

The Clerk's Table

New Jersey Court of Errors & Appeals.

BETWEEN

WALTER D. BELL and ALBERT W.
MARKLEY, Assignees of WILLIAM
W. FLEMING, *Appellants*,

AND

HENRY J. WILLIAMS, Executor, &c. of
THOMAS WILLIAMS, deceased, *Ap-
pellees*.

*On Appeal from the De-
cree of Chancellor.*

State of the Case.

On the 16th day of October, 1855, Walter D. Bell and Albert W. Markley, as assignees of William W. Fleming, for the benefit of his creditors, filed their Bill of Complaint in the Court of Chancery of New Jersey, against

Daniel L. Miller, Jr. and Anna R. his wife.

William H. Richards, and Mary his wife.

William W. Fleming, and Maria his wife.

Henry J. Williams, executor, &c. of Thomas Fleming, dec'd, and Andrew Given, and numerous creditors of said William W. Fleming, who had come in under said assignment, as defendants.

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The Bill sets out, among other things, in substance, that on the 11th day of September, 1854, said William W. Fleming duly made an assignment of all his estate to the complainants, for the benefit of his creditors, pursuant to our assignment laws; and that at the time of making said assignment, the said William W. Fleming and said William H. Richards (one of the defendants,) were equal tenants in common of a large tract of land in Burlington and Atlantic counties, called the "Atsion Estate," containing about sixty thousand acres; but that before filing the 20

said bill of complaint, the said William H. Richards had conveyed his undivided half of said lands to said Daniel L. Miller, Jr. who was then a tenant in common with said complainants. The bill then proceeds in reference to the bond and mortgage in question, as follows, viz :

And your orators further show unto your honor, that before the execution of the said deed of assignment, and on or about the eighth day of August, A. D. eighteen hundred and fifty-four, the said William W. Fleming made and executed to his father,
 10 Thomas Fleming, of Philadelphia, his bond in the penal sum of two hundred thousand dollars, conditioned for the payment of one hundred thousand dollars, in two years from the said date thereof, with interest thereon in quarterly payments ; and as a collateral security for the payment of said bond according to the conditions thereof, the said William W. Fleming, together with his wife Maria, also made and executed to said Thomas Fleming a mortgage upon their, the said William W. Fleming and wife's interest in the said Atsion Estate, with other lands, which said mortgage was afterwards, but before the making of the said
 20 assignment to your orators, recorded, or attempted to be recorded, in the respective clerk's offices of the aforesaid counties of Camden, Burlington and Atlantic, as your orators have been informed and believe.

And your orators further show unto your honor, that if the said mortgage so as aforesaid executed by the said William W. Fleming and wife, is valid, that upon a division of the said Atsion Estate as hereinafter prayed for, your orators admit that it should be charged upon and become an incumbrance only upon the part thereof that should be allotted to your orators, and the
 30 other land included in said mortgage ; but your orators expressly charge that the said bond and mortgage were and are fraudulent and void, and that the same ought to be vacated, and that the said mortgage is not an incumbrance for any amount upon the said Atsion Estate, or other lands included therein.

And your orators further show unto your honor, and charge that if the said bond and mortgage are not fraudulent and void, that then they were executed as aforesaid by the said William W. Fleming and wife, not to secure a debt of one hundred thousand dollars then due or owing by said William W. Fleming,
 40 but merely as a collateral security for certain sums of money then advanced or to be advanced by the said Thomas Fleming to the said William W. Fleming, and that the whole amount of money so advanced and to be advanced, and to secure which the said bond and mortgage were given, does not exceed the sum of fifty thousand dollars.

And your orators further show unto your honor, that after the execution of the said bond and mortgage, the said Thomas Fleming duly made and published his last will and testament, bearing date the fifteenth day of February, A. D. eighteen hundred and fifty-five, and afterwards departed this life without altering or revoking said last will and testament; which, since the decease of the said Thomas, was, by the executors therein named, duly proved in the city of Philadelphia, and it is of record in the office of the Register of Wills in and for said city; and that since having been so proved in said city of Philadelphia 10 according to the laws of Pennsylvania, the same has been proved before the Surrogate in and for the county of Camden, according to the laws of this state, and letters testamentary issued thereon to Henry J. Williams, one of the executors therein named, who have taken upon themselves the burden of executing said will upon the estate of said testator in this State, according to the laws thereof.

And your orators further show unto your honor, and charge that if the said bond and mortgage are or were when executed as aforesaid, valid as a security for any part of the money therein 20 mentioned, that the said Thomas Fleming in and by his said will gave and bequeathed the same to his said son William W. Fleming, as a portion of the estate given and devised by said Thomas Fleming to his children; and that the said Thomas, in and by his said will released the said William W. Fleming from the payment of the said bond and mortgage, and enjoined upon his said executors that they should not prosecute the said bond and mortgage, and as in and by the said last will and testament or a duly certified copy thereof now in the possession of your orators, will more fully and at large appear. 30

And your orators further show unto your honor, that the said Thomas Fleming in his lifetime claiming to be a creditor to a very large amount of the said William W. Fleming at the time of his said assignment, within three months thereafter presented his claim against the said William W. Fleming under oath to your orators as assignees as aforesaid, in and by which claim so presented the said Thomas Fleming claimed that the said William W. Fleming was indebted to him to the amount of one hundred and eighty-two thousand one hundred and ninety-five dollars and seventy-six cents, as by reference to said claim now 40 in the possession of your orators will more fully appear; which claim your orators afterwards and within the time limited by law, incorporated into a true list of all the claims of the other creditors of the said William W. Fleming, which had been presented to your orators as assignees as aforesaid, and filed said

list with the Clerk of the Inferior Court of Common Pleas of the county of Burlington; on which claim or such part thereof as may be established before such Court of Common Pleas, the said executor of the said Thomas Fleming will be entitled to a dividend from your orators out of the estate of the said William W. Fleming, assigned to your orators as aforesaid, unless the said Thomas Fleming in and by his said will released the said William W. Fleming therefrom as hereinbefore stated.

And your orators further show unto your honor, that the said
 10 Thomas Fleming in his said claims so as aforesaid presented to your orators, included all the debt or sum or sums of money secured or attempted or claimed to be secured by the aforesaid bond and mortgage to said Thomas Fleming. Your orators therefore charge and respectfully insist that the said Thomas Fleming having come in under said assignment and exhibited his demand as aforesaid for a dividend of the said estate of William W. Fleming, his executor is now wholly barred from having any further action or proceeding for the said debt or claim against
 20 the said William W. Fleming or his estate in the hands of your orators, and that any lien or incumbrance which might have been created upon the said lands by said mortgage if valid, was voluntarily abandoned and released by the said Thomas Fleming in his lifetime; and that his said executor cannot now claim any such lien or incumbrance.

After setting out various matters in relation to sundry liens and incumbrances upon the said tract of land and the creditors who had presented their claims to the said complainants as assignees aforesaid; and that the tract was susceptible of a division between the said complainants and said Daniel L. Miller,
 30 Jr., it prays among other things for such division, and that the aforesaid mortgage of William W. Fleming and wife to Thomas Fleming may be declared void and set aside; and for further relief (prout said bill).

The defendant, Henry J. Williams, executor, &c., filed the following Answer to said Bill of Complaint.

Copy of Answer.

The answer of Henry J. Williams, executor of the last will
 40 and testament of Thomas Fleming, deceased, to the Bill of Complaint of Walter D. Bell and Albert W. Markley, assignees of William W. Fleming, complainants. This defendant, reserving to himself all right of exception to the said bill of complaint, for answer thereto, or to so much thereof as he is advised is material or necessary for him to make answer unto, says, he admits

that the said William W. Fleming did, at the time mentioned in the said bill of complaint, duly executed under his hand and seal, an assignment of all his estate, real and personal, to the said complainants, and to Thomas Fleming and Stephen Colwell, in trust, for the benefit of the creditors of the said William W. Fleming, in pursuance of the directions of an Act of the Legislature of the State of New Jersey, entitled, "An Act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors." That the said complainants accepted the said 10 deed of assignment, and took upon themselves the execution of the trust therein contained. The said Thomas Fleming and Stephen Colwell, the other assignees named in the said deed of assignment, having refused to accept the same, as stated in the said bill of complaint. That at the time of the execution of the said deed of assignment, the said William W. Fleming and one William H. Richards, were equally seised in fee simple as tenants in common of several large and valuable tracts of land, situated in the counties of Burlington, Camden, and Atlantic, known as the "Atsion Estate," and 20 which are particularly described in the said bill of complaint, an undivided half part of which, by virtue of the said deed of assignment, became vested in the complainants as assignees as aforesaid.

And this defendant, further answering, says: That he has been informed, and believes it to be true, that since the execution of the said deed of assignment, the said William H. Richards and wife have conveyed all their estate and interest in the said "Atsion Estate," or some part thereof, to one Daniel L. Miller, Junior, who, by virtue of the said convey- 30 ance, now claims to have some estate and interest in the said "Atsion Estate," or in some part thereof, as tenant in common with the said complainants, assignees as aforesaid; but this defendant says he has no knowledge or information, save from the complainants' said bill, as to the particulars of the said conveyance, or as to the precise nature and extent of the said Daniel L. Miller's interest in the said "Atsion Estate," and has never seen the said deed of conveyance from the said William H. Richards and wife to the said Daniel L. Miller, but believes the same to be as in the said bill is alleged. 40

And this defendant, further answering, says: He admits that before the execution of the said deed of assignment, and on or about the eighth day of August, eighteen hundred and fifty-four, the said William W. Fleming made and executed to his father, Thomas Fleming, then of the City of Philadelphia, but now deceased, his bond in the penal sum of two hundred thousand dollars, conditioned for the payment of one hundred thousand dollars in two years from the date thereof, with interest thereon, in quarterly payments; and as a collateral secu-

rity for the payment of the said bond, according to the condition thereof, the said William W. Fleming, together with his wife Maria, at the same time, made and executed to the said Thomas Fleming, a mortgage in fee upon all the estate and interest of the said William W. Fleming and wife, in the said "Atsion Estate," together with other lands, which said deed of mortgage, bearing date the said eighth day of August, eighteen hundred and fifty-four, was, on the day of the date thereof, duly acknowledged by the said William W. Fleming
 10 and Maria, his wife, before James Otterson, Jr., a commissioner, resident at the City of Philadelphia, duly commissioned and qualified by the executive authority, and under the laws of the State of New Jersey, to take acknowledgments and proof of deeds, and to be used and recorded therein, as by a certificate of the said commissioner attached to the said indenture of mortgage, reference being thereupon had, will more fully appear.

And this defendant, further answering, says, that afterwards and before the making of the said deed of assignment,
 20 the said indenture of mortgage, or an abstract thereof, was duly recorded in the several clerks' offices of the said Counties of Camden, Burlington, and Atlantic, to wit: in the clerk's office of the County of Camden, on the tenth day of August, eighteen hundred and fifty-four; in the clerk's office of the County of Burlington, on the eleventh day of August in the same year; and in the clerk's office of the County of Atlantic on the fourteenth day of August in the same year, as by the certificates of the clerks of the said counties, respectively indorsed on the said indenture of mortgage, will appear.

30 And this defendant, further answering, says, that the said mortgage, so made and executed by the said William W. Fleming and wife, to the said Thomas Fleming, became, and was a valid incumbrance and lien upon the estate and interest of the said William W. Fleming and wife, being an equal, undivided moiety, or half part thereof, in the said "Atsion Estate," set forth and described in the said bill of complaint of the complainant, and respectfully submits that it should be charged upon, and be an incumbrance and lien upon that part of the said estate that may be allotted
 40 and set off to the complainants' assignees, as aforesaid, in the partition of the said estate, to the extent of the moneys due thereon, and intended to be secured thereby: and this defendant expressly denies, that to the knowledge, information, or belief, of this defendant, the said mortgage was, or is, in anywise fraudulent or void.

