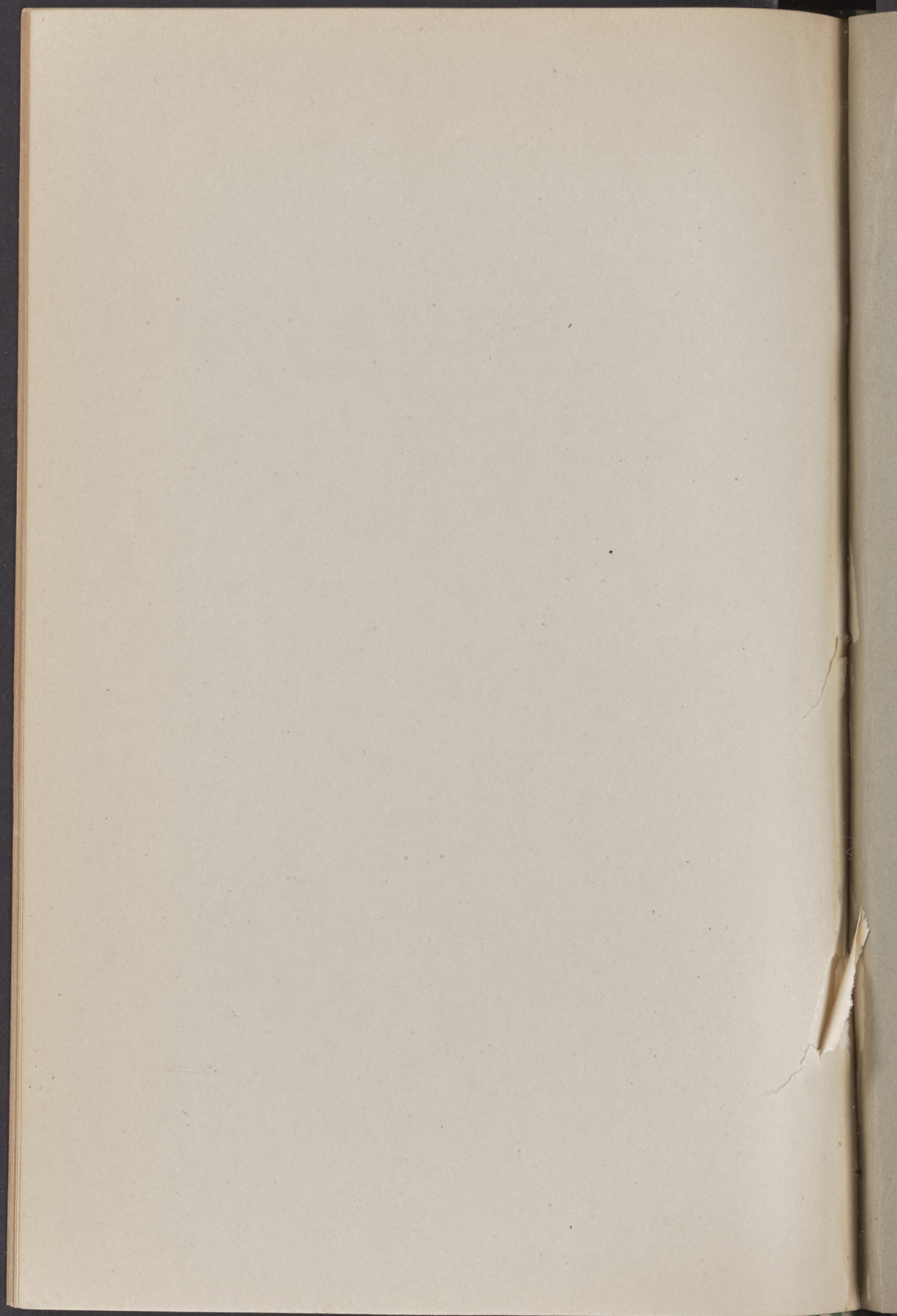
The validity of the Burrough judgment cannot be questioned here; it was found and reported by the Master and no exceptions were taken by the appellants to said finding, and it cannot be attacked collaterally.

We respectfully submit that the able opinion of the learned Vice Chancellor correctly states the law, and that the case should be affirmed on that opinion.

PETER V. VOORHEES,
EPHRAIM TOMLINSON,

For Respondent.





N. J. Court of Errors & Appeals

Between

AGNES H. LIPPINCOTT,

Complainant,

and

SAMUEL C. SMITH, ET UX., ET AL.,

Defendants.

DANIEL V. SUMMERILL, JR.,

Appellant,

and

RACHEL BURROUGH,

Respondent.

APPEAL FROM CHANCERY.

STATE OF THE CASE.

SAMUEL H. RICHARDS,

For Appellant

EPHRAIM TOMLINSON,

PETER V. VOORHEES,

For Respondent.

INDEX

	PAGE
Bill for Partition.....	1
Interlocutory Decree.....	8
Order Extending Time.....	8
Master's Report.....	9
Objections to Master's Report	22
Decree for Sale	23
Report of Sale.....	24
Order Confirming Sale	24
Petition for Sum in Gross	24
Order of Reference on Petition	24
Report as to Sum in Gross.....	24
Notice of Application to Confirm Master's Report.....	25
Opinion of Vice Chancellor Grey	26
Order Sustaining Exceptions	33
Notice of Appeal.....	35
Severance	36
Petition of Appeal.....	37
Answer of Respondent.....	39

IN CHANCERY OF NEW JERSEY.

BILL FOR PARTITION.

*To his Honor, William J. Magie, Chancellor of the State
of New Jersey:* 10

Complaining shows unto your Honor your oratrix, Agnes H. Lippincott, of the borough of Haddonfield, in the county of Camden and State of New Jersey:

That Samuel C. Smith, late of the borough of Haddonfield, in the county of Camden and State of New Jersey, deceased, was, at the time of his death, seized in fee simple of all the following described tract or piece of land and premises, situate in the borough of Haddonfield, county of Camden and State of New Jersey, and bounded and described as follows: 20

Beginning at a point in the northwesterly side of the main street, said point being a corner to lot belonging to Mary E. Horter and distant twenty-four feet southwestwardly from the southwest side of Friends' avenue; thence (1) along said side of Main street southwestwardly fifty-four and seven-tenths feet to a corner to land now or late of Isaac A. Braddock; thence by his land the following four courses and distances: (2) north twenty-nine degrees west, forty-six links; (3) north thirty-two degrees west, two chains and fifty-six links to a stone; (4) north twenty-five degrees thirty minutes west, two chains and forty links to a stone; (5) north fifty degrees and thirty minutes west, three chains and three and a half links to a corner to said Braddock in the line of the Friends' grave yard; thence (6) bounding by said grave yard north thirty-four degrees east, one chain and forty- 30

one links to a corner to the same in the southwest side of Friends' avenue; thence (7) along the said side of Friends' avenue south sixty-one degrees east, one chain and fifty-six links to an angle of said avenue; thence (8) still along the said side of said avenue south thirty degrees and fifteen minutes east, four chains and thirty-eight links to a corner to the said lot belonging to Mary E. Horter; thence (9) by her lot south sixty degrees west, twenty-four feet; thence (10) still by her lot thirty degrees fifteen minutes east, two hundred and twelve feet to the northwesterly side of Main street and place of beginning.

