Clerks Table

N. J. Court of Errors and Appeals.

ON APPEAL.

BETWEEN

GEORGE W. CASSEDY AND ALS,
Complainants,

—AND—

WILLIAM A. BIGELOW AND ALS,
Defendants.

Bill for Injunction and Relief.

[Filed February 3, 1874.]

IN CHANCERY OF NEW JERSEY.

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

Humbly complaining, show unto your Honor, your Orators, George W. Cassidy, Francis T. Lilliendahl, Virgil de Escoriaza and Simon Bernheimer, trustees, as hereinafter mentioned, the said Simon Bernheimer in his own right, The Marine National Bank, a corporation created under the laws of the United States, The National Park Bank, a corporation created in like manner, Theodore B. Woolsey, Rudolph C. Burlage and Frederick Rose, Charles Spielmann, The Hanover National Bank, a corporation created under the laws of the United States, The Union Bank of Jersey City, a corporation created

under the laws of the State of New Jersey, Raphael Barthold, Theodore Rose, Virgil de Escoriaza, in his own right, Ladislao de Escoriaza, William Kramer, David Jones, Watson E. Case and Isaac Bernheimer, that John Roemmelt and Andrew Leicht, of the County of Hudson, in said State, being seized in fee of certain lands situate now in Jersey City, in said County, which are hereinafter described and mortgaged to the said George W. Cassedy, Francis T. Lilliendahl, Virgil de Escoriaza and Simon Bernheimer, trustees, gave a mortgage on a part thereof, as hereinafter is stated and set forth, to one William A. Bigelow. The wife of the said John Roemmelt, and the wife of the said Andrew Leicht joined in the said mortgage, and by their acknowledgment barred their dower in the mortgaged premises.

The said mortgage to Bigelow bore date the twentieth day of March, in the year eighteen hundred and sixty-nine, and mortgaged to said Bigelow, in fee simple, said part of said lands, to secure to him the payment of certain moneys therein mentioned.

The said William Bigelow filed a bill in this Court some time prior to the month of October, in the year eighteen hundred and seventy-two, making parties thereto the said Roemmelt and Leicht and their wives, to foreclose his mortgage, and such proceedings were thereon had that on the petition of the said Bigelow, Complainant in that case, your Orators, the said trustees, were made parties to that suit, not in respect of the mortgage hereinbefore and hereinafter mentioned as given to them as trustees, but as trustees in bankruptcy proceedings, but said bankruptcy proceedings have been superseded. The right and title acquired by your Orators, the said trustees, as trustees in bankruptcy, were under the sanction and approval of the Court of Bankruptcy, re-assigned to the said Roemmelt and Leicht, and the mortgage to your Orators, the said trustees, made with the approval of the Court of Bankruptcy. And your Orators claim the relief

herein prayed under and by virtue of the mortgage aforesaid so given to them, the said trustees.

Such further proceedings were had in the said foreclosure suit of said Bigelow, that on the eighteenth day of October, in the year eighteen hundred and seventy-two, this court made a decree wherein, after reciting that it appeared by the report of a Master that there was due to the said Bigelow for principal and interest on his mortgage, the sum of fifty thousand dollars, principal of certain notes secured by said mortgage, amounting in the whole, with interest and protest fees, to fifty-two thousand and forty-two dollars; this Court did order, adjudge and decree that the Complainant's bill be taken as confessed, and the Master's report and all the matters therein contained should stand confirmed, and that the Complainant was entitled to have the said sum of fifty-two thousand and forty-two dollars, with lawful interest thereof, computed from the fourth day of said October, together with the costs of this suit, to be taxed, raised and paid out of the mortgaged premises; and did further order, adjudge and decree that so much of the estate and premises in the said mortgage contained, as would be sufficient to raise and satisfy the said debt, interest and costs, be sold, and that a writ of *fieri facias* issue for that purpose out of this Court, directed to the Sheriff of the County of Hudson, commanding him to make sale according to law of so much of the said mortgaged premises as will be sufficient to satisfy the said debt, interest and costs, and to pay the same to the Complainant or his solicitor; and in case more money should be raised by the sale than shall be sufficient to answer such payment, such surplus money may be brought into the Court and deposited with the clerk, to abide the further order of this Court, unless otherwise disposed of by order of this Court, and that the said Sheriff make return to this Court of his proceedings by virtue of the said writ; and did further order, adjudge and decree, that the Defendants stand absolutely debarred and foreclosed of and from all equity of re-

demption, of, in and to so much of the said mortgaged premises as should be sold as aforesaid by virtue of that decree. Pursuant to said decree the costs of the said Bigelow were taxed at ninety-five dollars and ninety-nine cents, and a *fieri facias* was issued thereof in conformity to the directions to John Reinhardt, then and still Sheriff of the County of Hudson, commanding him, as in said decree it was ordered he should be commanded.

The said John Reinhardt, Sheriff of the County of Hudson, has advertised the said lands and premises so mortgaged to said Bigelow, and the sale has been from time to time adjourned, and pursuant to the last adjournment the lands and premises so mortgaged to said Bigelow will be sold on the fifth day of February, in the year eighteen hundred and seventy-four, unless the sale is restrained by the order and injunction of this Court.

The said John Roemmelt and Andrew Leicht, with their said wives, by mortgage under their hands and seals, bearing date the twentieth day of June, in the year eighteen hundred and seventy-two, duly acknowledged by them and their wives on the twentieth day of August, A. D. eighteen hundred and seventy-two, so as to bar the estate of said wives, and thereafter recorded at length in the clerk's office of the County of Hudson, in said State of New Jersey, on the twenty-seventh day of August, A. D. eighteen hundred and seventy-two, at two o'clock P. M., in Liber ninety-seven of mortgages, on page four hundred and thirty-nine, &c., did grant, bargain, sell and convey unto your Orators, the said trustees, and to their heirs and assigns forever, as joint tenants and not as tenants in common, the whole of the lands, premises and property so mortgaged, to the said Bigelow and so ordered to be sold by said decree so obtained by said Bigelow, and so intended to be sold on the fifth day of February, eighteen hundred and seventy-four, and other lands.

The said mortgage to your Orators, the said trustees, recited the giving of a bond bearing even date therewith,

by said Roemmelt and Leicht to your Orators, the said trustees, in the penal sum of four hundred thousand dollars, conditioned for the payment at maturity, or within thirty days thereafter, of each and every of sundry promissory notes, according to their tenor and effect, made and delivered or to be made and delivered by the said Roemmelt and Leicht to said trustees, in pursuance of an agreement of compromise entered into between said Roemmelt and Leicht and their creditors; and also recited that the said promissory notes had been made and delivered by the said Roemmelt and Leicht to the said trustees, as trustees for the creditors of the said John Roemmelt and Andrew Leicht, in pursuance of the agreement of compromise entered into between the said Roemmelt and Leicht and their said creditors, and that the said bond contained an agreement by which, at the option of the trustees, all of the said notes should become due in case of a default for thirty days in the payment of any one.

The habendum and condition in the said mortgage contained is as follows :—

To have and to hold the above granted, bargained and described premises, with the appurtenances unto the said parties of the second part, their heirs and assigns, to their own proper use, benefit and behoof forever, as joint tenants and not as tenants in common.

Provided always, and these presents are upon the express condition, that if the said John Roemmelt and Andrew Leicht, their heirs, executors or administrators, shall well and truly pay or cause to be paid unto the said parties of the second part, their successors or assigns, the said several promissory notes mentioned in the condition of the said bond or obligation at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents and the estate hereby granted, should cease, determine and be void.

9. The bond in the said mortgage to said trustees re-

cited, was in fact, given by said Roemmelt and Leicht to said trustees, and is of the tenor in said mortgage recited, and the bond, mortgage, and notes were duly stamped according to the statutes of the United States then in force, and a list of the said notes referred to in said bond and mortgage to said trustees, was, at the time of the delivery of said bond and mortgage, annexed to said bond, and is as set forth in *Schedule A*, hereto annexed.

10. The promissory notes so secured by said bond and mortgage, were in fact given and consist of three hundred and twenty notes, all bearing date the first day of August, in the year eighteen hundred and seventy-two, and were all made by said Roemmelt and Leicht. by each of which they promise to pay to their own order a certain sum of money hereafter mentioned at a certain time hereinafter mentioned after the date of the said note, and all of the said three hundred and twenty notes were endorsed by the said Roemmelt and Leicht, and delivered to your Orators the said trustees, as trustees for the creditors of said Roemmelt and Leicht, and the notes described in said list, (so marked A, and hereto annexed), were made payable at the end of the number of months after the date thereof in the said list mentioned, and by each note said Roemmelt and Leicht promised to pay to their own order, at the Second National Bank in Jersey City, the amount of money which, in the list aforesaid, is set opposite the number of months for which said note is in said list stated as given, and all of said three hundred and twenty notes were delivered to the creditors of said Roemmelt and Leicht entitled to the same, that is to say, the notes in said list described were delivered to the person whose name in said list precedes the statement of the numbers of months and the amount of such note, all of whom were creditors of said Roemmelt and Leicht.

11. Of these said notes so delivered to any of your Orators, they now hold as follows, that is to say, your Orator, the said Simon Bernheimer, holds of the notes aforesaid those which in the list A, hereto annexed, im-

mediately after the name of the said "Simon Bernheimer," are stated as the 4th, 5th, 6th, 7th, 8th, 9th and 10th notes.

Your Orator, the said The Marine National Bank, holds, of the notes aforesaid, those which, in the said list immediately after "Marine National Bank," are stated as 4th, 5th, 6th, 7th, 8th, 9th and 10th notes.

Your Orator the said the National Park Bank, holds, of the notes aforesaid, those which in the said list immediately after "National Park Bank," are stated as 4th, 5th, 6th, 7th, 8th, 9th and 10th notes.

Your Orator, the said Theodore B. Woolsey, holds, of the notes aforesaid, those which, in the said list immediately after "Theodore B. Woolsey," are stated as 4th, 5th, 6th, 7th, 8th, 9th and 10th notes.

Your Orators, Rudolph C. Burlage and Frederick Rose, hold, of the notes aforesaid, those which, in the said list immediately after "Burlage & Co.," are stated as 4th, 5th, 6th, 7th, 8th, 9th and 10th notes.

Your Orator, Charles Spielman, holds, of the notes aforesaid, that which, in the said list immediately after "Charles Spielman," is stated as the 10th note, and that, which, in the said list immediately after "Union Bank of Jersey City," is stated as the 4th note, and a large number of other notes, passed to him by the owners thereof, in said list named.

Your Orator, the Hanover National Bank, holds of the notes aforesaid, those which, in the said list immediately after "Hanover National Bank," are stated as 4th, 5th, 6th, 7th, 8th, 9th, and 10th notes.

Your Orators, the Union Bank of Jersey City, holds, of the notes aforesaid, those which in the said list immediately after "Union Bank of Jersey City," are stated as the 5th, 6th, 7th, 8th, 9th, and 10th notes.

Your Orator, the said Rafael R. Barthold, holds, of the notes aforesaid, those which, in the said list immedi-

ately after "Rafael R. Barthold," are stated as 4th, 5th, 6th, 7th, 8th, 9th, and 10th notes.

Your Orator, the said Theodore Rose, holds, of the notes aforesaid, those which, in the said list immediately after "Theodore Rose," are stated as 4th, 5th, 6th, 7th, 8th, 9th, and 10th notes.

Your Orator, the said Virgil de Escoriaza, holds, of the notes aforesaid, those which, in the said list immediately after "Virgil de Escoriazi," are stated as 4th, 5th, 6th, 7th, 8th, 9th, and 10th notes; and also those which in the said list immediately after "Leo del Banco," are stated as 4th, 5th, 6th, 7th, 8th, 9th, and 10th notes; and also those which in the said list immediately after "William Tanning," are stated as 4th, 5th, 6th, 7th, 8th, 9th, and 10th notes.

Your Orator, the said Ladislao Escoriaza, holds, of the notes aforesaid, those which, in the said list immediately after "J. and J. M. Escoriaza," are stated as 4th, 5th, 6th, 7th, 8th, 9th, and 10th notes.

Your Orator, the said William Kramer, holds, of the notes aforesaid, those which, in the said list immediately after "William Kramer," are stated as 4th, 5th, 6th, 7th, 8th, 9th, and 10th notes.

Your Orator, David Jones, holds, of the notes aforesaid, those which, in the said list immediately after "David Jones," are stated as 4th, 5th, 6th, 7th, 8th, 9th, and 10th notes.

Your Orator, Watson E. Case, holds, of the notes aforesaid, those which, in the said list immediately after "Watson E. Case," are stated as 4th, 5th, 6th, 7th, 8th, 9th, and 10th notes.

