N. J. Court of Errors and Appeals

BRAMHALL, DEANE & CO., *Co-Respondents,* *vs.* ALISON E. HUTCHINSON *et al.*, *Appellants.*	*In Partition.*

Statement of Facts.

February 21st, 1882.—Lease from James A. Bradley to William W. McChesney and John B. Hutchinson (we claim as tenants in common). See Printed Case, page 100.

May 7th, 1883.—Bramhall, Deane & Co. recover their judgment in the Monmouth Circuit against William W. McChesney.

October 1st, 1883.—McChesney conveys his undivided half of leasehold to his co-tenant Hutchinson by assignment recorded October 2d, 1883, in County Clerk's Office, Book 372 of Deeds, page 179.

October 8th, 1883.—Hutchinson (John B.), to his father, Alison E. Hutchinson, by assignment of lease. Recorded October 15th, 1883, Book 372, page 271, &c. (as per directions of A. E. H. See Printed Case, page 38, line 22).

December 7th, 1883.—McChesney's undivided half sold complainants by execution upon their judgment (Deed dated January 4th, 1884).

January 2d, 1884.—Defendant Beakes recovers judgment.

April 5th, 1884.—Attempted levy thereon. (See p. 24, line 8.

As to lien of the defendant (appellant) A. E. Hutchinson's chattel mortgage on the lease hold. The question is settled.

Jones on Mortgages, 3d ed. (1882), Vol. I., p. 377, § 471.
Jones on Chattel Mortgages, page 258, side-paging 280.
See Decker *v.* Clarke, 26 N. J. Eq., 163.
9 Stew., 199.

In the second place, if this chattel real was partnership property, as alleged (which we deny), W. W. McChesney and John B. Hutchinson held it in *joint tenancy*, but it was not "so expressly set forth" in the lease. See page 100 of Printed Book, and see also *Revision of 1877, page 167, § 78.* But where deeded as here, "the title at law rests in the partners individually." *Ensign v. Briggs, 6th Gray (Mass.), 329.* And "a purchaser without notice would not be bound." *Tiffany and Bullard, Trusts and Trustees, p. 98.*

But if ever firm property, was it so January 2d, 1884, when Beakes recovered judgment? The record showed no title in either member of the putative firm. The record title was in A. E. Hutchinson (subject to our lien), by an assignment of lease of which he had notice and which was placed on record by his direction. See page 38, line 22, *et seq.*

No proceedings have ever been instituted to set aside these conveyances, and even if Alison E. Hutchinson is allowed to repudiate his deed, which we claim he should not be allowed to do, from John B. Hutchinson, there still remains the deed to John B. Hutchinson from McChesney before the property can be relegated to the status of partnership property.

We claim that even if all these objections are overcome that the judgment creditor of the individual member of the firm has the legal right to satisfy his judgment out of his debtor's interest in the firm property, and that a Court of Equity *never* interferes except upon the application of the other members of the firm or their legal representatives; never for a simple creditor.

"Before judgment and levy, creditors of a firm have no lien."

Greenwood v. Brodhead, 8 Barb., 596.
Freeman v. Finnall, 1 S. & M. Ch. Miss., 627.
9 N. J. Eq., 466. 17 N. J. Eq., 262.
Robb *v.* Stevens, 1 Clarke, Iowa, 198.

Not only is there "no lien" before execution, but there is no equity before execution is issued.

Story on Partners, 7th ed., §§ 358, 359, and note.

Note that the levy attempted April 5th, 1884, under the Beakes judgment was nugatory, no title in either defendant.

Belford v. Crane, 1 C. E. Gr., 265,

Claims of partnership creditors cannot be preferred

to those of the individual partners, unless there is bankruptcy or insolvency of the firm.

Washburn v. Bank, 19 Vt., p. *278.*
7th Iowa, 183. 13 Md., 102.

124 Mass 1 26 Geo 2d 568

And a bona fide assignment of the rights and interest of a partner in the partnership property would defeat this so-called lien of the partnership creditors.

10 10 Ves., 347. 13 Ala., 846. 35 Iowa, 323. 8 Ired., (Eq.) 21.

Nor is the effect of a conversion of the joint into separate estate "altered by the circumstance that at the time it took place the partners knew that the firm was insolvent."

Collyer on Partn., 6 Ed., Vol. 2, p. 1447, §916, (see V. C. opinion, p. 90, line 14.)

Marks v Hill 15 Gratton 400

20 "While the copartners are administering their own funds, the copartnership creditors have no specific or preferable lien upon the joint funds." * * * "While the partners have the legal control of their property they may distribute it as they see fit among all their creditors, provided they deal justly by all, and each partner with the assent of his companions has the corresponding right to give his individual creditors a preference in payment out of the effects of the firm, 30 which between him and his copartners and with reference to the debts for which they are all jointly liable is legally his own property."

Willard's Eq. Juris., (Potter ed.,) p. 719.

"The only thing approaching a lien is the equity between the partners, which, upon the application of a member of the firm or his representative, may be made available."

40 *Story on Partnership, § 360 and notes.*

And then "it is only through the lien of the partners."

Sanderson v. Stockdale, 11 Md., 573.
Holloway v. Turner, 61 Md., 217.
Mayer v. Clarke, 40 Ala., 259.

"Partnership creditors have a claim to priority of payment out of the joint funds so long as they continue to be joint, *but no specific lien, legal or equitable, upon them a priori*, the only lien belonging to the partners."

Allen v. The Center Valley Co., 21 Conn., 135.

But, "A partner by his sale, loses all equitable lien on partnership property."

Vosper v. Kramer, 4 Stew., 420.

And so "upon the dissolution of a partnership the firm property may for a valuable consideration, be sold and transferred to one of the partners, and when thus disposed of, *it is not followed by, nor subject to the claim of the partnership creditors*, as a fund out of which they are to be paid, and this rule prevails even though the partner so acquiring the property assumes the payment of the partnership debts."

City of Maquoketa v. Willey, 35 Iowa, p. 323.

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"The doctrine that the separate debt of one partner shall not be paid out of the partnership estate until all the debts of the firm are discharged is correct, *but* it does not apply until the partners cease to have a legal right to dispose of their property as they please. It is applicable only when principles of equity are brought to interfere in the distribution of the partnership property among the creditors. Those equitable principles operate on the property *remaining in the*

possession of the parties, and embrace all that has been *fraudulently disposed of.*"

McDonald v. Beach, 2 *Blackf.*, (*Ind.*) *p.* 55.
(Approved 2 *C. E. Green. p.* 262.)

Case v Beauregard 99 U.S. 119

The property in this suit is not "remaining in the possession of the partners," nor had it "been fraudulently disposed of."

McChesney's interest could be levied on.

Hill v. Beach, 1 *Beasl.*, *p.* 31.

At the time of complainant's levy and sale, no one had any lien or equity upon the property, unless it was John B. Hutchinson, and he did not assert any.

Young v. Frier, 1 *Stock.*, 465.
Mittnight v. Smith, 2 *C. E. Gr.*, 259.

The rule is one "which prevails in Courts of Equity in the distribution of equitable assets only. Those Courts have *never* assumed to exercise the power of setting aside or in any way interfering with an absolute right of priority obtained at law. In regard to all such cases the rule is *equitas sequitur legem.*"

Meech n. Allen, 17 *N. Y.*, *p.* 300, 302.
1 Story's Eq. Juris., § 553.
National Bank *v.* Sprague, 5th C. E. Gr., p. 30.
Howell *v.* Teel, 2 Stew., p. 302.

And so too "the principle that the separate creditors of each partner are entitled to be first paid out of the separate estate of their debtor, before the partnership creditors can claim anything, cannot apply to creditors who have secured their debts by judgment and execution liens."

Wisham & Kay v. Lippincott, 1 *Stock.*, 353.

"Upon the creditors of the firm," as we read in *Cammack v. Johnson, 1 Green., page 171*, "there is no other hardship than that which occurs continuously, when one creditor is preferred by his debtor over another. The law authorizes this preference if obtained by way of judgment, and it is practised every day."

"An execution against a firm has the preference over one against an individual partner, but when property is sold on an execution against a partner, though after the delivery of the execution against both partners, it is a valid sale, if sufficient time had not elapsed for an advertisement and sale under the other execution."

Fenton v. Folger, 21 *Wend., N. Y.*, 676.

We contend for what the American Annotator in Collyer on Partnership (H. G. Woods), 6th ed., p. 1150, says, "would seem to be the true rule," as established in *Sanders v. Young*, 31 *Miss., p.* 112, where it was held that "the legal interest of a partner may be levied on, and taken possession of by the Sheriff on execution and attachment, which is the partner's proportionate share of the partnership property, *and not* his share of what remains after the firm debts are paid, but that the solvent partners may, while the Sheriff is proceeding, file their bill in equity, and upon proper showing, limit the creditor to the actual interest of such partner after a settlement of the partnership debts.

See also Collyer, page 1148.
8, Clarke, Iowa, 13.
18, B. Monroe, Ky., 463.
12, Cal., 199.

There is no evidence in this case of fraudulent conveyance, and before the recovery of the Beakes judg-

ment, or the interference of the Court of Equity, the chattel real had passed out of the possession of the alleged firm. Neither partner has asked to have the property applied as firm property. And by *decree pro confesso* against both, they are concluded upon the question of its being firm property at all.

Nor do we think there is competent proof of the alleged partnership (page 49, lines 1–20). Certainly none that the scope of the partnership included the chattel real. Nor do McChesney or John B. Hutchinson, either or both, in any document executed by them, in relation to the building and leasehold, execute the same, or style themselves as a firm, but individually (see assignment of lease William W. McChesney to John B. Hutchinson, assignment of lease John B. to Alison E. Hutchinson), and even in the chattel mortgage given by William W. McChesney and John B. Hutchinson to Alison E. Hutchinson June 16th, 1882, there is no sign of any firm. Nor yet in the original lease from James A. Bradley, page 100. Nor are the firm books of account introduced, to show what, if any connection, there was between the conduct of the business of the firm and the erection of the building, nor yet are the firm creditors and the firm assets all before the Court, as they should be, to apply the principle contended for on the other side, or any other equitable principle.

Wherefore, the co-respondents, Bramhall, Deane & Company, insist that the appellant's prayer that our bill filed herein should be dismissed, should not be granted, for that complainants (B., D. & Co.) are entitled to one-half of the funds in the Sheriff's hands, with their reasonable costs.

JAMES STEEN,
Of Counsel for BRAMHALL, DEANE & CO.

J. J. Griffiths, Printer, 38 Montgomery St., Jersey City.

N. J. COURT OF ERRORS & APPEALS.

Between—
Alison E. Hutchinson and Sarah C. Hutchinson,
Appellants.

and

Charles H. C. Beakes and others.
Respondents.

On appeal from Court of Chancery.

BRIEF FOR RESPONDENT CHARLES H. C. BEAKES.

I.

The Court was right in making a decree determining the interests of the parties before it; in the fund in the hands of the sheriff.

At the time of settling the decree it was urged on the part of the appellants that the bill having been filed for partition of the property which afterwards was represented by the fund in the sheriff's hands, and the Vice Chancellor having decided that the complainants had no interest in the fund, the only decree that could be made was one dismissing the bill.

A brief review of the case will, it seems to us, show clearly that this contention is incorrect.

The complainants filed their bill for partition of the leasehold of William W. McChesney and John B. Hutchinson, alleging that they owned an undivided one-half by virtue of a conveyance from the sheriff under an execution issued upon a judgment obtained by them against McChesney in May, 1883. Alison E. Hutchinson was made defendant as the owner of the other undivided half by virtue of a conveyance of that interest alleged to have been made to him by John B. Hutchinson. Alison E. Hutchinson answers denying such conveyance to him (p. 11, line 26), and charging that McChesney and John B. Hutchinson were partners, that the leasehold and the building erected by them on the premises were partnership property and subject in equity to the payment of the partnership debts, and that the conveyance to the complainants did not vest in them an undivided half interest in the property, but only an interest subject to the payment of all partnership debts (p. 10, line 29) He charges that he is a partnership creditor by virtue of a chattel mortgage for $2000 executed to him in June, 1882, covering the building erected on the premises (p. 6, line 34), and that there are other creditors of the firm, mentioning particularly the respondent Charles H. C. Beakes by reason of a judgment against the partners obtained in January, 1884 (p. 9, line 39), and he insists that such partnership creditors are proper and necessary parties, and that the complainants should not be allowed to proceed further until those should be brought before the Court (p. 12, line 27). He also refers to a mechanic's lien judgment against the building and premises, which had been set forth in the bill as a paramount lien, and states that under an execution issued upon it, the building and premises will soon be sold (p. 11, line 18).

In accordance with the insistment of the answer, and, as we are informed, by direction of the Court, made at the instance of the appellants, a supplementary bill was filed (pp. 16, *et seq.*) making the suggested creditors parties and setting forth that since the filing of the original bill the premises had been sold under the mechanic's lien judgment, and a surplus of $1258.67 had been realized which the complainants prayed should be brought into Court. In this bill the complainants denied the validity of the chattel mortgage to Alison E. Hutchinson, and also of that held by Sarah C. Hutchinson, which had been set up in the answer.

The respondent Charles H. C. Beakes was brought before the Court upon the filing of this supplemental bill. He filed an answer (pp, 21 *et seq.*) charging that the premises were partnership property, setting forth his lien by virtue of his judgment and execution, denying the validity of the alleged liens of Alison E. Hutchinson and Sarah C. Hutchinson, and insisting that the surplus money in the hands of the sheriff should be applied in discharge of the partnership debts, and that his judgment was first in order and priority and should be first paid.

Upon the issue so framed the cause was heard by Vice-Chancellor Van Fleet. It will be observed that the testimony on the part of the appellants was directed almost exclusively to two points: *First*, that the premises were partnership property, and, *second*, not simply that there were partnership creditors, but that the chattel mortgages were valid liens upon the surplus money in the hands of the sheriff, and that as such they were prior liens to the judgment of the respondent Charles H. C. Beakes. This the record shows; it is needless to add, what the record cannot show, that the counsel for the appellants urged with great persistence that the Court should decree to his clients the surplus money, which was the sole object of controversy.

Thus it appears that the appellants, after insisting that the partnership creditors should be made parties,after urging that the property in dispute was subject to partnership debts, and that their claims were partnership debts,after occupying the time of the Court in taking testimony to show not only the above insistments, but also that as between the partnership creditors, *they* were to be preferred, and after having urged all these demands upon the attention of the Court and having asked that a decree be made giving to them the money in the hands of the sheriff; when the Court grants all they ask, except that they should be preferred to another partnership creditor, they say that the time has been wasted, that the Court could make no decree except to dismiss the bill, could determine nothing except as to who should pay costs.

The matters decided being such as the Court had jurisdiction to determine, and having been urged upon the attention of the Court by the appellants themselves, it is not for them now to say that those matters should be entirely disregarded and a decree made simply dismissing the bill.

In addition to this, however, it appears that the question as to the right of the creditors of the partnership to be first paid out of the fund in the sheriff's hands was distinctly placed in issue by the complainants. In the supplemental bill (p. 18, line 24) they say " that said Alison E. Hutchinson, Sarah C. Hutchinson, George W. Mann, Charles H. C. Beakes, William W. McChesney and John B. Hutchinson give out and pretend that the premises described in complainants' original bill were partnership property, and that the creditors of the alleged partnership are entitled to be first paid out of the proceeds of the sale that may remain in the hands of the sheriff aforesaid, whereas your orators expressly allege and insist that the contrary thereof is true," &c. Thus the

Court was called upon by the complainants to determine whether the general creditors should be first paid out of the fund. How could it determine that by dismissing the bill?

It cannot be said that the power of the Court under such an issue was limited to deciding that general creditors should be paid first. Those creditors, as defendants, were at issue as to priorities between themselves. In a Court of Equity a decree may be made determining the rights of co-defendants in a controversy between themselves, in which the complainant has no interest.

Vanderveer v. Holcomb, 2 *C. E. Gr.* 547.
Shannon v. Marselis, *Saxt.* 413.

The supplemental bill clearly brought these questions before the Court, and all the parties were before the Court. If the bill should be dismissed, the matters settled by this decree would have to be litigated anew. As was said by Chief Justice Ewing, sitting for the Chancellor, in *Decker vs. Caskey*, *Saxt.* 427, "It is the desire as well as the duty of this Court never to do justice by the halves; never merely to beget business for another Court, and never, when a case is fairly within its jurisdiction, to leave open the door for litigation farther or in any other place, if it can possibly be here closed."

Putting the case in the strongest possible light for the benefit of the appellants—leaving aside the inconsistent positions assumed by them, and leaving aside the issues raised by the supplemental bill—their claim is distinctly denied by Chancellor Green in the case of *Blair vs. Porter*, 2 *Beas.* 267. In that case the Chancellor was of the opinion that in strictness the bill should be dismissed; but he refused to do so, saying: "The fund is in Court and under its control. All the necessary parties are before the Court. Their rights may be

definitely settled and fully protected by a final decree. The effect of dismissing the bill would be to leave the parties, after five years of fruitless controversy, with nothing settled but liability for costs, to commence litigation anew."

As the complainants have not appealed, the questions as to the rights of the general creditors as against the creditor of an individual member of the firm do not arise and will not be discussed.

II.

The Court was right in decreeing that the money in the hands of the sheriff should be applied to the payment of the judgment of respondent Charles H. C. Beakes.

First. The building erected by the partners was incorporated into and became part of the land.

The building was erected upon brick foundations, and is clearly part of the land unless it can be brought within the rule concerning trade fixtures. The rule allowing a tenant to remove trade fixtures is founded principally, if not solely, on the ground that the tenant makes the annexation with the intention that it shall be for the purposes of his trade, and, as his interest in the land is only temporary, that it shall not be a permanent accession to the realty.

Ewell on Fixtures, p. 89.

Therefore the intention with which the building was erected is always a material inquiry, and from evidence of such intention the character of the building, whether it is a trade fixture or part of the land, will be determined.

Linahan vs. Barr, 41 Conn. 471.

Here there is no room for doubt as to the intent. The lease was of a lot in Asbury Park, 120 feet by 50 feet, for the term of twenty years at the yearly rental of fifty dollars. It contained the following covenant (p. 101, line 13): "It is also made a part of this lease, that, unless the parties of the second part shall erect on the lot within four months from the date hereof a building 30x60, three stories high, then this lease to be void." The tenants erected a building 30x60 and three stories high (testimony of Alison E. Hutchinson, p. 39, line 4). Mr. Hutchinson, the appellant, swears that he supposes they were compelled to build it (p. 39, line 21). It is very clear that they were so compelled by the covenant in the lease. Instead of erecting this building for the temporary purposes of their trade they did so because the lessor required them to make this accession to his land as a consideration for the demise.

Second. The building being a part of the land the chattel mortgage to Alison E. Hutchinson for $2000 constitute no lien whatever.

A chattel mortgage on realty is no lien, even as against persons having full notice of its existence.

Richardson vs. Copeland, 6 Gray, 536.

In the case cited Chief Justice Gray held that certain machinery was so affixed to the land as to become part of the realty, and that a chattel mortgage covering it had no validity, although the creditors against whom it was sought to be established, had knowledge of its existence. Counsel for appellant Alison E. Hutchinson urged that the respondent Beakes was bound by this mortgage because he was informed that there was a chattel mortgage on the building. Mr. Beakes denies this (p. 76, line 20), but if such notice had been given it could not have

the effect contended for. Stating it most strongly for the appellant, Mr. Beakes was notified that Alison E. Hutchinson had a chattel mortgage on the building; a chattel mortgage on the building is no lien; therefore Mr. Beakes was notified that Alison E. Hutchison had no lien.

It cannot be maintained that this mortgage is a valid incumbrance on the interest of the lessees in the building. The mortgage does not profess to convey such interest. It covers the building itself as a personal chattel. Besides, a chattel mortgage is an instrument incumbering a personal chattel only. It has no more efficacy as a lien on a leasehold interest in lands than as a lien on the land itself. Chancellor Runyon, in *Decker vs. Clarke, 11 C. E. Gr. 163*, held that the chattel mortgage act, which embraces "every chattel mortgage," refers only to mortgages of chattels personal, and does not include a mortgage of a leasehold interest in lands. See also, *Spielmann vs. Kliest, 9 Stew. 199.* The statute concerning leases for more than two years (*Rep., p. 157*), indicates the manner in which leasehold interests are to be incumbered. If this should be considered a mortgage of the interest of the lessees in that building what would be the result? Suppose the mortgagee foreclosed his mortgage, what does the purchaser at the sale acquire? He is unable to take the building away because it is part of the land; he is unable to use it in any way, because as soon as he enters it he becomes a trepasser on the land underneath.

Third. If the building is a chattel, and the mortgage of the appellant Alison E. Hutchinson a valid lien upon it, he certainly has no interest in the surplus money in the hands of the sheriff. That money was raised at a sale under an execution commanding the sheriff to make sale of certain lands.

He had no authority to sell anything else, and the money in his hands must be regarded as the proceeds of the sale of realty. *Arnett v. Finney*, 2 *Stew.* 309. A chattel mortgagee can have no interest in such proceeds.

Fourth. The ~~respondent~~ appellant Sarah C. Hutchinson has no interest in the fund in the hands of the sheriff.

The chattel mortgage assigned to her purports to cover a steam engine, boiler and apparatus, the building and the leasehold interest in the land (p. 8, line 25). This is in the same situation as the mortgage of Alison E. Hutchinson. If the engine and boiler are parts of the land the mortgage is no lien; if they are chattels they have not been sold. There is no pretence of any notice to Beakes of this mortgage, except that there was some claim against the machinery.

The only creditor of the partnership establishing any lien upon the fund was the respondent Charles H. C. Beakes by virtue of his judgment and levy. He was therefore entitled to have the money applied to the payment of his debt.

BABBITT & LAWRENCE,
Solicitors for and of Counsel with
CHARLES H. C. BEAKES.

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NEW JERSEY

Court of Errors and Appeals.

Between

Alison E. Hutchinson and Sarah C. Hutchinson, Appellants,

and

Charles H. C. Beakes, et als., Respondents.

On Appeal.

BRIEF OF ACTON C. HARTSHORNE, OF COUNSEL FOR APPELLANTS.

This suit was originally brought by Royal E. Deane and George G. Brooks, partners, &c., for a ~~portion~~ partition of a leasehold interest, but during its pendency the estate sought to be partitioned was sold at Sheriff's Sale, under a judgment on a mechanics' lien, paramount to the rights of any of the parties to this suit.

Subsequent to this sale the complainant filed a supplementary bill praying the same relief as to the surplus realized at the Sheriff's Sale as they had in their original bill to the leasehold interest described therein.

The defendant, Charles H. C. Beakes, was not made a party to the original bill, but was brought in by the supplemental bill, and made a party defendant.

The defendant, Alison E. Hutchinson, gave notice to dismiss both the original and supplemental bill, for want of equity.

The motion to dismiss was refused, and testimony was taken under the bill and answers, and the Chancellor thereupon decreed that the Sheriff pay out of the surplus

amounting to $1258.67

moneys remaining in his hands, to the defendant, Charles H. C. Beakes, the amount due on his judgment, together with his costs of this suit, and that he pay the balance of such surplus moneys to the defendant, John B. Hutchinson.

From this decree the defendants, Alison E. Hutchinson and Sarah C. Hutchinson, have appealed.

It is insisted in the first place, on behalf of the appellants that the complainants' bill should have been dismissed:

First. Because between the filing of the original and the supplemental bill, the premises sought to be partitioned had been sold under a judgment which was paramount to the rights of any of the parties to this suit. This being the case, the complainant had an adequate remedy at law. The court in which the judgment was obtained, and out of which the execution, issued had full power and control over the moneys realized thereon, and on application to that court by this complainant for the payment to him of the surplus money realized at the sale under the execution, his own as well as the rights of all the parties to this suit would have been fully and amply protected.

Second. Because the testimony conclusively discloses that the complainants are not entitled to the relief prayed for, nor to any relief. On this point the Vice Chancellor in his opinion covers the whole ground. He says: "The complainants also make a claim to a part of the moneys in question. They recovered a judgment against one of the lessees (Wm. W. McChesney), on the seventeenth of May, 1883. Their judgment is founded on a debt contracted by McChesney as an individual, and prior to the foundation of the partnership. The complainants, soon after the recovery of their judgment, caused a levy to be made upon McChesney's interest in the demised premises, and subsequently purchased the same at sheriff's sale. On the eighth of October, 1883, McChesney sold and conveyed all the assets of the partnership, including the lease, to his co-partner, his co-partner stipulating to pay all the debts of the firm. McChesney received no other consid-

eration for his transfer. The complainants had levied upon McChesney's interest in the demised premises long prior to McChesney's transfer to his co-partner, but they can stand no higher than McChesney did; whatever rights they have they derived through McChesney. By their purchase they simply took his place. He was entitled to nothing until the partnership debts were paid, and the complainants are in no better plight. The firm was hopelessly insolvent when McChesney conveyed his interest to his co-partner. The facts before the court leave no doubt on that subject."

Upon this point there can be no doubt of the correctness of the facts found by the Vice Chancellor, or of his deductions therefrom.

This being the case there was no other course left but to dismiss the bill.