And being so seized thereof, the said Samuel C. Smith, on or about the seventh day of May, eighteen hundred and seventy-two, departed this life, leaving him surviving his widow, Ann W. Smith, and six children, to wit: Charles H. Smith, Mary Anna Burrough, Martie A. Lippincott, Emma L. Doughty, Samuel C. Smith and your oratrix, whose maiden name was Agnes H. Smith; but having first made, published and declared his last will and testament, in writing, dated the fourteenth day of April, eighteen hundred and seventy-two, wherein and whereby he did direct as follows: "I will and direct that my estate be fully settled and distributed according to the provisions contained in the laws of the State of New Jersey, as provided for the settlement of the estates of persons dying intestate," which said last will and testament was duly proven before David B. Brown, Surrogate of the county of Camden, on the twenty-first day of May, eighteen hundred and seventy-two, and there recorded in Book "D" of Wills, page 441, &c.

And your oratrix further shows, that the said Charles H. Smith and Sallie V., his wife; Mary Anna Burrough and Samuel L., her husband; Martha A. Lippincott and Jacob H., her husband; Emma L. Doughty and John S., her husband, Samuel C. Smith and your oratrix, Agnes H. Smith, being all of the children of the said Samuel C.

Smith, deceased, together with their respective husbands and wives, by deed of conveyance, dated the twenty-third day of January, eighteen hundred and seventy-three, and duly executed and acknowledged the same day, and which said deed was duly recorded in the office of the Register of Deeds of Camden county, at Camden, New Jersey, on the twenty-ninth day of January, A. D. eighteen hundred and seventy-three, in Book No. 72 of Deeds, page 317, &c., did grant and convey the said premises, together with other land, to said Ann W. Smith (widow of the said Samuel C. Smith, deceased), for and during the term of her natural life. 10

And your oratrix further shows, that the said Ann W. Smith, being so thereof seized of a life estate in said premises, on or about the twelfth day of December, nineteen hundred and two, departed this life.

And your oratrix further shows, that on or about the sixteenth day of July, eighteen hundred and seventy-three, said Martie A. Lippincott departed this life intestate, and without ever having had a child born alive; leaving her surviving her husband, Jacob H. Lippincott, by reason whereof the undivided sixth part of said land and premises so held by said Martie A. Lippincott descended to and became vested in her five surviving brothers and sisters, to wit: Charles H. Smith, Mary Anna Burrough, Emma L. Doughty, Samuel C. Smith and your oratrix. The said Jacob H. Lippincott not being entitled to any estate by the curtesy therein. 20

And your oratrix further shows, that the said Charles H. Smith having survived his said wife, Sallie V. Smith, and married Fannie W. Smith, and being so seized of an equal undivided one-fifth part of said premises, departed this life on or about the twenty-sixth day of October, A. D. eighteen hundred and ninety-nine, intestate, leaving him surviving his widow, said Fannie W. Smith, and two children, to wit: Charles H. Smith, Jr., and Ethel Smith. 30

And your oratrix further shows, that on or about the twenty-fourth day of March, eighteen hundred and ninety-seven, one Rachel Burrough recovered a judgment in the New Jersey Supreme Court against the said Mary Anna Burrough and Samuel L. Burrough, her husband, in the sum of four thousand and four dollars and fifteen cents, which judgment your orators are informed and verily believe was recovered on a bond and warrant, given by the said Samuel L. Burrough and Mary Anna Burrough, his wife, to secure a loan of two thousand dollars, made by the said Rachel Burrough to the said Samuel L. Burrough but said Rachel Burrough, by reason of said judgment, claims to have some lien on the undivided interest, late of said Mary Anna Burrough in said land and premises.

10 And your oratrix further shows, that the said Mary Anna Burrough, having survived her husband, Samuel L. Burrough, and being so seized of and entitled to the equal undivided one-fifth part of said land and premises, departed this life on or about the fifteenth day of December, eighteen hundred and ninety-seven, in-
20 testate, leaving her surviving her only child, to wit: Joseph A. Burrough.

And your oratrix further shows, that Daniel V. Summerill, Jr., on or about the first day of March, nineteen hundred and four, recovered a judgment in the New Jersey Supreme Court against the said Joseph A. Burrough, for the sum of nine hundred and twelve dollars and thirty-two cents, and that on the same day
30 an execution was issued under said judgment, directed to the Sheriff of the county of Camden, and that on the fourth day of March, said execution was delivered to the Sheriff of the county of Camden, on which day the said Sheriff made a levy under said execution on said land and premises, and that by virtue thereof, the said Daniel V. Summerill, Jr., claims to have some lien on the undivided interest of said Joseph A. Burrough in said land and premises.

And your oratrix further shows, that the said Emma L. Doughty is the wife of John S. Doughty; that said Samuel C. Smith is a married man and his wife's name is Sophie J. Smith, and that she claims an inchoate right of dower in the share of said lands and premises of which her husband, said Samuel C. Smith, is seized as aforesaid.

And your oratrix further shows, that your oratrix, whose maiden name was Agnes H. Smith, is the wife of Joseph K. Lippincott, Jr.

10

And your oratrix further shows, that said Joseph A. Burrough is a married man and his wife's name is Mary L. Burrough, who claims an inchoate right of dower in the undivided interest of said Joseph A. Burrough in said land.

And your oratrix further shows, that Ethel Smith is an infant under the age of twenty-one years.

And your oratrix further shows unto your Honor, that she is seized of and entitled to one equal undivided fifth part of the said premises; and that the said Emma L. Doughty and Samuel C. Smith are each severally seized of and entitled to one equal undivided fifth part of said premises. The share of the said Samuel C. Smith being subject to the inchoate right of dower of his wife, said Sophie J. Smith, and that said Sophie J. Smith, wife of said Samuel C. Smith, claims an inchoate right of dower in the one equal undivided fifth part of said premises, to which he is entitled as aforesaid. And that the said Charles H. Smith, Jr., and Ethel Smith are each severally seized of and entitled to one equal undivided tenth part of said premises, subject to the right of dower of the said Fannie W. Smith therein, as aforesaid. And that the said Joseph A. Burrough is seized of and entitled to the one equal undivided fifth part of said premises, subject to the inchoate right of dower of his wife, Mary L. Burrough, therein, and subject to the judgment of the defendant, Daniel V. Summerill, Jr.,

20

30

And your oratrix further shows, that she is desirous that a partition or division of the said tract of land and premises should be made among your oratrix and the several parties entitled thereto, according to their several and respective rights, estates and interest therein; or, as your oratrix believes and avers the fact to be, that the said tract of land and premises cannot be divided among the owners thereof without great prejudice to their interests, then that the same may be sold and the proceeds thereof divided among your oratrix and the other parties entitled thereto as aforesaid, according to their respective rights and interests.

10.

But your oratrix is advised, that no valid or effectual partition, division or sale of the said premises can be effected without the aid and interposition of some competent Court. And that this honorable Court has full and complete jurisdiction in the premises.