Your Orator, Isaac Bernheimer, holds, of the notes aforesaid, those which, in the said list immediately after "Isaac Bernheimer," are stated as 4th, 5th, 6th, 7th, 8th, 9th, and 10th notes.

12. The residue of the notes secured by said bond and

mortgage to said trustees, are held by various persons, many of whom are to your Orators unknown, but said persons are represented by your Orators, the said trustees, and said persons are, besides being for the most part unknown, too numerous to make parties hereto.

13. The lands and property mortgaged to said trustees by said mortgage, are described in a *Schedule* marked *B*, hereto annexed.

14. The lands and property mortgaged to said Bigelow, and ordered to be sold by said decree, and which are to be sold on the fifth day of February, in the year eighteen hundred and seventy-four, are described in a *Schedule* marked *C*, hereto annexed.

15. Your Orators, Simon Bernheimer, in his own right, The Marine Nationl Bank, The National Park Bank, Theodore B. Woolsey, Rudolph C. Burlage, and Frederick Rose, Charles Speilman, The Hanover National Bank, The Union Bank of Jersey City, Rafael Barthold, Theodore Rose, Virgil de Escoriaza, in his own right, Ladislao Escoriaza, William Kramer, David Jones, Watson E. Case and Isaac Bernheimer, who hold three-quarters in amount of all the notes secured by said bond and mortgage to said trustees, have raised a fund sufficient to pay the said William A. Bigelow, the amount of money directed by the said decree to be raised by a sale thereof out of the said lands and premises so mortgaged to said Bigelow, that is to say, the principal and interest, costs and interest thereon, and Sheriff's and other execution fees, and have contributed thereto as follows: the said Simon Bernheimer, five thousand dollars; The Marine National Bank, six thousand dollars; The National Park Bank, five thousand dollars; Theodore B. Woolsey, fifteen hundred dollars; Rudolph C. Burlage and Frederick Rose, fifteen hundred dollars; The Hanover National Bank, twelve hundred dollars; The Union Bank of Jersey City, twenty-one hundred and fifty dollars; Raphael R. Barthold, five thousand dollars; Theodore Rose,

twenty-five hundred dollars; Virgil de Escoriaza, twenty-five hundred dollars; Ladislao Escoriaza, twenty-five hundred dollars; William Kramer, five thousand dollars; David Jones, five thousand dollars; Watson E. Case, fifteen hundred dollars; Isaac Bernheimer, five thousand dollars; and the said Charles Spielman, the balance thereof.

And your Orators further show unto your Honor, that the said lands and property so ordered to be sold by said decree, to raise and pay to said Bigelow said moneys in said decree and execution mentioned, are of very great value, and worth more than double the amount due to said Bigelow, on said decree and execution; yet if the same should be exposed to sale, and sold under said decree and execution, the same would bring a much less sum than they are worth. The lands and premises so to be sold under said Bigelow's decree consists of about two acres of land, containing at least twenty-four city lots, on which is built a large brewery, of about eighty by one hundred and five feet, extensive cellar, blasted out of solid rock, which alone cost fifty thousand dollars; stables, wagon houses, wagon shop, a large cooperage, a large dwelling house for the workmen, a saloon in a large frame building, a bowling alley and summer house, and the private residence of said Roemmelt and Leicht.

Adjoining the said property so mortgaged to said Bigelow, and on the south, are two plots of land, containing nearly an acre of land, which are mortgaged to your Orators, the said trustees, and are described in said mortgage as part of lots lettered A and A 1, and near to, but not adjoining said land, mortgaged to Bigelow, are eight city lots which are mortgaged to your Orators, the said trustees.

Your Orators, the said trustees, have also a chattel mortgage, given to them at the same time, by the said Roemmelt and Leicht, that the said mortgage on the said real estate was given to secure the payment of the same

bond that is secured by the said real estate mortgage. The said chattel mortgage covers and conveys in mortgage to your Orators, the trustees, all the tools, machinery, and implements, casks, barrels, wagons, horses, and other personal property belonging to, or in any wise relating to the carrying on of said brewery.

Such personal property, tools, &c., are of about the value of thirty thousand dollars, and it wonld be impossible to sell to advantage the said property on which said Bigelow has his said mortgage, separate from said tools, machinery, implements, casks, barrels, and other personal property, and a sale of said property comprised in said Bigelow decree, would greatly lessen the value of the security your Orators have in the mortgage on said tools, machinery, implements, and personal property.

The said brewery is now carried on with success by said Roemmelt and Leicht, who have paid to the beneficiaries under said mortgage, held by your Orators, the said trustees, since the same was given, about fifty-four thousand dollars, and there is now unpaid, of the moneys secured by said bond and mortgage, so given to your Orators, the said trustees, about the sum of one hundred and fifty-four thousand dollars, and of this one hundred and fifty-four thousand dollars there is unpaid to your Orators about one hundred and twenty-six thousand dollars, so that those of your Orators who have contributed to raise the money to pay the said Bigelow decree, represent about five-sixths of the whole moneys now secured by said mortgage to said trustees.

The said Bigelow holds the unpaid notes mentioned in the list hereunto annexed, which are stated immediately after his name, which amount to about ten thousand dollars.

The lands and property mortgaged to said Bigelow are more valuable to the said Roemmelt and Leicht than to any one else who is likely to buy the same, and no one is likely to buy the same at any price equal or nearly

equal to their fair value, or to their value to Roemmelt and Leicht, or to their value to your Orators and their co-beneficiaries, as security for the moneys due on the notes held by them respectively, and secured by the said bond and mortgage to said trustees, and all of your Orators' securities for the money due to them or to grow due on said trust mortgage are, together, a scanty security for said moneys.

If the said lands and property should be sold under said Bigelow decree, every one of your Orators would be most seriously prejudiced thereby.

Such sale would sweep away the said two acres of land on which are said brewery and said buildings, which compose a large portion, and by far the most valuable portion, of the security they have in said mortgage to said trustees on such sale; the said lands and property would not bring above one-half of their value, at least it is highly improbable that they will bring one-half of their value.

The present state of financial embarrassment prevailing in this State and elsewhere, makes it almost a certainty that the said lands and property would be sacrificed on such sale. It is really necessary for the protection of the interest of your Orators in said mortgage to said trustees, that the said sale should not take place. It is also really necessary for the protection of the interest in said mortgage of every person who is interested in said mortgage, that the said sale should not take place.

It is also really necessary for the protection of your Orators' interest in said mortgage to said trustees, and of said Bigelow's interest in said mortgage to said trustees—he being one of the beneficiaries thereunder—that the said sale should be prevented, and that the moneys due on the Bigelow decree should be paid by your Orators, and your Orators should be subrogated to the right, title and interest of the said Bigelow in said decree, and bond and mortgage on which it is founded, and should have an

assignment thereof to the intent that the amount thereof paid should be reimbursed to your Orators out of the lands and property directed be sold by said Bigelow decree. If the said lands and property be sold under the Bigelow decree, the interest of all the beneficiaries under said mortgage to said trustees, including the interest of said Bigelow as beneficiary thereunder, will be prejudiced and sacrificed.

By such sale, the land and property will be sold free from said mortgage to said trustees, and the lien of all such beneficiaries defeated without their being paid.

If your Orators should pay the said Bigelow decree, and not be subrogated to the rights of said Bigelow thereunder, and have an assignment thereof, they will lose the amount of the money so paid, which will be about fifty-seven thousand dollars.

If they pay and are subrogated, and have an assignment, they will be able to realize the money they pay on the Bigelow decree, and as they believe the whole amount of the notes secured by the said mortgage to the trustees, including the notes held by said Bigelow and secured thereby. At all events, your Oraters will have the opportunity of saving their liens, which will otherwise be destroyed.

And they are advised and insist that they have the right to pay off said decree, and to be subrogated to the rights of said Bigelow under his mortgage and decree, to redeem said mortgage and decree, and to have an assignment thereof from said Bigelow, to protect their as well as well as his interest under said mortgage to your Orators, the said trustees.

And your Orators further show, that none of them are under any personal obligation to pay any part of the claim the said Bigelow has under the said mortgage to said trustees, or any part of any claim he has against Roemmelt and Leicht, or either of them, nor are they sureties to him for any debt or claim whatever he has

against said Roemmelt and Leicht, though they will be obliged, for the protection of their interest in the mortgage to said trustees, to give the said Bigelow the amount of said decree.

And your Orators are advised that they are therefore, under the circumstances herein stated, entitled to redeem and pay off the said Bigelow decree, without losing the money so paid, and to the end that they may be reimbursed the said expenditure so as aforesaid necessary to protect their interest in said mortgage to said trustees, to be subrogated to the rights of said Bigelow under the said decree, and to have an assignment of the said bond and mortgage and decree of the said Bigelow.

The said Bigelow has been applied to in behalf of your Orators, and all the other beneficiaries under said mortgage to said trustees, to receive the said moneys due on said decree, in order that your Orators who contribute to the payment thereof may be subrogated to his rights thereunder, and have an assignment of said bond and mortgage and decree thereon, and they have requested an assignment thereof, but the said Bigelow has expressed himself willing to receive the said moneys, if they are tendered by your Orators, the said trustees, acting for the benefit of their trust, and your Orators desire so to tender the same, and are so willing to pay the same, but do not intend that the beneficiaries under said trust mortgage, who do not contribute to the payment of said decree, shall receive any part of said moneys so paid by your contributing Orators, when they are hereafter raised out of the property ordered to be sold by said decree. The said Bigelow has also caused your Orators to be informed that if the said money is tendered not *for the benefit of the trust generally*, but by or for the *benefit of any individual beneficiaries, or any mere portion of the beneficiaries, it will not be received.*

And your Orators say that they desire to tender and pay the same for the benefit of the trust generally, in manner

before explained, but not in such manner that the beneficiaries who do not contribute can realize hereafter out of the premises, subject to said decree, any portion of the money so contributed by your Orators so contributing.

It is impossible that the said money should be tendered by all the beneficiaries, as many are unable; although, as your Orators believe, every single beneficiary under said mortgage (except said Bigelow) is willing to do so, if he were able, yet every one, except Bigelow, is anxious and desirous that your Orators should make said tender, and be subrogated to said Bigelow's rights, and have an assignment of said bond and mortgage and decree thereon.

And the said Bigelow has also caused your Orators to be informed that even if the said money is tendered in the manner in which he has informed your Orators he would receive the same, he will not make any assignment of said decree.

And your Orators further show that the said Bigelow sets up and pretends that he has a right to refuse to permit your Orators to be subrogated to his rights under said decree, and to make an assignment, on the ground that he desires that the security of the said trust mortgage under which your Orators claim, and he also claims, as holder of the said notes, secured thereby to the extent of about ten thousand dollars, shall be enhanced in value by the extinguishment of the mortgage now in decree.

But your Orators are advised and insist that the said ground is a mere pretence. The said security of the mortgage to the said trustees cannot be enhanced except by the payment and cancellation of said Bigelow's decree.

The said Bigelow can have no equity to enhance his security by the total loss to your Orators of the money which they should pay to said Bigelow to protect their and his interest in the said trust mortgage from the said decree of said Bigelow.

The only equity of the said Bigelow, in respect of his

interest in said trust mortgage, is the very equity your Orators have, and no more or greater, to pay off said decree, for the protection of their and his said trust mortgage security, and have an assignment of said decree, and bond and mortgage on which it is founded, made for the benefit of those interested in said trust mortgage who pay the same, which benefits enures equally to the benefit of those who pay and those who do not, except that those who contribute will be further entitled to reimbursement of the money paid. The refusal of said Bigelow to assign said bond and mortgage, and decree on payment thereof, is inequitable and unjust.

The said ground of the refusal to assign said decree, that said Bigelow is entitled to have the security which he is entitled to, in common with your Orators and others, enhance is a mere pretence, but the real ground of refusal is that he desires to have the said property sacrificed, and to purchase the same in at one-half its value, or to constrain your Orators, by said refusal, to pay him at once the whole amount of his interest in said trust mortgage and another claim against said Roemmelt and Leicht, secured by stock and bonds, and he has, from time to time, proposed to give time to your Orators for several years to pay said decree, if your Orators would pay said notes held by said Bigelow, and secured by said mortgage to said trustees, and the other notes secured by said stock and bonds.

Your Orators have caused to be tendered to the counsel and solicitor of said Bigelow, the said moneys due on said decree, and demanded an assignment of the said bond, mortgage and decree, and said Bigelow has neglected and refused to make such assignment.

And your Orators further show, that they are willing to pay at once the money due on said decree of said Bigelow into this Court, to be paid out to the said Bigelow upon his making an assignment of said decree and execution, and bond and mortgage, on which the same are founded.

