Clerk's Table
No 1

New Jersey Court of Errors and Appeals.

JUNE TERM, 1882.

Between
PETER C. CORNELL, & *al.*, Trustees,
Appellants,

and

JOHN E. ANDRUS,
Respondent.

Brief for Appellants.

This appeal is from a decree denying specific performance on the ground that the title tendered is doubtful.

MAIN FACTS.

1.

On April 18th, 1838, the State of New York passed "An Act to authorize the business of Banking," and under this act "The North American Trust and Banking Company" was created a corporation of New York.

This New York corporation was in existence at the date (Nov. 14, 1838,) of the mortgage on which the title depends.

(*Bill, paragraph* 7, *pages* 8 *and* 9; *Answer, page* 21.)

Our New Jersey Banking Act of 1850 had the same title and contained generally the same phrascology, and is moulded upon the New York Act, but the New York Act contains, among others, the following provisions:

> SECTION 24.—"It shall be lawful for such *Asso-*
> "*ciation* to purchase, hold and convey real estate
> "for the following purposes:
> "1.—Such as shall be necessary for its imme-
> "diate accommodation in the convenient transac-
> "tion of its business; or
> "2.—Such as shall be mortgaged to it in good
> "faith by way of security for loans made by or
> "moneys due to such Association; or
> "3.—Such as shall be conveyed to it, in satis-
> "faction of debts previously contracted in the
> "course of its dealings; or
> "4.—Such as it shall purchase at sales under
> "judgments, decrees or mortgages held by such
> "Association.
> "The said Association shall not purchase, hold
> "or convey real estate in any other case or for
> "any other purpose; and *all conveyances of such*
> "*real estate* shall be made to the *President*, or
> "such other officer as shall be indicated for that
> "purpose in the articles of association; and
> "which President or officer *and his successors*,
> "from time to time, may sell, assign and convey
> "the same, free from any claim thereon, against
> "any of the shareholders or any person claiming
> "under them."

The whole Act may be found in Blatchford's General Statutes of New York, 1829 to 1851, page 51, and also in the Session Laws of 1838, p. 245.

The principal parts can be found in Banks' Edition of Revised Statutes, vol. 2, p. 551 to 561, under "Corporations and Banking Associations."

I may annex hereto in an appendix, a copy of the whole New York Act of 1838.

2.

The opinions of New York jurists on this New York statute (which become part of the statute) consist of the opinions of judges and decisions of the New York courts, among the rest the following:

Ch. J. Nelson, who (in Thomas *v.* Dakin, 22 Wend., p. 72,) says the members of the Association are "so "bound together, so moulded into one, as to constitute "but a single body, represented by a *common name or* "*names.*"

"In *this way* it purchases and holds real *and* personal property."

"It is true some portion of the business is conducted in the *assumed name* and some in the *name of the President* for the time being; but this in no manner changes the *character* of the body."

"A corporation may have more than one name; * * it may be known by two different names * *; the name of the President, his *official* name, or *any other*, will answer every purpose. The only material circumstance is a name or *names.*"

Thomas v. *Dakin*, 22 *Wend.*, *p.* 72.

Cowen, *J.*, p. 99–100, says: "In the associations created by the Banking Law great care has been taken to introduce and maintain corporate succession, in every part of the system;" and page 101: "The principle of *succession* is equally maintained in respect to the *President* for the purpose of receiving conveyances of real estate and selling it * *

"It need scarcely be remarked that the President of the banking associations in question, comes fully within the general definition of a corporation sole."

Bronson, *J.*, (stating opinion of whole Court) says:

"In one form the bank sues, or is sued, by its *original* corporate name; in the other it sues or is sued by that name, with the addition of the name of the President. *Both* are corporate names."

Delafield v. *Kinney*, 24 *Wend.*, 347.

Bronson, *J.*, (also delivering opinion of whole Court) says:

"A banking association formed under the law of 1838 * * must have a name. Whether the suit is brought in the name by which the company transacts its other business, or with the addition of the name of its President, cannot be material. We have already held, *more than once*, that these associations may sue or be sued in the same *corporate name* by which their *other* business is transacted."

People v. *Assessors*, 1 *Hill*, 620–621.

Duer, *J.*, (also delivering opinion of whole Court) the question being whether an assignment to the *President* of a banking association was an assignment to "the corporation *directly* and by *name*," held it was. There the assignment was to "David Leavitt, President of the American Exchange Bank," instead of being to the "American Exchange Bank."

4 *Duer*, 19 (*Point VI.*), *and p.* 21.

The Chancellor (Record, p. 23,) concedes that the "*adjudications* of the Courts of New York were that conveyances to the President were conveyances to the corporation."

For some time after the New York Banking Act there was a question whether the New York Act even incorporated the Banking Associations themselves. It was not passed by a two-thirds vote; but the question was put at rest in 1839 by the Courts holding that the associations were corporations, but not obnoxious to the constitutional provision requiring a two-thirds vote.

Warner v. *Beers*, 23 *Wend.*, 103.

Kent (2 vol. Commentaries, p. [272], note (a)) gives the history of the Act. It is so well settled now in New York that they are corporations that the New York courts will not hear an argument on the question.

Robinson v. *The Bank of Attica*, 21 *New York R.*, 408.

3.

The date of the incorporation of The North American Trust and Banking Company is not stated in the pleadings; but the bill states, and the answer admits, "that the said The North American Trust and Banking Company was a corporation of the State of New York duly created by virtue of and pursuant to said statute, and was in existence at the date of the mortgage;" and it is also stated and admitted that "Joseph D. Beers was at the date of said mortgage the President of said Company" (Bill, paragraph 7, pp. 8 and 9; Answer, p. 21).

On Nov. 14, 1838, the mortgage for $170,000 on which the title depends was made by Thomas E. Davis and wife. Davis was then owner of the fee (Bill, paragraph 4 and 5, page 4 and 5; Answer, p. 20).

On Jan. 10, 1839, Davis and wife then owning the fee (subject to the mortgage), in consideration of $300,000 conveyed the fee to The Bergen Port Company—a corporation of New Jersey. The conveyance contained this clause:

"Subject, nevertheless, to a certain indenture of mortgage bearing date the fourteenth day of November, one thousand eight hundred and thirty-eight, made and executed by the said parties hereto of the first part to Joseph D. Beers, President of the North American Trust and Banking Company, to secure the sum of one hundred and seventy thousand dollars, together with the interest to grow due thereon from the day of the date thereof, which forms part of the consideration money above named."

This clause, it is *insisted* in the bill,—(even if the mortgage did not pass the fee)—*charges* the mortgage on the fee conveyed to the Bergen Port Company, and sustains the foreclosure of the fee against that company and the sale of the fee of that company; but this *insistment* is denied by the answer (Bill, paragraph 5 (a), p. 7; Answer, p. 20).

On December 15, 1840, the mortgage was assigned by the successor of Beers, the *next President* of The North

American Trust and Banking Company, to Talmage, Yates & Noyes (Bill, paragraph 6, p. 8; Answer, p. 21).

The assignees commenced a foreclosure upon the mortgage in the New Jersey Court of Chancery against The Bergen Port Company--the New Jersey corporation to whom Davis and wife had, on Jan. 10, 1839, conveyed the fee as last stated—and subject to the mortgage (Bill, paragraph 6, page 8, and Answer, p. 21.)

The mortgaged premises were in the year 1843 decreed to be sold, and were sold in 1843 to purchasers who were remote grantors of the complainants, and from whom complainants, by many mesne conveyances, derive title (*Bill, paragraph* 4, *pp.* 4 *and* 5, *paragraph* 6, *page* 8; *Answer, pp.* 20 *and* 21).

The bill states (*paragraph* 4, *page* 4) that the title was refused by the purchaser because the title of the complainant was not a legal title in fee simple, and that the *only defect* insisted upon is that the mortgage did not clearly convey a fee simple. This is admitted by the answer by admitting the whole of paragraph 4 (*Answer, p.* 20).

The bill states, and it is admitted by the answer, that:

"It is unnecessary to state said decree of foreclosure or said conveyances inasmuch as there is no dispute between your orators and said Andrus as to said title, except on upon the point stated above," *i. e.*, that the mortgage *did not* clearly convey a fee simple (*Bill, paragraph* 6, *page* 8, *and paragraph* 4, *page* 4; *Answer, page* 20 *and* 21.

4.

The mortgage on which the title depends is set forth at large (*page* 10).

The *description* of party of the second part to the mortgage consists of a long passage, and is as follows:

—"Joseph D. Beers, President of the North "American Trust and Banking Company,—in the City "of New York in trust for the said Company and the

"shareholders thereof, being *the officer indicated for* "*that purpose* by the articles of association of said "Company, made and entered into under and pursuant "to an Act of the Legislature of the State of New York, "entitled 'An Act to authorize the business of banking' "passed April 18, 1838,—of *the second part*" (Record, p. 10).

This is set forth here in full, because the whole question in the case is, whether this description describes *a New York corporation by one of its names*, or only a natural person who was its officer.

Point I.

The following positions are *conceded:*

1st. That to pass a title in fee to lands in New Jersey, if the grantee is a *natural person*, the estate must be limited to his heirs.

2d. That the mortgage in question does not limit the estate to "heirs."

3d. That the law of New Jersey—the *situs* of the property in question—is the law according to which the fee must pass, if it passes at all, and not the law of New York.

4th. That Courts of Equity in deciding on questions of specific performance may refuse it, if there is *doubt*, as to the goodness of the title, but the doubt must have *serious* grounds, be *reasonable*, and there must be some debatable grounds on which the doubt can be *justified*.

The question which the Chancellor obliges us to consider *is* difficult.

As a question depending upon principles already established, it is not difficult.

But when it is affirmed, so solemnly that the Courts of New Jersey ought not to follow the Courts of New York—on the mere question, what *status* is created by the laws of New York, where the *status* was created—the question of *status* being the only doubt in the case :

—When it is also solemly affirmed that a New Jersey Court ought to wait till the question of *status* is presented, in a *direct* proceeding in a New Jersey Court and there decided, before a New Jersey Court can venture to declare that the New York *status* is the status the New Jersey Court will recognize—(not meaning to include in status its *consequences* in New York)—it is necessary,—for us to investigate the whole subject as an *original* one. Of course that is always difficult.

I fear it will be tedious from the mode of treatment, but it is in itself interesting.

Point II.

The decision was made by reason of misapprehension, as to what was conceded by counsel below.

The Chancellor states, p. 24, that "it is conceded that *on its face*, and in the absence of the construction contended for by the complainants, the mortgage, for the want of words of inheritance, conveyed only a life estate."

The concession was in writing, and is as follows :

"It is conceded by the complainants (for the purpose of this argument) that if the mortgage was to *Beers, as a mere private person*, and *not to a corporation*, the words would not pass the fee of the legal estate."

The *supposed* concession was calculated to *withdraw* the Court's attention from the reference to the date and title of the New York Act, and the other statements in the long and explanatory description of the party of the second part, which were all on the *face* of the mortgage, and a part of the description of the party of the second part.

The *actual* concession was calculated to *attract* the Court's attention to those very important particulars.

But relying on the *supposed* concession, that on the *face* of the mortgage, the title was bad, the Court passed by all statements on the face of the paper as to what the *status* of the mortgagee was. These statements were as nothing—if it were admitted, that on its face the title was bad.

The *supposed* concession—itself, intimates that on the face of the papers the counsel conceded the title was *doubtful*.

The opinion shows that it was taken for granted—that counsel admitted there was a *doubt;* at least on the face of the papers.

That this was *supposed* to be admitted—is manifest (a) from the absence of discussion of the numerous New York authorities which were cited; (b) from the absence of discussion of the extraordinarily long description—of the party of the second part; (c) from the absence of all discussion of the law of *status;* (d) from the presence of discussion of the *lex rei sitæ;* (e) from the fact that the force of the opinion is expended on the proposition that the purchaser will be left open to litigation on the question raised, without any statement of the usual limitation of that proposition—that the question is one where there are "some debatable grounds on which a *doubt* can be *justified*," or one on which some "*serious* grounds for *doubt*" exist. See Point VII.

The form of stating the *supposed* concession *assumes* there is a *doubt*, and it is evidently assumed—because it was supposed the doubt was *conceded* to exist, on the face of the papers. There is not a suggestion or word of argument in the opinion, as to there being a *doubt* on the question raised, except that contained in the supposed concession.

But it may be said, that the Chancellor did not found his opinion on the supposed concession or he would have held the title *bad* and not merely *doubtful*.

The answer to this is, that though the Chancellor thought it was conceded that the title was bad, on its face—he knew and stated that the concession was not absolute, but on a condition, which he admits. The concession as stated by him is that it is conceded, that "*in the absence*" of the New York construction on the question of *status*, the mortgage on its face passed only an estate for life.

It was on this question of *status* that the Chancellor had *no more* than a *doubt*. As the concession, as interpreted by him, was that the title was bad, *unless* the New York construction was the true one, and he had, only a *doubt* on *that*, he thought the conditional concession—could only amount to a concession of a *doubt*.

Accordingly the title was not declared bad, but only doubtful.

Point III.

On the face of the mortgage—the mortgag*ee* is not a natural person.

Nothing can demonstrate the proposition in this point more effectually than this consideration:

Suppose the New York statute of 1838 as to Banking Associations were a New Jersey statute[1], and the New Jersey Courts had construed the New Jersey statute as the New York Courts have construed the New York statute—could any layman, much less any lawyer, have had a *shadow* of a *doubt*, after reading the whole description of the party of the second part in this mortgage, that it described a New Jersey corporation?

What, *in that case*, would this description of the party of the second part consist of?

1st.—A statement of the name of the President of the Banking Association.

2d.—A statement of the name of the association of which he was President—*i. e.*, the regular assumed corporate name.

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[1]This is not a far-fetched supposition. Our Banking Act of 1850 has exactly the same title. The general form and order of the act, and the peculiar expressions of the New York Act which calls all the Banking Companies "associations," are the same in the New Jersey Act. But our statute expressly provided that on filing the certificate as to name, capital, &c., the association should be a *corporation*.

The great differences are (1st) that the 17th section of the New Jersey Act, unlike the 17th section of the New York Act, expressly declares, in an added clause, that the New Jersey Banking Associations shall be bodies corporate; and (2d) that the 28th section of the New Jersey Act, as to real estate, provided for the New Jersey corporations taking it directly; whereas, though the 24th section of the New York Act declared it lawful for the "association" (the very word used in the New Jersey Act, sec. 28) to purchase real estate, *directed* the conveyance to be made to the President, or such other officer as should be indicated in the articles of association; and enacted that the President or other officer, *and his successors*, &c., might sell, assign, and convey it free from claim of shareholders or any claiming under them; and (3d) that sections 21 and 22 of the New York Act provided for suits by or against associations in name of President and his successors (as did the 24th for conveyances of real estate to or by the President or his successors.)

The reason for the difference between the New York and the New Jersey Banking acts was,—in New York it was supposed that to incorporate the associations, in so many words, would induce

3d.—A statement that the mortgage was for the use and benefit of the association and its shareholders, showing the corporation only, was to be benefited.

4th.—A statement that the President was the officer indicated for *that purpose* (*i. e.*, for taking the mortgage) by the articles of association.

5th.—A statement that the articles of the association had been made and entered into, pursuant to an Act of the Legislature of the State of New Jersey, entitled "An Act to authorize the business of Banking," passed April 18, 1838.

6th.—And, *last* of all,—a statement that the party so described, was "party of the second part."

Would not any one reading this description—see that the *supposed* New Jersey statute must be consulted?

The only possible doubt, on the face of the mortgage that any one could have, of its being to a corporation, would arise from the mention of the name of the natural person,—the President.

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members to vote against it on the ground of a constitutional provision, which the Courts afterwards held did not extend to a general act for incorporating banks. (Warner *v.* Beers, 23 Wend., 103; 2 Kent, [272] note (a).)

New York Act.	*New Jersey Act.*	*New York Act.*	*New Jersey Act.*
1	1	18	18
2	2	19	19
3	3	20	20
4	10	21	21
5	4	22	Unnecessary, and as to suits only.
6	5	23	22—23, 24, 25, 26
7	6	24	28
8	7	25	29
9	8	26	30
10	9	27	31
11	10	28	33
12	11	29	34
13	12	30	35
14	13	31	—
15	15	32	40
16	16	33	36 to 39 are new.
17	17 with additions.		

