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Notice of Appeal.

(Filed April 2, 1923.)

In Chancery of New Jersey

Between GRACE LOUISE HILL and HENRY J. RUSSELL, Executors Under the Last Will and Testament of THOMAS HILL, Deceased, Complainants, and ERNEST PERRY HILL et als., Defendants.	On Bill, etc.

PLEASE TAKE NOTICE that the defendants Ernest Perry Hill and Arthur Edward Hill hereby appeal from the final decree and from the whole and every part thereof made in this Court in the above stated cause, as directs the complainants to pay out of the personal estate of Thomas Hill, deceased, the principal sum due on two bonds and mortgages mentioned in said decree together with interest on each from July 1st, 1919, and also from that part of the said decree which decrees that the real estate

covered by said mortgages be exonerated from the lien of said mortgages.

Dated, March 29th, 1922.

AUTENRIETH & GANNON,
Solicitors for Defendant Ernest Perry Hill and Arthur Edward Hill.

WILLIAM R. GANNON,
Of Counsel.

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

WILLIAM R. GANNON,
Of Counsel with Defendants Ernest Perry Hill and Arthur Edward Hill.

Bill of Complaint.

(Filed December 16, 1920.)

IN CHANCERY OF NEW JERSEY.

To:

EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey.

The Complainants, Henry J. Russell and Grace Louise Hill, Executors of the last Will and Testament of Thomas Hill, deceased, respectfully show that:—

1. Thomas Hill died on or about June 20th, 1919, a resident of New Jersey, leaving a last Will and Testament duly admitted to probate by the Surrogate of Hudson County, on July 1st, 1919, a copy of which will is annexed hereto and made a part hereof, in which will complainants are named as executors thereof and complainants have since duly qualified and Letters Testamentary have been issued to them by the said Surrogate of Hudson County.

2. That all of the debts of the said Estate have been paid except the one hereinafter mentioned (and one now in litigation rising out of a guardians bond signed by the said Thomas Hill as surety); and all of the property of the said estate both real and personal has been converted into cash, excepting that mentioned in paragraph two of the Will, and complainants now have on hand about the sum of Twenty thousand dollars ($20,000) for distribution and which they are now ready to distribute and file their final account and close the estate, except for the questions herein set out.

3. By the first paragraph of said Will testator directs that all of his just debts and funeral expenses be first fully paid; and by the second paragraph of said Will, he gives certain real estate therein enumerated and now known as premises street #57 and 59 Newark Avenue, in Jersey City, New Jersey, to the aforesaid Grace Louise Hill in trust, for the use and benefit of Maria Louise Hill and her children, Thomas Howard Hill, Marion Juliete Hill, Silvie Perry Hill, and the said Grace Louise Hill, under the trust set forth in said paragraph two of said Will; and all of said beneficiaries are still alive and Marion Juliete Hill and Silvie Perry Hill, are minors under twenty-one years of age and over fourteen years of age and none of them have attained the age of thirty years, as stipulated in said will.

4. That on or about November 1st, 1917, the said decedent, Thomas Hill, executed a bond to the Provident Institution for Savings in Jersey City, to secure the payment of Eight thousand dollars on January 1st, 1919, together with interest at five per cent. payable semi-annually, and as security for the payment of said bond, executed also a mortgage upon the aforesaid premises, mentioned in the second paragraph of said Will, and the said bond and mortgage remained unpaid at the time of his death except that the interest was paid thereon up to the last interest day preceding his death.

AMENDMENT No. 1.

5. That the trustee as well as the beneficiaries named in paragraph two of said Will have demanded of complainants that they pay the aforesaid bonds and mortgages to the Provident Insti-

tution for Savings out of the moneys in their hands, and on the other hand, the residuary legatees mentioned in the fifth paragraph of said Will, particularly Ernest Perry Hill and Arthur Edward Hill, demand of the complainants that they do not pay said bonds with the moneys in their hands, but that the said trustees mentioned in paragraph two of the said Will take said real estate therein enumerated subject to and encumbered by the aforesaid mortgages and its accompanying bonds to the Provident Institution for Savings.

6. Complainants are unable to decide whether according to the terms of the said Will they shall pay said bond and mortgage or let it remain unpaid by them, so that the trustee aforesaid shall take said real estate, subject to said mortgage and its accompanying bond; and complainants are advised by counsel that there is doubt as to which it is legally proper for them to do.

Complainants are without adequate remedy in the Court of Law and therefore pray:—

1. That said Will be interpreted and construed by decree or order of this Court, determining whether or not, under the terms of said Will, said bond and mortgage shall be paid out of the personal estate, by the complainants.

2. That complainants may be instructed by this Court whether or not they shall pay out of the personal estate, the aforesaid bond and mortgage; and receive such other instructions as the Court may deem necessary for carrying out the provisions of said Will.

3. That a writ or writs of subpoena may issue to the said Grace Louise Hill, Trustee under the Will

of Thomas Hill and Maria Louise Hill, Thomas Howard Hill, Marion Juliete Hill, Silvie Perry Hill, Grace Louise Hill, Ernest Perry Hill and Arthur Edward Hill, commanding them to answer this bill of complaint and to abide by such order or decree as this Court may make in the premises.

JAMES E. PYLE,
Solicitor for and of Counsel with
Complainants.

IN THE NAME OF GOD, AMEN.

I, THOMAS HILL, now residing at street number 127 Delaware Avenue, in Jersey City, New Jersey, being of sound mind, memory and understanding, do make and publish this my last Will and Testament, in manner following, that is to say:

FIRST: I direct that all my just debts and funeral expenses be first fully paid.

SECOND: I direct that the following properties, that is to say, the property covered by deed of Winfield L. Morse and Florence I. Morse, his wife, to Thomas Hill, dated February 13, 1912, and which deed is recorded in the office of the Register of Hudson County, N. J. on April 19, 1912 in book 1124 of deeds for said County on pages 103; and also the property covered by deed of Jacob F. Witterschein, Jr., and Annie Witterschein, his wife, to Thomas Hill, dated February 28, 1913, and which deed is recorded in the office of the Register of Hudson County, N. J. on February 28, 1913 in book 1148 of deeds for said County on pages 163 etc.; and

also the property covered by deed of Dickinson M. Van Vorst as Trustee and Executor of the last Will and Testament of Anna E. Miller, deceased, to Thomas Hill dated September 10th, 1908, and which deed is recorded in the office of the Register of Hudson County, N. J. on September 21, 1908, in book 1021 of deeds for said County, on pages 258; and also the property covered by deed of Charles W. Parker and Emily F. Parker, his wife to Thomas Hill, dated January 15, 1909, and which deed is recorded in the office of the Register of Hudson County, N. J., on January 18th, 1909, in book 1028 of deeds for said County, on pages 198 etc. be placed in the hands of my grand-daughter Grace Louise Hill, she, the said Grace Louise Hill to hold these, the aforesaid properties and to administer them as trustee, for the use of and for the benefit of Maria Louise Hill, widow of my deceased son William Howard Hill, and the children of my deceased son, William Howard Hill and Maria Louise Hill aforesaid, namely: Thomas Howard Hill, Marion Juliete Hill, Silvie Perry Hill and Grace Louise Hill aforesaid, until the youngest of the children aforesaid, shall have attained the age of thirty years of age, at which time, I direct that these properties be sold and the proceeds of such sale be divided share and share alike, between the aforesaid Maria Louise Hill, Thomas Howard Hill, Marion Juliete Hill, Silvie Perry Hill and Grace Louise Hill. Should any of the aforesaid, my daughter-in-law or my grandchildren therein named, die before I do, or die before the time set for the termination of the trusteeship, then in this event I direct that his or her share shall descend to his or her heirs. I direct that my trustee aforesaid shall not be required to furnish any bonds; that she shall during each year of this trusteeship, first pay any and all

taxes, assessments, water rents, interest, repairs and any and all other charges truly chargeable to the maintenance and upkeep of these properties, that she shall rent these properties to tenants at the best possible rents and from the rents so received deduct any and all expenses aforesaid, then the surplus remaining, if any, she shall apportion the surplus remainder share and share alike between the aforesaid Maria Louise Hill, Silvie Perry Hill, Thomas Howard Hill, Marion Juliete Hill, and Grace Louise Hill, or their heirs and pay it over to them. I also hereby empower the said Grace Louise Hill with full power to mortgage the aforesaid properties, if in her judgment she sees fit to do so, and she is also to have full power to sell and to execute and deliver good and sufficient deeds of conveyance as I myself have in my lifetime.

THIRD: I give and bequeath to my granddaughter Grace Louise Hill all of my jewelry and household effects.

FOURTH: I direct that my executors shall sell or rent out on royalties any or all of my patents, my interest in patents and all of my patents that may be pending. The proceeds of such sale, sales and royalties shall be apportioned by them, at such times as they in their judgment deem best in the following manner, that is to say, one quarter of such proceeds is to be given to Christ Hospital in Jersey City, N. J., one quarter is to be given to the Baptist Church in Jersey City, N. J., one quarter is to be given to the Methodist Episcopal Church in Jersey City, N. J., one quarter is to be given to the Protestant Episcopal Church in Jersey City, N. J., but they, my executors are to decide

for themselves, which particular churches or church in any and each of the denominations aforesaid is to receive the portion mentioned.

FIFTH: I direct that the balance of my property both real, personal and mixed, shall within one year after my death be sold and the proceeds of such sales shall be divided into three equal parts, one of which parts shall be divided share and share alike between Maria Louise Hill, Thomas Howard Hill, Marion Juliete Hill, Silvie Perry Hill, and Grace Louise Hill, of the remaining two parts, I give and bequeath one part to my son Ernest Perry Hill and the other remaining part I give and bequeath to my son Arthur Edward Hill. If it should so happen that any of my heirs or legatees herein mentioned be dissatisfied with the portion I have bequeathed to him, her or them, and by reason of such dissatisfaction decide to contest this my last Will and Testament, then in this event I desire and insist that such contestant be forever cut off and shall not receive anything from my estate and that their share or shares shall be added to my residuary estate.

SIXTH: I desire that my executors hereinafter named shall receive ten per cent. of the appraised value of my estate as compensation for their services in lieu of whatever amount they would be entitled to by law. That they shall not be required to furnish any bonds. That they shall have full power to sell and convey any property of which I own, excepting the properties mentioned in the second article of this instrument. I hereby nominate and appoint Grace Louise Hill and Henry J. Russell to be the executors of this my last Will and Testament.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 14th day of February, 1918, in Jersey City, N. J.

THOMAS HILL.
(Seal)

Signed, sealed, published and declared by the said testator as and for his last Will and Testament in our presence, who in his presence and at his request and in the presence of each other have hereunto subscribed our names as witnesses.