The appellants did not ask for affirmative relief, *neither did the defendant, Charles H. C. Beakes, ask for affirmative relief against the appellants, or either of them.*

The answer of Beakes is only an answer to the bill of complaint. There is no cross bill or answer in the nature thereof to the answer of the appellant, Alison E. Hutchinson, and no affirmative relief against him properly raised in the pleadings, and not being within the issue the bill should have been dismissed.

Brinkerhoff v. Franklin, 6 *C. E. Green*, 334, 337.

Hoff v. Burd, et als, 2 *C. E. Green*, 201.

Shannon v. Marselis, et als, Saxton, 413.

But, admitting that under the pleading this is a proper case to determine which of the parties is entitled to the surplus moneys, it is insisted that under the proofs taken in the cause that the appellants are entitled to priority of payment.

It appears in the case, beyond dispute, that on February 21st, 1882, James A. Bradley demised by lease, under seal, to William W. McChesney and John B. Hutchinson, a lot of land at Asbury Park for a term of twenty years, for the annual rental of fifty dollars, together with the payment of all taxes and assessments levied upon the demised premises. It was also made a part of the lease,

that unless the lessees should erect on the lot, within four months from the date thereof, a building 30x60 ft., three stories high, then that the lease should be void. And that, at the expiration of the said term, they would quit and surrender the premises thereby demised in as good state and condition as reasonable use and wear thereof would permit. Just before the lessees took the lease they formed a co-partnership to carry on the business of manufacturing and selling ice-cream, which business continued till the month of September, 1883, when they dissolved. Within the time limited the lessees, for the purpose of carrying on their business, erected the building they were required to erect by the terms of their lease. Two thousand dollars of the money expended in its erection was borrowed for that purpose of the appellant, Alison E. Hutchinson, upon the agreement that they were to secure him therefor by a first mortgage on the property. At that time McChesney said "there was nothing against the property and nothing against him, so that would make him all safe." In pursuance of such arrangement they, afterwards, on the sixteenth of June, executed a chattel mortgage to Alison E. Hutchinson. The only property mentioned in the schedule to the chattel mortgage is this building. The mortgage was recorded in the Clerk's Office of Monmouth county, in Book No. 4 of Chattel Mortgages, page 410, on the 17th of June, 1882. The judgment of the complainants against William W. McChesney, individually, and the judgment of the defendant, Charles H. C. Beakes, against the firm of McChesney & Hutchinson, were both recovered subsequent to the execution and record of this chattel mortgage.

It will thus be seen that the claim of Alison E. Hutchinson is for moneys advanced by him in the erection of the very building from which the surplus money in this case was created, and that it was the intention of both the mortgagors and mortgagee to secure this claim by this chattel mortgage, which was intended to be a first lien upon the building therein described. This certainly presents a very strong equity in favor of this appellant, and when it is remembered that the other claimants to the

fund are subsequent creditors, the court will require a very clear case to defeat this just and equitable claim.

Upon this point we insist that the building mentioned in the schedule annexed to the chattel mortgage was a personal chattel. It was a trade fixture so intended by the parties to the lease, and this intention has been declared and confirmed in the most unequivocal manner, both by the lessees and this appellant, in the giving and taking this chattel mortgage. And we insist that if the lessor does not object to the treatment of this building as a trade fixture or personal chattel, it does not lie in the mouth of these subsequent creditors to make that objection, especially when they both had actual as well as constructive notice of the existence of this chattel mortgage before the recovery of their respective judgments, as appears in this case.

The chattel mortgage made by McChesney & Hutchinson to Alison E. Hutchinson, June 16, 1882, covers only the building.

This building is a personal chattel. It was put upon the property by the tenants with the consent of the landlord, (see lease James A. Bradley to McChesney & Hutchinson), and is removable at any time before the expiration of the lease. A recent case is that of *Ham v. Kendall*, 111 *Mass.*, 297.

In December, 1866, Lucias Angier made an oral agreement with William Cumston, who was then the owner of the premises, that he might put an ice-house thereon, and that it might remain there five years, and he built the ice-house accordingly. In order to set the building the earth was dug away and levelled, and the floor was laid upon stones and posts placed on the ground.

Angier sold the ice-house to the defendant Kendall; Cumston afterwards conveyed the premises to the plaintiff by a warranty deed dated January 1, 1868, in which he covenanted that they were free from all encumbrances, "except permission to Mr. Angier to have his present ice-house on the premises for five years from the time he built it." Kendall subsequently, without the plaintiff's knowledge, sold the building to the defendant Walcott,

both Kendall and Walcott then knowing that the plaintiff had become the owner of the land. In November, 1871, Walcott entered upon the premises and removed the ice-house after he had been forbidden to do so by the plaintiff. The other defendants assisted him, at his request, in the removal. The ice-house was worth $550 at the time of removal. The superior court ordered judgment for the defendants, and the plaintiff appealed.

By the Court.

When the ice-house was erected upon the land under the agreement, it was personal property. The sales, whether of the land or the building, did not change its character in this respect. No notice to remove it was given to its owner, and he had a right to go upon the land and remove it, and appropriate the materials to his own use."

Taylor vs. Townsend, 8 *Mass.*, 416.

The intention of the parties must govern.

See Brearly vs. Cox, 4 *Zab.*, 289.

Blancke vs. Rogers, 11 *C. E. Gr.*, 563, *and numerous cases cited.*

Vorhis v. McGinnes, 48 *N. Y.*, 278.

Pope vs. Skinkle, 16 *Vroom*, 39, *and cases therein cited.*

Wood's Landlord Tenant, §§ 523, 528, 529.

It was clearly the intention that this building should be treated as a chattel. Mr. Bradley, in his lease, procures a covenant that the premises shall be returned to him in the same condition as they then were, wear and tear, &c., excepted. There were buildings at that time on the premises which were afterwards removed by the lessee, or Bradley. (See Page 59). McChesney & Hutchinson treat it as a chattel. They mortgage it, (not the leasehold interest) as a chattel to Alison E. Hutchinson, observing the strict rules governing chattel mortgages.

Where the landlord, tenant and mortgagee all treat the building as a chattel, a judgment creditor shall not be allowed to call it reality if its nature be in doubt.

A question akin to the present was considered in *Pope vs. Skinkle*, 16 *Vr.*, 41. I quote from the opinion of Judge Dixon: The defendant contends that when one person

erects a building on the lands of another, by the mere permission of the land owner, nothing further appearing, the building thereby becomes realty by presumption of law. But we think no such presumption arises. The case presented by these circumstances would be one for an inference of fact, not a conclusion of law. Whether the building was personalty or realty would depend on the intention of the builder and land-owner, if they both had the same intention, and if they had not, then it would depend on what common intent should be imputed to them, in the judgment of those called to pass upon their conduct; but either of these inquiries, as to the actual intention or as to the imputed intention, is one of fact and not of law. The cases in which no other circumstances than merely the erection by permission can be found to throw light upon the real purpose of the parties with regard to the ownership of the structure, must be very rare; but if such a case should occur, I think the more reasonable inference would be that the builder had designed not to part with his property, and the land-owner had consented on that understanding. The fact that the former secured permission to build indicates that he sought to avoid the consequences of building without permission, among which by far the most serious would ordinarily be the loss of the labor and materials which he was about to convert into a building.

Many cases indicate the propriety of such an inference. Thus, in *Doty v. Gorham*, 5 *Pick.*, 487. The permission of the land-owner to the erection of the structure was all that appeared to bind him, and the court held that the jury rightly found that the builder might remove the building as a chattel. In *Ham v. Kendall*, 111 *Mass.*, 297, the land-owner agreed that another might put an ice-house on his land, and that it might remain there five years; there was no agreement that it should be a chattel or be removable by the builder, but the court held that it was the builder's chattel, and he might remove it during the five years. In *Osgood v. Howard*, 6 *Me.*, 452, a tenant at will had erected a dwelling house and other buildings on the land with the express consent of the landlord; after

his death the tenant's administrator sold them to a stranger; the court held that the purchaser could maintain trover for them against the land-owner, putting its decision expressly on the consent, and not on the fact of tenancy. In *Dame v. Dame*, 38 *N. H.*, 429, the court says that the express assent and permission of the land-owner to the erection by another of a building on the land, almost necessarily implies an understanding that the builder may remove the building, and creates a tenancy at will in him. Numerous cases are there referred to as illustrative of the doctrine.

See also Whiting vs. Brastow, 4 *Pick.*, 310.

Now this building, being a chattel in contemplation of all the parties in interest, was properly the subject of chattel mortgages. It was covered by such mortgages, which were duly recorded in the clerk's office at Freehold, the last covering leasehold interest. The record, (taken in connection with the record of the lease) instantly became notice to all persons, and the mortgages were "valid against the mortgagor and his creditors, and against subsequent purchasers and mortgagees."

P. L. 1880, *p.* 267.

The chattel mortgage of the appellant, Sarah C. Hutchinson, was given by William W. McChesney and John B. Hutchinson to Lewis P. Thompson, for the sum of $1,207.75. It was dated December 23d, 1882, and covered the building above referred to, and machinery &c., therein contained, with the leasehold interest in the lot of land.

The consideration of the chattel mortgage was the purchase money of said machinery, &c., mentioned in the chattel mortgage, which were sold and delivered by the said Lewis P. Thompson to McChesney & Hutchinson. This chattel mortgage was assigned to Sarah C. Hutchinson, by assignment dated May 5th, 1884.

The same argument which relates to the Alison E. Hutchinson chattel mortgage is equally applicable to this one, with the addition that this chattel mortgage also covers the leasehold interest.

But even if the building is not a personal chattel, and

that the record of the chattel mortgage as such was not constructive notice to subsequent judgment creditors, still the lessees had a right to the use and possession of the building during the term of their lease, and that this right embraced power to pledge their interest therein as security for a debt. This much was certainly done and intended by the execution of the chattel mortgage, and we insist that the respective judgments of the complainants and the defendant Beakes are subsequent and subject to this pledge, because they both had actual notice thereof before the recovery of their said judgments.

Beakes held two judgments against McChesney, recovered in the New Jersey Supreme Court, the first for $888.83, and the second for $2,348.07, both dated Feb. 26, 1880. Mr. McChesney testifies that about the time of the formation of the partnership, some time in May or June, 1882, he went to see Mr. Beakes, and told him that he wanted him to give him a release, or to guarantee a release for him, so far as Mr. Hutchinson was concerned, so that he could give Mr. Hutchinson a chattel mortgage for $2,000. (See page 53.)

And on cross-examination, he says: "I told him (Beakes) that we wanted to build a building, and that Mr. Hutchinson was to advance us money in our business, and that he was to take the mortgage on the building for $2,000; and that I had promised Mr. Hutchinson it should be free from any claim that I knew of against myself, and that I had to have a release from him to relieve Mr. Hutchinson, or to allow him to come in first, ahead of Mr. Beakes' judgment." (Page 60.)

The release of the judgment from Charles H. C. Beakes to William W. McChesney, dated June 15th, 1882, is corroborative of this testimony, (page 98).

This was notice to Mr. Beakes that this chattel mortgage was to be executed to Mr. Hutchinson, and was at least sufficient to put him upon inquiry.

But upon this point the case does not rest here; John B. Hutchinson testifies as follows: "In October, 1884, I went to New York to see Mr. Beakes in regard to our account; he wanted me to give him my note with my

father's endorsement, and he asked me if my father had a chattel mortgage, and I told him he had; well, he said, it would be all right, then, because he has got a chattel mortgage, and that will come in ahead, and he will have the whole thing." (Page 64).

We submit that the testimony is conclusive that Beakes had actual notice of the chattel mortgage, pledge or security of Alison E. Hutchinson before and at the time of the recovery of his judgment, and should be decreed to be subject thereto.

This is emphatically the case from the fact that Beakes released his two judgments for the very purpose of allowing the execution of this chattel mortgage as a first lien on the building therein described, and he should not now be permitted to come in and deny the existence of the chattel mortgage, or its validity or effect as a first lien.

It appears unnecessary to submit the question of notice to the complainants of the existence of the chattel mortgage of the appellant, Alison E. Hutchinson, because his right to the surplus money in question seems to be effectually disposed of on the other branch of the case. It is sufficient to say that the testimony of Mr. McChesney shows that the attorney of record of the complainants in his judgment suit had notice of the chattel mortgage of Mr. Hutchinson before the recovery of their judgment, and Mr. Steen, the attorney, in his testimony admits that he had sufficient notice at least to put them upon inquiry.

The Vice Chancellor in his opinion concludes that even if the building in question were declared a mere personal chattel, that no part of the moneys in question could be applied to the satisfaction of the chattel mortgages, because he says the writ under which the moneys were raised commanded the sale of nothing in respect to the particular property from which these moneys were raised, but land.

We submit that no such conclusion will be reached by this court. The writ was a special execution under a judgment upon a mechanics' lien. The lien was filed against the building and the judgment, by force of the statute, was declared to be a lien upon the building, and the lot

or curtilage upon which the same was erected. As to that particular property the proceeding is *in rem*, the execution is in the usual form (*see Besson's Forms, page* 61) and describes both the building and the lot upon which it is erected, and commands the sale of both, and we apprehend that there will be no difficulty on this branch of the case.

The finding of the Vice Chancellor and the decree based thereon, concludes with saying that "if any surplus remains after the payment of the Beakes judgment, the residue shall be paid to John B. Hutchinson."

We submit that this portion of the decree is clearly erroneous, as between the parties to the chattel mortgage a court of equity would certainly give it effect. But this part of the opinion is the logical result of the reasoning of the Vice Chancellor, and only makes it the more apparent that he is in error in that part of his opinion in which he holds that the Beakes judgment is entitled to priority of payment over the claims of the appellants.

In conclusion, we respectively submit that for the reasons above assigned, the decree of the Chancellor should be reversed, and that the complainant's bill should be dismissed, or the chattel mortgages of the appellants should be decreed to be first paid out of the surplus money remaining in the hands of the sheriff.

The appellants are husband and wife, and are represented by the same counsel, and their respective equities can be adjusted between themselves.

ACTON C. HARTSHORNE,
Of Counsel with Appellants.

Printed at the MONMOUTH DEMOCRAT Office, Freehold, N. J.

In Chancery of New Jersey.

Between
Royal E. Deane and George G. Brooke, Partners trading under the style and firm name of Bramhall, Deane & Co., Complainants,
and
Alison E. Hutchinson, et als, Defendants.

On Bill for Partition.

BILL.

Filed January 19, 1884.

To His Honor, Theodore Runyon, Chancellor of the State of New Jersey:

Complaining show unto your Honor, your orator, Royal E. Deane, of the county of Hudson and State of New Jersey, and George G. Brooke, of the city, county and State of New York, partners trading in the said city of New York under the style and firm name of Bramhall, Deane & Company, that on or about *the twenty-first day of February, in the year of our Lord one thousand eight hundred and eighty-two*, James A. Bradley, of Asbury Park, in the county of Monmouth, made and executed a lease of certain lands in the township of Neptune, in said county, to William W. McChesney and John B. Hutchinson.

Your orators further show that the property described in said lease was therein set forth as follows, viz.: All that lot of ground situated in Asbury Park, beginning at the northwest corner of Main street and *Sommer*field avenue, running thence (1) northerly, along Main street fifty feet (50 feet); thence westerly, at right angles with Main street, one hundred and twenty feet; thence southerly,

parallel with Main street, fifty (50) feet; thence easterly, along *Summer*field avenue one hundred and twenty (120) feet to the place of beginning.

And your orators further show that the said premises were conveyed to said William W. McChesney and John B. Hutchinson, by said lease, for and during the term of twenty years from the first day of March, one thousand eight hundred and eighty-two, at the yearly rent of fifty dollars, to be paid in equal half-yearly payments, and the payment by the lessees of all taxes and assessments.

And your orators further show that in and by said lease it was agreed, that the lessees should have an extension of the term in said lease mentioned of a further term of ten years in addition to the twenty years aforesaid, at a rent to be agreed upon by and between the parties, or in default of such agreement to be fixed by arbitrators, to be selected and chosen as in said instrument of lease is set forth, to which said lease, or the record thereof, your orators would for greater certainty beg leave to refer.

Your orators further show that upon neglect to pay the said rent and said taxes and assessments, said lease would become null and void, and the said property would revert to said James A. Bradley.

Your orators further show that said lease having been duly executed, was upon the first day of March, eighteen hundred and eighty-two, acknowledged before David Harvey, Jr., one of the Masters of this Honorable Court, and having been so as aforesaid acknowledged, was, on the second day of March, eighteen hundred and eighty two, at the hour of ten in the forenoon, recorded in the office of the county clerk of the county of Monmouth, at Freehold, in Book 348 of Deeds, pages, 492, &c., to the several endorsements whereof on said lease your orators would for greater certainty beg leave to refer.

Your orators further show that having recovered judgment against William W. McChesney in the Circuit Court of the county of Monmouth, upon the *seventh day of May, in the year of our Lord one thousand eight hundred and eighty-three, for* the sum of *three hundred and eighty-two dollars and seventy-five cents*, your orators caused the interest of

said William W. McChesney of, in and to the *the* premises above described, to be levied on by virtue of an exetion issued out of the said Circuit Court on your orators' judgment, and the same having been duly advertised according to law was, by the sheriff of the county of Monmouth, sold and conveyed to your orators, your orators being the highest bidder at said Sheriff's sale. Your orators show that by virtue of such conveyance to them they became possessed of and are the owners of one equal undivided half part or interest of said premises, described in such lease from said James A. Bradley to said McChesney and Hutchinson.

Your orators further show that on or about the eighth (8th) day of October, anno domini eighteen hundred and eighty-three, John B. Hutchinson, by a deed of even date therewith, conveyed his interest in the premisies above set forth, as embraced in the aforesaid lease, to one Alison E. Hutchinson, of the township of Washington, in the county of Mercer and State of New Jersey, which said deed is of record in the Monmouth County Clerk's office, in Book 372 of deeds, pages 272, &c.

Your orators show that by virtue of said last mentioned conveyance, said Alison E. Hutchinson became and still is the owner of the other undivided half part or portion of the premises aforesaid, so as aforesaid in said lease described.

Your orators further show that on or about August *eight*, eighteen hundred and eighty-three, Nelson E. Buchanon, Garret V. Smock and George A. Smock, partners as Nelson E. Buchanon and Company, recovered a judgment in the Circuit Court of the county of Monmouth against William W. McChesney and John B. Hutchinson for the sum or amount of ten hundred and thirty dollars and eleven cents, or some other sum.

Your orators show that said judgment is in mechanics' lien, and therefore relates back to a period antecedent to your orators said judgment, wherefore and whereby said Nelson E Buchanon, Garret V. Smock and George A. Smock are incumbrances upon and interested in said premises.

Your orators show further said premises consist of a large frame building, three stories high and sixty feet long by thirty-two or thirty-three wide.

Your orators show that it is necessary that the conditions of said lease be complied with lest said premises, which are very valuable, be forfeited.

And your orators further show that they are desirous that a partition or division of the said tract of land and premises should be made among your orators and the several parties seized of and entitled thereto according to their several and respective rights, estates and interests therein, or in case (as your orators believe and aver the fact to be) that the said tract of land and premises cannot be divided among the owners thereof, without great prejudice to their interest, then that the same may be sold and the proceeds thereof divided among your orators and the other parties entitled thereto, as aforesaid, according to their respective rights and interests; and that in the meantime, owing to the precarious nature of the leasehold in the land whereon said buildings are erected, that a receiver be immediately appointed to take and receive the rents of the said premises and apply the same to the payments of the rents due for the occupation of said lands, if so be there are any due, and also to pay and satisfy all the taxes and assessments due on said premises according to the term of said lease, *untill* such time as said premises shall have been divided or sold by the decree of this Honorable Court.

But your orators are advised that no valid or effectual partition, division or sale of the said premises can be effectual without the aid interposition of some competent court, and that this Honorable Court has full and complete jurisdiction in the premises.

In consideration whereof, and to the end that the said defendants, Alison E. Hutchinson, James A. Bradley, Nelson E. Buchanon, Garret V. Smock and George A. Smock, partners, trading as N. E. Buchanon and Company, may, upon their several and respective oaths and affirmations, 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 again 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 orators and other persons entitled to shares of the said premises, according to their respective rights and interests therein ; and in case such partition and division, in fact, of the said premises shall be found to be impracticable, 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, and the proceeds thereof, after paying the costs and charges of this suit, divided among your orators and the several parties interested therein, according to their respective rights, shares and interests, and that, in the meantime, one or more proper person or persons may be appointed to receive the rents, issues and profits of the said premises for the benefit of your orators and all other persons interested therein, and that such rents and profits may be paid and divided among your orators and all other parties entitled thereto, according to their respective shares and interests in the same, and that your orators may have such further or other relief as the nature and circumstance of the case may require, and as shall be agreeable to equity.

May it please your Honor to grant unto your orators the State writ of subpœna to be directed to the said Alison E. Hutchinson, James A. Bradley, Nelson E. Buchanon, Garret V. Smock and George A. Smock, partners trading as N. E. Buchanon and Company, commanding them and each of them at a certain day and under a certain penalty therein to be expressed, personally to be and appear before your Honor, in this Honorable Court, then and there to answer the premises, and to stand to and abide and perform such decree therein, as to your Honor shall seem meet, and your orators will ever pray, &c.

JAMES STEEN,

Sol'r and of Counsel with Complainants.

A true copy,

G. S. DURYEE, Clerk.

ANSWER.

Filed March 29, 1884.

The answer of Alison E. Hutchinson, one of the defendants to the bill of complaint of Royal E. Deane and George E. Brook, partners trading under the style and firm name of Bramhall, Deane & Co., complainants.

This defendant, answering, admits that one James A. Bradley executed a lease to William W. McChesney and John B. Hutchinson, of such date, for the same lot of ground, for the same term and for the same rental as mentioned and set forth in the bill of complaint of the said complainants. And further, that said lease contains a clause extending the term thereof, upon the same conditions as in said Bill of Complaint set forth, and also a reverting clause, as therein set forth.

And further, that said Lease was duly acknowledged and recorded as set forth in said Bill of Complaint.

And this defendant further answering, says and charges and insists, that at the date of the execution of the Lease aforesaid, the said William W. McChesney and John B. Hutchinson were partners, and as such erected upon the lot of ground so leased, out of their partnership funds, a large frame building, three stories high, and about sixty feet long by about thirty-two feet wide.

And further, that said William W. McChesney and John B. Hutchinson, partners as aforesaid, and trading under the name, style and firm of McChesney & Hutchinson, upon the completion of said building took possession thereof, and occupied the same in the carrying on of their partnership business of manufacturing and selling ice cream, and continued so to do until sometime in the Fall of eighteen hundred and eighty-three.

And this defendant further answering, says that on or about the sixteenth day of June, in the year of our Lord one thousand eight hundred and eighty-two, the said William W. McChesney and John B. Hutchinson, partners as aforesaid, became indebted to this defendant in the sum of two thousand dollars, and for the purpose of securing the payment of the said sum and the interest

that should grow due thereon to this defendant, executed a Chattel Mortgage, bearing date the day and year last aforesaid, upon the building hereinbefore described, and in said Bill of Complaint set forth, and which said mortgage was acknowledged in due form of law by the said William W. McChesney and John B. Hutchinson, on the day the same bears date, before John F. Hawkins, a Master of this Court, and also contains a schedule, of which the following is a true copy, viz.:

SCHEDULE.

All that certain building known as McChesney & Hutchinson's Ice Cream Manufactory, situate at Asbury Park, New Jersey, on the northwest corner of Main Street and Summerfield Avenue.

W. W. McCHESNEY,
JOHN B. HUTCHINSON.

Signed in the presence of
JOHN F. HAWKINS.

And this defendant charges and insists that the money secured by said chattel mortgage was specially loaned to the said McChesney & Hutchinson for the express purpose of paying for the erection of the aforesaid building, and that said chattel mortgage contains an affidavit made by this defendant before John F. Hawkins, Master as aforesaid, stating the true consideration thereof and that the same was for money loaned for the erection of the building aforesaid. And this defendant further answering says, that said chattel mortgage was received in the Clerk's office of the county of Monmouth, on the seventeenth day of June, A. D. eighteen hundred and eighty-two, at five o'clock in the afternoon, and recorded in Book No. 4 of chattel mortgages for said county, on pages 410, &c.

And this defendant, in further answering, says, that on or about the twenty-third day of December, in the year one thousand eight hundred and eighty-two, the said William W. McChesney and John B. Hutchinson, partners as aforesaid, being indebted to one Lewis P. Thompson in the sum of twelve hundred and seven dollars and seventy-five cents, and for the purpose of securing the payment

thereof executed to the said Thompson a chattel mortgage bearing date the day and year last aforesaid, with the following conditions, viz: "Upon condition that if we, the said party of the first part, (McChesney and Hutchinson) shall and do, well and truly, pay unto the said party of the second part, the said Lewis P. Thompson, his executors, administrators and assigns, a certain promissory note given by us, the said McChesney & Hutchinson, to the said Lewis P. Thompson, dated December 23d, A. D. 1882, at Burlington, and payable four months after date thereof, at the Bordentown Banking Co., or a renewal of said note, or a part thereof within eight months from the date hereof, for the sum of twelve hundred and seven dollars and seventy-five cents, then these presents shall be void," and which said mortgage was acknowledged, according to law, by the said William W. McChesney and John B. Hutchinson, on the day the same bears date, before Mahlon Hutchinson, one of the Masters of this Court, and duly recorded in the aforesaid Clerk's office, in Book No. 5 of chattel mortgages, on page 431, &c., on the 25th day of December, A. D. 1882; and further, that said chattel mortgage contains a schedule of which the following is a true copy, viz:

"SCHEDULE.