Many of the old English corporations had two names, one of which was often *in part*, the name of a natural person. One name was "the master, fellows and scholars of——" Another name was the natural name of the master as "Doctor Craven, fellows and scholars of ——"

Many instances are given in Fraser's note B to 10 Co., 124, the case of the Mayor & Burgesses of Lynne. Indeed, the names of the ancient corporations were exceedingly troublesome to technical lawyers of old times, but the courts were always sensible on such questions. 10 *Co.* 126 (*a*). *See also Dean and Chapter of Norwich's case*, 3 *Coke*, 75*a*; *Inhabitants of Woolwich v. Forrest*, 1 *Pennington R.*, 116, 117.

In our case, the name of the natural person is followed by so much explanation before the words "party of the second part" occur,—that merely considering the explanations—examining the statute *referred to*, and above all the decisions on it—the doubt would vanish.

Would not such supposed New Jersey statute, in contemplation of law, be on the *face* of the mortgage?

Would not any one know that the New Jersey decisions must be consulted? And if consulted, would any *doubt* whatever remain?

It may be said that the words "in trust for the Company and its shareholders" made it equivocal who was the mortgagee; or made it unequivocal that the corporation was not the mortgagee, but that its officer was.

But the force of the supposed New Jersey statute and the supposed decisions of the New Jersey Courts—during 40 years before the question arose, would override this suggestion in an instant, in the opinion of any court before which the question would come, on a bill for specific performance 40 years after the mortgage had been foreclosed; and after so many repeated conveyances of the fee simple made,—that the present complainants are *admitted* to be, *remote* grantees of the Sheriff who sold in 1843. Can it be possible that this Court or any other New Jersey Court, if these New York statute and decisions were New Jersey statute and decisions,—would yet say the question raised is so *doubtful* that "until it is

decided,—in a *direct proceeding*—the title will be subject to an objection materially affecting its marketable value."

How does the question differ, as to this New Jersey title—that the statute and decisions happen to be a New York statute and New York decisions instead of a New Jersey statute and New Jersey decisions?

There is this difference:—that all persons dealing in New Jersey land would be *bound to take notice* of the supposed New Jersey Statute—though it was not referred to:—yet when the New York Statute *is* referred to, by its title, and in the very middle of the passage, describing the party of the second part,—all purchasers are charged with notice of the contents of the New York Statute.

As to the difference of position of a New Jersey Court in view of the statute being a New York Statute, and the decisions New York decisions,—*that* will be considered in Point V.

The question raised here would never have come before a New Jersey Court—if the purchaser did not want to get out of his bargain and get the title for a less price than agreed on.

Would not any New Jersey lawyer,—the moment he saw there were no words of inheritance in the mortgage, be compelled to scan the long and explanatory description of the party of the second part—consult the New York Statute referred to, in that description, and, the New York decisions?

I know, for myself, that a few months before this title was agreed to be conveyed, and, of course, before I was retained by the complainants—the New York counsel of a foreign corporation which had already bought and had conveyed to it, a large tract at Bayonne in this State, included in this same mortgage, brought me a copy of this mortgage, and asked me if a title under a foreclosure of it would be good in fee. We agreed it depended on the question whether the mortgage described a corporation or not.

We consulted the New York Statute on the spot, and

were both satisfied that the mortgage described, as party of the second part, a New York corporation; unless there were some New York decisions to the contrary, and we separated, he undertaking to look at them. Before he reported to me the result of his investigation, I was required to examine the decisions for this case. The purchasing corporation and their counsel are perfectly content with the title they had bought, and entirely on the ground, that the mortgagee was a New York corporation. The decisions are overwhelming, ancient and numerous.

I know other New Jersey counsel have, without consultation with me, recently passed the title to other portions of the mortgaged premises; for it includes about 3,000 lots worth at least $500,000, and probably much more.

There are plenty of these titles in all parts of East Jersey, for many of these New York Banking Corporations took many mortgages on New Jersey lands, which have been foreclosed and titles made under them, which are subject to the same objection made here, if there is anything in it.

Point IV.

The *doubtful* question is a question *of law.*

Really the Chancellor nowhere says, in so many words, that the question raised is a *doubtful* one. He *assumes* that. The decree *expresses* it.

But, as developed under Point II., specific performance was refused, largely, if not wholly, on the ground that complainants' counsel conceded that *on its face* the mortgage conveyed a title that was positively *bad*—unless the law of New York and its construction established the mortgagee to be a New York corporation.

It is true the Chancellor did not consider that this admission authorized him to declare that the title was *bad;* —for he says the admission was on the condition that the New York construction was unsound; but as the Chancellor's decision holds that *that* construction cannot be decided to be sound, except in a direct proceeding in a New Jersey Court, he in effect says, this qualified admission that the title is bad on its face is an admission that *now* the title is open to objection, is *doubtful*, no such decision having been made.

What, then, is the *doubtful* question? The Chancellor answers it thus:

"The question whether the mortgage was in fact given to a corporation or to a natural person."

But this is not exactly the question. It is whether it was given to a *New York* corporation or a natural person.

Any question of this kind may be stated as a question of fact, but the question may really be a question of law. This is very often so where the real facts are all ascertained and settled. This is the case here.

It is admitted that it *is* and *was* a *corporation of New York*—The North American Trust & Banking Company—for whose *benefit* this mortgage (whatever estate it conveys) was made.

It is admitted that Joseph D. Beers, the natural person whom the defendant alleges to be the mortgagee, was President of *that* corporation.

It is admitted that there was a statute of New York, under which the admitted corporation was created.

It is admitted that this statute contained the 24th section, which relates to the President of the admitted New York corporation recited in the bill, and such other provisions as Act shows.

It is admitted that the Courts of New York have made decisions that a conveyance to the President is a conveyance to the admitted New York corporation.

These controlling *facts* being admitted, and the legal proposition,—that a New York corporation must exist by virtue of some New York law,—being unquestionable, the real question is, is there a *law* of New York creating the mortgagee a New York corporation, or (which is the same thing) is there a law of New York which makes the mortgagee's *name* the name of a New York corporation.

This question, though, before our statute, Rev. 381, pl. 22–23, or even now,—technically a question of fact, is *substantially*, especially since *our* statute, a question of *law*;—certainly so, within all rules which distinguish between questions of law perfectly *settled* and questions yet *doubtful*.

If it were a question of fact, it is perfectly and conclusively settled as such, by the permanent record of the New York statute and the New York decisions. These permanent records ought to be conclusive on it, if it is a question of fact, as if these permanent *records* were *adjudications* of the fact, in a direct proceeding, to which the possible claimants under the alleged doubtful point, were parties.

If the New York statute were a New Jersey statute, and the New York decisions New Jersey decisions, the question whether this mortgage was given to a New Jersey corporation would still be a question of *fact*, in the same sense, that it is a question of fact as stated by the Chancellor.

In that supposed case, the admitted controlling facts would be exactly the same as the controlling facts now admitted to be true, by the answer in this case.

And if, in the supposed case of a New Jersey statute, it were admitted: that it is a corporation of New Jersey, for *whose benefit* the mortgage is made; that Beers the natural person, whom the defendant alleges is the mortgagee, is President of *that* corporation—the whole question would be a *legal* one, and involve nothing but the construction of the New Jersey statute. See *Point III.*

That the Chancellor considers it a question of law is manifest from this, that no real *fact* necessary to a decision of it as a question of law, is in doubt or question.

After stating that there was a concession by complainants—that the title was bad—unless the law of New York was to be held to be as contended, he immediately states what *facts* the defendant admits, as to there being a New York corporation and a President of it. He then states the legal proposition that the title passes according to the *lex rei sitæ*. He then adds, *as a therefore*—as a consequence,—"the question whether the mortgagee was in fact a New York corporation, is one to be determined by our *courts*," not by a *jury*; "and until it has been so *decided*," etc.

Point V.

The alleged doubtful question, is a question of mere *status;* and not of the home *consequences* of *status*. The *consequences* of *status*, are questions ruled or overruled by the law of the *situs;* but the doubtful question here, being, merely *status*, it is ruled by the law of the *status* and not of the *situs*, and the *status* that ought to have been recognized by the Court below was the New York *status*.

This proposition is not maintained with any view to deny the all controlling power of the law of this *situs* to pass or not, lands in New Jersey.

But where the law of the *situs* as to the different *estate* conveyed by the same words to a party, who has one *status*, from that conveyed to another party who has another *status*,—is *undisputed ;* and it is agreed on all sides, that the estate conveyed by the law of the *situs*, differs *according* to the difference of the *status* of the party, (whether that *status* be foreign or domestic); and that the law of the *situs*, is one way, if the *status*— is that of a corporation (foreign or domestic); and another way if the *status* is that of a natural person (foreign or domestic)— it is important to keep in view that the *doubtful question* is one of *status*.

This is necessary, so that the law of the *situs*, as to the estate conveyed, which belongs to one *status*—that of natural persons (foreign or domestic);—shall not be applied to the other *status*,—that of corporations (foreign or domestic).

It is also necessary to keep in view, that the doubtful question here is one of *status of a foreign corporation*,— as this, if it exist, must be *recognized* by the New Jersey Courts. The inquirer should constantly remember, that the law of New Jersey as to the existence or *mere status*, in New Jersey, of a foreign corporation (not its *capacity to take* or pass real estate, which relates to the law of the *situs*)—is to be drawn from, is founded on, and must be decided by, the foreign law—as its *only* source of information. Unless this is done—some local rules as to *status*, some doubts and difficulties of the local tribunals as to the *status*, or some *doubt* on the construction of the foreign law creating the *status*, will inevitably, though unconsciously, force themselves, into the judgment of the local court. It surely will be conceded, that the foreign law and the decisions on it (which are part of it)—is the sole *source*, from which the foreign *status* can *arise*.

If there were no foreign decisions, a New Jersey Court would have to construe a foreign statute for itself, but in doing so it would do it *professedly* to ascertain what the *foreign law* as to *status* was, not what its own law was as to *status*, for *that* is ascertained, if *recognized*, when the foreign status is ascertained; the only *status* in

the case that *can* be *recognized*, being the foreign *status*. Any other *status* that is attributed cannot be a *recognized* status, but must be an *imposed* status.

It is not at all inconsistent with this proposition, that the *foreign* status is the New Jersey status, if New Jersey *recognizes* the foreign status—that this State or any State may declare and decide that,—a foreign joint stock company merely, which is *not* a corporation of the State of *its creation*, and declared by that law *not* to be a corporation *there*,—is a corporation *here*.

The reason is this: this State is not bound to recognize by *force of our* broad and comprehensive statute a peculiar foreign STATUS given or created in even natural persons, if it is not corporate. Our statute is confined to foreign *corporate* status.

By comity, we may be bound to recognize the *natural status* of natural persons, but we cannot by comity be bound to recognize an *artificial* status of natural persons, created wholly by the foreign law; for the *artificial* status of a natural person may be as much a subject of objection to our law as the *wholly artificial* status of a foreign corporation. It is universally conceded that our State, were it not for our statute, might refuse to recognize a foreign *corporate* status; and the doctrine is so well settled that it is said a foreign corporation has no *status* outside of the State of its creation, unless by comity or statute of other States. Nor has any natural person any status here which is *not purely natural*—except by comity or statute, if it be conceded there is a status here of a natural person. The *status* of a joint stock company is not a purely natural status.

But if we *recognize* an artificial foreign status, we recognize it, and that ends it—the status *here*, is the status *there*.

The principle, on which the doctrine is held, that we have a right to consider that natural persons have a *corporate* status *here*, though they do *not* have it at *home*, but have *another artificial* status there, is that the *foreign status* they have *is not recognized:* that our policy

and statutes interfere with *allowing* the recognition of *such* foreign status, and we attribute *such* status (not a foreign one at all) as it is agreeable to our law, that they should have here. The foreign status is out of the case, —*not* recognized at all, and in that case the *status* we *give* them or attribute to them in our administration of *our law*, is not necessarily to be the foreign status. But if we *do* recognize the foreign status, we recognize *it;* and there is an end of *any other* than the foreign status; which is made the status here by recognition.

The case, in which a joint stock company created abroad, and there expressly declared not to be a corporation, was held to be a corporation *here*, is that of Liverpool Insurance Co. *v.* Massachusetts, 10 Wall., 576, and the principle of it is, undoubtedly, that above stated. This is not at all inconsistent with the position we take, that if the foreign status *is* recognized, *it* is recognized, and there can be no other domestic status; but if the foreign status is not recognized—we can and do consider the natural person or the company or whatever it is—to have such status as is suitable to our law. In that case Judge Bradley thought the foreign *status* ought to be recognized, and the joint stock company held to be such here, and not held to be a corporation *here*, as it was not so held at its home; but he agreed in the result on the ground that even as a joint stock company it was within the language of the Massachusetts taxing statute—the question in the case being whether the company was properly taxed under that statute. Taken either way—as the Court held or as Judge Bradley held—the case is not inconsistent with the positions here taken.

While the foreign status, *when recognized* by New Jersey, is the New Jersey status,—the effect or *consequence* here, as to real estate, of the *recognized* foreign *status* is another question; but the *existence* of it, and *what it is*, must be decided by the foreign law or not at all.

The case of Boyce *v.* St. Louis, 29 Barb., 650, cited by defendant's counsel, is very emphatic in *confining* the law of the *situs* to the *capacity* of the foreign corporation to *take lands* (p. 652, 653, 654).

The *status* in that case was not disputed. It had, in fact, been settled by the decisions of the Courts of Missouri, where it originated.

But it was insisted that the adjudications of the State of original *status*, on the *capacity to take lands elsewhere*, ought to be followed; but the New York Court rightfully denied the decision of the forum of the *status* to have any effect on the *capacity to take lands* abroad.

In this the New York Court was undoubtedly right; but it did not deny that as to the *status* alone, the law of the place of original status alone, controls. This case is cited by defendant to show that the law of the place of original status does not entirely control as to *status;* but it simply holds that the law of the status does not control as to the *capacity* to *take* lands in the foreign State or the State of the *situs*, which is purely a question of the law of the *situs*. On this authority we make no criticism. It extends only to the point of capacity to take lands abroad; and to this proposition,—that the law of the *situs* determines the capacity to take lands—we make no objection.

But that the law of the place of original status settles the *status* (as *status* alone) everywhere, is manifest.

Indeed, it is held with great uniformity that a foreign corporation has no legal *status* outside of the State by which it is *created;* but this is as uniformly qualified by the statement—"unless by statute or comity" (Wharton's Conflict of Laws, § 105). But if by comity or statute a State *recognizes* the existence of a corporate *status* created by a foreign State, the only external or internal *status*, or any *status* possible, is the foreign *status*, which is wholly *created* by the foreign law.

It must be remembered that in this case the *doubtful* question was *not* whether a fee passed in the New Jersey lands by this mortgage. That is in no wise doubtful; for by the New Jersey law it is certain that if the *status* is corporate the fee *does* pass; and if the *status* is that of a natural person, it does *not* pass.

The doubtful point being, which of two *status* it is,—that of a corporation or of a natural person—that the New

Jersey Court should find to be *the* true New Jersey status—and the law of the *situs* being one way,—if the *status* is *corporate* (foreign or domestic) and another way if it is that of a *natural* person (foreign or domestic)—the question of *status* is the preliminary one.

The law of the *situs* is a subsequent question.

The *status* is not only the preliminary, but, in this case, the only *doubtful* question. What the law of the *situs* is, in each case—(however the question of *status* is answered)—is admitted on all sides.

If to the preliminary question, the answer is—"the mortgagee is a natural person;"—the answer to the subsequent question—as to whether a fee passed,—will be—"a fee does *not* pass; the words heirs is necessary in *New Jersey* to pass a fee to a natural person, though it may not be necessary in New York."

If to the preliminary question the answer is:—"the mortgagee is *not* a natural person;—the mortgagee is a corporation, a New York or New Jersey corporation,"—the answer to the subsequent question will be, "a fee *does* pass;—the word "heirs" is not necessary to pass a fee in *New Jersey land* to any corporation, whether it is a New Jersey or *New York corporation*."

The question *which* is the provision of the law of the *situs* that applies—though a subsequent question,—is dependent on the answer to the preliminary question. This is so clear, that if the answer to the *preliminary* question is given by the Court, either way, the answer to the *subsequent* question will be given by both parties in the same terms, and will be either that the mortgage *does* or does *not* pass the fee, according as the answer of the the Court to the preliminary question is, that the mortgagee is a corporation or a natural person.

This shows that the whole question in *doubt* is, what is the *status?*

This preliminary question is a question of *status*, and like every other question may often be a question of *fact;* but if *facts* sufficient are admitted to raise a legal question, nothing but a question of law remains. This question of law is a question of *status*, dependent wholly on

the New York law; for all the *facts* to determine the *status* are admitted—it is admitted there was a New York corporation, of which Beers was president.

The only question remaining is, what was the New York law as to the *status* of the mortgagee, upon these facts; not what was the New York law, as to the estate conveyed, *consequent* upon the *status*.