And this defendant, further answering, says, that according to the best of his knowledge, information, and belief, the said William W. Fleming was, on the first day of July, in the year of our Lord one thousand eight hundred

and fifty-four, justly and truly indebted to the said Thomas Fleming, in a large sum of money, to wit: the sum of forty-four thousand nine hundred and eighty-nine dollars and ten cents, as by an account stated from the books of the said William W. Fleming, and after the date of his assignment, rendered to the said Thomas Fleming, and now in the possession of this defendant, and ready to be produced as this honorable court shall direct, will more fully appear. That the said Thomas Fleming afterwards, and in the course of the same year, eighteen hundred and fifty-four, and prior to the 10 assignment by the said William W. Fleming to the complainants hereinbefore set forth, and at the request of the said William W. Fleming, paid and advanced to and for the use of the said William W. Fleming, large sums of money, the dates and specifications of which said payments and advances will more fully appear by a reference to the claim which was presented by the said Thomas Fleming to the complainants, as assignees, as aforesaid, a copy of which said claim is hereto annexed, by way of schedule, and which this defendant prays 20 may be taken as part of this his answer.

And this defendant, further answering, admits, that the said bond and mortgage were made and executed by the said William W. Fleming, and wife, to the said Thomas Fleming, not to secure a debt of one hundred thousand dollars, then due and owing from the said William W. Fleming to the said Thomas Fleming, but as a security for a certain sum of money, then due from, paid by, or advanced and to be paid by, or advanced from, the said Thomas Fleming to the said William W. Fleming; but he expressly denies, that the whole amount of moneys, so due, paid, or advanced, and to secure which the said 30 bond and mortgage were given, did not exceed the sum of fifty thousand dollars, as stated in the complainants' said bill of complaint; on the contrary, this defendant alleges, that, according to the best of his information and belief, and as appears by the said claim and schedule before referred to, the whole amount so advanced, and to secure which the said bond and mortgage were executed, far exceeded the said sum of one hundred thousand dollars.

And this defendant, further answering, says, that, after the execution of the said bond and mortgage, the said Thomas 40 Fleming duly made his last will and testament, in writing, bearing date the fifteenth day of February, in the year of our Lord one thousand eight hundred and fifty-five; and also, a codicil thereto, bearing date the eighth day of March, in the same year. And afterwards, to wit, on or about the sixteenth day of March, in the same year, departed this life, without having altered or revoked the said last will and testament and codicil thereto. That the said last will and testament and codicil were on or about the twentieth day of March, in the same year, duly

proved in the City of Philadelphia, in the State of Pennsylvania, the place of residence of the testator at the time of his death, according to the laws of the State of Pennsylvania, and are now of record in the office of Register of Wills in and for the said City of Philadelphia; and that, having been so proved in the said City of Philadelphia, the same were afterwards, to wit, on the eighteenth day of June, in the same year, in pursuance of the statute of the State of New Jersey in such case made and provided, duly proved before the Surrogate of the County
 10 of Camden, and letters testamentary thereupon issued to this defendant, one of the executors named in the said will, who, thereby, took upon himself the burthen of the execution of the said will in the said State of New Jersey, as in and by a certified copy of the said last will and testament and codicil, and of the probate thereof, under the seal of the said Surrogate, now in the possession of this defendant, ready to be produced, as this honorable Court may direct, may more fully appear.

And this defendant, further answering, denies, that the said Thomas Fleming, in and by the said will, gave and bequeathed
 20 the said bond and mortgage to his said son, William W. Fleming, as a portion of the estate given and devised by the said Thomas Fleming, to his children; or, that the said Thomas Fleming, in and by his said will, released the said William W. Fleming from the payment of the said bond and mortgage, and enjoined upon his executors that they should not prosecute the said bond and mortgage, as in the said bill of complaint is alleged; but on the contrary, this defendant says, that the said testator, in and by his said will, after reciting that he had advanced, and been obliged to pay
 30 for his son, William W. Fleming, more than his share of the whole estate, and could not therefore, without injustice to his other children, add considerably to this amount, gave and bequeathed to his executors thereafter named, the sum of ten thousand dollars, to be held by them in trust, to invest the same, and to pay over the income and interest thereof, unto his said son, quarterly, or semi-annually, for and during the full term of his natural life, with a disposition of the said fund, after his death; and after said provision for the benefit of the said William W. Fleming, the only provision made for
 40 him by the said testator, in and by his said last will, or the codicil thereto, the said testator further ordered and directed as follows:

“In order to place my children as nearly upon an equality as may be, I direct, that all the debts with which my sons are respectively charged upon my ledger, shall be deducted from their respective shares of my estate, allowing to each of them a credit of twenty-five thousand dollars, being the sum I have advanced or given hereby to their sisters, excepting always my son William W. Fleming, against whom I desire my executors

to prosecute no suit, or claim for any debts he may owe me; but not to abandon the proceedings commenced against the estate assigned by him to Messrs. Bell and Markley, for the benefit of his creditors; but this direction is not to be taken or considered to release him from or to affect the claims of those who may hold his notes, or may be a party to any negotiable instrument signed or indorsed by him. The provision hereinbefore made, for my son William W., is to be in full of his whole share, or claim, from or out of my estate. I release to my other children (excepting William W. as aforesaid) all 10 debts not charged to them in my ledger, or account books, as aforesaid, or not arising from or upon notes, or instruments, signed or indorsed by them respectively."

As in and by the said last will and testament of the said Thomas Fleming, or a certified copy thereof, now in the possession of this defendant, and to which, for greater certainty, he prays leave to refer, will more fully and at large appear. And this defendant says, that the above-recited parts of the said last will and testament of the said Thomas Fleming, contain all the provisions and directions of the said testator, in 20 said will, relating to any bequest, or gift, to the said William W. Fleming, or touching or concerning the said bond and mortgage, given by the said William W. Fleming to the said Thomas Fleming; and this defendant respectfully insists that there is nothing in the said will that can be construed into a gift, or bequest, to the said William W. Fleming, of the said bond and mortgage, or of the moneys secured thereby, or which can release, or in anywise discharge the said William W. Fleming from the payment of the said bond and mortgage, or which can prevent the executors of the said Thomas 30 Fleming from setting up the said mortgage as a valid and subsisting lien, upon the premises hereinbefore set forth and referred to.

And this defendant admits that the said Thomas Fleming, in his lifetime claiming to be a creditor to a large amount of the said William W. Fleming, presented his claim against him under oath, to the complainants as assignees as aforesaid, and thereby claimed that the said William W. Fleming was indebted to him to the amount of one hundred and eighty-two thousand one hundred and ninety-five dollars and seventy-six 40 cents, and that the said claim was incorporated into the list of claims of the creditors of the said William W. Fleming, which had been presented to the complainants as assignees as aforesaid, which list was filed by the said assignees with the Clerk of the Inferior Court of Common Pleas of the County of Burlington.

And this defendant admits that the said Thomas Fleming, in his said claim so presented to the complainants as aforesaid, included all the debts or sums of money secured and intended

to be secured by the said bond and mortgage so as aforesaid given by the said William W. Fleming to the said Thomas Fleming. And this defendant says, that the said Thomas Fleming, at the time of the presenting his said claim as aforesaid, annexed thereto a memorandum, and also an affidavit of him, the said Thomas Fleming, in which it was expressly stated, that of the said sum so claimed by him, the said Thomas Fleming, to be due and owing from the said William W. Fleming, the sum of one hundred thousand dollars was secured by the aforesaid mortgage given by the said William W. Fleming to the said Thomas Fleming, as by the said claim so presented by the said Thomas Fleming, and now in the possession of the complainants, and to which, for greater certainty, this defendant refers, will more fully appear. And this defendant submits, that the said Thomas Fleming, by coming in under the said assignment, and exhibiting his claim as aforesaid, for a dividend of the estate of William W. Fleming, did not thereby abandon or release the lien or incumbrance created by the said mortgage upon the lands comprised therein, and that the said Thomas Fleming was not in his lifetime, nor is this defendant, his said executor, thereby barred from any action or proceeding against the estate of the said William W. Fleming in the hands of the complainants' assignees, as aforesaid, to enforce the lien of the said mortgage.

And this defendant, further answering, says, that he admits that at or about the time mentioned in the complainants' bill, the said William W. Fleming, and the said William H. Richards, for their equal use and benefit, erected a paper mill on the said "Atsion Estate," but what debts were contracted in the erection thereof, or to whom such debts are due and owing, or whether the same, or any part thereof, are liens upon the said paper mill, this defendant has no knowledge or information other than what is contained in the complainants' said bill, and therefore leaves the persons claiming said liens to make such proof thereof as they may be able to do.

And this defendant, further answering, says, that he is willing and consents that a fair partition and division of the said "Atsion Estate" should be made between the complainants, as assignees as aforesaid, and the said Daniel L. Miller, Jr., and that one equal half part thereof, subject to such incumbrances as may appertain and belong thereto, and particularly to the said mortgage of the said William W. Fleming and wife to the said Thomas Fleming, should be set off and assigned to the complainants, and that such incumbrances as belong equally to the complainants and to the said Daniel L. Miller, Jr., to pay, should be equitably and justly settled and adjusted in the said division; but this defendant respectfully insists that the said complainants' assignees as aforesaid must take the

said one equal half part of the said premises so to be set off and allotted to them, subject to the said mortgage to the said Thomas Fleming and to the lien of whatsoever sum may be found due thereon upon any proceedings instituted for that purpose upon the said mortgage; and although this defendant, for the greater satisfaction of this honorable court, has in manner aforesaid fully answered the complainants' bill, yet he submits that the complainants cannot in their said bill of complaint legally and properly pray for a partition of the said premises, and also in the same bill of complaint pray that the 10 aforesaid mortgage of William W. Fleming and wife to Thomas Fleming may be declared void and set aside; and this defendant prays that he may have the benefit of this objection to the complainants' said bill in the same manner and to the same extent as if he had demurred thereto. And he denies all combination and confederacy charged against him in the said bill of complaint without this, that any other matter or thing in the said bill of complaint contained, and not herein and hereby well and sufficiently answered unto, confessed and avoided, traversed or denied, is true to his knowledge or be- 20 lief; all which matters and things this defendant is ready to aver, prove, and maintain, as this honorable court shall direct, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

R. S. FIELD,

Sol. for and of Counsel with the Deft.

State of Pennsylvania, City of Philadelphia, ss.

Henry J. Williams, executor of the last will of Thomas 30 Fleming, deceased, the defendant above named, being duly sworn, on his oath saith, that the matters and things set forth in the above answer, so far as they relate to his own acts, are true, and so far as they relate to the acts of others, he believes them to be true.

HENRY J. WILLIAMS.

Sworn and subscribed at Philadelphia this twenty-ninth day of March, A.D. 1856, before me, James R. Ludlow, Commissioner for New Jersey.

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(Schedule referred to in the foregoing answer.)

MR. W. W. FLEMING,

To THOMAS FLEMING, Dr.

1854.