20

In consideration whereof, and to the end that the defendants hereinafter named may, but without oath, answer under oath being hereby waived, full, true, direct and perfect answer make to all and singular the charges and matters aforesaid, as fully and particularly as if the same were here repeated and they thereunto particularly interrogated. And that a fair partition and division of the above described premises may be made according to the course and practice of this Court, if the same be practicable and consistent with the rights of all the parties interested therein, among your oratrix and the other persons entitled to shares of the said premises, according to their respective rights and interests therein, and that the liens on the undivided estate or interest of any of the parties hereto be decreed to be a charge only on the shares assigned to such party, said share to be first charged with its just proportion of the costs of these proceedings in preference to any such lien, and in case such partition and division in fact of the said premises shall be found to be impractic-

30

able, or if it should appear that the same cannot be made without great prejudice to the owners of the said premises, then that the said tract of land and premises may be decreed by this honorable Court to be sold, including the right of dower of the defendant, Fannie W. Smith, and the inchoate rights of dower of the defendants, Sophie J. Smith and Mary L. Burrough and the proceeds thereof, after paying the costs and charges of this suit, divided among your oratrix and the several parties interested therein, according to their respective rights, shares and interests, and that the portion of the moneys arising from the sale of the estate, share or interest of any party against whom there are existing any liens or encumbrances held by any creditor of such party who is a party defendant to this suit, be brought into this Court by the Master or Commissioner as the case may be, who shall make sale of said premises, after deducting the costs charges and expenses to which it shall be liable; to the end that the Chancellor may make such order therefor as the circumstances of the case may require. 10

And that your oratrix may have such further and other relief as the nature and circumstances of the case may require, and as shall be agreeable to equity. 20

May it please your Honor to grant unto your oratrix the State's writ or writs of subpoena, issuing out of and under the seal of this honorable Court, to be directed to the said Samuel C. Smith and Sophie J. Smith, his wife; Joseph A. Burrough and Mary L. Burrough, his wife; John S. Doughty and Emma L. Doughty, his wife; Joseph K. Lippincott, Jr., Fannie W. Smith, Charles H. Smith, Jr., Ethel Smith, Daniel V. Summerill, Jr., and Rachel Burrough, commanding them and each of them, at a certain day and under a certain penalty which may fall thereon, personally to be and appear before your Honor in this honorable Court, then and there to answer the premises and to stand to, abide and per- 30

form such decree therein as to your Honor shall seem meet.

And your oratrix will ever pray, &c.,

JOSEPH KAIGHN,

Solicitor for Complainant.

SAMUEL H. RICHARDS,

Of Counsel with Complainant.

Filed April 22, 1904.

10

Interlocutory decree dated the tenth day of June, 1904, whereby the bill is taken as confessed against all the defendants except the infant defendant and reference is made to John G. Horner, Special Master, in the usual form, among other things directing him to ascertain and report the right, title and interest of the respective parties in the land described in the bill and whether the undivided interest or estate of any of the parties to the suit in said land is subject to any lien by mortgage, judgment, decree, devisee or otherwise, and if so, to what liens or encumbrances, and by whom they are held, and to ascertain and report the amount due to any party as aforesaid who has such lien on the said premises, and further directing him to report on June twenty-eighth, 1904.

20

Order made June twenty-eighth, 1904, extending the time for filing report to July fifth, 1904.

30

IN CHANCERY OF NEW JERSEY.

Between

AGNES H. LIPPINCOTT,

Complainant,

and

SAMUEL C. SMITH, ET UX., ET

ALS.,

Defendants.

ON BILL, ETC.

MASTER'S REPORT.

10

In pursuance of an order of this Court, made in the above entitled cause, bearing date the tenth day of June, nineteen hundred and four, whereby it was ordered that it be referred to the subscriber, one of the Special Masters of this court, to ascertain and report the right, title and interest of the respective parties in the premises mentioned and described in the bill of complaint in this cause; and also to report to this Court whether the premises are so situate that a partition thereof can be made without great prejudice to the owners, and in case such partition thereof cannot be made, then to ascertain and report whether in case of sale of said premises, under the circumstances of the case, having regard to the interest of all the parties, the estate and interest of Fannie Smith, widow of Charles H. Smith, deceased, and Sophie J. Smith and Mary I. Burrough, if any they or either of them have, as tenants in dower, or any inchoate right of dower in said premises, ought to be excepted from the sale thereof, or whether the same should be sold; and also to ascertain and report whether the undivided interest or estate, if any, of the parties to this suit, in said lands and premises, subject to any lien, by mortgage,

20

30

judgment, decree, devise or otherwise, and if so to what liens or encumbrances, and by whom they are held, and to ascertain and report the amount due to any party, as aforesaid, who has such lien on said premsies, and that he make his report to the Chancellor on the twenty-eighth day of June, then instant, at ten o'clock in the forenoon, at the State House, in Trenton, which said time was subsequently extended, by an order of this Court, until the fifth day of July, instant, at ten o'clock in the forenoon, at the State House, in Trenton: I, John G. Horner, do hereby report to his Honor, the Chancellor, that I have been attended by Joseph Kaighn, Esquire, the solicitor of the complainant, and Daniel V. Summerill, Jr., solicitor for Rachel Burrough, solicitor *pro se*, Peter V. Voorhees, by Ephraim Tomlinson, Esquire, and William B. Knight, solicitor for Daniel C. Smith, Sophie J. Smith, Charles H. Smith, Jr., Fannie L. Smith, John S. Doughty, Emma L. Doughty, Joseph K. Lippincott, Joseph A. Burroughs and Mary L. Burroughs, and in their presence have examined the matters referred to me by said order, and I do find and report that the rights and interests of the respective parties in the premises, whereof partition is sought by the bill of complaint, are as follows:

1. That the complainant, Agnes H. Smith, is seized in fee of one undivided fifth part of said premises.
2. That the defendant, Emma L. Doughty, is seized in fee of one undivided fifth part of said premises.
- 30 3. That the defendant, Samuel C. Smith, is seized in fee of one undivided fifth part of said premises, subject to the inchoate right of dower of his wife, Sophie J. Smith.
4. That the defendant, Sophie J. Smith, has an inchoate right of dower in an undivided one-fifth part of said premises.
5. That the defendant, Fannie W. Smith, widow of Charles H. Smith, deceased, has an estate in dower in one undivided fifth part of said premises.

6. That the defendant, Charles H. Smith, Jr., is seized in fee of one undivided tenth part of said premises, subject to the said estate in dower of the said Fannie W. Smith.

7. That the defendant, Ethel Smith, is seized in fee of one undivided tenth part of said premises, subject to the said estate in dower of the said Fannie W. Smith.

