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Bill of Complaint.

Filed January 7, 1919.

To the Honorable Edwin Robert Walker,
Chancellor of the State of New Jersey.

The complainants, John A. Stewart and Walter C. Hubbard, of the City, County and State of New York, and Thatcher Magoun Brown, of the City of Red Bank, County of Monmouth and State of New Jersey, Trustees of The Liverpool & London & Globe Insurance Company, Ltd., respectfully show that

1. On December 1st, 1909, Fairchild-Baldwin Company, a corporation of the State of New Jersey, being indebted to John A. Stewart, Charles H. Marshall and Edmund D. Randolph, Trustees of The Liverpool & London & Globe Insurance Company, Ltd., in New York, in the sum of three hundred and fifty thousand dollars, executed to them a bond of that date to secure that sum payable on December 1st, 1910, with interest at the rate of four per cent. per annum payable half yearly from the date of the bond.

2. To secure payment of the bond, the said Fairchild-Baldwin Company executed to the said New York trustees of The Liverpool & London & Globe Insurance Company, Ltd., a mortgage of even date with the bond; and thereby conveyed to them as trustees aforesaid in fee, the land hereinafter described on the express condition that such conveyance should be void if payment should be made according to the terms of the bond, which mortgage, having been first duly acknowledged, and a certificate of acknowledgment duly endorsed thereon, was recorded in the Register's Office of Essex County in Book V 24 of Mortgages, pp. 182 to 187, on December 6th, 1909.

3. The mortgaged premises are described as follows:

> All that certain tract and parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey:
>
> Beginning in the northerly line of Mechanic street at the southeasterly corner of the land conveyed by George Wilkinson, receiver of the Newark Savings Institution to Alexander Hamilton and others as joint tenants, by deed dated August 12th, 1864, and recorded in Book H 22, page

400, and at a point one hundred and nineteen feet and four inches easterly from Broad street, and exactly in range with the westerly side of the main westerly wall of the brick building known as No. 11 Mechanic street, situated on the land hereby conveyed; thence running northerly along the easterly line of said Alexander Hamilton and others, and along the westerly side of the said main westerly wall of said building No. 11 Mechanic street and on a line in continuation thereof, sixty-five feet and four inches more or less to the southerly line of lands of Theodore Macknet; thence easterly along his line fifty feet and five inches to the westerly line of land of Nicholas Van Ness; thence southerly along his line sixty-four feet seven and one-half inches to the said northerly line of Mechanic street; thence westerly along the same fifty feet and five inches to the place of beginning.

ALSO ALL that certain piece or parcel of land, with the buildings and improvements thereon, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey:

BEGINNING at the northeasterly corner of Mechanic and Broad streets; from thence running easterly along the northerly line of Mechanic street one hundred and nineteen feet four inches more or less to a point exactly in range with the westerly side of the wall of the brick building also belonging to the Newark Savings Institution, now known as No. 11 Mechanic street, and now occupied by A. M. Holbrook and others; thence northerly along the westerly side of said wall and in a line in continuation of the said westerly side of the same sixty-five feet five and one-half inches more or less to the southerly line of land now or formerly belonging to Theodore Macknet and formerly to Stephen B. Tuttle; thence in a westerly direction along said southerly line and along the northerly side of the wall of the building standing on the lot hereby conveyed, one hundred and nineteen feet two inches more or less to Broad street aforesaid; thence southerly along the easterly line of Broad street sixty-six feet eight and one-half inches more or less to the place of beginning.

4. Said mortgage of complainants was therein stated to be given to secure part of the consideration expressed in the conveyance of the said premises by the said trustees aforesaid to the said Fairchild-Baldwin Company by deed bearing even date with the said mortgage.

5. Both bond and mortgage contains an agreement that if any installment of interest or any tax, assessment, water rent,

or other municipal or governmental rate, charge, imposition or lien should remain unpaid for thirty days after the same should fall due, then the whole principal sum with all unpaid interest should, at the option of the mortgagees, their successors, heirs or assigns become immediately due.

6. By written assignment dated February 11th, 1914, said John A. Stewart and Edmund D. Randolph as surviving trustees aforesaid, assigned said bond and mortgage to John A. Stewart, Edmund D. Randolph and Walter C. Hubbard as trustees in New York, of The Liverpool & London & Globe Insurance Co., Ltd.; which assignment was recorded in the register's office of Essex County in Book 116 of Assignments of Mortgages, pp. 153, etc.

7. By written assignment dated January 18th, 1918, said John A. Stewart, Walter C. Hubbard and Edmund D. Randolph, trustees as aforesaid, assigned said bond and mortgage to complainants as trustees aforesaid; which assignment was recorded in the register's office of Essex County in Book 138 of Assignments of Mortgages, pp. 100, etc.

8. On December 1st, 1909, the said Fairchild-Baldwin Company conveyed said land by Warranty Deed of that date to the Progressive Investment Company, a corporation of the State of New Jersey in fee; which deed was, on December 8th, 1909, recorded in the register's office of Essex County in Book M 46 of Deeds, pp. 52, etc. Any interest which the said Progressive Investment Company may have in said lands is subject to the lien of complainants' mortgage.

9. By an agreement in writing dated March 16th, 1914, and recorded in Book H 32 of Mortgages for Essex County, pp. 489, etc., between John A. Stewart, Edmund D. Randolph and Walter C. Hubbard as trustees aforesaid, and the Progressive Investment Company, and for a valuable consideration, the interest on the principal sum was increased from four per cent. per annum to four and a quarter per cent. per annum; payments of said interest in accordance therewith to begin February 16th, 1914, and half thereof to be made on the first day of June and the other half on the first day of December of each and every year thereafter. All the other provisions contained in the said bond and mortgage it was agreed to continue unaltered.

10. On December 1st, 1909, the said Progressive Investment Company mortgaged said land to the said Fairchild-Baldwin Company for $105,000 which mortgage was, on December 8th, 1909, recorded in the register's office of said County in Book 25 of Mortgages, pages 235, etc. Said mortgage was therein stated to be given as part of the consideration expressed in the conveyance of the said premises to the said Progressive Investment Company by the said Fairchild-Baldwin Company by deed bearing even date with the said mortgage. Any interest which the said Fairchild-Baldwin Company may have in said lands is subject to the lien of complainants' mortgage.

11. By written assignment without date, but proved December 9th, 1909, said Fairchild-Baldwin Company assigned said bond and mortgage set forth in paragraph 10 to the Prospect Improvement Company, a corporation of the State of New Jersey; which assignment was recorded on December 24th, 1909, in the register's office of said County in Book 91 of Assignments of Mortgages, pp. 266, etc. Any interest which the Prospect Improvement Company may have in said lands is subject to the lien of complainants' mortgage.

12. By written assignment dated July 12th, 1911, the said Prospect Improvement Company assigned said bond and mortgage set forth in paragraph 10 to Louis Schlesinger; which assignment was recorded in the register's office of said County in Book 100 of Assignments of Mortgages, pp. 143, etc. Any interest which the said Louis Schlesinger may have had in said lands is subject to the lien of complainants' mortgage.

13. By written assignment dated July 14th, 1911, said Louis Schlesinger assigned said bond and mortgage set forth in paragraph 10 to Louis Bamberger and Felix Fuld, partners trading as L. Bamberger & Company; which assignment was recorded in the register's office of said County in Book 104 of Assignments of Mortgages, pp. 377, etc. Any interest which said Louis Bamberger and Felix Fuld, partners as aforesaid, may have in said lands is subject to the lien of complainants' mortgage.

14. Thereafter by written assignment said Louis Bamberger and Felix Fuld, partners trading as L. Bamberger & Co. assigned said bond and mortgage set forth in paragraph 10 to the Chester Realty Company, a corporation of the State of New Jer-

sey, which assignment has not been recorded. Any interest which the said Chester Realty Company may have in said lands is subject to the lien of the complainants' mortgage.

15. By an agreement in writing dated March 26th, 1914, between the said Chester Realty Company and the said Progressive Investment Company, the agreement set forth in paragraph 9 was ratified by the said parties, and the priority of the complainant's mortgage was admitted.

16. On March 27th, 1914, the said Progressive Investment Company by warranty deed of that date, conveyed said lands to the American Real Estate Company, a corporation of the State of New Jersey which deed was on April 1st, 1914, recorded in the register's office of said County in Book B 54 of Deeds, pp. 257, etc., which conveyance was made subject to complainants' mortgage. Any interest which the said American Real Estate Company may have in said lands is subject to the lien of the complainants' mortgage.

17. On March 1st, 1915, the said American Real Estate Company mortgaged said land to Hyman Rosensohn of Newark, N. J., trustee, for $15,000 which mortgage was, on March 11th, 1915, recorded in the register's office of said County in Book Q 33 of Mortgages, pp. 446, etc., which mortgage was made subject to the complainants' mortgage. Any interest which the said Hyman Rosensohn, trustee, may have in said lands is subject to the lien of complainants' mortgage.