July 1. To balance due on account
of notes for met. com-
pound, as per account
rec'd,

\$44,989 10

	July 12.	To Cash paid him,	\$6250 00	
		Int. to 11th Sept.,	63 54	
				\$6313 54
	19.	" Cash paid him,	4972 50	
		Int. to 11th Sept.,	44 76	
				5017 26
	26.	" Cash paid him,	6250 00	
		Int. to 11th Sept.,	48 96	
				6298 96
10	27.	" Cash paid him,	4200 84	
		Int. to 11th Sept.,	32 21	
				4233 05
	31.	" Cash proceeds of a draft on Samuel Asbury, Shelton, England, dated Aug. 1st, 1854, at six months from date, indorsed by me; said draft not having been accepted by S. Asbury, will have to be paid by me at maturity, with expenses, exchange, &c.,	7421 12	
20		Int. to 11th Sept.,	51 95	
				7473 07
	Aug. 2.	" Cash paid him,	2000 00	
30		Int. to 11th Sept.,	13 33	
				2013 33
	3.	" Cash paid him,	3148 00	
		Int. to 11th Sept.,	20 46	
				3168 46
	4.	" Cash paid him,	650 00	
		Int. to 11th Sept.,	4 12	
				654 12
	5.	" Cash paid him,	3700 00	
		Int. to 11th Sept.,	22 82	
				3722 82
40	10.	" Cash paid him,	4500 00	
		Int. to 11th Sept.,	24 00	
				4524 00
	12.	" Cash paid him,	3650 00	
		Int. to 11th Sept.,	18 25	
				3668 25
		Forward,		
				\$92,075 96

1854.	To amount brought forward,		\$92,075 96
Aug. 18.	" Cash paid him,	\$2000 00	
	Int. to 11th Sept.,	8 00	
			2008 00
19.	" Cash paid him,	2770 00	
	Int. to 11th Sept.,	10 62	
			2780 62
21.	" Cash paid him,	1055 60	
	Int. to 11th Sept.,	3 70	10
			1059 30
23.	" Cash paid him,	2000 00	
	Int. to 11th Sept.,	6 33	
			2006 33
31.	" Cash paid him,	1848 73	
	Int. to 11th Sept.,	3 39	
			1852 12
Sept. 4.	" Cash paid him,	402 40	
	Int. to 11th Sept.,	47	
			402 87 ²⁰
4.	" 340 shares Camden & Atlantic R. R. Stock, rec'd from him at par, and returned at the same rate at his special request,		17,000 00
7.	" Cash paid him,	2100 00	
	Int. to 11th Sept.,	1 40	
			2101 40 ³⁰
11.	" W. H. Richards' note, dated March 17, 1854, at six months. Indorsed by W. W. Fleming, due 20th Sept.,	1618 25	
	Protest,	1 37	
			1619 62
	Less disc't from 11th Sept.,	2 43	
			1617 19 ⁴⁰
	" F. Curtis & Co.'s note, dated March 17th, 1854, at six months. Indorsed by W. W. Fleming, due 20th Sept.,	2240 40	
	Protest,	1 37	
			2241 77

	Less disc't from 11th Sept.,	\$3 36	
			\$2238 41
	To F. Curtis & Co.'s note, dated March 24th, 1854, at six months. Indorsed by W. W. Fleming, due 27th Sept., 2320 60		
10	Protest, 1 37		
		2321 97	
	Less disc't from 11th Sept.,	6 19	
			2315 78
	Forward,		\$127,457 98
	To amount brought for- ward,		\$127,457 98
20	" Wm. C. Porter's note, dated 24th March, 1854, at six months. Indorsed, W. W. Fleming, due 27th Sept., protested,	1855 37	
	Less disc't from 11th Sept.,	4 94	
			1850 43
30	" Camden & Atlantic R. R. Co.'s note, dated April 10th, 1854, at six months. In- dorsed by W. W. Fleming, due 13th Oct., 2649 50		
	Protest, 1 38		
		2650 88	
	Less disct. from 11th Sept.,	14 13	
			2636 75
40	" Camden & Atlantic R. R. Co.'s note, dated April 15, 1854, at 6 mos. Indorsed by W. W. Fleming, due 18th Oct., 2649 50		
	Protest, 1 38		
		2650 88	
	Less disct. from 11th Sept.,	16 34	
			2634 54

To his note dated March 6, 1854, at 6 mos. Indorsed Arthur A. Burt, due 9th Sept., \$3640 50 Add interest to 11th Sept., 1 21		
		\$3641 71
" Note signed Arthur A. Burt, dated April 22, at 6 mos. Indorsed by W. W. Fleming, due 25th Oct., and unpaid, 3410 50 Less disct. from 11th Sept., 25 01		10
		3385 49
" His note dated May 5, 1854, at 6 mos. Indorsed Arthur A. Burt, due 8th Nov., 3610 00 Less disct. from 11th Sept., 22 86		20
		3587 14
" His note dated May 21, 1854, at 4 mos. Indorsed W. H. Richards, due 24th Sept., unpaid and protested, 2114 36 Less disct. from 11th Sept., 4 58		30
		2109 78
" Note signed W. H. Richards, dated April 3, 1854, at 4 mos. Indorsed by W. W. Fleming, due 6th Aug., 2140 56 Int. to 11th Sept., 12 85		
		2153 41
Forward,		40
To amount brought forward,		\$149,457 23
" His note dated June 6, 1854, at 6 mos. Indorsed Arthur A. Burt, due 9th Dec., 3641 00 Less disct. from 11th Sept., 54 00		
		3587 00

	To Note signed W. H. Richards, dated 14 July, at 4 mos. Indorsed by W. W. Fleming, due 17th Nov.,	\$3156 40	
	Less disct. from 11th Sept.,	35 77	
			\$3120 63
10	" Note signed Thomas H. Carleton, dated April 27, 1854, at 4 mos. Indorsed by W. W. Fleming, due 30th Aug.,	1560 54	
	Interest to 11th Sept.,	3 12	
			1563 66
20	" Note signed Thomas H. Carleton, dated Aug. 16th, 1854. Indorsed by W. W. Fleming, at one month, due 19th Sept.,	624 46	
	Less disct. from 11th Sept.,	83	
			623 63
30	" Note signed Charles E. French, dated March 3d, 1854, at 6 mos. Indorsed by W. W. Fleming, due 6th Sept.,	1460 54	
	Int. to 11th Sept.,	1 22	
			1461 76
40	" Note signed Charles E. French, dated July 3d, 1854, at 4 mos. Indorsed by W. W. Fleming, due 6th Nov.,	1464 22	
	Less disct. from 11th Sept.,	7 56	
			1456 66
	" Note signed Charles E. French, dated 30th March, 1854, at 4 mos. Indorsed by W. W. Fleming, due 2d Aug.,	1641 25	

Int. to 11th Sept.,	\$10 94	
		\$1652 19
To S. Asbury & Co.'s acceptance of bill dated July 27th, 1854, at 4 mos. Drawn and indorsed by W. W. Fleming, due 30th Nov.,	2113 40	
Protest,	1 38	10
	2114 78	
Less disct. from 11th Sept.,	28 17	
		2086 61
Forward,		\$165,009 37
To amount brought forward,		\$165,009 37
" S. Asbury & Co.'s acceptance of bill dated July 27th, 1854, at 4 mos., drawn and indorsed by W. W. Fleming, due 30th Nov.,	2460 50	
Protest,	1 38	20
	2461 88	
Less disct. from 11th Sept.,	32 80	
		2429 08 ³⁰
" S. Asbury & Co.'s acceptance of bill dated July 1st, 1854, at 6 mos., drawn and indorsed by W. W. Fleming, due 4th Jan'y,	2306 70	
Less disct. from 11th Sept.,	44 22	
		2262 48 ⁴⁰
" S. Asbury & Co.'s acceptance of bill dated July 7th, 1854, at 6 mos., drawn and indorsed by W. W. Fleming, due 10th Jan'y,	2313 30	

	Less disct. from 11th Sept.,	\$46 65	
			\$2266 65
	To his check on Trades- men's Bank, dated 11th Sept. 1854,		4500 00
	" his check on Trades- men's Bank, dated 11th Sept. 1854,		3614 00
10	" Note, signed N. Dillet, dated June 27, 1854, at 4 mos. Indorsed by W. W. Fleming, due 27th Oct.,	2130 52	
	Less disc't from 11th Sept.,	16 34	
			2114 18
	Amount due 11th Sept. 1854,		\$182,195 76

20

N.B. Of the above sum, one hundred thousand dollars is secured by a mortgage on real estate in New Jersey, given by the said William W. Fleming, to the said Thomas Fleming, dated the 8th day of August, A. D. 1854, recorded in Burlington, Camden, and Atlantic Counties, New Jersey.

State of New Jersey, Camden County, ss.

30 Thomas Fleming, of the City of Philadelphia, maketh oath and saith that William W. Fleming, late of Atsion, Burlington County, New Jersey, is justly indebted to this deponent in the sum of one hundred and eighty-two thousand one hundred and ninety-five 76-100 dollars, as stated in the foregoing account, for which sum of one hundred and eighty-two thousand one hundred and ninety-five 76-100 dollars, this deponent hath a just claim against the estate of the said William W. Fleming, of which \$100,000 is secured by a mortgage also, as before stated.

THOMAS FLEMING.

40 Sworn and subscribed before me, at Camden, the 9th day of December, A. D. 1854.

RICH. W. HOWELL,
Master in Chancery of New Jersey.

Such proceedings were afterwards had in the Court of Chancery, that said lands were divided by commissioners appointed for that purpose, and the partition confirmed by a decree of that Court, at the November Term thereof, 1856. (Joint proceedings.)

It is admitted that the account annexed to the above answer of Henry J. Williams, Exr., &c., is a true copy of the account presented by Thomas Fleming in his lifetime, to said complainants, as assignees, as aforesaid.

To the account thus presented, the said assignees, and several of the creditors of the said William W. Fleming, excepted, which, upon the exceptions filed, came on to be heard before the Court of Common Pleas, of the County of Burlington, at a special term thereof, held on Monday, October 13th, 1856, which Court, upon hearing, made the following 10 decree, viz. :

Copy of Decree.

See page 35

In Chancery of New Jersey.

Between WALTER D. BELL and ALBERT
W. MARKLEY, Assignees of WILLIAM
W. FLEMING, Complainants,
and
DANIEL L. MILLER, JR., and others,
Defendants.

On Bill, Answer,
and Agreement,
&c. Decree.

20

This cause coming on to be heard at the February Term of this Court, in the presence of Abraham Browning and William L. Dayton, of counsel with the complainants, and Thomas P. Carpenter and Richard S. Field, of counsel with Henry J. Williams, executor of the last will and testament of Thomas Fleming, deceased, one of the defendants in said cause, and the bill of complaint, the answer of the said defendant, an agreement between the said complainants and the said defendant, and the documents and exhibits therein mentioned and 30 referred to, being read (by which said agreement, bearing date the nineteenth day of December last, and signed by the solicitors of the said complainants and of the said defendant, it was submitted to the Court of Chancery upon the said bill of complaint and answer, and the additional facts stated in said agreement, to determine upon the validity and effect of a certain mortgage, stated and referred to in said bill and answer, bearing date the eighth day of August, eighteen hundred and fifty-four, and made and executed by the said William W. Fleming and wife, to the said Thomas Fleming, and 40 purporting to be given to secure the payment of the sum of one hundred thousand dollars in two years, with interest, and whether the said mortgage is a valid and subsisting lien and incumbrance upon the lands and premises mentioned and described therein, and as against the complainants, whether the same is a preferred debt upon the claim presented by the said Thomas Fleming in his lifetime, to the said assignees, to the amount mentioned in the said agreement, of fifty-nine thousand two hundred and ninety-seven dollars and fifty cents,

with interest, and whether the said defendant, Henry J. Williams, executor, as aforesaid, is entitled to any priority or preference out of the said estate, by virtue of the said mortgage, &c.), and the agreements of the respective counsel having been heard, the Chancellor took time to consider the same: and it appearing to the satisfaction of the Chancellor that the said William W. Fleming and his wife, prior to the assignment of his estate to the complainants for the benefit of his creditors, made and executed to the said Thomas Fleming,

10 his mortgage on the lands described in the bill of complaint, and that the said William W. Fleming also executed the bond therein mentioned, which said bond and mortgage, purporting to be given to secure the said sum of one hundred thousand dollars, as aforesaid, but were in fact made and executed to secure the payment of certain moneys then advanced, and also to be advanced by the said Thomas to the said William, which moneys, with the interest thereon, amounted, on the eleventh day of September, eighteen hundred and fifty-four, to the said sum of fifty-nine thousand two hundred and ninety-seven dollars

20 and fifty cents: that the said bond and mortgage were duly executed and delivered, and the said mortgage duly recorded, prior to the making of the said assignment, and that the same is a valid and subsisting lien and incumbrance upon the lands and premises mentioned and described in said mortgage and upon the moiety thereof, set off and allotted to the said complainants, upon the decree of partition in this suit, and that the same is a preferred debt upon the claim presented by the said Thomas in his lifetime, to the complainants, to the amount of the said sum of fifty-nine thousand two hundred and ninety-

30 seven dollars and fifty cents, with interest thereon to be added, from the said eleventh day of September, eighteen hundred and fifty-four: that the defendant, Henry J. Williams, executor, as aforesaid, is entitled to priority and preference out of the said estate, by virtue of the said mortgage, and is entitled to be first paid the said sum, with interest, as aforesaid, out of the proceeds of any sale that may be made of the said mortgaged premises: and that the said Thomas Fleming did not, by anything in his said last will contained, or otherwise, release or discharge the lien of the said mort-

40 gage. It is now, on this twenty-third day of June, in the year of our Lord eighteen hundred and fifty-eight, by the Chancellor, ordered, adjudged, and decreed, and the Chancellor doth hereby order, adjudge, and decree, that the said mortgage is a valid and subsisting lien and incumbrance upon the lands and premises mentioned and described in said mortgage, and upon the moiety thereof, set off and allotted to the complainants on the partition thereof, and is as against the complainants, upon the claim presented by the said Thomas Fleming, entitled to priority out of any proceeds of the sale

thereof, to the amount of the said sum of fifty-nine thousand two hundred and ninety-seven dollars and fifty cents, with interest from the said eleventh day of September, eighteen hundred and fifty-four, to be added, and that the said conveyance and assignment by the said William W. Fleming to the complainants for the benefit of his creditors, was subject to the lien of the said mortgage, to the said amount, with interest.