It is conceded by the Court below and by the defendant's counsel, that if the mortgagee is a New York corporation the title is good and unobjectionable.

The reasoning on which this concession has been made by the Court and by counsel of defendant is undoubtedly this: that if the mortgagee is a New York corporation—and the New Jersey law (the *lex rei sitae*) require no words of inheritance to pass a fee to a New York corporation any more than to a New Jersey corporation—none were necessary to pass the fee in these mortgaged premises.

The concession is founded on two grounds: 1st, A statute of New Jersey passed in 1873. Revision, 195, §99, reciting the comity of other States to New Jersey corporations, and that doubts had arisen as to whether foreign corporations can hold, mortgage and convey lands in this State, enacts that "it shall be lawful for all foreign corporations to hold, mortgage, lease and convey such real estate in this State as may be necessary for the purpose of carrying on the business of such incorporation in in this State, or such as it may acquire by way of mortgage or otherwise in the payment of debts due to said foreign corporations, and any conveyances or mortgages to or by such foreign corporations of lands in this State *heretofore made* are hereby declared to be good and valid in this State, both at law and in equity."

This confirmation of mortgages *heretofore* made is noticeable and important in two respects. It shows the State policy is consistent with the *comity* next mentioned and also confirms this mortgage.

It is to be remembered that the mortgage in question is on its face one for the payment of debts due to the mortgagee.

2d. Before this statute, by comity, *foreign corporations* might take title to lands in this State, though there was no express authority to do so granted by this State.

The following authorities support this:

Angell and Ames on Corporations, § 161, 162.
American Mutual Life Co. *v.* Owen, 15 Gray, 491.
Runyon *v.* Coster, 14 Peters, 122.

The whole doctrine, irrespective of *statutes* of the State in which the land lies, is carefully discussed by,—

Ch. J. Christiancy, with whom Judge Cooley agreed, in Thompson *v.* Waters, 26 Michigan, 214, s. c. in American Corporation Cases, by Withrow, Vol. IV., page 458.

It is there held that this is done by comity, and that comity is part of the law of nations.

Story, in his Conflict of Laws, § 38, puts comity under the head of international law, and says that it prevails, in case of *silence* on that head by the laws of the State. Thompson *v.* Waters is cited, and approved by *Wharton* on Conflict of Laws § 1, Note.

It is held by Denio, *J.*, in Moultrie *v.* Hunt, 23 N. Y., 394, that this law of comity is parcel of the *Municipal Law* (Wharton, § 1, Note).

The Supreme Court of the United States, in Christian Union *v.* Yount, 101 U. S. R., 359, 360, held that the *presumption* is that it is *not* against the policy of the State where the land lies; that a foreign corporation should take a conveyance of land there, for *purposes* for which it is authorized at *home* to take it.

It also held in that case that this conclusion may be strengthened by legislation, *subsequent* to the conveyance. *Ibid.*

The New Jersey legislation of 1873 (Revision, p. 195, sec. 99), as a declaration of comity, ought to be perfectly onclusive, as to the past, present and future.

There is also an act, approved March 17, 1882, which seems to put corporations of all States, even those foreign to our national government, on a par with any State in the United States.

To return to the point—which is the *preliminary* question, and which the *subsequent* one, this is to be observed: after the preliminary question, as above stated, is answered by saying the mortgagee is a New York corporation, the *lex rei sitæ* immediately spends its whole force, by vesting a fee in the mortgagee.

No other part or provision of the *lex rei sitæ* than that which declares a mortgage to a New York corporation or any corporation, passes the fee without the word heirs, is applicable or at all material, in the case, after it is ascertained that the mortgagee is a New York corporation, unless it be some part or provisision of a statute or some policy of New Jersey which would be interfered with, by vesting the fee in the New York corporation.

Confessedly there is neither an interfering statute or policy in this State. On the contrary, confessedly there is an express statute and an ancient policy, which invite New York corporations to take lands in this State.

The importance of the distinction between a question of mere *status* and a question of its *consequences* abroad, as to real estate, which latter are controlled by the law of the *situs* of the property, though perfectly clear and illustrated well enough as to legitimacy and as to many relations, particularly that of legitimacy as distinguished from legitimation (*Story's Conflict of Law*, § 87, 87(*a*), 93(*c*), 93(*o*), *note* 2), is but little noticed in Story on the Conflict of Laws—as to the *corporate* relation.

He speaks only of the right of a foreign corporation to sue (§ 565).

Rorer, on Inter-State Law, though he speaks of the right of a corporation to take lands in another State than that of its creation and the principle on which it depends —does not allude to the distinction between a question of mere *status* and a question of the *consequences* of status, as to real estate abroad (page 290).

Wharton, on Conflict of Laws, is very full on the corporate relation (§ 48(a), 105, and notes), as a *status*. He declares that "the domicil of a corporation has no *necessary* existence out of the State creating the corporation, and that the reason which leads to this conclusion, is based, as is generally the case in respect to *status*, on State policy" (§ 105). He adds at the end of the 105th section —that the principle supporting the right of a State to exclude a foreign corporation, is, that "it has *no* legal *status* outside of the state of creation;" but he means, of course—unless comity or statute of the State whose courts (the forum) it enters, or whose situs it uses for its real property—*requires* its recognition (*Wharton*, § 1 *and notes*).

But in a State, with such a statute as ours, which *requires* and compels the recognition (*Revision*, 185, § 99), of a foreign corporation—the foreign corporation has a *necessary* corporate status. *That* must be the *foreign* status. There is no other to *recognize*.

Where comity or a statute of the situs *requires* the recognition of the *relation* or *status* (whatever it is) the law of the *situs* (or, *forum*, if it be that)—has expended its *force* so far as it relates, or can relate, to the subject of *status* merely.

The *status* recognized must be the foreign *status*, for there is no other to *recognize*.

Though the *consequences* of that foreign *status*, as to real estate—will yet depend on the law of the *situs*—yet the mere *status* itself depends wholly on the foreign law creating it. This foreign law, as to *status*, is recognized as soon as the foreign *status* is recognized. Though this *recognition* of the *status* and of the foreign law creating it, takes its rise from the law of the *situs* (or in some cases of the forum) the *status* itself, as *recognized*, is that which the foreign law created.

Bennett's Story on Conflict of Laws, § 38a, without specially referring to corporate *status*, says: "The foreign *law*, by which the * * *relation* is created, becomes an indispensable element, in order to translate such *relation* into the vernacular language of the forum

(or *situs* in case of real estate); and the courts, in referring to the law of the foreign State, in order to give the *proper force* to the *relation*, cannot be said to act from *comity* any more than it can be said that it is by *comity*—that the court refers to a foreign dictionary to ascertain the meaning of the terms of a foreign contract."

This is undoubtedly sound in a sense of the word comity—i. e. courtesy; but, comity as it is now understood, is a part of international law and a part of the municipal law, (*Wharton*, § 1 *and Notes*).

The language of Lord Stowell,—from which Mr. Bennett considers paragraph 38a, of Story on Conflict of Laws, is derived,—gives a more just idea of the principle of recognition of foreign *status*,—that is, that it is the law of the *situs*,—that the law of the foreign state creating the *status*, is the *only* law to be referred to, in ascertaining it. Lord Stowell in Dalrymple *v.* Dalrymple, 2 Hagg Consist., R. 58, 59, where the marriage *status* (a Scotch marriage) was in controversy in an English Court, says:

"Being entertained in an English Court, it must be "adjudicated according to the principles of English law, "applicable to such a case. But the *only* principle "applicable to such a case, *by the law of England*, is, that "the *validity* of the marriage *must be tried* by *reference* "to the law of the country, where (*if it exist at all*) it "had its origin.

"*Having furnished this principle*, the law of England "*withdraws* altogether, and leaves the legal question to "the *exclusive* judgment of the law of Scotland."

Of course, cases of fraud vary this. He does not mean that the law of England leaves to the exclusive judgment of the law of Scotland, any of the English *consequences*, as to real estate, of a valid marriage *status*, for when that question—the question of the *consequences* of the *status*—comes up, as to real property, the law of England, *steps in again*; as decided in Birtwhistle *v.* Vardell, 9 Cl. and Fin. 935. There, *Ch. J.* Tyndall, (delivering the opinion adopted by the House of Lords), says: "Though marriage celebrated by the law of the domicil would be considered and treated as a perfect and complete mar-

riage, *throughout the whole of christendom*, the *consequences* as to real property must depend upon the law of the *situs* of it," pages 935, 936, 937.

What Lord Stowell meant was that on the *mere* question of *status*, the law of England *withdraws*, and leaves *that mere* question to the exclusive judgment of the foreign law.

In our case, it is this *mere* question of *status*, and not a question of any of its *consequences*—as to real estate—that the Court below considers *doubtful*. Is it not on this question, *merely* of status, as a *doubtful* one, that the title of complainants was refused?

The law of the *situs* (the New Jersey law) as to whether a fee was conveyed or not by the mortgage, is perfectly well settled and agreed to, on all sides; to be—that if the mortgage is to a foreign corporation—the fee passed; and, if not,—not. That, is not the doubtful question. If the Court below had followed implicitly as we think it ought—the New York law on this *mere* question of New York *status—none of the consequences*—as for instance, that a fee would pass, would be *inconsistent* with the law of New Jersey, as to real estate; but perfectly conformable to it, for the Court below and all of the counsel agree that *that* consequence that a fee passed, if the New York *status* is the true *status*, is *conformable* to, and is, the law of New Jersey;—which requires no limitation "to heirs," if the mortgage is to a New York corporation or any foreign corporation or any domestic corporation.

Wharton has a note to his § 105, from Green's Brice's Ultra Vires—which is very valuable; but neither in this note nor in the same note in the later edition of Ultra Vires—is the distinction between a question of mere *status*, and its *consequences* (in relation to real property) expressed in terms, though the distinction is plainly collectable from the cases there cited.

The distinction is more noticeable in Boyce *v.* St. Louis, 29 Barb., 650 (before cited), and in Jessup *v.* Carnegie, 44 New York Superior Court Rep., 260. In the last case the question was whether certain natural persons had con-

tracted, as such, or, whether they had been incorporated in Iowa, and thus a corporation of Iowa (of which the natural persons were members,)—had contracted. There, the Court held, and counsel all round conceded, that the *status* of these persons as natural persons or of the alleged corporation as such, must wholly depend on the laws of *Iowa* as interpreted by its courts. So far was this doctrine carried that the law of Iowa, as interpreted by its courts up to the time of its contract, was held to be the *only law* by which this question of *status* could be determined; and that an alteration of the Iowa law by statute or by decision subsequent—could not be permitted to control. This was on the authority of Bretz *v.* City of Muscatine, 8 Wall, 575. The law of New York as to *status* was not even *alluded* to.

It may be said that the law of New York was not alluded to in 44 Superior Court, 260, because it was a question of *who was the contractor*, or what was the *status* of the contractor, and real property in New York was not the subject of the contract; but the sole question in our case *also* is, who is the contractor—who is the mortgagee, what is the *status* of the mortgagee—corporate or natural? As there was in the New York case no question on the real property law of New York, so in our case—the law of the *situs* of the real property—our law—is not disputed or doubted; but agreed on all sides to be that a fee passed if the *status* of the mortgagee, *recognized* by our statutes and policy is the New York *status*, and that *status*, corporate. It is also agreed on all hands that a fee did *not* pass, if the *status* of the mortgagee, recognized by our law, is that of a natural person.

This the more demonstrates that the *doubtful* question is a question of mere *status;* for it is plain that the only *status* that can be *recognized* is the foreign *status*. It is true that the law of the *situs* repudiates the foreign *status* if any statute of the State of the *situs* expressly interfere, or some policy of the law of the *situs* interfere with the recognition of the foreign status.

But an express statute like ours, compelling the *recognition* of foreign corporations, puts out of the case all

possible questions of interference. It is conceded that in our case there is no express repudiation nor any policy of our law which interferes with the recognition of the foreign status.

Our law, the law of the situs, it is admitted, is clear. If the New York *status* is that of a corporation, the New Jersey law, is perfectly clear as to what estate passed, to wit: a fee—and if the New York *status* is that of a natural person it is also perfectly clear—as to what estate passed, to wit, a life estate.

So that our law provides for the very case of the New York *status* varying, and provides that in that case our law *shall* vary on the question of what estate shall pass, and that it shall vary *according* to the difference of the *New York status*. If that New York status is *corporate*, "heirs" is *not* a necessary word to pass the fee in lands in New Jersey; if that New York status is that of a *natural* person, it *is* a necessary word to pass the fee to lands in New Jersey.

In such a case, where the law of the *situs* makes provision for the variation of the estate conveyed, *according* to the variation of the *foreign* status, it is *impossible* to say that the *recognition* of the foreign status interferes with—the recognition of the *foreign* status.

The law of the *situs*, in such case, *bases* itself,—it varies itself, in its effect and operation *according* to what the foreign status is—and therefore does not *interfere* with, but makes the varying foreign status (whether it is corporate or natural), the *subject* of its own varying provisions.

It does not *permit* the varying *foreign status* to vary the law of the situs but enacts that if the *status* is *corporate* (be it foreign or be it domestic) the word heirs to pass a fee, shall *not* be necessary, and if the status is natural (be it foreign or domestic) the word heirs, to pass a fee, *shall* be necessary.

The law of the *situs* is also, that a foreign status, if it is *recognized* at all, is and must be recognized as the domestic status; in other words the law of the *situs* withdraws itself entirely from that question.

An enactment of the *situs*, that foreign corporations may take lands there, is in effect an enactment that the tribunals of the situs (or forum) shall not and will not meddle or concern themselves with the question of foreign status, except as Lord Stowell says they *must*,—by referring to the foreign law, and acting on the status of the foreign law, just as if it were a domestic *status* created by the law of the *situs*.

In other words the foreign status ascertained by reference to the foreign law is as much the subject of the law of the situs—as to the devolution of real estate—as the domestic status of a New Jersey corporation is.

The law of the *situs* in such case is, that persons (artificial persons) of foreign *or* domestic corporate *status* take a fee without the word heirs; and the law of the *situs* by consequence and in effect becomes this: Every *foreign corporate status* shall be taken to be that of the foreign creation of it. This must be so, because there is no other foreign or other status—than that of the *foreign* creation, if it is recognized.

These considerations show that the case of Milbank *v.* Crane, 25 How., Pr. 193, on the construction of a New York statute—as to the *devolution* of a trust estate in New York lands shall be to a person to be appointed by a Court; and the case of Gales Extrs *v.* Morris, 2 Stew., 222, which appears to be on a like statue of New York as to the devolution of an estate in land to an executor, are inapplicable, and for two reasons.

(1) The question in both of those cases was how shall real estate devolve;—a matter of pure *situs*.

Whereas, in our case that is not the question.

The question in *doubt* is the only question we are considering, and that is not what words shall pass real estate in New Jersey;—that is not at all in *doubt* but certain; and the question that is in doubt is—is the mortgagee a foreign corporation or not;—a question of *mere* status.

The second reason is that the terms of this very New York banking statute have been held by the Courts of New York to create a corporation—the name of which is

such that an assignment to J. D. B., president of the company, giving it its assumed name, is an assignment to the corporation itself, directly and by name. The only possible ground for such decision under the provisions of the New York statutes creating these banking corporations must be, that the corporation was binominous. It has it's *assumed* name and the name of the president preceding its assumed name,—both, as its names.

This title is held *doubtful*, not because it is doubtful what the law of the *situs* as to the devolution of real estate is, if the *status* is natural or corporate, — because the law of New Jersey (the *situs*)—is settled in each of those cases, and is different in each. But the title is held *doubtful*, because—as the Court below would not accept the statute and decisions of New York as fixing the foreign *status*, and thought a New Jersey Court ought not to decide what it was, except in a direct proceeding,—the *status* necessarily remained *doubtful* in New Jersey, until the *foreign status* was decided in a direct proceding in New Jersey.

The whole argument of defendant's counsel treated the question of *status*, as an original one now, at the distance of over 40 years from its creation, with numerous decisions by the tribinuals of the foreign status, on the very question. But the Courts of New York as early as 1860 (in 21 New York before cited) refused to consider the questions on this statute as original questions, and held that to do so would be absured and profitless, after so many decisions as had been given on it.

The Chancellor seemed to think that a New Jersey decision, that the name of a natural person was only a *part of one of the names* of the New York corporation, would be a decision, which *in effect* recognized the law of New York as to the *transmission* of *real estate* in New Jersey, as well as the law of New York as to the status of the mortgagee.

But this would not be a recognition of the New York law as to the transmission of real estate.