18. On December 1, 1918, a half year's interest fell due on complainants' bond and mortgage and remained unpaid for more than thirty days thereafter, and no part thereof has yet been paid. That in addition large arrears of taxes and assessments have become due and have remained unpaid for more than thirty days thereafter, and no part thereof have yet been paid as appears in Exhibit A annexed hereto and made a part hereof. Complainants have elected that the whole principal sum with all unpaid interest shall be now due.

19. Said Fairchild-Baldwin Company, Progressive Investment Company and the American Real Estate Company, or one of them has always been in possession of the mortgaged premises.

20. The parties whose names appear in Schedule B annexed to this bill of complaint, and made a part hereof, are in posses-

sion of the said mortgaged premises, or some portion thereof, as tenants under leases made to them by the said Fairchild-Baldwin Company, Progressive Investment Company, American Real Estate Company or one of them, by virtue whereof they, or any one of them may claim to have some interest in or lien upon the said mortgaged premises. Any interest which the said tenants may have in said mortgaged premises is subject to the lien of complainants' mortgage.

21. The taxes and assessments assessed against the said mortgaged premises, or some portion thereof, have not been paid as above set forth, by reason whereof complainants may be compelled to pay the said taxes in order to protect their title and save their mortgage from extinguishment; in which event complainants' claim that they should be permitted to have the amount so paid by them added to and made part of their mortgage debt as well by the terms of the said mortgage as by their equitable right.

22. The whole amount of principal with interest thereon at the rate of four and a quarter per cent. per annum from June 1st, 1918, is due upon complainants' bond and mortgage.

Complainants are without adequate remedy in the courts of law and therefore pray,

1. That the Fairchild-Baldwin Company, the American Real Estate Company, Prospect Improvement Company, Louis Bamberger and Felix Fuld, partners trading as L. Bamberger & Co., Chester Realty Company, Hyman Rosensohn, as trustee and individually, Franklin Savings Institution, a corporation, George Altemeier, Broad and Market National Bank, a corporation, Agostino Carluccio, Charles Spur, Board of Trade of the City of Newark, a corporation, Samuel Abraham, Charles Spengler, William H. Gross and Michael R. Gross, partners, trading as Gross & Gross, Joseph A. Fuerstman, Adolph Fisch, William Resh, Samuel Mitchell, Traders Investment Co., a corporation, Sol Rubinstein, Henry W. Morehouse, George H. Baker, J. Charlton McCurdy, Charles H. Halfpenny, Simon Lowy, Louis Kohn, C. S. Comforts Meeting Co., Harry Unger, Newark Building & Loan Association, Hyman Rosensohn, Timothy H. Manning, Milton Lowy, Godfrey Co-Operative Fertilizer & Chemical Co., a corporation, Cyrus C. Morrow, Newark Emblem Co., Inc., a corporation, John J. Radel, Will C. Headley and Elroy Headley, part-

ners trading as W. C. & E. Headley, Frank M. McDermit and James R. McDermit, partners trading as McDermit & McDermit, William J. Kearns, Alfonzo Del Guercio, Robert A. Meeker, John Ulrich, Edward Kenny, Emanuel Lowenstein, Leon Feist, Samuel Schwartz and Samuel Kaplan, partners trading as Schwartz & Kaplan, Allan L. Bland, Henry J. Stanfield, Edwin A. Rayner, John H. McCracken, Dominico Milone, Louis H. Aff, Edward L. Price, Adolph Altman and Joseph Altman, trading as Altman & Altman, Joseph Breidt, Jennie Richer, Julia B. Lowy, George A. Douglas, Newark Construction & Investment Company, a corporation, Ernest H. Fougner, William Greenfield, Julius Feldman and Philip Lowy and Mortimer Lowy, partners trading as Lowy & Lowy, who are the defendants to this suit may answer this bill of complaint (but without oath) and each statement therein made.

2. That an account may be taken of the amount due on complainants' mortgage:

3. That the defendants, or one of them, may be decreed to pay complainants the amount so found due, with interests and costs, by a short day, to be appointed by this court; and that in default of such payment, they, and each of them, be debarred and foreclosed of all equity of redemption in said lands; or

4. That a decree may be made for the sale of the mortgaged premises to raise, and pay to complainants, the amount so found due on their mortgage, with interest and costs:

5. That the complainants may have such other and further relief in the premises as may be agreeable to equity and good conscience.

6. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

McCARTER & ENGLISH,
Solicitors and Counsel with Complainants.

Bill of Complaint—Exhibits A and B.

EXHIBIT A.

No. 72144

SEARCH FOR TAXES AND ASSESSMENTS

Owner's Name American R. E. Co.
Block Map 164 - 1. 97. 98.
Taxing District 4 Street Broad
Street No. 800-804

Taxes 1918 a Lien on and after Dec. 20, 1918

1917	648		14877
1916	635		13499.50
paid	9/8/17	2996.00	
"	11/8/17	3736.25	
Broad St. Paving		11/13/14	997.50
paid	1/12/15	199.50	
"	11/18/15	199.50	
"	11/14/16.	199.50	
Branford Place Opening 1/13/17.			1800.

Interest and Cost to be added.

J.H.P.

I hereby certify, that in accordance with your requisition dated Dec 19 1918, I have searched the records in my office for unpaid taxes and assessments affecting the lands and real estate described herein, and find that no unpaid taxes and assessments heretofore, levied, assessed, or made by and on behalf of said City exist against said lands and real estate, except as above stated.

Comptroller's Office, City Hall
Newark, N. J., Dec 19 1918

Elmer A. Day
Deputy Director of Revenue
& Finance

EXHIBIT B.

Franklin Savings Institution, A Corporation,
George Altemeier,
Broad & Market National Bank, a Corporation,
Agostino Carluccio,
Charles Spur,
Board of Trade of the City of Newark, a Corporation,

Bill of Complaint—Exhibit B.

Samuel Abraham,
Charles Spengler,
William H. and Michael R. Gross, partners trading as Gross & Gross,
Joseph A. Fuerstman,
Adolph Fisch,
William Resh,
Samuel Mitchell,
Traders Investment Co. a Corporation,
Sol Rubinstein,
Harry W. Morehouse,
George H. Baker,
J. Charlton McCurdy,
Charles H. Halfpenny,
Simon Lowy,
Louis Kohn,
C. S. Comforts Meeting Co.,
Harry Unger,
Newark B. & L. Association,
Hyman Rosensohn,
Timothy H. Manning,
Milton Lowy,
Godfrey Cooperative Fertilizer & Chemical Co. a Corporation,
John J. Radel,
Will C. & Elroy partners trading as W. C. & E. Headley,
Frank M. and James R. McDermit, partners trading as McDermit & McDermit
William J. Kearns,
Alfonson Del Guercio,
Robert A. Meeker,
John Ulrich,
Edward Kenny,
Emanuel Lowenstein,
Leon Feist,
Samuel Schwartz and Samuel Kaplan, partners trading as Schwartz & Kaplan,
Allan L. Bland,
Henry J. Stanfield,
Edwin A. Rayner,
J. H. McCracken,
Dominco Milone,

Louis H. Aff,
Edward L. Price,
Adolph & Joseph Altman trading as Altman & Altman
Joseph Briedt,
Jennie Richer,
Julia B. Lowy,
George A. Douglas,
Newark Construction & Investment Company, a Corporation,
Ernest H. Fougner,
William Greenfield,
Julius Feldman,
Philip and Mortimer Lowy, partners trading as Lowy & Lowy
Cyrus C. Morrow
Newark Emblem Co. Inc. a Corporation

Order Amending Bill of Complaint.

Filed January 11, 1919.

It appearing that subpoenaes have been issued in this cause, but no answers having been filed by any of the defendants,

It is, on motion of Messrs. McCarter & English, solicitors of the complainants, this tenth day of January, nineteen hundred and nineteen, ORDERED, that the bill of complaint in this case be and it is hereby amended, by substituting the following clause:

> "4. Said mortgage of complainants was therein stated to be given to secure part of the consideration embraced in the conveyance of the said premises by the said trustees aforesaid, to the said Fairchild-Baldwin Company, by deed bearing even date with the said mortgage."

for clause #4 of the said bill of complaint.

Respectfully advised,

MERRITT LANE,
V. C.

Order of Amendment.

Filed March 5, 1919.

IN CHANCERY OF NEW JERSEY.

Between

JOHN A. STEWART, *et als.*, Trustees, etc.,
Complainants,

and

FAIRCHILD-BALDWIN COMPANY, *et als.*,
Defendants.

On Bill, etc.