And it is further ordered, that the complainants and the said defendant respectively be at liberty to apply to this court 10 for further directions, and that the costs of the complainants and of the said defendant be, and the same is hereby ordered to be paid by the complainants out of the general assigned estate.

B. WILLIAMSON,
C.

A true copy.

W. M. BABBITT,
Clerk.

After the aforesaid decree in the said Court of Common 20 Pleas, the said complainants and said Henry J. Williams, executor, as aforesaid, entered into the following agreement in writing:

Copy of Agreement.

In Chancery.

Between WALTER D. BELL and ALBERT
W. MARKLEY, Assignees of WILLIAM
W. FLEMING, Complainants,
and
DANIEL L. MILLER, Jr., and others,
Defendants.

On Bill
for
Partition, &c. 30

Whereas, in the above-stated cause, a bill of complaint was filed by said complainants, as assignees of William W. Fleming, who had before then assigned his estate to the complainants for the benefit of his creditors; seeking the partition of certain real estate situate in the counties of Burlington, Camden, and Atlantic, in the bill of complaint particularly described, between the complainants, assignees, as aforesaid, and said Daniel L. Miller, Jr., one of said defendants (prout said 40 bill of complaint).

And whereas, one Thomas Fleming, named in said bill of complaint, now deceased, in his lifetime held a mortgage, bearing date the eighth day of August, A. D. 1854, on the equal undivided half part of all the said real estate mentioned in the said bill of complaint (and also on certain other real estate situate in the said County of Camden), which mortgage had been made and executed by the said William W. Fleming and his wife to the said Thomas Fleming, and also acknowledged

and recorded before the said William W. Fleming had assigned his estate, as aforesaid, to the complainants, said mortgage (and the bond therein referred to) as set forth in the said bill of complaint, purporting to be given to secure the payment of the sum of one hundred thousand dollars, to be paid by the said William to the said Thomas in two years from the date thereof, with interest (prout the said judgment, bond, mortgage, and indorsements and record thereof).

And, whereas, the said bond and mortgage were not given
 10 to secure a debt or sum of one hundred thousand dollars then owing by the said William W. Fleming to the said Thomas Fleming, as mentioned in the condition of said bond, but were intended to secure certain sums of money then advanced, and to be advanced, by the said Thomas Fleming to the said William W. Fleming; and which several sums of money, and interest computed thereon, from the times of advancing the same respectively to the eleventh day of September, in the year of our Lord eighteen hundred and fifty-four (the time when the aforesaid assignment for the benefit of creditors was
 20 made by the said William W. Fleming), amount in the aggregate to the sum of fifty-nine thousand two hundred and ninety-seven dollars fifty cents, and are the same sums set forth in a certain claim of the said Thomas Fleming against the estate of the said William W. Fleming, from item No. 2 to item No. 20 in said claim, inclusive, excepting item No. 19, the same being items subsequently allowed by the Court of Common Pleas of the County of Burlington upon exceptions filed to said claim, as by the decree of the said court, bearing date the eighteenth day of October, A. D. eighteen hundred and
 30 fifty-six, upon exceptions filed to the claim of the said Thomas Fleming, deceased, may more fully appear (prout said claim and decree).

And whereas, the said Henry J. Williams, executor of the last will and testament of the said Thomas Fleming, deceased, claims and insists that as to the said sum of fifty-nine thousand two hundred and ninety-seven dollars and fifty cents, the moneys alleged to be advanced by the said Thomas Fleming, deceased, to the said William on the security of the said bond and mortgage (as insisted upon in the answer), he is a pre-
 40 ferred creditor, entitled to be paid the said sum of fifty-nine thousand two hundred and ninety-seven dollars and fifty cents, with interest from the said eleventh day of September, in the year of our Lord one thousand eight hundred and fifty-four, out of the proceeds of the sale of the said mortgaged premises. And whereas, the said assignees, in and by their said bill of complaint, deny the validity of the said bond and mortgage, and deny the said lien and preference so claimed as in and by the said bill of complaint will more fully appear; and it is expedient to have the said controversy settled in the said

suit and upon the said bill and answer and the additional facts stated in this agreement. And the said parties have agreed that the same shall be submitted and settled as aforesaid, without the formality and delay of other and further suits and pleadings.

Now therefore it is agreed by and between the said complainants, assignees as aforesaid, and the said defendant, Henry J. Williams, executor as aforesaid, that it shall be submitted to the Court of Chancery upon the said bill of complaint and answer thereto, and the additional facts stated 10 in this agreement, to determine upon the validity and effect of the said mortgage, and whether the said mortgage is a valid and subsisting lien and incumbrance upon the lands and premises mentioned and described in said mortgage, and as against the complainants upon the said claim as a preferred debt, to the amount of the said items, so as aforesaid allowed by the said Court of Common Pleas, amounting to the sum of fifty-nine thousand two hundred and ninety-seven dollars and fifty cents, with interest to be added as aforesaid; and whether the said Henry J. Williams, executor as aforesaid, 20 is entitled to any priority or preference as aforesaid, out of the said estate, by virtue of and under said bond and mortgage, and that any order or decree of the Court of Chancery shall be binding on said parties, subject only to appeal by either party to the Court of Errors and Appeals. And it is hereby further agreed, that any order and decree of said court, in respect to the said controversy in said suit and upon said bill and answer, and affecting the lands described in said bill of partition, shall be binding upon said parties, as respects the other lands and premises mentioned and described in said 30 mortgage. And it is hereby further agreed, that if there shall be any variance between the papers herein referred to, as referred to, and said papers, the said papers shall be before the said court, for the purpose of correcting such variance.

Dated, December 19, 1857.

A. BROWN,
Sol. for Compls.

Upon this article of agreement, and upon the said bill, answer, and other papers therein mentioned, this cause came 40 regularly on for hearing at the February Term, 1858, and at the May Term following, the Chancellor delivered the following opinion, and made the following decree, from which an appeal has been taken by said complainants.

Chancellor's Opinion.

BELL and other Assignees of

WM. W. FLEMING

v.

HENRY J. WILLIAMS, Ex.

} May Term, 1858.

A. Browning and Attorney-General Dayton, for complain-
10 ants.

R. S. Field and T. S. Carpenter, for defendants.

Williamson, Chancellor.—William W. Fleming and Daniel L. Miller, Junr., were seised in fee-simple, equally, as tenants in common of several large and valuable tracts of land, situate in the counties of Burlington, Camden, and Atlantic, and generally known and designated as the "Atsion Estate."

On the eighth of August, eighteen hundred and fifty-four, William W. Fleming executed to his father, Thomas Fleming, then residing in the City of Philadelphia, a bond in the penal
20 sum of two hundred thousand dollars, conditioned for the payment of one hundred thousand dollars in two years from the date thereof, with interest thereon, in quarterly payments: and to secure the payment of the said bond, according to its condition, the said William W. Fleming and his wife executed to the said Thomas Fleming a mortgage upon the "Atsion Estate."

After the execution and recording of this mortgage, and on the eleventh of September, eighteen hundred and fifty-four, William W. Fleming made a general assignment, for the benefit
30 of his creditors, to the complainants in this suit, by virtue of which, his interest and title in the "Atsion Estate" became vested in the complainants, as his assignees.

Immediately after the assignment, Thomas Fleming presented claims to the assignees of debts due to him from his son, amounting to upwards of one hundred and eighty thousand dollars, which were incorporated into a list of creditors which the assignees were required by law to make, and which list was filed with the clerk of Common Pleas of the County of Burlington. Among these claims so presented to the as-
40 signees by Thomas Fleming, was the debt secured by the bond and mortgage before mentioned.

Since then, Thomas Fleming has deceased, leaving a will bearing date the fifteenth of February, eighteen hundred and fifty-five, which was after the presentation of his claims, as aforesaid, to the assignees. By his will, he gives some directions to his executors in reference to the prosecution of the claims so presented.

There are three questions involved in this suit. They arise between the complainants as assignees of William W. Flem-

ing, and the executor of the will of Thomas Fleming, who has taken out letters testamentary in this State.

The first question is as to the validity of the mortgage. Second. As to the construction of the will of Thomas Fleming; whether it operates as a release of the mortgage. Third. The effect upon the mortgage security, resulting from the fact of proof of the debt under the assignment.

It is insisted that the mortgage is invalid, because it was given, in part, to secure future advances. The broad ground is taken, that a mortgage for future advances is not valid in 10 this State. At the time of the execution of the mortgage, there was a debt due from William to Thomas Fleming, for money advanced, of \$38,894 61. The mortgage was executed to secure that debt, and such further advances as Thomas Fleming might make to his son, not exceeding the amount mentioned in the bond and mortgage. Between the date of the mortgage, which was the 8th of August, 1854, and the date of the deed of assignment, which was the 11th of September, 1854, Thomas Fleming advanced to his son, in different sums, from time to time, \$20,024 58, making the 20 aggregate debt, secured by the mortgage, \$58,919 19. It is contended not only that the mortgage is invalid as a security for the advances which were made subsequent to its execution, but as to the debt also which was due at the time of its execution.

It has been repeatedly decided, that a mortgage to secure future advances is a valid security as against subsequent incumbrances, for all advances made up to the time when such incumbrances intervene. Whether it will secure advances to the time only when the subsequent incumbrance was actually 30 executed, or to the time of the actual notice of such future incumbrance, may be deemed not altogether a settled question. The authorities are numerous, and are very decided and uniform in reference to the validity of such mortgages as against a subsequent lien for all advances prior to such liens being acquired. *Shirras and others v. Caig and Mitchell*, 7 Cranch, 50; *Brinkerhoof v. Marvin*, 5 J. C. R. 327; *Livingston v. McImray*, 16 Johns. Rep. 165; *The Bank of Utica v. Finch*, 3 Bail. C. R. 298, 303; *Leeds et al. v. Cameron*, 3 Sumner's Rep. 488; *Gardner v. Weber*, 17 Pick. 407; *Com. Bank v.* 40 *Cunningham*, 24 Pick. 274.

In looking at these authorities, it will be seen, that none of the objections which counsel in the argument of this case urged against the validity of such a mortgage, has failed to receive the due consideration of the courts. It was insisted as an objection to its validity, that this mortgage was false on its face; that, while it purports to be a security for a debt of \$100,000 actually due, the debt really existing was but little over one-third of that amount. In *Shirras and others v. Caig & Mit-*

chell, it was part of the argument of counsel, that the mortgage untruly recited the whole transaction, and that the mortgage was made only to cover future contingent responsibilities. Ch. J. Marshall, in his opinion, says: "It is true, the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000 sterling, due to all the mortgagees. It was really intended to secure different sums, due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. It is not to be denied, that a deed, which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is certainly always advisable, fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed, of his real equitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentations." In the case of the *Bank of Utica v. Finch*, the Chancellor says: "The security may be taken in the form of a mortgage or judgment for a specific sum of money sufficiently large to cover the amount of the floating debt intended to be secured thereby." He quotes the case in 7 Cranch, as recognizing the principle. In the case of the *Commercial Bank v. Cunningham*, the Court particularly notices the objection, that the true consideration did not appear on the mortgage, but was the matter of a separate agreement between the parties, which was not recorded. The Court said, that the agreement, that the mortgage-property should stand bound for future discount and advances, was valid and unexceptionable. In New Hampshire they have a statute, as appears in *Leeds et al. v. Cameron* (3 Sum. 492), "That no title, or estate, in fee-simple, &c., of any lands, &c., shall be defeated or encumbered by any agreement whatever, unless such agreement or writing of defeasance shall be inserted in the condition of said conveyance, and become part thereof, stating the sum or sums to be secured, or other thing or things to be performed."