The effect of such a decision would have been a decision that the fee did pass by this mortgage; but not be-

cause it was the law of New York that the fee would pass to a natural person (Beers, for instance) without the word *heirs;* but, because by the law of New Jersey, a fee to a corporation (foreign or domestic) passes without the word heirs. Because it happens to be the law of New York (whether the mortgage was to either a natural person or a corporation) that the word heirs is not necessary to pass a fee in New York lands, and that in New York the fee in New York lands would pass to Beers though he was a natural person; it does not result that the New Jersey court follows the law of New York in the *two* cases in which the law of New York provides that "heirs" may be omitted by following it in *one* of those cases. In a conveyance to a corporation, the law of New Jersey *also* enacts that the word heirs may be omitted and yet a fee pass to New Jersey lands.

The effect of such a decision would undoubtedly have been to recognize the power of a foreign legislature to create a corporation, and to give it any name it chose, and its power to give it an obscure name or a confusing name, which might put the simple citizens and lawyers of our State, in searching titles, to the trouble of ascertaining whether the queer name was that of a natural person or of a corporation, but it would not recognize the power of a foreign legislature to regulate the transmission of property here.

There might be some policy of our State which would be infringed by some corporate names—and if there were, our Courts might refuse to recognize such queerly named foreign corporations. Most of the States have laws in relation to the names of special partnerships forbidding the use of the word "company" (Revision, 808, § 13).

If there was any law of our State forbidding the use of certain names for corporations, it would be proper for our Courts to take no notice of corporations with such forbidden names.

But our act (Revision 195, Sec. 99) does not permit our courts to hesitate to recognize a foreign corporation on account of the pecularity of its name, or because a

part of the name is that of a natural person. It recognizes all foreign corporations of whatever names, whether the name is confusing, peculiar, or like the name of a natural person or not.

Point VI.

The New York *status* was corporate, and the mortgage was to a corporation; whether Beers was a corporation sole, or *his* name with the assumed name of the company, was *one* of the *names* of "The North American Trust and Banking Company."

It is not necessary for me to repeat here the New York decisions and (what the Court below calls) New York *dicta* to establish that the New York *status* was corporate.

These decisions are stated under the head of *Main Facts.*

This, however, is to be observed,—what are called *dicta*, on a question of foreign law, are almost as valuable as decisions on the very point are.

A foreign law is proved, by the opinion of practicing lawyers only, very frequently. It is a matter of opinion —and the opinion is taken as the best evidence of the fact of what the foreign law is. It is a fact, only *sub modo*. Therefore *dicta* of eminent Judges are very valuable on a question of foreign law. They often give the reasons on which the subsequent decisions are made,

though the reasons are not given in the subsequent decision. For instance, the case of Fisher *v.* Leavitt, 4 Duer, 21, is a most valuable decision on the very point, that an assignment to the President is an assignment to the corporation *directly and by name*. This, by inference, establishes that the corporation was *binominous*. Now, the *dicta* of Ch. J. Nelson and Judge Cowen, in 22 Wendell, 72, 99, are valuable, because they enlarge on the point that the corporation is binominous: that it has two names—one, the name it assumes in its certificate, and the other the Legislature itself gives it—*i. e.* the President's name, followed by the assumed name.

This, the binominous character of the New York Banking corporations, undoubtedly was the reason of the decision in 4th Duer—that an assignment to the President is an assignment *directly* to the corporation, and to the corporation by *its name; i. e.*, by one of them.

The binominous character is also affirmed in Delafield *v.* Kinney, 24 Wendell, 347, and again in People *v.* Watertown, 1 Hill, 621.

Counsel for defendant contended that the New York decisions and the New York dicta differed from each other, and that, therefore, even the New York status, of this mortgagee, was not settled there. The New York decisions, it was said, are that conveyances to the President are conveyances to the corporation; but that it does not follow, because a conveyance to the President of New York lands, would, in New York, be a conveyance to the corporation, that a conveyance to the President—of New Jersey lands—would, in New Jersey, be a conveyance to the corporation.

And, indeed, it does not *follow* in every sense of the terms used in the New York decisions. If the sense of the terms used in the New York decisions, is, that those provisions of the law of New York, which relate to the *transmission of real estate* there, enact that a conveyance to the President is a conveyance to the corporation—it does not follow that a conveyance of land here, to the President, would be here, a conveyance to the corporation.

But if the sense of the terms used in the New York decisions is that those provisions of the laws of New York which relate to the *status* there, of the President and the company, enact that the President is a corporation *sole*, *or*, that his name, "*J. D. B., Prest.* of the North American Trust and Banking Company," is *one* of the names of the corporation called the North American Trust and Banking Company,—then it *would follow* that a conveyance of land in New Jersey to the President, is *here* a conveyance to the corporation, because all that the *New York* decisions (so understood) hold is that the *name* of the mortgagee is the name of a New York corporation, or, in other words, that the *status* of the mortgagee is corporate.

The *name*, being the distinguishing element of corporate *status*, should adhere to the mortgagee and be recognized (as Lord C. J. Tyndal says, in 7 Cl. and F., 935) "throughout christendom."

I apprehend that it was losing sight of this distinction,--that the New York law in question, which made the President, a corporation sole, or his name with an addition, one of the names of its banking corporations, *was* a law as to *status* and as to a name; and *not* a law as to the transfer of New York real estate—which caused the decision below, that the title was *doubtful*.

The further decision in this case, that—until a New Jersey Court, in a direct proceeding, should decide that the mortgage was to a New York corporation, and not to a natural person, or as it may be otherwise expressed that the *name* of the mortgagee was a corporation's name and not a natural person's name,—the title must be considered *doubtful*—would never have been made, if the Court had kept in view that the question before it—on which it doubted—was a question of the New York *status* of persons, which must be followed here, and not a question of the law of the transfer of real estate in New York, which is *not* to be followed here.

If the distinction between questions of doubt on the *status* here, of persons possessing a foreign status, and questions of doubt as to the transmission of real estate

here, had been kept steadily in view, and the New York decisions *duly* interpreted as going *only* to the question of *status*, and that alone; the decision that this title was *doubtful*, could never have been made.

The confusing element in the case undoubtedly was that the law of the State of the status and the law of the State of the *situs* was the same, as to the transmission of real estate in each State, if the *status* was corporate. To follow the law of the State of the *status*, as to corporate *status*, when the law of the State of the *situs* and the law of the State of the *status* were the *same* as to the transmission to corporations of real estate situate in either, seems, at first sight, to be following the law of the State of *status* as to the transmission of real estate there—, as well as its law as to *status* there. Though the foreign law were followed as to transmission of real estate to a corporation, it would not be followed *qua* foreign law; but because the foreign law as to real estate conveyed to corporations *happens* to be the same as the law of the State of *situs*.

What the Chancellor called *dicta* were what we insist were decisions,—that these banking corporations were *binominous*. These alleged *dicta* in no wise differ from what the Chancellor considered the decisions. The alleged *dicta* are but the important premiss (or the reason) from which was drawn the conclusion expressed in the decisions—that a conveyance to the president is a conveyance to the corporation. That premiss—that reason—is,—these corporations are *binominous*. This does not constitute a difference between the admitted decisions and the alleged *dicta*, for they are complements of each other, and part of one whole.

But counsel says that other *dicta* were, that the President was a corporation *sole*, and the Banking Company a corporation *aggregate—two* corporations; and that the decisions were, that there was but *one* corporation, and that the decisions and dicta *therefore* differ: that, therefore, the law of New York is not settled; that it is doubtful whether, by the law of New York, the President is a corporation *sole*, or whether his name, with an

addition, is *one of the names* of an admitted aggregate corporation—the Banking Company. The answer to this is, that, if it is unsettled *which* way it is, it is yet admitted that it *is* one way *or* the other. This is enough for our purpose. A New York decision that the President is a corporation *sole*, *or* a New York decision that his name, with an addition, is one of the names of a corporation aggregate, would settle the question in doubt, which is simply the status of the mortgagee. That the mortgagee is a corporation, or has a corporate status, is the material question. Whether it is a corporation *sole* or *aggregate* is entirely immaterial. If its status is *corporate*, that is enough. This must be its status, if it is a corporation sole or a corporation aggregate.

Another objection is, that here the mortgage says, "in trust for the said company and the shareholders thereof, being the officer indicated for that purpose;" and therefore the mortgage was not to the corporation, but to Beers, as a natural person, in trust for the corporation.

This was disposed of in Point III. But the expression—"being the officer indicated for that purpose by the articles * * made and entered into under and pursuant to an act," etc., means he is the officer, whose name —with the assumed name of the company added—is one of the names of the corporation—which it has a right to use and must use, if the mortgage is for the *benefit of the corporation*.

The objection in 4 Duer, p. 15, was that "the transfer was made for the *use and benefit of the corporation*, and was *not* made to the corporation, *directly and by name*," as required by statute. In our case, these words, "in trust for the said company and the shareholders thereof," were put in merely to show that the mortgage *was* "for the use and benefit of the corporation," and *therefore* one of the cases, in which the name of the President, with the addition, was one of the names of the corporation. The case in 4th Duer, p. 21, holds that a transfer which is "for the use and benefit of the corporation," is to it, directly and by name, if to the President.

The reason of the decision is—that his *name*, with an addition, is one of the names of the corporation, *if* the instrument is for the benefit of the corporation.

It really seems as if, to justify the use of the President's name, with the addition, as one of the names of the corporation—the instruments should show that they are "for the use and benefit of the corporation"—which has the two names. These two names are not to be used in *all cases*—one name is used in one case, and another in another, and yet each is a name of the corporation. This is fully discussed by Nelson, Ch. J., and Cowen, Judge, in 22 Wend., 72, 99 and 100, and by any treatise on corporations.

But another point is made against us—and that is, that there are words of limitation in this instrument—to wit: "*his* successors," which import or indicate that the mortgagee was a natural person. But "his" *is* appropriate to a corporation *sole*, and if Beers was a corporation *sole*—that is enough, and settles the *doubt* raised.

It is true "his" is not appropriate to a corporation *aggregate;* and "his" *may* indicate that the corporation meant is not a corporation aggregate, and, therefore (but a very weak therefore), "his" is an indication that the mortgage was to Beers as a natural person. But this "therefore" depends on the *grammar;*—which, even when bad, never vitiates.

The objection to the title thus comes down to a question of the use or misuse of a *pronoun*. If the pronoun has been misused, the title is good; if it was used grammatically it is an *indication* that the title is bad.

This, really, is frivolous. If the pronoun was used grammatically and yet Beers *is* a corporation sole, the title is good. Again, whether he is a corporation sole or not, yet if his name as president of the company, with an addition, is one of the names of the corporation—the title is good.

Another objection is, that Leavitt *v.* Fisher, 4 Duer, 21, was a decision, not that a conveyance of *land* to the president was a conveyance to the corporation; but that an assignment of personalty to the president was an as-

signment to the corporation. But we do not need a decision as to New York *land*, the New York statute itself decides *that*.

Anothor objection is that there were *no words of limitation* in the assignment in 4 Duer, 19, 21, as "his successor;" and therefore the *indication*, by the use of the pronoun "his" in our mortgage, that our mortgage is to a natural person, was not present in the case in 4th Duer, 21, for there were no words of limitation there at all. Therefore, 4th Duer is no authority for us. In this criticism of 4th Duer, we have the *absence* of the erroneous pronoun, to make our title bad.

Are not all of the objections to this title equally fine spun and filmy; destitute of "*serious* grounds of *doubt*" and of any "debatable grounds on which a doubt can be *justified?*"

All these really frivolous suggestions of doubts are answered by the considerations suggested in 4 Duer, at pages 19 and 21, to-wit: that the name of the president with the addition of his style of office is in fact one of the corporate designations of the banking company, and therefore an assignment to the president in that style is an assignment to the corporation, and also to it directly and by *name*. This could not have been the decision in 4th Duer, unless the corporation is *binominous*.

Point VII.

Though a title may be open to litigation by *any* party who may *make claim* on a point suggested by the purchaser, that is no answer to a bill for specific performance, unless "*serious* grounds for doubt" on that point exist, or "some *debatable grounds* exist on which *a doubt* on that point *can be justified*"

Every conceivable title, no matter how good, *is always* open to litigation on some point by any party who may choose to set up that point, however frivolous.

It is true the Court is not bound, on a bill for specific performance, to determine that the title is absolutely good or bad; but it *is* bound to consider the point made against the title, so far, as to show, that it *is* at least *doubtful*.

What we complain of here is, that the Court below did not examine the question sufficiently—to discover any *debatable ground* on which even so much as a *doubt* could be *justified*, or to find a *serious ground* for a *doubt* or any *doubt* except that which arose from a misinterpreted concession of counsel (see Points II. and IV.).

I have endeavored, under Point V., to show that the doubt on which the Chancellor acted, was whether the *status* of the mortgagee was corporate or natural.

The point which, under the Chancellor's decision, a New Jersey court must decide, in a *direct proceeding*, before the supposed *doubt* will be quieted—is also one of *status*.

Under the rule laid down by the Court below, any number of decisions, *not* in a *direct proceeding*, by which is meant a proceeding to which the present complainants and any *possible claimants* to the land, on the point of doubt here suggested—any number of decisions of a New Jersey court,—to the effect that mortgages to the president of a New York banking association, are mortgages to the corporation *itself*, *directly* and by *name*, would still leave *this* title doubtful, because there yet would be no such decision, as the Chancellor says there must be—"a decision in a direct proceeding." Only such a decision, he says, can remove the *doubt*, whether *this* mortgage to a president of a New York banking association is a mortgage to a corporation.

This seems a doctrine entirely new. It is not reasonable to require this.

It certainly would have been enough to require that the general proposition had been *settled* in New Jersey, that such mortgage to the president of a New York banking corporation was to the corporation itself.

But even this would not be reasonable to require, unless there were "some *debatable grounds* on which a *doubt* on the point in question could be *justified;*" or "some *serious* grounds for doubt" were disclosed by the Court, refusing specific performance.

Nor would it be reasonable to require *any* New Jersey decision in a direct proceeding or in *any* proceeding or any New Jersey decision at all, where the whole question on which the *doubt* arose, was a mere question of *foreign* status, which is *wholly* dependent on the foreign law (as endeavored to be demonstrated in Point V.), and which foreign *status* had been overwhelmingly and repeatedly settled, by the tribunals administering the foreign law.

To require any New Jersey *recognition* of this foreign status, by a New Jersey decision at all, much less a decision in a direct proceeding, is simply requiring the New Jersey courts not only to disregard the New York decisions on a question purely of New York law, but to disregard our own New Jersey statute, Revision 195, § 99, which (as has been endeavored to be shown under Point V.) declares that our courts *shall* recognize foreign corporations.

The New Jersey courts cannot recognize a New York corporation at all, without wholly and entirely recognizing the foreign creation by the foreign law, and of course the foreign law itself, and the construction of it by the foreign tribunals.

But this Point VII. is devoted to show on what *doubts* courts refuse to force titles on purchasers, in a suit for specific performance.

It is familiar learning that the *ancient rule* was for the Court to decide the title was *good* or *bad*.

Lord Eldon said that was the best rule. Van Couver *v.* Bliss, 11 Vesey, 465.

He said departure from it had been the source of great mischief.

There is much to be said on both sides of this question; but we concede that a Court of Equity may with propriety refuse a title without deciding it is *bad*, if it is doubtful.

The English Courts have of late years indicated dissatisfaction with the rule that a *doubtful* question of law is, in all cases, enough to refuse a title; and maintained that the Courts should meet and decide most questions.

Lord Cottenham in 1848 in Grove *v.* Bastard, 2 Phillips, 621, says: "Generally the Court has no means of escaping the duty of deciding on the title in the absence of the party interested in disputing it."

Lord Truro in 1851, in the same case on appeal, 1 De Gex McNaughton *v.* Gordon, 76, said "to require a will to be established against an heir at law, is to impede all disposition of property, and if purchaser wanted it done, he should pay the expenses."

Sir J. Romilly in 1863 in Bull *v.* Hutchins, 9 Jurist, N. S., 954; S. C. 32, Beav., 615, had said Pyrke *v.* Waddingham, the leading case cited by the Court below, had been pressed too far.

This case of Pyrke *v.* Waddingham is now put by Mr. Bigelow under overruled cases. In 1866, Vice Ch. Paige Wood in Hamilton *v.* Buckmaster, L. R. 3 Equity, 326, said the question that had weighed with him was how far the title could be forced on the purchaser, but he said he had no doubt, and to decide for the purchaser would be to make *his* title unmarketable.

Recently many decisions have been made, that a *doubt* expressed by the Court below, in no manner creates a *doubt* which the Court of Appeal should act on. The old rule was that it *did*.