8. That the defendant, Joseph A. Burrough, is seized in fee of one undivided fifth part of said premises, subject to the inchoate right of dower of his wife, Mary L. Burrough, and that the said share of the defendant Joseph A. Burrough is subject to the lien of the following judgments, and in the following order of priority: 10

a. To a judgment of Daniel V. Summerill, Jr., recovered in the New Jersey Supreme Court on the first day of March, nineteen hundred and four, against the said Joseph A. Burrough, for the sum of eight hundred and eighty-two dollars and twelve cents, damages, and thirty dollars and twelve cents, costs, upon which said judgment there is due on the day of the date of this report the sum of nine hundred and thirty-five dollars and four cents, for damages, costs and interest and Sheriff's fees, as will appear by a schedule hereunto attached and made part hereof (marked Schedule "A"); that upon said judgment an execution was issued and delivered to the Sheriff of the county of Camden, on the fourth day of March, nineteen hundred and four, and under said execution, the said Sheriff, on the same day, made a levy upon all the right, title, estate and interest of the said Joseph A. Burrough, of, in and to the premises mentioned and described in the bill of complaint, and that I report to his Honor, the Chancellor, that in my opinion the said judgment of the said Daniel V. Summerill, Jr., against the said Joseph A. Burrough is a first and prior lien upon the estate and interest of the said Joseph A. Burrough in the premises mentioned and described in the bill of complaint and entitled to priority over the judgment of the said Rachel 20 30

Burrough against Mary Anna Burrough, as hereafter set forth.

10 b. To a judgment of Rachel Burrough, recovered in the New Jersey Supreme Court, on the twenty-fourth day of March, eighteen hundred and ninety-seven, against Mary Anna Burrough, the ancestor of the said Joseph A. Burrough, and through whom the lands descended unto the said Joseph A. Burrough, for the sum of two thousand seventy-eight dollars and thirty cents, debt and costs, together with interest from the twenty-
 20 third day of March, eighteen hundred and ninety-seven, which to the day of the date of this report amounts to two thousand nine hundred and eighty-six dollars and fifty-two cents, as will appear by a schedule (marked Schedule B) hereunto attached and made part hereof; and that upon said judgment an execution was issued on the twenty-fourth day of March, eighteen hundred and ninety-seven, and an alias execution on the fourth day of June, eighteen hundred and ninety-seven, but
 20 that no levy upon the premises mentioned and described in the bill of complaint was made under said execution or said alias execution.

9. That the defendant, Mary L. Burrough, has an inchoate estate in dower in one undivided fifth part of said premises, and that the same is subject to the judgment recovered by Rachel Burrough against Mary Anna Burrough, as is above set forth.

30 And I do further certify and report that the said premises are in my opinion so situate that a partition thereof cannot be made between the parties interested without great prejudice to the owners thereof, and that my reasons for this opinion are that the premises in question constitute, as a whole, one single dwelling house, with convenient grounds for garden and pasture, and if divided into lots among the parties interested therein, the several lots would be too small to be of any particular value, and that the dwelling house, constitu-

ting the most valuable part, is incapable of division as appears by the depositions hereunto annexed.

And I do further certify and report, that under all the circumstances of the case, regard being had to the interest of all the parties, the estate and interest of Fannie L. Smith, widow of Charles H. Smith, of Sophie J. Smith and Mary L. Burrough, in the said premises, ought not to be excepted from the sale thereof, but that in case of sale of said premises, their said estate and interests should be sold.

10

All of which, as further directed in and by said order, and the supplemental order thereto, I report on this fifth day of July, A. D. nineteen hundred and four.

JOHN G. HORNER,
Special Master in Chancery of N. J.

SCHEDULE A.

20

Judgment of Daniel V. Summerill, Jr., against Joseph A. Burrough, recovered in the New Jersey Supreme Court, March 1st, 1904; under this judgment an execution was issued and a levy made upon the premises in question; amount of judgment for damages and costs

\$912 24

Interest thereon from March 1, 1904, to July 5, 1904

18 85

Sheriff's fees paid.....

3 95

30

Amount due this day..... \$935 04

Dated July 5, 1904.

JOHN G. HORNER,
Special Master in Chancery of New Jersey.

SCHEDULE B.

Judgment of Rachel Burrough against Mary Anna Burrough, recovered in the New Jersey Supreme Court, March 24, 1897; under this judgment an execution and an alias execution was issued, but no levy was made under either upon the premises in question;

10 amount of judgment for debt and costs. . . . \$2,078 30
 Interest thereon from March 23, 1897, to July
 5, 1904 908 22

Amount due this day. \$2,986 52

Dated July 5, 1904.

JOHN G. HORNER,
 Special Master in Chancery of New Jersey.

20

30

IN CHANCERY OF NEW JERSEY.

Between

AGNES H. LIPPINCOTT,

Complainant,

and

SAMUEL C. SMITH, ET UX., ET

AL.,

Defendants.

ON BILL, &C., FOR

PARTITION. 10

DEPOSITIONS.

Depositions of witnesses taken in the above entitled cause before John G. Horner, one of the Special Masters in Chancery, at his office, 111 Market street, Camden, New Jersey, on Saturday, the eighteenth day of June, A. D. nineteen hundred and four, at ten o'clock in the forenoon. 20

Appearances:

JOSEPH KAIGHN, ESQ., for Complainant.

DANIEL V. SUMMERILL, JR., ESQ., Sol'r *pro se*.

PETER V. VOORHEES, ESQ., by EPHRAIM TOMLINSON, ESQ., for Rachel Burrough.

WM. B. KNIGHT, ESQ., for the other defendants. 30

CAMDEN COUNTY, ss.

EMMA L. DOUGHTY, being duly sworn according to law, on her oath says: I reside at Haddonfield, New Jersey; I am one of the defendants in this cause; I am a daughter of Samuel C. Smith, deceased; my father died

May 7th, 1872. At the time of my father's death he owned the property described in the bill of complaint and also other property.

At my father's death he left surviving him his widow, who was my mother, Ann W. Smith, and six children, namely, Charles H. Smith, Mary Anna Burrough, Martie A. Lippincott, Emma L. Doughty (myself), Samuel C. Smith and Agnes H. Smith, who afterwards married one Joseph K. Lippincott, Jr.

- 10** My mother, Ann W. Smith, died December 12th, 1902. Charles H. Smith died October 26th, 1899, intestate; he was survived by a widow, Fannie L. Smith, and two children, namely, Charles H. Smith and Edith Smith; of these children, Charles is of age, but Ethel is a minor, being nineteen years old on January 6th last; both are unmarried.

Mary Ann Burrough died December 15th, 1897, intestate, leaving no husband—her husband was pre-deceased—but one child, Joseph A. Burrough, who is married and whose wife's name is Mary L. Burrough.

- 20** Martie A. Lippincott died July 16th, 1873, intestate, leaving a husband, Jacob H. Lippincott, surviving, but no children; Martie never had any children born to her.

I am married; my husband's name is John S. Doughty.

Samuel C. Smith is still living; is married; his wife's name is Sophie J. Smith.

Agnes H. Smith is still living; she has since married and her name is Lippincott, her husband's name being Joseph K. Lippincott, Jr.

- 30** At the time of my father's death he left a will, in which he left his property to be distributed according to the laws of the State of New Jersey.

Shortly after my father's death, to wit, January 23d, 1873, all of the children, with our respective husbands and wives, made and executed and delivered a deed for this property with others unto my mother: "for and during the term of her natural life." Witness being shown a deed, Charles H. Smith and others to Ann W. Smith,

dated January 23d, 1873, and recorded in the Clerk's office of Camden county, N. J., in Book No. 72 of Deeds, page 317, &c., says, "That is the deed we made to mother for life."