The objection that parol testimony is not competent for the purpose of showing that the mortgage was executed and intended to secure a debt different from that expressed in the mortgage, was particularly noticed by the Vice-Chancellor in the case of *The Bank of Utica v. Finch* (8 Barb. C. R. 277). Its admissibility was properly sustained, on the ground, that it was offered not to contradict the written instrument, but to show the purpose and intent for which it was executed. But this objection must necessarily have been considered in every case, where the validity of a mortgage for future advances has been sustained.

A further objection was started: that such a mortgage con-

travenes our registry laws, and defeats their main purpose; that, instead of the record being a notice to subsequent purchasers and creditors of the real transaction, it holds out a false light to misguide and embarrass them. But, although the statute requires that the registry must contain the amount of the mortgage, and when payable, the registry is not intended as notice of the amount which is actually due upon the mortgage; a mortgage may be half paid a week after it is executed, and so only half the amount be due upon it, as it stands upon the record. It may be a mortgage of long standing, with a large 10 accumulation of interest upon it, so that the amount due upon it is very much larger than appears from the record. Neither the mortgagor or the mortgagee is bound to keep the record accurate as to the amount due upon the mortgage. If it had been intended that the amount appearing upon the record should be conclusive between the parties, and if the object of recording the amount was, that purchasers and creditors might rely upon the record as to the amount actually due between the parties, then the statute is very imperfect in its provisions for accomplishing such an object. But this was not the object. 20 It was simply to give to parties interested such notice, as would lead them to proper inquiries, and enable them to protect their interest. The incumbrance can never stand for a larger amount than the record calls for. If the inquiring party chooses to take a subsequent lien, or to purchase, subject to the amount of incumbrances appearing upon the record, he is sure they cannot exceed that amount with the interest. But if the amount is larger than he anticipated, he is notified by the record where to inquire as to the true character of the incumbrance and the amount due upon it. There is nothing in our Registry Act 30 which places a mortgage for future advances upon any different footing from those, where they have been sustained by the authorities to which reference has been made.

Where there are so many authorities sustaining the validity of mortgages precisely similar, as to the particular we have been considering, to the one in controversy in this suit, and as no case has been produced which questions even the correctness of those authorities, it could scarcely be expected that this Court, without any new light shed upon the subject, would make a decision opposed to the principles which they 40 have established.

But this question is not a new one in this Court. It was very elaborately argued in the case of *Robinson et al. v. Urquhart et al.*, decided at the last term, and a similar mortgage was sustained. Several terms since, in a case not yet reported (the name of which I cannot now recall), the same question was argued and decided, and the mortgage was declared valid.

I took occasion, in my opinion in the case last referred to,

to suggest the propriety and safety of always stating in the mortgage the real character of the transaction. If the transaction is a fair one, there can be no objection to state it as it really exists. By stating it otherwise, it renders the security a suspicious one. It would require very little, in addition to this circumstance, to induce the Court to postpone such a mortgage to a creditor, or bona fide purchaser.

This case, however, is relieved from any suspicion of unfairness. There is no doubt that the mortgage was executed 10 in good faith, with the expectation, on the part of William Fleming, that he would receive the advances, and with the intention, on the part of the father, to make them. The bona fides of the transaction is apparent, from the manner and promptness with which the advances were made. There is no one before the Court who makes any complaint that he has been misled, or been placed in a worse position in consequence of the character of the mortgage.

The next question is, as to the construction of the will of Thomas Fleming, and how it affects this mortgage. By the 20 ninth clause of his will the testator declares as follows:

“9. In order to place my children as nearly upon an equality as may be, I direct that all the debts with which my sons are respectively charged upon my ledger, shall be deducted from their respective shares of my estate, allowing to each of them a credit of twenty-five thousand dollars, being the sum I have advanced or given hereby to their sisters, excepting always my son William W. Fleming, against whom I desire my executors to prosecute no suit or claim for any debts he may owe me; but not to abandon the proceedings 30 commenced against the estate, assigned by him to Messrs. Bell & Markley, for the benefit of his creditors.”

Without the last member of the clause of the will I have recited, there can be no doubt it would have operated as an equitable release of the mortgage. If the direction to the executors, to prosecute no suit or claim against William for any debts he might owe the testator, was without any qualification, the fair and legitimate construction would be, that it was the testator's intention to forgive William all debts that he owed him. To have enforced this mortgage upon the 40 ground that it was a proceeding in rem, and not in personam, and that collecting the debt out of William's property was not prosecuting a suit or claim against him, would have been a distinction to which this Court would not have listened. This Court would have construed the will as an equitable release of the debt, and would have protected William against its enforcement, both against him personally and against his property.

What is the effect of the direction to his executors “to prosecute no suit or claim for any debts he may owe me,” by the

qualification annexed to such directions, "but not to abandon the proceedings commenced against the estate assigned by him to Messrs. Bell and Markley, for the benefit of his creditors?" This qualification amounts to a positive direction to his executors to prosecute the proceedings already commenced by the testator, against the estate assigned to Bell & Markley. A part of the estate assigned was the mortgaged estate. If then the proceedings the testator had already commenced against that estate, were for the purpose of subjecting it to the payment of the mortgage debt, it appears to me, that the faithful prosecution of those proceedings by the executors, involves the obligation on their part, to conduct that prosecution in such a manner as to make most out of the estate. 10

But it was insisted by counsel, that the testator having proved his mortgage debt under the assignment, the legitimate fruit of such proceeding is a dividend upon his debt; that when those dividends should be received by the executors, there would be an end to the proceedings referred to by the testator, and that the executors could accomplish nothing more without instituting other proceedings, which could in no proper sense be regarded as the "proceedings commenced against the estate" mentioned by the testator in his will. It is a very dangerous mode of testing the intention of a testator by so ingenious and technical an argument. A testator has very frequently, in this way, been argued into, and out of, his real intention. But, admitting the premises, that the legitimate fruit of the proceedings is a dividend upon the debt, must not the executors, if those proceedings are properly conducted, before they are terminated, get the whole benefit of the mortgage security? Assuming that the dividend which, by law, a mortgage creditor is entitled to receive, is upon the balance of his debt after he has exhausted his security, then this mortgage security must necessarily be first exhausted, before it can be ascertained to what dividend the executors are entitled. Now the proceedings which are necessary to be instituted to reach this result, would properly be a part of and a continuation of the proceedings commenced against the estate by the testator, and to which reference is made in his will. The fallacy of the argument consists in assuming that it is necessary for the executors to institute other proceedings, in order to obtain the benefit of their mortgage after the proceedings already commenced shall have been terminated. Whereas, the subjecting of the mortgage security to the payment of the debt, must necessarily precede their receiving the dividend to which they are entitled. Indeed, the very agreement which the parties have entered into in this suit, to submit all the equities to be determined by the Court, is an irresistible argument, that this mortgage security must be disposed of before the proceedings under the attachment can be properly and legally disposed of and terminated. 30 40

But looking for the intention of the testator in a broader and more liberal view of the whole matter, taking the language of the will, in connection with all the facts relating to the subject-matter we are considering, it appears to me to be a very forced construction to put upon the will, that the testator meant to release the estate from the mortgage. His son was insolvent; and the reason is plain enough why he released him from all personal liability of his indebtedness. But he had good security for part of his debt. To release that, was
 10 no benefit to his son, but was taking just that amount out of his own estate. The counsel was driven to the argument that the testator was actuated by motives of generosity; that he threw away his security, and was willing to come in and share his loss with the other creditors. But if such were his motives, he would not have left them subject to so much ambiguity.

It was attempted to draw an inference in favor of the testator's intention to release the mortgage from the disposition manifested by him through the whole will, and particularly in
 20 the clause recited to make an equal disposition of his property among his children. It is insisted, if this mortgage is enforced, then William will not get, in the division of the estate, an equal share with his brothers and sisters. Laying out of view the fact, that it by no means appears, after a very nice calculation, that by releasing the mortgage, it will make William's portion any nearer equal with that of the testator's other children than it will be by enforcing it, it is very evident that no inference whatever of intention, can with any propriety be drawn from the consideration referred to. William
 30 had assigned all his property for the equal benefit of his creditors. His debts amounted to upwards of six hundred and sixty thousand dollars. A release of the mortgage could not benefit the son personally. He would be released from his debts as to those creditors who should come in under the assignment, whether the mortgage estate was, or was not, thrown into the common fund. It is a most violent presumption under such circumstances, to be derived from the fact of an intention on the part of the testator to make an equal distribution of his property among his children, that rather
 40 than disturb this equality, he would prefer the creditors of William over his other children, although, by his doing so, his son could derive no possible advantage from such preference. If the testator had intended to release the mortgage, from motives of justice and morality so uncommon among men, he would have said so plainly, and not left it to mere inference. I do not think the will will bear such a construction.

The only question remaining is as to the effect of the testator's proving his mortgage-debt under the assignment. It is insisted, that by proving his debt, he abandoned his mortgage

security, and that all he can claim after having proved his whole debt is to come in with the other creditors for a dividend upon it. What are the rights of a mortgage creditor under the assignment, and to what dividend, if any, is he entitled upon his debt?

The act puts all creditors upon an equal footing. They are to present their claims to the assignee under oath or affirmation, within three months after the assignment. The assignees, or any creditor, or other person interested, may file exceptions to the claim of any creditor. These are disposed of in 10 the manner prescribed by the act. The assignee is then to "proceed to make, from time to time, fair and equal dividends among said creditors, of the assets which shall come to hand, in proportion to their claims." This is all that is said in the act as to the manner in which the dividends shall be made. There is nothing said as to mortgage creditors except in the first and thirteenth sections of the act, where they are recognized as preferred creditors to the extent of their liens. The first section declares, that every assignment shall be for the equal benefit of creditors, and that all preferences of one cre- 20 ditor over another, or whereby one or more shall be first paid, or have a greater proportion in respect of his, her, or their claim, than another, shall be deemed fraudulent and void, excepting judgment and mortgage creditors, when the judgment has not been by confession for the purpose of preferring creditors. The thirteenth section gives full power and authority to the assignee to refer to arbitration, settle, and compound, and to agree with any person, touching all matters belonging or appertaining to the estate, and to redeem all mortgages and conditional contracts. 30

It was conceded by counsel on both sides in argument that the mortgage creditor is entitled to a dividend upon any balance that may remain unpaid of his debt, after the security is exhausted. This was the construction put upon the act by Ch. J. Hornblower in *Vanderveer v. Conover et al.*, 1 Harr. 491. This certainly is the most unfavorable position in which the mortgagee can be placed. It cannot be contended that because a creditor has a mortgage or other security for his debt, he is thereby deprived of all benefit under the assignment, or that he must abandon his security and throw it into 40 hotchpotch. Such a construction has never been suggested by court or counsel. The only question that has ever been raised as to the rights of the mortgagee in reference to his interest in the assigned property, has been whether he could claim a dividend upon his whole debt, and look to his security for the balance, or whether the security must be first appropriated, and the creditor be entitled to a dividend only upon any deficiency. In the case of *Greenwood v. Taylor* (1 Russell & Mylne, 185), in a suit instituted for the administration

of the assets of the estate of a deceased mortgagor, it was contended by counsel that the mortgagee had a right to avail himself concurrently of all the remedies which belonged to him, either in respect of his specific lien on the estate, or as a general creditor of the mortgagor by virtue of the covenant for the payment of the mortgage-money, but the Master of the Rolls (Sir John Leach) said, "The rule in bankruptcy must be applied here, and the mortgagee cannot be permitted to prove for the full amount of his debt, but only for so much
 10 as the mortgaged estate will not extend to pay. This rule is not founded, as has been argued, upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the administration of assets. The mortgagee who has two funds, as against the other specialty creditors who have but one fund, must resort first to the mortgage security, and can claim against the common fund only what the mortgaged estate is deficient to pay." The principle upon which the case of *Greenwood v. Taylor* was made, was questioned by Lord Cottenham in *Mason v. Bogg* (2 Mylne and
 20 *Craig*, 446), where he says, "If there were such a rule of equity as that which Sir John Leach propounds, it would be found in some text book or decided case; and with respect to the principle of that case it is to be observed, that a mortgagee has a double security: he has a right to proceed against both, and to make the best he can of both." Notwithstanding what was said by the Lord Chancellor, it was remarked by counsel in the case, that *Greenwood v. Taylor* had been acted upon ever since it was decided. The case is referred to by Justice Story in his 1st vol. *Eq. J. D.* 633, and the principle stated,
 30 in the language of the Master of the Rolls, without any doubt as to its accuracy or propriety.