Beioley *v.* Carter, L. R. 4 ch. 236, A. D. 1869, citing many cases. See also Bull *v.* Hutchins, 9 Jurist, N. S. 954; S. C., 32 Beav., 615; Radford *v.* Willis, L. R. 7 ch. 710, A. D. 1871.

In 1870, in Alexander *v.* Mills, L. R. 6 Chy. App. 131, Court said "We do not say that there may not be cases in which a question of law may be considered so doubtful that a Court could not compel a purchaser to take a title; still as a general and *almost universal rule* the Court *is bound*, as much between vendor and purchaser as in every other case, to ascertain and determine as best it may, *what the law is*.

In 1870 Lord Romilly in Mullings *v.* Trinder, L. R. 10 Eq., 452, 454 to 457, forced the very same title on a purchaser, with no alteration whatever in the facts or questions produced by lapse of time or otherwise, which Vice Ch. George J. Turner in 1852 had refused, in Pyrke *v.* Waddingham, 10 Hare, 1, to pass.

This case of Pyrke *v.* Waddingham is thus not only completely overruled but actually *reversed*, as not being one of a *doubtful title*, although the principles of the case are not overruled; for though Lord Romilly passed the very same title which Vice Ch. Turner declared doubtful, he admitted the justness of the principles of Pyrke *v.* Waddingham, but said they were wrongfully applied in that case. He added that "a man of a naturally doubtful disposition, diffident of his own judgment—would not force a title upon any body. The consequence is you throw more doubts upon titles and render them less marketable in this way than by any conclusion you could come to. The *Court ought* to *weigh and consider the reasons for doubt*, and if it finds them preponderating it ought so to decide." He also says "it is a great scandal to the public and profession generally that there should be a case in which a Court is not able to determine what the law is."

Vice Ch. Malins in 1873 in Bell *v.* Holtbey, L. R. 15 Eq., 193, says: "I am happy to find that, quite in accordance with my own opinion, *that* notion, about *doubtful* titles not being forced upon purchasers, has disappeared in modern decisions. I think it may be considered as settled, that where doubtful cases of construction arise, whether on an *act of parliament* or the words of an instrument or will, *it is the duty of this Court* to remove that doubt, by deciding it, and instead of feeling a doubt whether other judges at other times may think in the same way with them, I consider it is the duty of the Court to assume, that that which a competent tribunal has at one time decided, will be followed at future times."

Vice-Ch. Malins *confines* his opinion that it is the duty of the Court to decide the doubt, to cases of doubt as to construction of *statutes*, and to instruments and wills.

In our case, the *doubt* is whether a foreign *statute*—the construction of which is perfectly settled by many decisions of the foreign tribunals—created a foreign corporate *status*. Such a question is not merely within Vice Ch. Malins' proposition, if *there were any doubt* on the question; but there is, and ought to be, no *doabt* on the question, for the reasons stated in *Point V.*

But whether the view of Vice Ch. Malins is correct or not—the *doubt* in our case, if it exist, seems almost *frivolous*.

This title has been held *doubtful* on a new principle—a principle adopted without examination, and which would be applicable to this title, if there were any number of decisions of the New Jersey courts to the effect of the decisions of the New York courts, unless the New Jersey decisions were "in a direct proceeding."

Lord Hardwiche, in Lyddal *v.* Weston, 2 Atk., says: "It *is the business* of this Court to carry such agreements into effect, and it must govern itself by a moral certainty; for it is impossible, in the nature of things, that there should be a mathematical certainty of a good title."

A *threat*, or even possibility of a contest, will not suffice to cast doubt on the title. The doubt must be *considerable* and rational; not based on *captious*, frivolous and *astute* niceties.

Kostenbader *v.* Potts, 80 Penna., 435.

In this Pennsylvania case a title was forced on a purchaser, where, as an original question, the title would have been doubtful, but practice had settled the doubtful question (page 437–8).

This case also holds that, where *doubts* on facts arise, which the Court cannot *satisfactorily investigate*,—specific performance will not be decreed. This is a perfectly reasonable doctrine, and we have no objection to it; but when the whole question turns on a statute thoroughly construed—the Court *can* satisfactorily investigate it, whether it is considered a question of law or *fact*.

The latest English decision, and one of the latest New Jersey cases, indicate how far the Court ought to examine the question, before it comes to the conclusion, in a suit for specific performance, even that there is *doubt*. These cases establish that there must be "serious grounds for doubt," or "debatable grounds on which a doubt may be *justified*.

The English case is that of Palmer *v.* Lock, L. R., 18 ch., Divis. 381, A. D. 1881.

There the history of the *doubtful* question was traced, as a doubtful one, through case after case, by the Court below and the Court of Appeal; and Lord Selborne, L. Ch., at page 389, undertakes to prove, and does prove, that there are "serious grounds for doubting the title."

The New Jersey case is that of Vreeland *v.* Blauvelt, 8 C. E., Gren., 483, 486.

In that case the questions were sharp and difficult, and required much learning to dispose of them. Yet when the requisite learning was brought to bear, the doubts vanished. Vice Ch. Dodd, in forcing the title on the purchaser, and settling the supposed doubts, affirmed the general rule, that a doubtful title would not be forced on a purchaser, and said: "But there *must* be some *debatable* grounds on which the doubt can be *justified*."

In Tillotson *v.* Gessner, 6 Stew., 327, our Court of Errors says: "The purchaser is entitled to be *reasonably* sure that no flaw or doubt will come up to disturb its marketable value." There the doubt was on a *fact*.

In our case—keeping in mind that the whole alleged doubt is on a question of *status*—whether the mortgagee is a foreign corporation or a natural person; and that this is a question which must be determined by the foreign law—and that our statute *compels* our Courts to recognize all foreign corporations, and that the foreign law is statutory, has been construed by the foreign tribunals to create the corporate *status*—are there any *serious grounds* for doubt?

Are there any "*debatable* grounds on which the alleged doubt can be *justified?*" See Point VI.

In the case of Bacot *v.* Wetmore, 2 C. E. Green, 250, a title valued at $50,000 was forced on the purchaser by Chancellor Green. The questions were intricate and difficult. It was there insisted that the title could not be forced on the purchaser, unless certain *possible claimants* were made parties. This point was disregarded.

One claiming under these possible claimants, afterwards brought *a direct proceeding*, but the case in 2 C. E. Green, 250, was cited and followed, and the title held good, though the property had increased in value to $250,000.

Wetmore v. *Midmer*, 6 *C. E. Green*, 245.

This case in 2 C. E. Green was afterwards followed in a like case on another will. Leggett *v.* Doremus, 10 C. E. Green, 125.

The case of Wood *v.* White, 4 Mylne & Craig, 483, cited in 2 C. E. Green was a case where Lord Cottenham declined to allow possible claimants to be made parties, and held the title valid; and decreed performance though the Master of the Rolls had held the title *not* good. 4 My. & Cr., 470, 473, 482-3.

Rudderow *v.* Nield, 12 C. E. Green, 92, was a case in which the purchaser was forced to take the title.

He objected that the will did not empower the executors to sell one of the shares; but Wetmore *v.* Bacot, 2 C. E. Green, 250, was cited and the objection overruled.

In Tillotson *v.* Gessner, 6 Stew., 323, an error in boundaries was held not to be a good ground of objection, no adverse claim being yet made; but a question of *fraud*, a doubtful fact, was the ground on which the title was held *doubtful*.

It is to be remembered that the admission in the answer in our case show that the *only* objection to the title is the one as to what the foreign *status* of the mortgagee was. This admission shows this is not a case where there is any difficulty as to boundaries or possession. On this admission, in the answer, we are entitled to the presumption, and the fact is—possession has gone according to this mortgage and its foreclosure from 1843 to this time, and in truth possession has gone according to the paper title from the original patent in 1688.

The number of cases and text books referred to by the Chancellor, or referred to in those he cites, in which titles have been refused—is very great.

A short general review of those cited by the Chancellor or by counsel for defendants, and which the Court may feel bound to consult, may be useful.

Pyrke *v.* Waddingham, 10 Hare, 1, is reckoned as an overruled case by Bigelow. *The same title exactly*, refused there in 1852, was forced on a purchaser in 1870 in Mullings *v.* Trinder L. R., 10 Eq., 452–7. The question was whether there was an estate for life or in tail.

In St. Mary's Church *v.* Stockton, 4 Halst Ch., 520, 531, the doubt was double. 1st, whether the trust was for the benefit of one church or all churches of a particular denomination, and depended upon an ancient, obscure deed; and 2d, whether the purchaser was not bound to look to the application of the purchase money.

Dobbs *v.* Norcross, 9 C. E. Green, 327, was a case where a Pennsylvania patent was obtained by a *plain fraud*, and the title was held *adversely*.

In the case cited by the Chancellor, in which Judge Sharswood spoke of its being a common mistake to suppose that a doubtful title can be made marketable by an opinion of a court on a case stated between vendor and vendee, Pratt *v.* Ely, 67 Pa., 306, the Court held *untenable* one objection to the substance of the title, as it was cured by the statute of limitations; but on a question of an incumbrance on the title, whether a "mortgage" was within the words of a statute providing that if there was "no payment for twenty-one years on a ground rent, annuity or *other charge* upon real estate, it should be presumed extinguished," the Court were divided, and the title refused on that ground alone.

This is not a very satisfactory case on which to hold titles *doubtful*.

Freer *v.* Herse, 4 De G., M. & G., 495; S. C., 21 Eng. L. & Eq., 82 (cited by Parsons on Contracts, Vol. 3, p. 380) was a case in which the construction of a late English statute as to discharge of judgments by not docketing, unless there was actual notice of them, Court

held the *construction* of the statute was unsettled, and the fact of notice not made out. Yet in this case the purchaser fulfilled, even against the opinion of the Court.

Collard *v.* Sampson, 4 De G., M. & G., 224 (S. C., 21 Eng. L. & Eq., 352), was a case of unsettled construction of an act of parliament, and there was reasonable doubt of it.

Garrett *v.* Macon, 2 Brock, 244, cited by Parsons, was a clear case of notice of an intent to commit a breach of trust, the seller intending to use the purchase money contrary to the trust (p. 243).

Lord Eldon, in one case, Moody *v.* Walters, 16 Vesey, Jr., 314, said he had no doubt, but if he had been counsel of the purchaser, he should do as he had done, require the seller to file a bill; he decreed performance.

By the Courts warranting the title, is meant as good a warranty as can be procured from a court of appeal, which is a precedent for a decision in purchaser's favor.

I Sugden on Vendors, 508, 7th Am. from 11th London Edn., Ch. X., Section 3. See long note (4) to 1 Vesey, Jr., 367, as to doubtful titles.

The expression of the Courts "warranting the title" seems first used by Lord Thurlow in Heath *v.* Heath, 1 Brown, C. C., 148, where he had held that the seller had a fee defeasible, *i. e.*, a fee subject to be defeated by an executory devise—*a clearly bad title.*

Hovenden in note (4) to 1 Vesey, Jr., 567, say this word warranty, is not to be understood in its absolute sense.

Sir Wm. Grant in Toulmin *v.* Steere, 3 Merv., 223, said the Court of Chancery employs its officer to investigate titles to estates, but does not warrant them.

1 Sugden on Vendors ch. X, §III, and IV., pages 508, 514, abounds in valuable suggestions on doubtful titles.

APPENDIX.

[GENERAL BANKING LAW, AS ORIGINALLY PASSED.]

(Laws 1838, Chap. 260, P. 245.)

An Act *to authorize the business of Banking. Passed April* 18, 1838.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. The Comptroller is hereby authorized and required to cause to be engraved and printed in the best manner, to guard against counterfeiting, such quantity of circulating notes, in the similitude of bank notes, in blank, of the different denominations authorized to be issued by the incorporated banks of this State, as he may from time to time deem necessary, to carry into effect the provisions of this act, and of such form as he may prescribe.

Such blank circulating notes shall be countersigned, numbered, and registered in proper books, to be provided and kept for that purpose in the office of said Comptroller, under his direction, by such person or persons as the said Comptroller shall appoint for that purpose, so that each denomination of such circulating notes shall *all be of the same similitude*, and bear the uniform signature of such register, or one of such registers.

§ 2. Whenever any person or association of persons, formed for the purpose of banking under the provisions of this act, shall legally transfer to the Comptroller any portion of the public debt now created, or hereafter to be created, by the United States, or by this State, or such

other States of the United States as shall be approved by the Comptroller, such person or association of persons shall be entitled to receive from the Comptroller an equal amount of such circulating notes, of different denominations, registered and countersigned as aforesaid; but such public debt shall in all cases be, or be made to be, equal to a stock of the State producing five per cent. per annum; and it shall not be lawful for the Comptroller to take any stock at a rate above its par value.

§ 3. Such person or association of persons are hereby authorized, after having executed and signed such circulating notes in the manner required by law, to make them obligatory promissory notes, payable on demand, at the place of business within this State, of such person or association, to loan and circulate the same as money, according to the ordinary course of banking business, as regulated by the laws and usages of this State.

§ 4. In case the maker or makers of any such circulating note, countersigned and registered as aforesaid, shall at any time hereafter, on lawful demand, during the usual hours of business, between the hours of ten and three o'clock, at the place where such note is payable, fail or refuse to redeem such note in the lawful money of the United States, the holder of such note making such demand may cause the same to be protested for non-payment by a notary public, under his seal of office, in the usual manner; and the Comptroller, on receiving and filing in his office such protest, shall forthwith give notice in writing to the maker or makers of such note to pay the same; and if he or they shall omit to do so for ten days after such notice, the Comptroller shall immediately thereupon (unless he shall be satisfied that there is a good and legal defence against the payment of such note or notes), give notice in the State paper that all the circulating notes issued by such person or association will be redeemed out of the trust funds in his hands for that purpose; and it shall be lawful for the Comptroller

to apply the said trust funds belonging to the maker or makers of such protested notes to the payment and redemption of such notes, with costs of protest, and to adopt such measures for the payment of all such circulating notes put in circulation by the maker or makers of such protested notes, pursuant to the provisions of this act, as will, in his opinion, most effectually prevent loss to the holders thereof.

§ 5. The Comptroller may give to any person or association of persons so transferring stock, in pursuance of the provisions of this act, powers of attorney to receive interest or dividends thereon, which such person or association may receive and apply to their own use; but such powers may be revoked upon such person or association failing to redeem the circulating notes so issued, or whenever, in the opinion of the Comptroller, the principal of such stock shall become an insufficient security; and the said Comptroller, upon the application of the owner or owners of such transferred stock in trust, may, in his discretion, change or transfer the same for other stocks of the kinds before specified in this act, or may re-transfer the said stocks, or any part thereof, or the mortgages, or any of them hereinafter mentioned and provided for, upon receiving and canceling an equal amount of such circulating notes delivered by him to such person or association, in such manner that the circulating notes shall always be secured in full, either by stocks or by stocks and mortgages, as in this act provided.

§ 6. The bills or notes so to be countersigned, and the payment of which shall be so secured by the transfer of public stocks, shall be stamped on their face, "Secured by the pledge of public stocks."

§ 7. Instead of transferring public stocks, as aforesaid, to secure the whole amount of such bills or notes, it shall be lawful for such person or association of persons, in case they shall so elect, before receiving any of

the said bills or notes, to secure the payment of one-half of the whole amount so to be issued, by transferring to the Comptroller bonds and mortgages upon real estate, bearing at least six per cent. interest, of this State, payable annually or semi-annually; in which case all such bills or notes issued by the said person, or association of persons, shall be stamped on their face, "Secured by pledge of public stocks and real estate."

§ 8. Such mortgages shall be only upon improved, productive, unincumbered lands, within this State, worth, independently of any buildings thereon, at least double the amount for which they shall be so mortgaged; and the Comptroller shall prescribe such regulations for ascertaining the title and the value of such lands as he may deem necessary; and such mortgages shall be payable within such time as the Comptroller may direct.

§ 9 The Comptroller may, in his discretion, re-assign the said bonds and mortgages, or any of them, to the person or association who transferred the same, on receiving other approved bonds and mortgages of equal amount; and when any sum of the principal of the bonds and mortgages transferred to the Comptroller shall be paid to him, he shall notify the person or association that transferred the bonds and mortgages of such payment, and may pay the same to such person or association on receiving other approved bonds and mortgages of equal amount.

§ 10. The person, or association of persons, assigning such bonds and mortgages to the Comptroller may receive the annual interest to accrue thereon, unless default shall be made in paying the bills or notes to be countersigned as aforesaid, or unless, in the opinion of the Comptroller, the bonds and mortgages or stocks so pledged shall become an insufficient security for the payment of such bills or notes.