The property consists of a brick dwelling house and lot, having a frontage of about sixty feet and a depth of about five hundred feet; the back of the lot is unimproved and has been used as a garden and pasture lot. I have known of this property for over thirty years and I do not think there could be any actual partition thereof on account of the size and nature of the property. The only way an equal and proper partition can be made is to sell the property and divide the proceeds among those entitled. 10

EMMA L. DOUGHTY.

Sworn and subscribed before me this 18th day of June, 1904.

JOHN G. HORNER,
Special Master in Chancery of New Jersey. 20

CAMDEN COUNTY, ss.

EPHRAIM TOMLINSON, alleging himself conscientiously scrupulous of taking an oath, and being duly affirmed says: I was in the office of and managing clerk of Voorhees and Reynolds.

On March 24th, 1897, Rachel Burrough recovered a judgment in the New Jersey Supreme Court against Mary Anna Burrough, for the sum four thousand and four dollars and fifty cents, on bond and warrant, the real debt with costs being two thousand and seventy-eight dollars and thirty cents; Voorhees & Reynolds were the attorneys of the plaintiff. On the same day 30

an execution was issued and delivered to the Sheriff of Camden county, on March 27th, 1897.

On June 9th, 1897, an alias execution was issued and delivered to the Sheriff of Camden county.

Nothing was ever realized on account of or to reduce the debt, interest or costs of the Rachel Borrough judgment.

EPHRAIM TOMLINSON.

10 Affirmed and subscribed before me this 18th day of June, 1904.

JOHN G. HORNER,
Special Master.

CAMDEN COUNTY, ss.

20 WILLIAM D. BROWN, being duly sworn, on his oath says: I am the Under Sheriff of the county of Camden, and actually in charge of the business of the office. On March 4th, 1904, at 12.50 P. M., an execution was delivered to the Sheriff of the county of Camden, at the Sheriff's office, in the suit of Daniel V. Summerill, Jr., against Joseph A. Borrough, in the New Jersey Supreme Court, for nine hundred and twelve dollars and thirty-two cents, damages and costs. On the same day I, as Under Sheriff, made a levy on all the right, title, estate and interest of Joseph A. Borrough, of, in and to the estate of Samuel C. Smith, deceased, being an interest in real estate located at Haddonfield, Camden county, New Jersey. Nothing has ever been received through the Sheriff's office on account of this execution.

WM. D. BROWN.

Sworn and subscribed before me, this 18th day of June, 1904.

JOHN G. HORNER,
Special Master in Chancery of New Jersey.

CAMDEN COUNTY, ss.

RACHEL BURROUGH, alleging herself conscientiously scrupulous of taking an oath and being duly affirmed, says: I live in Camden, New Jersey. I am the plaintiff in the suit of Rachel Burrough against Mary Anna Burrough, in the New Jersey Supreme Court. I placed this matter in the hands of my attorneys, Voorhees & Reynolds, to attend to for me. Since that time I have had nothing to do with it. Since then I have never received anything on account of debt, interest or costs, and the entire amount of the judgment, debt, costs, interest and Sheriff's fees is due. 10

RACHEL BURROUGH.

Affirmed and subscribed before me, this 18th day of June, 1904.

JOHN G. HORNER,
Special Master in Chancery of New Jersey. 20

CAMDEN COUNTY, ss.

DANIEL V. SUMMERILL, JR., being duly sworn, on his oath says: I am the plaintiff in the suit in the New Jersey Supreme Court of Daniel V. Summerill, Jr., plaintiff, versus Joseph A. Burrough, defendant. I recovered the judgment on March 1st, 1904, for nine hundred and twelve dollars and thirty-two cents, damages and costs. I had an execution issued on the same day, and placed the same in the hands of the Sheriff of Camden county, on March 4th, 1904, with instructions to levy on the interest of Joseph A. Burrough in lands in Haddonfield, N. J., being his interest in the lands of which Samuel C. Smith died, seized. I have seen a description of the lands or interest therein levied upon, 30

as attached to the execution as the levy, and these lands as therein described are the same lands as are mentioned and described in the bill of complaint in this case. There is now due on said judgment nine hundred and twelve dollars and thirty-two cents, for damages and costs, with interest from March, 1st, 1904, together, three dollars and ninety-five cents Sheriff's fees.

DANIEL V. SUMMERILL, JR.,

10 Sworn and subscribed before me, this 18th day of June, 1904.

JOHN G. HORNER,
Special Master in Chancery of New Jersey.

Hearing and further taking of testimony adjourned until Monday, the 27th day of June, 1904, at 9 A. M.

JOHN G. HORNER,
Special Master in Chancery.

20

June 27th, 1904, at 9 A. M., the hearing was resumed.

Appearances as before stated.

Joseph Kaighn, Esq., solicitor of the complainant, offered in evidence the following papers:

30 Deed, Jeremiah Willits to Samuel C. Smith, dated March 27th, 1855, and recorded in the Clerk's office of Camden county, in Book 7 of Deeds, page 199, &c.; admitted and marked Exhibit C1.

Deed, Isaac A. Braddock to Samuel C. Smith, dated May 11th, 1868, and recorded in the Clerk's office of Camden county, in Book 55 of Deeds, page 427, &c.; admitted and marked Exhibit C2.

Deed, Charles H. Smith and others to Ann W. Smith, dated January 23d, 1873, and recorded in the Clerk's

office of Camden county in Book 72 of Deeds, page 317, &c.; admitted and marked Exhibit C3.

Certified copy of the will of Samuel C. Smith, deceased, dated April 14th, 1872, admitted to probate before the Surrogate of Camden county, on May 21st, 1872; recorded in said Surrogate's office in Book D of Wills, page 441, &c.; admitted and marked Exhibit C4.

Daniel V. Summerill, Jr., Esq., solicitor *pro se*, offers in evidence the following papers:

10

Certified copy of the record of the judgment recovered in the New Jersey Supreme Court in the case of Daniel V. Summerill, Jr., vs. Joseph A. Burrough, entered March 1st, 1904, for the sum of eight hundred and eighty-two dollars and twelve cents damages and thirty dollars and twelve cents costs; admitted and marked Exhibit D1 for Summerill.

Certified copy of the record of two executions issued out of the New Jersey Supreme Court in the case of Rachel Burrough vs. Mary Ann Burrough, and the records of the levies endorsed thereon and the Sheriff's return; admitted and marked Exhibit C2 for Summerill.

20

Execution issued out of the New Jersey Supreme Court, at the suit of Daniel V. Summerill, Jr., vs. Joseph A. Burrough, and the Sheriff's levy as attached thereto; admitted and marked D3 for Summerill.

JOHN G. HORNER,
Special Master.

30

IN CHANCERY OF NEW JERSEY.

Between

AGNES H. LIPPINCOTT,

Complainant,

10

and

SAMUEL C. SMITH, ET UX., ET

ALS.,

Defendants.

ON BILL FOR PARTITION.

OBJECTIONS TO MASTER'S REPORT.