After stating the general principle to be, that if one party has a lien on or interest in two funds for a debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the rights, or operate to the prejudice of the party entitled to the
 40 double fund, the learned author illustrates the rule by a reference to the case of *Greenwood v. Taylor*, using the very language of the Master of the Rolls; yet it is perfectly manifest that so far from the principle being illustrated by this case, that the case was decided in violation of the rule; for the rights of the mortgagee were trenched upon, and he was prejudiced by its application. The Master of the Rolls certainly applied the rule without any regard to the important qualification always annexed to it. If he had simply declared that he would adopt the rule upon the broad ground, that equality

is equity, it is quite probable that it would have been followed, without its propriety being questioned.

If, then, the mortgage creditor is entitled to a dividend upon any deficiency remaining after exhausting his security, how is he to obtain it? What proof of his debt must he make to the assignee?

In this case, the testator made out his account against the debtor. It was for money lent and advanced, and money paid in different sums from time to time, from July 1st, 1854, to Sept. 11th, 1854. The whole amount was \$182,195 76. At the foot of the account was this memorandum: (N.B. Of the above sum, one hundred thousand dollars is secured by a mortgage on real estate in New Jersey, given by the said William W. Fleming to the said Thomas Fleming, dated the 8th day of August, A. D. 1854, recorded in Burlington, Camden and Atlantic Counties, New Jersey.) To this is annexed the affidavit of the testator, in which he swears that the debtor is justly indebted to him in the sum stated in the account, and which concludes as follows, "for which sum of \$182,195 76-100ths dollars this deponent has a just claim against the estate of the said William W. Fleming; of which \$100,000 is secured by a mortgage also, as before stated."

Exceptions were filed to the account, which have undergone the investigation prescribed by the statute. It is agreed by the parties, by an agreement filed in this suit, that there is due upon the mortgage \$59,297 50.

It is insisted on the part of the assignees, that by this mode of proof, the testator relinquished his security, and that he is barred from all benefit of his mortgage, by virtue of the fourteenth section of the act, which declares, that with respect to the creditors who shall come in under said assignment, and exhibit their demands, as aforesaid, for a dividend, they shall be wholly barred from having afterwards any action or suit at law or equity against such debtors or their representatives. It is insisted that the mortgage cannot be enforced, except by a suit at law or equity against the assignees as the representative of the debtor, and that such suit after proof of the debt, is barred by the statute.

We have seen what the rights of the mortgagee are under the assignment. Now, if it can be shown, that he could secure those rights in no other mode than by the proof he made to the assignee, it cannot be that by his adopting the only mode which the statute left open to him to secure his rights, he thereby forfeited them.

The act declares, that if any creditor shall not exhibit his claim within three months after the date of the assignment, such claim shall be barred of a dividend. This mortgage creditor was obliged to present his claim within three months. It was therefore out of his power to prove so much of his debt

only as might be due him after exhausting his security. There was no way for him to subject the mortgaged estate to the payment of his debt, except by a bill in this court; and such proceeding could not have been brought to maturity within the time limited by the statute for proof of his claim. There was no alternative left him but to prove his debt as it really existed. He waited until within a day or two of the expiration of the three months, and then proved his claim, reserving in the forms of his proof the benefit of his mortgage.

- 10 This was the object, and it was the legal effect of the memorandum at the foot of the account, and of the statement in the affidavit as to the character and extent of his mortgage. The claim he made was for all his legal and equitable rights under the assignment. It cannot be, that having made his claim in the only mode by which he could secure to himself his rights under the assignment he has thereby forfeited any of those rights. No court would ever put such construction upon the act, and yet such is the inevitable result if the construction contended for on behalf of the complainants is adopted.

- 20 There were some cases in bankruptcy referred to, and among others that of *Ex parte Downes* (18 Ves. 290), which was the case of mortgagee, who electing to give up his mortgage, was admitted to prove under a commission of bankruptcy against the mortgagor. Finding the estate turned out better than he anticipated, he presented a petition asking that he might retract his election, which was refused. There can be no doubt that the mortgagee is at liberty to abandon his security, but the question is whether the fact of his proving his
- 30 debt amounts to an abandonment of his security. The statute and the rules of the courts, which have been established to carry out the bankrupt law, are entirely different as to proof of debts from those which govern under our attachment act. Under the bankrupt law, a creditor when he comes to prove his debt, is obliged to swear whether he has a security or not, and he must then elect whether he abandons it or not. If he refuses to abandon it, the proof of his claim is deferred, and the commissioners sell the estate, and after appropriating the proceeds to the payment of the debt, then permit the creditor
- 40 to prove for the deficiency. 1 *Cook's Bankrupt Laws*, 119. And in *Eden on Bankrupt Law*, 104, it is said: "It has been a practice long established in bankruptcy, not to suffer a creditor holding a security to prove, unless he will give up the security, or the value has been ascertained by the sale of it. The reason, as observed by Lord Eldon, is obvious: till his debt has been reduced by the proceeds of that sale, it is impossible correctly to say what the actual amount of it is, and in the event of any doubt attaching upon his right to retain the security, he is enabled in a contest with the rest of the cre-

ditors, to sustain his disputed title in a situation of predominant advantage."

This question has received some consideration from our own courts. In the case of *Vanderveer v. Conover et al.*, before referred to, the question was not directly involved in the decision of the cause. The Chief Justice, however, in reviewing the operation and provisions of the statute, says, "If a judgment creditor, apprehending that the property actually bound by his judgment or execution may not be sufficient to satisfy him, thinks proper to come in under the assignment, he has 10 a right to do so. By doing so he does not waive his priority as a judgment creditor, so far as respects the property bound by his judgment or execution, but is entitled to a dividend upon any balance that may remain due to him after exhausting that property." In *Moses v. Thomas* (2 Dutcher, 125), the court decided that a judgment creditor, who puts in a claim under an assignment, does not thereby waive his lien under an execution. This case was unanimously affirmed in the Court of Errors and Appeals, at — Term, 1857.

There is some embarrassment in adjusting the claim of a 20 mortgage creditor who proves his debt. The mortgaged premises must necessarily be disposed of, before it can be ascertained to what dividend the creditor is entitled. Unlike the bankrupt law, and the proceedings under it in this respect, the act makes no provision for the sale or disposition of any such securities. The pledge can only be sold by a bill in this court. The assignees cannot compel the creditor to file such bill. They may refuse to give him a dividend until he does, but such refusal will operate to the delay and prejudice of the other creditors. The assignees have the power, and it is their 30 duty, so to dispose of the property, real and personal, of the debtor, as will be most advantageous for the creditors generally. They may compound with the mortgage creditor, by fixing a value upon the security. If no compromise can be made, there is no difficulty in the assignees filing their bill, and obtaining such decree as will secure the interest of all parties.

I am of opinion, that the mortgage is a valid one; that it is not released by the will of Thomas Fleming; and that, as a security, it was not impaired by the mortgagee's proving his 40 mortgage debt under the assignment.

Copy of Decree.

At a special term of the Inferior Court of Common Pleas of the County of Burlington, held at the court-house in Mount Holly, on Monday, the 13th day of October, A.D. 1856.

Present, their Honors, Stacy G. Potts, Pres. Judge, George

See page 19

Haywood, Joseph J. Budd, Joseph K. Hulme, Associate Judges.

HENRY J. WILLIAMS, Executor of the
last will and testament of THOMAS
FLEMING, deceased, claimant,

v.

WALTER D. BELL and ALBERT MARKLEY,
Assignees, &c., and others, excep-
tants.

10

In matter of assignment of William W. Fleming, who hath assigned, &c., for the benefit of creditors.

This cause coming on to be heard before this court, on exceptions filed to the claim and account of Thomas Fleming, now deceased, by the said assignees, and by others, creditors of the said William W. Fleming, on the thirteenth day of October, instant, and the court having heard the depositions and examination of witnesses, and having inspected and seen the documents and exhibits produced by the respective parties, it is now, on this 18th day of October, A. D. 1856, in the presence of the respective parties and their counsel, ordered, adjudicated, and settled, as follows:

That the following items in the claim of Henry J. Williams, executor of the estate of Thomas Fleming, deceased, against the assigned estate of William W. Fleming, are allowed, to wit:

All those sums of money mentioned in the account presented by Thomas Fleming in his lifetime, from July 12th, 1854, to September 7th, 1854, except the item of September 4, 1854, of seventeen thousand dollars, which was settled during the hearing, by a return of three hundred and forty shares of stock, amounting in the aggregate to fifty-nine thousand, two hundred and ninety-seven dollars, fifty cents (\$59,297 50). Also those other six items in said account, being numbers 21, 22, 23, 24, 25, and 26, of the items in said account, amounting in the aggregate to thirteen thousand two hundred and ninety-three dollars, ten cents (\$13,293 10): Also those two other items in said account, being numbers 43 and 44 of the items in said account, amounting together to eight thousand one hundred and fourteen dollars (\$8114); and also fifteen thousand dollars, part of those other items, numbered 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 42, in said account, which, in the aggregate, amount to the sum of thirty-three thousand seven hundred and forty-six dollars, seventeen cents (\$33,746 17), the whole of the items above allowed amounting to ninety-five thousand seven hundred and four dollars, sixty cents (\$95,704 60). A schedule of the items, allowed in full or in part, is hereto annexed, and

that as to all the residue of the items of said claim, the same are disallowed.

STACY G. POTTS, P. J.

No. 1. Schedule of Items allowed in full.

1854.

July 12, To Cash paid him,	6250 00	
Int. to 11 Sep.,	63 54	
		6313 54 10
" 19, " Cash paid him,	4972 50	
Int. to 11 Sept.,	44 76	
		5017 26
" 26, " Cash paid him,	6250 00	
Int. to 11 Sep.,	48 96	
		6298 96
" 27, " Cash paid him,	4200 84	
Int. to 11 Sep.,	32 21	
		4233 05
" 31, " Cash proceeds of a draft on Sam'l Asbury, Shelton, Eng'd, dated Aug't 1, 1854, at 6 mo's from date, indorsed by me, said draft not having been accepted by S. Asbury, will have to be paid by me at maturity, with expenses, exchange, &c.,		20
Int. to 11 Sep.,	7421 12	
	51 95	
		30
		7473 70
Aug't 2, To Cash paid him,	2000 00	
Int. to 11 Sep.,	13 33	
		2013 33
" 3, " Cash paid him,	3148 00	
Int. to 11 Sep.,	20 46	
		3168 46
" 4, " Cash paid him,	650 00	
Int. to 11 Sep.,	4 12	
		40
		654 12
" 5, " Cash paid him,	3700 00	
Int. to 11 Sep.,	22 82	
		3722 82
" 10, " Cash paid him,	4500 00	
Int. to 11 Sep.,	24 00	
		4524 00
" 12, " Cash paid him,	3650 00	