It appearing to the court that no answers have been filed by any of the defendants in this suit and that a decree *pro confesso* has been entered against all of said defendants, except the defendant Hyman Rosensohn, individually, and as trustee, and application being made, and due cause appearing,

IT IS ORDERED on this 5th day of March, 1919, on motion of McCarter & English, solicitors of the complainants, that the bill of complaint be, and it is hereby amended as follows:

By inserting a new paragraph between paragraphs 17 and 18 of the Bill, which shall be numbered 17 1/2, and read as follows:

"17 1/2. Said mortgage was given to secure the payment of certain promissory notes, aggregating in all the sum of $15,000, said notes having been issued in series and each in the sum of $500, and bearing date March 1, 1915, payable on March 1, 1918, with interest thereon at the rate of six per cent. per annum, payable semi-annually, on the first days of September and March in each year; that said notes were issued and that they are held by the following individuals: Charles J. Basch, Hyman Rosensohn, Joseph E. Stricker, Samuel F. Leber, Merchants Land & Improvement Company, Moses Eisner, Otto H. Oppenheimer, Leon Christian Fleissner; that said persons last named are *cestui que trustent* of the said Hyman Rosensohn as trustee, and are the persons beneficially interested in the said mortgage referred to in the 17th paragraph of this bill, which said mortgage was given to secure payment of the said notes held by the said beneficiaries."

Petition of Defendant, Chester Realty Company.

And it is further ordered that the prayer of the bill of complaint be amended by adding after the words: "Partners trading as Lowy & Lowy" and ahead of the words: "who are the defendants in this suit" the following words: "Charles J. Basch, Hyman Rosensohn, Joseph E. Stricker, Samuel F. Leber, Merchants Land & Improvement Company, Moses Eisner, Otto H. Oppenheimer, Leon Feist, Glasby Lumber Company, Samuel J. Rosensohn and Christian Fleissner."

It is further ordered that no further amendment need be filed with the Clerk of this Court, but that said Bill of Complaint shall be considered as amended upon the filing of this order.

Respectfully advised,

MERRITT LANE,
V. C.

Petition of Defendant, Chester Realty Company.

Filed January 18, 1919.

IN CHANCERY OF NEW JERSEY.

Between

JOHN A. STEWART, WALTER C. HUBBARD and THATCHER MAGOUN BROWN, Trustees, etc.,

Complainants,

and

FAIRCHILD-BALDWIN COMPANY, *et als.,*

Defendants.

On Bill to Foreclose.

On Petition for Appointment of Receiver.

Petition.

The petition of the defendant, Chester Realty Company, a corporation of the State of New Jersey, respectfully shows that:

1. On January 10, 1919, John A. Stewart, Walter C. Hubbard and Thatcher Magoun Brown, trustees of the Liverpool & London & Globe Insurance Company, Ltd., filed a bill of complaint in the above stated cause to foreclose a mortgage held by them and made by the said defendant, Fairchild-Baldwin Company, a corporation of the State of New Jersey.

Petition of Defendant, Chester Realty Company.

2. The said mortgage was given by the said Fairchild-Baldwin Company to secure the payment of three hundred and fifty thousand dollars ($350,000) in ten years from December 1, 1909, with interest at the rate of four per cent.

3. By agreement in writing, dated March 16, 1914, the interest on said principal sum was increased from four per centum per annum to four and a quarter per centum per annum.

4. Petitioner is informed and believes that the whole amount of principal of said mortgage with interest thereon at the rate of four and a quarter per cent. from June 1, 1918, is due and unpaid, as appears by the bill of complaint in this cause.

5. Your petitioner is the holder of a mortgage, dated December 1, 1909, second and subsequent and subject to the lien of said complainants' mortgage, made by Progressive Investment Company, the then owners of the property, to the said Fairchild-Baldwin Company to secure the payment of one hundred five thousand dollars ($105,000), with interest at the rate of five per cent., payable fifteen thousand dollars ($15,000) on December 1, 1914, and ninety thousand dollars ($90,000) on December 1, 1919, with interest as aforesaid, which mortgage is dated December 1, 1909, and was recorded on December 8, 1909, in the register's office of the County of Essex in Book 25 of Mortgages, page 235.

6. By written assignment, without date but proved October 9, 1909, said Fairchild-Baldwin Company assigned said mortgage to the Prospect Improvement Company, a corporation of the State of New Jersey, which assignment was recorded on December 4, 1909, in the register's office of Essex County in Book 91 of Assignments of Mortgages, page 266.

7. By written assignment, dated July 12, 1911, the said Prospect Improvement Company assigned said mortgage to Louis Schlesinger, which assignment was recorded in the register's office of Essex County in Book 100 of Assignments of Mortgages, page 143.

8. By written assignment, dated July 14, 1911, said Louis Schlesinger assigned said mortgage to Louis Bamberger and Felix Fuld, partners, trading as L. Bamberger & Co., which assignment was recorded in the register's office of Essex County in Book 104 of Assignments of Mortgages, page 277.

Petition of Defendant, Chester Realty Company.

9. Thereafter by written assignment, dated January 2, 1913, said Louis Bamberger and Felix Fuld, partners trading as L. Bamberger & Co., assigned said mortgage to the petitioner, which assignment has not been recorded.

10. There is due upon the petitioner's mortgage the sum of ninety thousand dollars ($90,000), with interest from June 1, 1918, at the rate of five per cent.

11. The mortgaged premises consist of an office building, constructed of brick and stone, at the northeast corner of Mechanic and Broad streets, City of Newark, Essex County, New Jersey, having a frontage of 66 feet and 8 1/2 inches more or less on Broad street and with a depth of 169 feet and nine inches more or less.

12. The premises are now owned by the American Real Estate Company, a corporation of the State of New Jersey, and they have neglected to make the necessary repairs to said building and have permitted the same to greatly depreciate in value.

13. The said premises embraced in petitioner's mortgage and in the complainants' mortgage have greatly depreciated in value since the making of said mortgages and are not now worth more than the sum of five hundred and twenty-five thousand dollars ($525,000) and that at a fair and ordinary sale would not realize more than that sum and that at a forced sale, in the opinion of your petitioner, would not sell for more than four hundred and fifty thousand dollars ($450,000).

14. The balance of the taxes for the year 1916, the taxes for the years 1917 and 1918 on said mortgaged premises and also the balance of the paving assessment for the paving of Broad street and the assessment for the opening of Branford place, amounting in all to upwards of thirty thousand dollars ($30,000), besides interest and costs, are in arrears and unpaid, the lien of which taxes and assessments is paramount to the lien of the petitioner's said mortgage and the mortgage of the complainants.

15. The said mortgaged premises have been for several months past and are now occupied by the following tenants at aggregate annual rentals of, approximately, forty thousand dollars ($40,000). The said American Real Estate Company collects the said rents and refuses to pay the same to the petitioner

or to the complainants, or to allow the petitioner or the complainants to collect and apply the same to the payment of the said mortgages or taxes and assessments:

Franklin Savings Institution, a corporation.
George Altemeier.
Broad & Market National Bank, a corporation.
Agostino Carluccio.
Charles Spur.
Board of Trade of the City of Newark, a corporation.
Samuel Abraham.
Charles Spengler.
William H. and Michael R. Gross, partners trading as Gross & Gross.
Joseph A. Fuerstman.
Adolph Fisch.
William Resh.
Samuel Mitchell.
Traders' Investment Co., a corporation.
Sol Rubinstein.
Harry W. Morehouse.
George H. Baker.
J. Charlton McCurdy.
Charles H. Halfpenny.
Simon Lowy.
Louis Kohn.
C. S. Comforts Meeting Co.
Harry Unger.
Newark B. & L. Association.
Hyman Rosensohn.
Timothy M. Manning.
Milton Lowy.
Godfrey Cooperative Fertilizer & Chemical Co., a corporation.
John J. Radel.
Will C. and Elroy Headley, partners trading as W. C. & E. Headley.
Frank M. and James R. McDermit, partners trading as McDermit & McDermit.
William J. Kearns.
Alfonson Del Guercio.
Robert A. Meeker.

John Ulrich.
Edward Kenny.
Emanuel Lowenstein.
Leon Feist.
Samuel Schwartz and Samuel Kaplan, partners trading as Schwartz & Kaplan.
Allan L. Bland.
Henry J. Stanfield.
Edwin A. Rayner.
J. H. McCracken.
Dominco Milone.
Louis H. Aff.
Edward L. Price.
Adolph and Joseph Altman, trading as Altman & Altman.
Joseph Braidt.
Jennie Richer.
Julia B. Lowy.
George A. Douglas.
Newark Construction & Investment Company, a corporation.
Ernest H. Fougner.
William Greenfield.
Julius Feldman.
Philip and Mortimer Lowy, partners trading as Lowy & Lowy.
Cyrus C. Morrow.
Newark Emblem Co., Inc., a corporation.

16. The said American Real Estate Company, to the best of petitioner's knowledge and belief, is unable to pay to the said petitioner and complainants the said mortgage debts, taxes and assessments and the security for the same is insufficient for this purpose.