§ 11. In case such person or association of persons shall fail or refuse to pay such bills or notes on demand, in the manner specified in the fourth section of this act, the Comptroller, after the ten days' notice therein mentioned, may proceed to sell at public auction the public stocks so pledged, or the bonds and mortgages so assigned, or any or either of them, and out of the proceeds of such sales shall pay and cancel the said bills or notes, default in paying which shall have been made as aforesaid; but nothing in this act contained shall be considered as implying any pledge on the part of the State for the payment of said bills or notes, beyond the proper application of the securities pledged to the Comptroller for their redemption.

§ 12. The public debt and bonds and mortgages to be deposited with the Comptroller by any such person or association, shall be held by him exclusively for the redemption of the bills or notes of such person or association put in circulation as money, until the same are paid.

§ 13. The plates, dies and materials to be procured by the Comptroller for the printing and making of the circulating notes provided for hereby, shall remain in his custody and under his direction; and the expenses necessarily incurred in executing the provisions of this act shall be audited and settled by the Comptroller, and paid out of any moneys in the treasury not otherwise appropriated; and for the purpose of reimbursing the same, the said Comptroller is hereby authorized and required to charge against and receive from such person or association applying for such circulating notes, such rate per cent. thereon as may be sufficient for that purpose, and as may be just and reasonable.

§ 14. It shall not be lawful for the Comptroller, or other officer, to countersign bills or notes for any person or association of persons, to an amount in the aggregate exceeding the public debt, or public debt and bonds and

mortgages at their value, as provided in the second section of this act, deposited with the Comptroller by such person or association; and any Comptroller or other person who shall violate the provisions of this section, shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by a fine not less than five thousand dollars, or be imprisoned not less than five years, or by both such fine and imprisonment.

§ 15. Any number of persons may associate to establish offices of discount, deposit, and circulation, upon the terms and conditions and subject to the liabilities prescribed in this act; but the aggregate amount of the capital stock of any such association shall not be less than one hundred thousand dollars.

§ 16. Such persons, under their hands and seals, shall make a certificate which shall specify,—

1. The name assumed to distinguish such association, and to be used in its dealings.
2. The place where the operations of discount and deposit of such association are to be carried on; designating the particular city, town, or village.
3. The amount of the capital stocks of such association, and the number of shares into which the same shall be divided.
4. The names and places of residence of the shareholders, and the number of shares held by each of them respectively.
5. The period at which such association shall commence and terminate; which certificate shall be proved or acknowledged, and recorded in the office of the clerk of the county where any office of such association shall be established, and a copy thereof filed in the office of the Secretary of State.

§ 17. The certificate required by the last preceding section, to be recorded and filed in the offices of the clerk of the county and Secretary of State as aforesaid, or

copies thereof, duly certified by either of those officers, may be used as evidence in all courts and places for and against any such association.

§ 18. Such association shall have power to carry on the business of banking; by discounting bills, notes and other evidences of debt, by receiving deposits; by buying and selling gold and silver bullion, foreign coins and bills of exchange, in the manner specified in their articles of association for the purposes authorized by this Act; by loaning money on real and personal security; and by exercising such incidental powers as shall be necessary to carry on such business; to choose one of their number as president of such association; and to appoint a cashier, and such other officers and agents as their business may require, and to remove such president, cashier, officers and agents at pleasure, and appoint others in their place.

§ 19. The shares of said association shall be deemed personal property, and shall be transferable on the books of the association in such manner as may be agreed on in the articles of association; and every person becoming a shareholder by such transfer, shall, in proportion to his shares, succeed to all the rights and liabilities of prior shareholders; and no change shall be made in the articles of association by which the rights, remedies or security of its existing creditors shall be weakened or impaired. Such association shall not be dissolved by the death or insanity of any of the shareholders therein.

§ 20. It shall be lawful for any association of persons organized under this act, by their articles of association, to provide for an increase of their capital, and of the number of the associates, from time to time, as they may think proper.

§ 21. Contracts made by any such association, and all notes and bills by them issued and put in circulation as money, shall be signed by the president or vice-president

and cashier thereof; and all suits, actions and proceedings brought or prosecuted by or on behalf of such association, may be brought or prosecuted in the name of the president thereof; and no such suit, action or proceeding shall abate by reason of the death, resignation or removal from office of such president, but may be continued and prosecuted according to such rules as the courts of law and equity may direct, in the name of his successor in office, who shall exercise the powers, enjoy the rights, and discharge the duties of his predecessor.

§ 22. All persons having demands against any such association may maintain actions against the president thereof; which suits or actions shall not abate by reason of the death, resignation or removal from office of such president, but may be continued and prosecuted to judgment against his successor; and all judgments and decrees obtained or rendered against such president for any debt or liability of such association, shall be enforced only against the joint property of the association, and which property shall be liable to be taken and sold by execution under any such judgment or decree.

§ 23. No shareholder of any such association shall be liable in his individual capacity for any contract, debt, or engagement of such association, unless the articles of association by him signed shall have declared that the shareholder shall be so liable.

§ 24. It shall be lawful for such association to purchase, hold and convey real estate for the following purposes:

1. Such as shall be necessary for its immediate accommodation in the convenient transaction of its business; or,

2. Such as shall be mortgaged to it, in good faith, by way of security for loans made by or moneys due to such association; or,

3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or,

4. Such as it shall purchase at sales under judgments, decrees or mortgages held by such association.

The said association shall not purchase, hold or convey real estate in any other case or for any other purpose; and all conveyances of such real estate shall be made to the president or such other officer as shall be indicated for that purpose in the articles of association; and which president or officer, and his successors, from time to time, may sell, assign and convey the same, free from any claim thereon, against any of the shareholders, or any person claiming under them.

§ 25. Upon the application of creditors or shareholders of any such association, whose debts or shares shall amount to one thousand dollars, and stating facts, verified by affidavit, the Chancellor may, in his discretion, order a strict examination to be made by one of the masters of his court of all the affairs of such association, for the purpose of ascertaining the safety of its investments and the prudence of its management; and the result of every such examination, together with the opinion of the Master and of the Chancellor thereon, shall be published in such manner as the Chancellor shall direct, who shall make such order, in respect to the expenses of such examination and publication, as he may deem proper.

§ 26. Such association shall, on the first Mondays of January and July in every year, after having commenced the business of banking, as prescribed by this Act, make out and transmit to the Comptroller, in the form to be provided by him, a full statement of the affairs of the association, verified by the oath of the president or cashier, which statement shall contain:—

1. The amount of capital stock paid in according to the provisions of this Act, or secured to be paid.

2. The value of the real estate of the association;

specifying what portion is occupied by the association as necessary to the transaction of business.

3. The shares of stock held by such association, whether absolutely or as a collateral security; specifying each kind and description of stock, and the number and value of the shares of each.

4. The amount of debts due to the association; specifying such as are due from moneyed or other corporations or associations; and also specifying the amount secured by bond and mortgage or judgment; and the amount which ought to be included in the computation of losses.

5. The amount of debts due by such association; specifying such as are payable on demand, and such as are due to moneyed or other corporations or associations.

6. The amount of claims against the association not acknowledged by it as debts.

7. The amount of notes, bills or other evidences of debt issued by such association.

8. The amount of the losses of the association; specifying whether charged on its capital or profits, since its last preceding statement, and of its dividends declared and made during the same period.

9. The average amount in each month during the preceding six months of the debts due to and from the association; the average amount of specie possessed by the same during each month, and the amount of bills and notes issued by such association and put in circulation as money, and outstanding against the association, on the first day of each of the preceding six months.

10. The average amount in each month during the preceding six months due to the association from all the shareholders in the association; also, the greatest amount due to the association in each of the said preceding six months from all the shareholders in such association.

11. The amount which the capital of the association has been increased during the preceding six months, if there shall have been any increase of the said capital; and the names of any persons who may have become parties to the said articles of association, or may have withdrawn therefrom since their last report.

It shall be the duty of the Comptroller to cause the statement required to be made by this section to be published in a newspaper printed in the county where the place of business of such association is situated, and in the State paper; the expense of which shall be paid by such association.

§ 27. If such association shall neglect to make out and transmit the statement required in the last preceding section, for one month beyond the period when the same is required to be made, or shall violate any of the provisions of this act, such association may be proceeded against, and dissolved by the Court of Chancery, in the same manner as any moneyed corporation may be proceeded against and dissolved.

§ 28. If any portion of the original capital of any such association shall be withdrawn for any purpose whatever, whilst any debts of the association remain unsatisfied, no dividends or profits on the shares of the capital stock of the association shall thereafter be made, until the deficit of capital shall have been made good, either by subscription of the shareholders, or out of the subsequently accruing profits of the association; and if it shall appear that any such dividends have been made, it shall be the duty of the Chancellor to make the necessary orders and decrees for closing the affairs of the association, and distributing its property and effects among its creditors and shareholders.

§ 29. Such association shall be liable to pay the holder of every bill or note put in circulation as money, the payment of which shall have been demanded and refused, damages for non-payment thereof, in lieu of interest, at and after the rate of fourteen per cent. per annum, from the time of such refusal, until the payment of such evidence of debt, and the damages thereon.

§ 30. The president and cashier of every association formed pursuant to the provisions of this act shall at all times keep a true and correct list of the names of all the shareholders of such association, and shall file a copy of such list in the office of the clerk of the county where any office of such association may be located, and also in the office of the Comptroller, on the first Mondays of January and July, in every year.

§ 31. It shall not be lawful for any association formed under the provisions of this act to make any of its bills or notes of a denomination less than one thousand dollars to be put in circulation as money, payable at any other place than at the office where the business of the association is carried on and conducted.

§ 32. The Legislature may at any time alter or repeal this act.

§ 33. No association of persons authorized to carry on the business of banking under this act shall at any time, for the space of twenty days, have on hand at their place of business less than twelve and a half per cent. in specie on the amount of the bills or notes in circulation as money.

In Chancery of New Jersey.

To the Honorable THEODORE RUNYON, *Chancellor of the State of New Jersey.*

Humbly complaining, your orators PETER C. CORNELL, ANDREW E. DOUGLASS and ALEXANDER H. BULLOCK, commonly called and known as Trustees of the Hazard Trust, show unto your Honor as follows:—

1. The complainants, on the seventeenth day of September, in the year eighteen hundred and eighty-one, were in possession of, and, as they were advised, held the legal title to

All that certain plot, piece or parcel of land situate, lying and being at Constable Point, in the City of Bayonne, County of Hudson and State of New Jersey, bounded and described as follows:—

Beginning at a cedar monument standing in the division line between lands of your orators and lands known as belonging to the Tracy heirs, which said monument is the most northerly corner of lands conveyed by your orators to the Standard Oil Company, by deed dated the twenty-eighth day of March, eighteen hundred and eighty-one, and recorded in Hudson County Register's office on the 14th day of April, 1881, in Book 354 of Deeds, at page 501—and from said cedar monument to run, *First*, South seventy-five degrees and fifty-five minutes east (S. 75°, 55′ E.), being along northernmost line of said land conveyed to said Standard Oil Company, and passing over a stone monument standing at or near high water-mark of New York Bay two thousand six hundred and eighty-one and twenty-three one-hundredths ($2,681\frac{23}{100}$)

feet to the exterior line for solid filling in New York Bay, as said exterior line is established by the Riparian Commissioners of the State of New Jersey; thence *Second*, Curving northwardly with a radius of six hundred and eighty-eight and sixteen one-hundredths ($688\frac{16}{100}$) feet along said line for solid filling three hundred and eighty-six and seventy-four one-hundredths ($386\frac{74}{100}$) feet; thence *Third*, North twenty degrees and one minute west (N. 20°, 1′ W.), still along said line for solid filling seven hundred and eighty-six and three-tenths ($786\frac{3}{10}$) feet; thence *Fourth*, South sixty-nine degrees and fifty-nine minutes west, one thousand one hundred and thirty feet (S. 69°, 59′ W., $1{,}130\frac{00}{100}$ feet); thence *Fifth*, North seventy-eight degrees and twenty-nine minutes west (N. 78°, 29′ W.), passing over a stone monument standing at or near high water-mark of New York Bay nine hundred and eighty-eight and seventy one-hundredths ($988\frac{70}{100}$) feet to a stone monument standing in the centre line of the road known as road leading to Terhune's Mill; thence *Sixth*, North seventy-five degrees and nine minutes west (N. 75°, 9′ W.), being along the centre of said old road known as road leading to Terhune's Mill twenty-seven and ninety-four one-hundredths ($27\frac{94}{100}$) feet to a stone monument; thence *Seventh*, curving to the left with a radius of one hundred and fifty-seven and forty-six one-hundredths ($157\frac{46}{100}$) feet, and still along the centre of said old road known as road leading to Terhune's Mill ninety-six and eighty-seven one-hundredths ($96\frac{87}{100}$) feet to a stone monument; thence *Eighth*, South sixty-nine degrees and thirty-six minutes west (S. 69°, 36′ W.), still along the centre of said old road known as road leading to Terhune's Mill, seventy-eight and fifty-eight one-hundredths ($78\frac{58}{100}$) feet to a stone monument; thence *Ninth*, curving to the right with a radius of one hundred and twenty-one and sixty-three one-hundredths ($121\frac{63}{100}$) feet, and still along the centre of said old road known as road leading to Terhune's Mill one hundred and twenty-two and thirty-one one-hundredths ($122\frac{31}{100}$) feet to a stone monument standing in the division line between lands of your orators and lands known as belonging to

the Tracy heirs; thence *Tenth*, South seven degrees and fifty-two minutes east, two hundred and seventy-two and seventy-nine one-hundredths feet (S. 7°, 52′ E., $272\frac{79}{100}$ feet) to the cedar monument at the place of beginning: Containing thirty-two and four hundred and twenty-nine one-thousandths ($32\frac{429}{1000}$) acres, strict measurement. Subject, however, to an easement and right of way through and across said premises by an old road leading to Terhune's Mill; together with all the right, title and interest of your orators, of, in and to the wharf and water right privileges, and of, in and to the land under water lying in front of the easterly boundary of said premises and between the northerly and southerly lines thereof produced in a straight line.

2. Being so possessed on the said seventeenth day of September, 1881, your orators made an agreement in writing with John E. Andrus, the defendant hereto, at the City of New York, and in the State of New York, whereby it was agreed between your orators and said Andrus,—in consideration of $2,500 paid to them at the time of such agreement by the said Andrus,—as follows: that your orators would,—for the sum of $65,000, of which said $2,500 was to be a part,—sell and convey to the said Andrus, and to his heirs and assigns forever, the said premises above described.

It was agreed that said sum of $65,000 should be paid as follows:—the said sum of $2,500 at the time of the signing of the agreement; $22,500 in cash on the first day of November, A. D. 1881; and $40,000 to be secured by said Andrus' bond, and his mortgage to your orators on the said lands.

The said last mentioned sum was to bear interest at six per centum per annum, and said interest was to be payable semi-annually.

On the payment of the $22,500 and the delivery of the bond and mortgage for the $40,000, your orators were to execute, acknowledge and deliver to the said Andrus a proper trustee's deed, with the usual full covenants for the conveying and assuring to him the fee sim-

ple of the said premises, free from all encumbrances suffered by, through or under your orators, to the first day of November, A. D. 1881. The deed was to be subject, however, to an easement and right of way across said premises by an old road leading to Terhune's Mill. The deed was to be delivered and received at the office of W. J. Osborne, 55 Pine Street, New York City, at eleven o'clock in the forenoon of said first day of November, in the year 1881.

3. Your orators caused to be prepared a deed for the said premises so agreed to be sold and conveyed, and on the 31st day of October, A. D. 1881, they signed, sealed and acknowledged the same, and by the said deed did purport to bargain, sell and convey to the said John E. Andrus, and to his heirs and assigns forever, the said premises so agreed to be sold and conveyed,—in the manner in and by said agreement stipulated.

4. On the said first day of November, in the year 1881, at eleven o'clock of that day, your orators attended at the said office of the said W——— J. Osborne, at number 55 Pine Street, in the City of New York, for the purpose of delivering the said deed and of receiving the said sum of $22,500 and the said bond and mortgage of the said Andrus to your orators on the said premises; and then and there were ready to tender the said deed to the said John E. Andrus, but the said John E. Andrus waiving said tender, alleged that he would not accept the said deed, or pay or tender said sum of $22,500, or said bond and mortgage for $40,000, because the title of your orators (he was advised by counsel), was not a legal title in fee simple.