"One Steam Engine, 12 horse power, one Boiler of 20 horse power, shafts, apparatus, and pulleys and connections. Ice cream factory situated on the Northwest corner of Main and Summerfield Avenue, of the borough of Asbury Park, Neptune Township, County of Monmouth, State of New Jersey, and being three stories high and thirty-two feet wide by sixty feet in length, with the leasehold interest of the said McChesney and Hutchinson for the ground on which said factory is located for twenty years." And further, that there is attached to said chattel mortgage and affidavit of the said Lewis P. Thompson, taken before Mahlon Hutchinson, one of the Masters of this Court, on the said 23d day of December, 1882, stating that the true consideration of said mortgage was for the said Steam Engine, Boiler, Pump, Shafting, Pulleys and apparatus sold and delivered to the said McChesney &

Hutchinson by the said Thompson for the said sum of twelve hundred and seven dollars and seventy-five cents, before the execution of said mortgage.

And this defendant, in further answering, admits that on or about the eighth day of August, in the year of our Lord one thousand eight hundred and eighty-three, Nelson E. Buchanon, Garret V. Smock and George A. Smock, partders as N. E. Buchanon & Co., recovered a judgment in the Circuit Court of the county of Monmouth against William W. McChesney and John B. Hutchinson, for the sum or amount of ten hundred and thirty dollars and eleven cents, and that said judgment was recovered upon a mechanics' lien, and charges and insists that said lien was filed to secure the payment of material furnished by the said N. E. Buchanon & Co. to the said McChesney & Hutchinson, partners as aforesaid, as builders and owners of the building aforesaid, in the erection and construction thereof.

And this defendant, further answering, says, that on or about the first day of October, A. D., eighteen hundred and eighty-three, the said William W. McChesney assigned, transferred and set over to the said John B. Hutchinson the Lease aforesaid, and all his undivided one-half interest of that messuage described therein, by an assignment bearing date the day and year last aforesaid, and the same was acknowledged according to law by the said William W. McChesney on the day the same bears date, before R. Tenbroeck Stout, one of the Commissioners of Deeds of said county, and recorded on the second day of October, A. D. eighteen hundred and eighty-three, in the aforesaid Clerk's office, in Book 372 of Deeds, page 179, &c.

And this defendant, in further answering, admits, as he has been informed and believes it to be true, that the said John B. Hutchinson made and executed an assignment of the aforesaid lease to this defendant, but of what date and of the purport thereof and where recorded this defendant has no knowledge except such as he has gathered from the said complainant's bill of complaint.

And this defendant, further answering, says, that on or about the second day of January, A. D. eighteen hundred

and eighty-four, one Charles H. C. Beakes recovered a judgment in the Supreme Court of the State of New Jersey against the said William W. McChesney and John B. Hutchinson, for the sum of one thousand and ninety-three dollars and fourteen cents damages and costs and charges, upon information and belief that the consideration of said judgment or the amount of damages recovered thereon was a partnership debt contracted by the said William W. McChesney and John B. Hutchinson while carrying on the ice cream factory at Asbury Park aforesaid, under the name, style and firm of McChesney & Hutchinson, aforesaid, and further charges, upon information and belief, that the said late firm of McChesney & Hutchinson have other outstanding debts due and owing by the said late co-partnership to sundry persons, but to what amount and to whom owing this defendant is not informed.

And your *orator*, further answering, admits that the said complainants recovered a judgment against the said William W. McChesney, in said court, and for said amount, and on the day as stated in said Bill of Complaint, and that an execution was issued upon said judgment, a levy made and a sale thereon by the Sheriff, as stated therein; and further admits that a conveyance was executed by the Sheriff of the county of Monmouth, and delivered to the said complainants for the right, title and interest of William W. McChesney, in the lot of land (with buildings thereon) set forth and described in said Bill of Complaint, but denies that by virtue of such conveyance to them they become possessed of and are the owners of one equal undivided half part or interest in said premises, and expressly charges and insists that the same were conveyed to the said complainants (and are subject in Equity) to the payment of all the debts and liabilities of the co-partnership of the late firm of McChesney & Hutchinson.

And this defendant, further answering, says, that the mechanics' lien, upon which the judgment aforesaid of the said N. E. Buchanon & Co. was recovered, was filed in the aforesaid Clerk's office on the second day of April, A. D. eighteen hundred and eighty-three, and the lien of said

judgment relates back to the second day of April, eighteen hundred and eighty-two, and is prior lien or encumbrance on the said buildings and premises to the judgment aforesaid of the said complainants, and charges and insists that the aforesaid deed of conveyance by the said Sheriff to the said complainants was made and executed subject to all legal prior encumbrances; and that at the date of said sale by the said Sheriff, and of the aforesaid deed, the said judgment of the said N. E. Buchanon & Co., the aforesaid Chattle Mortgages of this defendant and of the said Lewis P. Thompson, were liens and encumbrances upon the aforesaid building and premises, and further charges and insists that the creditors of the late co-partnership of McChesney & Hutchinson have an equitable interest in said buildings and premises, which could not be cut off by the Sheriff's sale and the Sheriff's aforesaid deed to the aforesaid complainant.

And this defendant further answering, says, that John I. Thompson, Sheriff of Monmouth county, has advertised upon the Fieri Facias issued upon the aforesaid judgment of the said N. E. Buchanon & Co., the building and premises aforesaid to be sold on the eighth day of April, A. D. eighteen hundred and eighty-four, between twelve and five o'clock P. M., at the Court House in Freehold, N. J., and that the same undoubtedly will be sold by the said Sheriff.

And this defendant further answering, says, that the aforesaid Assignment of Lease from the said John B. Hutchinson to this defendant, was made and executed in his absence and without his knowledge and consent, and has never been delivered to him, nor has he ever seen it, nor has any consideration whatever passed for the same, nor was this defendant informed of its existence until some time after the execution thereof, and therefore charges and insists that the said assignment is not a valid instrument, and does not legally assign or convey to him the building and premises therein mentioned and described or the interest of William W. McChesney and John B. Hutchinson, or either of them therein, and that the legal title thereto is still in the said John B. Hutch-

inson, the same as if said Assignment had never been made or executed.

And this defendant further answering, says, that he is still the holder and owner of the said Chattle Mortgage made and executed to him by the said William W. McChesney and John B. Hutchinson, and that the same is a lien and encumbrance upon the aforesaid building, that the same has not been cancelled or given up by him for that purpose, or receipted for or against in any way, nor has said Chattle Mortgage or any part thereof been paid to him or satisfied, except one year's interest paid thereon, and that the full amount of the principal thereof, viz.: the sum of two thousand dollars with interest from the 16th day of June, A. D. 1883, is still due and owing thereon to this defendant; and this defendant further answering, says that in case of the aforesaid Assignment of Lease from the said John B. Hutchinson to him should be held by this Honorable Court to be valid and binding; this defendant charges that in the making and execution thereof it was not the intention of the parties thereto to merge the aforesaid Chattle Mortgage of this defendant, or that the same should be given up, or cancelled, or be affected thereby in any way, but it was at that time and has ever since been the intention of said parties to keep the said Chattle Mortgage alive and a good and subsisting lien and encumbrance upon the said building.

And this defendant, further answering, charges and insists that in view of the facts hereinbefore set forth, the said William W. McChesney, John B. Hutchinson, Lewis P. Thompson and Charles H. C. Beakes are proper and necessary parties to the complainant's said bill of complaint, and that the complainant should not be allowed by this Honorable Court to proceed further thereon until the said bill of complaint is amended, and all proper and necessary persons thereto are made parties defendant.

And this defendant, further answering, denies that by virtue of the aforesaid conveyance from John B. Hutchinson to him he became and is still the owner of the equal undivided half part or portion of the premises aforesaid, but on the contrary charges and insists that the legal title

thereto is still in the said John B. Hutchinson, and that he has no interest whatever therein except so much thereof as is conveyed by his aforesaid chattle mortgage.

And this defendant submits to this Honorable Court that all and every of the matters in said complainants' bill, mentioned and complained of, are matters which may be tried and determined at law, and with respect to which the said complainants are not entitled to any relief in this court, and this defendant hopes he shall have the same benefit of this defence as if he had demurred to the said complainants' bill, all which matters and things this defendant is ready to maintain, aver and prove as this Honorable Court shall direct, &c.

ROBBINS & HARTSHORE,

Solicitors for and of Counsel with the defendant, Alison E. Hutchinson.

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

Alison E. Hutchinson, the above named defendant, being duly sworn according to law on his oath saith, that the matters and things set forth in the above answer so far as relates to his own acts are true, and so far as relates to the acts of others he believes them to be true.

ALISON E. HUTCHINSON.

Sworn and subscribed before me this 29th day of March, A. D., 1884.

ISAAC F. RICHEY,
M. C. C.

A true copy.

G. S. DURYEE, *Cl'k.*

PETITION.

Filed April 25, 1884.

To the Honorable Theodore Runyon, Chancellor of the State of New Jersey:

Royal E. Deane and George G. Brooks, partners, &c., the above named complainants, respectfully show that,

since the filing of the complainants' bill in the above entitled cause, the premises described in said bill of complaint have been sold at Sheriff's sale by John I. Thompson, Sheriff of the county of Monmouth, under the judgment upon mechanics' lien, held by the defendants, Nelson E. Buchanon, Garret V. Smock and George A. Smock, partners as N. E. Buchanon & Company, your orators show that thereby the interest of said firm, and of James A. Bradley, who leased the premises in question and had the reversion thereof, in this cause was extinguished, wherefore your petitioners would ask leave to discontinue as against them, without costs.

Your petitioners further show that at said Sheriff's sale said property brought a large sum, to wit, twelve hundred and fifty-eight dollars and sixty-seven cents, or thereabouts, over and above the sum necessary to pay and satisfy the execution whereon said property was sold, which said surplus your petitioners pray may be considered as real estate, and that the Sheriff of Monmouth county may be directed to pay the same into this court, to abide the determination of this cause, and to be dealt with as may seem just and equitable, and your petitioners will ever pray, &c.

JAMES STEEN,
Sol'r and of Counsel with Compl'ts.

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

James Steen, of full age, being duly sworn according to law, on his oath saith, the foregoing petition so far as it relates to his own acts is true, and so far as it relates to the acts of others he believes it to be true.

JAMES STEEN.

Sworn and subscribed before me this 24th April, A. D., 1884.

ROBERTSON SMITH,
Notary Public.

A true copy.
G. S. DURYEE, *Cl'k.*

REPLICATION FILED APRIL 26, 1884.

The complainant joins issue to the answer of the defendant. JAMES STEEN, *Sol'r of Compl't.*

ORDER.

Filed April 26, 1884.

Upon reading and filing the petition of complainants' with the affidavit annexed :

It is on this 25th day of April, A. D. 1884, on motion of James Steen, solicitor and of counsel with complainants, ordered that the defendant, Alison E. Hutchinson, show cause before the Chancellor, on Monday, the 5th day of May, A. D. 1884, at 10 A. M., at the Vice Chancellor's chambers, in Newark, why the complainants should not be allowed to dismiss their bill against James A. Bradley, Nelson E. Buchanon, Garret V. Smock and George A. Smock, of the defendants, without costs, and also that he then and there show cause why the Sheriff of Monmouth county should not be directed to pay into this court the surplus moneys arising from the sale of the premises described in the complainants' Bill of Complaint, which sale was had by virtue of the judgment of said Nelson E. Buchanon, Garret V. Smock and George A. Smock, of the defendants, with leave for either party to take affidavits.

THEODORE RUNYON, *C.*

A true copy,

G. S. DURYEE, *Clerk.*

NOTICE FILED.

SIR : Take notice that application will be made to the Chancellor, or the Vice Chancellor sitting for him, at the State House, in the city of Trenton, on Tuesday, the 8th day of July next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing and discharging the petition of the complainants and the order to show cause granted thereupon, filed the 25th day of April last, on the ground that the same were improperly filed and improvidently granted, and also because the

same have not been prosecuted and proceeded with in due time. Yours respectfully,

ROBBINS & HARTSHORNE,
Solrs. of Alison E. Hutchinson, Deft.

June 26, 1884.

To JAMES STEEN, ESQ.,
Solr. of Compl'ts.

Motion made July 8, 1884, in accordance with the above notice, and refused.

Supplemental Bill Filed July 17/84

To His Honor, Theodore Runyon, Chancellor:

Complaining show unto your Honor your orators, that on or about the *nineteenth day of January, eighteen hundred and eighty-four*, your orators exhibited their original Bill of Complaint in this Honorable Court against the defendant herein and others, praying for the partition of certain real property or interest in real property in said bill, alleged to belong to said defendant and your orators as joint tenants or tenants in common, and your orators further show that said Alison E. Hutchinson put in his answer unto your orators' bill.

And your orators further show that the premises therein sought to be divided in your said orators' bill for partition were, afterwards, to wit, *on or about April 15th*, 1884, *sold by the Sheriff of Monmouth county*, by virtue of a *valid execution* in favor of Nelson E. Buchanon, Garret V. Smock and George A. Smock, partners as N. E. Buchanon & Company, whereby said N. E. Buchanon's & Company's interest in the subject matter of this suit has been removed.

And your orators further show that there is now in hands of John I. Thompson, Sheriff of the county of Monmouth, after payment of the said judgment of N. E. Buchanon & Company, the sum of *twelve hundred fifty-eight dollars and sixty-seven cents*, or some other sum, the which your orators insist belongs one-half of it to your orators and one-half of it to the said defendant, Alison E. Hutchson.

And your orator showeth that one Charles H. C. Beakes

recovered a judgment against William W. McChesney, in the Supreme Court of New Jersey, about the twenty-sixth day of February, eighteen hundred and eighty, for the sum of eight hundred and eighty-eight dollars and eighty-three cents.

Your orators also show that said Charles H. C. Beakes, on the second day of January, eighteen hundred and eighty-four, recovered a certain other judgment in said Supreme Court, of the amount of ten hundred, ninety-three dollars and fourteen cents against William W. McChesney and John B. Hutchinson.

And your orators further show that one George W. Mann has recovered a judgment against McChesney and Hutchinson, aforesaid, for one hundred and fifty-five dollars and sixteen cents, or some other sum.

And your orators further show that said McChesney and said Hutchinson did, as joint owners or tenants in common, make and execute a certain pretended mortgage to said defendant, which said Chattel Mortgage was for the sum of two thousand dollars, and was supposed to cover or include the said building which had been erected upon the real estate sought by your orators' original Bill of Complaint to have divided.

Your orators show further, that said Chattel Mortgage was recorded, as your orators have lately learned, in the County clerk's office of Monmouth county, on June 17th, 1882, in the Book of Chattel Mortgages No. 4, page 410, &c. But your orators insist and allege that the same is not recorded according to law, and that your orators had no notice thereof, legal, actual or constructive, and that whatever force or efficacy the same might have had, that the same was extinguished by the assignment of the leasehold or interest in the real estate, made by John B. Hutchinson to said Alison E. Hutchinson, dated as set out in your orators bill. Your orators further show that on or about the 23d day of December, 1882, said William W. McChesney and John Hutchinson executed a Chattel Mortgage upon certain machinery, consisting of a boiler and engine, shafting, pulleys and connection, and also upon the premises, the subject matter of this suit,

which said mortgage was recorded or attempted to be recorded in Book 5 of Chattel Mortgages, pages 431, &c., which said mortgage was given to one Lewis P. Thompson.

But your orators expressly charge that the same was not recorded as provided by law, and that the same was not brought to your orators' notice or knowledge in any way.

And your orator showeth *further showeth*, that on or about the fifteenth day of April, 1884, said Lewis P. Thompson sold and assigned said Chattel Mortgage for the sum of ten hundred and nineteen dollars, to Sarah J. Hutchinson, the wife of the defendant, Alison E. Hutchinson. But your orators are informed, and charge it to be true, that the sale made by William W. McChesney of his interest in said property to John B. Hutchinson, who afterwards sold to the defendant, Alison E. Hutchinson, was upon the express condition that all the alleged chattel mortgages and all the judgments should be paid and satisfied, and your orators insist that although said assignment of said Chattel Mortgage is made to Sarah C. Hutchinson, it was in very truth paid for by Alison E. Hutchinson, the defendant herein.

And your orator showeth that said Alison E. Hutchinson, Sarah C. Hutchinson, George W. Mann, Charles H. C. Beakes, William W. McChesney and John B. Hutchinson give out and pretend that the premises described in complainants' original bill were partnership property, and that creditors of the alleged partnership are entitled to be first paid out of the proceeds of the sale that may remain in the hands of the Sheriff aforesaid, whereas your orators expressly allege and insist that the contrary thereof is true; and whereas, also, your orators insist that even if this Court should hold, as alleged by said defendants, allege that said Lewis P. Thompsen mortgage is a lien upon the premises or upon the fund in the Sheriff's hands, still your orators insist that the other chattels in said Mortgage should be first sold and exhausted prior to impairing said fund.

And your orator prays that said fund in said Sheriff's

hands be paid into this court to await the determination of this cause.

To the end therefore that the defendants may, if they can show cause why your orators should not have the same relief hereby, and by their original bill prayed, and may without oath answer the premises as fully as if the same were here again repeated, and they thereunto particularly interrogated, and that your orators may have the same relief as he might have had if the facts hereinbefore stated and charged by way of supplement had been stated in your orator's original bill, and may have the same relief from his original bill as if said defendants above named had been made parties thereto, and that your orators may have such other or further relief in the premises as the circumstances of the case may require and to your Honor shall seem meet.

May it please your Honor the premises considered to grant unto your orators the State's writ of subpœna issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, Alison E. Hutchinson, Sarah C. Hutchinson, Charles H. C. Beakes, George W. Mann, John B. Hutchinson, and William W. McChesney, commanding them and each of them by a certain day, and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and to good conscience, and your orators as in duty bound will ever pray, &c.

JAMES STEEN,
Solicitor and of Counsel for Complainants.

A true copy.
G. S. DURYEE, *Cl'k.*

NOTICE FILED.

Take notice that application on behalf of the said Hutchinson will be made to the Chancellor, or Vice Chancellor sitting for him, on Monday, the 11th day of August next,

at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancellor's Chambers in Newark, N. J., for leave to apply to the Circuit Court of the county of Monmouth, or the Judge thereof, for the surplus money arising from the sale of the premises mentioned in the Bill of Complaint, by virtue of the judgment of Nelson E. Buchanon, Garret V. Smock and George A. Smock, partners trading as N. E. Buchanon & Co., and to apply the same to the payment, so far as the same will extend, of the Chattel Mortgage of the said Hutchinson, mentioned in his answer filed in this case, and to such other liens or encumbrances which were on said premises or may be entitled to the said money, or any part thereof, and for such other relief as may be proper under the circumstances. Yours, &c.,

ROBBINS & HARTSHORNE,
Solicitors of Alison E. Hutchinson.

Dated July 29th, 1884.

To JAMES STEEN, ESQ.,
Solr. for Compl'ts.

NOTICE FILED.

Take notice that application on behalf of Alison E. Hutchinson, one of the defendants in the above stated cause, will be made to the Chancellor, or Vice Chancellor sitting for him, on Monday, the 11th day of August next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancellor's Chambers, in Newark, N. J., for an order or decree dismissing both the original and supplemental bills filed by the complainants in said cause, for want of equity, and for such other relief as may be proper under the circumstances.

ROBBINS & HARTSHORNE,
Solrs. of Alison E. Hutchinson.

Dated July 29, 1884.

To JAMES STEEN, ESQ.,
Sol'r for Complainants.

Motions made August 11, 1884, in accordance with the foregoing notices, and refused.

ORDER FILED.

It is on this eleventh day of August, 1884, ordered that complainants have leave to amend their supplementary bill of complaint in said cause, by making John I. Thompson, Sheriff of the county of Monmouth, party defendant thereto, with appropriate averments.

THEODORE RUNYON, *C.*

Respectfully advised,

A. V. VAN FLEET, *V. C.*

ORDER FILED.

It is on this eleventh day of August, eighteen hundred and eighty-four, on motion of James Steen, of counsel for complainants, ordered that the above cause be referred to Vice Chancellor A. V. VanFleet, to hear and determine and advise upon the matters therein at issue.

THEODORE RUNYON, *C.*

By consent, I hereby appoint Wednesday, September 3, 1884, at 10 A. M., at the Vice Chancellor's Chambers, in the city of Newark, as the hour and place for the hearing in the above stated cause.

Dated August 11, 1884.

A. V. VAN FLEET, *V. C.*

ANSWER OF CHARLES H. C. BEAKES.

Filed October 1, 1884.

The answer of Charles H. C. Beakes, one of the defendants to the original Bill of Complaint and Supplemental Bill of Royal E. Deane and George E. Brooks, partners under the firm name of Bramhall, Deane & Company, complainants.

First. This defendant admits that a Lease was executed by James A. Bradley to William W. McChesney and John B. Hutchinson, at the time, for the term under the rental upon the conditions, and covering the property in

the bill set forth, and that said lease was acknowledged and recorded as is therein stated.

Second. This defendant charges the truth to be, that at the time said Lease was executed, said William W. McChesney and John B. Hutchinson were partners, and as such erected upon the land so leased, with the partnership funds, a large frame building, three stories high, and about sixty feet long by about thirty-two feet wide; that said land was leased by the said McChesney and Hutchinson, as such partners, and for the purpose of conducting their partnership business; and that as such partners they took possession of said building and occupied and used the same in their partnership business of manufacturing and selling ice cream, and continued so to do until the latter part of the year eighteen hundred and eighty-three.

Third. This defendant further answering, says that there appears of record as stated in said bill, a conveyance of the interest of John B. Hutchinson, in said leased premises to the defendant, Alison E. Hutchinson, bearing the date therein stated, but this defendant denies that by virtue of such conveyance said Alison E. Hutchinson became the owner of an undivided half part of said land and premises, and charges the truth to be that such conveyance was made to said Alison E. Hutchinson, subject to the payment of all the debts and liabilities of the said firm of McChesney and Hutchinson.

Fourth. This defendant admits that on or about the eighth day of August, eighteen hundred and eighty-three, Nelson E. Buchanon, Garret V. Smock and George A. Smock, partners as N. E. Buchanon & Co., recovered a judgment in the Circuit Court of the county of Monmouth, against William W. McChesney and John B. Hutchinson, for the sum of ten hundred and thirty dollars and eleven cents, and that said judgment was recovered on a mechanics' lien, and relates back to a period antecedent to the judgment of the complainants, set forth in the Bill of Complaint, and also to the judgment of this defendant against the said William W. McChesney and John B. Hutchinson, therein set forth and hereinafter referred to,

and further admits that by virtue of an execution issued on said judgment, the said leased premises were on the fifteenth day of April, eighteen hundred and eighty-four, sold, and that there is now in the hands of John I. Thompson, Sheriff of the county of Monmouth, after payment of said judgment, the sum of twelve hundred and fifty-eight dollars and sixty-seven cents, or some other sum.

Fifth. This defendant, further answering, admits that the complainants recovered a judgment against the said William W. McChesney, on the day, for the sum and in the court stated in said bill, and that an execution was issued upon said judgment, a levy made and a sale made thereon by the Sheriff, as stated therein, and that a conveyance was made by the Sheriff of the county of Monmouth and delivered to the complainants for the interest of said William W. McChesney on the lot of land with the buildings thereon, described in the Bill of Complaint, but this defendant denies that by virtue of such conveyance the complainants became possessed of and are entitled to one equal undivided half part or interest in said premises, and charges that the same were conveyed to the said complainants, subject to the payment of all the debts and liabilities of the said firm of McChesney and Hutchinson.

Sixth. This defendant, further answering, admits that on the twenty-sixth day of February, eighteen hundred and eighty, he recovered a judgment against William W. McChesney in the Supreme Court of this State, for the sum of eight hundred and eighty-eight dollars and eighty-three cents.

Seventh. This defendant admits that on the second day of January, eighteen hundred and eighty-four, he recovered a judgment in said Supreme Court, for the sum of ten hundred and ninety-three dollars and fourteen cents, against William W. McChesney and John B. Hutchinson, and further says that said judgment was obtained against said McChesney and Hutchinson as partners in trade, and that the indebtedness for which said judgment was obtained, was contracted by the said William W.

McChesney and John B. Hutchinson, with this defendant, in the course of their partnership business, during a period running from the month of May, eignteen hundred and eighty-two, to September fifteenth, eighteen hundred and eighty-three; and this defendant further says, that a writ of fieri facias was issued upon said judgment, and that under and by virtue of said writ, the Sheriff of the county of Monmouth did, on the fifth day of April, eighteen hundred and eighty-four, levy upon the lot of land leased to said McChesney and Hutchinson, with the buildings thereon.