Wm. R. Harrison, 43 Gautier Avenue, Jersey City.
Bernh. Philip, 52 Harrison Avenue, Jersey City.

Answer of Defendants Ernest Perry Hill and Arthur Edward Hill.

(Filed January 20, 1921.)

IN CHANCERY OF NEW JERSEY.

Between GRACE LOUISE HILL and HENRY J. RUSSELL, Executors under the last Will and Testament of THOMAS HILL, deceased, Complainants, and ERNEST PERRY HILL et als., Defendants.	On Bill, etc.

The defendants ERNEST PERRY HILL and ARTHUR EDWARD HILL, answering the Bill of Complaint say that:

1. They admit paragraphs 1, 2 and 3 of said Complaint.

2. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraphs 4, 5 and 6 of said Complaint.

3. If the allegations in paragraphs 4, 5 and 6 of the complainant's bill are true, defendants say that the provisions of an act entitled, "An Act Concerning Proceedings on Bonds and Mortgages Given for the same Indebtedness, and the Foreclosures and sale of Mortgaged Premises Thereunder," approved March 12th, 1880, together with the Amendments thereof and Supplements thereto, apply to the state of facts before this Court; and that said complainants should be instructed by this Court that the

residuary of the personal estate of the decedent in their hands is not liable for the exoneration of the premises mentioned in paragraph 3 of the Bill of Complaint, from the lien and effect of the bond and mortgage mentioned in paragraph 4 of said Bill of complaint.

4. If the allegations in paragraphs 4, 5 and 6 of said bill of complaint are true, defendants further say that the devisees of said premises, mentioned in paragraph 3 of the bill of complaint are not entitled to have the bond mentioned in paragraph 4 of the said bill of complaint paid from the residuary of the personal estate of said decedent, because no claim for the payment of said debt was presented to the executor of the estate of said decedent within the time required by an order of the Hudson County Orphans' Court dated July 1st, 1919, limiting creditors of said decedent, and on April 3rd, 1920, a decree barring creditors of said decedent was made by said Court, pursuant to the provisions of an act entitled "An Act respecting the Orphans' Court, and relating to the powers and duties of the ordinary, and the Orphans' Court and Surrogates' (Revision One Thousand Eight hundred Ninety-eight)," approved June 14th, 1898, and therefore the said complainants should be instructed not to pay the amount due upon said bond, from the residuary of the personal estate of said decedent.

WILLIAM R. GANNON,
Solicitor for defendants Ernest Perry Hill and Arthur Edward Hill.

Answer of Defendants Grace Louise Hill, Trustee, and Others.

(Filed January 24, 1921.)

IN CHANCERY OF NEW JERSEY.

Between GRACE LOUISE HILL and HENRY J. RUSSELL, Executors under the Last will and testament of THOMAS HILL, dec'd., Complainants, and ERNEST PERRY HILL, and others, Defendants.	On Bill, &c.

The defendants Grace Louise Hill, Trustee, under the second paragraph of the Will of Thomas Hill, deceased, and Maria Louise Hill and Thomas Howard Hill, answering the bill of complaint says that:—

1. They admit paragraphs one, two, three, four, five and six of the complaint.

2. That the complainants have in hand for distribution after payment of all debts of the estate of Thomas Hill (excepting the bond hereinafter mentioned) a sum of money more than sufficient to pay in full a bond of Eight thousand dollars made by Thomas Hill to the Provident Institution for Savings in Jersey City, mentioned in the fourth paragraph of the Bill of Complaint and that said moneys are now in the hands of the complainants waiting the decree of this Court in this suit, and that by the terms of the first paragraph of the Will of Thomas Hill all his just debts and funeral ex-

penses are directed to be first fully paid and that said bond of Eight thousand dollars is one of the debts of the said Thomas Hill and has not been paid, although the same became due November 1st, 1918; and that therefore complainants as Executors of the Estate of Thomas Hill should pay said bond before making the distribution of the residuum of said estate among the residuary legatees and that said complainants should be so instructed by this Court.

PHILIP S. BIRNBAUM,
Solicitor of Defendants, Grâce Louise Hill, trustee under the 2nd paragraph of the will of Thomas Hill, dec'd and Maria Louise Hill and Thomas Howard Hill.

Stipulation of Agreed Facts.

(Filed April 6, 1921.)

IN CHANCERY OF NEW JERSEY.

Between
GRACE LOUISE HILL and HENRY J. RUSSELL, Executors, under the last Will and Testament of THOMAS HILL, Dec'd.,
Complainants,
and
ERNEST PERRY HILL and others,
Defendants.

The parties hereto, by their respective Solicitors do hereby agree that the following facts are admitted in the case, in like manner as if proved by competent testimony:—

That all of the allegations of the Bill of Complaint are admitted.

That in the Estate of Thomas Hill an order limiting creditors was entered July 1st, 1919 by the Surrogate of Hudson County, and on April 3rd, 1920 a decree barring creditors was entered by the Orphans Court of Hudson County in said Estate; and that no claim under oath as required by statute has been filed with the Executors of said Estate by the Provident Institution for Savings in Jersey City, or by anyone else, for the payment of the amount due on the bond and mortgage mentioned in the Bill of Complaint, but that verbal demand was made Before April 3, 1920 upon the Executors by the devisees of the real estate, covered by the mortgage, that said Executors pay said bond and

mortgage out of the personal estate, and thus exonerate said real estate from the lien of said bond and mortgage, which the Executors refused to do without first obtaining the advice of the Court on the subject and furthermore that the said Executors are willing and then waived and do now waive the necessity of presenting said claim under oath as required by the statute. The Solicitor of Ernest Perry Hill and Arthur Edward Hill Executors not hereby admitting that the executors have a legal right to so waive.

JAMES E. PYLE,
Solicitor for Complainants.

WILLIAM R. GANNON,
Solicitors for defendants Ernest Perry Hill and Arthur Edward Hill.

PHILIP S. BIRNBAUM,
Solicitor for Defendants Grace Louise Hill Trustee and Maria Louise Hill, Thomas Howard Hill.

Amendment to Bill of Complaint.

(Filed February 14, 1922.)

IN CHANCERY OF NEW JERSEY.

Between GRACE LOUISE HILL and HENRY J. RUSSELL, Executors under the Last Will and Testament of THOMAS HILL, dec'd., Complainants, and ERNEST PERRY HILL and others, Defendants.	On Bill, &c.

The bill of complaint in the above entitled cause is hereby amended by consent of the respective parties as follows:

1. Add to paragraph 4 as part thereof the following: "That also on or about March 19th, 1919 the said decedent Thomas Hill executed another bond to the Provident Institution for Savings in Jersey City, to secure the payment of Two Thousand Dollars, on July 1st, 1919, with interest at five percent. per annum payable semi-annually, and as security for the payment of said bond, also executed a mortgage upon the aforesaid premises mentioned in the second paragraph of said will, and which said bond and mortgage remained unpaid at the time of his death, except that the interest was paid thereon up to the last interest day preceding his death; said first above mentioned mortgage being recorded in the Register's office of Hudson County on December 13th, 1917 in Book 912 of mortgages page 395 and said mortgage second

above mentioned being recorded in the aforesaid Register's office on March 20th, 1919 in Book 941 of Mortgages page 434"; and also in paragraph four change the date of the $8,000 mortgage from November 1st, 1917 to November 21st, 1917.

2. Paragraphs 5 and 6 are amended so that where mention is made therein to the aforesaid bond and mortgage to the Provident Institution for Savings, it shall read the aforesaid two bonds and mortgages to the Provident Institution for Savings; and in like manner paragraphs one and two of the prayer for relief are amended so that where reference is made therein to the said bond and mortgage it shall read the said two bonds and mortgages.

JAMES E. PYLE,
Solicitor of Complainants.

We do hereby consent to the aforesaid amendments.

JAS. E. PYLE,
Solicitor of Complainants.

PHILIP S. BIRNBAUM,
Solicitor of Defendants Grace Louise Hill, Trustee under the 2nd paragraph of the Will of Thomas Hill deceased, and Maria Louise Hill and Thomas Howard Hill.

WILLIAM R. GANNON,
Solicitor of Defendants Ernest Perry Hill and Arthur Edward Hill.

Amended Answer.

(Filed February 14, 1922.)

IN CHANCERY OF NEW JERSEY.

Between GRACE LOUISE HILL and HENRY J. RUSSELL, Executors under the Last Will and Testament of THOMAS HILL, dec'd., Complainants, and ERNEST PERRY HILL and others, Defendants.	On Bill, &c.

The answer of defendants Ernest Perry Hill and Arthur Edward Hill heretofore filed is hereby amended so that whenever reference is made to or mention thereof to the bond and mortgage in the Bill of Complaint it shall read the two bonds and mortgages mentioned in the Bill of Complaint, so that all allegations in said answer as heretofore shall apply to the additional mortgage as set forth and mentioned in the complainants amendment to their bill of complaint.

WILLIAM R. GANNON,
Solicitor for Defendants Ernest Perry Hill and Arthur Edward Hill.

We do hereby consent to the aforesaid amendment.

JAS. E. PYLE,
Solicitor of Complainants.

WILLIAM R. GANNON,
Solicitor of Defendants Ernest Perry Hill and Arthur Edward Hill.

PHILIP S. BIRNBAUM,
Solicitor of Defendants Grace Louise Hill, Trustee under the 2nd paragraph of the Will of Thomas Hill dec'd, & Maria Louise Hill and Thomas Howard Hill.

Amended Answer.

(Filed February 14, 1922.)

IN CHANCERY OF NEW JERSEY.

Between GRACE LOUISE HILL and HENRY J. RUSSELL, Executors, under the Last Will & Testament of THOMAS HILL, dec'd., Complainants, and ERNEST PERRY HILL and others, Defendants.	On Bill, &c.

The defendants answer heretofore filed is hereby amended so that paragraph two reads as follows:

"That the complainants have in hand for distribution after payment of all debts of the estate of Thomas Hill (excepting the two bonds hereinafter mentioned) a sum of money more than sufficient to pay in full the two bonds of Eight Thousand Dollars and Two Thousand Dollars, respectively, each made by Thomas Hill to the Provident Institution for Savings in Jersey City, mentioned in the Fourth paragraph of the Bill of Complaint and that said moneys are now in the hands of the complainants waiting the decree of this Court in this suit, and that by the terms of the first paragraph of the Will of Thomas Hill all his just debts and funeral expenses are directed to be first fully paid and that said two bonds one of Eight Thousand dollars and the other of Two Thousand Dollars, are two of the debts of the said Thomas Hill and have not been paid, although the first became due

January 1st, 1919, and the second on July 1st, 1919; and that therefore complainants as Executors of the Estate of Thomas Hill should pay said two bonds before making the distribution of the residum of said estate among the residuary legatees and that said complainants should be so instructed by this Court.