The only defect of title insisted upon by the said defendant is this: that your orators' title is derived under a mortgage bearing date the 14th day of November, A. D. 1838, made by Thomas E. Davis, the then owner thereof in fee simple, and by his wife, and duly acknowledged and recorded, which mortgage the defendant alleges he is advised did not clearly convey a fee simple;—

and, is founded upon a decree of foreclosure thereof, made in the year 1843 in this Court; and upon a sale in the year 1843 of the said premises under said decree of this Court foreclosing the equity of redemption of the then legal owner of the fee simple, and ordering the said sale; and upon a deed from the Sheriff, to whom the *fieri facias* to enforce said foreclosure decree, was directed and delivered—to a remote grantor of your orators, in and about the year 1843.

5. In order that this Court may have a clear understanding of what is alleged to be the defect of title insisted on, your orators have annexed hereto a copy of the said mortgage in a schedule marked "A."

The said mortgage bears date the 14th day of November in the year 1838, and at the time of the making thereof Thomas E. Davis, it is conceded, was the owner of the fee simple of said premises so agreed to be conveyed.

The said mortgage was given by Thomas E. Davis and Anne, his wife, as party of the first part, unto "Joseph "D. Beers, the President of The North American Trust "and Banking Company," of the second part.

The said Thomas E. Davis and Anne, his wife, in and by said mortgage, after reciting the giving by him and others of twelve bonds (bearing even date with said mortgage) to the said Company, for the payment of various sums of money by the obligor or obligors in said bonds respectively mentioned, in all amounting to the sum of $170,000 principal moneys, besides interest, as mentioned in the conditions of said bonds respectively, and that the interest was payable semi-annually and the principal sums in one year after the date of said bonds and mortgage—did—(as is therein stated) for the better securing the payment of said several sums of money mentioned in the conditions of the said several bonds or obligations, with interest thereon respectively, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to them in hand paid by the party of the second part at or before the ensealing and deliv-

ery of those presents, the receipt whereof was thereby acknowledged,—grant, bargain, sell, alien, release, convey and confirm to the said party of the second part, and to his successors and assigns forever, the said premises so agreed to be purchased from your orators by the said Andrus, and other lands, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties thereto of the first part.

To have and to hold the therein above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, his successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, his successors and assigns forever; provided always nevertheless, and those presents were therein declared to be on the express condition that if the said obligors in said bonds should well and truly pay, or cause to be paid, unto the said party of the second part, his successors or assigns, the said several sums of money mentioned in the conditions of the said bonds, with the interest at the times and in the manner mentioned in the conditions thereof, then and from thenceforth those presents, and the estate thereby granted, should cease, determine, and be utterly null and void.

The said mortgage also contained further provisions therein, and among the rest a covenant by the said Davis for himself and his heirs (which words, "his heirs," your orators charge, indicate a clear intention to pass a fee simple by the said mortgage); that after default in the performance of the conditions of said bonds, the said party of the second part, his successors and assigns, might enter into, possess and enjoy the thereby bargained premises without the let, suit, trouble, hindrance, molestation, interruption or denial of the said parties of the first part, their heirs or assigns, or of any other person or persons whatsoever]; (which mention, again, of the heirs of said Davis also indicated the said clear intention to vest a fee simple in the mortgagee).

The due acknowledgment by the parties of the first part, and the recording of the said mortgage, are undisputed by the said defendant John E. Andrus.

The said Thomas E. Davis and Anne, his wife, on the tenth day of January, in the year eighteen hundred and thirty-nine, by their deed of bargain and sale, bearing that date, did,—for the consideration of $300,000, to them paid by The Bergen Port Company, a corporation of the State of New Jersey created by special act of the Legislature of said State of New Jersey, passed the seventh day of March, A. D. 1837, and to be found in the Pamphlet Laws of that year at page 387, &c.,—bargain, sell and convey the said premises so agreed to be purchased from your orators by the said Andrus, and other lands, unto the said The Bergen Port Company, and to their successors and assigns forever,—and also all the estate, right, title, interest, dower and right of dower, possession, property, claim and demand whatsoever of the said Davis and wife, of, in and to the same.

To have and to hold the therein above granted and described premises unto the said The Bergen Port Company, their successors and assigns, to their only proper use and behoof forever.

The said conveyance last mentioned contained a clause following immediately after the *habendum* in the words following:

"Subject, nevertheless, to a certain indenture of mortgage bearing date the fourteenth day of November, one thousand eight hundred and thirty-eight, made and executed by the said parties hereto of the first part to Joseph D. Beers, President of The North American Trust and Banking Company, to secure the sum of one hundred and seventy thousand dollars, together with the interest to grow due thereon from the day of the date thereof, which forms part of the consideration money above named."

5(*a*). And your orators insist that the said clause last mentioned not only indicated that the said mortgage passed a fee simple but charged the said mortgage on the estate in fee conveyed by the said deed of Davis and wife to The Bergen Port Company; and, that by virtue thereof, if the said mortgage did not technically convey

a fee (which your orators insist it did), the said mortgage, as against the said Davis and wife, and as against the said The Bergen Port Company, was a mortgage of the fee simple of the premises so mortgaged; and thereby also both said Davis and wife and their heirs, and the said The Bergen Port Company, its successors and assigns, are estopped both at law and in equity to deny that a fee simple passed by the said mortgage; and to deny that the said foreclosure of said mortgage against the said The Bergen Port Company and the said sale thereunder passed a fee simple to the purchaser at said Sheriff's sale.

5(*b*). The said deed to The Bergen Port Company was duly acknowledged by said Davis and wife, and in due time recorded.

6. The said mortgage, on the 15th day of December, A. D. 1840, was assigned in writing under seal by "Thomas G. Talmage, President of the said North American Trust and Banking Company," the said Thomas G. Talmage then and there being the then President of said company, and the successor in office of the said Joseph D. Beers, party of the first part, to Thomas G. Talmage, Henry Yates and William Curtis Noyes, and the said foreclosure suit was commenced by said assignees in this Court against the said The Bergen Port Company; and such proceedings were thereupon had that the said premises so agreed to be purchased from your orators by the said Andrus were decreed to be sold to satisfy said mortgage, and were duly sold to purchasers from whom your orators by many mesne conveyances derive title.

It is unnecessary to state said decree foreclosure or said conveyances, inasmuch as there is no dispute between your orators and said Andrus as to said title except upon the point stated above.

7. Your orators further show, that the said The North American Trust and Banking Company was a corporation of the State of New York, duly created by virtue of and pursuant to a statute of said State, passed by the Leg-

islature of said State on the eighteenth day of April, in the year eighteen hundred and thirty-eight, entitled "An Act to authorize the business of banking;" and was in existence at and before the date of said mortgage of Davis and wife to the said Joseph D. Beers, President of The North American Trust and Banking Company.

The said Joseph D. Beers was at the date of said mortgage the President of said company.

By the law of the State of New York at the time of the making of said bond and mortgage, and especially by the 24th section of the said Act of the Legislature of New York, the said Joseph D. Beers, so being President of the said The North American Trust and Banking Company, was at the date of said mortgage a corporation sole of the State of New York, and by the law of the State of New Jersey took a fee simple by said mortgage without any further limitation of estate than is contained in the said mortgage—to his successors and assigns.

8. To the end, therefore, that the said John E. Andrus may answer this your orators' bill without oath, and that he may be decreed to specifically perform said agreement between your orators and him, and to pay the said sum of $22,500 in cash without interest till decree, and to execute and deliver to your orators a mortgage on the said premises,—so by said agreement agreed to be sold and conveyed by your orators to said Andrus in fee simple, and purchased by said Andrus,—and a bond to your orators conditioned for the payment of said sum of forty thousand dollars with interest, as in said agreement stipulated, to be secured by said mortgage,—your orators being willing and hereby offering specifically to perform the said agreement on their part; and, on being paid the said remaining purchase money and interest, and on said John E. Andrus executing said mortgage and bond,—to execute a proper conveyance of the said premises to the said John E. Andrus, and to let him into possession of the rents and profits thereof from the said first day of November, A. D. 1881; and that your orators may have such further and other relief in the premises as shall be agreeable to equity.

May it please your Honor to grant unto your orators the State's most gracious writ of subpœna, issuing out of and under the seal of this Honorable Court, to be directed to the said John E. Andrus, commanding him on a certain day and under a certain penalty to be and appear before your Honor, in this Honorable Court, then and there to answer the premises and to abide and perform such decree in the premises as shall be agreeable to equity and to your Honor shall seem meet.

ROB'T GILCHRIST,
Sol'r for and of
Counsel with said Complainants.

SCHEDULE "A" TO THE BILL.

Mortgage.

This Indenture, made the fourteenth day of November, in the year of our Lord one thousand eight hundred and thirty-eight, between Thomas E. Davis of the City of New York and Anne, his wife, of the first part, and Joseph D. Beers, President of The North American Trust and Banking Company, in the City of New York, in trust for the said company and the shareholders thereof, being the officer indicated for that purpose by the Articles of Association of said company made and entered into under and pursuant to an act of the Legislature of the State of New York, entitled " An Act to authorize the business of banking," passed April 18th, 1838, of the second part. *Whereas*, the said Thomas E. Davis of the City of New York is justly indebted to the said party of the second part in the sum of twenty-five thousand five hundred dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents, in the penal sum of fifty-one thousand dollars lawful money as afore

said, conditioned for the payment of the said first mentioned sum of twenty-five thousand five hundred dollars.

And whereas, James B. Murray of the City of New York, gentleman, is justly indebted to the said party of the second part in the sum of twenty-five thousand five hundred dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents, in the penal sum of fifty-one thousand dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of twenty-five thousand five hundred dollars.

And whereas, Thomas Austin of the said City of New York, gentleman, is justly indebted to the said party of the second part in the sum of seventeen thousand dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents, in the penal sum of thirty-four thousand dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of seventeen thousand dollars.

And whereas, John L. Mason of the said City of New York, counsellor-at-law, is justly indebted to the said party of the second part in the sum of seventeen thousand dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents, in the penal sum of thirty-four thousand dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of seventeen thousand dollars.

And whereas, Thatcher T. Payne of the said City of New York, counsellor-at-law, is justly indebted to the said party of the second part in the sum of seventeen thousand dallars lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents, in the penal

sum of thirty-four thousand dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of seventeen thousand dollars.

And whereas, John W. Gossler of the said City of New York, merchant, is justly indebted to the said party of the second part in the sum of seventeen thousand dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents, in the penal sum of thirty-four thousand dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of seventeen thousand dollars.

And whereas, Andrew Parsons of Paterson, in the State of New Jersey, is justly indebted to the said party of the second part in the sum of seventeen thousand dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents, in the penal sum of thirty-four thousand dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of seventeen thousand dollars.

And whereas, John R. Satterlee of the City of New York, gentleman, is justly indebted to the said party of the second part in the sum of eight thousand five hundred dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents, in the penal sum of seventeen thousand dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of eight thousand five hundred dollars.

And whereas, Walter Mead of the said City of New York, gentleman, is justly indebted to the said party of the second part in the sum of eight thousand five hundred dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation

bearing even date with these presents in the penal sum of seventeen thousand dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of eight thousand five hundred dollars.

And whereas, Augustus F. Cammann of the County of Somerset, in the State of New Jersey, is justly indebted to the said party of the second part in the sum of fourteen thousand four hundred and fifty dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents, in the penal sum of twenty-eight thousand nine hundred dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of fourteen thousand four hundred and fifty dollars.

And whereas, John Travers of Paterson, in the State of New Jersey, is justly indebted to the said party of the second part in the sum of twelve hundred and seventy-five dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents, in the penal sum of two thousand five hundred and fifty dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of twelve hundred and seventy-five dollars.

And whereas, Thomas A. Alexander of the City of New York, merchant, is justly indebted to the said party of the second part in the sum of twelve hundred and seventy-five dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents, in the penal sum of two thousand five hundred and fifty dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of twelve hundred and seventy-five dollars, which said twelve several bonds or obligations, amounting in the aggregate to the sum of one hundred and seventy thousand dollars, are respective-

ly payable in one year from the dates thereof, with interest thereon respectively, at and after the rate of seven per centum per annum, to be paid half-yearly in the City of New York, as the same shall accrue on the first days of May and November in each and every year, until the said several principal sums of money shall be fully paid as by the said several bonds or obligations and the conditions thereof respectively, reference being thereunto had, may more fully appear.

Now this Indenture witnesseth, That the said parties of the first part, for the better securing the payment of the said several sums of money mentioned in the conditions of the said several bonds or obligations, with interest thereon respectively, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm to the said party of the second part, and to his successors and assigns forever, all those seven certain pieces or parcels of land situate in the Township and County of Bergen and State of New Jersey, containing in the aggregate two hundred and sixty-three acres and twenty-eight hundredths of an acre of land, be the same more or less, and which are more particularly described as follows:

First.—The first of said pieces of land being the part of Bergen Point usually called Constable's Hook, and bounded as follows: Commencing at a point on the northeasterly bank of Platly Kill Creek about twenty-five chains and seventy-eight links from its mouth, thence running north sixteen degrees east seventy-nine links to a stake, thence north eighty-two degrees, east thirty-six chains and sixty links, to a certain rock on the line of James J. Van Buskirk; thence south sixty-five degrees thirty minutes, east four chains sixty links, to an old wal-

nut tree in an angle of the property belonging to said Van Buskirk; thence north twenty-four degrees, east fourteen chains, to the Bay of New York; thence along said Bay easterly, westerly and southerly to the river Kill Von Kull, along said river southerly and westerly to the mouth of the afore-mentioned creek, and along the northeasterly bank of said creek to the place of beginning, comprising in all two hundred and thirteen acres and ninety-two-hundredths of an acre, be the same more or less.

The above courses being as the needle pointed in the year of our Lord one thousand eight hundred and thirty-six.

Second.—All that certain wood lot situate on Bergen Neck, bounded as follows: Beginning at a stake standing on the northwest side of the road leading from Bergen to Bergen Point, which said stake stands in the south corner of the wood lot of James Van Buskirk, and running thence along said road south thirty-eight degrees thirty minutes, west three chains thirty-five and a half links, to a stake; thence north fifty-two degrees, west thirty-nine chains eighty-six links, to the Newark Bay; thence northerly along said bay to a point from which a line drawn parallel to the second mentioned line will strike the place of beginning; thence from said point in a straight line to the place of beginning, containing thirteen acres and thirty-four hundredths of an acre of land. Bounded northeasterly by wood lot of James Van Buskirk, southeasterly by aforesaid road, southwesterly by woodland of Michael Zabriskie, and northwesterly by Newark Bay.

Third.—All that certain wood lot, containing five acres, bounded as follows: Southwest by wood land of J. G. and Gerritt T. Vanwinkle, northwest by land of Thomas Crips, northeast by wood land of Daniel Vreeland and southeast by wood land of Leonard Johnson; being the same premises more particularly described in deed from Peter Vreeland to Thomas E. Davis, one of

the parties hereto of the first part, bearing date the thirtieth day of August, one thousand eight hundred and thirty-six, and recorded in the clerk's office December 3, 1836.

Fourth.—All that certain lot, containing five acres and sixteen-hundredths of an acre of land, bounded as follows: Northerly by lot number four, sold to David Van Buskirk, easterly by a meadow of Cadmus, southerly by lot number six, sold to Jacob Cubberly, and west by land of H. Osborne and others; being the same premises further described in deed from Stephen Terhune to Thomas E. Davis, one of the parties hereto of the first part, bearing date the thirtieth day of August, one thousand eight hundred and thirty-six, and recorded in the Clerk's office December 20th, 1836.

Fifth.—All that certain piece or parcel of land, containing five acres and ninety-six one-hundredths of an acre of land, bounded southwest by the road leading from Bergen to Constable's Hook, northwest by road leading to Bergen Point, northeast by land of George Cadmus, and southeast by land of Jacob Van Horne; being the same premises conveyed by Michael Terhune to Thomas E. Davis, one of the parties hereto of the first part, by deed bearing date the thirtieth day of August, one thousand eight hundred and thirty-six, and recorded in the Clerk's office the 20th December, 1836.

Sixth.—All that piece or parcel of land bounded by a line commencing at a stake standing south thirty-seven degrees thirty-five minutes, west eleven chains and four links from a stone marked B standing in the west corner of the allotment of common lands number two hundred and seventy-seven; and from said stake running south fifty-two degrees twenty-five minutes, east twenty-three chains twenty links, to a stake by the meadow edge; thence south forty-four degrees thirty-five minminutes, west five chains sixty-eight links, to a stake; thence north fifty-two degrees, twenty-five minutes, west

twenty-two chains eighty links, to a stake in the middle of the road, being the northerly corner of the tract number four hundred and eighteen allotted to Jacob Van Buskirk; thence along the middle of said road north thirty-seven degrees thirty-five minutes, east five chains and sixty-three links, to the place of beginning, containing twelve acres and ninety-hundredths of an acre of land; the courses mentioned in the last description being as the needle pointed in January, one thousand, seven hundred and ninety-seven, and being the same premises conveyed to Thomas E. Davis, one of the parties hereto of the first part, by Michael Terhune, by deed bearing date the thirtieth day of August, one thousand eight hundred and thirty-six, and received in the Clerk's office 20th December, 1836.