Eighth. This defendant further answering, says that he is informed that said McChesney and Hutchinson, executed as stated in the supplemental bill of complaint, a pretended mortgage to the defendant, Alison E. Hutchinson, for the sum of two hundred dollars, which mortgage purported to cover the building erected upon the lot of land so leased as above stated, and this defendant has been informed, since the entry of his judgment above set forth against said McChesney and Hutchinson, that said mortgage was recorded as in said bill stated, but this defendant charges and insists that said pretended mortgage was not recorded according to law, and that he had no notice thereof, legal, actual or constructive, except such information as was given him as above stated after the entry of his aforesaid judgment.

Ninth. This defendant, further answering, says that he has also been informed since the entry of his said judgment, that a pretended mortgage was executed by said McChesney and Hutchinson to one Lewis P. Thompson, bearing the date and purporting to cover the property stated in said supplemental bill, and recorded as therein stated, but this defendant insists that said pretended mortgage was not properly recorded, and that he had no notice whatever of it until after the entry of his said judgment as above stated.

Tenth. This defendant has no knowledge except as informed by said supplemental bill of complaint, of any assignment by said Lewis P. Thompson, of said pretended mortgage.

Eleventh. This defendant further answering, says that he has no knowledge except as informed by said supplemental bill of the judgment obtained by one George W. Mann.

Twelfth. This defendant, further answering, charges and insists that the property sold under the mechanics' lien above referred to, was partnership property of the said firm of McChesney & Hutchinsan, and that out of the surplus remaining in the hands of the said Sheriff, the partnership debts of said firm should first be paid in the order of their priority, and further that the judgment of this defendant against said William W. McChesney and John B. Hutchinson, aboue set forth, and the execution and levy thereon is first in order and priority, and should be first paid out of said fund.

BABBITT & LAWRENCE,

Sol'r for and of Counsel with the defendant, Charles H. C. Beakes.

TRANSCRIPT.

Before His Honor, Vice Chancellor VanFleet.

James Steen, Esq., for complainants.

Acton C. Hartshorne, Esq., for defendant Hutchinson.

Robert L. Lawrence, Esq., for defendant Beakes.

Transcript of short hand notes of testimony, &c., taken in the above stated cause at the Vice Chancellor's Chambers, at Jersey City, on Tuesday, October the 7th, 1884.

Counsel read the pleadings.

Complainant's counsel offers in evidence a certified copy of the Lease from James A. Bradley to W. W. McChesney and John B. Hutchinson, dated the 21st day of February, 1882, and recorded in the Monmouth county Clerk's office, in Book 348 of Deeds, page 492.

Also an assignment of said Lease from William W. McChesney to John B. Hutchinson, dated October 1st, 1883, and recorded in the Monmouth county Clerk's office, in Book 372, page 179.

Also the assignment of said Lease from John B. Hutch-

inson to Alison E. Hutchinson, dated October 8, 1883, and recorded in the Monmouth county Clerk's office, in Book 372, page 271.

By Mr. Hartshorne.—I object to that paper because it never was delivered to us; it was made out by John B. Hutchinson, and placed on record without our knowledge, and I object to the paper in order to save whatever rights I may have.

Complainant's counsel also offers in evidence deed from John I. Thompson, Sheriff, and so forth to Royal E. Deane and others, partners under the name of Bramhall, Deane & Co., bearing date the 4th day of January, 1884.

By Mr. Hartshorne.—We don't dispute the documentary evidence at all.

By the Court.—You propose to offer in evidence the recovery of the judgment by N. E. Buchanon & Company.

By Mr. Steen.—That is admitted, I understand.

By Mr. Hartshorne.—Oh, yes; there won't be any difficulty about that.

By Mr. Steen.—It is agreed that the amount of surplus on the 15th day of April, 1884, the day of the sale, was $1,258.67, and is in the hands of John I. Thompson, Sheriff.

Nelson E. Buchanon, a witness produced on behalf of the complainant, being duly sworn according to law, deposeth and saith:

Direct Examination by Mr. Steen—

Q. Where do you reside? *A.* Asbury Park.

Q. How old are you? *A.* About forty-three.

Q. You are one of the firm of N. E. Buchanon & Company? *A.* Yes, sir.

Q. And as such are one of the plaintiffs in the judgment recovered on the mechanics' lien against John McChesney and John B. Hutchinson? *A.* Yes, sir.

Q. Under which the property in question was sold? *A.* Yes, sir.

Q. Were you present at an interview held in the office of R. Ten Broeck Stout, counsellor at law, at Asbury

Park, at which Mr. Alison E. Hutchinson was also present? *A.* Yes, sir.

Q. When was that? *A.* The month of November as near as I can tell from notes I have.

Q. What year? *A.* Last year.

Q. Before you had notice of this partition suit—you were parties to the partition suit before the property was sold? *A.* I don't remember about that, at all.

Q. At that conversation was any mention made of a deed from John B. Hutchinson, or an assignment of a Lease from him to Allison E. Hutchinson? *A.* Yes, sir.

Q. What was it? *A.* I went there for the purpose of assigning my judgment to Mr. Hutchinson.

Q. Your lien judgment? *A.* Yes, sir.

Q. Which Mr. Hutchinson? *A.* Mr. Allison E. Hutchinson.

Q. After negotiation to that effect? *A.* Yes, sir; as per agreement with him.

Q. Well? *A.* I visited Mr. Harvey, a lawyer in the same building, and requested him to draw the assignment; then I went into Mr. Stout's office and informed them of what I had done, and Mr. Stout made the remark that Mr. Hutchinson couldn't take an assignment of the judgment, and I inquired the reason and he said it was because he already had a deed for the property.

Q. Was Mr. Stout acting as Mr. Hutchinson's lawyer? *A.* I don't know, I am sure; I should suppose so, but that is all I know about it.

Q. How did you come to go there? *A.* I went there with Mr. Hutchinson; Mr. Hutchinson told me to go in there.

Q. Mr. Alison E. Hutchinson? *A.* Yes, sir.

Q. That is all?

Cross-examination by Mr. Hartshorne—

Q. What was this lien claim for? *A.* Material furnished in the building—in the erection of the building.

Q. Furnished to whom? *A.* McChesney & Hutchinson.

Q. The firm? *A.* Yes, sir.

Q. And charged to the firm? *A.* Yes, sir.

Q. Were McChesney & Hutchinson doing business in Asbury Park? *A.* Yes, sir.

Q. What business were they in? *A.* The ice cream business.

Q. In this building that the lien was filed upon? *A.* Yes, sir.

Q. How long had they been in business there? *A.* Well, I couldn't say; I should judge at least a year; probably more.

Q. As soon as the building was erected did they take possession of it? *A.* Yes, sir; they erected the building themselves.

Q. For that purpose? *A.* Yes, sir; or at least I so understood.

Q. Do you know or not whether Mr. Stout was the attorney for Mr. Alison E. Hutchinson? *A.* No, sir; not positively.

Q. Or for Mr. John B. Hutchinson? *A.* No, sir; I supposed he was the attorney for these parties and that is the reason I was invited there. That is all I know about it; it is guess work on my part.

Q. At that time was Alison E. Hutchinson with you? *A.* Yes, sir.

Q. Did he know of the existence of that deed at that time? *A.* He didn't appear to know anything about it; he was out when Mr. Stout made that reply, and I said "what under the sun do you want a deed for, when you have a mortgage; you will put your mortgage out and let these other folks in ahead of you." He said "I don't know anything about a deed," and Mr. Stout appeared to be in somewhat of trouble. As soon as I found out that I couldn't transact the business I went for, I left them and went back and told Mr. Harvey not to write the assignment.

Q. Then you had made arrangements for Mr. Hutchinson to take the assignment of your judgment? *A.* Yes, sir.

Q. When was that arrangement made? *A.* That

arrangement was made about the time I commenced the lien claim, or soon after.

Q. Mr. Alison E. Hutchinson is what relation to John B. Hutchinson? *A.* His father, I believe.

Q. The father of John B., who is a partner of McChesney? *A.* Yes, sir. The agreement was made that I should put my claim in a lien and assign it to him.

Q. Did you have any correspondence with him as to that agreement? *A.* Well, I don't remember about that.

Q. Or did you send word to him that you had recovered a judgment, or anything like that? *A.* I wrote him that I was ready to make the assignment.

Q. Did he come down to see you? *A.* Yes, sir.

Q. And did he agree at that time to do it? *A.* Yes, sir.

Q. Then when you went to Mr. Stout's office he refused to take it? *A.* Do you mean to take the assignment?

Q. Yes, sir. *A.* Yes, sir; and soon after that I ordered the property advertised.

Q. And sold it? *A.* Yes, sir.

Q. And got your money? *A.* Yes, sir.

Q. Do I understand you to say that when you were informed that Mr. Hutchinson had a deed you told him if he had a deed he didn't want the assignment? *A.* Yes, sir; I was thunder-struck, and I made the remark that I wanted to know what he wanted to take a deed for when he had a mortgage.

Q. That is all?

Re-direct.

Q. They never afterwards agreed to take the assignment of the judgment, did they; never asked you for an assignment of the judgment? *A.* No, sir; not after that.

Q. And that was the reason that they gave you at that time for not taking the assignment according to the previous arrangement? *A.* Mr. Stout informed me; he said Mr. Hutchinson can't take an assignment of this because he has a deed, and then I made my remark, as I said before, that I was surprised that he would take deed

when he had a mortgage; and as soon as I found out that the negotiations were through I got up and left.

Q. You went there at Mr. Hutchinson's invitation? *A.* Yes, sir.

Q. That is all?

By the Court.—Anything further?

By Mr. Steen.—No, sir.

By the Court.—Let me understand whether you rest?

By Mr. Steen.—I think I have all the testimony in.

By the Court.—Well, you rest, do you?

By Mr. Steen.—Yes, sir.

By Mr. Hartshorne.—We have Mr. Thompson here, from Bordentown, to whom the Chattel Mortgage was executed; he is the gentleman who sold the machinery to the firm, and I would like to examine him to-day in order to save him from coming back again.

Lewis P. Thompson, a witness produced on behalf of the defendants, being duly sworn according to law, deposeth and saith:

Direct examination by Mr. Hartshorne—

Q. Mr. Thompson, where do you reside? *A.* Bordentown, New Jersey.

Q. And what is your business? *A.* Machine business and machine builder.

Q. You knew the firm of McChesney & Hutchinson, at Asbury Park? *A.* Yes, sir.

Q. Have you had any dealings with them? *A.* I sold them some machinery; engine, boiler and machinery.

Q. Can you enumerate what that machinery consisted of? *A.* Engine, boiler, counter-shafting, pulleys, pump; they are about the main articles, so far as I can remember.

Q. What did you receive in payment for that machinery? *A.* Well, after a while I received a note.

Q. What did you get from them to secure that note, if anything? *A.* I got a chattel mortgage through my attorney.

Q. (Handing witness paper). Just look at that Chat-

tel Mortgage and see if that is the one? *A.* Yes, sir; that is the one.

Q. Now the schedule is in these words: "One steam engine twelve horse power, one boiler twenty horse power, shafting apparatus and pulleys and connections." Are those the things that you sold to McChesney & Hutchinson? *A.* Yes. sir, and the pump.

Q. It says in the affidavit, pumps, shafting, pulleys and so forth. Now this chattel mortgage was given to you for the consideration—for the purchase money—of the property? *A.* Yes, sir.

Q. That you sold them? *A.* Yes, sir.

Q. Where were these things put; do you know? *A.* They were put in that building; I saw them in that building after I went to Asbury Park. I sold them delivered on the cars at Bordentown.

Q. But you saw them in that building at Asbury Park? *A.* Yes, sir; I saw them there.

Q. When you were down there afterwards? *A.* Yes, sir; some time afterwards.

Q. You saw them in the building that McChesney & Hutchinson used as an ice cream manufactory? *A.* Yes, sir.

Q. You saw those same things in there? *A.* Yes, sir.

Q. Did McChesney & Hutchinson make you some payments on this purchase? *A.* Yes, sir.

Q. The firm made you some payments? *A.* Yes, sir.

Q. What payments were they; do you know? *A.* April 26th, 1883, they paid $60; May 5th, $60; August 17th, $120.

Q. Did you assign that chattel mortgage to any one? *A.* Yes, sir.

Q. Whom to? *A.* Mrs. Hutchinson.

Q. Sarah T. Hutchinson? A. Yes, sir.

Q. (Handing witness paper.) Is that the assignment you made for it? *A.* Yes, sir.

Q. This reads: "In consideration of one thousand no hundred and nine dollars, ($1,009);" was that amount due from McChesney & Hutchinson to you? *A.* Yes, sir.

Q. (Handing witness paper.) Is that the note for

which the Chattel Mortgage was given to secure? *A.* Yes, sir.

Q. Do you know McChesney & Hutchinson's signature? *A.* Well, I received the note from them.

Q. And you made credits on the back of the amounts received, as you have stated? *A.* Yes, sir; I did.

Q. And the note and the mortgage were sold and assigned by you to Mrs. Hutchinson? *A.* Yes, sir.

Cross-Examination by Mr. Steen—

Q. What relation are you to any of the parties in this case, Mr. Thompson? *A.* Well, I couldn't tell you, exactly, without I go back; I am very poor in those things about people; I believe that John Hutchinson married a forty-second cousin or something like that, I can't tell what, but I didn't know the young man was in existence until I saw him in our shop with McChesney, buying machinery.

Q. Is that the only relationship? *A.* I don't know what it is.

Q. Is there any other relationship between you and the Hutchinson family? *A.* No other relationship.

Q. Is there no other relationship than that which you have mentioned? *A.* Not that I am aware of.

Q. That is all.

Alison E. Hutchinson, a witness produced in his own behalf, being duly sworn, deposeth and saith:

Direct Examination by Mr. Hartshorne—

Q. Where do you reside? *A.* I reside in Washington township, Mercer county.

Q. How long have you resided there? *A.* About forty-three or forty-four years; ever since I was born; I was born there.

Q. Do you know John B. Hutchinson? *A.* Yes, sir.

Q. What relation is he to you? *A.* He is my son.

Q. Do you know William W. McChesney? *A.* Yes, sir.

Q. Do you know anything about McChesney & Hutchinson forming a co-partnership? *A.* Yes, sir.

Q. Tell when that was?

Objected to by the complainant's counsel on the ground that the articles of co-partnership should be produced, and they would prove the date.

By the Court.—Were there any articles of co-partnership?

By Mr. Steeen.—I understood so from Mr. Hutchinson; he said he had them, but he refused to let me see them.

By the Witness.—Yes, sir, there were; but I couldn't say positively what date their co-partnership was formed.

Q. When was that? *A.* I think it was in January or February, 1882, but I won't be positive.

Q. Was it prior to your loaning them any money? *A.* Yes, sir.

Q. Where were they doing business? *A.* Asbury Park.

Q. What was the first thing they did after forming their co-partnership, if you know? *A.* Well, sir, they wanted to borrow two thousand dollars of me.

Q. No, but I mean about getting a place of business; what did they do? *A.* They got a lease for a certain time in Asbury Park, and then they borrowed two thousand dollars of me.

Q. For what purpose? *A.* For building a new building.

Q. To put up the building with? *A.* Yes, sir.

Q. An ice cream manufactory? *A.* Yes, sir.

Q. The same building in which they carried on business afterwards? *A.* Yes, sir.

Q. Who made the application to you for that money? *A.* Mr. McChesney.

Q. W. W. McChesney? *A.* Yes, sir; that was his proposition that I should furnish them two thousand dollars—loan them two thousand dollars and take a mortgage on the property, as he said there was nothing against it and nothing against him, so that would make me all safe.

Q. Did you furnish the two thousand dollars? *A.* I did, sir.

Q. How did you furnish it? *A.* I furnished it in checks along just as they wanted it; whenever they wanted some money I sent them checks; sometimes, perhaps, I loaned them a little money, but I guess mostly I paid them by checks.

Q. (Handing witness paper). Look over these papers and see if they are the ones—the checks which you gave for the money? *A.* Yes, sir; that is them; they are two that my son said to me that they could hardly get the checks cashed there, and I stopped off at Freehold and got them cashed, and gave them the money. This is one of them (pointing to paper), and there is one more there. I happened to stop at the post office and get a letter from him to that effect, so I went into one of my neighbor's and got him to cash my check for fifty dollars; and the other I went into the Freehold Bank, and I seen a man there that recognized me, and I got that check cashed, making a hundred dollars in all that I got in money for them.

Q. Is that your genuine signature to all those vouchers here? *A.* Yes, sir.

Q. Do you know the signature of McChesney & Hutchinson? *A.* Yes, sir.

Q. Look at all those endorsements on the back of those checks? *A.* Yes, sir.

Q. Are they all endorsed by McChesney & Hutchinson? *A.* Yes, sir; and I think there is one little charge on my book for some few dollars which I paid for some nails for them.

Q. Have your book here? *A.* Yes, sir; and you will find that my book will correspond with these checks as I have charged them with the money they have.

Q. (Handing witness book). Is this your regular day-book? *A.* Yes, sir; and here is where I commenced (pointing to an entry in book) March 24th, and you will find that my checks will correspond with these entries.

Q. You made the charges all the way through? *A.* Yes, sir; I think up to the last, and there I credited them by the mortgage of two thousand dollars.

Q. Where is that small charge which you say you had

against them beside the checks? *A.* Here it is, thirty-two dollars for nails.

Q. $32.50? *A.* Yes, sir.

Q. Where did these nails go? *A.* To their factory.

Q. And went into the building? *A.* Yes, sir.

Q. Now this two thousand dollars that you loaned, was it loaned expressly for that purpose? *A.* That is for building that building.

Q. And was so understood by you and McChesney at the time? *A.* Yes, sir.

Q. (Handing witness paper). Now look at that paper; is that the chattel mortgage executed to you? *A.* Yes, sir.

Q. How much have McChesney and Hutchinson paid you? *A.* They paid me one year's interest, and that is all.

Q. $120? *A.* Yes, sir.

Q. Is the whole of that mortgage, two thousand dollars, with interest from its date, with the exception of one year's interest, due to you? *A.* Yes, sir.

Q. Now I want to ask you about the signatures, (referring to endorsements on the back of checks); state whether they are made by your son or by McChesney? *A.* Most of them by my son; here is one of McChesney's, (pointing to paper), and here is one of my son's, (pointing to paper), and so on.

Q. (Handing witness paper). Here is a paper purporting to be an Assignment of a Lease from John B. Hutchinson to you, dated October 8th, 1883, for that building, and a leasehold interest down there for McChesney and Hutchinson; it is an Assignment of a Lease; now, do you know anything about that? *A.* No, sir; I only heard it was done, and I don't know anything about it.

Q. You heard Mr. Buchanon give his testimony? *A.* Yes, sir.

Q. Did you go with him to Mr. Stout's office that time? *A.* I did, sir.

Q. Was that the first you ever knew of the existence of this assignment of the Lease? *A.* No, sir; I think the first I ever knew of it my son came to my house a few

days before that and told me that Mr. Stout thought it would be best to assign the Lease of the building to me, and that he had done so; that was all I knew about it; I didn't know anything about its interfering with me in any way, and I came down to Asbury Park as Mr. Buchanon wrote to me for to have that judgment transferred to me.

Q. And you were prepared then to take an assignment of it, were you? *A.* Yes, sir; I was there for that purpose.

Q. Did you know at that time, when this Lease was executed, October 8th, 1883, that it was going to be done? *A.* No, sir.

Q. Did you authorize any one to receive this paper for you? *A.* No, sir.

Q. As your attorney? *A.* No, sir.

Q. Who was Mr. Stout attorney for? *A.* My son, I believe; at least he done some writings for him.

Q. Was he attorney for you? *A.* No, sir; he done some little writings for me afterwards.

Q. In other matters? *A.* Yes, sir.

Q. He isn't attorney acting for you in this matter? *A.* No, sir; he was the attorney for—well, I don't know as he was the attorney anyhow for my son, but he just went and got some papers wrote there.

Q. Did you ever authorize Mr. Stout to receive this assignment of Lease for you? *A.* No, sir.

Q. How long was it before you and Mr. Buchanon went to Mr. Stout's office first, that your son came up to see you at your home? *A.* Well, I think it must have been two or three weeks previous to that.

Q. You are positive then, that when your son came to see you it was after the date of this assignment? *A.* Yes, sir; I know it was.

Q. Did he tell you he had executed the assignment? *A.* He told me he had assigned the Lease over to me.

Q. Did he tell you who advised him to do it? *A.* He said Mr. Stout advised him to do it.

Q. Had any consideration whatever passed between you and your son for that assignment? *A.* Not one cent; no, sir.

Q. Have you had possession of this assignment of Lease before it was put in your hands to-day? *A.* No, sir; I never seen it before; if this is it, this is the first time I have ever seen it.

Q. Did you ever authorize Mr. Stout, or any one else, to place this assignment of Lease upon record? *A.* No, sir; I don't know that I ever did.

Q. Now as to this Chattel Mortgage of yours; have you always regarded that as a good and subsisting lien against the premises? *A.* I have.

Q. You never gave it up in any way? *A.* No, sir.

Q. It was never cancelled? *A.* No, sir.

Q. Nor your son never had possession of it? *A.* No, sir.

Q. Nor Mr. McChesney? *A.* No, sir.

Q. And it was never your intention to give it up? *A.* No, sir; I supposed that it was as good as wheat.

Q. Were you present when the property was sold on the Buchanon judgment? *A.* Yes, sir.

Q. Who purchased it at that sale? *A.* It was bought for me.

Q. You were the highest bidder there? *A.* Yes, sir.

Q. (Handing witness paper.) Is that the deed you received for the property? *A.* Yes, sir.

Q. When didyou take possession of that property—first take possession of that property? *A.* Myself?

Q. Yes, sir; yourself? *A.* Well, after I got possession of it; after I bought it.

Q. After you bought it? *A.* Yes, sir.

Q. You mean at Sheriff's sale? *A.* Yes, sir.

Q. And you never had possession of it before? *A.* No, sir.

Cross-Examination by Mr. Steen—

Q. You went down with Mr. Buchanon to take an assignment of his judgment, didn't you? *A.* Yes, sir.

Q. Who advised you in the first place to take that—what counsel? *A.* I don't know that any one particularly; Mr. Buchanon wished his money, and it was under-

stood that he was to get his judgment and then assign it to me.

Q. Then how did you come to go to Mr. Stout's office when Mr. Buchanon's lawyer was Mr. Harvey—Mr. Harvey was his lawyer, wasn't he? *A.* Yes, sir.

Q. How did you come to go to Mr. Stout's office to see about the assignment? *A.* He had been doing some writing for my son, and he told me to go there.

Q. Well, now, when you got there, didn't Mr. Stout tell you that it was not necessary to take the assignment of that judgment, because you had that deed already? *A.* Yes, sir.

Q. And you acted on his advice and didn't take the assignment? *A.* Certainly I did.

Q. Well, in point of fact, you advised with Mr. Stout on that matter? *A.* Well, he told me that part, of course, and he knows more about it than I do.

Q. And you declined to take the judgment from Mr. Buchanon on that ground? *A.* Yes, sir.

Q. On the ground that you had this deed? *A.* Yes, sir.

Q. Now do you say that you didn't tell Mr. Stout to send that Assignment of Lease to be put on record? *A.* I didn't tell him anything about it; McChesney was talking something about some one had a claim, and I went to Freehold and looked to see; I think it was Mr. Beakes, but I found that there was no claim there, and I wrote to him in this way; that Mr. Beakes had no claim there, and perhaps he had better send it up; those is just the words, as near as I can tell.

Q. Who did you write that to? *A.* To Mr. Stout.

Q. And he has that letter yet? *A.* I suppose so.

Q. So that Mr. Stout did that on a qualified direction from you? *A.* I wrote to him just in that way, that I didn't see anything there, or that Mr. Beakes had nothing against it, and perhaps he had better have it recorded; something of that sort; I don't know that that is it exactly.

Q. Was that the same day that I saw you and had a conversation with you? *A.* No, sir.

Q. Before that, was it? A. I don't know, but I guess it was before.

Q. Now this building in Asbury Park, how large is it? A. I think it is 30x60, or 32x60, it is something like that.

Q. How many stories is it high? A. Three stories.

Q. What is the first story used for? A. Making ice cream.

Q. What is the second story used for? A. When do you mean, now or when they had it?

Q. I mean when your son was there? A. It was used for no purpose.

Q. What was the third story used for? A. Nothing.

Q. Didn't they hire it out? A. They might have, once in a while, in the evening.

Q. So that the whole of that building is not necessary for the manufacture of ice cream? A. No, sir.

Q. It was out of all proportion for their business of making ice cream? A. Yes, sir; it was.

Q. They were compelled to build it under a Lease they got from Mr. Bradley? A. Well, I suppose they were.

Q. The firm, as you call them, your son and Mr. McChesney, owned some machinery there, didn't they? A. Yes, sir; they had some.

Q. And they had quite a little trade, supplying hotel keepers and cottages about there, hadn't they? A. Yes, sir.

Q. And they have books of account, haven't they? A. Yes, sir.

Q. And there is something due on those books of account, is there not? A. There was some, but not of much account, I guess.