PHILIP S. BIRNBAUM,
Solicitor of Defendants.

We do hereby consent to the aforesaid amendment.

JAS. E. PYLE,
Solicitor of Complainants.

WILLIAM R. GANNON,
Solicitor of Defendants Ernest Perry Hill and Arthur Edward Hill.

PHILIP S. BIRNBAUM,
Solicitors of Defendants, Grace Louise Hill, Trustee under the 2nd paragraph of the Will of Thomas Hill, dec'd, and Maria Louise Hill and Thomas Howard Hill.

Amended Stipulation of Facts.

(Filed February 14, 1922.)

IN CHANCERY OF NEW JERSEY.

Between GRACE LOUISE HILL and HENRY J. RUSSELL, Executors under the Last Will & Testament of THOMAS HILL, dec'd., Complainants, and ERNEST PERRY HILL and others, Defendants.	On Bill, &c.

It is hereby agreed between the respective parties hereto that the written stipulations as to agreed facts heretofore signed by the respective parties and filed in the above entitled cause, shall apply not only to the one bond and mortgage mentioned therein but also in like manner to the additional mortgage set forth in the amendments to the bill of complaint mentioned therein, being the mortgage made by Thomas Hill to the Provident Institution for Savings for $2,000 and dated March 19th, 1919.

JAS. E. PYLE,
Solicitor of Complainants.

We do hereby consent to the aforesaid amendment.

JAS. E. PYLE,
Solicitor of Complainants.

WILLIAM R. GANNON,
Solicitor of Defendants Ernest Perry Hill and Arthur Edward Hill.

PHILIP S. BIRNBAUM,
Solicitor of Defendants Grace Louise Hill, Trustee under the 2nd paragraph of the Will of Thomas Hill, dec'd., & Maria Louise Hill and Thomas Howard Hill.

Final Decree.

(Filed May 1st, 1922)

IN CHANCERY OF NEW JERSEY.

Between GRACE LOUISE HILL and HENRY J. RUSSELL, Executors under the Last Will and Testament of THOMAS HILL, Deceased, Complainants, and ERNEST PERRY HILL, et als., Defendants.	On Bill &c.

This cause coming on to be heard in the presence of James E. Pyle, of Counsel with the complainants, and William R. Gannon, Solicitor for the defendants Ernest Perry Hill and Arthur Edward Hill, and Philip S. Birnbaum, Solicitor for the defendants Grace Louise Hill, Trustee &c., and Maria Louise Hill and Thomas Howard Hill, and the pleadings, proofs and arguments of the respective parties having been read, heard and considered; and it appearing that on June 20th, 1919, Thomas Hill died seized of the premises known as street nos. 57 and 59 Newark Avenue, in Jersey City, New Jersey, leaving a Last Will and Testament duly admitted to probate before the Surrogate of Hudson County on July 1st, 1919, in and by which he appointed the complainants, the Executors thereof and they have since duly qualified as such; and that amongst other legacies and devises contained in the said Will, the said decedent did in and by the first paragraph of said will provide that all of his just debts and funeral expenses be first

paid and by the second paragraph thereof he did give the said premises #57 and 59 Newark Avenue to the defendant Grace Louise Hill, in Trust for the use and benefit of Maria Louise Hill and her children Thomas Howard Hill, Marion Juliette Hill, Silvie Perry Hill and Grace Louise Hill, and that on said premises, at the time of his death were two mortgages, each given to secure two bonds, all of which were made and executed by the decedent Thomas Hill, in his lifetime; one dated November 1st, 1917, to secure the payment of $8,000 on January 1st, 1919, with interest at five percent and the other dated March 19th, 1919, to secure the payment of $2,000 on July 1st, 1919, with interest at five percent; each of said bonds and mortgages were made by the said Thomas Hill in his lifetime to the Provident Institution for Savings in Jersey City; and that on July 1st, 1919, an Order Limiting Creditors was entered in the Hudson County Orphans Court and on April 3rd, 1920, a Decree Barring Creditors of said Estate of Thomas Hill was entered in said Court, and that no written claim under oath was filed by said Provident Institution for Savings in Jersey City, but that the Executors of said Estate waived the necessity of filing said claims and that before April 3rd, 1920, verbal demand was made upon the said Executors by the devisees of said real estate that the Executors pay the two said bonds and mortgages out of the personal estate of said decedent, and it further appearing that the said Executors after paying all of the debts of said Estate excepting the said two bonds and mortgages, have on hand, funds sufficient to pay said two bonds and mortgages, and are ready and able to pay out of the personal estate the said two bonds and mortgages, with interest

thereon, but are unable and unwilling to do so without the advice and direction of this Court, because the legatees of said personal estate or some of them have demanded of the complainants that said two bonds and mortgages be not paid out of the personal estate of said decedent; and the Court being of the opinion that the said two bonds and mortgages should be paid out of the personal estate of said decedent and that the real estate devised as aforesaid should be exonerated from the lien of said two bonds and mortgages, and that the complainants are entitled to be so directed and advised in respect to the payment of said two bonds and mortgages.

It is on this 13th day of April, 1922, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor by virtue of the authority of this Court, doth hereby order, adjudge and decree that the said Complainants, Grace Louise Hill and Henry J. Russell, Executors under the last Will and Testament of Thomas Hill deceased, pay out of the personal estate of said Thomas Hill deceased, the principal sum due on the aforesaid two bonds and mortgages, together with interest on each from July 1st, 1919, and that the said real estate be exonerated from the lien of said two mortgages,

And it is further ordered and decreed that a counsel fee of $300 be allowed to James E. Pyle, counsel for the Complainants and a counsel fee of $300 be allowed to William R. Gannon, counsel for the defendants as aforesaid, and a counsel fee of $300 be allowed to Philip S. Birnbaum counsel for the defendants as aforesaid, and that said amounts be included in the taxed costs herein of the respective parties and that said costs and counsel fees be paid by the said Executors, the complain-

ants herein, out of the personal estate of the said decedent.

Respectfully advised.

Amended Opinion.

(Filed April 3, 1922)

GRACE LOUISE HILL and HENRY J. RUSSELL, executors under the last will and testament of THOMAS HILL, Deceased

vs.

ERNEST PERRY HILL, et al.

(Decided April 13th, 1922)

1. The right of a devisee to exoneration by payment of a debt secured by mortgage upon the land from the personal assets of the estate exists in full force except in so far as it has been abolished by statute.

2. 3 Comp. Stat. p. 3421, par. 2, does not abolish the substantial right of a devisee of land to exoneration by payment of the bond secured by mortgage on the land devised to him from the personal property of the testator.

3. While a statute relating to remedy and procedure is to be liberally construed with a view to the effective administration of justice, it must be strictly construed in so far as it changes or diminishes fundamental rights, both as to the cases

embraced in its terms and the methods to be pursued.

4. The legislature makes public policy, not the courts.

On bill, &c.

Mr. JAMES E. PYLE, for the complainants.

Mr. WILLIAM R. GANNON, for the defendants Ernest Perry Hill and Arthur Edward Hill.

Mr. PHILIP S. BIRNBAUM, for the defendants Grace Louise Hill, trustee, &c., and Maria Louise Hill and Thomas Howard Hill.

LEWIS, V. C.

This litigation was initiated by a bill filed by the complainants as executors of the estate of Thomas Hill, deceased, for instructions regarding the payment of two bonds made by the testator during his lifetime to the Provident Institution for Savings in Jersey City aggregating $10,000 to secure which he gave mortgages upon the property on Newark Avenue, in Jersey City, devised by him in his will to Grace Louise Hill, as trustee.

As appears from the agreed state of facts all the allegations in the bill are admitted by the defendants Ernest Perry Hill and Arthur Edward Hill, and the complainants, as executors, admit the order limiting creditors and the decree barring creditors in the matter of the estate of Thomas Hill mentioned in the answer of the defendants Ernest Perry Hill and Arthur Edward Hill. No claim under oath has been filed with the executors of the

said estate by the Provident Institution for Savings in Jersey City, the mortgagee mentioned in the mortgages covering the lands above referred to, and by no one else for the payment of the amount due on the bonds and mortgages mentioned in the bill of complaint, but that verbal demand was made before April 3d, 1920, upon the executors by the devisees of the real estate covered by said mortgages, that said executors pay said bonds and mortgages out of the personal estate of the said decedent and thereby exonerate the real estate from the lien of the said bonds and mortgages.

It is admitted that the executors have waived the necessity of the said devisee presenting the said claim under oath, and the question as to the legal right to so waive was not argued before me, although it is set up as one of the defences by the defendants Ernest Perry Hill and Arthur Edward Hill in their answers.

It may be said in passing that it has been held that an executor may pay any claim against the estate, which he is satisfied is just, without requiring a statement of the items, or that it be sworn to. Kinman v. Wight, 39 N. J. Eq. 501. It was also held, in Heisler v. Sharp, 41 N. J. Eq. 167, that an executor or administrator may pay the debt which is just, though it be barred by the statute of limitations, and in Boynton v. Sandford, 28 N. J. Eq. 184, that where an action is brought against him on a claim barred by the statute of limitations an executor is not bound to plead the statute.

The interesting and important question, however, which I am asked to pass upon is, Does the doctrine of exoneration exist today in New Jersey, or has it been abolished by the statute of 1880, in the absence of any express intention to exonerate, as evidenced by the will?

The right to such exoneration was well settled in England and in New Jersey, and unquestionably, exists today in New Jersey in full force, unless it has been abolished in the case of mortgage debts of the ancestor, or devisor, which are represented by the bonds of such ancestor or devisor which come within the operation of the act of March 12th, 1880. 3 Comp. Stat. p. 3420. The old authorities, laying down the original rule above referred to, may be found cited in Park. Dig. col. 5540 p. 192; Smith v. Wilson, 75 N. J. Eq. (at p. 312).

Of course, all cases laying down or following the ancient rule which precedes the statute of March 12th, 1880, have an application to the present inquiry, which is confined to the question whether the statute of 1880 abolished the right of exoneration in cases coming within the operation of the statute.

We may go further and say that cases which came up in court and were decided after the act of 1880 can have little, if any, bearing upon the question under examination, if, as a matter of fact, the bond and mortgage of the ancestor or devisor was in existence prior to the time when the act of 1880 became a law. It may be that the constitutional provision prohibiting the legislature from passing any law depriving a party of any remedy for enforcing a contract which existed when the contract was made preserves the right of exoneration to the heir or devisee if the bond of the ancestor or devisor was in existence when the act of 1880 took effect. It is settled in this state that the act of 1880 could not prevent the holder of a bond and mortgage in existence when the act took effect from availing himself of the remedy which he had when the bond was given, by a suit at law before any foreclosure was attempted.