20

Exceptions taken by the defendant, Rachel Burrough, by Peter V. Voorhees, her solicitor in this cause, to the report made therein, on the fifth day of July, A. D. nineteen hundred and four, by John G. Horner, Esq., one of the Masters of this court, to whom the said cause was referred to ascertain and report the right, title and interest of the respective parties in the premises mentioned and described in the bill of complaint in said cause, and, among other things, to ascertain and report whether the undivided interest or estate of any of the parties to said suit in said land and premises is subject to any lien by mortgage, judgment, decree, devise or otherwise, and if so, to what liens or encumbrances, and by whom they are held, and to ascertain and report the amount due to any party, as aforesaid, who has such lien on the said premises.

30

Exception for that the said Master has reported the share of the defendant, Joseph A. Burrough, primarily subject to the lien of a judgment recovered against Joseph A. Burrough, and secondarily subject to a judgment recovered by Rachel Burrough against Mary Anna Burrough, the ancestor of the said Joseph A. Burrough, and

through whom the lands descended unto the said Joseph A. Burrough.

And the defendant, Rachel Burrough, insists that the judgment recovered by her in the lifetime of the said Mary Anna Burrough, and on which executions were issued in the lifetime of the said Mary Anna Burrough, is a first and prior lien on the share or interest of the said Joseph A. Burrough in the said premises, and that the lien of the judgment of Daniel V. Summerill, Jr., recovered against said Joseph A. Burrough, is subject thereto, and that the interest or estate of the said Joseph A. Burrough in and to the said lands and premises descended to him, the said Joseph A. Burrough, subject to the lien of the judgment of Rachel Burrough against his ancestor, Mary Anna Burrough. 10

Whereas, the said Master has not reported properly, and in which several matters and respects this exceptant prays the judgment of this Court.

PETER V. VOORHEES,

Solicitor of Defendant, Rachel Burrough.

Filed July 5, 1904.

20

Decree for sale made July fifth, 1904, consented to by solicitors for the defendants, Daniel V. Summerill, Jr., and Rachel Burrough, which decree, after reciting the Master's report, says, "and no cause being shown or appearing against confirming said report, except as to the portion thereof which fixes the priority of the liens upon the share of the defendant, Joseph A. Burrough," proceeds to "order, adjudge and decree that the said Master's report and the matters and things therein contained, except as aforesaid, stand ratified and confirmed." After stating the interests of the complainant and other defendants, the decree says: "The defendant, Joseph A. Burrough, is seized in fee of one undivided fifth part of said premises, subject to the inchoate right of dower 30

of his wife, Mary L. Burrough, and also subject to the lien of two certain judgments, one of which is held by the defendant, Rachel Burrough, and the other by the defendant, Daniel V. Summerill, Jr.; that there is due on the judgment of the defendant, Rachel Burrough, the sum of two thousand nine hundred and eighty-six dollars and fifty-two cents, and that there is due on the judgment of the defendant, Daniel V. Summerill, Jr., the sum of nine hundred and thirty-five dollars and four cents." The decree was otherwise in the usual form, with a direction that the premises be sold in the presence and under the direction of Thomas E. French, Special Master.

10

Report of sale.

20

Order confirming sale.

Petition by Fannie L. Smith for sum in gross.

30

Order of reference of Fannie L. Smith; petition to Thomas E. French, Special Master.

Report of Master as to sum in gross.

IN CHANCERY OF NEW JERSEY.

Between

AGNES H. LIPPINCOTT,

Complainant,

and

SAMUEL C. SMITH, ET UX., ET

AL.,

Defendants.

ON BILL, &c.

NOTICE.

10

Gentlemen: Please take notice, that on the third day of October, A. D. nineteen hundred and four, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, before the Chancellor, at the Chancery Chambers, in Camden, I shall make application for an order confirming the report of Hon. John G. Horner, Special Master in the above stated cause, as to the portion thereof which fixes the priority of the liens upon the share of the defendant, Joseph A. Burrough. 20

Dated September 26, 1904.

Your obedient servant,

SAMUEL H. RICHARDS,

Solicitor for defendant, D. V. Summerill, Jr.

30

To JOSEPH KAIGHN, ESQ.,

Solicitor for Complainant.

To PETER V. VOORHEES, ESQ.,

Solicitor for Rachel Burrough.

Acknowledgments of service for complainant and for defendant, Rachel Burrough, are endorsed.

IN CHANCERY OF NEW JERSEY.

10

LIPPINCOTT,

vs.

SMITH.

SYLLABUS.

20

1. The lands of a deceased debtor descend to his heirs-at-law bound for the payment of the ancestor's debts. The heir receives by descent the estate whereof the ancestor dies seized, subject to all its liens and charges.

2. The creditor of the heir cannot, by entry of judgment and levy against the heir, acquire a right to payment from the ancestor's lands in priority to the debts owing by the ancestor, subject to which the defendant heir took his estate.

30

3. The judgment creditor of the heir can, under his judgment, levy an execution on all that belonged to his debtor, but he can take nothing more. He simply represents the debtor, and takes the property as the debtor held it.

4. *Clement vs. Kaighn*, 2 *McCarter*, 47, distinguished.

IN CHANCERY OF NEW JERSEY.

Between

AGNES H. LIPPINCOTT,

Complainant,

and

SAMUEL C. SMITH, ET AL.,

Defendants.

IN PARTITION.

EXCEPTIONS TO

MASTER'S REPORT. 10

MEMO.

In this case, lands situate in Camden county have been sold, and the proceeds of sale distributed by a decree dated the 22nd day of December, 1904, except the portion thereof arising from the sale of the share of the defendant, Joseph A. Burrough, which portion by the same decree has been directed to be paid into this Court, to abide the Chancellor's order as to its further disposition. 20

By the Master's report and the testimony thereto annexed, it appears that Mary Anna Burrough was seized in fee of an undivided one-fifth part of the premises sold; that on the second day of March, 1897, while she was so seized, Rachel Burrough entered judgment in the Supreme Court for \$2,078.30, against Mary Anna Burrough, which then became a lien upon Mary Anna's share. 30

Two executions were delivered to the Sheriff of the county of Camden in the lifetime of the defendant, Mary Anna Burrough, but neither of them appears to have been levied upon the undivided one-fifth part of Mary Anna in the premises sold in this partition suit.

Mary Anna Burrough died intestate on December 15, 1897, and the undivided fifth share of which she was seized in fee descended to her only child and sole heir at law, Joseph A. Burrough.

10 Daniel V. Summerill, Jr., on March 1st, 1904, entered a judgment in the Supreme Court against Joseph A. Burrough, apparently for his individual debt for \$882.00, damages, and \$30.00, costs. On March 4th, 1904, an execution issued on this judgment was delivered to the Sheriff of Camden county, and levied on the estate of the defendant, Joseph A. Burrough, in the undivided one-fifth of the premises sold.

The Master has reported that the share of Joseph A. Burrough is subject to the lien of both the above mentioned judgments, but that the lien of the Summerill judgment is first in order of priority.

20 Exceptions have been filed by Rachel Burrough to the Master's report in this respect, the exceptant insisting that her judgment, (even if the execution is sued upon, it was not levied on the particular undivided one-fifth), became by mere entry and the delivery of executions to the Sheriff, a lien upon all the estate of the defendant, Mary Anna Burrough. That the estate which descended to her heir at law, Joseph A. Burrough came to him charged with the lien of Rachel's judgment, and that the only interest upon which Summerill's judgment could become a lien, or be levied, was that which descended to Joseph A. Burrough, which interest was subject to the lien of Rachel's judgment, as above stated.