In tender consideration whereof, and forasmuch as your Orators have no relief, except in this honorable Court, to the end that the said William A. Bigelow and John Reinhardt may answer this, your Orators' bill, under oath, and that the said William A. Bigelow may be compelled, by the decree of this Court, to accept said money due on his said decree, and that your Orators, who contribute said money to pay said decree, may be allowed to redeem said mortgage and decree of said Bigelow, and be subrogated to the rights of the said Bigelow, under his said bond, mortgage, and decree thereon, and execution issued, and that the said William A. Bigelow may be compelled to assign the said bond, mortgage, and decree, and execution to your Orators who contribute said money to pay said decree, or otherwise, as shall be equitable and just, and that in the meantime, all interest on the moneys due upon said decree may cease, your Orators thereby tendering to pay the same into this Court, to be paid out on the assignment of said decree, and that the said Bigelow and John Reinhardt, Sheriff of the County of Hudson, who holds the said writ of execution, may be enjoined and restrained from selling the said lands and property in said decree of said Bigelow, and execution described, on the fifth day of February, in the year eighteen hundred and seventy-four, or at any other time, and that your Orators may have such further and other relief as to this Court shall seem just.

May it please your Honor to grant unto your Orators not only the State's writ of injunction, issuing out of and under the seal of this honorable Court, to be directed to the said William A. Bigelow, his solicitors, attorneys, counsellors and agents, and the said John Reinhardt, enjoining and commanding them that they refrain from selling or disposing of the lands and property in the *Schedule C*, hereto annexed, so mortgaged to said Bigelow, and ordered to be sold by said decree and execution. But, also, the State's writ of subpœna, issuing out of and under the seal of this Court, to be directed to the said William

A. Bigelow, John Reinhardt, John Roemmelt and Amelia his wife, Andrew Leicht, and Mary his wife, commanding them on a certain day and under a certain penalty, to be and appear before your Honor in this honorable Court, then and there to answer the premises, and to abide and perform such decree in the premises as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

ROBERT GILCHRIST,

Solicitor for and of Counsel with Complainants.

SCHEDULE A.

Notes referred to in the within Bond.

H. LANDSBERG.

3 mos.	1st note		$342 82
10 "	2d "		700 00
16 "	3d "		633 45
22 "	4th "		621 57
34 "	6th "		600 00
40 "	7th "		582 31
46 "	8th "		565 93
52 "	9th "		549 05
58 "	10th "		270 33
			$5,515 46

JOHN KRESS.

3 mos.	1st note		$140 83
10 "	2d "		300 00
16 "	3d "		300 00
22 "	4th "		300 00
28 "	5th "		300 00
34 "	6th "		300 00
40 "	7th "		281 86
46 "	8th "		263 72
52 "	9th "		245 57
58 "	10th "		100 00
			$2,531 98

HANOVER NATIONAL BANK.

3 mos.	1st note		$126 33
10 "	2d "		255 90
16 "	3d "		246 00
22 "	4th "		240 00
28 "	5th "		232 11
34 "	6th "		227 67
40 "	7th "		222 23
46 "	8th "		218 78
52 "	9th "		209 34
58 "	10th "		100 00
			$2,079 36

VIRGIL DE ESCORIAZA.

3 mos.	1st note		$1,495 74
10 "	2d "		2,837 66
16 "	3d "		2,752 28
22 "	4th "		2,692 81
28 "	5th "		2,411 69
34 "	6th "		2,573 87
40 "	7th "		2,414 40
46 "	8th "		2,354 93
52 "	9th "		2,295 46
58 "	10th "		1,157 33
			$22,986 67

J. & J. M. DE ESCORIAZA.

3 mos.	1st note		$666 75
10 "	2d "		1,405 09
16 "	3d "		1,216 40
22 "	4th "		1,238 32
28 "	5th "		1,160 24
34 "	6th "		1,133 42
40 "	7th "		1,082 60
46 "	8th "		1,126 01
52 "	9th "		961 24
58 "	10th "		599 71
			$10,598 78

SIMON BERNHEIMER.

3 mos.	1st note		$604 26
10 "	2d "		1,271 95
16 "	3d "		1,104 19
22 "	4th "		1,134 77
28 "	5th "		1,165 34
34 "	6th "		995 91
40 "	7th "		1,026 48
46 "	8th "		957 06
52 "	9th "		987 63
58 "	10th "		476 77
			$9,724 36

ISAAC BERNHEIMER.

3 mos.	1st note			$650 58
10 "	2d "			1,221 37
16 "	3d "			1,282 07
22 "	4th "			964 77
28 "	5th "			1,089 59
34 "	6th "			916 52
40 "	7th "			943 46
46 "	8th "			885 20
52 "	9th "			997 32
58 "	10th "			530 40
				$9,481 28

ALBERT GEIGER.

3 mos.	1st note			$110 26
10 "	2d "			232 26
16 "	3d "			221 35
22 "	4th "			216 56
28 "	5th "			210 77
34 "	6th "			200 00
40 "	7th "			195 00
46 "	8th "			187 35
52 "	9th "			184 61
58 "	10th "			89 15
				$1,847 31

CHARLES MILLER.

3 mos.	1st note			$612 88
10 "	2d "			1,248 35
16 "	3d "			1,163 33
22 "	4th "			1,135 04
28 "	5th "			1,126 75
34 "	6th "			1,088 46
40 "	7th "			1,090 27
46 "	8th "			1,021 98
52 "	9th "			973 69
58 "	10th "			469 63
				$9,930 38

WM. H. AKIN & SON.

3 mos.	1st note			$——
10 "	2d "			75 23
16 "	3d "			
22 "	4th "			68 57
28 "	5th "			
34 "	6th "			64 28
40 "	7th "			
46 "	8th "			60 75
52 "	9th "			
58 "	10th "			28 93
				$297 76

WATSON E. CASE.

3 mos.	1st note			$240 55
10 "	2d "			500 00
16 "	3d "			460 31
22 "	4th "			453 17
28 "	5th "			445 99
34 "	6th "			428 81
40 "	7th "			411 63
46 "	8th "			400 00
52 "	9th "			387 27
58 "	10th "			181 85
				$3,909 58

WM. A. BIGELOW.

3 mos.	1st note			$835 23
10 "	2d "			1,800 00
16 "	3d "			1,723 91
22 "	4th "			1,650 00
28 "	5th "			1,628 53
34 "	6th "			1,600 00
40 "	7th "			1,523 14
46 "	8th "			1,450 00
52 "	9th "			1,437 75
58 "	10th "			700 00
				$14,358 56

FIRST NATIONAL BANK, HOBOKEN

3 mos.	1st note			$278 44
10 "	2d "			565 11
16 "	3d "			525 73
22 "	4th "			519 93
28 "	5th "			500 00
34 "	6th "			490 00
40 "	7th "			487 55
46 "	8th "			476 78
52 "	9th "			455 97
58 "	10th "			205 28
				$4,504 79

THEODORE ROSE.

3 mos.	1st note			$372 98
10 "	2d "			783 69
16 "	3d "			724 25
22 "	4th "			700 00
28 "	5th "			681 95
34 "	6th "			670 80
40 "	7th "			650 00
46 "	8th "			620 00
52 "	9th "			600 00
58 "	10th "			290 00
				$6,093 67

MARINE NATIONAL BANK.

3 mos.	1st note			$746 04
10 "	2d "			1,500 00
16 "	3d "			1,430 20
22 "	4th "			1,400 00
28 "	5th "			1,367 73
34 "	6th "			1,326 49
40 "	7th "			1,285 27
46 "	8th "			1,244 03
52 "	9th "			1,200 00
58 "	10th "			551 12
				$12,050 88

BURLAGE & CO.

3 mos.	1st note			$162 05
10 "	2d "			330 59
16 "	3d "			312 18
22 "	4th "			300 00
28 "	5th "			300 00
34 "	6th "			283 36
40 "	7th "			275 41
46 "	8th "			267 48
52 "	9th "			259 61
58 "	10th "			125 41
				$2,616 09

DE LA VERGUE AND HARE.

3 mos.	1st note		$100 00
10 "	2d "		213 46
16 "	3d "		190 63
22 "	4th "		194 11
28 "	5th "		192 58
34 "	6th "		181 07
40 "	7th "		179 53
46 "	8th "		173 02
52 "	9th "		166 51
58 "	10th "		70 46
			$1,661 37

NATIONAL PARK BANK.

3 mos.	1st note		$465 89
10 "	2d "		958 47
16 "	3d "		885 50
22 "	4th "		884 60
28 "	5th "		833 70
34 "	6th "		800 00
40 "	7th "		800 00
46 "	8th "		781 06
52 "	9th "		730 18
58 "	10th "		362 40
			$7,501 80

LEO DELBANCO.

3 mos.	1st note		$419 92
10 "	2d "		861 79
16 "	3d "		800 00
22 "	4th "		775 40
28 "	5th "		759 62
34 "	6th "		738 84
40 "	7th "		710 00
46 "	8th "		700 00
52 "	9th "		676 52
58 "	10th "		326 80
			$6,768 89

UNION BANK OF JERSEY CITY.

3 mos.	1st note		$450 00
10 "	2d "		921 92
16 "	3d "		861 86
22 "	4th "		851 22
28 "	5th "		830 00
34 "	6th "		810 00
40 "	7th "		790 00
46 "	8th "		762 10
52 "	9th "		737 15
58 "	10th "		338 67
			$7,353 62

ERNST. O. BERNET.

3 mos	1st note		$162 93
10 "	2d "		332 60
16 "	3d "		318 48
22 "	4th "		310 22
28 "	5th "		300 00
34 "	6th "		290 00
40 "	7th "		285 47
46 "	8th "		277 22
52 "	9th "		268 97
58 "	10th "		129 86
			$2,675 76

WILLIAM FANNING.

3 mos	1st note		$328 42
10 "	2d "		669 94
16 "	3d "		622 67
22 "	4th "		600 00
28 "	5th "		600 00
34 "	6th "		584 33
40 "	7th "		568 22
46 "	8th "		550 00
52 "	9th "		536 10
58 "	10th "		233 97
			$5,293 65

JOHN EICHLER.

3 mos.	1st note		$170 00
10 "	2d "		338 92
16 "	3d "		315 03
22 "	4th "		300 00
28 "	5th "		298 73
34 "	6th "		290 00
40 "	7th "		282 43
46 "	8th "		270 00
52 "	9th "		260 00
58 "	10th "		118 56
			$2,643 67

WILLIAM KRAMER.

3 mos.	1st note		$610 92
10 "	2d "		1,286 96
16 "	3d "		1,217 17
22 "	4th "		1,167 38
28 "	5th "		1,227 60
34 "	6th "		1,107 82
40 "	7th "		1,068 04
46 "	8th "		1,018 25
52 "	9th "		998 47
58 "	10th "		480 80
			$10,083 41

CHARLES SPIELMAN.

3 mos.	1st note		$570 36
10 "	2d "		1,200 00
16 "	3d "		1,100 00
22 "	4th "		1,096 97
28 "	5th "		1,070 00
34 "	6th "		1,015 99
40 "	7th "		1,000 00
46 "	8th "		965 00
52 "	9th "		919 51
58 "	10th "		468 44
			$9,406 27

CHRISTIAN CORNEHLSEN.

3 mos.	1st note		$80 47
10 "	2d "		157 60
16 "	3d "		152 33
22 "	4th "		148 26
28 "	5th "		149 19
34 "	6th "		144 49
40 "	7th "		140 42
46 "	8th "		131 35
52 "	9th "		127 28
58 "	10th "		64 17
			$1,295 56

DAVID JONES.

3 mos.		1st note		$574 23
10 "		2d "		1,177 46
16 "		3d "		1,121 91
22 "		4th "		1,100 00
28 "		5th "		1,073 17
34 "		6th "		1,028 79
40 "		7th "		964 43
46 "		8th "		950 05
52 "		9th "		935 69
58 "		10th "		451 80
				$9,377 53

ANDREW E. LEICHT.

3 mos.		1st note		$336 00
10 "		2d "		687 65
16 "		3d "		647 38
22 "		4th "		640 03
28 "		5th "		612 68
34 "		6th "		590 00
40 "		7th "		577 98
46 "		8th "		560 61
52 "		9th "		533 26
58 "		10th "		252 35
				$5,437 94

JOSEPH RUBSAM.

3 mos.		1st note		$290 00
10 "		2d "		594 92
16 "		3d "		566 76
22 "		4th "		540 00
28 "		5th "		532 06
34 "		6th "		509 72
40 "		7th "		497 37
46 "		8th "		480 00
52 "		9th "		460 00
58 "		10th "		228 23
				$4,699 06

GEORGE P. SCHINZEL.

3 mos.		1st note		$320 00
10 "		2d "		679 45
16 "		3d "		620 94
22 "		4th "		610 00
28 "		5th "		600 00
34 "		6th "		581 07
40 "		7th "		574 46
46 "		8th "		547 83
52 "		9th "		521 23
58 "		10th "		241 45
				$5,296 43

THEODORE B. WOOLSEY.