As it is settled, therefore, that the holder of the bond and mortgage was unaffected by the subsequently passed statute of 1880, it may be argued with force that the right of exoneration in such case is preserved for the benefit of the heir or devisee.

The cases which bear upon the question under consideration are:

(1) Kreuger v. Ferry (Vice-Chancellor Van Fleet, 1886), 41 N. J. Eq. 432, 437; affirmed on opinion below, 43 N. J. Eq. 295. Vice-Chancellor Van Fleet lays down the old rule that the personal estate of decedent is the primary fund for the payment of his debts and that the heir, devisee or widow has a right to exonerate his land in any mortgage existing thereon for which the decedent was personally liable. Vice-Chancellor Van Fleet further held that the right belongs to the three classes of persons mentioned and that an alienee or mortgagee of an heir or devisee has no such right. No notice whatever is taken of the possible effect of the act of 1880. The old rule was affirmed, or rather referred to as in full force. The case, however, has little bearing upon our inquiry for two reasons:

First. The point decided was that the alienee or mortgagee of the heir or devisee would not receive by assignment or otherwise his grantor's or mortgagor's right to exoneration.

Second. As a matter of fact, the bonds and mortgages with which the vice-chancellor had to deal was made by the testator in 1860, twenty years before the new law went into effect. In recogniz-

ing the old rule of exoneration as in existence in New Jersey, Vice-Chancellor Van Fleet refers (at p. 437) only to one New Jersey case, Keen v. Munn, 16 N. J. Eq. 398, a case decided in 1863, seventeen years before the statute with which we are dealing was enacted by the State of New Jersey.

(2) Bird v. Hawkins (Vice-Chancellor Grey, 1899), 58 N. J. Eq. 229. Vice Chancellor Grey recognizes the old rule of exoneration (at p. 254). The only New Jersey case cited to sustain the rule is Whitehead v. Gibbons, 10 N. J. Eq. 236, which case was decided in 1854, twenty-six years before the statute of 1880 was passed.

(3) Higbie v. Morris (Court of Errors and Appeals, 1895), 53 N. J. Ep. 173. This decision of our court of last resort lays down the old rule of exoneration and holds that the right of exoneration of land mortgaged by the decedent exists and is payable out of personal property as a primary fund.

It may be noted that the will under examination in this Higbie Case was dated November 10th, 1888, eight years after the statute in question was passed. The opinion of the court of errors and appeals (at p. 176) states that the mortgage in question existed when the testatrix made her will and when she died, and that such mortgages secured the "personal bond of the testatrix."

(4) Smith v. Wilson (Vice Chancellor Stevenson, 1911), 79 N. J. Eq. 310. This case came squarely under the old law of exoneration. The mortgage debt, in respect of which the heirs-at-law claimed exoneration, consisted in a bond of the testatrix secured by a mortgage made by the testatrix

in 1903. The common law rule of exoneration in such a case was recognized and the authorities cited (at p. 312). Vice Chancellor Stevenson decided that the right of exoneration in a case like this coming within the class of debts described in the statute of 1880 had been abolished by that statute and that the heirs took title cum onere. Neither Kreuger v. Ferry, Bird v. Hawkins, nor Higbie v. Morris, above referred to, was cited. The old New Jersey cases laying down exoneration rule which were decided prior to 1880 were cited.

(5) Atkinson v. Atkinson (Vice Chancellor Backes, 1914), 84 N. J. Eq. 105. This was a suit by an heir to secure exoneration. Vice Chancellor Backes, in a brief opinion, followed Smith v. Wilson, supra, citing no other cases.

(6) Chancellor Walker, when vice chancellor, in Hetzel v. Hetzel (1908), 74 N. J. Eq. 770, in a suit involving the construction of a will, held that devisees were entitled to have a mortgage made by their testator paid out of his personal estate in exoneration of the lands, but not as to lands subject to mortgages which were upon them at the time of their acquisition by the testator, which he assumed. This was a reiteration and an application of the common law rule of exoneration by the vice chancellor eighteen years after the passage of the act of 1880, and without any reference being made to that act. One of the mortgages in this case was made after the passage of the act.

The vice chancellor, in deciding the case of Smith v. Wilson did not refer to the case of Higbie v. Morris nor Hetzel v. Hetzel.

Therefore, it appears that the only reasoned adjudication in this state that the statute of 1880 abolished the exoneration rule was that of Vice

Chancellor Stevenson in Smith v. Wilson, supra; for Vice Chancellor Backes in Atkinson v. Atkinson, supra, only adopted and applied Smith v. Wilson as a precedent.

I am constrained to dissent from the adjudications in these two cases (Smith v. Wilson and Atkinson v. Atkinson) and from the reasoning of Vice Chancellor Stevenson in Smith v. Wilson.

The pertinent provision of the statute of 1880 is section 2, which was amended in 1881 (Comp. Stat. p. 3421), which reads as follows:

> "That in all cases where a bond and mortgage has or may be hereafter given for the same debt, all proceedings to collect said debt shall be, first, to foreclose the mortgage, and if at the sale of the mortgaged premises under said foreclosure proceedings the said premises should not sell for a sum sufficient to satisfy said debt, interest and costs, then and in such case it shall be lawful to proceed on the bond for the deficiency, and that all suits on said bond shall be commenced within six months from the date of the sale of said mortgaged premises, and judgment shall be rendered and execution issue only for the balance of debt and costs of suit."

The learned vice chancellor(in Smith v. Wilson, says (at p. 315) that the act of 1880, and its supplements, have abolished the right of the heir or devisee to be exonerated from a mortgage, created and owned by the ancestor or testator out of his personal estate; that in such cases the statute expressly makes the mortgage the primary fund out of which the debt secured thereby is to be paid,

and permits the personal remedy on the bond only after the remedy against the land has been exhausted. Here is no expressed legislative intention to abolish the common law rule of exoneration, and, if the statute has that effect, it must be so held by construction. This statute, it will be observed, relates solely to remedy and procedure, and while such statutes are to be liberally construed with a view to the effective administration of justice, nevertheless, such as take away, change or diminish fundamental rights must be strictly construed both as to the cases embraced within their terms, and as to the methods to be pursued. 36 Cyc. 1188, citing Crowder v. Fletcher, 80 Ala. 219. And in 2 Lew. Suth. Stat. Const. 454, it is laid down that it is not to be presumed that the legislature intended to make any innovation upon the common law further than the necessity of the case required; that a statute that a mortgagee shall not be entitled to the possession of the mortgaged property until after foreclosure, does not affect his right to the appointment of a receiver as before the passage of the act (citing Lowell v. Doe, 44 Minn. 144).

The supreme court in Tinsman v. Belvidere-Delaware Railroad Co., 26 N. J. Law 148 (at p. 167), observed that statutes in derogation of common law rights are to be strictly construed, and we are not to infer legislative intent to alter the common law principles further than is clearly expressed, or that the case absolutely requires. See, also, State v. Norton, 23 N. J. Law 33, 40, 41; Hetfield v. Central Railroad Co., 29 N. J. Law 571, 573; Sinnickson v. Johnson, 17 N. J. Law 129; 34 Am. Dec. 184.

Furthermore, the supreme court in Knight v. Cape May Land Co., 82 N. J. Law 16, expressly held that this very act "which provides 'that in

all cases where a bond and mortgage have or may be hereafter given for the same debt, and proceedings to collect the debt shall be first to foreclose the mortgage,' being in derogation of the common law force inherent in the bond must be construed strictly." And the court of errors and appeals, although reversing this case, expressly affirmed the supreme court, holding that this statute should be strictly construed, observing that it was at the oppressive proceedings of foreclosing a mortgage and suing on the bond at the same time that the statute was aimed. S. C., 83 N. J. Law 597 (at p. 601).

The vice chancellor, in Smith v. Wilson, goes on to observe (at p. 315) that the rule of exoneration accords with the policy of the English law which protected the heir and had tender regard for landed estates by which families were sustained and family succession was promoted; but in modern times, and especially in America, land occupies a very different position from that which it occupied under the old English system; that men buy lands and put mortgages upon them, sell their equities, and oftentimes deal with the lands which they have mortgaged as the primary fund out of which payment of the debt is to be made; that great fortunes which perpetuate families are perhaps handed down more frequently in the form of personal property than in the form of land; that in 1829 the State of New York abolished the right of the heir or devisee to exoneration in a statute which provides that whenever any real estate, subject to a mortgage executed by any ancestor or testator, shall descend to an heir or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own property, unless there be an express direction in the will of such testator that such mortgage be otherwise paid, and he states that the

English parliament in 1854 passed a statute similar in effect but much broader, providing that where a person dies seized of land charged with any money by way of mortgage, the heir or devisee shall not be entitled to have the mortgage discharged out of the personal estate or any other real estate of the ancestor or testator, but that such land so received by him shall be primarily liable, unless the testator or intestate by his will, deed or other document has signified any contrary or other intention. These statutes disclose a change of public policy in England and in the State of New York; and the legislature makes public policy, not the courts. Earle v. American Sugar Refining Co., 74 N. J. Eq. 751 (at p. 762), and cases cited.

If our legislature had intended by the act of 1880 to have abolished the exoneration rule, how easy it would have been for it to have accomplished the purpose by using proper and apt words to express its meaning in that regard, as the legislature of New York did by providing in terms that the heir or devisee should satisfy and discharge the mortgage out of his own property, unless there be an express direction to the contrary, and, as the English parliament did by providing in terms that the heir or devisee should not be entitled to have the mortgage discharged out of the personal or other real estate of the ancestor or testator unless a contrary intention had been expressed.

The title of the act is "An act concerning proceedings on bonds and mortgages given for the same indebtedness and the foreclosure and sale of the mortgaged premises thereunder." P. L. 1880 p. 225.

In Toffey v. Atcheson, 42 N. J. Eq. 182, Vice Chancellor Van Fleet, in construing the first sec-

tion of the act of 1880 (at p. 184), said that all this statute attempts to do is to prescribe a new rule of practice.

These acts of 1880 and 1881 have been held to be unconstitutional, but only so far as attempted to be applied to mortgages made prior to their passage. Champion v. Hinkle, 45 N. J. Eq. 162, 165, and cases cited.

As the views above expressed do not accord with the reasoning of Vice Chancellor Stevenson, and are not in harmony with Smith v. Wilson and Atkinson v. Atkinson, supra, I consulted the chancellor as to the soundness of this opinion and the propriety of promulgating it, and he authorizes me to say that after an investigation of the subject, he concurs in my view that the act of 1880 does not abolish the exoneration doctrine in this state, and that the two cases last mentioned should, therefore, be overruled.