17. Petitioner, therefore, prays that a receiver may be appointed to collect the rents of the said mortgaged premises now due and hereafter to become due with such power as may be necessary and that the said American Real Estate Company be enjoined from further collecting said rents and the said
Franklin Savings Institution, a corporation.
George Altemeier.
Broad & Market National Bank, a corporation.
Agostino Carluccio.
Charles Spur.

Petition of Defendant, Chester Realty Company.

Board of Trade of the City of Newark, a corporation
Samuel Abraham.
Charles Spengler.
William H. and Michael R. Gross, partners trading as Gross & Gross.
William Resh.
Joseph A. Fuerstman.
Adolph Fisch.
Samuel Mitchell.
Traders Investment Co., a corporation.
Sol Rubinstein.
Harry W. Morehouse.
George H. Baker.
J. Charlton McCurdy.
Charles H. Halfpenny.
Simon Lowy.
Louis Kohn.
C. S. Comforts Meeting Co.
Harry Unger.
Newark B. & L. Association.
Hyman Rosensohn.
Timothy H. Manning.
Milton Lowy.
Godfrey Cooperative Fertilizer & Chemical Co., a corporation.
John J. Radel.
Will C. and Elroy Headley, partners trading as W. C. & E. Headley.
Frank M. and James R. McDermit, partners trading as McDermit & McDermit.
William J. Kearns.
Alfonson Del Guercio.
Robert A. Meeker.
John Ulrich.
Edward Kenny.
Emanuel Lowenstein.
Leon Feist.
Samuel Schwartz and Samuel Kaplan, partners trading as Schwartz & Kaplan.
Allan L. Bland.
Henry J. Stanfield.
Edwin A. Rayner.

J. H. McCracken.
Dominco Milone.
Louis H. Aff.
Edward L. Price.
Adolph and Joseph Altman, trading as Altman & Altman.
Joseph Breidt.
Jennie Richer.
Julia B. Lowy.
George A. Douglas.
Newark Construction & Investment Company, a corporation.
Ernest H. Fougner.
William Greenfield.
Julius Feldman.
Philip and Mortimer Lowy, partners trading as Lowy and Lowy.
Cyrus C. Morrow.
Newark Emblem Co., Inc., a corporation.

from paying over to the said American Real Estate Company or to any other person whomsoever any of the rents and profits of the said mortgaged premises until the further order of this Court.

Your petitioner will ever pray, etc.

PITNEY, HARDIN & SKINNER,
Solicitors for and of Counsel with said Petitioner.

Affidavit of Felix Fuld.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } *ss.*

FELIX FULD, of full age, being duly sworn according to law on his oath deposes and says:

I am the vice-president of the Chester Realty Company, the petitioner in the foregoing petition named, and am familiar with the facts herein set forth.

That on January 10, 1919, John A. Stewart, Walter C. Hubbard and Thatcher Magoun Brown, trustees of the Liverpool & London & Globe Insurance Company, Ltd., filed a bill of complaint in the above stated cause to foreclose a mortgage held by

them and made by the said defendant, Fairchild-Baldwin Company, a corporation of the State of New Jersey; that the said mortgage was given by the said Fairchild-Baldwin Company to secure the payment of three hundred fifty thousand dollars ($350,000) in ten years from December 1, 1909, with interest at the rate of four per cent.; that by agreement in writing, dated March 16, 1914, the interest on said principal sum was increased from four per centum per annum to four and a quarter per centum per annum; that deponent is informed and believes that the whole amount of principal of said mortgage with interest thereon at the rate of four and a quarter per cent. from June 1, 1918, is due and unpaid, as appears by the bill of complaint in this cause.

That the petitioner in the foregoing petition named is the holder of a mortgage, dated December 1, 1909, second and subsequent and subject to the lien of said complainants' mortgage, made by Progressive Investment Company, the then owners of the property, to the said Fairchild-Baldwin Company to secure the payment of one hundred five thousand dollars ($105,000), with interest at the rate of five per cent., payable fifteen thousand dollars ($15,000) on December 1, 1914, and ninety thousand dollars ($90,000) on December 1, 1919, with interest as aforesaid, which mortgage is dated December 1, 1909, and was recorded on December 8, 1909, in the register's office of the County of Essex in Book 25 of Mortgages, page 235; that by written assignment, without date but proved October 9, 1909, said Fairchild-Baldwin Company assigned said mortgage to the Prospect Improvement Company, a corporation of the State of New Jersey, which assignment was recorded on December 4, 1909, in the register's office of Essex County in Book 91 of Assignments of Mortgages, page 266; that by written assignment, dated July 12, 1911, the said Prospect Improvement Company assigned said mortgage to Louis Schlesinger, which assignment was recorded in the register's office of Essex County in Book 100 of Assignments of Mortgages, page 143; that by written assignment, dated July 14, 1911, said Louis Schlesinger assigned said mortgage to Louis Bamberger and Felix Fuld, partners, trading as L. Bamberger & Co., which assignment was recorded in the register's office of Essex County in Book 104 of Assignments of Mortgages, page 277; that thereafter by written assignment, dated January 2, 1913, said Louis Bamberger and Felix Fuld, partners, trading as

L Bamberger & Co., assigned said mortgage to Chester Realty Company, which assignment has not been recorded; that there is due upon this mortgage the sum of ninety thousand dollars ($90,000), with interest from June 1, 1918, at the rate of five per cent.

That the mortgaged premises consist of an office building, constructed of brick and stone, at the northeast corner of Mechanic and Broad streets, City of Newark, Essex County, New Jersey, having a frontage of 66 feet and 8½ inches more or less on Broad street and with a depth of 169 feet and nine inches more or less; that the premises are now owned by the American Real Estate Company, a corporation of the State of New Jersey, and that they have neglected to make the necessary repairs to said building and have permitted the same to greatly depreciate in value; that the said premises embraced in the mortgage of Chester Realty Company and in the complainants' mortgage have greatly depreciated in value since the making of said mortgages and are not now worth more than the sum of five hundred twenty-five thousand dollars ($525,000) and that a fair and ordinary sale would not realize more than that sum and that at a forced sale, in the opinion of your deponent, would not sell for more than four hundred fifty thousand dollars ($450,000).

That the balance of the taxes for the year 1916, the taxes for the years 1917 and 1918 on said mortgaged premises and also the balance of the paving assessment for the paving of Broad street and the assessment for the opening of Branford place, amounting in all to upwards of thirty thousand dollars ($30,000), besides interest and costs, are in arrears and unpaid, the lien of which taxes and assessments is paramount to the lien of the mortgage of Chester Realty Company and the mortgage of the complainants.

That the said mortgaged premises have been for several months past and are now occupied by the following tenants at aggregate annual rentals of, approximately, forty thousand dollars ($40,000); that said American Real Estate Company collects the said rents and refuses to pay the same to Chester Realty Company or to the complainants, or to allow the Chester Realty Company or the complainants to collect and apply the same to the payment of the said mortgages or taxes and assessments:

Franklin Savings Institution, a corporation.

George Altemeier.

Broad & Market National Bank, a corporation.
Agostino Carluccio.
Charles Spur.
Board of Trade of the City of Newark, a corporation.
Samuel Abraham.
Charles Spengler.
William H. and Michael R. Gross, partners trading as Gross & Gross.
Joseph A. Fuerstman.
Adolph Fisch.
William Resh.
Samuel Mitchell.
Traders Investment Co., a corporation.
Sol Rubinstein.
Harry W. Morehouse.
George H. Baker.
J. Charlton McCurdy.
Charles H. Halfpenny.
Simon Lowy.
Louis Kohn.
C. S. Comforts Meeting Co.
Harry Unger.
Newark B. & L. Association.
Hyman Rosensohn.
Timothy H. Manning.
Milton Lowy.
Godfrey Cooperative Fertilizer & Chemical Co., a corporation.
John J. Radel.
Will C. and Elroy Headley, partners trading as W. C. & E. Headley.
Frank M. and James R. McDermit, partners trading as McDermit & McDermit.
William J. Kearns.
Alfonson Del Guercio.
Robert A. Meeker.
John Ulrich.
Edward Kenny.
Emanuel Lowenstein.
Leon Feist.
Samuel Schwartz and Samuel Kaplan, partners trading as Schwartz & Kaplan.

Allan L. Bland.
Henry J. Stanfield.
Edwin A. Rayner.
J. H. McCracken.
Dominco Milone.
Louis H. Aff.
Edward L. Price.
Adolph and Joseph Altman, trading as Altman & Altman.
Joseph Breidt.
Jennie Richer.
Julia B. Lowy.
George A. Douglas.
Newark Construction & Investment Company, a corporation.
Ernest H. Fougner.
William Greenfield.
Julius Feldman.
Philip and Mortimer Lowy, partners trading as Lowy and Lowy.
Cyrus C. Morrow.
Newark Emblem Co., Inc., a corporation.