3 mos.		1st note		$126 40
10 "		2d "		255 81
16 "		3d "		240 00
22 "		4th "		237 35
28 "		5th "		233 16
34 "		6th "		223 99
40 "		7th "		214 81
46 "		8th "		210 64
52 "		9th "		206 46
58 "		10th "		100 00
				$2,048 62

RAFAEL R. BARTHOLD.

3 mos.		1st note		$1,017 03
10 "		2d "		2,083 11
16 "		3d "		1,952 86
22 "		4th "		1,899 07
28 "		5th "		1,845 28
34 "		6th "		1,791 15
40 "		7th "		1,737 00
46 "		8th "		1,682 87
52 "		9th "		1,628 72
58 "		10th "		800 46
				$16,437 55

Schedule B.

All those certain lots, pieces, or parcels of land, situate, lying, and being in Hoboken, County of Hudson, and State of New Jersey, and which are known and distinguished upon a map entitled "Map of Property, situate at Hoboken, Hudson County, New Jersey, belonging to the estate of John G. Coster, deceased, surveyed and laid out into lots, November, 1860, by Daniel Ewen, Austin D. Ewen, city surveyors, New York," filed in the office of the clerk of said County of Hudson, as lots numbers 14 and 15, in block number 9; lots numbers 1, 2, 3, 4, 5, 6, 7, and 8, in block number 29; lot number 24, in block

number 18; lots numbers 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28, in block number 19; lots numbers 1, 2, 3, 4, 5, and 6, in block number 139; lots numbers 2, 3, and 4, in block number 132; part of lots numbers 30, 31, 32, and 33, in block number 17, westerly part of block number 23; lots numbers 25, 26, 30, and 31, in block number 29; lots numbers 27, 28, 29, and 30, in block number 27; lots numbers 15, 16, 17, 30, 31, 32, 33, and 34, in block number 26; lots numbers 10, 11, 12, 13, 14, 15, 16, and 17, in block number 40; lots numbers 1, 2, 3, and 4, in block number 25; lots numbers 26, 27, 28, and 29, in block number 17; lots numbers 26, 27, 28, and 29, in block number 16; lots numbers 25, 26, 27, 28, 29, and 30, in block number 15; lots number 15, 16, and 17, in block number 30; lots numbers 7, 8, 11, and 12, in block number 31; lots numbers 1, 2, and 3, in block number 11; lots numbers 5, 6, 7, and 8, in block number 62; part of lot number 4, in block number 30, as laid out on said map.

Also all those lots of land, situate, lying, and being in the City of Hudson, aforesaid, County of Hudson aforesaid, and which on map entitled "Property belonging to James Montgomery, Jr., Hudson City, N. J.," made by J. M. Foquet & Co., surveyors, are known and distinguished as follows: lots numbers 1 and 2, and lot lettered A, in block number 1; lots numbers 1, 2, 3, 4, 14, 26, and 27, in block number 4; lots numbers 7 and 8, in block number 3, as laid down on said map.

Also, all those certain lots, pieces, or parcels of land situate, lying and being in the City of Hudson aforesaid, which on a map entitled "Map of Property belonging to the Van Vorst Heights Company, situated on Palisade avenue, opposite Washington Village, Hudson County, N.J.," are designated and distinguished as part of lot lettered A and lots lettered A 1, B 1, B 2, CC 1, C 2, DD 1, D 2, and lots numbers 123, 124, 169, 170, 171, 172, 173, 174, as laid down on said map.

Also all those certain lots, pieces, or parcels of land situate, lying and being in the City of Hudson aforesaid, which are known and distinguished on a map entitled, "Map of Property of E. C. Bramhall and others, Hudson City, Hudson County, N. J., made by Loper & Britton, Town Surveyors, Bergen, Hudson County, N. J., April 18th, 1865," as lots numbers 1, 2, 3, and 4, forming one plot, numbered 1, in block number 12; lots numbers 1, 2, 3, and 4, forming one plot number 4 in block number 12; and lots numbers 1, 2, 3, and 4, forming one plot, number 3, in block number 10, as laid down on said map.

Also, the one undivided half or moiety of all those certain lots, pieces, or parcels of land situate lying and being in the City of Hudson aforesaid, known and distinguished on a map entitled, "Map of Property situate on Bergen Heights, adjoining the Reservoir of the Jersey City Water Works, laid out by Levi W. Post, City Surveyor," filed in the office of the Clerk of Hudson County, as lots numbers 16, 17, and 18 in block A; lots 17 and 18 in block D; lots 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37 in block M; lots numbers 21, 22, and 23 in block I; lots numbers 1, 2, 3, 4, and 5 in block O; lots numbers 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30 in block N, as laid down on said map.

Also, all those certain tracts of land situate, lying, and being in the township of North Bergen, County of Hudson aforesaid, containing together about thirty acres, more or less, which were conveyed to the said John Roemmelt and Andrew Leicht, by Aloys Hollinger, by deed dated April 20th, 1866, and recorded in the Clerk's Office of Hudson County, on the 21st day of April, 1866, in *Liber* 131 *of Deeds, page* 383, &c.

SCHEDULE C.

All those nine certain lots, pieces or parcels of land and premises, situate, lying and being in the City of Hudson, in the County of Hudson, and in the State of New Jersey, and which on a map, "Map of the Property belonging to the Van Vorst Height Company, situate on Palisade avenue, opposite Washington Village, Hudson County, N. J.," and duly filed of record in the office of the clerk of said County of Hudson, are known and designated as lots lettered BB 1, B 2, CC 2, DD 1, D 2, and taken together, and may be described as follows: Beginning at a point in the easterly side of Hudson avenue, distant one hundred and seventy-five (175) feet, southerly from the southerly line of Broad street, as shown on said map; thence running southerly along the easterly line of Hudson avenue two hundred and sixty-two feet and six inches (262 feet, 6 inches;) thence easterly, and at right angles to Hudson avenue, three hundred and fifty (350) feet to Paterson avenue; thence northerly along the westerly side of Paterson avenue two hundred and sixty-two feet and six inches (262 feet, 6 inches;) thence westerly, and parallel with the line above run at right angles to Hudson avenue, three hundred and fifty (350) feet to Hudson avenue, at the point or place of beginning, subject, however, to the easement of a private mountain road, as indicated and laid down on the said map, being the same premises conveyed to the said John Roemmelt and Andrew Leicht by the following deeds: one deed from Frederick Rohland and wife, dated August 21st, 1856, and recorded August 28th, 1856, in Book 56 of Deeds for Hudson County, pages 130, &c.

One deed from Peter Scheider and wife, dated April 6th, 1858, and recorded April 26th, 1858, in Book 66 of Deeds, pages 513, &c.

One deed from Philip Lauer and wife, dated May 1st, 1858, and recorded December 19th, 1859, in Book 78 of Deeds, pages 30, &c., and a deed from John Walker and wife, dated Deeember 15th, 1862, and recorded December 20th, 1862, in Book 97 of Deeds, pages 374, &c.

New Jersey, } *ss.*
Hudson County, }

Charles Spielman, being duly sworn according to law, on his oath saith:—

That he is one of the above named Complainants; that he has read the foregoing bill of complaint; that he has been conversant with the facts relating to the settlement of the said Roemmelt and Leicht with their creditors, and with the giving of the said mortgage to said trustees, and generally with the progress of matters relating to said mortgage and said decree of said Bigelow; that the sale under said Bigelow decree and execution is to take place on the fifth day of February, A. D. 1874; that the Complainants have contributed the moneys in the bill mentioned to pay off said Bigelow decree in the proportion therein mentioned; that the Complainants are owners of such of the notes secured by said trust mortgage as in said bill is stated and set forth; that it is necessary for the protection of the interest of all parties who are beneficiaries under the said trust mortgage that the said sale, under said Bigelow decree, should not take place, but that the said Bigelow decree should be paid by the persons so interested in said trust mortgage, if they can be subrogated to said Bigelow's right under said decree, and have an assignment thereof; that the said Bigelow's pretence of being unwilling to assign his said decree on payment thereof, because he wishes his security as *cestui que trust*, under the trust mortgage to be enhanced, is without any foundation in truth; that he knows an en-

hancement thereof by such payment can never take place, inasmuch as if such would be the effect of such payment, he well knows that the payment would not be made; that his real object in refusing to make an assignment of said decree is either to enable him to purchase the lands subject to be sold thereunder at a great sacrifice, or to constrain his co-beneficiaries under the trust mortgages to pay the notes he holds secured by said trust mortgage and another claim he has against said Roemmelt and Leicht, secured by pledge of stock and bonds; that said Bigelow has made propositions to deponent, that if the said trustees or the other creditors, or said Roemmelt and Leicht would pay off the said debts due to said Bigelow, secured by said trust mortgage, and the debt he claims so secured by said stock and bonds, he would not press said sale under his said decree, but none of the Complainants are under any moral, equitable, or legal obligation to do so, and were obliged to refuse such proposition; such proposition has been renewed, and in writing, more than once; that said chattel mortgage in said bill mentioned, was given to said trustees as in said bill is stated; the situation of the property mortgaged to said Bigelow, as well as of that mortgage to said trustees, is as it is stated to be in said bill; that the amount stated in said bill as paid on said trustee mortgage, and the amount remaining unpaid thereon, and the amount unpaid and due on the notes held by the Complainant, are truly stated in said bill; that deponent has seen the letter of the counsel of the said Bigelow to the counsel of the Complainants, in which the ground on which said Bigelow refuses to assign said mortgage on payment by Complainants is stated, and the said ground is truly stated in said bill; and deponent further says, that he verily believes every allegation of the said bill to be true; that deponent knows all the securities that said trustees have for the payment of the moneys secured by said trust mortgage, and all of them together are a scanty security for the payment of said moneys.

CHARLES SPIELMAN.

Sworn and subscribed before me at Newark, this 2d day of February, A. D. 1874.

THEODORE RUNYON, *C.*

NEW JERSEY, } *ss.*
ESSEX COUNTY, }

SIMON BERNHEIMER, being duly sworn according to law, on his oath deposeth and saith :—

That he is one of the trustees and Complainants in the above bill mentioned, that on the second day of February, A. D. eighteen hundred and seventy-four, he made a tender to Cortlandt Parker, Esquire, solicitor and counsel for said Bigelow, in the foreclosure suit within mentioned, of fifty-six thousand nine hundred and seventy-five dollars, the amount of money due on the decree aforesaid, as deponent verily believes; that said tender was made on certified checks, and said Parker waived getting legal tenders for the purpose of said tender, which had been procured by deponent for the purpose, and deponent then and there, on behalf of Complainants, demanded an assignment of said decree, bond and mortgage, and execution, and said Parker said he declined to accept the moneys on such condition, but would telegraph to his client, and he did not know what he would do; and deponent further says, that the facts, matters, and things in the foregoing bill set forth, so far as they relate to the acts and deeds of deponent, are true, of his own knowledge, and so far as they relate to the acts and deeds of others, he believes the same to be true.

SIMON BERNHEIMER.

Sworn and subscribed before me, at Newark, this 2d day of February, A. D. 1874.

THEODORE RUNYON, *C.*

State of New York, City and County of New York, *ss.*— Adolph Ascher, being duly sworn according to law, on his oath deposeth and saith—that he resides in said City of New York, that he has read the foregoing bill of complaint, entitled "In the Court of Chancery of New Jersey," and that he knows, of his own knowledge, that the statements made in paragraphs nine and ten thereof, are true.

A. ASCHER.

Subscribed and sworn to before me, this 30th day of January, 1874.

FREDERICK B. SWIFT,
Commissioner for N. J., in and for N. Y.

[A true copy.]

H. S. LITTLE, *Clerk.*

[Order of February 3d, 1874.]

On reading and filing the bill in the above case, and the affidavits thereto annexed, the original mortgage, under which the Complainants claim being duly acknowledged, and being shown to the Chancellor, and other verification of the facts set forth in the bill being dispensed with; and the Complainants having by leave of the Court, hereby granted, paid to the Clerk of the Court the sum of fifty-six thousand nine hundred and seventy-five dollars, the amount of the decree with principal, interest and costs, which said Bigelow has against Roemmelt and Leicht, on a mortgage prior to that of the Complainants, said money to be paid out to said Bigelow only on the execution and delivery of an assignment to the Complainants of said *decree*, or on the Court, by decree securing to the Complainants the reimbursement thereof, by and under said decree of said Bigelow. It is ordered that the said William A. Bigelow show cause before the

Chancellor, at his Chambers, No. 745 High street, in the City of Newark, on the twenty-third day of February, instant, at ten o'clock, in the forenoon, of that day, why an injunction should not issue pursuant to the prayer of the bill, and that in the meantime and until the further order of the Court, the said Bigelow and the said John Reinhardt, Sheriff of the County of Hudson, refrain from selling the land and property advertised for sale under an execution out of this Court, at the suit of said Bigelow against Roemmelt and Leicht, and others; and that this order and the bill shall be sufficiently served upon said Bigelow, by serving the same upon his solicitor in said decree, Parker and Keasby; and that the order and not the bill be served on said Sheriff.