Petition of Appeal.

(Filed April 16, 1923)

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

Between GRACE LOUISE HILL and HENRY J. RUSSELL, Executors under the Last Will and Testament of THOMAS HILL, deceased, Complainants-Appellees, and ERNEST PERRY HILL, et als., Defendants-Appellants.	On Bill, etc.

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

The petition of Ernest Perry Hill and Arthur Edward Hill, the appellants in the above stated cause respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date April 29th, 1922, wherein the said Grace Louise Hill and Henry J. Russell, Executors under the Last Will and Testament of Thomas Hill, deceased, were complainants, and the said Ernest Perry Hill and Arthur Edward Hill and Grace Louise Hill, Trustee, etc. and Marie Louise Hill and Thomas Howard Hill were defendants, in this respect, to wit: That the said decree adjudges "That the said complainants Grace Louise Hill and Henry J. Rus-

sell, Executors under the Last Will and Testament of Thomas Hill, deceased, pay out of the personal estate of said Thomas Hill, deceased, the principal sum due on the aforesaid two bonds and mortgages, together with interest on each from July 1st, 1919, and that the said real estate be exonerated from the lien of said two mortgages";

And your petitioners humbly appeal from that part of the decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous for that:

1. The lands covered by the two mortgages given to secure the payment of the two bonds directed to be paid out of the personal estate of the decedent, are the primary fund for the satisfaction of said debt; and

2. For the further reason that the devisees of said lands and premises are not entitled to have the same exonerated from the lien of said debts because the decedent intended that said lands should be taken cum onere; and

3. For the further reason that the common law right to exonerate, in the absence of expressed intention to exonerate has been abolished by the provisions of an act of the legislature entitled "An Act Concerning Proceedings on Bonds and Mortgages given for the same Indebtedness and the Foreclosure and Sale of Mortgage Premises Thereunder, Approved March 12th, 1880" and the amendments thereof and supplements thereto.

Your petitioners therefore pray that the said decree of the Chancellor may be in the particulars

aforesaid 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.

AUTENREITH & GANNON,
Solicitors for Appellants.

WILLIAM R. GANNON,
of Counsel.

Answer of Complainants-Appellees.

(Filed May 7, 1923)

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

Between GRACE LOUISE HILL and HENRY J. RUSSELL, Executors under the Last Will and Testament of THOMAS HILL, deceased, Complainants-Appellees, and ERNEST PERRY HILL, et als., Defendants-Appellants.	On Bill, &c.,

The answer of the Complainants-Appellees, Grace Louise Hill and Henry J. Russell, Executors under the Last Will and Testament of Thomas Hill, deceased, to the Petition of Appeal, of the above named defendants-appellants:

These complainants-appellees not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a decree was on the 29th day of April, 1922, made and entered in the Court of Chancery in the cause for that purpose mentioned in said Petition, as is therein stated; but as to the substance and form thereof, these complainants-appellees pray to refer thereto when the same shall be produced. And these complainants-appellees are advised and believe that the said decree is agreeable to equity and they pray that the same may be affirmed with costs to be adjudged to these complainants-appellees.

JAS. E. PYLE,
Solicitor for and of Counsel with complainants-appellees, Grace Louise Hill & Henry J. Russell, Executors under the last will and testament of Thomas Hill, deceased.

Answer of Defendants-Appellees.

(Filed May 7, 1923)

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

Between GRACE LOUISE HILL and HENRY J. RUSSELL, Executors under the Last Will and Testament of THOMAS HILL, deceased, Complainants-Appellees, and ERNEST PERRY HILL, et als., Defendants-Appellants.	On Bill, &c.,

The answer of the defendants Grace Louise Hill, Trustee, etc., and Marie Louise Hill and Thomas Howard Hill to the Petition of Appeal, of the above named defendants-appellants:

These defendants-appellees not acknowledging all or any of the matters which in the said petition of Appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree was on the 29th day of April, 1922, made and entered in the Court of Chancery in the cause for that purpose mentioned in said Petition, as is therein stated; but as to the substance and form thereof, these defendants-appellees pray to refer thereto when the same shall be produced. And these defendants-appellees are advised and believe that the said decree is agreeable to equity and they pray that the same may be affirmed with costs to be adjudged to these defendants-appellees.

J. HAVILAND TOMPKINS,
Solicitor for and of Counsel with defendants-appellees, Grace Louise Hill, trustee, etc., and Marie Louise Hill, and Thomas Howard Hill.

New Jersey Court of Errors and Appeals

Between GRACE LOUISE HILL and HENRY J. RUSSELL, executors under the last will and testament of THOMAS HILL, deceased, Complainants-Appellees, and ERNEST PERRY HILL, *et als.*, Defendants-Appellants.	On Appeal from Court of Chancery.

Joint Brief of Complainants-Appellees, and Defendant-Appellee Grace Louise Hill as Trustee, etc., and Others.

This appeal is from a final decree of the Chancellor, as advised by Vice-Chancellor Lewis, instructing the executors to exonerate from the lien of two mortgages certain real estate that was specifically devised under the will of Thomas Hill, deceased.

Apparently the real question for consideration is whether the common-law rule is still in force in this State as to the right of a devisee to have real estate, specifically devised to him, freed from the lien of mortgages made by the decedent.

The Facts.

The testator, Thomas Hill, died June 20, 1919, leaving a will, dated February 14, 1918, which was duly probated by the Surrogate of Hudson County. In the first paragraph he directed that all his "just debts and funeral expenses be first fully paid," and in the second paragraph, by reference to the deeds by which he took title, the testator devised the real estate known as 57 and 59 Newark Avenue, Jersey City, to Grace Louise Hill, in trust, for the benefit of certain of the defendants. The questions presented on this appeal are with respect to this specific devise.

At the time of his death said real estate was subject to two mortgages; one dated November 21, 1917, for $8,000.00, and the other dated March 19, 1919, for $2,000.00. Both mortgages were made by the testator to the Provident Institution For Savings Of Jersey City, and he gave his personal bond with each mortgage. The $8,000.00 mortgage became due on January 1, 1919, and the $2,000,000 mortgage became due on July 1, 1919, and both remained unpaid at the time of his death.

The executors named in the will have duly qualified. The personal estate is more than sufficient to pay all the debts, including the principal and interest due on said bonds and mortgages.

The trustee and beneficiaries named in the second paragraph of the will contend that the executors should pay said mortgages out of the personal estate. The residuary legatees contend that the trustee take said real estate encumbered by said mortgages, and that the executors have no legal right to use the personal estate to pay off the mortgages in question. The executors filed the bill in Chancery to determine which contention is correct and asked the Court for instructions.

The cause was submitted to Vice-Chancellor Lewis on a stipulation of agreed facts, and he advised the final decree which was made by the Chancellor directing the executors to pay the principal and interest due on said mortgages out of the personal estate, so as to exonerate from the lien of said mortgages the real estate specifically devised in trust under the said second paragraph of said will.

POINT I.

The doctrine of exoneration does exist in New Jersey to-day, and was not abolished by the Statute of 1880.

The appellants apparently admit that the common-law rule in this State is that where lands are specifically devised subject to mortgages made by the decedent himself, that the personal estate is, in the absence of statute, primarily liable for the discharge of such encumbrances. One of the reasons for the rule is stated to be that the personal property constitutes the natural fund for the payment of all of the decedent's debts, and that the personal estate has been increased by the consideration for which the mortgage encumbrances were given.

28 Ruling Case Law, p. 304, Sec. 285.

This rule was referred to by the Chancellor in *Keene* v. *Munn*, 16 N. J. Eq., 398, as follows:

> "At common-law personal estate is the primary fund for the payment of debts, and the heir-at-law may call upon the executor to exonerate the land by discharging the mortgage debt out of the personal estate, upon the ground that the personal estate had the bene-

> fit of the money for which the mortgage was given. The devisee stands in the same position as the heir, and is entitled to the same equity."

See, also:

> *Krueger* v. *Ferry,* 41 N. J. Eq., 432, and
> *Smith* v. *Wilson,* 79 N. J. Eq., 310.

While the appellants do not deny this rule, they contend that this doctrine of exoneration was abolished by the statute of this State, Chap. 170 of Laws of 1880, as amended in 1881. That Act is entitled: "An Act Concerning Proceedings on Bonds and Mortgages given for the same indebtedness, and the foreclosure and sale of mortgaged premises thereunder." As the learned Vice-Chancellor points out in his opinion below, this statute relates solely to the remedy of the holder of a bond and mortgage, and to the *procedure* he must follow when collecting the mortgage debt.

The Act of 1880 did not relieve a mortgagor from his obligation on the bond; he was still indebted to the holder of the bond and mortgage. The act only changed the method of procedure to be pursued by the holder of the bond and mortgage when collecting his debt. The title of the act clearly shows that it was an act of procedure. If it had been intended by that act to change the said long-established common-law rule of exoneration, then it should have been so specified in the title of the act in order to comply with the provisions of our state constitution. There is, however, nothing either in the title of the act or in the act itself that justifies us in implying an intention of the legislature to change this rule of the common law that had been so firmly established under the decisions in this state.

From the standpoint of the devisee the Act of 1880 had no practical effect, for the reason that even before that act the holder of a bond and mortgage had the right to first collect his debt out of the mortgaged security, and no one could prevent him from proceeding in that way. Before the act the general method of procedure when collecting a mortgage debt was to first bring foreclosure proceedings. The sole purpose of the act was to relieve a mortgagor from the embarrassment to him, of allowing the holder of a bond and mortgage from proceeding either at law on the bond, or in equity by foreclosure, or by both methods.

In *Mershon* v. *Castree*, 57 N. J. Law, 484, Chief Justice Beasley in his opinion pointed out that:

> "The hardship that the statute was intended to alleviate was the seizure and sale of the chattels of the mortgagee by virtue of a judgment on the bond, before resorting to the land. No purpose is observed in it to abridge the right of the mortgagee beyond that measure. The statute must be *construed strictly*, as it is in derogation of the common-law force inherent in the bond and mortgage."

In *Crosby* v. *Washburn*, 66 N. J. Law, 494, Justice Garrison pointed out that:

> "That act was passed for the better protection of the debtor's property and not to secure any object of public policy."

See, also:

Hellyer v. *Baldwin*, 53 N. J. Law, 141.

In *Andrus* v. *Burke*, 61 N. J. Eq., 297, it was held that:

> "The act of March 23rd, 1881 (P. L. of 1881, p. 184), providing that the first proceeding on

> a bond and mortgage shall be a suit to foreclose a mortgage, does not apply where the mortgagor subsequently executes a warrant of attorney to confess judgment for the same debt with intention that judgment shall be entered at once."