That the said American Real Estate Company, to the best of deponent's knowledge and belief, is unable to pay to the said Chester Realty Company and complainants the said mortgage debts, taxes and assessments and the security for the same is insufficient for this purpose.

FELIX FULD.

Sworn and subscribed to before me
this 16th day of January, A D. 1919.

HOWELL M. STILLMAN,
Notary Public of N. J.

Affidavit of Alfred T. Beckwith.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } *ss.*

ALFRED T. BECKWITH, being duly sworn on his oath deposes and says, I am a real estate broker in the City of Newark, with offices in the Fireman's Building. I have been in business for myself as a real estate broker in this city since 1907, during

which time I have purchased and sold properties in the City of Newark and vicinity. Prior to going in business for myself I was for a number of years associated with the Lehigh Valley Railroad Company in its Real Estate Department, during which time I had occasion to purchase real estate in and about the City of Newark, and to familiarize myself with real estate transactions in this city. I know the premises described in the bill of complaint herein, and generally known as the Globe Building.

I have examined the records in the tax office in the City Hall, and find the last recorded assessed valuation of this property, that is, for the year 1919, was $551,000 as follows: $491,000 for the land and $60,000 for the building. I am familiar with the value of properties surrounding the Globe Building, having six or seven years ago sold the building known as the Central Building, Nos. 828-830 Broad street, which closely adjoins the Globe Building, and I have kept myself informed of such other sales as have been made in and about that vicinity since I have been in the business in Newark. In my opinion the premises mentioned in the mortgage here under foreclosure, under usual circumstances, are not worth more than $525,000, and at a fair and ordinary sale would not bring more than that amount, if as much as that. At a forced sale I think these premises would not sell for more than $450,000, and I doubt if as much as that could be realized under those circumstances.

ALFRED T. BECKWITH.

Sworn to and subscribed this 17th day of January, 1919, before me.

AUGUSTUS C. STUDER, JR.,
Master in Chancery of New Jersey.

Order Appointing Receiver.

Filed January 18, 1919.

This matter being opened to the Court by Messrs. Pitney, Hardin & Skinner, solicitors of the Chester Realty Company, one of the defendants above named, and the petitioner herein, and upon reading and filing the said petition, and the affidavits thereto annexed, and the solicitors of the complainants herein, Messrs.

Order Appointing Receiver.

McCarter & English, consenting to the entry of this order, and it further appearing that the prayer of the said petition should be granted,

It is, on this 18th day of January, 1919, on motion of Messrs. Pitney, Hardin & Skinner, solicitors of the petitioner as aforesaid, ORDERED, that Archie H. Ormond, Esq., be and he hereby is appointed receiver in this cause, to take charge of the mortgaged premises described in the bill of complaint herein, and to manage the same, with power to sue for and collect the rents, issues and profits thereof,

AND IT IS FURTHER ORDERED, that the tenants in possession of the said premises be and they are hereby ordered and directed to pay the rents now in arrears, if any, and the rents due and to grow due, to the said receiver until the further order of the court,

AND IT IS FURTHER ORDERED, that the said receiver after deducting such allowances and disbursements as may be allowed by the court, apply the rents, issues and profits received from the said mortgaged premises, as follows:

1st, to the payment of the accrued taxes and assessments now outstanding as a lien against said mortgaged premises.

2nd, to the payment of the interest on the first mortgage lien on said premises;

3rd, to the payment of the interest on the second mortgage lien on said premises;

4th, as may be further ordered by the court.

AND IT IS FURTHER ORDERED, that before entering upon his duties, said receiver to give a bond to the Chancellor for the faithful performance of his duties, in the sum of $10,000, with such surety or sureties as may be approved by one of the Special Masters of this Court, said bond to be filed with the Clerk of this Court, and if said receiver should at any one time have in his custody more than $10,000, then application shall be made to increase the bond.

AND IT IS FURTHER ORDERED, that said receiver may apply to the Court from time to time for such further order and direction in the premises as may be necessary and proper.

AND IT IS FURTHER ORDERED, that the American Real Estate Company, the owner of the said premises, and the tenants thereof

in the petition named, show cause before this Court at the Chancery Chambers in the City of Newark on Tuesday, the 28th day of January, 1919, at ten o'clock in the forenoon, why the appointment of said receiver should not be continued, and why the directions as to the disposal and application of the proceeds should not be confirmed and proper directions given as to their disposal.

And it is Further Ordered, that copies of this order, which need not be certified, be served upon the said owner and tenants within five days from the date hereof. Service upon tenants may be made by leaving copies at the offices occupied by them.

E. R. WALKER,
C.

Respectfully advised,

Merritt Lane, *V. C.*

Consented to.

McCarter & English,
Solicitors of Complainant.

Order Continuing Receiver.

Filed January 28, 1919.

This matter coming on to be heard upon the return of a rule to show cause made in the above entitled cause bearing date, January 18, 1919, in the presence of Augustus C. Studer, Jr., of counsel with the complainants, and William L. Morgan, Esq., of counsel with the defendant-petitioner, Chester Realty Company and Samuel F. Leber, solicitor for defendants, American Real Estate Company and Hyman Rosensohn and it appearing that true copies of said order to show cause have been duly served upon the American Real Estate Company, the owner of the mortgaged premises described in the bill of complaint herein, and upon the tenants thereof in the petition of said Chester Realty Company named, and no cause being shown to the contrary;

It is on this 28th day of January, 1919, on motion of Pitney, Hardin & Skinner, solicitors for said defendant-petitioner, Chester Realty Company, Ordered that the appointment of the

receiver named in the said order to show cause be and hereby is confirmed, and said receiver be and he hereby is continued, with all the powers and authorities incident thereto and conferred upon him by said order heretofore made appointing him receiver, and with power and authority to let the said premises, or any part thereof, from time to time and to agree concerning the rents to be paid therefor and to do all things necessary for the proper care and management of said premises, and to maintain the same in a good and tenantable condition.

And it is Further Ordered, that the directions in said rule to show cause contained as to the disposal and application of the proceeds be and the same hereby are confirmed.

And it is Further Ordered, that the said receiver, or any of the parties hereto, may apply to the Court from time to time for such further order and directions in the premises as may be necessary and proper.

And it is Further Ordered, that the tenants of the said premises refrain from paying over to any person whomsoever, except the said receiver, the rents now in arrears, if any, and the rents due and to grow due until the further order of the Court.

And it is Further Ordered, that the receipts of rents accrued prior to the appointment of said receiver be kept by in a separate fund, pending the further order of the Court.

Respectfully advised,

Opinion.

Filed March 6, 1919.

HEADNOTE.

1. In an ordinary case, a receiver appointed of mortgaged premises may not collect rents accrued but unpaid at the time of his appointment, his power being limited to rents accruing after his appointment.

2. The mortgagor and those holding under him, although they may not have assumed the payment of the mortgage debt, are bound to pay taxes and other municipal liens and interest on prior encumbrances, as against a mortgagee.

3. Where the grantor holding under a conveyance made subject to a mortgage, though it contains no assumption thereof, has permitted taxes and municipal liens to accrue and remain unpaid as well as interest upon prior encumbrances, a receiver appointed at the instance of a second mortgagee will be directed to collect the rents accrued prior to his appointment but unpaid so far as necessary to pay all municipal taxes and liens and interest in prior encumbrances.

Messrs. McCarter & English for complainants.

Messrs. Pitney, Hardin & Skinner for Chester Realty Company, petitioner for receiver.

Mr. Samuel F. Leber for the American Real Estate Company, owner of the fee.

LANE, *V. C.*

The question for determination is whether a receiver appointed in a foreclosure case is entitled to the rents accrued but unpaid at the time of his appointment. The mortgagee rests his position upon the text in Beach on Receivers (Alderson's Edition) p. 194; High on Receivers, 4th Edition, secs. 643, 644, p. 796; Jones on Mortgages, 7th Edtion, Vol. 3, sec. 1536 and the cases cited to support the text.