Q. Then there is no telling whether McChesney and Hutchinson are solvent or not, is there? A. Well, I remember when he called his creditors together; I met them there and, told them that if they would take all he had in the world to settle, I would give him $500 to set him where he commenced.

Cross-examination by Mr. Lawrence—

Q. The amounts, Mr. Hutchinson, which were furnished by you under this Chattel Mortgage, were given as the checks you have produced bear date, were they not? *A.* Yes, sir.

Q. And those checks will make up that amount? *A.* I think it does. I may have paid a little sum in cash, but I won't say positively, but I think it does; you can look over them and see.

Q. You knew before this assignment to you was put on record, that Mr. Beakes had a claim against the firm of McChesney & Hutchinson? *A.* I heard that they owed it to him, because my son wrote to him to meet with creditors and they didn't do it.

Re-direct.

Q. Did you know that they had a judgment at that time? *A.* No, sir; I think they had no judgment at that time.

Q. They had no judgment then? *A.* I know that my son wrote to them, or had wrote to them, to meet with the creditors and see if he could not make some compromise in some way or another; I thought he was a young man, and I didn't like to see him lose anything.

Q. You didn't take it from the Clerk's office? *A.* No, sir.

By Mr. Steen.—I took it out myself; it was the only way I could prove it.

Q. After your son informed you that such a deed had been made, did I understand you to say that you went and made a search to see if there was anything against him? *A.* Mr. McChesney claimed that there was something at Freehold, or that Beakes had some former judgment, and I went there to see about it, and it was not there; and I wrote to him that there was nothing there that I seen.

Q. You didn't write to him that you would give up your Chattel Mortgage in any way? *A.* No, sir.

Q. Was it your intention at any time to give up the Chattel Mortgage? *A.* No, sir.

Q. At the time you were making these advances by check was the building in progress then? *A.* Yes, sir; I didn't send my checks until after they had commenced building, and then it was to pay the help and for material.

Q. Since you have owned the building you have paid the rent for the Lease, hav'nt you? *A.* Yes, sir.

Q. To Mr. Bradley? *A.* Yes, sir.

Q. Who paid the rent previously to that? *A.* The firm.

Q. The firm? *A.* I suppose so.

Q. You didn't pay it? *A.* No, sir.

Q. After you received this deed, this first deed, or when you heard it was made and until you got the Sheriff's deed, did you pay the rent then? *A.* I couldn't say whether—no, sir; I think not; I think my son paid it in the Fall, before he left.

Q. That is all.

Cross-Examination by Mr. Steen—

Q. You spoke of looking for that former judgment; who was that against, McChesney alone, or against the firm? *A.* It was against Mr. McChesney alone?

Q. You say you looked to find out whether that was ever recorded before you told Mr. Stout to send up the deed or the assignment? *A.* Yes, sir.

Q. Didn't you find Bramhall, Deane & Company's judgment on record? *A.* I did.

Q. And finding that on record you still told Mr. Stout to send it up? *A.* Well, I don't know anything at all about that; I was ignorant about those matters.

Re-Direct.

Q. Did you know that Bramhall & Company's judgment was a lien on the property? *A.* No, sir; I didn't know anything about that; I don't know anything about liens.

Q. As soon as you found you were in trouble where did you go then? *A.* To you—Robbins & Hartshorne.

Q. And you acted then under our advice? *A.* Yes, sir.

Cross-Examination by Mr. Lawrence—

Q. When did you first learn that the firm of McChesney & Hutchinson owed Mr. Beakes? *A.* I kept asking my son in the Fall if they had paid you, and he told me that Mr. McChesney had a bill to collect which he was to pay over to you, and instead of paying it over to you I think the money went somewheres else.

Q. You knew that the firm owed Mr. Beakes, early in the Fall? *A.* Yes, sir.

Re-Direct.

Q. Fall of 1883? *A.* Yes, sir; when they were doing business there at the time, my son wrote to them to meet the creditors.

Cross-Examination by Mr. Steen—

Q. You did know of the judgment of Bramhall & Company against McChesney? Now why did you think that would not bind the property, and that the judgment of Mr. Beakes against Mr. McChesney would? *A.* Well, I was told by Mr. McChesney; I didn't know anything about it; I didn't know about anything.

Re-Direct.

Q. When you made the search—did you make a search against the property? A. No, sir; only just against McChesney; I had a search before and found there was nothing there.

Q. Did you find out afterwards where the Beakes' judgments were? *A.* Yes, sir; I heard afterwards they were in Trenton.

Q. In the Supreme Court? *A.* Yes, sir.

The judgment of Mr. Beakes is admitted.

By Mr. Lawrence.—I have a letter here which I subpœnaed the Sheriff to prove, but he couldn't come; will you admit it?

Mr. Hartshorne stated that he didn't care to admit it without having made some inquiry about it first, but that he would see the Sheriff and would notify Mr. Lawrence, at an early day, whether he required him to prove it or not.

Adjourned until the hour of ten o'clock in the forenoon of Tuesday, October 21st, 1884, at the Vice Chancellor's Chamber, Newark, New Jersey.

Continued on Tuesday, the 21st day of October, A. D. 1884.

William W. McChesney, a witness produced on the part of the said defendants, having been duly sworn according to law, deposeth and saith :

Direct examination by Mr. Hartshorne—

Q. Where do you reside? *A.* Asbury Park.

Q. How long have you resided there? *A.* 10 or 11 years.

Q. Do you know John B. Hutchinson? *A.* I do.

Q. Was he formerly a partner of yours'? *A.* Yes, sir.

Q. What was your firm name? *A.* McChesney & Hutchinson.

Q. Were there articles of agreement—articles of co-partnership drawn? *A.* There was.

Q. Have you those articles with you? *A.* I have not; they were mislaid.

Q. Have you searched for them? *A.* I have searched for them.

Q. And can't find them? *A.* No, sir.

Q. When did you go into partnership, you and Mr. Hutchinson together? *A.* I think about March, 1881.

Q. Was it March 1881, or 1882? *A.* It must have been 1882.

Q. How long were you in partnership? *A.* Until about the Fall of 1883.

Q. You were in partnership not quite two years then? A. Not quite two years.

Q. What were the purposes for which you formed the

co-partnership? *A.* The manufacture and sale of ice cream.

Q. After you first entered in co-partnership, what was your first act in reference to the business of the concern?

Mr. Steeen.—I don't want to be captious, but I think the books of the concern or the articles of co-partnership ought certainly to be produced; I don't like this style of testimony.

The Court.—I understood the witness to say that he couldn't find the articles of co-partnership.

Mr. Steen.—He did say it in a manner, but it didn't appear that it was impossible to find them; he said he had searched for them and didn't find them; but I think it should be established, beyond a doubt, that they are lost before he is allowed to put in other evidence; I think the books will show what the first transaction of the firm was, and he has not yet sworn that they cannot be produced.

The Court.—It isn't necessary that the witness should produce the books for the purpose of showing when the business commenced; but I think that the proof of the loss of the co-partnership articles is a little meagre.

Q. Were you requested by myself to search for your articles of co-partnership and bring them here? *A.* Yes, sir.

Q. Did you search for them? *A.* I did.

Q. Did you make a diligent search for them? *A.* I made as diligent a search as I knew how.

Q. And couldn't find them? *A.* No, sir.

Q. You made a search among your papers? *A.* Yes, sir.

The Court.—The other side have a right to cross-examine as to the extent and nature of the search, if they desire to do so.

Mr. Steen.—Yes, sir; I will do so.

Cross-examined by Mr. Steen—

Q. When did you see the articles of co-partnership last? *A.* I don't remember seeing any in an immense long time.

Q. Do you know whether Mr. Hutchinson hasn't got them? your late partner? *A.* We each had a copy of them.

Q. When did you make this search for them? *A.* On Saturday and on Sunday; I was requested by Mr. Hartshorne on Friday to search for them; I was at Freehold at the time, and he specially requested me to make search for them, and I did so.

Q. You kept your books in the hotel in Asbury Park, where you reside? *A.* Yes, sir.

Q. Well, now have you looked through all of them? *A.* I have looked through all the papers pertaining to that business; yes, sir.

Q. Well, did you look through the rest of your private documents? *A.* I looked through my papers generally.

Q. Is there no other place that the articles could possibly be? *A.* Every place that I thought I might find them in I looked at; I searched all my letters and papers —all my general business papers.

Q. But some of your papers you didn't examine, did you? *A.* I don't know of any.

Q. Well, do you say that you examined all of your papers? *A.* I searched with the full intention of finding them, as Mr. Hartshorne requested me; I had the full intent of finding the partnership papers, if I could.

Q. You don't remember where you saw the articles last, or where you kept them? *A.* No, sir; I have no recollection of what became of them.

Q. Where were they drawn? *A.* Mr. Ten Broeck Stout's office.

Q. Did you inquire of him if he had them? *A.* No, sir; the article was given to me at the time—I am not positive of its being drawn in his office; but it was either in my room or in his office.

Q. Are you sure there were articles of co-partnership? *A.* Yes, sir; I am sure.

Q. Who witnessed it? *A.* I think Mr. Stout, but I am not quite positive about that.

Q. Are you sure that Mr. Stout has not got possession

of those articles now? *A.* I have no reason to think he has them; he has had no call for them.

Q. Were there copies of the articles of agreement kept? *A.* I tell you where I think mine were lost; the house was recently rented, and I was hurt at the same time, and possession was taken while I was hurt, and I think those papers were in my office desk; and there was a number of my important papers lost at that time from that place by my porter, and I think that the articles were recently lost with those papers; I am not positive, but there were quite a number of papers in my office desk that were lost, and that's the only reason that I can give you as to what has become of them.

Q. Do you remember the date of the articles? *A.* I think about March or April; about that time.

Q. You don't know whether your partner has his copy or not? *A.* I do not; I don't say that they cannot be found, but I searched for them with the intention of finding them, as Mr. Hartshorne requested me last Friday, as he said he wanted them.

Mr. Hartshorne.—Mr. Hutchinson, the other partner, is here. I requested him also to bring his co-partnership papers, and he searched for them and can't find the articles of co-partnership; there seems to be some fatality about them. Shall I go on examining Mr. McChesney?

The Court.—Do you still object, Mr. Steen?

Mr. Steen.—Yes, sir; I desire to enter my objection to the introduction of secondary proof.

The Court.—*Q.* There were two copies, you say, of the articles of co-partnership? *A.* Yes, sir.

The Court.—You may call Mr. Hutchinson and examine him about the paper.

John B. Hutchinson, a witness produced on the part of the said defendants, having been duly sworn according to law, deposeth and saith:

Direct Examination by Mr. Hartshorne—

Q. Are you one of the co-partners of McChesney & Hutchinson? *A.* I am.

Q. Did you have a duplicate copy of the articles of co-partnership between you and Mr. McChesney? *A.* Yes, sir.

Q. Where is that copy? *A.* I don't know; I hunted for it, but couldn't find it.

Q. Did you make a thorough search for it? *A.* Yes, sir.

Q. Did you look among all your papers? *A.* Yes, sir; I thought it was in my trunk, and I looked for it, but couldn't find it.

Q. Were you requested by me to bring them here to-day? *A.* Yes, sir.

Cross-examined by Mr. Steen.—

Q. Did you ever have occasion to show those articles of co-partnership to anybody? *A.* Only to my father.

Q. You are living with your father now, are you not? *A.* No, sir.

Q. You are living near him? *A.* Yes, sir.

Q. Do you know whether he has them or not? *A.* He hunted for them this morning, and couldn't find them.

Q. Didn't he hunt for them until this morning? *A.* No, sir; we didn't think about it until this morning; I had forgotten about it.

Q. Then this morning was the first you hunted for them? *A.* Yes, sir.

Q. And you say you hunted through your trunk? *A.* Yes, sir.

Q. Where else did you search for them? *A.* All over wherever I kept any such things or any such papers; I never had very many of them, and I came to the conclusion Mr. Stout must have it; he has had some of my papers—the lawyer at Asbury Park.

Q. Is he the one who drew them? *A.* No, sir.

Q. Who did draw them? *A.* Mr. Stout.

Q. Well, that's what I asked you; now, you think he has them? *A.* I think he has; he may not have them, but I think so.

Re-Direct.

Q. You don't know that he has them? *A.* No, sir.

Q. Didn't Mr. Hawkins draw the articles of co-partnership? *A.* Yes, sir; who did I say? I meant to say it was Hawkins; that's the man.

Further Cross—

Q. You say Mr. Hawkins drew them; what do you mean? *A.* The articles of co-partnership.

Q. You don't mean the other papers? *A.* No, sir.

Q. Mr. Stout drew the other papers for you, didn't he? *A.* Well, not for some time afterwards; no, sir.

Q. Who drew the Assignment of the Lease? *A.* He did.

Q. The assignment of the Lease which McChesney made to you and the one you made to your father, didn't he? *A.* Yes, sir.

Q. Didn't he have the articles of co-partnership at that time? *A.* I don't think he did.

Q. You never asked Mr. Hawkins or Mr. Stout for them, have you? *A.* No, sir.

Re-Direct.

Q You had them in your possession, hadn't you? *A.* Yes, sir; I did.

Q. Where did you keep them? *A.* In my trunk; my wife said they were there, and I looked for them this morning, and they were not there.

Q. And then you searched around elsewhere? *A.* Yes, sir; I did; I supposed there was no use in looking for them after she said they were in the trunk, and I couldn't find them there.

Q. They were there until this morning, were they? *A.* Yes, sir; but I had no further time to look for them, because it was time to take the train, and I had to leave.

Mr. Steen.—I insist upon my objection here.

The Court.—Do you think you have laid a proper foundation for the introduction of secondary evidence?

Mr. Hartshorne.—Yes, sir.

The Court.—Well, you are wrong, or I am; I do not agree in that.

Mr. Hartshorne.—Well, I am not asking about the co-partnership anyway.

The Court.—It appears by the testimony of this witness that this contract was executed in duplicate, each partner taking one copy; they were both directed to make search for their respective copies; the proof as to Mr. McChesney's copy shows clearly it is lost and that he cannot find it; but the other partner, Mr. Hutchinson, didn't commence his search until this morning, and he is of opinion that the papers are where they are accessible. He believes that Mr. Stout has them. That being so, I could not permit you to offer secondary evidence as to its contents.

Mr. Hartshorne.—He said they were in his trunk the last he saw them.

The Court.—Yes; the last he remembers to have seen them, but his opinion is that they are in the possession of Mr. Stout, and before secondary evidence would be admissible you would have to show that Mr. Stout has not them.

Re-Direct.

Q. Did you give them to Mr. Stout after you had them in your possession? *A.* I don't think I ever did; I don't think he has them; he may have them.

The Court.—By this course of proof you only make the evidence more obscure, and you have the witness to very seriously reflect upon himself. He has already stated very distinctly that he believes, or that it is his opinion, that Mr. Stout has the articles of co-partnership. He has not, so far as the proof appears, been there to see if he has them yet. Now, if you have him to state facts which show that the opinion which he has already expressed is groundless, you see where you place your witness.

Mr. Hartshorne.—Well, I don't care much about the articles of co-partnership, anyway. The only reason that I speak of the articles at all, is, that the counsel on the other side called for them the other day.

The Court.—I don't think sufficient foundation for the introduction of secondary evidence has been laid. It is unfortunate that your client didn't commence his search a little earlier, so that when the opinion took possession of his mind that the papers were in the possession of Mr. Stout, he could go there and enquire.

Wm. W. McChesney, a witness heretofore produced, recalled:

Further Direct, by Mr. Hartshorne—

Q. What was the first act you did as co-partners? A. building.

Q. Didn't you do something before you put up the building? *A.* Do you mean in the business?

Q. In preparing for your business? *A.* We tore down the old building and rebuilt.

Q. Didn't you get a lease? *A.* Yes, sir.

Q. Who did you lease from? *A.* James A. Bradley.

Q. (Handing witness a paper). Is that the Lease that you got from Mr. Bradley? *A.* Yes, sir.

Q. After you obtained this Lease, what did you do then as co-partners?

Mr. Steen.—I object to that.

Q. Did you borrow any money of Alison E. Hutchinson? *A.* The firm borrowed two thousand dollars.

Q. Did you receive that money all at once? *A.* No, sir.

Q. You received it at different times? *A.* Yes, sir.

Q. What did you do with that money? *A.* It was used partially, I suppose, in rebuilding; I re-built my ice cream—we re-built the ice cream factory.

Q. Wasn't it all used in paying for materials and labor in putting up that building? *A.* I really couldn't tell what portion was used for that and what proportion was used for supplies; we were in business before the building was quite through.

Q. You were in business? *A.* I think we did some little work.

Q. Was any part of it used outside of the business of McChesney & Hutchinson? A. None; not a dollar.

Q. It was used for the benefit of the firm; the whole of it? A. For the benefit of the firm; not a dollar was used for any other purpose.

Q. What did you tell Mr. Hutchinson you wanted to do with the money when you borrowed it? A. To enlarge the building to carry on the ice cream business; for rebuilding and carrying on the ice cream business.

Q. How much capital did each one of you furnish? Objected to and overruled.

Q. How was the building put up—I mean as to whether there was a cellar under it or not? A. There was a foundation built, but no cellar.

Q. Was it just put up on the foundation? A. Yes, sir.

Q. What was the building erected for—what was the purpose of the building? A. The manufacture of ice cream and other purposes.

Q. Is that the same building that is mentioned in the Chattel Mortgage to Alison E. Hutchinson? A. Yes, sir.

Q. Was that building used by the firm while they were in business? A. Yes, sir.

Q. Who paid the rental of the land during the existence of the firm? A. The firm did.

Q. It was paid out of the firm's assets? A. Yes, sir.

Q. Who furnished the lumber for erecting that building, and the materials? A. Who did we buy of?

Q. Yes? A. Buchanon & Company.

Q. And they filed a mechanics' lien? A. Yes, sir; or at least I understood they did. I never saw it, but I understood they did.

Q. You were sued, were you not, as one of the partners on that Mechanics' lien? A. Well, I never had any notice of the suit, to my knowledge.

Q. Don't you know that a judgment was obtained against you? A. I know there was—or at least I was told there was a suit.

Q. And that judgment was obtained? A. I was told that too.

Q. But you saw it advertised, didn't you, for sale? *A.* Yes, sir; and I may have received notice, but I have no recollection of it.

Q. Now, before that sale, was the Lease and the building, and the machinery therein contained, a part of the assets of the firm of McChesney & Hutchinson?

Objected to and overruled.

Q. Before you made any deed to anyone, or before it was sold by the Sheriff, to whom did the building and the Lease, and the machinery contained in that building, belong?

Objected to and overruled.

Q. There was machinery in that building, wasn't there? *A.* Yes, sir.

Q. Who was that purchased of? *A.* Mr. Thompson.

Q. Who purchased it? *A.* The firm.

Q. What was given in payment for it? *A.* Notes.

Q. Was anything given to secure the notes? *A.* A Chattel Mortgage; not directly at that time; I think it was much later.

Q. (Handing witness a paper). Look at that note and see whether any more than one note was given for the deed? *A.* This is the note that was given, and then there was some sort of a settlement made in Mr. Thompson's office at Bordentown, at the time the Chattel Mortgage was given, and I think notes were given at that time; but I am not positive about that.

Q. Is that the signature of McChesney & Hutchinson to that note? *A.* Yes, sir.

Q. The signature of the firm? *A.* Yes, sir.

Q. (Handing witness Chattel Mortgage). Is that the Chattel Mortgage that was given to secure this note and the purchase money? *A.* Yes, sir.

Q. For what was that machinery used? *A.* The manufacture of ice cream.

Q. By whom? *A.* McChesney & Hutchinson.

Q. Was that machinery in the building at the time of the Sheriff's sale? *A.* I suppose it was; in fact, it is there now.

Q. How long was that machinery and the building

used by the firm? *A.* From the time it was completed until long in September, 1883.

Q. Is that the time the firm dissolved? *A.* Yes, sir; the time the firm dissolved.

Q. You say from the time it was completed; when was it completed? *A.* Probably in May or June; I don't know the exact time, but early in the season of 1882.

Q. Do you know Mr. Charles H. C. Beakes? *A.* I do.

Q. Did he recover a judgment against you in the Supreme Court? *A.* He did.

Q. That was before you entered into the co-partnership with Mr. Hutchinson? *A.* Yes, sir.

Q. What did you do in reference to getting those judgments released—or this property released from this judgment? *A.* About the time we were going into partnership I went to see Mr. Beakes, and told him I intended to take Mr. Hutchinson in as a partner, and that I was to receive two thousand dollars from this partner for the business, and I asked him to give me a release, or to guarantee a release for me, so far as Mr. Hutchinson was concerned from his judgment, so that I could give Mr. Hutchinson a mortgage for two thousand dollars.

Q. What kind of a mortgage? *A.* A chattel mortgage, I believe.

Q. Did he afterwards give you that release? *A.* He did.

Q. Have you got it with you? *A.* I have.

Q. (Handing witness a paper). Is this the release you got at that time? *A.* This is the release that I got.

By Mr. Hartshorne.—(To Mr. Lawrence.) I believe you admit the signature of that?

Mr. Lawrence.—Yes.

Mr. Hartshorne.—They admit that to be the signature without my bringing the subscribing witness to prove it.

Q. This release is dated the fifteenth day of June, 1882? *A.* This release was got after the building was completed; after we were to work in the building; of course there were improvements made on the building afterwards.

Q. And after the co-partnership had been formed? *A.* Yes, sir.

Q. (Handing witness a paper.) Here is the Chattel Mortgage you gave Mr. Hutchinson; what is the date about, of that?

The Court.—The paper will show for itself.

Mr. Hartshorne.—Well, it was the next day after the release, and that's what I wanted to show.

Q. What was the intention of that paper?

Objected to and overruled.

Q. You know Mr. Steen, do you not? *A.* I do.

Q. Do you know whether or not he was acting as attorney for Bramhall, Deane & Co? *A.* He was.

Q. Did he have a claim against you for collection? *A.* Yes, he did have a claim against me.

Q. Against you individually, or as a partner? *A.* Individually.

Q. Was a suit brought on that claim? *A.* It was.

Q. Did you file a plea? *A.* I did.

Q. Well, just state about that; there was a trial on it, wasn't there? *A.* There was a trial.

Q. Before that case went to trial state if you went to see Mr. Steen at any time at his house or at his office, in reference to that claim? *A.* Yes, I called on Mr. Steen in regard to it.

Q. You did? *A.* Yes, sir.

Q. When was that; do you know? *A.* I don't know the date of it.

Q. Was it before he got judgment, or after? *A.* Before the trial; my impression is that it was between the adjournment of the trial and the trial day; that is my impression.

Q. Between the adjournment of the case and the trial? *A.* Yes, sir.

Q. State what took place between you and Mr. Steen? *A.* I asked him if any settlement could be made of the matter; I told him that I had nothing in the property, and that he would simply injure my business; and I told him that there was a judgment against the property already.

Q. You told him what there was against the property? *A.* I don't know whether I told him the full amount or not.

Q. Well, what did you tell him was against it? *A.* I told him that there was a judgment against me, and that there were debts against the property.

Q. What did you tell him the debts were? *A.* I don't know as I told him the amount; I told him there was nothing in the property, and that if he got a judgment against me it would only interfere with my business if he should go on with it.

Q. Didn't you tell him there was a Chattel Mortgage on the property?

Objected to as leading and overruled.

Q. Was anything mentioned at that time about mortgages? *A.* I am quite positive there was; I am sure there was a full statement made, but I am not positive enough to give full evidence about that; I know that I laid the case before him.

Q. You laid the whole case before him? *A.* As far as I could.

Q. What did you tell him there was at that time against the property; what were the exact words you used in telling him that at that time? *A.* I am very positive that I told him of the mortgage, but I cannot place the words; I can't place the conversation; there was probably about one-half hour's conversation at that time.

Q. Did you state what was the object of your coming to see him then? *A.* I did.

Q. What was it?

By the Court.—Let him state what he told Mr. Steen was his object in coming.

Q. Yes, state what you told Mr. Steen? *A.* My object was a settlement; I proposed to settle for $150; that was the proposition, but we made no settlement, though.

Q. Mr. Steen would not accept of that? *A.* No, sir; It amounted to nothing and I made no special minute of it.

Q. You are positive that was before he got judgment

on the Bramhall-Deane claim? *A.* I am quite positive.

Q. That's all.

Cross-Examination by Mr. Steen—

Q. How often have I had occasion to sue you for different parties? *A.* I think you sued me twice; I think you have.

Q. Yes; haven't I sued you three times? *A.* I don't remember it, sir.

Q. Are you sure that the time you came to see me it was in reference to the Bramhall, Deane & Co.'s matter? *A.* I am positive it was.

Q. You say it was between the adjournment and the trial of the case? *A.* Yes; the trial didn't come off the first day.

Q. Do you mean to say you came to see me after the first term of Court was on? *A.* What do you mean?

Q. Where was that trial, do you recollect? *A.* Freehold.

Q. You are sure you haven't got that visit mixed up with the case before a Justice of the Peace? *A.* No, sir.

Q. And that it was between the adjournment and the trial day, before the Justice of the Peace? *A.* No, sir.

Q. Didn't you tell me there was nothing in the property? *A.* I said there was nothing in the property for Bramhall and Dean.