See, also:

Water v. *Dey*, 7 N. J. Law, 335.

In *Weatherby* v. *Weatherby*, 63 N. J. Law, 445, the Supreme Court, in an opinion by Justice Collins, held that the provisions of the act of 1881 should be construed strictly, the Court saying:

> "If, under order to limit creditors, a verified claim on the bond of a deceased obligor be presented to his legal representatives, and they serve notice disputing the same, a suit may be brought on the bond, without first foreclosing an accompanying mortgage, notwithstanding the statutory requirement (Gen. Stat., p. 2112, pl. 47) that in all cases where a bond and mortgage shall be given for the same debt, all proceedings to collect said debt shall be first to foreclose the mortgage, and after sale, then to proceed on the bond for the deficiency."

In the case of *Smith* v. *Crater*, 43 N. J. Eq., 636, the Court of Errors and Appeals held that:

> "The act of 1881 prohibits suit upon the bond until the sale is made under the decree of foreclosure, but does not prevent the creditor from presenting his claim to the administrator under the rule to bar."

As pointed out by the learned Vice-Chancellor below, it is not to be presumed that the legislature intended to make an innovation upon the common law further than the necessity of the case required, and the authorities that he cites in his opinion bear out this contention.

POINT II.

The decree of the Chancellor should be affirmed, for the reason that the questions raised on this appeal were decided by the Court of Errors and Appeals in 1895.

The case of *Highbie* v. *Morris,* 53 N. J. Eq., 173, was decided by this Court in the March term, 1895—fifteen years after the passage of the act of 1880-1881. The appellants, realizing that they must either clearly distinguish the case at bar from the Highbie case or fail in their appeal, have devoted a considerable part of their brief to a discussion of what this Court really decided. This appeal is an attempt to have this Court change the rules that were clearly laid down by it in the Highbie case. From the opinion therein it appears that the testatrix died in *April, 1892,* leaving a will dated *November 10, 1888.* That she died seized of land in Plainfield which was subject to two mortgages both made by her, and which encumbered said property both at the time she made her will, and at the time she died. That she devised said property to her granddaughter, providing in her will that her just debts and funeral expenses be first paid. It was argued that it was the intention of the testatrix to exonerate the personal estate because, in the devise of the Plainfield property, the testatrix used the words "all my right, title and interest," which was claimed meant only her equity of redemption in the lands in question. The executors asked for instructions as to whether the mortgage debts should be paid out of the personal estate, etc., or whether the devisee took the lands subject to the mortgages. The Court in its opinion clearly lays down a rule that fully supports the contention of the respondents

on this appeal, namely, that the personalty of an estate will not be exonerated from the primary liability to pay debts *unless* there is a clear intention in the will that the personal property shall be discharged therefrom. The following quotation from the opinion can leave no reasonable doubt as to this question:

> "When we remember that the right, title and interest of the testatrix in the Plainfield property consisted of the fee encumbered by two of her just debts, a doubt at once arises whether she intended those debts to be included among the debts that were to be paid out of her money and negotiable securities, or intended them to remain charged upon the Plainfield property only.
>
> "The most satisfactory solution of the doubt thus engendered is found in the legal rule, that the personal estate of a testator is the primary fund for the payment of his debts, even though the debts be secured by mortgage upon his realty, and that the personalty will not be exonerated from this primary liability merely because the testator has evinced a purpose to charge his debts upon his real estate, unless he has clearly indicated an intention to discharge his personal property therefrom.
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> * * * * * * * *
>
> "While therefore this will does not show that the testatrix intended that her granddaughter should have the Plainfield property discharged of the mortgage debts, it cannot be said to show that she designated to have her personal estate relieved of its legal liability as a primary fund for the payment of those debts; and consequently the residuary legatee can take only so much personal property as may be left after the mortgages are satisfied."

The testator in the case at bar does not in his will relieve his personal property from the primary

liability of paying debts. The testator in his will does, however, expressly state in the first paragraph thereof that his just debts shall be first paid, and this surely indicates a clear intention that all of his debts, including bond and mortgage debts, should be first paid. Surely no debt could be more solemnly incurred.

The learned Vice-Chancellor below also pointed out in his opinion that neither Vice-Chancellor Stevenson nor Vice-Chancellor Backes cited or referred to the Highbie case, and undoubtedly overlooked the same. The Highbie case is conclusive of the questions presented on the present appeal, and the appellants have offered no reason that would justify this Court in changing the rule laid down by it in that case.

But the case of *Highbie* v. *Morris* must be distinguished if the appellants are to succeed in their appeal, so they contend that the facts in that case were different than those in the case at bar. An examination of the report of the case and of the opinion shows conclusively that the facts in the case at bar are more favorable to the appellee's contention than those in the Highbie case. For instance, in the Highbie case, as in the case at bar, the will was dated over ten years subsequent to the passage of the act of 1880, and both decedents made a specific devise of real estate. Both decedents made the mortgages, and when they died the lands specifically devised by each of them were still subject to the mortgages. In the Highbie case the testatrix devised "all my right, title and interest" in the lands in question, while in the case at bar the testator devised the land in question by reference to the title deeds, record, etc. In both cases the mortgages and wills were dated, and the decedents died, many years after the passage of

the act of 1880. The appellants have failed to distinguish the facts in the Highbie case from the facts in the case at bar.

The appellants also contend that the act of 1880 was not brought to the attention of the Court of Errors and Appeals when it decided the case of *Highbie* v. *Morris,* and for that reason contend that that decision was not binding upon the appellants in the case at bar. It is rather presumptious to assume that the highest Court in this State overlooked the well-known provisions of the act of 1880. At the time of said decision that act had been in force for over fifteen years, and during that period of over fifteen years it had been the settled and well-known practice under the act of 1880 to compel the holder of a bond and mortgage to first foreclose his mortgage. It is absurd to contend that the members of the Court were not entirely familiar with the law and practice as laid down by the said act of 1880.

The appellants are in error when they state that the Court in the Highbie case was simply setting forth a statement of the common law as it existed prior to the statute of 1880. The report and opinion of the case clearly show that they were dealing with transactions that all took place years after the passage of the act of 1880, and it is ridiculous to contend that the Court was simply defining the common law as it existed prior to the enactment of the statute in question.

In view of the opinion written by Vice-Chancellor Lewis below in this case and the authorities therein cited, it is unnecessary to again cite the authorities here.

The decree below should be affirmed.

Respectfully submitted,

JAMES E. PYLE,
Solicitor for Complainants-Appellees.

J. HAVILAND TOMPKINS,
Solicitor for Defendants-Appellees Grace Louise Hill, Trustee, etc., and others.

[9883]

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NEW JERSEY

Court of Errors and Appeals

Between

GRACE LOUISE HILL and HENRY J. RUSSELL, executors under the last will and testament of Thomas Hill, deceased,
Complainants-Appellees,

and

ERNEST PERRY HILL *et als.*,
Defendants-Appellants.

On Appeal from Court of Chancery.

BRIEF OF DEFENDANTS-APPELLANTS ERNEST PERRY HILL AND ARTHUR EDWARD HILL.

The appeal in this matter is from the final decree of the Chancellor, advised by Vice-Chancellor Lewis, instructing the executors that they should exonerate real estate devised under the will of Thomas Hill, deceased, from the lien and effect of two mortgages covering the same, which were made and executed by the testator during his lifetime. The real question involved is whether or not the common law rule as to exoneration of real property devised under a will, from the lien of a mortgage remaining thereon at the time of the death of the testator has not been changed by vir-

tue of the provisions of "An act concerning proceedings on Bonds and Mortgages given for the same indebtedness, etc., passed by the Legislature in 1880."

The Facts.

The facts in the case may be readily drawn from the agreed state of facts upon the pleadings, which were stipulated by the respective solicitors for the purpose of argument on final hearing in the Court below. Briefly, the facts disclosed by said stipulation, and its amendment, are as follows:

During his lifetime, Thomas Hill, the testator, executed and delivered two bonds and mortgages aggregating $10,000, covering premises in Jersey City, which premises by his last will and testament he devised to Grace Louise Hill in trust for the use and benefit of Marie Louise Hill, and her children. The nature or purpose of the trust is immaterial to this question and need not be inquired into. The devisees of the encumbered premises made application to the executors to exonerate the devised lands from the lien and effect of the said two mortgages out of the proceeds of the residuary personal estate, which, it is conceded, is amply sufficient for that purpose, and the residuary legatees objected and the executors of the will filed the bill in the above-entitled cause for instructions.

The answer of the defendants-appellants Ernest Perry Hill and Arthur Edward Hill specifically pleads an act entitled "An Act Concerning Proceedings on Bonds and Mortgages given for the same indebtedness, and the foreclosure and sale of mortgaged premises thereunder," approved

March 12, 1880, together with the amendments thereof and supplements thereto, and by virtue of the effect of said act that the devisees were not entitled to have the mortgaged premises exonerated from the lien of the encumbrance. The answer of the defendants-appellants, Ernest Perry Hill and Arthur Edward Hill, also specifically pleads that no claim for the payment of the debt was presented to the executors of the estate within the time required by the order limiting creditors, and was barred by the entry of the decree barring creditors made by the Hudson County Orphans' Court, but this point may be disposed of upon two grounds, first, because it appears by ample authorities that the executors had the power to waive such presentment and by the stipulation of facts, that they did so waive; and second, by the fact that if the devisee is not entitled to have the mortgaged premises exonerated from the lien and effect of the mortgage, the mortgaged premises are made the primary fund for the payment of the debt and therefore no presentment of a claim to the executors is necessary by the mortgagee and the devisees cannot present the claim because doing so would amount to a claim for exoneration.

The answer of the defendants-appellees, Grace Louise Hill, trustee, and others, who are the devisees of the land, contends that the premises should be exonerated from the lien and effect of the mortgage because of the common law rule, and to all practical purposes the controversy in this action is between co-defendants.

The Law.

FIRST POINT.

The basis upon which the common law rule was founded rested upon what was the presumed intention of the testator. The presumed intention of the testator was drawn from the state of the law respecting the fund primarily liable for the payment of the debt, at the time the presumption of law as to the intention of the testator was created.

There can be no question but that at common law, the personal estate was the first fund for the payment of debts.

> Lord Hardwicke, case of *Lord Inchiquin* v. *French and others,* Ambl. Rep. 33; cited in *Whitehead* v. *Gibbons,* 10 N. J. Eq. p. 237.

Chancellor Williamson, who wrote the opinion in *Whitehead* v. *Gibbons,* further states that "it is a settled rule that the personal estate is the primary fund to pay the debts * * *." Also "this rule is within the control of the testator and is not applicable where his intention to the contrary is either expressed or clearly implied."