I will first consider the cases cited to support the text. *First National Bank* v. *Illinois Steel Co.,* Supreme Court of Illinois, 51 N. E. 200, is not at all in point. *Conover* v. *Grover,* 31 N. J. E. 539, as will hereafter be pointed out, is an authority contrary to the statement of the text. In *Gaynor* v. *Blewett,* Supreme Court of Wisconsin, 52 N. W. 313, the court in a case in which, after an action to foreclose had been instituted and a *lis pendens* filed, the mortgagor made a lease to a tenant for a term of years and received rent in advance held that the receiver was entitled to recover from the tenant for the use of the premises after the date of the appointment. The Court, Pinney, Judge, *obiter,* says: "The appointment of a receiver is equivalent to a sequestration of the rents and profits accruing after the date of the order, and as to all which have previously accrued, and which remain unpaid," citing, among others, New York cases which will be hereafter noted. The cases of *Ortengren* v. *Rice,* 104 Ill. App. 428 and *Stephen* v. *Reibling,* 45 Ill. App. 40, are not in point. In the latter case the court said: "The rents are for no period of time anterior to his appointment as receiver." The

rule in New York referred to by the Wisconsin court in *Gaynor* v. *Blewett* seems to be in some confusion. The assistant vice-chancellor in *Lofsky* v. *Maujer,* in 1845, Sanford's Chancery Reports, Vol. 3, p. 71, said that it was well settled that a Court of Chancery would appoint a receiver of the lands mortgaged, and would restrain the mortgagor or his grantee from collecting the accrued rents, unpaid by the tenant, as well as the future rents and that this was clearly the effect of what the Chancellor had held in the case of *Howell* v. *Ripley,* 10 Paige, 43. A reference to *Howell* v *Ripley* will disclose that the question was not argued before the Chancellor although he had observed that "all the right that the complainant in such suit (a foreclosure suit on a first mortgage) could have claimed, in behalf of such receiver (a receiver appointed in such suit) would have been that the receiver in the former suit (a suit to foreclose a second mortgage) should deliver up to him the possession of the premises immediately; so as to enable him to receive and collect the rents then due from the tenants or which should thereafter become due." The Court of Appeals of New York, in *Argall* v. *Pitts,* 78 N. Y. 239, in 1879, opinion by Earle, said: "The mortgagee can only be entitled to the rents of the mortgaged premises by commencing suit for the foreclosure of his mortgage and procuring the appointment of a receiver, and then he will be confined to the rents and profits accruing during the pendency of the suit. The mortgagee has a mere lien upon the land mortgaged, as security." In *Rider* v. *Bagley,* 84 N. Y. 465, the court, again speaking through Judge Earle, said: "By the appointment of the receiver the plaintiff obtained an equitable lien upon the unpaid rents, and upon them only." He cited as authority *Lofsky* v. *Maujer, Howell* v. *Ripley* and his own case of *Argall* v. *Pitts.* His own opinion in *Argall* v. *Pitts* with respect to the right of a mortgagee to rents was precise, and the language used in *Rider* v. *Bagley* cannot be reconciled unless it be considered that, when he referred to unpaid rent in the latter case, he meant rent not accrued at the time of the appointment of the receiver. In *Wyckoff* v. *Scofield,* 1885, the Court of Appeals of New York, 98 N. Y. 477, after speaking of *Argall* v. *Pitts,* stated that in a proper case upon foreclosure the mortgagee may have a receiver of the rents who may be authorized to collect rents as have theretofore accrued but have not yet come to the hands of the owner of the equity of redemption, citing *Hollenbeck* v. *Donnell,* 94 N.

Y. 342. I can find nothing in *Hollenbeck* v. *Donnell* to justify its citation as authority for the statement made in *Wyckoff* v. *Scofield.* The question in that case was whether or not code provisions had taken away from the court of equity the power to appoint a receiver. The court said: "But when default has been made in the condition of the mortgage, the mortgagee at once becomes entitled to a foreclosure of the mortgage and a sale of the mortgaged premises. This process requires time, and on general principles of equity, the court may make the decree, when obtained, relate back to the time of the commencement of the action, and where necessary for the security of the mortgage debt, may appoint a receiver of the rents and profits accruing in the meantime, thus anticipating the decree and sale." In 1887 the New York Supreme Court, 1st Department, Patterson, Judge, at Special Term, in *Mutual Life Insurance Company* v. *Belknap,* 19 Abbott's New Cases, 345, said: "It is extremely doubtful whether a receiver of the rents and profits in a foreclosure case can reach rents accrued prior to the commencement of the suit in which he was appointed." And referring to *Argall* v. *Pitts* stated: "Although the precise question involved here was not directly before the court, the strong statement of the rule there made indicates the view of the court of last resort to be against the practice of extending receiverships of the rents and profits to rents accruing before suit." Only one New York case that I can find can be considered as direct authority and that is the case of *Lofsky* v. *Maujer,* opinion by the assistant Vice-Chancellor. In this State the rule is settled that a mortgage does not create an immediate legal estate in the mortgagee as at common law. The mortgage is a lien only and gives the mortgagee the right of entry only upon breach of the condition mentioned in the instrument. *Blue* v. *Everett,* 11 Dick. 455, Court of Errors and Appeals. The court said: "Until such entry the mortgagor continues to be the legal owner for all purposes." It is the general rule that until entry by the mortgagee or sale under foreclosure, or the appointment of a receiver, the mortgagor is entitled to the possession of the property and the rents, issues and profits thereof. In *Hotel Company* v. *Hountze,* 1882, 107 U. S. 378, 27 L. Ed. 609, at p. 615, the Supreme Court of the United States, said: "But in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself, the specific thing, which is pledged." And at page 616 the court stated that it was always

within the power of a court of equity to appoint a receiver and preserve not only the corpus but the rents, issues and profits. In *Teal* v. *Walker,* 111 U. S. 242, 28 L. Ed. 415, the same court stated the American view to be that the mortgagee is not entitled to the rents and profits until he gets possession under a decree of foreclosure. In *Freedman's Savings & Trust Co.* v. *Shepherd,* 1887, 127 U. S. 494, 32 L. Ed. 163, the court stated the rule to be that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession or until possession is taken in his behalf by a receiver. The court held that a pledge of rents accrued, but not paid, prior to the appointment of a receiver or of a sale under foreclosure, was valid. To the same effect is *Willis* v. *Eastern Trust & Banking Co.,* 1897, 168 U. S. 295, 42 L. Ed. 752; *Woodworth* v. *North Western Mutual Life Insurance Company,* 1901, 185 U. S. 353, 46 L. Ed. 945, at page 949; *Noyes, receiver* v. *Rich,* 52 Maine 115. And see 1 Am. & English Encyc of Law, 1st Edition, title "Mortgages," p. 812, 19 Ruling Case Law, title "Mortgages," sec. 96.

In view of the unquestioned rule that a mortgagor, until default and proceedings taken thereunder by the mortgagee, is entitled to the rents, issues and profits, in the absence of express stipulation, it is hard to conceive of a theory upon which can be based the right of a receiver to collect rents accrued but unpaid at the time of his appointment or at the most, at the time of the filing of the bill, for some cases have held the right of the mortgagee may relate back to the filing of the bill. The only theory that I can think of may be that the rents, although accrued, yet so long as they remain unpaid, are a part of the real estate. That this is not true, however, is indicated by the holding that a purchaser at judicial sale, under foreclosure or otherwise, obtains no right to rents which have accrued prior at least to the date of sale. 16 Ruling Case Law, Judicial Sales, sec. 106. *Cropper* v. *Brown,* 76 N. J. E. 406, in which case Vice-Chancellor Garrison said, at page 419: "The legal title does not vest in the purchaser until the delivery of the deed, but in the meantime it is held in trust for him. Since he has stipulated that he is not to receive possession until a future date, namely, the time when the deed is be delivered to him, he is not entitled to the fruits of possession, which are the current avails of the land."

Opinion of Vice-Chancellor.

The precise question before me has been referred to in several cases in this State. Vice-Chancellor Van Fleet in *Northrup* v. *Roe*, 10 N. J. L. J. 334 (1887) held, in a case where the land was occupied by a tenant who in lieu of a money rent, was to deliver a share of the produce of the land, that the receiver would not be permitted to take all of the mortgagor's share of the produce but that the value of the produce which the mortgagor was to receive would be considered as a fair rental of the premises for the year and the receiver would be permitted to take that portion of the produce as represented a fair rental value subsequent to the date of his appointment. In *Leeds* v. *Gifford*, 41 N. J. E. 464, the same Vice-Chancellor had said: "According to the rule now in force, a prior encumbrancer has an unquestionable right, as against the mortgagor and subsequent encumbrancers, in case his security is uncertain or precarious, to have the rents of the mortgaged premises, accruing subsequent to the appointment of a receiver, sequestered for his benefit." In 1879, the Chancellor, (Runyon) said in *Conover* v. *Grover*, 31 N. J. E. 539: "The mortgagees are entitled to the rents and profits which have accrued since the appointment of the receiver, if necessary, for the satisfaction of their mortgages." Although the remarks of the court in the two latter cases may be considered *dicta* the statement of Vice-Chancellor Van Fleet in *Northrup* v. *Roe* appears to be a direct authority.