THEODORE RUNYON, *C.*

February 2d, 1874.

[A true copy.] H. S. Little, *Clerk.*

ANSWER.

The answer of William A. Bigelow to the bill of complaint of George W. Cassedy, Francis T. Lilliendahl, Virgil de Escoriaza, and Simon Bernheimer, trustees, and others named in said bill, their *cestui que trusts*, in a certain mortgage therein mentioned named, Complainants.

This Defendant, now and at all times hereafter, reserving to himself all right of objection to the errors, uncertainties, and irregularities in said bill contained, for answer thereto, or so much as he is advised it is material for him to make answer unto, answering, says:—

That he admits that he hath obtained in this Court the decree for foreclosure and sale in said bill mentioned, that execution hath been sued out thereon, the sale ordered thereby advertised, and that such sale would

have taken place as in said bill stated, but for the order of this Honorable Court.

This Defendant also admits, that prior to the filing of the said bill of complaint, tender was made to the counsel of this Defendant of a sum of money equal to the amount of said decree, with interest and costs, by the counsel of said Complainants, or some of them; and he says that he learns from his said counsel, and believes that on inquiry by his own attorney and solicitor as to said tender, it was expressly stated that the same was made for and on condition of receiving from this Defendant an assignment of said decree, and that the tender was not made by the trustees in said mortgage, but by certain of the *cestui que trusts* secured thereby, and that, under instructions from this Defendant, his said solicitor refused said tender upon said conditions, stating that he would receive from said Defendants on said execution, or any person acting for them, payment of the same, and would receive such payment from the said trustees, or any persons secured by said mortgage, payment of said execution and decree, but that this Defendaut would not make an assignment of said decree to any one.

And this Defendant further answering saith, that the reason of his conduct in the premises was not, as alleged in said bill, a desire to have said property sacrificed, or to purchase the same himself, or to constrain the Complainants to pay him any other debt, as stated in said bill; but that the motives governing him are as follows: First, that he is advised by counsel that he is not by law called upon to make any such assignment; second, that being himself a creditor of the said Defendants in said execution to a considerable amount, as stated in said bill, and having a full conviction that said Defendants in such execution can pay the said decree if they choose, or procure some one to pay it for them, he regards the enforcement of said decree best for his own interests, and best for that of the parties represented by said trust mortgage.

And this Defendant insists that he has the same right to his opinion as to what is best for his own interest, both as Complainant in said decree, and as one of said *cestui que trusts* under said mortgage, as the said Complainants or either of them, and he submits that the statement of the Complainants in the said bill that said Roemmelt and Leicht have, since the making of said mortgage, actually paid thereon enough to satisfy or nearly satisfy the said decree, sufficiently sustains his opinion as to their ability to pay said decree, if the same be proceeded with.

And this Defendant submits, that it sufficiently appears that said Complainants have not any right to demand the assignment of said decree of him, because, if such assignment were made, this Defendant would occupy exactly the same position in relation to the Complainants, which they now sustain in relation to him. They would own the decree which he now owns, and has an interest in the mortgage, in which they now possess such large interest, and if their insistment is right, this Defendant, after assigning said decree, could pay them back said money, and have the right thereupon to receive the said decree back again, and so on *ad infinitum*.

And this Defendant submits, that the only proper course for the protection of all parties in this matter, is for the sale to take place. If any buyer will give enough to pay both mortgages, they will be paid, and the rightful demands of all satisfied. If not, the said trustees, by purchasing the property, can acquire the same for the use and advantage of their said trust.

And this Defendant saith, that he is ready to accept the money due on said decree in payment thereof, but not to give any party, who is no more entitled to equitable relief than himself, the advantage of the decree which he possesses, and by means whereof he can, in his judgment, compel the Defendants in said execution to discharge the first mortgage, and thereby enhance the security of the second.

And Defendant saith, that the Complainants took their said mortgage with full notice of his first mortgage now in decree, but by seeking to obtain payment of their debt before said first mortgage or said decree was paid, and by taking the avails of the business of Roemmelt and Leicht for their own use, instead of causing them to be applied to the first lien, have created all difficulty there is in the matter. All they need do is to pay back to Roemmelt and Leicht what they have received. Let it be applied to the discharge of the decree, and with their security enhanced, to wait awhile and get the money back from the property or from its present owner.

And as to the value and condition of said property, Defendant saith, that he has no knowledge, and that he hopes and believes it good security for both the mortgages existing thereon. But he denies, from information and belief, that it cannot be divided, or is unsaleable unless sold together.

And this Defendant denies all manner of combination and confederacy wherewith he is by said bill charged, and humbly prays to be hence dismissed, with his reasonable costs herein wrongfully sustained.

PARKER & KEASBEY,
Solicitors and of Counsel for Defendant.

Essex County, *ss.*:—William A. Bigelow, the above named Defendant, being duly sworn, saith—that the facts, matters, and things in the above auswer contained, so far as they relate to his own act and deed, are true, and so far as they relate to the acts and deeds of others, he believes them to be true.

WILLIAM A. BIGELOW.

Sworn and subscribed, this 23d day of February, 1874 before me,

N. Perry, Jr.,
M. C. of N. J.

ANSWER.

[Filed May 1, 1874.]

The joint and several answer of John Roemmelt and Amelia, his wife, and Andrew Leicht and Mary, his wife, Defendants to the bill of complaint of George W. Cassidy and others, Complainants.

These Defendants for answer unto the said bill, or so much and such parts thereof as they are advised it is material for them to make answer unto, answering say—that they admit the truth of the allegations in said bill contained, so far as their knowledge, information or belief extend, except they say, that some of the residue of notes spoken of in the twelfth paragraph of said bill, have been paid off by these Defendants, Roemmelt & Leicht, to the amount of about fifty-four thousand dollars, as mentioned in the seventeenth paragraph of said bill.

And these Defendants further aver, that they are not able, because of the want of funds. to pay off the amount due to said William A. Bigelow, on his said decree, and that unless the Complainants in said bill obtain the relief therein prayed for, the property ordered by said decree to be sold, must be sold thereunder ; and these Defendants believe from their knowledge of the present condition of monetary affairs and of the position and character of said property, that at such sale the said property must be sacrificed for very much less than its real worth ; and that by such sale and the separation of said property from the other property included in the mortgage given to the Complainants, the trustees, the marketable value of that other property will be very much diminished, and the security of the mortgagees under the last mentioned mortgage, rendered insufficient.

And these Defendants further aver, that all of the property of said Roemmelt & Leicht is included in the said mortgage to the Complainant, trustees; and that if,

therefore, the mortgagees under said mortgage are deprived of their security under said mortgage, they will lose their debts.

And these Defendants further aver, that in case the prayer of said Complainants in the said bill be granted, and time be thereby given to said Roemmelt & Leicht to carry on their business of brewing, which has been profitable hitherto, the said Roemmelt & Leicht will be able to pay off their obligations gradually, and so the security of their creditors will keep enhancing and all will in time be paid; but if the property ordered by said decree to be sold, should be sold, then their business must at once stop, and with it their ability to pay their debts will be at an end.

And these Defendants consent to the substitution of the said Complainants in the place of said Bigelow, as the owner of said decree, and admit, that the payment thereof by the Complainants or any of them, should not extinguish the said debt or the lien of said decree, and they consent that the same shall remain a first lien on the premises in said decree mentioned, subject however, to a prior mortgage of about twenty-three hundred dollars on a part of the said premises.

And these Defendants say, that they consent to and desire the granting of the prayer of said bill, and hereby submit themselves to this Honorable Court in the premises.

DIXON & COLLINS,
Solicitors of said Defendants.

JONATHAN DIXON,
Of Counsel.

STATE OF NEW JERSEY, COUNTY OF HUDSON, *ss.*:—John Roemmelt and Amelia Roemmelt, his wife, and Andrew Leicht and Mary Leicht, his wife, being duly sworn on their several and respective oaths say—that the matters

and things in the foregoing answer alleged, so far as they relate to the acts of these deponents, are true, and so far as they relate to the acts of others, they believe them to be true.

JOHN ROEMMELT,
AMELIA ROEMMELT,
ANDREW LEICHT,
MARIA LEICHT.

Subscribed and sworn to this February 23d, A.D. 1874, before me,

GUSTAV SCHUMANN,
Commissioner of Deeds.

[Filed May 28, 1874.]

This cause coming on to be heard before the Chancellor, on the twenty-third day of February, in the year eighteen hundred and seventy-four, on an order to show cause why an injunction should not issue pursuant to the prayer of the bill, and having been adjourned from time to time, for the convenience of counsels' arguments, and on the fourth day of May instant, the answer of said Bigelow being read and amended in the reading thereof at the request of his counsel, so as to admit the tender by the trustees for certain of the beneficiaries as in the bill mentioned, and the answer of Roemmelt and Leicht and their wives being read, and it appearing by the answer of the latter that the principal debtors admit the equity of the Complainants' bill, and that it would be just that on the redemption and payment of the bond and mortgage and decree of said Bigelow by the said trustees, in behalf of the beneficiaries who raise the money to pay and to redeem said mortgage and bond of said Bigelow, and the decree thereon, which mortgage of said Bigelow is prior to the mortgage of said trustees, said persons pay-

ing the same should be entitled to enforce the same against the mortgaged premises, and the said John Reinhardt not having answered the bill, and the cause being, as respects him, ready for decree final.

And the Chancellor having heard the arguments of Robert Gilchrist, of counsel with the Complainant, and of Cortlandt Parker, of counsel with the Defendant, Bigelow; and it appearing to the Chancellor by the bill and answer of said Bigelow, that the said Complainants are trustees of a mortgage on property on which the mortgage and decree of said Bigelow are a prior lien, and that certain of the beneficiaries in the bill named under the the mortgage of said trustees, raised and paid into Court, by leave of the Court, the full amount of the said Bigelow's bond, mortgage, and decree, principal, interest, and costs, to the day of such payment; and it also appearing to the Chancellor that the said moneys were, on the day of the payment into Court, tendered to the said Bigelow or his counsel, and such tender was not made upon an improper condition, by reason of the demand for an assignment of said bond, mortgage, and decree, and that from the day of such tender and payment into Court the interest on said money due to said Bigelow should cease, except so far forth as the interest realized on the money while in this Court—

It is now, on this twenty-eight day of May, in the year eighteen hundred and seventy-four, (until which day the Chancellor considered the said pleadings and agreements,) ordered by the Chancellor *that the said injunction prayed for the bill do issue*, and that on the delivery into Court or to the Complainant out of Court, for the beneficiaries paying the money aforesaid of an assignment by said Bigelow of his said bond, mortgage, and decree, the said money now in Court be paid out to the said Bigelow; the said assignment to be duly acknowledged and to be approved, if the Complainant require it, by a Master of the Court, to whom the Court will refer the matter, in case the parties shall differ; *no sale under*

the execution on said decree is to be made, however, without the order of this Court thereto first had and obtained; and all further equity is reserved until the final hearing of the cause.

THEODORE RUNYON, *C.*

[A true copy.] H. S. LITTLE, *Clerk.*

On June 4, 1874, the Complainants filed a replication.

On June 9, 1874, Bigelow filed an appeal from the order of May 28, 1874. 10

N. J. COURT OF ERRORS AND APPEALS.

BETWEEN

WILLIAM. A. BIGELOW,
Appellant,

—AND—

GEO. W. CASSEDY AND ALS,
Defendants.

On Bill &c., and Appeal from Interlocutory Order.

SIR:—Take notice that we shall apply to the New Jersey Court of Errors and Appeals on Monday, November 30th instant, at 11 o'clock A. M., or as soon thereafter as the said Court can hear such application at the State House at Trenton, for an order that said Appellant should have liberty to deposit with the clerk of the Court of Chancery an assignment under his seal made and executed according to the prayer of the bill of complaint in this cause filed in said Court of Chancery, transferring to the Appellees herein, or such of them as shall be directed, the decree of said Court of Chancery mentioned in said bill of complaint obtained by said Appellant, and proceedings under which were enjoined by the interlocutory order appealed from; that such assignment be deposited with said Clerk in Escrow, to be delivered at the determination of this appeal, on fulfillment of such directions and terms as shall by the order of this Court, then to be made on the order of the Chancellor, in conformity therewith be decreed; and that, upon making such deposit, said Appellant be paid and receive from said clerk in Chancery the moneys with him deposited and mentioned in the bill of complaint in this cause, with such in-

terest as shall by the practice of said Court of Chancery be payable thereon; and that such assignment and reception of said moneys by said Appellant shall be without prejudice to the prosecution of his said appeal; and you are further notified, that in default of obtaining such order we shall ask said Court for such other relief in the premises as to said Court shall seem equitable and just.