Vice-Chancellor Stevenson in writing the opinion in *Smith* v. *Wilson,* 79 N. J. Eq. at page 316, said:

> "The authorities agree that the ancient rule was founded upon a presumption in regard to intention. The testator could very

easily compel his devisee to take lands which he had mortgaged cum onere."

Citation Fish. Mort. (1910), Sec. 1322.

To understand the presumption upon which the common law rule was based, it is necessary to observe the exceptions which were made to the rule of the right of an heir or devisee to have the devised premises exonerated from the lien of a mortgage covering the same.

It appears clearly that exoneration was not allowed where the land received by the heir or devisee was encumbered by a mortgage not placed thereon by his ancestor or the testator.

McLenahan v. *McLenahan,* 18 N. J. Eq. 101.

Campbell v. *Campbell,* 30 N. J. Eq. 415.

It also appears clearly that "the devisee stands in the same position as the heir and is entitled to the same equity. The principle is adopted in favor of the heir or devisee alone and not in favor of his alienee."

Keene v. *Munn,* 16 N. J. Eq. 398, at page 400.

Chancellor Green, who wrote the opinion in this case, cites numerous authorities to support this statement.

It appears clearly, therefore, what was the common rule with respect to this question and it is an elementary proposition that *the testator or intestate conclusively was presumed to know the state of law.*

It is further well settled that the rule as to exoneration "is within the control of the testator and is not applicable where his intention to the contrary is either expressed or clearly implied."

Whitehead v. *Gibbons, supra.*

Therefore, if the state of the common law as to the fund primarily liable for the debt was well settled, and the testator or intestate was conclusively presumed to have known the state of the law, but notwithstanding these two facts he had within his control to provide otherwise by will, the conclusion is logical and unmistakable that the basis upon which the common law rule was founded was upon what the law presumed to be the intention of the testator, because of the state of the law which he was conclusively presumed to have known at the time of his death and his neglect to alter the effect thereof upon his property, in the absence of which expressed intention the presumption was created that he intended that the law should operate. This is how the presumed intention was created, upon which the common law rule is based.

SECOND POINT.

An Act of Legislature entitled "An Act concerning proceedings of bonds and mortgages given for the same indebtedness and foreclosure and sale of mortgaged premises thereunder" (3 Comp. Stat., p. 3421, Sec. 48) changed the common law procedure and made the land the primary fund out of which a mortgage should be paid; and until the land covered by the mortgage is exhausted, the personal estate of the testator cannot be touched for the payment of the debt.

It is unquestioned by the authorities cited under the first point, that prior to the enactment of the statute of 1880 above cited, the common law rule was that the personal estate of the obligor was the primary fund for the payment of the debt. And if he gave a mortgage to secure the payment of the debt, such mortgage was merely collateral and the obligee or mortgagee had the right either to sue the obligor personally on the bond, or, if he saw fit, to file a bill to foreclose the equity of redemption of the estate created by the mortgage given by the mortgagor to secure the payment of the debt.

In 1880 Legislature passed an act entitled "An Act concerning proceedings on bonds and mortgages, given for the same indebtedness, and the foreclosure and sale of mortgaged premises thereunder" (P. L. 1880, p. 255; 3 Comp. Stat. p. 3420). Section 2 of said act provides as follows:

> "Sec. 2—That in all cases where a bond and mortgage has or may hereafter be

> given for the same debt, all proceedings to collect said debt shall be, first, to foreclose the mortgage, and if at the sale of the mortgaged premises under said foreclosure proceedings, the said premises should not sell for a sum sufficient to satisfy the said debt, interest and costs, then and in such case, it shall be lawful to proceed on the bond for the deficiency, and that all suits on said bond should be commenced within six months from the date of the sale of said mortgaged premises, and the judgment shall be rendered, and execution issued only for the balance of debt and costs of suit" (P. L. 1880, p. 255, as amended P. L. 1881, p. 184).

The passage of the statute of 1880 above quoted completely changed the common law procedure and the land was made the primary fund for the payment of the debt, and until the land covered by the mortgage is exhausted, the personal estate of the obligor cannot be touched for the payment of the debt. We are using the words "personal estate" to apply either in the lifetime of the testator or after his death.

We do not think it will be disputed that what is known as the common law rule of the right to exoneration amounts to nothing more nor less than a rule of procedure. The common law was made up of adjective or procedure law as well as substantive law, and the procedure prescribed by the common law for the payment of a debt, even though it was secured by a mortgage, was the adjective branch of the law. The statute of 1880 above quoted is also the adjective branch of the law setting out the procedure for the payment of a debt when it has been secured by a mortgage

covering land, and changing it from the common law procedure.

THIRD POINT.

At the time the presumption of law respecting the intention of the testator was created, the statute of 1880 respecting mortgages, above quoted, was not in existence, and the passage of that act by the Legislature changed the state of the law as to the fund primarily liable for the payment of the debt.

In support of the above contention, the fact that the statute quoted under the second point was not passed by the Legislature until 1880, is sufficient proof of the fact that said statute was not in existence at the time the common law rule was created and developed, and a perusal of the second section of said act clearly indicates the procedure as to the payment of a debt, where it was secured by a mortgage covering land, was changed from the common law rule. We consider that the wording of the statute is so clear that further argument on this point is unnecessary.

FOURTH POINT.

By virtue of this change in procedure, the presumption of law upon which the common law right of an heir or devisee of real property, to have the same exonerated from the lien of a mortgage placed on said property during the lifetime of the testator or intestate, was founded, has been changed and said right does not now exist in the absence of expressed intention to exonerate as evidenced by the will of the testator.

If the contentions set out in the first, second and third points are correct and substantiated by the authorities quoted, it logically follows that the contention set out in the fourth point must be correct.

The reasons for this conclusion are as follows:

In the first place, if the common law rule as to exoneration was founded upon the presumed intention of the testator, which presumed intention was drawn from the fact that,

(a) at the time such rule was established, the personal estate was primarily liable for the payment of the debt, and

(b) the testator or intestate was conclusively presumed to have known the state of the law, and

(c) had it within his control to provide otherwise by will, and

(d) therefore, in the absence of doing so the presumption arose that he intended that the law should operate. And secondly, as the statute of 1880 above mentioned changes the common law

procedure where a mortgage has been given to secure a debt, making the land primarily liable for the payment of the debt, it necessarily takes away the main ground upon which the presumed intention of the testator or intestate was founded, namely, that his personal estate at common law was the primary fund for the payment of the debt, and taking away this main ground and substituting in its place the statute of 1880, making the land the primary fund for the payment of the debt, the presumed intention of the testator is completely changed around, for the reason that at the time of his death,

(a) the fund primarily liable for the debt was the mortgaged land, and

(b) the testator was conclusively presumed to have known this state of the law and also,

(c) that he had within his control to provide otherwise by will, and therefore using the same logic and reasoning creating the presumption upon which the common law rule is founded,

(d) in the absence of doing so, the presumption arises that he intends that the law shall operate. Following this reasoning, the logical and reasonable conclusion is that the testator intended when he devised his property by will, that it should be taken *cum onere* and that the common law rule as to exoneration should not apply.

There is no expressed intention in the will of Thomas Hill, deceased, to exonerate the devised premises from the lien of the mortgage covering the same, such as was necessary under the common law, and, of course, the same principle would apply even under the statute of 1880. Under the common law rule, it was not sufficient merely to

charge the debt upon the realty, the intention must be clearly expressed to exonerate the personalty.

Whitehead v. *Gibbons,* 10 N. J. Eq., at page 237.

FIFTH POINT.

Prior to the passage, to the Act of 1880, the law respecting the fund liable for the payment of a debt secured by mortgage was adjective law and did not grant any vested rights, and upon testator's death his devisee stood in the position of the testator with respect to the fund primarily liable for the payment of the debt.

We do not see how the fact that an heir or devisee is claiming exoneration alters the effect of the statute merely because of the title of the act. This act, as above mentioned, is part of the adjective law to-day and is derogatory of that part of the adjective branch of the common law which prescribed the procedure for the collection of a debt. As argued above under point two, that part of the common law rule, namely, that the personal estate was primarily liable for the payment of the debt, was unquestionably procedure law, and, as such, adjective law dealing with remedies available to a creditor. It has been uniformly held that acts prescribing methods of procedure and remedies of creditors are adjective law. That part of our Orphans' Court act prescribing procedure and methods of distribution has been declared by this Court to be a procedure act and therefore part of the adjective branch of the law to-day.

Wood v. *Tallman,* 1 N. J. L. 153.

If this is so, such a law cannot grant any vested rights until the right has actually accrued. To explain this point, prior to the death of Thomas Hill, he had the right to either pay this debt out of his personal fund and discharge the mortgage, or he had the right to tell his creditor to look to the land for the payment of the debt. Therefore, since the testator had his option of one or two methods of procedure, it cannot be said that any rights vested in the devisee prior to his decease, and upon his decease only such rights vested as existed under the law applicable to the facts prescribing the procedure at the time of the testator's death. And at the time of Thomas Hill's death, the statute of 1880 was in force and effect and, therefore, if the procedure prescribed by this act designated the land as the primary fund for the payment of the debt, the fact that the statute of 1880 changed the old common law rule, would not disturb any vested rights of the devisee, because at the time the rights became vested the common law rule had been abrogated by the statute of 1880. If the bond and mortgage had been executed and delivered prior to the enactment of the statute of 1880, a different question might arise, but such is not the fact in this case, as is clearly evidenced by the stipulation of agreed facts. Also, if Thomas Hill had died prior to the enactment of the statute of 1880, the common law rule probably would have applied, but such is not the fact in this case, which clearly appears by the stipulation of facts.

If, therefore, during the lifetime of the testator, the land was the primary fund for the payment of the debt, upon his death the state of law would not change, and upon his death the land still remained under the law the primary fund for the payment of the debt, and his personal estate was

not charged with that debt until there was a deficiency upon foreclosure, and there is no question of deficiency raised in this case because the mortgage has never been foreclosed and it is still open and encumbering the premises. This clearly appears by the stipulation of facts.

Now, therefore, if the personal estate of the testator was not chargeable with this debt under the state of the law at the time of his death, we contend further that the residuary legatees or the legatees of the personal estate of the testator have a vested interest to the full extent thereof, subject only to be diminished by any deficiency which may be shown upon a foreclosure of the mortgage and that no deficiency can be shown until a foreclosure has taken place.