20

On these exceptions the matter was heard.

MR. EPHRAIM TOMLINSON and MR. P. V. VOORHEES, for Exceptant, Rachel Burrough.

MR. S. H. RICHARDS, for Respondent, Daniel V. Summerill, Jr.

GREY, V. C.:

It appears in proof, that Mary A. Burrough, in 1873, while seized of a fee simple estate in her share of the lands sold in this suit, conveyed to her mother, Ann W. Smith, an estate therein during her (Ann's) life. The Rachel Burrough judgment against Mary A. Burrough was entered in 1897, and then became a lien upon the fee simple estate which remained in the defendant in that judgment, Mary A. Burrough, but subject to the life estate of Ann W. Smith, previously conveyed to her by Mary A. Burrough. This life estate terminated upon Ann W. Smith's death, in 1902. 10

There can, I think, be no question that Rachel Burrough's judgment became a lien upon the fee simple estate of Mary A. Burrough, the defendant, in that judgment, in any lands in this State, by its mere entry in the minutes of the Supreme Court. That is the declaration of No. 2 of the act concerning judgments. Rev. approved March 27th, 1874, to be found in Genl. Stat. p. 1841. 20

After Rachel's judgment had been actually entered in the minutes, and thus became a binding lien upon the estate of the defendant, Mary Ann Burrough, the latter had no power by any act of her own, save by payment of that judgment, to discharge its lien. She could not discharge it by either her deed or her will. This situation continued during the whole life of the defendant, Mary Anna Burrough. She did not pay Rachel's judgment in her lifetime. Upon Mary Anna's death intestate, her lands descended to her heir at law, charged with the lien of Rachel's judgment. The heir 30

took as a volunteer, simply that of which the ancestor died seized, no more, no less, subject to all its liens and charges. As his ancestor, Mary Anna Burrough could not, in her lifetime, divest the lien of Rachel's judgment, (save by payment), neither could her heir at law, Joseph A. Burrough, discharge it in any other way, for all that descended to him, all that he acquired by the descent, was his ancestor's estate, charged with the lien of Rachel's judgment.

- 10 This was the situation which existed in 1904, when Summerill entered his judgment against the heir, Joseph A. Burrough. As a creditor of Joseph he had the right by his judgment to acquire a binding lien upon the estate which Joseph received from his ancestor, Mary A. Burrough, namely, a fee simple in the lands in question, charged with the lien of Rachel's judgment. A judgment creditor may take and apply that estate in his defendant debtor's property, which his defendant debtor owns, subject to all liens and charges existent upon it, but he can take no greater
- 20 or freer estate or interest in that property than his defendant debtor owns. That is the definition of the judgment creditor's right given by our Court of Appeals in the case of *Herbert vs. Mechanics' B. & L. Assn., 2nd C. E. G., 500*, when it declared that the creditor "can, under his judgment, levy on execution all that belonged to his debtor, but he can take nothing more. He simply represents the debtor, and he takes the property as the debtor held it."

- 30 There is, therefore, no conflict of lien between these two judgments. That of Rachel became, on March 24th, 1897, a lien upon the fee simple estate which Mary Anna Burrough then held in the undivided one-fifth part of the premises in question.

When Mary Anna died, on December 15th, 1897, intestate, her estate, subject to Rachel's judgment, descended to her heir at law, Joseph A. Burrough. Mr. Summerill's judgment, entered March 1st, 1904, against

Joseph is a lien only upon what Joseph acquired by the descent, i. e. an estate in fee in the said undivided one-fifth part, subject to the lien of Rachel's judgment.

Counsel for Mr. Summerill insists that under the provisions of Sec. 9 of the act concerning the sale of lands, &c., (Genl. Stat. p. 2981), and its construction in this court in the case of *Clement vs. Kaighn, 2 McCarter, 47*, by Chancellor Green, it must be held that the plaintiff in a junior judgment, by suing out and actually levying the first execution upon the land, acquires a priority of lien over that of the senior judgment under which no execution has been issued, or if issued, which has not been executed by levying it on the land. This construction given in the case cited, though one of first instance in respect to the extent of its application in the case decided by Chancellor Green, has ever since been accepted as the established law of the State.

The essence of that decision is its interpretation of Sec. 13 of Rev. L., p. 433, which is No. 9, Nix. Dig. 724, and now to be found in Genl. Stat. p. 2981, under the title "Sales of Land." Chancellor Green there held that section to mean that where a judgment was entered against K. and no execution was issued and levied under it, and subsequently another judgment was entered against the same person, under which an execution was recorded and issued and levied on the lands of K, the purchaser buying under the junior judgment and levy acquired a title prior to the lien of the senior judgment, and that this priority operated to postpone the senior judgment to all liens intermediately imposed on the lands between the senior and junior judgments.

The Chancellor placed his decision upon the recital in the preamble of No. 9, to the effect that the design of the statute is to give the plaintiff in the junior judgment, upon which execution is first issued out, "the proper fruits and effects thereof."

In that decision it will be noticed that all the judgments were entered against the same person. They bound the same estate in the lands, and the point to be determined was the effect of the statute upon their priority.

10 In the present case the judgments are entered against different persons and bind different estates. The judgment of Rachel Burrough was against Mary A. Burrough, and bound the estate which Mary A. Burrough had in the lands, at the time it was entered, in 1897. The judgment of Daniel V. Summerill, Jr., was against Joseph A. Burrough, and bound only the estate which Joseph had in the land in 1904. What he had was what descended to him from his mother, Mary A. Burrough, subject to all liens and charges against her estate.

20 The "proper fruits and effects" to which Mr. Summerill became entitled by his judgment was to have the estate in the lands whereof his debtor, Joseph A. Burrough was seized, applied to the payment of his judgment. When this is done, Mr. Summerill will have had the full "fruits and effects" to which his judgment and levy against Joseph A. Burrough entitled him.

30 That the estate in lands of a deceased debtor is charged with a lien to each of his creditors for the payment of his debts, without their having any judgments, was expressly held by the court of appeals in *Haston vs. Castner*, 4 *Stew.*, 699, interpreting the effect of the statute, (Rev. P. 766, No. 70, now L.L. 1898, p. 743, No. 81). The Court declared that the debt of the ancestor continued to be a lien on his lands after descent and until a bona fide sale thereof has been made by the heir.

In view of this declaration of our highest Court, that the estate in lands of a deceased debtor is bound for his debts to his creditor without a judgment, it would be absurd indeed to hold that because the creditor of an ancestor had entered a judgment against him in his lifetime, but did not levy, the creditor should lose his lien for the benefit of the levying judgment creditors of the heir at law.

The trend of the whole policy of all statutory enactment on the subject is to compel the application of the property of decedents to the payment of their debts. The heir takes what is left after the debts of the ancestor have been paid out of his estate. As this is all the heir receives from the ancestor, it is all that the heir's creditors can seize.

The Master erred in holding that the Summerill judgment, execution and levy had priority over the Rachel Burrough judgment, and the exception taken to his report should be sustained. 10

A decree to that effect will be advised.