	Int. to 11 Sep.,	\$18 25	
			\$3668 25
	Aug. 18, To Cash paid him,	2000 00	
	Int. to 11 Sep.,	8 00	
			2008 00
	" 19, " Cash paid him,	2770 00	
	Int. to 11 Sep.,	10 62	
			2780 62
	" 21, " Cash paid him,	1055 60	
10	Int. to 11 Sep.,	3 70	
			1059 30
	" 23, " Cash paid him,	2000 00	
	Int. to 11 Sep.,	6 33	
			2006 33
	" 31, " Cash paid him,	1848 73	
	Int. to 11 Sep.,	3 39	
			1852 12
	Sept. 4, " Cash paid him,	402 40	
	Int. to 11 Sept.,	47	
20			402 87
	" 7, " Cash paid him,	2100 00	
	Int. to 11 Sep.,	1 40	
			2101 40
	" 11, " W. H. Richards' note,		
	dated March 17, 1854,		
	at 6 mos., indorsed		
	by W. W. Fleming,		
	due 20 Sep., 1618 25		
30	Protest, 1 37	1619 62	
	Less disc't fr. 11		
	Sep.,	2 43	
			1617 19
	" " F. Centes & Co.'s note,		
	dated M'ch 17, 1854,		
	at 6 mos., indorsed		
	by W. W. Fleming,		
	due 20 Sep., 2240 40		
	Protest, 1 37	2241 77	
40	Less disc't from 11		
	Sep.,	3 36	
			2238 41
	" " F. Centes & Co.'s note,		
	dated M'ch 24, 1854,		
	at 6 mos., indorsed		
	by W. W. Fleming,		
	due 27 Sep., 2320 60		
	Protest, 1 37	2321 97	

Less disc't from 11 Sep.,	\$6 19	
		\$2315 78
Sept. 11. To Wm. C. Porter's note, dated 24 M'ch, 1854, at 6 mos., indorsed W. W. Fleming, due 27 Sept., protested,	1855 37	
Less disc't from 11 Sep.,	4 94	10
		1850 43
" Cam. & Atlantic R. R. Co.'s note, dated April 10, 1854, at 6 mos., indorsed by W. W. Fleming, due Oct. 13th, 2649 50		
Protest, 1 38		
	2650 88	
Less dis'ct from 11 Sept.,	14 13	20
		2636 75
" Cam. & Atlantic R. R. Co.'s note, dated 15 April, 1854, at 6 mos., indorsed by W. W. Fleming, due 18 Oct., 2649 50		
Protest, 1 38	2650 88	
Less dis'ct from 11 Sept.,	16 34	30
		2634 54
" His check on Trades- men's Bank, dated 11 Sep., 1854,		4500 00
" His check on Trades- men's Bank, dated 11 Sep., 1854,		3614 00
		\$80,704 60 40

No. 2. Schedule of Items on which \$15,000 is allowed.

Sept. 11. To note signed Arthur A. Burt, dated Apr. 22, at 6 mos., indorsed by W. W. Fleming, due 25 Oct. and unpaid,	3410 50
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		Less disc't from 11 Sep.,	<u>\$25 01</u>	\$3385 49
	Sept. 11.	To his note, dated May 5, 1854, at 6 mos., indorsed Arthur A. Burt, due 8 Nov.,	3610 00	
		Less disc't from 11 Sep.,	<u>22 86</u>	
10	"	" his note, dated May 21, 1854, at 4 mos., indorsed William H. Richards, due 24 Sep., unpaid and protested,	2114 36	3587 14
		Less disc't from 11 Sep.,	<u>4 58</u>	
				2109 78
20	"	" note signed Wm. H. Richards, dated Apr. 3, 1854, at 4 mos., indorsed by W. W. Fleming, due 6 Aug., Int. to 11 Sep.,	2140 56 12 85	
			<u>12 85</u>	2153 41
	"	" his note, dated June 6, 1854, at 6 mos., indorsed Arthur A. Burt, due 9 Dec.,	3641 00	
30		Less disc't from 11 Sep.,	<u>54 00</u>	
				3587 00
	"	" note signed Wm. H. Richards, dated 14 July, at 4 mos., in- dorsed by W. W. Fleming, due 17 Nov., Less disc't from 11 Sep.,	3156 40 35 77	
40			<u>35 77</u>	3120 63
	"	" note signed Thos. H. Carleton, dated Apr. 27, 1854, at 4 mos., indorsed by W. W. Fleming, due 30 Aug., Int. to 11 Sep.,	1560 54 3 12	
			<u>3 12</u>	1563 66
	"	" note signed Thos. H. Carleton, dated Aug.		

16, 1854, indorsed by W. W. Fleming, at one month, due 19 Sep.	\$624 46	
Less disc't from 11 Sep.,	83	
		\$623 63
Sept. 11. To note, signed Chas. E. French, dated March 3, 1854, at 6 mos., indorsed by W. W. Fleming, due 6 Sep.,	1460 54	10
Int. to 11 Sep.,	1 22	
		1461 76
" note, signed Chas. E. French, dated July 3, 1854, at 4 mos., indorsed by W. W. Fleming, due 6 Nov.,	1464 22	
Less disc't from 11 Sep.,	7 56	20
		1456 66
" note, signed Chas. E. French, dated 30 March, 1854, at 4 mos., indorsed by W. W. Fleming, due 2 Aug.,	1641 25	
Int. to 11 Sep.,	10 94	
		1652 19
" S. Asbury & Co's. ac- cep. of bill, dated July 27, 1854, at 4 mos., drawn and indorsed by W. W. Fleming, due 30 Nov.,	2113 40	30
Protest, 1 38		
	2114 78	
Less disc't from 11 Sep.,	28 17	40
		2086 61
" " S. Asbury & Co., ac- ceptance of bill, dated July 27, 1854, at 4 months, drawn and indorsed by W. W. Fleming, due 30th Nov.,	2460 50	
Protest, 1 38	2461 88	
	6	

	Less disct. from 11 Sept.,	\$32 80	
			\$2429 08
	Sep. 11. To S. Asbury & Co's., ac- ceptance of bill, dated July 1, 1854, at 6 mos., drawn and in- dorsed by W. W. Fleming, due 4 Jan.,	2306 70	
10	Less disct. from 11 Sept.,	44 22	
			2262 48
	" " S. Asbury & Co's., ac- ceptance of bill, dated July 7, 1854, at 6 mos., drawn and in- dorsed by W. W. Fleming, due 10th Jan.,	2313 30	
20	Less disct. from 11 Sept.,	46 65	
			2266 65
	" Schedule No. 1, amount allowed,	\$80,704 60	\$33,746 17
	" Schedule No. 2, amount allowed,	15,000 00	
	" Total amount of decree,		\$95,704 60

30 State of New Jersey, Burlington County, ss.

I, Samuel Smith, Clerk of the Court of Common Pleas, of said County, do hereby certify that the above or foregoing is a true, full, and correct copy of rules, &c., as taken from the minutes of said Court.

In testimony whereof, I have hereunto set my
[SEAL.] hand, and affixed the seal of said County, this
twenty-second day of October, A. D. 1856.

SAMUEL SMITH,
Clerk.

40

Copy of Appeal.

Court of Errors and Appeals in the last resort, &c.

Between WALTER D. BELL and ALBERT
W. MARKLEY, Assignees of Wm. W.
FLEMING, Appellants,
and

HENRY J. WILLIAMS, Executor, &c.,
of THOMAS FLEMING, deceased,
Appellee.

On Appeal, &c.
Pétition of Ap-
peal.

To the honorable the Court of Appeals in the last resort in
all causes, &c.

The humble petition of Walter D. Bell and Albert W. Markley, assignees of William W. Fleming, appellants in the above-stated cause, respectfully show: That your petitioners find themselves aggrieved by a final decree made in the Court of Chancery of his honor, Benjamin Williamson, Chancellor of New Jersey, bearing date the twenty-third day of June, A.D. eighteen hundred and fifty-eight, wherein the said appellants were complainants, and Daniel L. Miller, Jr., and the said Henry J. Williams, executor, &c., of Thomas Fleming, deceased, and others, were defendants, in this respect, to wit, 10 in that the said decree, adjudging that a certain mortgage therein mentioned, of the said William W. Fleming and wife, to the said Thomas Fleming, bearing date the eighth day of August, A. D. eighteen hundred and fifty-four, is a valid and subsisting lien and incumbrance upon the lands and premises mentioned and described in said mortgage, and upon the moiety thereof, set off and allotted to the said appellants, on the partition thereof, and, as against the said appellants, upon the claim presented to them as assignees, as aforesaid, is entitled to priority out of the proceeds of the sale thereof, to 20 the amount of the sum of fifty-nine thousand two hundred and ninety-seven dollars and fifty cents, with interest thereon, from the eleventh day of September, A. D. eighteen hundred and fifty-four; and that the conveyance and assignment by said William W. Fleming to said appellants, for the benefit of his creditors, was subject to the lien of said mortgage, to the amount of the said sum of money, and interest thereon, as aforesaid. And your petitioners humbly appeal from that part of the said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for 30 that said mortgage is not a valid and subsisting lien and incumbrance on said lands, and is not entitled to priority out of the proceeds of the sale thereof, as aforesaid, to the amount of the said sum of money, or any part thereof; and that the said conveyance and assignment to your petitioners was not subject to the lien of said mortgage, to the amount of said sum of money, or any part thereof. Your petitioners therefore pray, that the said decree may, in the particulars aforesaid, be reversed, set aside, and for nothing holden; and that your petitioners may have such relief in the premises as to 40 this honorable Court shall seem meet.

A. BROWNING,
Solicitor, &c.

W. L. DAYTON,
Counsel.

Dated July 20th, 1858.

Thomas Fleming died, at Philadelphia, March 16, 1854, leaving a will, of which the following is a copy; which, after

being proved in Philadelphia, was proved also before the Surrogate of the County of Camden, in this State; and letters testamentary issued to said Henry J. Williams, Esq. He left an estate of about \$800,000.

Copy of Will.

Be it remembered, that I, Thomas Fleming, of the City of Philadelphia, formerly of the City of Charleston, merchant,
10 do make this, my last will and testament in manner following, that is to say :

I hereby declare, that my domicile is, and for many years has been, in the City of Philadelphia.

2. I will and direct all my just debts and funeral expenses to be paid soon as possible.

3. I give to my wife, Clarissa T. Fleming, my house and lot, with the appurtenances, situate on the north side of Walnut Street, between Eleventh and Twelfth Streets, No. 327, in which I now reside, (*and the stable on the south side of*
20 *George Street, between Eleventh and Twelfth Streets,*) for and during the full term of her natural life; and all books, plate, household and other furniture, and all articles of any kind which may be in or about the same, for her own absolute use and behoof; and I, also, give to my said wife my six houses on Locust Street, between Fifteenth and Sixteenth Streets; and my two houses, Numbers 309 and 311, on the north side of Locust Street, between Broad and Fifteenth Streets, for and during the full term of her natural life; and I direct, that all the above real estate shall be perpetually
30 insured at the expense of my estate; and that these devises and bequests shall be taken by her in satisfaction of her dower, or thirds, and of all her claims against my said estate.

4. I give and devise unto my half-sister, Elizabeth Thompson, wife of John Thompson, the farm, of eighty acres, on which she resides, in Montgomery County, for and during the full term of her natural life; and, after her death, I give the same to her two daughters and her son, John Thompson (who is feeble-minded), and to their respective heirs and assigns, share and share alike; and, in the case of the death of either or any of the
40 said these children before me, without leaving issue living at the time of my death, then I give his or her share to the survivor or survivors, or the issue of either, who may be then dead, leaving issue, living at the time of my death, their respective heirs and assigns, such issue, however, taking only their parent's share.

5. I have given to each of my daughters, on their marriage, sums of money, or property, which amount to about twenty-five thousand dollars; and I think it just, to place my unmarried daughter upon an equal footing with her sisters. I there-

fore give and bequeath unto my said daughter, Margaretta A. Fleming, the sum of ten thousand dollars.