This is a phase of the case which the Court below did not consider in his opinion, although on oral argument it was urged, namely, that the residuary legatees of the personal estate of the testator had a vested right therein which could only be diminished by the amount of the deficiency upon a foreclosure sale. This necessarily means that the mortgage must be foreclosed before a deficiency can arise, and, of course, if the mortgage is foreclosed and satisfied in full, there is no debt to be charged to the personal estate of the testator; and the devisee has no right, if he or she pays off the mortgage voluntarily, to any claim for exoneration out of the personal estate of the testator because the statute expressly makes the land the primary fund for the payment of a debt. Under the common law the procedure was directed at and governed creditors and so is the procedure under the Act of 1880 directed at and governing upon creditors; and, therefore, if the procedure under the common law was held to create any rights, or affect rights of an heir or devisee by vir-

tue of presumed intention created, the same reasoning and logic may be applied to the Act of 1880, and the only difference in the conclusion will be that instead of creating a right in an heir or devisee to have devised land encumbered by a mortgage exonerated from the lien thereof, it will create a right in the residuary legatee of the personal estate of the testator to take the same to the full extent thereof, subject only to be diminished by any deficiency which may be shown upon a foreclosure of a mortgage covering devised premises.

SIXTH POINT.

The Act of 1880 is likewise a procedure act and adjective law and should be construed liberally.

We believe the statement contained in the sixth point is so clear that it does not require argument. The very title of the act indicates that it is a procedure act, and also the contents of Section 2 of said act, quoted under the second point above, indicates clearly that it is governing procedure. This being so, it necessarily follows that it is part of the adjective branch of the law and being a procedure or remedial statute shall be liberally construed.

SEVENTH POINT.

Discussion of Court's opinion and summary of cases cited therein.

In considering the opinion of the Court below, filed in this case, those cases which were decided prior to the enactment of the statute of 1880 must

be disregarded, except in so far as they enunciate principles which are applicable to the state of facts and law existing in the case at hand. Cases such as *Keene* v. *Munn,* 16 N. J. Eq. 398, and *Whitehead* v. *Gibbons,* 10 N. J. Eq. 236, can have no bearing upon the question of the effect of the statute of 1880 because they were decided prior to its enactment.

We will consider, therefore, cases cited in the opinion of the Court below, which were decided after the enactment of the statute of 1880, in the order in which they are cited in the Court's opinion.

The case of *Krueger* v. *Ferry,* 41 N. J. Eq. 432, affirmed 43 Equity 295, is not an interpretation of the effect the statute of 1880 has upon a case where the question of exoneration is purely and simply involved. A perusal of the opinion discloses that the question to be decided was whether or not an alienee or mortgagee had the right to hold the personal estate of a decedent as the primary fund for the payment of a debt secured by a mortgage, and in deciding that an alienee or mortgagee had no such right, the Court stated by way of *obiter dicta* what was the common law rule regarding the right to exoneration. This is as far as the case of *Krueger* v. *Ferry* goes and the application of the statute of 1880 was not passed upon in this case nor does it appear from the opinion that it was even mentioned or argued, much less made an issue to be decided as in the present case. Manifestly, therefore, if the question of the application and effect of the statute of 1880 was not made part of the issues in the case of *Krueger* v. *Ferry,* any decision of the Court on the subject would merely be *obiter dicta* and not binding upon this Court in deciding the case at hand. Furthermore, it appears that the bonds involved in the case of *Krueger* v. *Ferry* were made by the testator in

1860, twenty years before the statute of 1880 went into effect, and, of course, the question there presented, as argued, was entirely different from the question involved in the present case where the bonds were made by the testator after the enactment of the 1880 statute.

The case of *Bird* v. *Hawkins,* 58 N. J. Eq. 229, we believe should not be applied to the principles involved in the case at hand, because apparently the Vice-Chancellor, in deciding that question, did the very thing which the Court did in all cases decided after the enactment of the 1880 statute, except Vice-Chancellor Stevenson in the case of *Smith* v. *Wilson,* 79 N. J. Eq. 310, and Vice-Chancellor Backes in *Atkinson* v. *Atkinson,* 84 N. J. Eq. 105, namely, they ignored the principle upon which the common law rule was founded which was the presumed intention of the testator drawn from the fact that the personal estate was the primary fund for the payment of the debt, and the testator was conclusively presumed to have known this and also that he had the power to change this effect by will, if he saw fit, and in the absence of doing so the Court presumed that he intended that the law should operate. There is no discussion of the principles underlying the doctrine of exoneration in any of the cases prior to *Smith* v. *Wilson, supra.* If this fact is borne in mind it is readily understandable how the Court concluded that because the title to the Act of 1880 apparently affected mortgagees, that it could not disturb what the Court considered to be a vested right to exoneration on the part of an heir or devisee. An analysis of the principles underlying the doctrine of exoneration will clearly show that there was no vested right in an heir or devisee prior to the death of the testator, and then only such right as vested by virtue of the presumed inten-

tion of the testator which was founded upon the facts argued in points one, two, three and four above set out. If this is so, manifestly, the decisions subsequent to the passage of the 1880 act should not be considered binding because they ignore the principles involved in the doctrine of exoneration. Furthermore, with the exception of the case of *Higbie* v. *Morris,* 53 N. J. Eq. page 173, all the cases are chancery cases and this Court certainly has the power to distinguish between the principles enunciated by the Court in those cases, or repudiate the same and reverse the decisions.

The case of *Higbie* v. *Morris, supra,* may be distinguished in several ways. In the first place, the appeal was from a decree of the Court of Chancery based upon an opinion written by Vice-Chancellor Green, and the case before the Vice-Chancellor was tried on the theory that the words of the testatrix's will whereby she devised "all her right, title and interest" in and to certain lands, constituted sufficient expressed intention under the common law rule to compel the devisee to take *cum onere,* and the Chancery Court decided that such words were not sufficient expression of intention to make the devisee take *cum onere,* and the Court of Errors and Appeals only reversed the decree below in so far as it subjected the residuary real estate to the payment of these debts in exoneration of the mortgaged premises, and the statement of the common law rule in the opinion of the Vice-Chancellor and in the opinion of Justice Dixon, for the Court of Errors and Appeals, was confined merely to this question, because the appeal was only from that part of the final decree which subjected the residuary real estate to the payment of the debts in exoneration of the mortgaged premises; so that therefore the Court of

Errors and Appeals cannot be considered as having examined the common law doctrine of exoneration by its opinion in the *Higbie* case for the reason that not only was the statute of 1880 not considered, but neither was the common law rule as to exoneration questioned by any of the parties.

We might say, for the information of the Court, that the case of *Higbie* v. *Morris* was discussed fully with the Court below, and the writer personally inspected the briefs and state of case in this case in the Court of Errors and Appeals on file in the New Jersey State Library. The case is bound in Volume 197-1894 of the Court of Errors and Appeals cases, and an examination of the bill of complaint and answer and final decree and briefs in this case discloses that the case was tried entirely upon the theory that the words "all my right, title and interest" constituted sufficient expressed intention to compel the devisee to take *cum onere*. Therefore, this Court did not pass upon the application of the statute of 1880 in deciding the case of *Higbie* v. *Morris* because that statute was not brought to the Court's attention, and any statement of the old common law rule which existed prior to the enactment of the statute of 1880 is merely *obiter dicta*.

It may be argued that because the Court stated that the old common law rule was still in existence, even though it did not mention the statute of 1880, that it was presumed to have known of its existence and to have considered it, and having considered it, even though it did not mention it in its opinion, held by implication that the statute of 1880 did not change the common law rule as to exoneration.

But we believe that this Court will not permit itself to be led astray by such an ingenious argument because the answer to the same is this: If,

as a matter of fact, the Court did not have called to its attention the statute of 1880 and did not consider the effect of its application as changing the common law rule, and, if, as a matter of law, irrespective of the *Higbie* case, this Court should consider upon examining the principles above pointed out in points one, two, three and four, as underlying the rule upon which the common law right to exoneration was founded, that such principles justify a conclusion of law that the statute of 1880 has changed the presumed intention of the testator, then the case of *Higbie* v. *Morris* should not be allowed to stand in the way of establishing in this State what we believe is the correct rule respecting the presumed intention of the testator in such cases as the present case. To do so would permit a fiction of law to contradict a fact and to stand in the way of a logical and reasonable determination of the question involved. We believe that the doctrine of *stare decisis* is a doctrine which should only be applied where reason and logic dictate and numerous instances are given in our reports that this is the view adopted by the Courts where they either distinguish or repudiate views previously expressed where the reason and logic of the same are shown to be unsound.

The case of *Hetzel* v. *Hetzel,* 74 N. J. Eq. 770, cited in the opinion of the Court below, is no more applicable to the principles involved in the case at hand than the other cases cited in the Court's opinion, for the reason that a perusal of the opinion in the case of *Hetzel* v. *Hetzel* discloses that the question determined was whether or not an heir at law or doweress could call upon the personal representative to discharge an obligation secured by a mortgage out of the personal estate of the decedent, where such mortgage was not placed thereon by the decedent during his lifetime, but

was assumed by him. Irrespective of the application of the statute of 1880, such a question could be decided by the common law rule and was so decided by the Court on the basis of the common law rule, as clearly appears in the opinion on page 775, where the Court cites *Campbell* v. *Campbell,* 30 N. J. Eq. 415, and *Mount* v. *Van Ness,* 33 N. J. Eq. 262, as enunciating common law principles applicable to the state of facts involved in the *Hetzel* case. This case is another illustration of how the Courts in the several opinions of cases decided after 1880 on the question of exoneration have sought to determine the question upon common law principles without taking into consideration the effect of the statute of 1880, but it must be borne in mind that such cases as *Higbie* v. *Morris, Hetzel* v. *Hetzel, Krueger* v. *Ferry,* could have been decided the same way on common law principles irrespective of the application of the 1880 act, because even under the common law rule, the exoneration sought was not permissible.

We therefore respectfully submit that these cases may be distinguished in effect from the present case at hand and they should not be considered as construing the effect and operation of the Act of 1880 upon the right to exoneration by an heir or devisee as the law at present exists.

It is respectfully submitted that if we have supported by our arguments the points set out above, that the enactment of the statute of 1880 had the effect of changing the presumed intention of Thomas Hill, the testator in this case, and that when he died and left a will and devised land therein to the defendants Grace Louise Hill, trustee, and others, which lands were subject to a mortgage, and he was presumed to have known that the land was the primary fund for the payment of

the debt, and that his personal estate could only be touched for any deficiency after foreclosure sale, and also that he had the right by his will to direct that the mortgage should be paid out of his personal estate, the natural presumption of law is that he intended that the premises should be taken *cum onere*.

Respectfully submitted,

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Ernest Perry Hill and Arthur
Edward Hill.

WILLIAM R. GANNON,
of Counsel.