Dated, Newark, Nov. 27, 1874.

Yours respectfully,

PARKER & KEASBY,
Solicitors of Appellant.

To

ROBERT GILCHRIST, ESQ.,
Solicitor of Appellees.

The Court of Errors on December 12th, 1874, made the following order:—

It is ordered that the clerk in Chancery pay the money in that Court, with such interest thereon as he has received from the depository of the Court, to the Appellant upon his delivery to the clerk for the parties who contributed the said money, as stated in the bill, an assignment of said decree, mortgage and bond, to said parties in proportion to the amount paid by them, subject to a lien thereon for such interest and costs as this Court shall determine ought to be paid to Appellant, if any, and in case the parties differ about the form of said assignment, the same shall be settled by the Court of Chancery.

Dec. 12, 1874.

(Right). C. PARKER,
("). ROB'T GILCHRIST.

IN CHANCERY OF NEW JERSEY

BETWEEN

GEORGE W. CASSEDY AND ALS,

Complts,

—AND—

WILLIAM A. BIGELOW AND ALS,

Defts.

Feb. 3, 1874.—Amt. deposited in Court.....	$56,975 00	
Jan. 11, 1875.—Interest to date, 11 months and 8 days, at 4 per cent.....	2,139 73	10
	$59,114 73	
Clerk's commission.....	145 44	
	$58,969 29	
Jan. 11, 1875.—By check to Parker & Keasbey, solicitors.....	58,969 29	

A true copy of the deposit account in above cause from the records.

H. S. LITTLE, *Clerk.*

This Indenture, made this sixth day of January, one thousand eight hundred and seventy-five, between William A. Bigelow, of the City, County and State of New York, party hereto of the first part, and Simon Bernheimer, The Marine National Bank, The National Park

Bank, Theodore B. Woolsey, Rudolph C. Burlage, Frederick Rose, The Hanover National Bank, The Union Bank of Jersey City, Raphael R. Barthold, Theodore Rose, Virgil De Escoriaza, Ladislao Escoriaza, William Kramer, David Jones, Watson E. Case, Isaac Bernheimer, and Charles Spielmann, party hereto of the second part.

Witnesseth, whereas heretofore, to wit, on the eighteenth day of October, in the year one thousand eight hundred and seventy-two, a certain final decree was made and rendered in the Court of Chancery of New Jersey, in a cause therein pending, wherein the said William A. Bigelow was Complainant, and John Roemmelt and Andrew Leicht, with their respective wives, and others were Defendants, by which decree it was declared and adjudged that the said William A. Bigelow was entitled to have the sum of fifty-two thousand and forty-two dollars, with lawful interest thereof, computed from the fourth day of October in the year aforesaid, together with the costs of said suit to be taxed, raised and paid out of certain mortgaged premises in said decree mentioned, and that so much of the estate and premises in a certain mortgage in said decree described, contained, as would be sufficient to raise and satisfy the said debt, interest and cost, be sold; and that a writ of *fieri facias* for that purpose do issue out of said Court to the Sheriff of the County of Hudson, commanding him, among other things, to make sale, according to law, of so much of the said mortgaged premises as will be sufficient to satisfy the said debt, interest and costs, and to pay the same to the Complainant, or his solicitor; pursuant to which decree said costs were taxed at ninety-five dollars and ninety-nine cents, and a *fieri facias* was duly issued to the then Sheriff of said County of Hudson, commanding him, as by the said decree directed, which writ was by said Sheriff duly levied upon said mortgaged premises; and whereas it hath been agreed that said decree, with the bond, notes and mortgage whereon the same is founded,

shall be assigned to the said party hereto of the second part.

Now, therefore, this indenture witnesseth, that the said William A. Bigelow, party hereto of the first part, for and in consideration of the sum of fifty-six thousand nine hundred and seventy-five dollars, being the amount due on said decree, at the date of paying said sum into Court, to him in hand duly paid, in manner following, that is to say, by Simon Bernheimer, five thousand dollars; The Marine National Bank, six thousand dollars; The National Park Bank, five thousand dollars; Theodore B. Woolsey, fifteen hundred dollars; Rudolph C. Burlage and Frederick Rose, fifteen hundred dollars; the Hanover National Bank, twelve hundred dollars; the Union Bank of Jersey City, twenty-one hundred and fifty dollars; Raphael R. Barthold, five thousand dollars; Theodore Rose, twenty-five hundred dollars; Virgil de Escoriaza, twenty-five hundred dollars; Ladislao Escoriaza, twenty-five hundred dollars; William Kramer, five thousand dollars; David Jones, five thousand dollars; Watson E. Case, fifteen hundred dollars; Isaac Bernheimer, five thousand dollars, and Charles Spielman the balance thereof, party of the second part, hath bargained, sold, assigned, transferred and set over, and by these presents doth bargain, sell, assign, transfer, and set over, unto said party of the second part, their heirs, executors, administrators and assigns, the said decree and all moneys due and to grow due thereon, together with the mortgage therein, and in the said bill of complaint described, and for the satisfaction of which said decree was given, and the estate thereby granted, and the bond in said mortgage described and secured thereby, and the notes in said bond mentioned, and all moneys payable thereby or to grow due thereon.

To have and to hold the same unto the said party hereto of the second part, their heirs, executors, administrators and assigns, respectively, in proportion to the

amounts by them respectively paid towards the consideration hereof, to their own proper use, benefit and behoof forever; subject, nevertheless, to a lien thereon for such interest and costs as the Court of Errors and Appeals in New Jersey, in a certain cause therein depending on appeal between said William A. Bigelow, Appellant, and the party hereto of the second part and other Appellees shall determine, ought to be paid to said William A. Bigelow, if any.

In witness whereof, the said William A. Bigelow hath hereto set his hand and seal the day and year first above written.

WM. A. BIGELOW, [L. S.]

Sealed and delivered in the presence of

WILLIAM F. LETT.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

Be it remembered that on this seventh day of January, A. D. 1875, before me, William F. Lett, a commissioner duly appointed by the executive authority, and under the laws of the State of New Jersey, personally appeared William A. Bigelow, who, I am satisfied, is the assignor mentioned in the foregoing instrument in writing, and who executed the same, and to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[L. S.] WILLIAM F. LETT,
Commissioner for New Jersey,
in New York City,
335 *Broadway.*

DECREE OF COURT OF ERRORS.

[Filed March 13, 1875.]

This cause having been debated before the Court by Mr. Cortlandt Parker of counsel for the Appellant, and Mr. Robert Gilchrist of counsel for the Appellees, and the matters in difference having been considered by the Court, they are of opinion and do now decree that the Appellant (who was Defendant in the Court of Chancery), was not bound, on the tender made as set forth in the pleadings, to execute or deliver to said Appellees, Complainants in the Court of Chancery, or any of them, any assignment of the bond, mortgage or decree of the Court of Chancery mentioned in the said pleadings, and held by him. That Complainants are entitled to subrogation, and that in case of decree for or submission to redemption of said lien, said Appellant was and is entitled to payment of the full amount of principal, interest and costs due on said decree, notwithstanding said tender or the payment of the amount tendered, into the Court of Chancery; and thereupon it is further decreed that the interlocutory order of the Chancellor from which appeal is taken be, and the same is hereby reversed with costs, and that the record and proceedings in this cause be remitted to the Court of Chancery, to be proceeded with according to law and the terms of this decree.

It is further ordered that said Appellant do recover his costs on this appeal, including the expenses of printing the case and his points as required by the rules of this Court.

VAN SYCKEL, *J.*

ORDER OF JULY 14, 1875, APPEALED FROM.

Appeal having been taken from the interlocutory order in this cause, and dated the twenty-eighth day of May, eighteen hundred and seventy-four, and it now appearing that the said order and the proceedings in the said matter have been remitted to this Court by the Court of Appeals, and that said Court are of opinion, and have decreed that the said Defendant above named was not bound on the tender made as set forth in the pleadings, to execute or deliver to said Complainants or any of them, any assignment of the bond, mortgage, or decree of the Court of Chancery, mentioned in said pleadings, and held by him, that said Complainants were entitled to subrogation, and that in case of a decree for or submission to redemption of said lien, said Defendant was entitled to payment of the full amount of principal, interest and costs due on said decree, notwithstanding said tender or the payment of the amount tendered into the Court of Chancery; and that thereupon it was further by said Court of Appeals decreed that the interlocutory order of the Chancellor from which appeal was taken should be, and the same was thereby reversed with costs, and that the record and proceedings in the cause should be remitted to the Court of Chancery, to be proceeded with according to law, and the terms of said decree, and that it was further ordered, that said Defendant, Appellant, in said Court, shall recover his costs on said appeal, including the expenses of printing the case, and his points, as required by the rules of said Court; and it further appearing that said costs have been taxed at the sum of one hundred and seven dollars ninety-six cents.

It is thereupon on this fourteenth day of July, one thousand eight hundred and seventy five, on motion of Parker & Keasbey, solicitors, and of counsel with Defendant, ordered and decreed in conformity with said decree of said Court of Appeals, that the injunction granted in this cause be dissolved with costs to be taxed.

And it further appearing that in conformity with orders of this Court, and of the Court of Appeals made pending said appeal, said decree, bond and mortgage, and notes mentioned in the pleadings in this cause had been by the consent of said Defendant, Appellant, assigned by him to said Complainants, subject to a lien thereon for such interest and costs, as the said Court of Appeals should determine, ought to be paid to Appellant, if any, in consideration of the payment of a certain sum of money, being the moneys named in said decree, and paid into Court by said Complainants with the interest derived thereon from its investment thereof by the clerk of this Court, and that by the determination aforesaid of said Court of Appeals the said Defendant is entitled to the sum of thirty-four hundred and fourteen dollars sixty-six cents, being the additional interest due upon said decree to the date hereof, with said sum of one hundred and seven dollars ninety-six cents of costs in said Court of Appeals; it is now further ordered that said Complainants pay said sums respectively with interest from this date to said Defendant, William A. Bigelow, within thirty days from service of a copy hereof on them or their solicitor, or that in default thereof the said Defendant be at liberty to proceed to collect the same by sale under the said decree and execution thereon.

THEODORE RUNYON, *C.*

(A true copy)—H. S. Little, *Clerk.*

IN CHANCERY OF NEW JERSEY.

BETWEEN GEORGE W. CASSEDY AND ALS, *Complts,* —AND— WILLIAM A. BIGELOW, AND ALS, *Defts.*	*On Bill, &c.*

Objections to order proposed after Remittitur from Court of Errors.

On behalf of the Complainants in this Court who were Respondents in Court of Errors. I object to the order proposed and *insist*,

1st. That in any event, and if the objections hereinafter contained are not valid the Complainants here are entitled to have added to said order the words following: "Without prejudice to any application on part of Complainant for leave to withdraw the Replication and to amend the bill or other application for relief, to which they may be advised they are entitled."

2d. That to dismiss the bill would be erroneous, and contrary to all practice.

3d. The time given to pay the interest is not the *usual* time. The course of the Court is uniform, six months are allowed; and at any rate we should have at least the time the Sheriffs require to advertise.

4th. The order proposed is dated May, 18th. It should bear date after the refusal of the rehearing above, and after these objections.

5th. All that this Court can do is to make the order the Court above made, as modified by the construction put upon it in the Court above, in refusing the rehearing.

6th. The part of the order which declares the said Bigelow is absolutely entitled to the ——— sum is unwarranted.

7th. Such an order goes further than the Court above intended, and further than the Court above did go.

8th. The Court above intended to permit the Complainant to amend if he should be so advised, and so declared that intention on refusing the rehearing above, and to get such other relief as he might be entitled to in case the Chancellor had given the opinion expressed by the Court above.

9th. This Court cannot order the Complainants to pay money on the footing of the assignment without direct proceedings by the said Bigelow to enforce the lien mentioned in the assignment, nor did the Court above make such order, nor has this Court, nor had the Court above any jurisdiction to make such order in this suit on these pleadings, or in the appeal cause.

10th. Said decree of the Court of Errors determines that the said Complainants in this Court are entitled to subrogation, and said order is unconditional, and said order will not be carried out by the order of the Court now proposed, but on the contrary, be violated.

11th. The said decree of the Court of Errors does not give the said Bigelow a right to the interest claimed except on redemption, and the Complainants do not propose to redeem him or his former decree, but to make by their bill amended or unamended, and proofs title to the interest which, on the case as it stood in that Court above, held Bigelow was entitled to, that that Court could not take notice of the assignment as was settled in the case of *Black*, 9 *C. E.*, *Green*, 456, and were bound to dispose of the case on the facts which were before the Chancellor at the time of his decision.