And I also give unto my executors, hereinafter named, the further sum of fifteen thousand dollars, to be held by them in trust, to invest the same in their names in trust for the use of the said Margaretta A. Fleming, and to pay over the income or interest thereof unto the said Margaretta for and during the full term of her natural life, for her sole and separate use; the said income or interest to be paid quarterly or half-yearly into her own hands or upon her own orders and receipts, 10 signed not more than one month before the same falls or becomes due and payable, and not to be subject to any anticipation, sale, alienation, or disposed by her own act or by any act of law, whether for or without consideration, nor to any debts, liabilities, or engagements which she may contract, nor to any debts, liabilities, or engagements of any husband she may have or take, nor to any attachment or execution against her in any way whatever, and upon her death to hold the same upon such trusts and for such persons and estates as may be designated, expressed, and contained in any last will, 20 testament, or appointment, in the nature thereof, to be made and signed by her, and in default of such last will, testament, and appointment, in trust for her children, and the issue of any deceased child living at the time of her death, their respective executors and administrators, share and share alike, such issue taking, however, only their parents' share, and in default of both last will, testament, or appointment, and of issue living at the time of her death, then in trust for such persons as would be entitled thereto, under the intestate laws of Pennsylvania, if she had died possessed thereof, freed from 30 all trusts whatever.

6. As I have advanced, and have been obliged to pay for my son, William W. Fleming, more than his share of my whole estate, and cannot, therefore, without injustice to my other children, add considerably to this amount, I therefore give and bequeath to my executors, hereinafter named, the sum of ten thousand dollars to be held by them in trust, to invest the same, and to pay over the income and interest thereof unto my said son, quarterly or semi-annually, for and during the full term of his natural life, the said income or in- 40 terest to be paid over to him, personally, or to his orders, to be signed by him, and dated not more than one month before the same falls or becomes due and payable, and not to be subject to any anticipation, sale, alienation, or disposal, by his own act, nor by any act of law, nor to any debts, contracts, or engagements heretofore contracted, or hereafter to be contracted by him, nor to any attachment or execution, in any way whatever, his own receipts or orders, as aforesaid, to be the only sufficient vouchers for the payment thereof, and upon and immediately after his death to pay over the whole income

or interest thereof, unto his wife, Maria L. Fleming, for and during her natural life, for her sole and separate use, to be paid to her quarterly or half yearly, on her own receipts or orders, dated not more than one month before the same becomes due, and not to be subject to any anticipation, alienation, sale, or disposal, by her own act, or any act of law, nor to any contract, liability, or engagement, made or entered into by her, nor to the control, debts, or contracts of any other husband she may have or take, her own receipts and
 10 orders, as hereinbefore provided, to be the only sufficient vouchers for the payment thereof, and upon the death of my said son and his wife, I give and devise the said sum of ten thousand dollars unto his children, and the issue of any deceased child living at the time of the death of the survivor of them, share and share alike, such issue, however, taking only their parents' share. If my said son and his wife should both die without leaving any issue of my said son, William W., living at the time of the death of the survivor of them, then I will and direct that the said sum shall fall into and become part of my
 20 residuary estate.

7. I give and devise to my executors, hereinafter named, the further sum of ten thousand dollars in trust to invest the said sum, and to pay over the net income thereof unto Maria L. Fleming, wife of my son William W. Fleming, from the day of my death, for and during the full term of her natural life, the said income, and the principal thereof in the hands of my said executors, to be held for and subject, from the time of my death, to the restrictions, limitations, conditions, uses, and trusts, persons, and estates, hereinbefore mentioned, expressed
 30 and contained in relation to the sum of ten thousand dollars given to her after the death of my son William W. Fleming.

8. All the rest, residue, and remainder of my estate, real and personal, whatsoever and wheresoever the same may be, I hereby give, devise, and bequeath unto my children, Jane Eliza Adger, wife of Robert Adger, Charleston, S. C., Robert I. Fleming, of Missouri, Thomas Flinn Fleming, of Missouri, Clarissa A. Burt, wife of Arthur A. Burt, Alfred W. Fleming, Thomas Macauley Fleming, and Margaretta A. Fleming, their respective heirs, executors, and administrators, share and
 40 share alike; but as respects the shares and proportions of my daughters, I will and direct that they shall be held by my executors hereinafter named, their heirs, executors, and administrators, in trust, to collect and receive the rents, interest, and income of the respective shares of my daughters, and to pay over the same, first deducting all proper and necessary charges and expenses, unto my said daughters, for their sole and separate use, for and during the full term of their natural lives, to be paid to them respectively or upon their respective orders and receipts signed not more than three months before

the said income falls or becomes due, and payable, and not to be subject to any alienation, anticipation, or disposition by their own acts, or by acts of law, or to any control or interference of any husbands they may respectively have or take, or to any liability for any of their debts, contracts, or engagements; and upon the death of each of my said daughters, to have and to hold her share or proportion in trust for the persons, uses, trusts, and estates mentioned and declared in any last will, testament, and appointment she or they respectively may make, and in default of any such will or appointment 10 then in trust for the children of my said daughters respectively, and the issue of any deceased child, their heirs, executors, and administrators, share and share alike; such issue taking however only their parents' share.

In order to place my children as nearly upon an equality as may be, I direct that all the debts with which my sons are respectively charged upon my ledger, shall be deducted from their respective shares of my estate, allowing to each of them a credit of twenty-five thousand dollars, being the sum I have advanced or given hereby to their sisters, excepting always 20 my son William W. Fleming, against whom I desire my executors to prosecute no suit or claim for any debts he may owe me, but not to abandon the proceedings commenced against the estate assigned by him to Messrs. Bell and Markley for the benefit of his creditors, but this direction is not to be taken or considered to release him from or to affect the claims of those who may hold his notes or may be a party to any negotiable instrument signed or indorsed by him. The provisions hereinbefore made for my son William W. is to be in full of his whole share or claim from or out of my estate. 30

10. I release to my other children (excepting William W. as aforesaid) all debts not charged to them in my ledger or account books as aforesaid, or not arising from or upon notes or instruments signed or indorsed by them respectively.

11. I hereby give, devise, direct, and declare that my executors and trustees herein named, or any other trustee or trustees who may be named in their place, or stand in the place of them for the purpose of making division of my estate among my children, or for any other purpose whatever, shall have full power and authority to grant, bargain, and sell, or let on 40 ground-rent, mortgage, exchange, or make partition of all and any part or parts of my said estate at public or private sale, for any price or consideration, with any reservations, restrictions, or conditions, for cash, or upon credits, taking security upon the premises for any balance of the purchase-moneys, and to sell, execute, and deliver all deeds, conveyances, mortgages, and other instruments necessary for the purposes aforesaid, without any obligation on the purchasers to see to or be responsible for the application or misapplication of the con-

sideration paid or given therefor, or for the propriety or expediency of any exercise of this power.

I direct that my business with my sons, Alfred W. and T. Macauley Fleming, conducted under the firm of Alfred W. & T. M. Fleming & Co., shall be closed and settled immediately after my death, and the loss arising therefrom shall be chargeable to my estate according to my promise to them.

As there is a large amount of debt standing upon my books as a charge against my sons Robert and William as former
10 partners in the house of Thomas Fleming & Sons, I will and direct that but one-fourth of that sum shall be considered as due from my son Robert, and deducted from his share of my estate; all the balance is assumed by me, and thereby extinguished.

I will and direct that the sum of thirty thousand dollars shall be taken and retained by my executors hereinafter named, from each of the shares of my estate hereby given and devised unto my sons Robert F. and Alfred W. Fleming, and that the said two sums of thirty thousand dollars shall be
20 held by them in trust for the benefit of my said sons severally and respectively, the income of said several sums to be paid over to each of the said sons respectively during their lives, on their own receipts or orders, not dated more than three months before the same falls and becomes due, and not to be subject to any alienation, anticipation, or disposal by their own respective acts, or by acts of law, nor to any attachment or execution, and upon their respective deaths to hold the same in trust for such persons, uses, and estates as may be given, expressed, or contained in any last will, testament, or
30 appointment, to be signed by them respectively, and in default of such last will, testament, and appointment, in trust for their respective children and the issue of any deceased child, share and share alike, such issue however taking only their parent's share, and in default of such last will, testament, and appointment, and of such issue, in trust for such persons as would be entitled thereto under the intestate laws of the State of Pennsylvania, if they had been seised and possessed thereof freed from any trusts whatever.

I will and direct further, that if the sum of twenty-five thousand dollars, hereinbefore directed to be credited to my sons respectively, should not be absorbed by their respective debts due as aforesaid, the same or the balance thereof shall be paid to them from my general estate.

I authorize my executors herein named, in their sole and absolute discretion, without any personal responsibility of any kind, to extend the period for the payment of the debts to be collected from my sons, according to the opinion of the justice and propriety of each particular case, and I further will and direct that they shall not in any instance be made responsible

for any mistake of judgment, although it may be injurious to my estate.

And lastly, I hereby nominate and appoint my wife Clarissa T. Fleming, my son Thomas Flinn Fleming, and my friends Henry J. Williams, Esq., John Richardson, Esq., and Jasper Corning, Esq., N. Y., executors of this my last will and testament.

In witness whereof, I have hereunto set my hand and seal, this fifteenth day of February, Anno Domini one thousand eight hundred and fifty-five (1855). 10

Witness

THOMAS FLEMING. [SEAL.]

Signed, sealed, published, and declared by the said Thomas Fleming, above named, as and for his last will and testament, in our presence, who, in his presence, and in the presence of each other, and at his request, have hereunto set our names as witnesses thereto. The words "and the stable on the south side of George Street between 11th and 12th Sts.," being first interlined on the first page.

JOHN THOMPSON. 20

SAMUEL DAY.

H. C. THOMPSON.

Be it remembered, that I, Thomas Fleming, of the City of Philadelphia, do make this codicil to my last will and testament, dated the fifteenth day of February, Anno Domini 1855, in manner following, that is to say:

I give and bequeath unto my son-in-law, Robert Adger, of Charleston, S. C., his executors and administrators, the sum of seventy thousand dollars, to be held by him, his executors, and 30 administrators upon and for the following trusts and purposes.

1. In trust to hold the same for the use of the children of the said Robert Adger, and Jane Eliza his wife, in equal shares, to wit: ten thousand dollars for Clarissa Walton Adger; ten thousand dollars for Sarah Elizabeth Adger; ten thousand dollars for Jane Eliza Adger; ten thousand dollars for Margaret Anne Adger; ten thousand dollars for Susan Dunlap Adger; ten thousand dollars for Mary Louisa Fleming Adger, and ten thousand dollars for William Adger.

2. In trust to invest and reinvest the same as often as may 40 be necessary in good safe real or personal securities, and to retain the respective income thereof, to be accumulated and added to the principal of each respective child's share until they shall successively and respectively attain the age of twenty-one years, and then to pay over to each of said children respectively, as and after they attain their majority, the whole nett income of such respective accumulated funds for and during the natural lives of the said children respectively, the said income to be paid quarterly or half-yearly, into their

own hands respectively, upon their several and respective receipts, and not to be subject to any anticipation, sale, or alienation, or disposal by their own acts respectively, or by any act of law, whether for or without consideration; nor to any debts, liabilities, or engagements, which they may respectively contract, nor to any debts, liabilities, or engagements of any husband or husbands they may respectively have or take, nor to any attachment or execution against them in any way whatever, and upon the death of each of the said children, to have
 10 and to hold his or her share and proportion in trust for the persons, uses, trusts, and estates, mentioned, expressed, and contained in any last will and testament and appointment in the nature thereof, he, she, or they may respectively make, and in default of any such last will, testament, and appointment, then in trust for their respective children, and the issue of any deceased child living at the time of their respective deaths, their executors and administrators respectively, share and share alike, such issue taking, however, only their parents' share and in default of both last will and testament or appointment, and
 20 of issue living at the time of their several and respective deaths, then in trust for such persons as would be entitled thereto, under the intestate laws of Pennsylvania, if they had respectively died possessed thereof freed from all trusts whatever.

And I hereby nominate and appoint my said son-in-law, Robert Adger, an executor of this my last will and testament, in addition to those therein named.

And except so far as it is hereby altered, I republish my said last will and testament.

30 In witness whereof to this present writing, which I hereby declare to be a codicil to my last will and testament, and which I direct to be added thereto and to be taken as part thereof, I have set my hand and seal this eighth day of March in the year of our Lord one thousand eight hundred and fifty-five (1855).

THOMAS FLEMING. [SEAL.]

Signed, sealed, published, and declared by Thomas Fleming, above named, as and for a codicil to be taken and considered
 40 to be annexed to his last will and testament, in our presence, who, in his presence, and in the presence of each other, and at his request, have hereunto set our names as witnesses thereto.