I conclude, therefore, that in an ordinary case a receiver of mortgaged premises cannot be directed to collect rents which have accrued prior to his appointment although unpaid. The rule in England seems to have been the converse. *Codrington* v. *Johnstone*, 1838, Lord Langdale, Master of the Rolls, 48 English Reprint, 1042. It is urged on behalf of the second mortgagee, at whose instance the receiver was appointed, that the mortgagor or those holding under him have permitted taxes and other municipal liens and interest on the first mortgage, to accrue and remain unpaid, with the result that liens have been created paramount to the lien of the second mortgage, and that in equity the receiver ought to be permitted to collect rents accrued, which have not been paid to the mortgagor or those holding under him, to be applied to the reduction of these paramount liens. I can find no case in which this precise question has been considered. The second mortgage contains a covenant obligating the mortgagor to pay taxes, assessments and other municipal liens. It

was a purchase money mortgage. Subsequent to it execution and in 1914 the premises were conveyed by the mortgagor to the present owner. The conveyance was made subject to two mortgages then liens upon the premises, a first mortgage now under foreclosure in this suit, and a second mortgage held by the applicant for the receiver herein. In the deed there is no assumption of the mortgages. It is the duty of a mortgagor to pay taxes and municipal liens and to keep down prior encumbrances. Amer. & English Encyc. of Law, 1st Ed., title "Mortgages" p. 814, 27 Cyc., title "Mortgages" p. 1253, 19 Ruling Case Law, title "Mortgages" sec. 180. The mortgagor cannot acquire, and hold adversely, a tax title against the mortgagee nor can his grantees although all that the grantees purchased is the equity of redemption and there is no assumption of the mortgage debt. 19 Ruling Case Law, title "Mortgages" sec. 172. Note to *Cones* v. *Gibson,* 16 L. R. A., N. S. 121, at p. 124; *Vuege* v. *Nebraska Mortgage Company,* 52 L. R. A., N. S. 877, at p. 878, *State Mutual Building and Loan Asso.* v. *Millville Improvement Company,* 74 N. J. E. 721, at p. 728, etc., affirmed on the opinion of the Chancellor (then Vice-Chancellor) 76 N. J. E. 336, *Farmer* v. *Ward,* 75 N. J. E. 33. It is recognized that, with respect to taxes, there is a fiduciary relation between the mortgagor and those holding under him, and the mortgagee and that they are bound in equity and conscience, to do no act, and to suffer none to be done, which will destroy the mortgagee's title or impair his security. In jurisdictions in which it is recognized that a mortgage does not convey the legal title and does not give the mortgagee the right to immediate possession, courts of equity, after default, but prior to sale, have sanctioned the practice of appointing receivers to sequester the rents and profits, although not expressly pledged in the mortgage, where the mortgagor is insolvent and the security inadequate, upon the ground that the mortgagee acquires an equitable lien upon the rents, which holding must have been based upon the theory that, unless a receiver is appointed, the rents are liable to be collected by the mortgagor and diverted from their legitimate course, which must be assumed to be a keeping down of encumbrances upon the property. 27 Cyc title "Mortgages" 1251, Amer. & English Encyc of Law, 2nd Ed. p. 980. The tendency is toward extending the power of appointing a receiver. *Land Title and Trust Company* v. *Kellogg,* 73 N. J. E. 524; *Broad and Market National Bank* v. *Larson,* 102 Atl. 265, P. L. 1915 p. 506.

Opinion of Vice-Chancellor.

The duty of a mortgagor to keep down encumbrances was recognized by the Chancellor (Runyon) in *Mahon* v. *Crothers,* 28 N. J. E. 567. He there said that a mortgagee who has no personal security is entitled to a receiver where it appeared that the mortgagor's premises was an insufficient security; that the mortgagor who is in receipt of the rents and profits not only has not kept down the interest but has not paid the annual taxes, whereby a lien on the premises therefor, paramount to that of the mortgagee and bearing a high rate of interest, has been created and still exists—a lien which, unless the property be redeemed therefrom, will extinguish the mortgage. This statement was clearly based upon the idea of a breach of duty on the part of the mortgagor to properly apply the rents. The duty of a mortgagor to apply rents and profits and to keep down encumbrances was also recognized in *Cortleyeu* v. *Hathaway,* 11 N. J. E. 39. The Chancellor (Williamson) after stating that the rule in New York with respect to the appointment of a receiver of mortgaged premises had not been recognized in this state, and that the court had acted upon the ground that where a man takes a mortgage security for his debt and permits the mortgagee to remain in possession, if there is a default in payment, the mortgagee must appropriate the property in the usual way for the payment of his debt, said: "Where there is any act on the part of the mortgagor or such tenant which shows fraud on his part, or makes him chargeable with bad faith *in misappropriating* (Italics mine) the rents and profits for other purposes than that of keeping down the interest on the encumbrances, in such cases the court may very properly appoint a receiver." This is a clear recognition of a duty on the part of the mortgagor to apply rents to keeping down of encumbrances. The Chancellor also said that where the receiver was appointed at the instance of a second mortgagee he would be directed to keep down interest on prior mortgages.

It may be well argued that a mortgagee taking land as security for his debt does it with his eyes open, but he also does it with the understanding that liens prior to his shall remain at the amount they were at the time he took his mortgage and that no other paramount liens will be created such as taxes or other municipal liens. He assumes, as he has a right to assume, that the mortgagor or those holding under him will perform their duty of liquidating the interest accruing upon prior liens existing at the time he took his mortgage, and will pay taxes and muni-

cipal liens as they accrue. It seems to me that income accruing from property should, in equity, be first applied, as against a holder of a lien upon the property, toward the liquidation of taxes and other municipal liens and interest accruing on prior liens. To permit a mortgagor, after default, to collect rents accrued but not yet paid and neglect to apply them toward the payment of taxes and municipal liens and interest on prior existing liens would, I think, be to permit the perpetration of a fraud upon the holder of the mortgage. It would permit a mortgagor to grant his property to an irresponsible third party, that third party to collect the rents, issues and profits of the property and apply them to his own use, permitting taxes and municipal liens to accrue, without the knowledge of the mortgagee, and then, when forclosure is started, withdraw with his profits, leaving the mortgagee to face prior encumbrances not contemplated by the mortgagee. So far as the rents, issues and profits may have been actually collected by the owner of the fee the court, under the authorities, is helpless but I can see no good reason why rents accrued but not yet paid at the time of the appointment of the receiver should not be intercepted by the receiver and applied by him as equity and good conscience requires them to be applied toward the payment of taxes and municipal liens and interest upon prior encumbrances accrued prior to the time of the appointment of the receiver, and I think that this may be done upon the same theory as induced courts of equity originally to appoint a receiver and sequester rents, although not expressly pledged because, otherwise, they might be diverted from their legitimate course.

The receiver will be directed to collect the rents accrued but unpaid at the time of his appointment and apply them as herein indicated.

No costs to either party.

Order.

Filed March 11, 1919.

Application being made to the court for an order directing the receiver, heretofore appointed herein, to collect the rents which had accrued and remained uncollected at the time of his appointment, and the matter coming on to be heard in the presence of

Stipulation.

McCarter & English, solicitors for the complainant, Messrs. Pitney, Hardin & Skinner, solicitors of Chester Realty Company, the petitioners herein, and Samuel F. Leber, Esq., solicitor for the American Real Estate Company, the owner of the fee, and one of the defendants herein, and it appearing to the court that the mortgagor herein, or those holding under him, have permitted taxes and other municipal liens and interest on the first mortgage to accrue and remain unpaid, with the result that liens have been created paramount to the lien of the said mortgage, and that in equity the receiver ought to be permitted to collect the accrued rents which have not been paid to the mortgagor or those holding under him, and apply the same to the reduction of these paramount liens,

It is thereupon on this 11th day of March, 1919, on motion of Messrs. Pitney, Hardin & Skinner, solicitors of Chester Realty Company, ORDERED that the receiver herein proceed to collect the rents accrued and unpaid at the time of his appointment, that he keep the same in a separate fund and apply them to the payment of the taxes and municipal liens which have accrued and remain unpaid, and second, to the payment of interest on the first mortgage and that he hold the balance, if any remains after so doing, until the further order of the court.

MERRITT LANE,
V. C.

Stipulation.

Filed April 15, 1919.

It is hereby stipulated between the respective solicitors for the complainants, and for the defendant, Chester Realty Company, and for the defendant, American Real Estate Company, that at the hearing held on the return of the order to show cause made in the above cause on January 18th, 1919, which hearing was held on January 28th, 1919, it was stipulated in open court before his Honor Merritt Lane, Vice-Chancellor, by said solicitors that the rents arising out of the premises described in the complainants' bill, which had accrued prior to the appointment of the receiver made in said cause, and which remained unpaid amounted to $2,226.

Stipulation.

It is further stipulated that of the rents which had accrued prior to his appointment, said receiver had collected, between January 18th, 1919, and January 28th, 1919, the sum of $357.50.

It is further stipulated that at said hearing on January 28th, 1919, it appeared to the court by stipulation of counsel that said American Real Estate Company had theretofore, to wit, on or about July 19th, 1918, recovered judgment in the Essex County Circuit Court against one William M. Resh, for rent for part of the aforementioned premises, which judgment was for the sum of $1,090 damages, and $41.98 costs of suit, and which judgment was, at the time of the appointment of said receiver, and still is, wholly due and unpaid. It is further stipulated that Vice-Chancellor Lane declined to authorize said receiver to collect said judgment, and that said judgment is still held by said American Real Estate Company.