Q. Wasn't that on a Sunday night, on the way to Hightstown, or somewhere else? A. No, sir; I went up there on purpose to see you.

Q. What day was it? *A.* Sunday night.

Q. Didn't I cut the conversation pretty short, and didn't you apologize for coming on Sunday? *A.* Yes, I apologized for coming on Sunday, but still you came out and spoke about it, and we had a half hour's talk.

Q. Are you positive about that? *A.* Yes, sir; and it was all very pleasant; there was nothing irregular about it.

Q. It was slightly irregular talking business on Sunday night, wasn't it? *A.* Well, I asked you if you had

any objection, and you said no, that you had no objection to talk of business on special occasions.

Q. What were your exact words in speaking about the matter? *A.* I have just stated that I don't know what they were; I don't remember the conversation; it amounted to nothing, and therefore I didn't make any special note of it.

Q. You did say there was nothing in the property? *A.* I said there was nothing in the property for Bramhall and Deane.

Q. Now did you say anything about a judgment of a mortgage, either one? *A.* That is my impression.

Q. Well, but do you swear you did really? *A.* I cannot swear I did, but I think I did.

Q. In point of fact, you came there to get compromise of that claim for $150? *A.* Yes; and I gave him my reasons why it would be policy to do it.

Q. And you told me it was more than I could get in any other way, because you had nothing in the property? *A.* Yes, sir.

Q. And that was about the sum and substance of the conversation, was it? *A.* No, sir; I believe I told you the reason why there was nothing in the property, and the reason why I was anxious to obtain a settlement was because I was in business, and I thought that it might interrupt my business for the balance of the season.

Q. What time was it? *A.* I can't remember, but I think it was in August.

Q. It was between the first time the case was called and the time at which it was tried? *A.* Well, I don't remember the time it was called, but the trial was at Freehold, and it must have been June or July; I don't remember the time it was called.

Q. Now, I guess we can assist your memory a little. Wasn't the case on the call at the October term of the Monmouth Circuit? *A.* I don't remember that even.

Q. Or was it January term? *A.* I say I don't remember the time it was called.

Q. Well, do you remember about what time in the year it was, when you had this conversation which you

say you had with me? *A.* Well, I am indefinite in regard to that, but if the judgment had been pressed then it would have interfered with my ice cream trade; I know that.

Q. Well, what time in the year do you have ice cream trade? *A.* From May to the first of October.

Q. Do you know when the judgment was recovered against you? *A.* I don't remember the date of it.

Q. Now wasn't the first time the case was noticed for trial in January? *A.* I believe it is, possibly, but I don't know.

Q. And wasn't Mr. McDermott, your counsel, sick at that time? *A.* Yes, sir.

Q. And wasn't it put off till the May term? *A.* It may have been.

Q. And wasn't a judgment rendered against you during the month of May, 1883? *A.* It may have been.

Q. Now, if you came to see me between January and May, how would that have interfered with your ice cream trade. *A.* I have said that I am not positive as to whether I came to see you before or after the judgment was recovered.

Q. And is your memory equally clear as to what you said to me when you saw me? *A.* Oh, well—(interrupted).

Q. What was the date of the dissolution of your co-partnership? *A.* I think it was in September.

Q. You are not positive of that, are you? *A.* No, sir.

Q. What was the last thing you did at the time you dissolved partnership? *A.* What do you mean?

Q. What was the last act you did in reference to the property which you call partnership property, when you dissolved the co-partnership? *A.* When I dissolved I sold the property to John Hutchinson.

Q. That is the gentleman here? *A.* Yes, sir.

Q. (Handing witness a paper). And is this the document? *A.* Let's see that; I have been very anxious to see it for a long time; (witness read same); that's it.

Q. That is the original, is it? A. That is the document.

Q. (Handing witness another paper). Do you know anything about that? A. That I never seen before.

Q. What was the value of this property at Asbury Park when you sold it to Mr. Hutchinson?

Objected to and overruled as not cross-examination.

Q. You stated that you tore down the old building on these premises? A. Yes, sir.

Q. What was that building? A. It had been used for an ice cream factory.

Q. By whom. A. By me, McChesney.

Q. Did that go into the building? A. The old building belonged to James A. Bradley and he hauled away the timbers, I believe.

Q. You say that this new building that was put up was used for the manufacture of ice cream and other purposes; what other purposes? A. It was put up for the purpose of manufacturing ice cream and for other purposes while it wasn't used; it wasn't let except now and then for a ball-room; it was used principally for the ice cream business.

Q. How much of the building? A. The lower floor and the second floor was used—the two lower stories.

Q. How many stories were there? A. Three.

Q. You were obliged to put up a three-story building by the terms of the Lease, were you not? A. I don't remember that we were; I think we were; I am quite under the impression that we were.

Q. You spoke of machinery, on your direct examination, in the building; did you ever sell that machinery? A. How is that?

Q. Did you ever sell that machinery there which you used for making ice cream? A. I sold the whole thing to John B. Hutchinson; I sold the building as it stood.

Q. Did you sell the machinery? A. Yes, sir.

Q. Did you give a bill of sale for it? A. Yes, sir; as per contract.

Q. What contract? A. The assignment of the Lease.

Q. Assignment of Lease? A. Yes, sir.

Q. Did that assignment of Lease carry with it the building, machinery and all?

Objected to by Mr. Hartshorne, on the ground that the assignment of Lease will show for itself.

Cross-Examination by Mr. Lawrence—

Q. The building that you put up was a building that you were required by the terms of the Lease to erect, wasn't it? *A.* Yes, sir; I believe it was.

Q. You say that you saw Mr. Beakes shortly after or before you had formed your co-partnership? *A.* I saw him before we formed the co-partnership; just before.

Q. And you told Mr. Beakes that you intended to form the co-partnership? *A.* Yes, sir.

Q. And that you were going to borrow the money? *A.* Yes, sir.

Q. From Mr. Hutchinson? *A.* Yes, sir.

Q. Did you tell him the amount of money you were going to borrow? *A.* $2,000.

Q. Did you tell him any more than that, except that you wanted to get a release from him—you told him that you wanted him to release you from the judgment against you; now did you tell him anything more than that? A. I told him that we wanted to build a building, and that Mr. Hutchinson was to advance us the money in our business, and that he was to take the mortgage on the building for $2,000; and that I had promised Mr. Hutchinson it should be free from any claim that I knew of against myself, and that I had to have a release from him to relieve Mr. Hutchinson, or to allow him to come in first, ahead of Mr. Beakes's judgment.

Q. Did you tell him that you were required by the Lease to put up a building? *A.* I don't remember it.

Q. You are positive, then, that you told him you were going to give Mr. Hutchinson a mortgage? *A.* Yes, sir.

Q. And that is all you told him? *A.* That is about all that I know of.

Q. Well, are you positive about that, that that is all

you told him; that you were going to give him a mortgage? *A.* I told him that I was going to give him a mortgage.

Q. Did you tell him what the mortgage was to cover?

A. I don't remember of telling him.

Q. Then you only remember that you told Mr. Beakes that you were going to give Mr. Hutchinson a mortgage? *A.* That I was going to give him a mortgage and that I wanted a release for that purpose; I went there the day before giving the mortgage—I think it was the day before.

Q. When you sold and assigned your interest in this Lease to John B. Hutchinson, was there any arrangement as to the debts of the co-partnership?

Objected to by Mr. Hartshorne. Objection overruled.

Q. Now was there any arrangement? *A.* In consideration of the sale John B. Hutchinson was to take all the property and pay all the bills.

Q. That was the consideration of the transfer from you to John B. Hutchinson? *A.* Yes, sir.

Q. And it was the whole of the consideration, wasn't it? *A.* It was the whole of the consideration; there was a written agreement between John B. Hutchinson and myself, that he was to take all the property and pay all the bills.

Q. Now, Mr. McChesney, what do you consider the value of that Lease as distinct from the value of the building?

Objected to and overruled as not cross-examination.

Further cross-examination by Mr. Steen—

Q. In reference to the conversation you said you had with me, wasn't the whole of the conversation about the hotel Asbury on that occasion? *A.* No, sir.

Q. The Hotel Asbury was the building in which the complainants here had put the range, wasn't it? *A.* I don't know in regard to that; I had no interest in the Hotel Asbury at that time.

Q. And that is what you told me at that time, is it not; you told me you had no interest in it? *A.* I may

have told you that, because I had no interest at that time in it.

Re-Direct Examination.

Q. Whatever money was paid for the erection of the building, and for the machinery, and for the rent of the Lease, whose money paid it? *A.* It was all paid by the firm of McChesney & Hutchinson, for the building and machinery both.

Q. That's all.

John B. Hutchinson, a witness produced on the part of the aforesaid defendants, having been duly sworn, testified as follows:

Direct Examination by Mr. Hartshorne—

Q. Are you a partner of Mr. McChesney? *A.* I am, or was.

Q. When was it you first entered into partnership? *A.* About March 1st, 1882.

Q. When was it you dissolved? *A.* October 1st, 1883.

Q. What was your business? *A.* Ice cream manufacturing.

Q. After you first formed the co-partnership, what was your first act as co-partners? *A.* To lease the ground from Mr. Bradley.

Q. Then what was the next step you took? *A.* To build the building.

Q. Where did you get the money for putting up the building? *A.* From my father.

Q. How much did you get? *A.* $2,000.

Q. Did you get it all at one time? *A.* No, sir; he made it payable in checks for different amounts at different times.

Q. Were you the pay-master of the concern, or not? *A.* Yes, sir; as a general thing.

Q. What did you do with the money? *A.* I paid it out for material and labor.

Q. Is that the same building that is in the Chattel Mortgage to your father? *A.* Yes, sir.

Q. Was it or not necessary to have machinery in your business? *A.* It was.

Q. Did you get the machinery? *A.* We did.

Q. Who of? *A.* Louis P. Thompson, of Bordentown.

Q. Was that machinery put in the building? *A.* Yes, sir.

Q. And used by the firm? *A.* Yes, sir.

Q. How long? *A.* During the summer of 1882 and 1883.

Q. What did you give in payment of that machinery? *A.* We gave a note, secured by Chattel Mortgage.

Q. Who did you give it to? *A.* Louis P. Thompson.

Q. Is this the Chattle Mortgage?

By the Court.—It has been sufficiently identified. You may rest your proof on that point till it is attacked.

Recess.

Q. You were speaking of the machinery just before the adjournment; did that go into the building? *A.* Yes, sir.

Q. Where is it now? *A.* In the building.

Q. Of whom did you purchase the material? *A.* Do you mean the building?

Q. Yes. *A.* N. E. Buchanon & Co.

Q. In whose name was the material bought? *A.* The firm's, McChesney & Hutchinson.

Q. Do you know whether or not there was a mechanics' lien filed against the building? *A.* Yes, sir.

Q. By whom? *A.* N. E. Buchanon & Co.

Q. And a suit brought on it? *A.* Yes, sir.

Q. Did it go to judgment? *A.* Yes, sir.

Q. Was there a sale? *A.* Yes, sir.

Q. How was this building erected; I mean, in reference to its foundation? *A.* On a brick foundation.

Q. Was there any cellar under it? *A.* No, sir.

Q. Now as to the firm's intention at the time of build-

ing, about removing the building before the expiration of the Lease, what was it?

Objected to and overruled.

Q. In leasing this land, had you the privilege of removing the building before the expiration of the Lease?

Objected to and overruled.

Q. This leased land, and the building and the machinery, from March, 1882, to October, 1883, was used by whom? *A.* By the firm of McChesney & Hutchinson.

Q. Who were the rentals of the lease paid by? *A.* by the firm.

Q. Out of the partnership funds? *A.* Yes, sir.

Q. You know Mr. Beakes, this gentleman here, (pointing to Mr. Beakes)? *A.* Yes, sir.

Q. Did you ever go to his place of business in New York, to see him? *A.* Yes, sir.

Q. When was that? *A.* Last October—the Fall of 1883.

Q. What was your business there? *A.* To see him in regard to our account.

Q. Well, what took place between you there at that time? *A.* He wanted me to give him my note with my father's endorsement, and he asked me if my father had a Chattel Mortgage, and I told him he had; well, he said, it would be all right then, because he has got a Chattel Mortgage, and that will come in ahead, and he will have the whole thing.

Q. At that time was there anything said about the Thompson Chattle Mortgage? *A.* Yes, sir; I think there was; I stated to him the whole debts of the concern.

Q. You stated to him all the debts of the concern? *A.* Yes, sir.

Q. You know when Mr. Beakes recovered judgment against the firm? *A.* Not exectly; no, sir; I think it was about the holidays.

Q. Was it previous to this or after this? *A.* After this.

Q. He recovered this judgment after this time you were up there? *A.* Yes, sir.

Q. Whose money paid for the erection of the build-

ing—whatever was paid on it—and for the machinery and whatever was paid for the rents under the Lease? *A.* My father.

Q. In what way? *A.* In small amounts.

Q. Well, did he loan it to the firm? *A.* Yes, sir.

Q. Well, then, who paid it? *A.* I did, generally; I was pay-master.

Q. From where? *A.* From the $2,000.

Q. Well, from the firm's assets? *A.* Yes, sir.

Q. There has been a deed spoken of from William W. McChesney to you, which was executed and offered in evidence here; there was a deed made to you, was there? *A.* Yes, sir.

Q. Did your father know anything about the making of that deed? *A.* No, sir; not till afterwards.

Q. How long afterwards? *A.* About two weeks.

Q. You didn't consult him at all about taking it? *A.* No, sir; I was at the Park then, and he was home.

Q. The deed from you to your father, which has been offered in evidence here, do you know about that? *A.* Yes, sir.

Q. How came you to make that deed? *A.* By the advice of Mr. Stout.

Q. Did your father know anything about it? *A.* No, sir; not till I went home two weeks afterwards, and then I told him about the whole thing.

Q. Mr. Stout is an attorney-at-law? *A.* Yes, sir.

Q. And your counsel? *A.* Yes, sir; that is, he drew some papers for me.

Q. Your father did not know anything about it until you went home two weeks afterwards? *A.* No, sir.

Q. How do you know he knew it then? *A.* Because I told him.

Q. Did he have any knowledge whatever of that deed before it was made? *A.* No, sir.

Q. Your partner spoke of renting out occasionally the upper story of the building; did you rent that out occasionally? *A.* Yes, sir; occasionally for a ball.

Q. Where did the funds go—the money you received for rent, where did that go? *A.* Into the firm's funds.

Q. That's all?

Cross-Examined by Mr. Steen—

Q. How long do you say it was after you made this assignment of Lease to your father, that your father first heard of it? *A.* Two weeks.

Q. You were here the last day of the examination, were you not? *A.* Yes, sir.

Q. Well, now, is this the assignment which you made to your father? (Handing witness a paper). *A.* Yes, sir.

Q. Was it executed on the day it bears date? *A.* Yes, sir.

Q. And acknowledged on the ninth of October? *A.* It is dated on the eighth.

Q. But the acknowledgment, I said? *A.* The ninth.

Q. Was that the day on which you signed and sealed it? *A.* Yes, sir.

Q. And it was two weeks after that before your father heard of it? *A.* About two weeks before I went home.

Q. Are you sure he didn't know anything about it before that? *A.* No, sir.

Q. Did you hear your father swear that he went to Freehold and then wrote that he found there was no claim at Freehold, and wrote to him in this way, that there was no claim there and perhaps he had better send it up; did you hear your father swear to that? *A.* I guess I did; I heard what he said.

Q. Now, this is recorded on the 15th day of October; what explanation have you to offer of the statement that your father didn't know anything about it for two weeks after it was recorded; if your father is correct that he made a search and wrote to Stout or McChesney to send the deed up, and it wasn't dated until the eighth or ninth of October, where do you get your two weeks from?. *A.* Well, I don't know anything about that.

Q. Didn't your father know it before the deed was sent up there, or didn't he tell the truth; didn't he know about the assignment of the Lease before it was sent to Freehold for record, or do you mean to say he didn't? *A.* I can't tell what my father meant.

Q. In point of fact, don't you know that your father knew about this assignment before it was made? A. No, sir; he did not.

Q. Well, didn't he know it before it was sent up for record? A. Well, I wouldn't swear to that, because I couldn't tell.

Q. Well, now, you swear that he may have known it, don't you? A. No, sir; I don't swear any such thing.

Q. You heard what he swore to? A. I suppose I did.

Q. So that two weeks did not elapse between the date of the record of the document and the time you saw him, did it? A. That shows it did not.

Q. Did it require for the manufacture of ice cream a building of thirty by sixty and three stories high; did you need all that building to make ice cream in? A. We used two stories.

Q. Then you didn't need it all? A. No, sir.

Q. If you had simply been building a building for your own business you would not have built it three stories high, would you?

Objected to. Objection overruled.

A. No, sir; I suppose not.

Q. Then the third story was unnecessary for the purpose of your business? A. Yes, sir.

Q. Now, how much of that two thousand dollars which you got from your father was used for the building, and how much for the purchase of necessary materials used in the manufacture of ice cream? A. I couldn't tell you.

Q. Was a part used for each of these purposes? A. Well, we commenced making ice cream before we quite finished the building.

Q. And used some of the money for that? A. We may have done so; I couldn't tell you.

Q. Didn't you keep any account of it? A. No, sir; not of that particularly.

Q. When was the last payment made by your father to you of that two thousand dollars? A. I think at the time the Chattel Mortgage was given, if you have the date here.

Q. Wasn't it made after the date of the Chattel Mortgage? *A.* I can't state positively as to that.

Cross-Examined by Mr. Lawrence—

Q. The judgment obtained by Mr. Beakes against yourself and McChesney, what was that obtained for? *A.* For cream bought of Mr. Beakes.

Q. For the firm? *A.* Yes, sir.

Q. Can you tell about what time was covered by the cream bought for which he obtained judgment? *A.* I don't know what time we got the first cream, but it was during those two seasons; some in 1882 and some in 1883.

Q. Up to about what time was the last that you bought? *A.* Somewhere about, I should judge, the middle of September, or October the first; I couldn't tell you exactly.

Q. You had bought all that you did buy of that which he obtained the judgment for before you went to see him, and had this conversation you have been testifying about, hadn't you? *A.* Yes, sir.

Q. Now what did you tell Mr. Beakes in that conversation as to any mortgage against the property? *A.* Why he wanted me to give my note with my father's signature, and he asked me if my father had a judgment, or I told him, or anyway it was understood there; we talked about it.

Q. You talked about your father having a judgment? *A.* That he had a Chattel Mortgage.

Q. Had a Chattel Mortgage? *A.* Yes, sir; a Chattel Mortgage.

Q. Are you positive about that? *A.* Yes, sir.

Q. That you told him it was a Chattel Mortgage? *A.* Yes, sir.

Q. Are you positive that you said so? *A.* I think so.

Q. You think so? *A.* Yes, sir; I told him of a Chattel Mortgage; I never thought of anything else.

Q. You are positive that you said more than that he had a mortgage, and that you called it a Chattel Mortgage? *A.* Yes, sir.

Q. Now, about Thompson; did you tell him anything about Thompson? *A.* I won't be positive about Thompson.

Q. You don't know about that? *A.* But we talked over the general affairs of the firm, of course.

Q. Well? *A.* It was all brought up.

Re-Direct.

Q. Did you talk over how much was against the firm's property? *A.* Yes, sir.

Q. Now, the deed that was spoken of; might not that have been sent up for record before you saw your father? *A.* It might possibly have been.

Q. All this building was under the control of the firm; all the three stories? *A.* Yes, sir.

Q. At the time you commenced this business; wern't you a new beginner? *A.* Yes, sir.

Q. Did you know what size building was required for the use of the firm? *A.* No, sir; I knew nothing of it.

Alison E. Hutchinson, a witness produced in his own behalf, recalled for

Further Direct, by Mr. Hartshorne—

Q. In figuring up the amount of these checks that you testified to the other day, I see they amount to——— dollars, and bills paid to Mr.——— ———dollars, making———dollars; how do you account for the balance? *A.* The rest was for interest; I was to have interest.

James A. Steen, a witness produced on the part of the aforesaid defendants, having been duly sworn, according to law, deposeth and saith:

Direct Examination by Mr. Hartshorne—

Q. You are an attorney and counsellor at law of this State? *A.* Yes, sir.

Q. You know the firm of Bramhall, Deane & Co.? *A.* Yes, sir; I represented them as attorney.

Q. Did you have a claim put in your hands of that firm against McChesney for collection? *A.* Yes, sir.

Q. When? *A.* I couldn't tell you the exact date now.

Q. About what time? *A.* I couldn't say; but some time prior to my recovering the judgment.

Q. How long prior? *A.* I couldn't tell you that, either; not without my docket.

Q. Did you sue on it? *A.* Yes, sir.

Q. And you recovered a judgment? *A.* Yes, sir.

Q. How many terms was that case on the calendar? *A.* I know it was on it for two, and I wouldn't say whether it was for more than that or not; but it went off on the application of the defendant.

Q. Judgment was recovered May 7th, 1883, wasn't it? *A.* Yes, sir; that's my memorandum.

Q. Now, previous to May 7th, 1883, did you have any knowledge whatever of any Chattel Mortgage existing upon the partnership property of McChesney & Hutchinson? *A.* My recollection is, that the time Mr. Throckmorton, Mr. McDermott's partner, applied to the Court for a postponement, that I resisted the application on the ground that I saw, by the index of Chattel Mortgages, that the defendant had been giving a Chattel Mortgage on his property; but I knew nothing about what it covered.

Q. Didn't you state at that time that there were two Chattel Mortgages? *A.* I may have done so; but I am not positive.

Q. Didn't you state at that time that one of them was given to Alison E. Hutchinson? *A.* I don't remember that I did, and I think I made the general assertion that the defendant was covering up his property by Chattel Mortgages.

Q. Hadn't you searched the records to find out what Chattel Mortgages there were against the property? *A.* I don't think I did; for the search which I have of Chattel Mortgages was made after I had recovered the judgment and for the purpose of making the levy.

Q. I am speaking of previous to May 7, 1883; didn't you go to the Clerk's office and look yourself to see what Chattel Mortgages McChesney & Hutchinson had given? A. I think in January, when the case first came up on motion to postpone—(Interrupted).

Q. 1883? A. Yes, sir; but I saw by the index of Chattel Mortgages that a Chattel Mortgage had been given, and I am pretty clear that I didn't make a search to see what the Chattel Mortgage covered, or I may have made a memorandum of the books and pages; but I didn't at that time make any examination of what the Chattel Mortgages were.

Q. What index do you refer to? A. The index of the books where the Chattel Mortgages are recorded.

Q. In the Clerk's office? A. Yes, sir.

Q. These indexes give the date, the names of the parties, and the amounts of the mortgage, don't they? A. Yes, sir; I think they do.

Q. And you saw that index? A. Yes, sir.

Q. That index was used by the Clerk in registering all Chattel Mortgages coming in there for record? A. Yes, sir; I think so.

Q. That's all? A. I think there is a register of deeds in which the first coming of papers into the County Clerk's office of that character is recorded; I may have seen it in that, and I think my attention was drawn to the fact that a Chattel Mortgage of recent date had been sent into the Clerk's office.

Q. Recent date? A. Just recently; prior to the January term of court; I think in December or November, or something like that; that's my recollection.

Q. Were there no other Chattel Mortgages but these two? A. Well, I am speaking now from memorandum made since—after the commencement of this suit, or in preparing for this suit; I think there was a Chattel Mortgage to McAlliston, and one or two other Chattel Mortgages; I think Mr. Buchanon had a Chattel Mortgage.

Q. On this property? A. No; it didn't cover this property.

Q. Those were the only two Chattel Mortgages that

you knew of that covered this property? *A.* Well, I can tell by looking at my memorandum.

Q. Look at it. *A.* I was looking for McChesney; I was pressing the judgment against McChesney alone.

Q. Well, that would bring out McChesney and Hutchinson, wouldn't it? *A.* Yes, sir; (referring to memorandum;) there is a Chattel Mortgage of W. W. McChesney to Van Dusen, New York city, on portable pump, engine and boiler in ice cream factory, Asbury Park, New Jersey.

Q. Where is that recorded? *A.* I think in Book 3 of Chattel Mortgages, page 169.

Q. Wasn't that paid and cancelled? *A.* I think not; my memorandum doesn't show any such cancellation, although it may have been; there was also one in Book 2, page 63, W. W. McChesney to Smock and Buchanon, covering the engine, freezer, &c.; then Wm. W. McChesney to McAllister, for furniture in the hotel Asbury; then W. W. McChesney to Cooper and Hewitt, and another one, October 24, 1882, Wm. W. McChesney and John B. Hutchinson to Thomas Mills and John W. Davidson, on freezer, &c.; then Wm. W. McChesney and John B. Hutchinson to Lewis P. Thompson, on shafts, pulleys and so forth, in ice cream factory; and Wm. W. McChesney and John B. Hutchinson—well, I don't know whether that's the same one or not; I think it is the same one that I gave you before, to Mills and Davidson.

Q. That is the memorandum that you used in January, 1883, wasn't it? *A.* No, sir.

Q. Wasn't that memorandum made from a search which you made before January, 1883, or at that time? *A.* I don't think I made an actual search; I think I simply glanced at the index and resisted the motion made for the postponement of the trial, on the ground that the defendant, Wm. W. McChesney, had been making Chattel Mortgages.