The fact of the assignment was not before the Chancellor at the time of his decision, and no order of this Court which takes notice of this fact as a ground for the order, can be made *in pursuance* of the order above, but must be made on considerations presented to the Chancellor now.

On this question of fact of the assignment, and the circumstances under which it was made, the Complainants have not been heard to show why they should not be proceeded against, as proposed in this order.

12th. The Complainants object that this Court has not jurisdiction to enforce a lien not alleged by any pleadings in the cause.

13th. The lien claimed, the Complainants dispute.

14th. The lien claimed was created, if it is created, under an entire misapprehension by the Complainants and their counsel, and they desire to be heard thereon before the same is enforced against them.

The Complainants pray that their objections be filed.

ROBERT GILCHRIST,

Solicitor for and of Counsel with Complainants.

July 10, 1875.

IN THE COURT OF ERRORS AND APPEALS,

OF THE STATE OF NEW JERSEY.

BETWEEN

GEORGE W. CASSIDY, AND OTHERS, *Appellants*,

—AND—

WILLIAM A. BIGELOW, *Appellee.*

Petition of Appeal.

To the Judges of the Court of Errors and Appeals of the State of New Jersey:—

The petition of George W. Cassedy, Francis T. Lilliendahl, Virgil de Escoriaza, Simon Bernheimer, trustees, the said Simon Bernheimer in his own right, The Marine National Bank, a corporation created under the laws of the United States, The National Park Bank, a corporation created in like manner, Theodore B. Woolsey, Rudolphe C. Burlage and Frederick Rose, Charles Spielmann, The Hanover National Bank, a corporation created under the laws of the United States, The Union Bank of Jersey City, a corporation created under the laws of New Jersey, Raphael B. Barthold, Theodore Rose, Virgil de Escoriaza, in his own right, Ladislao de Escoriaza, William Kramer, David Jones, Watson E. Case and Isaac Bernheimer, respectfully shows that in a certain cause lately pending in the Court of Chancery, of New Jersey, wherein your petitioners were Complainants, and John Roemmelt, and Amelia, his wife, and Andrew Leicht, and Mary, his wife, and John Reinhardt were Defendants, a certain interlocutory order was made by the Chancellor, bearing date the fourteenth day of July, in the year eighteen hundred and seventy-five, and filed

in the office of the clerk of the Court of Chancery on said fourteenth day of July, A. D., eighteen hundred and seventy-five, whereby they find themselves aggrieved in this respect, to wit: that by said interlocutory order it is recited that an appeal had been taken from the interlocutory order in said cause, and dated the twenty-eighth day of May, in the year eighteen hundred and seventy-four, and that it appeared on said fourteenth day of July, A. D., eighteen hundred and seventy-five, that the said order and proceedings in the matter had been remitted to the Court of Chancery by the Court of Appeals, and that said Court of Appeals was of opinion and had decreed that William A. Bigelow, one of the Defendants in the Court of Chancery, was not bound on the tender made as set forth in the pleadings to execute or deliver to said Complainants in the Court of Chancery, or to any of them, any assignment of the bond, mortgage or decree mentioned in said pleadings and held by him, the said Bigelow, that said Complainants were entitled to subrogation, and that in case of a decree for, or submission to redemption of said lien, the said Defendant, William A. Bigelow, was entitled to payment of the full amount of principal, interest and costs due on said decree, notwithstanding said tender or the payment of the amount tendered into the Court of Chancery, and that thereupon it had been further by said Court of Appeals decreed that the interlocutory order of the Chancellor, bearing date the 28th day of May, A. D. 1874, from which said appeal had been taken, should be, and the same had been thereby reversed with costs, and that the record and proceedings in said cause should be remitted to the Court of Chancery, to be proceeded with according to law and the terms of said decree, and that it had been further ordered that said Defendant, William A. Bigelow, should recover his costs on said appeal, including his expenses of printing the case and his points, as required by the rules of said Court of Appeals, and that it further appeared that said costs had

been taxed at the sum of one hundred and seven dollars, ninety-six cents.

And are also aggrieved by the said interlocutory order bearing date the fourteenth day of July, in the year eighteen hundred and seventy-five, in this, that by said interlocutory order dated the fourteenth day of July, A. D. 1875, it is ordered that the injunction heretofore granted by the Court of Chancery be dissolved with costs.

And are also aggrieved in this, that by said interlocutory order it is declared that by the determination in said order recited of said Court of Errors and Appeals, William A. Bigelow, one of the Defendants in the Court of Chancery, is entitled to the sum of thirty-four hundred and fourteen dollars and sixty-six cents.

And are also aggrieved in this, that by said interlocutory order it is declared and decreed that the sum last mentioned is the additional interest due upon said decree in said order mentioned, to the date of the said order bearing date the fourteenth day of July, in the year eighteen hundred and seventy-five.

And are also aggrieved in this that by said interlocutory order it is declared and decreed that William A. Bigelow, one of the Defendants in the Court of Chancery, is entitled to the sum of one hundred and seven dollars and ninety-six cents of costs in said Court of Appeals.

And are also aggrieved in this that by said interlocutory order it is ordered that your petitioners, the complainants in the Court of Chancery, pay said sums respectively, with interest, from the date of said order, bearing date the 14th day of July, in the year eighteen hundred and seventy-five, to said Defendant, William A. Bigelow, within thirty days from service, of a copy of the order last mentioned, or that in default thereof, said William A. Bigelow be at liberty to proceed to collect the same by sale under the said decree of said Bigelow in the

said order recited, and in the pleadings in the said cause mentioned, and execution thereon.

And your petitioners humbly appeal from the said interlocutory order of the Chancellor so bearing date the 14th day of July, in the year eighteen hundred and seventy-five, upon the ground that the same in the particulars aforesaid is erroneous and contrary to law and equity.

Your petitioners, therefore, pray that the said parts of the said order of the Chancellor reciting, ordering, declaring and decreeing as aforesaid, may be reversed, set aside and for nothing holden, and that they may have such other relief in the premises, and in respect of the former interlocutory order of this Court as to this Honorable Court may seem equitable and fit.

ROBERT GILCHRIST,

Solicitor for and of Counsel with Appellants.

IN CHANCERY OF NEW JERSEY.

CASSEDY
vs.
BIGELOW.

OPINION.

May 28, 1874.

The Chancellor. The Complainants, George W. Cassidy, Francis T. Lilliendahl, Virgil de Escoriaza, and Simon Bernheimer, as trustees, and Simon Bernheimer and Virgil de Escoriaza in their own right, and The Marine National Bank, The National Park Bank, and other individuals and corporations, filed their bill to redeem. The trustees are holders of a mortgage to secure the payment of over $200,000 upon the brewery premises of Roemmelt and Leicht, in Hudson County, on which the Defendant, Bigelow, when they took their mortgage, held a prior mortgage for $50,000 and interest. Upon this mortgage he had then obtained a decree for foreclosure and sale in this Court. That decree is still unsatisfied. An execution was issued upon it, under which the premises have been advertised for sale by the Sheriff, but no sale has yet taken place, adjournments having been made from time to time. At the filing of the bill the Defendant, Bigelow, threatened to proceed to sale. The trustees hold their mortgage in trust for various creditors of Roemmelt and Leicht, among whom are two of their own number, and the other Complainants and the De-

fendant, Bigelow. The premises comprised in the mortgage consist of about two acres of land in what was formerly Hudson City, (now included in the boundaries of Jersey City,) on which is a very large brewery of costly construction, with stables, wagon houses, wagon shops, a large cooperage, a large dwelling house for workmen, a saloon in a large frame building, a bowling alley, and a summer house, and the private dwelling house of Roemmelt and Leicht, the mortgagors. In addition to this property, the mortgage of the trustees covers two plots, containing nearly an acre, adjoining the land covered by the first mortgage, and about eight city lots near to, but not adjoining the premises described in the first mortgage. The trustees hold besides, as security for their mortgage debt, a chattel mortgage of all the tools, machinery and implements, casks, barrels, wagons, horses, and other personal property belonging or relating to the brewery or its business. This personal property is of the value of about $30,000, and if sold apart from the brewery must be sold at a comparative sacrifice. The business is now successfully carried on by Roemmelt and Leicht, who, since the giving of the mortgage of the trustees, have paid on account of the debt secured thereby, about $54,000, and there is now unpaid on account of it $154,000, of which unpaid indebtedness the amount of $126,000 is held by those of the beneficiaries under the second mortgage, who have contributed to redeem the first. The premises are more valuable to Roemmelt and Leicht than to anybody else, The part covered by the first mortgage is by far the most valuable part of them, the buildings being upon it. The property, if sold at this time would not, it is alleged, bring over half of its value, and a sale would endanger, if not destroy the Complainants' security. The interest of the Defendant under the second mortgage is about $6,000. The Defendants, Roemmelt and Leicht, and their wives, have answered, consenting to the substitution of the Complainants in the place of Bigelow, as to the owner of the decree, and admitting that the payment thereof by

the Complainants or any of them should not extinguish the debt or lien of the decree, and consenting that the decree shall remain a first lien on the premises mentioned therein, subject to a prior mortgage of about $2,300 on part of those premises.

The Complainants ask to be permitted to redeem Bigelow's mortgage in the interest and for the protection of the trust under their mortgage. Before filing the bill, they applied to Bigelow and requested him to permit them to redeem his mortgage, tendering themselves ready to pay the amount due on the decree and execution, on his executing an assignment thereof to them, but he refused. He expressed his willingness, however, to accept the amount *tendered in payment of the decree, and acknowledge satisfaction, but refused to permit the Complainants to be substituted, by virtue of such payment, to his rights under the decree.*

Bigelow has answered, admitting the facts above stated. He resists the Complainants' claim to subrogation, on the ground that he, having a debt secured by the mortgage of the trustees, and another debt due from Roemmelt and Leicht, not secured by mortgage upon the brewery premises, has a right to protect those claims by means of his mortgage, and this, he thinks, can be best done by compelling payment. His counsel argues that his equity is equal to that of the Complainants, and that, therefore, if this Court should allow the desired subrogation, he, by virtue of his interest under the mortgage to the trustees, might in turn successfully apply to be permitted to redeem the mortgage now held by him, from them. He further insists that if the substitution be allowed, the Complainants will, by reason thereof, have the advantage over him which he now has over them. But no such result is to be anticipated. It is admitted that, notwithstanding the statement in the answer to the contrary, the application to redeem is made in behalf of the whole trust, including, of course, the Defendant's claim thereunder, although the Complainants, other than the trustees,

have alone contributed the whole of the money requisite to the redemption. This Court will see to it that in the subrogation no advantage is given to the Complainants to the prejudice of Bigelow's interest, as a beneficiary under the mortgage held by the trustees. The decree is under the control of this Court. If it be decreed to stand as security to the Complainants for the amount advanced to redeem Bigelow, with the restriction that sale of the mortgaged premises under it shall not be made without the order of the Court, it is difficult to see how Bigelow's interest under the mortgage of the trustees can be prejudiced. The right of the mortgagees under that mortgage to redeem, under the circumstances, is clear. Tacking is not permitted in this State. Nor will the fact that the prior mortgage has an interest under the subsequent one, prevent the Court from decreeing the redemption. In *Saunders* v. *Winship and Frost*, 5 *Pick.* 259, the holder of the first and second mortgages was, with two other persons, the holder of the third. He was in possession under the first and second.

The two who were interested with him in the third mortgage applied to redeem him as to the first and second. He resisted, on the ground of his interest in the third mortgage, insisting that he was entitled to hold the premises until his debt under that mortgage should be paid, and that, therefore, the Complainants should be required to redeem him, not only as to the first and second mortgages, but also as to his interest under the third.

It was held that they might redeem him, as to the first and second mortgages, and though they could not compel him to contribute, he could not avail himself of his interest in the third mortgage, but they would be entitled to possession until they were reimbursed his proportion, and that, if he elected to hold under the third mortgage, he should contribute to the redemption of the first and second in the proportion his interest in the third bore to that of the other two mortgages.

Bigelow claims that, inasmuch as in his judgment it will be to his interest, with a view to the collection of his debt which is not secured by mortgage on the brewery, that his debtors should be compelled to pay off his mortgage, the Court will not compel him to assign that mortgage. It is difficult to see how the collection of the debt unsecured by mortgage, is to be facilitated or accelerated by compelling the debtors to pay off his mortgage, but were such a result to be expected, that would not prevent the Court from doing equity between him and the trustees as mortgagees.