IN CHANCERY OF NEW JERSEY.

Between

AGNES H. LIPPINCOTT,

Complainant,

and

SAMUEL C. SMITH, ET UX., ET

AL.,

Defendants.

ON BILL FOR

PARTITION.

ORDER ON EXCEP-

TIONS TO MASTER'S

REPORT.

20

This matter coming on to be heard, in the presence of 30
 Samuel H. Richards, Esq., solicitor of the defendant,
 Daniel V. Summerill, Jr., and Peter V. Voorhees and
 Ephraim Tomlinson, solicitors of the defendant, Rachel
 Burrough, and it appearing to the Court that the Master,
 to whom the said cause was referred to report the right,
 title and interest of the several parties in interest in said
 cause, did, among other things, report the share of the
 defendant, Joseph A. Burrough, in said premises primar-

ily subject to the lien of a judgment, execution and levy recovered by the said Daniel V. Summerill, Jr., against him (subject to the inchoate right of dower of Mary L. Burrough, wife of the said Joseph A. Burrough) and secondarily liable and subject to a judgment recovered by the said Rachel Burrough against Mary Anna Burrough, the ancestor of the said Joseph A. Burrough, and through whom the said lands descended, and the said Rachel Burrough, having entered objections to the said Master's report, and the findings of the said Master, as aforesaid, and the Court having heard the same and having determined that the said Master erred therein, and that in fact and in law the said judgment of the said Rachel Burrough was prior in order and a lien upon the estate of Mary Anna Burrough in said lands,

It is, on this thirteenth day of March, A. D. nineteen hundred and five, on motion of Peter V. Voorhees and Ephraim Tomlinson, solicitors of the said Rachel Burrough, ordered, adjudged and decreed, that the exceptions taken to the said Master's report be and the same are hereby sustained, and it is hereby declared and decreed, that the lands held by the said Mary Anna Burrough, in her lifetime and at the time of her death, descended to the said Joseph A. Burrough, primarily subject to the charge and lien of the judgment of the said Rachel Burrough, amounting, at the date of the said Master's report, to the sum of two thousand nine hundred and eighty-six dollars and fifty-two cents, and that the lien of said judgment is prior to any inchoate right of dower of Mary L. Burrough, wife of the said Joseph A. Burrough, in said lands, and that said lands are secondarily charged with the lien of the judgment of said Daniel V. Summerill, Jr., amounting, at the date of the said Master's report, to the sum of nine hundred and thirty-five dollars and four cents, and that said charge is subject to the inchoate right of dower of Mary L. Burrough, wife of the said Joseph A. Burrough, and sale having been made of said lands and the proceeds of said share or portion having been paid to the Clerk of this

court to abide the order of this Court, it is further ordered, that the Clerk of this court pay unto the said Rachel Burrough, the said judgment creditor, or to her solicitor, the said sum of two thousand nine hundred and eighty-six dollars and fifty-two cents, or such portion thereof as may be of said deposit, with the accumulations thereon, after deducting the commissions allowed to him.

W. J. MAGIE,
C.

Respectfully advised.

M. P. GREY,
V. C.

10

IN CHANCERY OF NEW JERSEY.

Between

AGNES H. LIPPINCOTT,

Complainant,

and

SAMUEL C. SMITH, ET UX., ET

AL.,

Defendants.

ON BILL, &C.

NOTICE OF APPEAL.

20

The defendant, Daniel V. Summerill, Jr., hereby appeals from an order or decree made in the above stated cause on the thirteenth day of March, nineteen hundred and five, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

30

SAMUEL H. RICHARDS,
Solicitor for and of Counsel with Defendant.
Daniel V. Summerill, Jr.

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

SAMUEL H. RICHARDS,
Of Counsel with Defendant, Daniel V.
Summerill, Jr.

[ENDORSED.]

10

Due service acknowledged 3-17, '05.

EPHRAIM TOMLINSON,
Solicitor for Defendant, Rachel Burrough.

Severance of complainant and all defendants except
Daniel V. Summerill, Jr., and Rachel Burrough from
20 appeal; filed March 30, 1905.

NEW JERSEY COURT OF ERRORS AND AP- PEALS.

Between

AGNES H. LIPPINCOTT,

Complainant,

and

SAMUEL C. SMITH, ET UX., ET

AL.,

Defendant,

DANIEL V. SUMMERILL, JR.,

Appellant.

APPEAL FROM

COURT OF CHAN-

CERY.

10

20

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

The petition of Daniel V. Summerill, Jr., the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, William J. Magie, Chancellor of the State of New Jersey, bearing date the thirteenth day of March, nineteen hundred and five, wherein Agnes H. Lippincott is complainant and Samuel C. Smith and others are defendants, in this respect, that the said order adjudges that the exceptions taken to the Master's report in said cause are thereby sustained, and also declares and decrees that the lands held by Mary Anna Burrough, in her lifetime and at the time of her death, descended to the defendant, Joseph A. Burrough primarily, subject to the charge and lien of the judgment of the defendant, Rachel Burrough, and also adjudges that the

30

lien of the judgment of said Rachel Burrough is prior to any inchoate right of dower of Mary Anna Burrough, wife of said Joseph A. Burrough, in said lands, and that said lands are secondarily charged with the lien of the judgment of said Daniel V. Summerill, Jr., and that the said charge is subject to the inchoate right of dower of Mary A. Burrough, wife of said Joseph A. Burrough, and did further order and adjudge that the Clerk in Chancery pay unto said Rachel Burrough, or to her solicitor, 10 the sum of two thousand nine hundred and eighty-six dollars and fifty-two cents, or such portion thereof as may be of said deposit by accumulations thereof, after deducting the commissions allowed to him.

Your petitioner humbly appeals from the said order of the Chancellor, upon the ground that the same is erroneous, for that the said order should have confirmed the Master's report and should have found that the judgment of the defendant, Daniel V. Summerill, Jr., was a 20 lien upon the fund in court prior to and ahead of the lien of the defendant, Mary Anna Burrough, and should have ordered the amount of the Summerill judgment paid out of the moneys in court.

Your petitioner therefore prays that the said order of the Chancellor may, in the particulars aforesaid, be reversed, set aside and for nothing holden, and that your petitioner may have such further relief in the premises as to this Honorable Court shall seem meet.

SAMUEL H. RICHARDS,
Solicitor and of Counsel with Appellant.

30

[ENDORSED.]

Acknowledgment of service filed March 30, 1905.

NEW JERSEY COURT OF ERRORS AND AP-
PEALS.

Between

AGNES H. LIPPINCOTT,

Complainant,

and

SAMUEL C. SMITH, ET UX., ET

ALS.,

Defendants.

DANIEL V. SUMMERILL, JR.,

Appellant,

and

RACHEL BURROUGH,

Respondent.

10

20

The answer of the above named respondent to the petition of appeal of Daniel V. Summerill, Jr., the above named appellant.

30

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that an order was, on the thirteenth day of March, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition,

as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said order is agreeable to equity, and she prays that the same be affirmed, with costs to be adjudged to this respondent.

PETER V. VOORHEES,

Solicitor for and of Counsel with Respondent.

10

20

30