Q. You say you did see these two mortgages there then? *A.* I think it is quite likely; it is possible.

Q. Ever since you sued on this claim of Bramhall,

Deane & Co., you have had charge of it up to this time as attorney? *A.* Yes, sir.

William W. McChesney, a witness produced heretofore, recalled for

Further-Direct Examination by Mr. Hartshorne—

Q. There was only one Chattel Mortgage on the partnership property, besides Mr. Hutchinson's and Mr. Thompson's? *A.* Mr. Hutchinson, Mr. Thompson and Mr. Mills had Chattel Mortgages.

Q. The Mills Chattel Mortgage has been paid?

The Court.—Is that at all important?

Mr. Hartshorne.—I don't know as it is; I desire now to offer in evidence first a Supreme Court search to show two judgments of C. H. C. Beakes against Mr. McChesney, and then a release from C. H. C. Beakes from those two judgments. Then the several checks of Mr. Hutchinson, and the book of account of Mr. Hutchinson, showing one item that I have mentioned. He says that he has not it here to-day, but will send it to me; also the Chattel Mortgage of McChesney & Hutchinson to Alison E. Hutchinson; also the note of McChesney & Hutchinson to Lewis P. Thompson; also the Chattel Mortgage from McChesney & Hutchinson to Lewis P. Thompson, to secure said note; also the assignment of the note and mortgage by Thompson to Sarah T. Hutchinson; also Sheriff's deed to Alison E. Hutchinson; the articles of co-partnership, if they can be found, I desire also to offer in evidence. I would like to make a further search for them, and desire that your Honor shall have them.

Mr. Hartshorne rests.

James Steen, a witness produced on the part of the complainants, having been duly sworn, deposeth and saith:

Direct Examination.

In relation to McChesney's testimony as to the conversation he had with me at my house in reference to the

property, it was in the main correct, with the exception that he mentioned no mortgage; the claim of the complainant was based on a bill for a range or heater that had been put in the Hotel Asbury, and the property in Asbury Park entirely separate and distinct from this ice cream manufactory, and which was in the name of somebody else; I think our conversation was mainly directed to that; I charged Mr. McChesney with being the real owner of that property, and he informed me that he had nothing in that property nor any other property in Asbury Park, but I am very clear that there was no mention made of any mortgage or judgment; he told me there was nothing in the property and we would get our money quicker and more easily if we would take his offer of compromise than by pressing the matter to judgment, and I recollect distinctly that he told me there was nothing in the property, and I think he said there was a Mrs. McAllister, an aunt, or some relative or other, that owned the Hotel Asbury, where the range or some other apparatus had gone; the rest of the conversation was about as he related it.

Cross-Examined by Mr. Hartshorne—

Q. This conversation was after you had made that statement to the Court about putting off the case? *A.* I am not clear about that; I think, though, it was between the January and the May terms.

Q. Give us the date of that conversation, as near as you can? *A.* I can't give it nearer than that; it was after he had been sued and before judgment.

Q. After he had been sued and before judgment? *A.* Yes, sir.

Q. Are you positive that you and he didn't talk about the building of the factory and of the Chattel Mortgage, and a judgment against it? *A.* Not particularly.

Q. Are you positive it was not mentioned? *A.* I am not positive; in fact, I rather think he did say something about the factory.

Q. And about the Chattel Mortgage? *A.* No, sir; he said nothing about the Chattel Mortgage.

Q. Didn't he speak about this being covered up? *A.* No, sir; we were talking about the Hotel Asbury, which he was running at the time, and into which Bramhall, Deane & Company's range had gone, and which I charged him with being the real owner of, and he said there was nothing in it for him or his creditors.

Q. Wasn't the factory building spoken of at that time? *A.* Yes, sir.

Q. In what connection did he speak of that? *A.* I told him that besides the Hotel Asbury, there was also his property in the ice cream factory.

Q. Now didn't he tell you it was covered up? *A.* He said there was nothing in it.

Q. That is, for him? *A.* Yes, sir.

Q. Didn't he also say it was all covered up? *A.* No, sir; I am pretty clear he did not.

Q. Well, are you positive? *A.* Yes, sir; I am positive; I know he said he had no property that could be touched, but he didn't mention any mortgages.

Q. Prior to that time you had made the search you speak of? *A.* Prior to that time I had ascertained that he had been making one or more Chattel Mortgages; I didn't make what I call a search.

Complainant rests.

Mr. Lawrence.—It is admitted that the defendant, Charles H. C. Beakes, recovered a judgment for $1,093.14 on the second day of January, 1884, against McChesney & Hutchinson, and that upon that judgment a levy was made by the Sheriff of the county of Monmouth, on the fifth day of April, 1884, on the leasehold interest in that building.

Charles H. C. Beakes, a witness produced in his own behalf, having been duly sworn, testified as follows:

Direct Examination by Mr. Lawrence—

Q. Where do you reside? *A.* New York.

Q. What is your business? *A.* Milk and cream.

Q. You sold to McChesney & Hutchinson cream during the year 1883? *A.* Yes, sir.

Q. And for what you sold them you obtained a judgment against the firm? *A.* Yes, sir.

Q. In January, 1884? *A.* Yes, sir.

Q. About the time this partnership was commenced Mr. Hutchinson came to you, didn't he? *A.* Yes, sir.

Q. To procure a release from two judgments that you had against him personally? *A.* Yes, sir.

Q. Now, what did he say to you about their borrowing money from Alison E. Hutchinson? *A.* He said Mr. Hutchinson would loan them what money they needed, if I would release them from the action of this judgment against them, so that the judgments would not come in and sweep up the business.

Q. That was the ground upon which he based his request for the release? *A.* Yes, sir.

Q. So that you wouldn't swoop down and carry off the whole business? *A.* Yes, sir.

Q. Did he say anything further than that, except that they were going to borrow money from Mr. Hutchinson? Did he state what amount they were going to borrow? *A.* No, sir; I don't remember that he did.

Q. Did he state anything about what security they proposed to give Mr. Hutchinson, or whether they proposed to give him any? *A.* I have no recollection of his stating what security they were going to give at all.

Q. You had a conversation with Mr. John B. Hutchinson, didn't you, in the Fall of 1883? *A.* Yes, sir.

Q. That conversation was after all the credit had been given, wasn't it? after you sold all the cream which you did sell them? *A.* Yes, sir; the conversation of which Mr. Hutchinson speaks; but of course I was down there during the Summer very often.

Q. In this conversation did Mr. Hutchinson state to you that there was any claim against the leasehold interest? *A.* No, sir.

Q. He didn't make any mention of any claim against the leasehold? *A.* No, sir.

Q. Mr. Beakes, what in your opinion is the relative

value of the building without the leasehold and the leasehold interest without the building?

Objected to upon the ground that the witness had not been shown to be competent to give an opinion upon that subject.

Q. Do you know this property? *A.* Yes, sir.

Q. You have been there frequently, haven't you? *A.* Yes, sir; I say I know what it is; I have never been upstairs.

Q. But you have seen the building? *A.* Yes, sir.

Q. You have been in the portion of it used as an ice cream factory? *A.* Yes, sir.

Q. And know what the building is? Now, what in your opinion—(interrupted.)

Objected to for the same reason.

Q. The firm's business is a business you are very familiar with, is it not? *A.* Yes, sir.

Q. It is right in your line? *A.* Yes, sir.

Q. And a building put up for purposes of that nature; you have experience in and know the value of such buildings, don't you? *A.* Yes; I know what people pay for their buildings, but not in Asbury Park.

Q. Just state what, in your opinion, is the relative value between the building without the leasehold interest, and the leasehold interest by itself?

Objected to. Objection overruled.

A. Well, I would as soon have the lease without the building as the building without the lease.

Q. You would give just as much for the lease alone? *A.* Yes, sir.

Q. Is that your opinion of what the building would bring at a sale, and the leasehold without the building would bring at a sale? *A.* Do you mean each sold separately?

Q. Yes. *A.* Yes.

Q. Upon what do you base your opinion? *A.* Well, I base it—I would take it in this way, that the building I should think, cost over three thousand dollars; and six per cent. of three thousand dollars is only $180 a year; and they say that they can get from $400 to $600 for the

building as it stands there, without the leasehold; I had never rented it and I don't know anything about it.

Mr. Steen.—Of course I object to any severance of the building and the leasehold.

Cross-examined by Mr. Hartshorne.—

Q. Do you know whether a second and third story of that building have been rented at all? *A.* Only as Mr. Hutchinson has said.

Q. Just what you heard in here? *A.* No, sir; Mr. Hutchinson told me before that they let it for parties at night.

Q. Well, do you know what it brought—what rent? *A.* No, sir.

Q. Do you know what the rental value of the land is along there? *A.* No, sir.

Q. You don't know? *A.* No, sir.

Q. You don't know anything about that? *A.* No, sir.

Q. You have never been in Asbury Park only on occasional visits? *A.* No, sir.

Q. You have never remained there any time? *A.* No, sir.

Q. Have you been there over night at any time? A. I don't think I ever was; I have stayed pretty nearly all night, but not quite.

Q. You just ran down there and back again on the same day? *A.* Yes, sir.

Q. Do you know of a sale that has been made right close by this building of a leasehold property? *A.* No, sir.

Q. You don't know anything about that? *A.* No, sir.

Q. Are you positive, Mr. Beakes, that these Chattel Mortgages of Hutchinson and Thompson were not spoken of by Mr. Hutchinson when he came to see you; didn't he speak about them to you? *A.* Am I what?

Q. Are you positive he didn't mention them to you when he came up on his visit to you in October, 1883? *A.* He didn't mention the mortgage of his father.

Q. But didn't he mention the other mortgage? *A.* No, sir.

Q. Are you sure? *A.* Perfectly sure.

Q. Didn't he tell you how much there was against the property? *A.* I asked him how much there was against the machinery, and he said there was a mortgage to secure the payment of it and they had never paid it.

Q. A mortgage to secure the machinery? *A.* Yes, sir.

Q. Didn't he say against whom? *A.* No, sir.

Q. Did you ever take pains to find out about that mortgage? *A.* No. sir.

Q. You never did? *A.* No, sir; nothing more than to send in to my counsel to find out what was on the property, but that was afterwards.

Mr. Lawrence rests.

Wm. W. McChesney recalled.

Direct Examination by Mr. Hartshorne—

Q. What did this building cost you, do you know? *A.* About $3,200; I don't know positively, but the building and fixtures was about $3,200.

Q. Did that include the machinery? *A.* No, sir.

Q. Then the machinery would make it $4,400? *A.* Yes, sir.

Q. And that's what the building cost? *A.* Yes, sir.

Cross-Examined by Mr. Steen—

Q. What is the whole property worth? *A.* About five thousand dollars; it ought to be cheap at five thousand dollars; but if you want to buy it, it can be bought for a little less, I think.

Q. You mentioned something, I think, before, about when you sold your interest to John B. Hutchinson, that you mentioned the Beakes judgment, did you?—you mentioned the claims that were on the property? *A.* To John B. Hutchinson?

Q. Yes? *A.* He knew about the claims.

Q. He knew of the Bramhall, Deane & Co's judgment too, didn't he? *A.* The judgment had been obtained at that time?

Q. Yes? *A.* Well, I don't know.

Further Direct—

Q. There has been a property sold by the receiver down there, a leased property? *A.* Not that I have heard of, and I wonder, too, that I haven't, for I am in the real estate business; was it a factory property?

Q. Yes? *A.* Oh, yes; a factory property; I know about that.

Q. What is the name of the one you think of? *A.* Sullivan & Co.

Q. Yes, that's the one? *A.* I know that property.

Q. What did it bring?

Objected to.

A. There was about thirty thousand dollars worth of property sold for seven thousand dollars worth of obligations.

Q. And that was on lease? *A.* Yes, sir; but it was all complicated; it was very much complicated; and there was about thirty thousand dollars worth of property there.

Q. Didn't you occupy this property in controversy before you went into parnership with Mr. Hutchinson? *A.* Yes, sir.

Cross-Examined by Mr. Lawrence—

Q. You stated that the whole property was worth five thousand dollars; what proportion of the amount do you think the leasehold land is worth? *A.* Speaking of the leasehold, I have always considered it a valuable property; that is, a cheap lease. I recently tried to rent one 50 by 150, across the railroad, on a tract of land that I don't consider near as good as this, and I couldn't rent it for $150 a year; a party wanted to build a factory on it for a certain purpose, and that's across the railroad.

The Court. Q. But you don't answer counsel's question; he wants to know what you think the leased land is

worth? *A.* I consider the leasehold worth fifteen hundred or two thousand dollars.

Further Direct—

Q. Do you mean for the 20 years it has to run? *A.* Well, that's why I consider it valuable; it is rented at a low rental, fifty dollars a year, and it has got 20 years to run with a ten years' renewal.

Q. Twenty years? *A.* Yes, sir; and it is one of the best corners in Asbury Park for business.

Alison E. Hutchinson, recalled.

By Mr. Hartshorne—

Q. You bought this property in question, didn't you? *A.* Yes, sir.

Q. And took possession of it in the Spring? *A.* Yes, sir.

Q. Did you try to rent it this Summer? *A.* I did.

Q. What did you get for it? *A.* Well, I rented it for three hundred dollars.

Q. The whole thing? *A.* No, sir; the lower floor.

Q. Could you rent the upper floors? *A.* Yes, sir; I rented them for fifteen dollars a month, for a month; I don't know how long he is going to stay, and the lower floor the party paid me one hundred dollars and then left, and then after that I rented it for —— ——— dollars a month.

Q. Two hundred dollars you rented it for this Summer? *A.* Yes, sir; and then I got a few little traps that the man left when he ran away; some things that were really of no use to me much, and then I tried to rent it again, and it has been in Mr. McChesney's hands.

Q. You put it in his hands to rent? *A.* Yes, sir.

Q. What rent do you ask? *A.* $300.

Q. And he couldn't rent it? *A.* He didn't rent it; there was a party took it, but ran away after he had been there two or three months.

Cross-Examined by Mr. Steen—

Q. Did you rent it for three hundred dollars? *A.* He

paid me one hundred dollars down, and when he came to the payment of the next installment he couldn't pay me, or didn't pay me.

Rest all.

OPINION.

Filed June 9, 1885.

On final hearing on bill and answers and proofs taken in open Court.

Mr. JAMES STEEN for Complainants.

Mr. ACTON C. HARTSHORNE for Alison E. Hutchinson and Sarah C. Hutchinson.

Mr. ROBERT L. LAWRENCE for Charles H. C. Beakes.

1. A building erected by a tenant on the demised premises, pursuant to a covenant in his Lease, and which his Lease gives him no right to remove, is not severable or removable as a trade fixture.

2. A Chattel Real cannot be encumbered by a Chattel Mortgage so as to make the record of the mortgage effectual against the creditors of the mortgagor, if it is recorded only in the record of Chattel Mortgages.

3. A sale of partnership property under a judgment, against a member of the partnership for his individual debt, gives the purchaser only such interest in the partnership property as the judgment debtor may be entitled to after the partnership debts are paid and the equities of the partners are adjusted.

VAN FLEET, V. C.

The present object of this suit is to have the legal character of certain surplus moneys determined, and also to procure a decision as to which of several claimants is entitled to the moneys. The suit was originally brought for a partition of a leasehold interest, but during its pendency the term or estate sought to be partitioned was sold, at judicial sale, under a judgment entitled to rank as the first

lien on the demised premises, and standing paramount to the right of any of the parties to this suit. The sale, of course, rendered the original object of the suit unattainable, but the sale having resulted in raising a considerable sum in excess of the amount required to satisfy the judgment under which it was made, the suit has been brought to final hearing for the purpose of having a determination made deciding which of the parties is entitled to the surplus moneys.

The following facts need to be stated. On the twenty-first of February, 1882, James A. Bradley demised by Lease under seal to William W. McChesney and John B. Hutchinson, a term of twenty years, commencing on the first day of March, 1882, in a lot fifty feet by one hundred and twenty, at Asbury Park, the lessees covenanting to pay an annual rent of $50, and also to pay all taxes and assessments levied upon the demised premises. The lessees also covenanted, that unless they erected on the demised premises, within four months from the date of the Lease, a building thirty feet by sixty, three stories high, the Lease should be void. They further covenanted that, on the expiration of their term, they would quit and surrender the demised premises, and that they should then be in as good state and condition as reasonable use and wear would permit. The Lease was recorded immediately after its execution in the record of deeds. The lessees, within the time limited, erected the building they were required to erect. It was erected on brick foundations, sunk into earth, and cost about $3,200. Two thousand dollars of the money expended in its erection was borrowed of Alison E. Hutchinson, and at the time the loan was made the lessees promised to secure it by a first mortgage on the property. They afterwards, on the sixteenth of June, 1882, executed a Chattel Mortgage to Mr. Hutchinson. The only property mentioned in the schedule annexed to the mortgage is the building, and it is there described as "the building known as McChesney and Hutchinson's Ice Cream Manufactory." The mortgage was recorded as a Chattel Mortgage in the book designated by law for the registration of such instruments.

The lessees afterwards, on the twenty-third of December, 1882, executed a Chattel Mortgage to Lewis P. Thompson, for $1,307.75, to secure the price of certain machinery which they had purchased of him and placed in the building for use in their business. The property described in the schedule annexed to this mortgage consists of machinery, the building and the leasehold interest. Sarah C. Hutchinson, the wife of Alison E. Hutchinson, is now the holder of this mortgage, it having been assigned to her on the fifteenth of April, 1884. The lessees having failed to pay for all the material used in the erection of the building a mechanics' lien was filed against the building alone, and not against the lot or curtilage whereon it stood. Suit was afterwards brought to enforce this lien, and on the eighth of August, 1883, a general and special judgment was entered therein. An execution to enforce this judgment was issued, which commanded that in case the plaintiff's debt could not be made by the sale of the property, then the whole or the residue of the debt, as the exigencies of the case might require, should be made "of "the following described lands, tenements and real estate of "the said William W. McChesney and John B. Hutchin- "son, builders and owners, viz: The said building is a "three-story and attic frame building, sixty feet six inch- "es deep by thirty-two feet six inches wide, erected on a "lot or curtilage of land situate in the borough of Asbury "Park," and then describing the lot by course and distance. The building was sold under the writ on the eighth day of April, 1884, and a conveyance made to the purchaser on the twenty-eighth day of the same month. The deed, in describing the subject of the grant, follows with precision the language of the execution. Over $1,250 was raised by the sale in excess of the sum required to satisfy the plaintiff's debt. This surplus is the subject of the present contest. Just before the lessees took the Lease, they formed a co-partnership to carry on the business of manufacturing and selling ice cream, which business they continued to carry on from some time in May, 1882, until the month of September, 1883, when they dissolved. On the second of January, 1884, Charles

H. C. Beakes recovered a judgment against the lessees in the Supreme Court of this State, for a debt which they incurred while they were carrying on business as partners, and a levy was made on the building on the fifth of April, 1884, by virtue of an execution issued on this judgment. Both Mr. Hutchinson and Mr. Beakes assert a claim to the surplus moneys to the exclusion of the other.

The question to be decided between these parties is whether Mr. Hutchinson, by virtue of his Chattel Mortgage, had a lien on the property from which the moneys in question were raised? His counsel contends that he had, and in support of his contention insists that the building is a trade fixture, and as such may be severed and removed at any time. The building, according to his view, is, in contemplation of law, a mere personal chattel. His argument, it will be observed, rests entirely on the ground that the title to the building and the title to the land into which the building is built are distinct, being vested in different persons, and that the owner of the building has a right, as against the owner of the land, to sever and remove the building at his will. The whole strength of this argument, it will be perceived, depends upon whether or not the building is removable by the lessees; if it is not, the argument is without foundation. Now while it is a rule of law of great antiquity, that whatever is affixed to the soil becomes, in contemplation of law, a part of it, and is consequently subject to the same rights of property as the soil itself, (2 *Smith's, L. C.*, 8 *Am. Ed.*, 206; *Wood's L. and T., paragraphs* 525), yet it is also well established that erections made by a tenant, on the premises he holds by demise, for purposes of trade as well as for some other purposes, are removable, and that he may exercise his right of removal at his will, at any time before the end of his term. But an essential quality of all removable erections is that they shall have been made under such circumstances as to show that the tenant made them of his own will or choice, and for his own benefit, intending that they should remain his property and not in fulfillment of a duty or obligation to his lessor. Here just the reverse appears. The building was erected by

the lessees in fulfillment of a covenant of their lease, they were obliged to erect it to preserve the life of their lease; a breach of the covenant would have been just as fatal to the life of their grant as a failure to pay the rent reserved by the lease. The lessees were not at liberty to consult either their choice or interest in the matter, but were just as much bound to build the building as they were to pay the rent they had covenanted to pay. The Lease, neither by express words nor by implication, reserves a right to the lessees to remove the building, and its silence in that regard would seem to render it almost as certain that the parties intended that no such right should exist, as it is that they intended that the lessees, after paying the rent reserved by the lease, should have no right to reclaim the money. If the covenant had been that the lessees, instead of erecting the building themselves should furnish to the lessor the money necessary for that purpose, and the money had been furnished and the building erected, in that condition of affairs the intention of the parties to incorporate the building into the land and to make it an inseparable part of the land might have been slightly more conspicuous than it is in the covenant under consideration; yet the two covenants are so identical in all their essential parts, that, in my judgment, it would be impossible to give them different constructions on the point under consideration.

Besides, I think the covenant defining what the lessees should surrender on the expiration of their term, and in what state and condition the demised premises should then be, furnishes very cogent evidence of the intention of the parties in respect to the building. This covenant requires the surrender of the demised premises, and the thing demised consisted simply of the naked land—the building did not, when the lease was executed, constitute part of the demised premises—but the lessees, by the execution of the lease, bound themselves to make the building a part of the demised premises within four months from that date. They were bound to build the building or suffer the loss of the term. They performed their covenant by erecting a building on brick foundations sunk

into the earth, thus incorporating the building into the soil and making it permanently a part thereof. The building thereby became a part of the demised premises, just as much so, both in legal theory and in fact, as though it had been erected by the lessor, for although he did not erect the building himself, it was erected for him. The building was put on the lessor's land in discharge of a duty the lessees were bound to perform to him. The building constitutes part of the demised premises; it is made by the Lease an inseparable part of the land, and the lessees, in my judgment, have no right in it except to possess and use it during their term, and they are bound, on the expiration of their term, to surrender it as part of the demised premises.

But had a different conclusion been reached on this branch of the case, and the building been declared to be a mere personal chattel, still I think it is manifest that no part of the moneys in question could have been applied to the satisfaction of the chattel mortgages. The writ under which the moneys were raised commended the sale of nothing, in respect to the particular property from which these moneys were raised, but land. That is all the sheriff was authorized to sell, and all he could either sell or convey. It is authoritatively established, that under an execution simply commanding the sale of land, the officer executing the writ had no authority to make sale or to pass title to any class of property except that described in his writ, and that the money raised by sale under such a writ, no matter what the sheriff may have attempted to do under color of its authority, must be regarded and disposed of as the proceeds of the sale of land. *Arnett v. Finney*, 2 *Stew.*, 309. It is clear, therefore, that the moneys in question do not represent personal chattels.

But the claim on behalf of Mr. Hutchinson is put on an additional ground. It is said, conceding that the building is not a personal chattel, and that it is immovable, still there can be no doubt that the lessees had a right to the possession and use of the building during the term of their lease, and that this right embraced power to pledge

their interest in the building as security for a debt. I think there can be no doubt about the soundness of both parts of that proposition, but the more material question just now is, can property of this nature be effectually pledged as against the creditors of the mortgagor by a Chattel Mortgage? One of the fundamental objects of the law is the classification of property. It divides all property into two kinds, real and personal, and by positive rules prescribes by what means the title to each may be acquired and transmitted. The rules governing the acquisition and transmission of title to personal property differ in many essential particulars from those which govern the acquisition and transmission of the title to real property. For example, statutes exist authorizing the registration of mortgages of both real and personal property, and making such record notice of the contents of the mortgage to all persons subsequently acquiring an interest in the mortgaged property; but these statutes provide that the record of each class of these securities shall be kept separate and distinct from the other, so that if a mortgage of chattels is recorded in the record of mortgages of land the record can have no effect. The record of an instrument not authorized by law to be recorded is a mere voluntary act, and is, in judgment of law, no notice. *Spielmann v. Kliest*, 9 *Stew., Eq.*, 199. And so the record of a mortgage of chattels, recorded in the record of mortgages of land, and not in the manner directed for the registration of mortgages or chattels, will not constitute notice to a subsequent judgment creditor. *Williamson v. New Jersey Southern R. R. Co.*, 2 *Stew.*, 311. Several years prior to the execution of the lease in question, leasehold interests were, by statute, put on the footing of freehold estates in several important particulars. That statute declares that leases granting terms of not less than two years may be recorded as deeds of lands are, and that such record shall be notice to subsequent judgment creditors, purchasers, lessees and mortgagees; that such interests or estates may be mortgaged as freehold estates are, and that a mortgage on such an estate may be made a matter of public record, by registration,

in the same manner that mortgages of freehold estates are; and that its record shall have the same force and effect that the record of mortgages of freehold estates have; and that such estates shall be liable to seizure and sale under judgments only in the manner in which the law directs the seizure and sale of freehold estates, *Rev.* 157. It is manifest, I think, that the estate of these lessees in the demised premises could not, as against their creditors, be either encumbered or transmitted by judicial sale, except in a manner which should substantially conform to the provisions of this statute, and that a Chattel Mortgage, which by its express terms embraces nothing but goods and chattels, is utterly inefficacious to create a lien on such property.