Seventh.—All that piece and parcel of land containing seven acres, bounded northeasterly by the property of Benjamin Zabriskie, southeasterly by the road from Bergen to Bergen Point, southwesterly by the property of James Van Buskirk, and northwesterly by the property of Aaron Newkirk, being the same premises conveyed to Thomas E. Davis, one of the parties hereto of the first part, by Stephen Terhune, by deed bearing date the thirtieth day of August, one thousand eight hundred and thirty-six, and received in the Clerk's office 20th December, 1836. Together with all and singular the rights, members, privileges and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title and interest of the said parties of the first part, of, in and to the land under water adjacent to the said pieces or parcels of land, or any of them hereby conveyed or intended so to be, and all the right of the said parties of the first part to any grant of land under water adjacent to the said premises or any part thereof.

And also all the estate, right, title, interest, dower and right of dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties

of the first part, of, in and to the said hereby granted premises and every part and parcel thereof, with the appurtenances. To have and to hold the above granted, bargained and described premises, with the appurtenances unto the said party of the second part, his successors and assigns, to the only proper, use, benefit and behoof of the said party of the second part, his successors and assigns forever.

Provided always, nevertheless, and these presents are upon this express condition that if the said Thomas E. Davis, James B. Murray, Thomas Austin, John L. Mason, Thatcher T. Payne, John N. Gossler, Andrew Parsons, John R. Satterlee, Walter Mead, Augustus F. Cammann, John Travers, Thomas A. Alexander, their heirs, executors or administrators, shall and do well and truly pay or cause to be paid unto the said party of the second part, his successors or assigns the said several sums of money mentioned in the conditions of the said twelve in part recited bonds or other obligations, with the interest thereon, at the times and in the manner mentioned in the conditions of the said several bonds or obligations, and according to the true intent and meaning thereof, then and from thenceforth these presents and the estates hereby granted shall cease, determine and be utterly null and void, anything herein before contained to the contrary in anywise notwithstanding.

And the said Thomas E. Davis, one of the parties hereto of the first part, for himself, his heirs, executors and administrators, doth covenant and grant to and with the said party of the second part, his successors and assigns, that the said party of the second part, his successors and assigns, shall and may from time to time, and at all times after default shall be made in the performance of the proviso or condition hereinbefore contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance, molestation, interruption or denial of the said parties of the first

part, their heirs or assigns, or any other person or persons whatsoever; and it is further covenanted and agreed by the said parties of the first part to these presents that until the payment of the money hereby intended to be secured shall be fully made, it shall be lawful for the said party of the second part, his successors or assigns, at his option, to continue the insurance against loss or damage by fire now effected and assigned to him, or hereafter to be effected and assigned to him, on the buildings now erected or hereafter to be erected on the hereby granted premises, or to effect new insurance thereon, the said party of the second part in either case to designate the insurance company or companies at which such insurance shall be effected; and these presents shall operate as a security to all intents and purposes for the repayment of the premium or premiums for the said insurance, and the interest thereof, as effectually as if the same were specified in the said several bonds or obligations.

And it is also agreed between the parties hereto, that the said parties of the first part shall be at liberty to pay, and the said party of the second part agreed to receive, at the time designated in the said several bonds or obligations for the payment of the interest moneys aforesaid, the whole or any part of the said principal moneys.

In witness whereof, the parties to these presents of the first part have hereunto set their hands and seals the day and year first above written.

THOMAS E. DAVIS, [L. S.]
ANNE DAVIS, [L. S.]

Sealed and delivered in the presence of

L. B. WOODRUFF.

STATE OF NEW YORK,
City and County of New York, } *ss:*

Be it remembered, that on the tenth day of December, A. D., 1838, before me, Lewis B. Woodruff, Commissioner under the act of the Legislature of the State of New Jersey passed December 27th, 1826, and the supplement thereto passed November 3d, 1836, personally appeared Thomas E. Davis and Anne, his wife, who I am satisfied are the grantors mentioned and described in the foregoing mortgage deed, and I having first made known to them the contents thereof they severally acknowledged that they signed, sealed and delivered the same as their several voluntary act and deed for the uses and purposes therein expressed; and the said Anne, wife of the said Thomas E. Davis, being by me privately examined separate and apart from her said husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed freely, without any fears, threats or compulsion of her said husband.

L. B. WOODRUFF,
Commissioner.

ANSWER.

The answer of John E. Andrus, the said defendant, to the bill of complaint of the said complainant.

This defendant answering, says, that he admits the allegations contained in the following paragraphs of said bill, viz: the first, second, third, fourth, and also the allegagations contained in the fifth paragraph, except the parenthetical clauses insisted upon by the complainant, from the use of the word "heirs," in the covenants of mortgage therein set forth.

The defendant denies the charges contained in paragraph 5(*a*).

This defendant also admits the allegations contained in paragraph 5(*b*), and in the 6th paragraph; and of the allegations contained in the 7th paragraph, this defendant admits that The North American Trust and Banking Company was a corporation of the State of New York, duly created by virtue of the statute of that State mentioned in said bill; that Joseph D. Beers was President thereof at the date of said mortgage from Davis to Beers, as set out in said bill.

And this defendant insists that the said mortgage made by Thomas E. Davis to Joseph D. Beers, the President of said company, conveyed a life estate only to said Beers, and that therefore the title which passed by the subsequent decree of foreclosure and sale, and the sale founded upon said mortgage, was a life estate only in said lands, and that the complainants have no other or greater estate in said lands.

And this defendant prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

JOHN E. ANDRUS.

BENTLEY & HARTSHORNE,
Sol'rs of Def'd't.

It is stipulated that the statute of the State of New York mentioned in the bill of complaint, and the decisions of the courts of the State of New York, shall be admitted as though proved in evidence.

CHAS. H. HARTSHORNE,
Of Counsel with Def'd't

ROB'T GILCHRIST,
Sol'r and of Counsel with Compl'ts.

Dec. 12, 1881.

FEBRUARY TERM, 1882.

PETER C. CORNELL, and others,
v.
JOHN E. ANDRUS.

Bill for Specific Performance.

On Final Hearing on Bill and Answer.

Mr. R. GILCHRIST, for complainant.
Mr. C. H. HARTSHORNE, for defendant.

THE CHANCELLOR:—This suit is brought to enforce specific performance of a contract for the sale of land in Hudson County. The price agreed to be paid is $65,000. The defendant resists on the ground that the title is not such as he ought to be compelled to take, that it is at least a doubtful one. The complainants insist, on the other hand, that their title is good and free from all reasonable doubt. The objection made to the title is that it is derived under a mortgage given to "Joseph D. Beers, President of The North American Trust and Banking Company," which contained no words of inheritance, but conveyed the property to him, his successors and assigns. The defendant therefore apprehends, and is advised, that the estate mortgaged was but a life estate. The bill states that The North American Trust and Banking Company was, when the mortgage was given, a corporation of the State of New York duly created by virtue of and pursuant to a statute of that State passed April 18th, 1838, and entitled "An Act to authorize the business of banking," and that Beers was then its President, and that by virtue of the twenty-fourth section of that act he, as President, was a corporation sole of the State of New York, and therefore took an estate in fee under the mortgage notwithstanding the absence of words of inheritance.

On the hearing it was further urged that if Beers should not be held to be such corporation sole, it should be held that the words "Joseph D. Beers, President of The North American Trust and Banking Company," were one of the names of the corporation, and that in either case the title in fee passed by the mortgage.

In support of these propositions are adduced adjudications of the courts of New York, that associations under that act were corporations in fact, and that conveyances to the president were conveyances to the corporation, and also *dicta* of more or less weight to the effect that those corporations were binominous; one of their names being the one assumed, and the other that of the president (or other officer designated to hold and convey its land) as such. By the provisions of that act, mortgages or other conveyances of real estate to the association were not to be made to it, but to the president or such other officer as should be indicated for the purpose in the articles of association; and it was further provided, that the president or such other officer, and his successors, from time to time might sell, assign and convey the same, free from any claim thereon against any of the shareholders or any person claiming under them.

It is insisted on behalf of the complainants, that it is incumbent on this Court to pass upon and decide, for the purposes of this litigation, the question raised in defence—whether the mortgage which is the foundation of the title, conveyed an estate in fee or only for life. If such decision would have the force and effect of an adjudication in a direct proceeding for the purpose, and be an end of controversy on the subject, and establish the title, the Court might well proceed to the determination of the question—but this suit is a proceeding in *personam* merely, and will bind those only who are parties to it.

"It is a great, though perhaps a common, mistake," said the Court in *Pratt v. Eby*, 67 *Pa. St.*, 396, "to suppose that a doubtful title can be made marketable by an opinion of a Court in a case stated between vendor and vendee." The real question to be decided in this case is whether the title which the complainant offers is a mar-

ketable one. If it is such a title as would be questionable, the Court ought not to force it on the unwilling purchaser, even though in its opinion it would, on litigation, be sustained. Obviously, for the considerations before presented, the decision of the question in this suit would be but the opinion of this Court on the subject, which would still be open to litigation by parties claiming adversely to the title. It is conceded that on its face, and in the absence of the construction contended for by the complainants, the mortgage, for the want of words of inheritance, conveyed only a life estate.

The answer admits that The North American Trust and Banking Company was a corporation under the before mentioned statute, and that Beers was its President, but it deneis that a greater estate than a life estate passed by the mortgage. The title to real estate can only be acquired, passed and lost according to the *lex nei sitae*, and a party must have a capacity to take according to the law of the *situs*, otherwise he will be excluded from all ownership. (*Story Confl. of L.*, §§ 428–430.)

The question whether the mortgage was in fact given to a corporation, whether aggregate or sole, or to a natural person, is one to be determined by our courts, and until it shall have been so decided—in a direct proceeding,—the title will be subject to an objection materially affecting its marketable value.

The exercise of equity jurisprudence respecting the specific performance of contracts is not a matter of right in either party, but of sound and reasonable discretion in the Court. (*Story's Eq. Jur.*, § 742.) And the Court in the exercise of that discretion will not compel a party to take a title which may expose him to litigation, even though it may believe it to be good. (*Pyrke v. Waddington*, 10 *Hare*, 1; *Dobbs v. Norcross*, 9 *C. E. Gr.*, 327; *Fry on Spec. Per.*, § 573; *Waterman on Spec. Per.*, § 412, *and cases cited.*)

Said the Court in Tillotson v. Gessner, 6 Stew., 313: "The true rule is stated in 3 *Pars. on Con.*, (*6th Ed.*), 380, that if the character of the title be doubtful, although the Court were able to come to the conclusion that on the

whole a title could be made that would not probably be overthrown, this would not be good enough, for the Court have no right to say that their conclusion or their opinion would bind the whole world and prevent an assault on the title. The purchaser should have a title which shall enable him not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value. The Court cannot, satisfactorily or conclusively, settle a title in the absence of parties who are not before them in the suit to assert their estate or interest in the land." It is quite clear that if this Court were to compel the defendant to take the title in question it would have no judicial certainty that he would not be subject hereafter to litigation to test before other tribunals in direct proceedings the very question which it would have decided in this suit. Much less could it be certain that he would not be embarrassed in disposing of the property to purchasers by the apparent defect of estate which he now urges in his defence. Under such circumstances, a decree for specific performance should be denied.

IN CHANCERY OF NEW JERSEY.

Between PETER C. CORNELL, ANDREW E. DOUGLASS, and ALEXANDER H. BULLOCK, Trustees, *Compl'ts,*		*On Bill for Specific Performance.*
and		
JOHN E. ANDRUS, *Def'd't.*		*Decree.*

This cause coming on to be heard at the October term of this Court, 1881, upon bill and answer and evidence of the law of New York referred to at the foot of the answer, and Robert Gilchrist, Esquire, appearing as counsel for the complainaints, and Charles H. Hartshorne as counsel for the defendant, and the bill and

answer having been read, and the law of New York and the evidence thereof referred to in said agreement between the respective solicitors—which is at the foot of the answer—being also read and considered, and the arguments of counsel having been heard and duly considered by the Chancellor, and the Chancellor being of opinion that it is doubtful whether the mortgage in the bill mentioned,—made by Thomas E. Davis and wife to Joseph D. Beers, President of The North American Trust and Banking Company, a copy whereof is thereto annexed, conveyed a title in fee to the mortgaged premises described in said mortgage, of which the premises described in said bill are part, and that it is therefore doubtful whether the title tendered by the complainants to the defendant is a title in fee,—and that complainants are not entitled to the relief prayed for in their bill.

It is, on this second day of January, eighteen hundred and eighty-two, ordered, adjudged and decreed that the complainants' said bill be dismissed, with costs to be taxed, and without prejudice to an action at law.

THEODORE RUNYON, *C.*

IN CHANCERY OF NEW JERSEY.

Between PETER C. CORNELL and ANDREW E. DOUGLASS (surviving ALEXANDER H. BULLOCK, deceased), Trustees, &c.

Compl'ts,

and

JOHN E. ANDRUS,

Def'd't.

On Decree Dismissing Bill for Specific Performance.

Appeal.

Peter C. Cornell and Andrew E. Douglass, Trustees above named,—who with Alexander H. Bullock, who departed this life on the seventeenth day of January, A. D. 1882, after argument and decision of the cause, but before de-

cree actually signed, and whose death has been suggested on the record,—were complainants in this Court on a bill for specific performance against said John E. Andrus, and to whom, as surviving trustees, the cause of action survives,—hereby appeal from the final decree made in the said cause last mentioned bearing date the second day of January, A. D. eighteen hundred and eighty-two, whereby it was declared that it is doubtful whether the mortgage in the bill mentioned,—a copy whereof is thereto annexed, made by Thomas E. Davis and wife to Joseph D. Beers, President of The North American Trust and Banking Company, conveyed the mortgage title in fee to the premises described in said mortgage, of which the premises described in said bill are part, and that it is therefore doubtful whether the title tendered by the complainants to the defendant is a title in fee, and that the complainants are not entitled to the relief prayed in their bill, and whereby it is ordered, adjudged and decreed that the complainants' said bill be dismissed with costs to be taxed, without prejudice to an action at law, to the Court of Errors and Appeals in the last resort in all causes, &c.

ROB'T GILCHRIST,
Sol'r for Compl'ts and
Counsel for Compl'ts.

Dated February 20, A. D. 1882.

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

ROB'T GILCHRIST,
Of Counsel with Compl'ts.

NEW JERSEY COURT OF ERRORS & APPEALS

To the Honorable the Court of Errors & Appeals in the last resort in all causes.

The humble petition of Peter C. Cornell and Andrew E. Douglass, Trustees, respectfully shows that your petition-

ers find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Theodore Runyon, Chancellor of New Jersey, bearing date the second day of January, in the year eighteen hundred and eighty-two, in a certain cause wherein your petitioners, with Alexander H. Bullock, who departed this life on the seventeenth day of January, A. D. 1882, after argument and decision of the cause, but before decree actually signed, and whose death has been suggested on the record of the said Court of Chancery, were complainants (whom your petitioners survive, and to whom as surviving trustees the cause of action survives), and John E. Andrus was defendant,—in this respect, to wit: that it is thereby declared that it is doubtful whether the mortgage in the bill mentioned,—a copy whereof is thereto annexed,—made by Thomas E. Davis and wife to Joseph D. Beers, President of The North American Trust and Banking Company, conveyed the mortgage title in fee to the premises described in the said mortgage of which the premises described in said bill are part, and that it is therefore doubtful whether the title tendered by the complainants to the defendant is a title in fee, and that the complainants are not entitled to the relief prayed in their bill, and whereby it is ordered, adjudged and decreed that the complainants' said bill be dismissed with costs to be taxed, without prejudice to an action at law.

And your petitioners humbly appeal from the said decree upon the ground that the same is erroneous, for that it is not and was not doubtful whether, on the single objection made to the said title, the said mortgage conveyed the mortgage title in fee to the premises described in said mortgage, nor is it or was it doubtful whether, on the single objection made to the said title, the title tendered by the complainants to the defendant is or was a title in fee, and for that the complainants are and were, notwithstanding the said single objection made to said title, entitled to the relief prayed in their bill, and for that the said decree should have ordered the said agreement in said bill set forth to be specifically performed notwithstanding said objection.

Your petitioners therefore pray that the said decree of the said 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.

February 20, A. D. 1882.

ROBT. GILCHRIST,
Sol'r for and of
Counsel with Appellants.

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