It is the equitable right of the trustees to be permitted to redeem his mortgage, and to hold the premises under it, until they shall have been reimbursed their necessary expenditure to that end, the principal, interest and cost due on the decree. And they have a right to an assignment of the decree. *Pardee* vs. *Van Anken*, 3 *Barb. S. C. R.* 534; *Averill* vs. *Taylor*, 8 *N. Y.* 44; *Cheesebrough* vs. *Millard*, 1 *J. C. R.* 409; *Stevens* vs. *Cooper*, 1 *J. C. R.* 125; *Smith* vs. *Green*, 1 *Coll.* 555; *Ex parte Crisp*, 1 *Atk.* 133 and 135.

The Complainants, on filing the bill, paid into the Court the full amount, $56,975, due on the decree. They had previously tendered it to Bigelow, who, as before stated, refused to receive it except in satisfaction of the decree. He is not entitled to interest on the money secured by the decree, except that which is allowed on money paid into Court. *Austin* v. *Dadwell's Ex'rs*, 1 *Eq. Ca. Abr.* 319.

The order to show cause will be made absolute, and an injunction will be issued restraining Bigelow from selling under the decree. On his executing an assignment of the decree and execution to the trustees, in trust, to secure to contributing Complainants the repayment to them of the amount by them contributed to the redemption, with interest on so much thereof as is principal from the time the money was paid into Court, he will be permitted to

take the money deposited, with the interest on it, payable under the rule of this Court.

For the complete protection of Bigelow, in respect of his claim under the mortgage held by the trustees, no sale under the execution will be permitted without the previous order of the Court.

William Davison, Printer, 19 Montgomery street, Jersey City.

Court of Appeals of N. J.

Wm. A. Bigelow,
Appellant,

and

George W. Cassedy *et al*,
Respondents.

} *Appeal.*

SYLLABUS.

1. As a general rule, all persons who have acquired an interest in the lands mortgaged where the mortgage is due and liable to be foreclosed, have a right to disengage the property from all incumbrances when it becomes necessary to do so in order to make their own claims beneficial or available.

2. The junior mortgagee succeeds by subrogation to the rights and interest of the prior mortgagee in the lands, and the right to redeem a mortgage does not carry with it the right to an assignment of the mortgage, unless the redeeming party occupies the position of surety for the mortgage debt.

3. As to sureties, the right to an assignment is limited to such securities as continue to exist, and do not by payment become extinguished as to the principal debtor.

4. The mere fact that a person occupies the position of a second mortgagee or subsequent judgment creditor, does not entitle him to redeem the prior mortgage. Unless some special equity exists in the subsequent incumbrancer, the prior mortgagee has a right to retain his security, and may refuse to surrender it so long as the mortgagor does not wish to discharge it.

5. If the second incumbrancer happens to be in such a position that he is in danger of losing the benefit of his security, unless he is permitted to redeem, and the circumstances are such that equity would subrogate him, upon making these facts known to the first mortgagee, and making him an unconditional tender of his money, he would be put upon his inquiry, and after taking a reasonable time to be advised, his refusal to accept the tender and deliver up his mortgage uncancelled would be at his peril.

COURT OF ERRORS AND APPEALS, N. J.

WM. A. BIGELOW,
Appellant,

and

GEORGE W. CASSEDY *et al*,
Respondents.

} *Appeal.*

Argued at March Term, 1875,

By Mr. C. PARKER, *for Appellant,*
Mr. GILCHRIST, *for Respondent.*

The opinion of the Court was delivered by

VAN SYCKEL, *J.*

Bigelow held a first mortgage executed by Roemelt & Leicht, upon two acres of land on which is a large brewery with stables, wagon houses, and the dwelling of the mortgagors. Subsequently, and subject to this mortgage, the property of the mortgagors became vested in the respondents as their trustees in bankruptcy.

Bigelow foreclosed his mortgage, making the mortgagors and these trustees in bankruptcy parties to his bill of foreclosure, and obtained a degree for the sale of the mortgaged premises, caused an execution to be issued thereupon, and pressed a sale. Pending the proceedings for foreclosure, the title acquired by the trustees in bankruptcy was under the sanction of the Court of Bankruptcy, reassigned to the mortgagors, who thereupon, for the benefit of the then creditors, of whom Bigelow was one, executed a mortgage to the same trustees upon the same two acres of land, together with other lands, and also a chattel mortgage upon all the tools, machinery, implements, and other personal property used in the treasury business.

Under these circumstances, the trustees tendered Bigelow the amount due on his decree, and demanded an assignment of it, which he refused to make.

The trustees then paid the money into court, and filed their bill to redeem, and to compel Bigelow to make an assignment to them of his decree.

The complainants insist upon their right to an assignment, and that Bigelow is not entitled to interest upon his decree after the tender.

As a general rule, all persons who have acquired an interest in the lands mortgaged, where the mortgage is liable to be foreclosed, have a right to disengage the property from all incumbrances when it becomes necessary to do so in order to make their own claims available or beneficial.

This does not carry the right to demand of the mortgagee an assignment of his security, nor to insist upon the right to redeem before the due day of the mortgage, for it is manifest that it would impair the obligation of his contract to compel him to accept the money before the maturity of the bond which he had taken.

In Smith *vs.* Green, 1 Collyer, 555, the Vice-Chancellor admitted the strict law to be, that the first mortgagee is not bound to assign his securities. In Pearce *vs.* Morris, Law Rep., 8 Equity, 217, the counsel of the plaintiff conceded that a mortgagee cannot be compelled to transfer his mortgage, but in that case he had accepted a tender of the principal, interest and costs from the person who claimed a right to redeem, and Lord Romilly therefore held that he was bound to convey the legal estate to the plaintiff. The reversal of this case in 5 Chy. Appeals, 227, was upon other grounds.

The Court in Pardee *vs.* Van Anken, 3 Barb., 534, regarded the junior mortgagee as a surety. The doctrine laid down in this case, that the right to an assignment might spring directly from the mere right of redemption, was disclaimed by the Court of Appeals of New York, in Ellsworth *vs.* Lockwood, 42 N. Y., 89, where Justice Sutherland reviews the case in 3 Barb., and declares the law to be, that the junior mortgagee succeeds by subrogation on settled principles of equity, to the rights and in-

terest of the prior mortgagee in the lands, as security for the amount he pays without any assignment or act of transfer, by or on the part of the junior mortgagee. He holds the right of redemption and of subrogation by law to be inconsistent with the right to an assignment of the debt, and of the evidence of the debt, was much as the assignment assumes the continued existence of the debt, and the subrogation by law assumes its payment, and that the right to redeem a mortgage does not carry with it the right to an assignment of the mortgage, unless the redeeming party occupies the position of surety for the mortgage debt. The court refused to entertain a bill, in Samson *vs.* Drake, 105 Mass., 564, by a tenant for life, to compel the mortgagee, to whom he had tendered the amount due on his mortgage, to make an assignment of it, but maintained the bill simply as a bill to redeem. The case of Saunders *vs.* Frost, 5 Pick., 266, which was cited in support of the contrary doctrine, was controlled by Massachusetts Statute, as appears by a note to Loring *vs.* Cooke, 3 Pick., 48. In the latter case it was held that a person entitled to redeem must make an unconditional tender. The same rule was recognized by Chancellor Zabriskie, in Hamilton *vs.* Dobbs, 4 C. E. Gr., 227, where he states that a tenant or other person like a second mortgagee or judgment creditor, having a right to redeem, has not strictly the right to a written assignment of the bond and mortgage, but he stands by redemption in place of the first mortgagee, and is subrogated to his rights. He has the right to have the mortgage delivered to him uncancelled, which in equity operates as an assignment of it.

In Hill *vs.* Miller, Saxton, 435, after the first mortgagee had prosecuted his bond to judgment and execution at law, under which he purchased the mortgaged premises, the second mortgagee filed his bill to redeem, and although he had tendered the first mortgagee the amount due him, he was allowed to redeem only upon terms of paying the full principal and interest.

Upon redemption, an assignment was directed to be made of the mortgage, but no question was made upon this point, and it may have been deemed necessary for

the second mortgagee to have not only an equitable, but a legal assignment of the first mortgage to enable him to maintain ejectment against the first mortgage, who was in possession of the premises as purchaser under the execution at law. The cases cited relating to principal and surety, and those depending upon a contract express or implied between the contending parties, are governed by a different rule, and are not applicable to this discussion. In these instances the surety may have a right to succeed to the legal standing of his principal, and upon that ground he might be entitled to a cession of actions, and his claim to an assignment could be maintained. But even in such a case the general rule must be qualified by limiting it to such securities as continue to exist, and do not by payment become extinguished as to the principal debtor. The right of the surety, on paying the original debt to have an assignment of any independent collateral securities held by his creditor is not to be confounded with the supposed right to have the original debt assigned. The assignment of the instrument on which he was surety, which had been already paid, would be a mere nullity in equity, as well as at law, since it could not have, in the hands of the surety, any subsisting obligation. But the mere fact that a person occupies the position of second mortgagee or subsequent judgment creditor does not entitle him to redeem the prior mortgage. Unless some special equity exists in the subsequent incumbrancer, the prior mortgagee has a right to retain his security, and may refuse to surrender it. It would greatly depreciate the value of a first mortgage, if any one by taking a second mortgage incumbrance could in all cases compel the holder to give it up. He is a stranger to the second mortgagee, the registry of such second mortgage not being constructive notice to him of its existence. It is the well settled rule in this State that a prior mortgagee is not bound to notice the bill of a subsequent mortgagee filed on his mortgage, although he is made a party to it. Even if the bill charges that the prior mortgage is fraudulent or void or paid, and it turns out to be a valid, subsisting incumbrance, the mortgaged premises will not be sold to pay the

prior mortgage without the consent of the prior mortgagee; all that can be sold without such consent will be the equity of redemption mortgaged to the complainant.

Gihon *vs.* Belleville Comp'y, 3 Hal. Chy., 536.
Potts *vs.* New Jersey Arms Com'py, 2 C. E. Gr., 518.

This illustrates the regard which is had to the right of the prior mortgagee to retain his security, and is inconsistent with the doctrine that from the mere relation of second mortgagee to the property the right of redemption accrues. This right would not only be a very slender one, but the position of the prior mortgagee would be rendered very hazardous if he is compelled to decide at his peril whether he will refuse or accept a tender of his money from any one not in priority with him, but merely claiming to be a subsequent mortgagee. By the civil law, when a second creditor paid the prior creditor, or deposited the amount of the debt, on his refusal to receive payment he established his own right. He thereby succeeded to him, by operation of law, and was subrogated, as of right, without the necessity of any special agreement to that effect, on the ground that it was just; that the payment which was made by the subsequent creditor to the more ancient one, in virtue of the privilege which the law allowed him, should not result to his prejudice and be unavailable to him. By this means only could he preserve the property charged. In this respect, under the civil law, a creditor who redeemed a prior incumbrance was distinguished from a surety who paid the debt, and who was, by reason thereof, entitled to a cession of actions, thus clearly preserving the distinction between subrogation and assignment.

The reason of the civil law rule that in all cases the later incumbrancer could redeem, was that so long as the more ancient creditor remained unpaid the subsequent creditor could not proceed for payment against the thing hypothecated, but that he must first pay the precedent creditor (Dixon on Subrogation, p. 13). This rule, as has already been shown, has not been adopted into our law. The second mortgagee takes with full notice of the prior burden,

and he may proceed to realize the fruits of his security without regarding the prior lien.

In the absence of any special equity, the earlier creditor has a right to retain his investment undisturbed, so long as the mortgagor himself does not wish to discharge the debt. The second mortgagee has everything for which he contracted, and he can, at his pleasure, proceed to foreclosure and sell all that passes to him by his mortgage deed.

If such second mortgagee happens to be in such a position that he is in danger of losing the benefit of his security without he is permitted to redeem, and the circumstances are such that equity would subrogate him upon making these facts known to the first mortgagee, and maklng him an unconditional tender of his money, he would be put upon his inquiry, and after taking a reasonable time to be advised of his rights, his refusal to accept the tender and deliver his mortgage uncancelled would be at his peril.

In England he is allowed six months in which to ascertain whether the person making the offer is entitled to redeem him or not.

What would be a reasonable time here must depend upon the circumstances of the case.

In the case now under consideration, Bigelow was not only willing to receive the money due him, but he was using the process of the Court of Chancery to compel its payment. Under the circumstances of the case, a sale of a part of the mortgaged premises might greatly endanger the security of the complainants, and they were, therefore, entitled to redeem; but inasmuch as they did not make an unconditional tender, Bigelow was not bound to accept it. The complainants will be entitled to redeem Bigelow's decree upon payment to him of the full amount of his decree, interest and costs, and will thereupon be subrogated to his rights thereunder. Equity can so construct its decree as to effect a complete substitution, without the affirmative act of the complainant to it.

The decree of the Chancellor should be reversed, and the record remitted that a decree may be made in accordance with the views herein expressed. The appellants should have their costs in this court, and in the court below.