But had this statute not been passed, I think it is entirely clear that even in that condition of the law Mr. Hutchinson's claim to these moneys would not have been a whit stronger than it is now. For it is well settled that in order to make the record of a mortgage of a chattel real effectual against a person subsequently acquiring an interest in the mortgaged property, the mortgage must have been recorded in the manner and in the record in which mortgages of lands are directed to be recorded, and that our statute regulating the execution and registration of chattel mortgages was intended to prescribe rules applicable alone to mortgages of personal chattels. It is quite obvious, both from the provisions and policy of this statute, that it was not intended to apply to mortgages of chattels real. *Decker v. Clarke*, 11 *C. E. Gr.*, 163; *Spielmann v. Kliest*, 9 *Stew.*, 199.

My conclusion is, that as between the chattel mortgages and the judgment, the judgment is entitled to the moneys in question.

The complainants also make a claim to a part of the moneys in question. They recovered a judgment against one of the lessees, (William W. McChesney,) on the seventh of May, 1883. Their judgment is founded on a debt contracted by McChesney as an individual, and prior to the formation of the partnership. The complainants, soon after the recovery of their judgment, caused a levy to be

made upon McChesney's interest in the demised premises, and subsequently purchased the same at sheriff's sale. On the eighth of October, 1883, McChesney sold and conveyed all the assets of the partnership, including the lease, to his co-partner, his co-partner stipulating to pay all the debts of the firm. McChesney received no other consideration for his transfer. The complainants had levied upon McChesney's interest in the demised premises long prior to McChesney's transfer to his co-partner, but they can stand no higher than McChesney did; whatever rights they have they derived through McChesney. By their purchase they simply took his place. He was entitled to nothing until the partnership debts were paid, and the complainants are in no better plight. The firm was hopelessly insolvent when McChesney conveyed his interest to his co-partner. The facts before the court leave no doubt on that subject. If any part of the moneys in question shall remain after Mr. Beakes judgment is satisfied, and his costs of this suit are paid, the residue should be paid to John B. Hutchinson. The complainants are not entitled to any part of it.

DECREE.

Filed July 16, 1885.

This matter, having originally come before his Honor, Abraham V. VanFleet, Vice Chancellor, on the original bill filed by the complainants, and the answer thereto of Alison E. Hutchinson; and the defendant, Alison E. Hutchinson, having in and by his said answer denied that he was a part owner with the complainants of the property sought to be partitioned, and having alleged therein that he was a creditor of the firm of McChesney & Hutchinson, and that the complainants were creditors of an individual member of said firm, and that there were other general creditors of said firm, and among them one Charles H. C. Beakes; and said defendant, Alison E. Hutchinson, in his said answer having also alleged that the property sought to be partitioned was partnership

property, and was subject in equity to the debts of the general creditors of said firm, and that the creditors referred to in his said answer were necessary parties to the complainant's bill, and that the complainants should not be allowed to proceed further until they should amend their bill and make all proper and necessary persons parties defendant thereto; and the complainants having thereafter, with the permission of the court, filed a supplemental bill, making the general creditors of the firm of McChesney & Hutchinson parties defendant, and in said supplemental bill setting forth that at a sale of the property in question, subsequent to the filing of the original bill, a surplus was made, which was in the hands of John I. Thompson, Sheriff of the county of Monmouth, and alleging that the said general creditors claimed that they were entitled to be paid out of said surplus, but denying the right to such payment on the ground that the property in question was not partnership property, and praying that the said surplus money be brought into this court; and Charles H. C. Beakes, who was made a defendant to said supplemental bill, having filed an answer thereto, setting forth that he was a creditor of said firm, that the surplus monies in the hands of the said Sheriff were partnership assets and subject to the debts of the creditors of the said firm, and that he was entitled to be first paid therefrom, and the complainants, the defendant Alison E. Hutchinson, and the defendant Charles H. C. Beakes, having come before his Honor, Araham V. VanFleet, to whom the cause had been referred, and testimony being taken before the court on the question of whether the said surplus monies were partnership assets of said firm, and on the question of the proper distribution thereof, and arguments of counsel of the respective parties having been heard upon these questions, and the court being of opinion that the defendant, Charles H. C. Beakes, is entitled to be paid out of said monies the amount of his judgment stated and set forth in his answer, together with interest thereon and his costs of this suit, and that neither the complainants nor the defendant, Alison E. Hutchinson, nor the defendant, Sarah C. Hutchinson, are entitled to any por-

tion of said monies, but that the balance thereof, after payment of said judgment, interests and costs, should be paid to the defendant, John B. Hutchinson :

It is, on this fifteenth day of July, eighteen hundred and eighty-five, on motion of Babbitt & Lawrence, Solicitors for and of counsel with the defendant, Charles H. C. Beakes, ordered, adjudged and decreed, that John I. Thompson, late sheriff of the county of Monmouth, out of the surplus monies remaining in his hands raised by the sale made by him on the fifteenth day of April, A. D. 1884, under the execution issued on the judgment obtained by Nelson E. Buchanon, Garret V. Smock and George A. Smock, partners as N. E. Buchanon & Company, against William W. McChesney and John B. Hutchinson, do pay, if sufficient there be, to the defendant, Charles H. C. Beakes, or to his solicitors, the amount due to him on his judgment obtained on the second day of January, eighteen hundred and eighty-four, against the said William W. McChesney and John B. Hutchinson, with interest, which said amount is hereby ascertained and decreed to be the sum of eleven hundred and ninety-three dollars, and out of said surplus moneys, if sufficient there be, he do also pay to the said defendant, Charles H. C. Beakes, or to his solicitors, his costs of this suit, to be taxed; and that he pay the balance of such surplus moneys to the defendant, John B. Hutchinson.

THEODORE RUNYON, *C.*

Respectfully advised,

A. V. VAN FLEET, *V. C.*

A true copy,

G. S. DURYEE, *Clerk.*

NOTICE OF APPEAL.

Filed July 20, 1885.

Alison E. Hutchinson and Sarah C. Hutchinson hereby appeal from the final Decree in the above stated cause, made on the fifteenth day of July, A. D. eighteen hundred and eighty-five, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated July 18, 1885.

A. C. HARTSHORNE,

Solicitor for and of Counsel with Alison E. Hutchinson and Sarah C. Hutchinson, Defendants.

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

A. C. HARTSHORNE,

Of Counsel with Alison E. Hutchinson and Sarah C. Hutchinson, Defendants.

New Jersey Court of Errors and Appeals.

Between
Alison E. Hutchinson, and Sarah C. Hutchinson, Appellants,
and
Charles H. C. Beakes, et al, Respondents.

Petition of Appeal.

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

The humble petition of Alison E. Hutchinson and Sarah C. Hutchinson, the appellants in the above stated cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery, by his Honor, Theodore Runyon, Chancellor of New Jersey, bearing date the fifteenth day of July, in the year of our Lord one thousand eight hundred and eighty-five, in a cause for partition, wherein Royal E. Deane and George G. Brooks, partners, trading under the firm name of Bramhall, Deane & Co., were complainants, and the said Alison E. Hutchinson, Sarah C. Hutchinson, Charles H. C. Beakes and others were defendants in the following respects, to wit: That the said decree adjudges that John I. Thompson, late Sheriff of the county of Monmouth, out of the surplus moneys remaining in his hands raised by the sale made by him on the fifteenth day of April, A. D. 1884, under the execution issued on the judgment obtained by Nelson E. Buchanon, Garret V. Smock and George A. Smock, partners, as N. E. Buchanon & Company, against William W. McChesney and John B. Hutchinson, do pay, if sufficient there be, to the defendant, Charles H. C. Beakes, or to his solicitors, the amount due to him on his judgment obtained on the second day of

January, eighteen hundred and eighty-four, against the said William W. McChesney and John B. Hutchinson, with interest, which said amount is hereby ascertained and decreed to be the sum of eleven hundred and ninety-three dollars; and out of said surplus moneys, if sufficient there be, he do also pay to the said defendant, Charles H. C. Beakes, or to his solicitors, his costs of this suit to be taxed; and that he pay the balance of such surplus moneys to the defendant, John B. Hutchinson.

And your petitioners humbly appeal from the said decree, and from the whole and every part thereof, upon the ground that the same is erroneous, for that your petitioners are entitled to have either the said complainants' bill for partition dismissed in the Court of Chancery with costs, or a decree requiring the surplus moneys remaining in the hands of John I. Thompson, Sheriff, as aforesaid, to be paid to your petitioners.

Your petitioners therefore pray that the said decree of the said Chancellor may be reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

A. C. HARTSHORNE,
Solicitor of Appellants.

A. C. HARTSHORNE,
Of Counsel with Appellants.

ANSWER.

The answer of Charles H. C. Beakes to the petition of Appeal of the above named appellant.

This respondent, not acknowleding 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 a decree was on the fifteenth day of July, eighteen hundred and eighty-five, 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 decree is agreeable to equity, and he prays that the same may be affirmed with costs to be adjudged to this respondent.

BABBITT & LAWRENCE,

Sol'rs for and of Counsel with Respondent.

No answer filed by respondents, Bramhall, Deane & Co.

Exhibits.

SEARCH.

NEW JERSEY SUPREME COURT.

Charles H. C. Beakes vs. William W. McChesney.	In case. By Default. Linn & Babbitt, Att'ys. Entered Feb. 26, 1880. Damages, $857.48. Costs, 31.35. $888.83
Daniel Bailey and Charles H. C. Beakes vs. William W. McChesney.	In Case. By Default. Linn & Babbitt, Att'ys. Entered Feb. 26, 1880. Damages, $2,316.72. Costs, 31.35. $2,348.07

I, BENJAMIN F. LEE, Clerk of the Supreme Court of the State of New Jersey, hereby certify that I have searched the Records of said Court, and do not find made up of record or docketed therein, any Judgment, Attachment, of Decree from Chancery against William W. McChesney, for twenty years last past, except as above stated.

IN TESTIMONY WHEREOF, I have hereto set my hand and the seal of said Court, this eleventh day of December, eighteen hundred and eighty-three, 9 A. M.

[L. S.]

BENJAMIN F. LEE, *Clerk.*

RELEASE OF JUDGMENTS.

Charles H. C. Beakes
to
William W. McChesney.

KNOW ALL MEN BY THESE PRESENTS that I, Charles H. C. Beakes, of the city of New York, in consideration of the sum of one dollar to me paid by William W. McChesney, of Asbury Park, New Jersey, the receipt whereof is hereby acknowledged, have released and hereby do release and discharge from the lien of two certain judgments, one recovered by me against the said William W. McChesney and the other recovered by Daniel Bailey and Charles H. C. Beakes, composing the firm of Bailey & Beakes, against said William W. McChesney, and which is now held and owned by me. All that leasehold premises and the building thereon erected, situated on the northwest corner of Sumerfield Avenue and Main Street, in the village of Asbury Park, Monmouth county, New Jersey, said premises extending about fifty feet on Main Street and about one hundred and twenty-five feet on Sumerfield Avenue, and now being in the occupation of the firm of McChesney & Hutchinson, composed of said William W. McChesney and John B. Hutchinson.

To the end and purpose that the said leasehold premises and building hereby released, or intended so to be, may be held and owned and transferred by the said William W. McChesney and the said firm of McChesney & Hutchinson, free, clear and discharged of and from any charge or lien by reason of said judgments, or either of them, hereby reserving, however, to myself, my executors, administrators and assigns, all my rights, claims and demands against the said William W. McChesney and under said judgments, except as against the said property hereinabove specifically released.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this fifteenth day of June, 1882.

CHAS. H. C. BEAKES. [L. S.]

Sealed and delivered in the presence of

EDWIN R. ALLEN.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

Be it remembered, that on this fifteenth day of June, 1882, before me, the subscriber, a Notary Public of the State of New York, duly authorized to take affidavits and proofs of acknowledgments in and for the city and county of New York, personally appeared Charles H. C. Beakes, to me known, and who, I am satisfied, is the person described in and who executed the foregoing instrument, and I, having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed.

EDWIN R. ALLEN, *Notary Public*,
Kings county, N. Y.

Cert. filed in N. Y. Co.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

I, WILLIAM A. BUTLER, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, the same being a Court of Record, do hereby certify that Edwin R. Allen has filed in the Clerk's Office of the county of New York a certified copy of his appointment as Notary Public for the county of Kings, with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument, duly authorized to take the same. And further that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment to be genuine. I further certify, that said instrument is executed and acknowledged according to the law of the State of New York.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and county, the 15th day of June, 1882.

[L. S.]

W. A. BUTLER, *Clerk.*

LEASE.

James A. Bradley
to
W. W. McChesney and John B. Hutchinson.

Received in the Clerk's office of the county of Monmouth, on the 2d day of March, A. D., 1882, at 10 o'clock in the forenoon, and recorded in Book 348 of deeds for said county, on pages 492, &c.

THOMAS V. ARROWSMITH, *Clerk.*

THIS INDENTURE, made the twenty-first day of February, one thousand eight hundred and eighty-two, between James A. Bradley, party of the first part, and William W. McChesney and John B. Hutchinson, of the second part,

WITNESSETH, That the said party of the first part hath let and by these presents do grant, demise, and to farm let, unto the said party of the second part, all that lot of ground situated in Asbury Park, beginning at the northwest corner of Main Street and Summerfield Avenue, running thence northerly, along Main Street, fifty (50) feet; thence westerly, at right angles with Main Street, one hundred and twenty (120) feet; thence southerly, parallel with Main Street, fifty (50) feet; thence easterly, along Summerfield Avenue, one hundred and twenty (120) feet to the place of beginning, with the appurtenances, for the term of twenty years from the first day of March, one thousand eight hundred and eighty-two, at the yearly rent or sum of fifty dollars, ($50) to be paid in equal half-yearly payments.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom.

And the said party of the second part do covenant to pay to the said party of the first part, the said yearly rent

as herein specified; and also to pay all taxes and assessments accruing on said premises during the lease. If the taxes and assessments are not paid within six months after they become due, then this lease to be void and of no effec. It is hereby made a part of this lease, that the premises shall never be used for tenement houses, soap factory, gas house, or any other business emiting noxious vapors, or for a slaughter house, storage or sale of intoxicating liquors, or livery stables. It is further made a part of this lease that no building shall ever be erected nearer the line of Main Street than fifteen feet. Any violation of the above conditions will render this lease null and void. It is also made a part of this lease, that, unless the parties of the second part shall erect on the lot within four months from the date hereof, a building 30x60, three stories high, then this lease to be void.

And that at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

And the said party of the first part do covenant that the said party of the second part, on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises, for the term aforesaid.

And the said party of the first part, his executors, administrators and assigns, further covenants, that he will on or before the expiration of this present lease, at the request and expense of the said party of the second part, grant and execute to him a new lease of the premises hereby demised, with their appurtenance, for the further term of ten years, to commence from the expiration of the term hereby granted; at a yearly rent to be agreed upon by the parties hereto. And in case they cannot agree, such disagreement shall be referred to three disinterested persons, one to be chosen on each side and they two to choose another; the decision in writing, signed by any two of whom, shall be final. The rent to be payable in the like manner, and subject to the like covenants, pro-

visos and agreements, (except a covenant for further renewal) as are contained in these presents, provided that the said party of the second part shall give six months notice in writing to the said James A. Bradley, his executors, administrators or assigns, before the expiration of this lease, of his determination to have said lease renewed.

In Witness Whereof, the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

JAMES A. BRADLEY, [L. S.]
W. W. McCHESNEY, [L. S.]
JOHN B. HUTCHINSON, [L. S.]

Sealed and delivered in the presence of }

As to JAMES A. BRADLEY,

DAVID HARVEY, JR.

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

BE IT REMEMBERED, that on this first day of March, in the year of our Lord one thousand eight hundred and eighty-two, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared James A. Bradley, who, I am satisfied, is the lessor in the within Indenture of Lease named, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

DAVID HARVEY, JR., *M. C. C.*

DEED.

John I. Thompson, Sheriff,
to
Alison E. Hutchinson.

Received in the Clerk's office of the county of Monmouth, the 28th day of April, A. D. 1884, and recorded in Book 382 of Deeds, page 188, &c.

JAMES H. PATTERSON, *Clerk.*

To All to whom these Presents shall Come. I, John I. Thompson, High Sheriff of the county of Monmouth, in the State of New Jersey, send greeting:

Whereas, a certain writ, lately issued out of the Circuit Court of the county of Monmouth, (in equity) in the State of New Jersey, to the Sheriff of the said county of Monmouth, directed and delivered in the words following, to wit:

Monmouth County, ss. The State of New Jersey to the Sheriff of the county of Monmouth, Greeting: [L. S.] We command you that of the goods and chattels of William W. McChesney and John B. Hutchinson, builders and owners in your county, you cause to be made the sum of one thousand and thirty dollars and eleven cents, which Nelson E. Buchanon, Garret V. Smock and George A. Smock, partners as N. E. Buchanon & Co., lately in our Circuit Court, held at Freehold, in and for said county of Monmouth, recovered against the said William McChesney and John B. Hutchinson as well for their damages, which they had sustained on occasion of the non-performance of certain promises and undertakings by the said William W. McChesney and John B. Hutchinson, then lately made to the said Nelson E. Buchanon, Garret V. Smock and George A. Smock, partners, as N. E. Buchanon & Co., as for their costs and charges by them about their suit in that behalf expended, whereof the said William W. McChesney and John B. Hutchinson, builders and owners, are convicted as appears to us of record; and if sufficient goods and chattels of the said William McChesney and John B. Hutchinson, builders and owners, in your coun-

ty, you cannot find whereof to make the damages aforesaid, then, in that case, we command you that you cause the whole, or the residue, as the case may require, of the damages aforesaid, to be made of the lands, tenements and hereditaments and real estate of the said William W. McChesney and John B. Hutchinson, in your county, whereof they were seized, on the eighth day of August, in the year of our Lord one thousand eight hundred and eighty-three, in whosesoever hands the same may be; and we do especially command you that in case you do not make the damages aforesaid, otherwise that you make the whole or the residue, as the case may require, of the damages aforesaid, of the following described lands, tenements and real estate of the said William W. McChesney and John B. Hutchinson, builders and owners, viz.: The said building is a three-story and attic frame building, sixty feet and six inches deep by thirty-two feet and six inches front, with addition in rear thirty-two feet six inches by five feet eleven inches; also another addition four feet and seven inches by eleven feet and one inch, erected on a lot or curtilage of land, situate, lying and being in the borough of Asbury Park, in the county of Monmouth and State of New Jersey, beginning at the northeast corner of Main street and Summerfield Avenue; running thence northerly along Main street fifty (50) feet; thence westerly, at right angles with Main street, one hundred and twenty (120) feet; thence southerly, parallel with Main street, fifty (50) feet; thence easterly, along Summerfield Avenue, one hundred and twenty (120) feet to the place of beginning; and have you those moneys before our Circuit Court, aforesaid, at Freehold aforesaid, on the first Tuesday of October next, to render unto the said Nelson E. Buchanon, Garret V. Smock and George A. Smock, partners, as N. E. Buchanon & Co., for their damages aforesaid; and have you then there this writ.

Witness, EDWARD W. SCUDDER, Esquire, Judge of our Circuit Court, at Freehold, aforesaid, the sixteenth day of August, in the year of our Lord eighteen hundred and eighty-three.

JO. C. ARROWSMITH, *Cl'k.*

DAVID HARVEY, JR., *Att'y.*

Received August 16th, 1883, in the Clerk's office of the county of Monmouth, and recorded in Liber, B2 of Executions, page 482, &c.

JO. C. ARROWSMITH, *Clk.*

By Virtue of which said Writ, I, the said John I Thompson, Sheriff as aforesaid, did levy on all the land and real estate in the hereinbefore recited writ particularly set forth and described.

And to the end that a sale of the said lands should be made pursuant to the statutes in such case made and provided, I, the said John I. Thompson, Sheriff as aforesaid, by public advertisements signed by myself and set up at five or more public places in said county of Monmouth, one whereof was in the township of Neptune, wherein said real estate is situate, at least two months next before the time so appointed for selling the same; and also published in *The Monmouth Democrat* and *The Asbury Park Journal*, two of the newspapers printed and published in the said county of Monmouth, one of which was and is a newspaper printed and published at the county seat of said county, and the other was and is a newspaper printed and published nearest to the place in the said county in which the said real estate is situate, and circulating in that neighborhood, at least four weeks successively, once a week next preceding the said time, did give notice of the time and place when the said lands would be exposed to sale: And I, the said John I. Thompson, Sheriff as aforesaid, at the time and place so appointed, that is to say, on Tuesday, the eighth day of April, in the year of our Lord one thousand eight hundred and eighty-four, between the hours of twelve and five o'clock in the afternoon, at the Court House, at Freehold, in the township of Freehold, in said county of Monmouth, did, in an open and public manner, adjourn said sale until Tuesday, the fifteenth day of April, A. D. eighteen hundred and eighty-four, at the time and place and between the hours aforesaid: And at the time and place so adjourned to as aforesaid, to wit, Tuesday, the fifteenth day of April, A. D. eighteen hundred and eighty-four, between the hours

and at the Court House aforesaid, I did, in an open and public manner, expose to sale, at public vendue, to the highest bidder, all the land and real estate in the hereinbefore recited writ, particularly set forth and described.

And Alison E. Hutchinson, of the township of Washington, in the county of Mercer and State of New Jersey, bidding the sum of twenty-four hundred dollars for said tract of land and real estate, and no person or persons bidding so much or more, the same was by me, at the time and place, and between the hours aforesaid, in an open and public manner, struck off and sold to him for that amount, he being the highest bidder therefor.

Now know ye, That I, the said John I. Thompson, Sheriff as aforesaid, by virtue of the premises above mentioned, and for and in consideration of the said sum of twenty-four hundred dollars, the receipt whereof I do hereby acknowledge, have granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the said Alison E. Hutchinson, his heirs and assigns, all the following described lands, tenements and real estate of the said William W. McChesney and John B. Hutchinson, builders and owners, viz.: The said building is a three story and attic frame building, sixty feet and six inches deep, by thirty-two feet and six inches front, with addition in rear thirty-two feet, six inches, by five feet, eleven inches.

Also, another addition four feet and seven inches by eleven feet and one inch, erected on a lot or curtilage of land, situate, lying and being in the borough of Asbury Park, in the county of Monmouth and State of New Jersey, beginning at the northwest corner of Main Street and Summerfield Avenue, running thence northerly along Main Street, fifty (50) feet; thence westerly, at right angles with Main Street, one hundred and twenty (120) feet; thence southerly, parallel with Main street, fifty (50) feet; thence easterly, along Summerfield Avenue, one hundred and twenty (120) feet to the place of beginning, subject to all legal prior encumbrances.

Together with the hereditaments and appurtenances to the same belonging; to have and to hold the hereby

granted lands and premises, with the appurtenances, unto the said Alison E. Hutchinson, his heirs and assigns forever, according to the force, power and effect of the statutes in such case made and provided.

In Witness Whereof, I, the said John I. Thompson, Sheriff as aforesaid, have hereunto set my hand and seal this twenty-eighth day of April, in the year of our Lord one thousand eight hundred and eighty-four.

Signed, Sealed and Delivered in the presence of }

J. L. HOWELL.

JOHN I. THOMPSON, *Sheriff*, [L. S.]

State of New Jersey, Monmouth County, } ss.

Be it Remembered, that on the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and eighty-four, before me, the subscriber, one of the Masters in the Court of Chancery of said State, personally appeared John I. Thompson, High Sheriff of the county of Monmouth, well known to me to be the grantor mentioned in the within deed; and I having first made known to him the contents of the same, he, the said John I. Thompson, High Sheriff as aforesaid, acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

J. L. HOWELL,
Master in Chancery of N. J.

State of New Jersey, Monmouth County, } ss.

I, John I. Thompson, High Sheriff as aforesaid, do solemnly swear that the real estate described in this deed, made by me to Alison E. Hutchinson, was by me sold by virtue of a good and subsisting execution as is therein recited; that the money ordered to be made has not been to my knowledge or belief paid or satisfied; that the time and place of sale of said land and real estate was by me duly advertised as required by law; and that the same

was cried off and sold to a bona fide purchaser for the best price that could be obtained.

JOHN I. THOMPSON.

Sworn and subscribed to, this twenty-eighth day of April, A. D. 1884, before me, one of the Masters of the Court of Chancery of the State of New Jersey. And I having examined this deed do approve the same, and order it to be recorded as a good and sufficient conveyance of the land and real estate therein described.

J. L. HOWELL,
Master in Chancery of N. J.

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On part of Complainants.

On part of Defendant, Beakes.

Rebuttal on part of Defendant, Hutchinson.

Exhibits.