McCARTER & ENGLISH,
Solicitors for Complainants.

PITNEY, HARDIN & SKINNER,
Solicitors for Defendant, Chester Realty Company.

SAMUEL F. LEBER,
Solicitor for Defendant, American Real Estate Company.

Dated March 15, 1919.

Stipulation.

Filed May 8, 1919.

It is hereby stipulated and agreed by and between the respective solicitors for the complainants, and for the defendant, Chester Realty Company, and for the defendant, American Real Estate Company, that at the time when the Receiver herein was directed to collect the rents which had accrued prior to his appointment, in addition to the interest on the second mortgage amounting to $2,250, which had become due December 21, 1918; interest on the first mortgage amounting to $7,437.50 as of De-

Stipulation.

cember 21, 1918, had also accrued and remained unpaid, as well as the following taxes and other municipal liens:

Taxes due the City of Newark for 1918	$15,979.
with interest from December 20, 1918, @ 8%	
Taxes due the City of Newark for 1917	14,877.
with interest from December 20, 1917, @ 8%	
Balance of taxes due the City of Newark for the year 1916	2,867.25
with interest from December 20, 1916, @ 8%	
Paving assessment for paving Broad Street	399.
with interest from November 13, 1914, @ 8%	
Assessment for Branford Place opening	1,800.
with interest from Jan. 13, 1917, @ 8%	
Total not including interest	$35,922.25

It is further stipulated and agreed that the second mortgage contains a covenant obligating the mortgagor to pay taxes, assessments and other municipal liens; that it was a purchase money mortgage, and that subsequent to its execution, and in 1914, the premises were conveyed by the mortgagor to the present owner, the conveyance being subject to two mortgages then liens upon the premises, one being the first mortgage, now under foreclosure in this suit, and the other the second mortgage hereinabove referred to, and held by the applicant for the Receiver in this proceeding.

And it is further stipulated and agreed that the liens created by the unpaid interest on the first mortgage, as well as the unpaid taxes and other municipal liens, as above set forth, were all paramount to the lien of the second mortgage.

McCARTER & ENGLISH,
Solicitors for Complainants.

PITNEY, HARDIN & SKINNER,
Solicitors for Defendant, Chester Realty Company.

SAMUEL F. LEBER,
Solicitor for Defendant, American Real Estate Company.

Dated May 6, 1919.

Notice of Appeal.

Notice of Appeal.

Filed April 7, 1919.

To the above named complainants and to the defendant, Chester Realty Company:

TAKE NOTICE that the defendant, American Real Estate Company, hereby appeals to the Court of Errors and Appeals of New Jersey from so much of the orders made in this Court, in the above stated cause, on January 18th, 1919, January 28th, 1919, and March 11th, 1919, as orders and empowers the receiver appointed in said cause to receive and collect the rents, arising out of the premises described in the complainants' bill, which were in arrears on the day of the appointment of said receiver, to wit, January 18th, 1919, and from so much of said orders as directs the tenants in possession of said premises to pay to said receiver such rents as were in arrears at the time of said appointment of said receiver, and from so much of said orders as directs the disposal and application of any of the rents of said premises which were in arrears and unpaid at the time of the appointment of said receiver and from so much of the order of January 28th, 1919, as continues the power and authority conferred upon said receiver by the order of January 18th, 1919, to collect and receive the rents of said premises in arrears and unpaid at the time of the appointment of said receiver, and from so much of the order of March 11th, 1919, as directs the said receiver to collect the rents of said premises accrued and unpaid at the time of his appointment, and to keep the same in a separate fund and apply them to the payment of the taxes and municipal liens, and to the payment of interest on the first mortgage and to hold the balance of said rents if any remains after such application and payments.

This defendant expressly excepts from the foregoing notice of appeal so much of the orders appealed from as appoints a receiver of the rents, issues and profits of the aforementioned premises and as directs the application and disposal of such rents as accrued after the appointment of said receiver, the sole intent of this appeal being to review the ruling of the Court as to the right of said receiver to collect and receive such rents of said premises as accrued prior to his appointment and were in

Notice of Appeal.

arrears at the date thereof, and the order of this Court directing the tenants of said premises to pay such rents in arrears to said receiver.

SAMUEL F. LEBER,
Solicitor for and of Counsel with Defendant,
American Real Estate Company.

Dated, April 4th, 1919.

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

SAMUEL F. LEBER,
Of Counsel with Defendant,
American Real Estate Company.

Due and legal service of the within Notice of Appeal is hereby acknowledged.

McCARTER & ENGLISH,
Solicitors for Complainants.

PITNEY, HARDIN & SKINNER,
Solicitors for Defendant, Chester Realty Company.

Petition of Appeal.

Filed April 9, 1919.

New Jersey Court of Errors and Appeals

Between JOHN A. STEWART, *et als.*, trustees, etc., *Complainants,* *and* FAIRCHILD-BALDWIN COMPANY, *et als.*, *Defendants.*	*On Appeal from Chancery.* *Petition of Appeal.*

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

The petition of the American Real Estate Company, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by three certain orders made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, entered on January 18th, 1919, January 28th, 1919, and March 11th, 1919, respectively, in a certain cause in said court depending wherein John A. Stewart, *et als.*, trustees, etc., are complainants, and Fairchild-Baldwin Company, *et als.*, are defendants, in that said orders direct and empower the receiver appointed in said cause to receive and collect the rents arising out of the premises described in the complainants' bill, which were in arrears on the date of the appointment of said receiver, to wit: January 18th, 1919; and in that said orders direct the tenants in possession of said premises to pay to said receiver such rents as were in arrears at the time of said appointment of said receiver; and in that said orders direct the disposal and application of such rents of said premises as were in arrears and unpaid at the time of said appointment of said receiver; and in that the order of January 28th, 1919, continues the power and authority conferred upon said receiver by said order of January 18th, 1919, to collect and receive the rents of said premises in arrears and unpaid at the time of said appointment of said receiver; and in that the said order of March 11th, 1919, directs the said receiver to collect the rents of said premises accrued and unpaid at the time of his said appointment, and

directs him to keep the same in a separate fund, and to apply them to the payment of the taxes and municipal liens and to the payment of interest on the first mortgage, and to hold the balance of said rents if any remains after such application and payments.

And your petitioner humbly appeals from so much of said orders which order and direct as aforesaid, upon the ground that the same are erroneous, for that the Chancellor should have ordered and directed that the receiver appointed as aforesaid, collect and receive only such rents as accrued and became due subsequent to his appointment as such receiver, and should not have ordered and directed the said receiver to collect any of the rents of said premises accrued and unpaid at the time of the appointment of said receiver; and should not have directed the said receiver to keep such rents in a separate fund, but on the contrary, should have ordered and directed that the receiver pay the same to your petitioner; and should not have directed the said receiver to apply such rents to the payment of taxes and municipal liens and interest on the first mortgage, and to hold the balance of said rents, if any remains after said application and payments, but on the contrary, should have ordered and directed the said receiver to pay any such rents collected by him to your petitioner, and thenceforth to desist and refrain from collecting any rents of said premises which accrued prior to his appointment as such receiver.

Your petitioner therefore prays that the said orders of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this honorable court may seem meet.

SAMUEL F. LEBER,
Solicitor for and of Counsel with Appellant.

Due and sufficient legal service of the within Petition of Appeal is hereby acknowledged, and the deposit for costs of appeal as required by the rules of court is hereby waived.

McCARTER & ENGLISH,
Solicitors for Complainants.

PITNEY, HARDIN & SKINNER,
Solicitors for Defendant, Chester Realty Co.

Dated April 8, 1919.

Answer in Appeal for John A. Stewart, Et Als., Trustees, Respondents.

The answer of John A. Stewart, Walker O. Hubbard and Thatcher Magoun Brown, trustees of the Liverpool, London & Globe Insurance Company, Limited, some of the respondents to the petition of appeal of appellant, American Real Estate Company.

These respondents, not acknowledging any or all of the matters in the said petition of appeal contained, to be true, for answer thereto nevertheless say and admit: that three certain orders were, on January 18, 1919, January 28, 1919, and March 11, 1919, respectively made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said orders and each of them is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

McCARTER & ENGLISH,
Solicitors for and of Counsel with John A. Stewart, Walter O. Hubbard and Thatcher Magoun Brown, Trustees of the Liverpool, London & Globe Insurance Company.

Answer of Chester Realty Company.

Filed April 13, 1919.

The answer of Chester Realty Company, a corporation, one of the respondents, to the petition of appeal of the appellant, American Real Estate Company.

This respondent, not acknowledging any or all of the matters in the said petition of appeal contained to be true, for answer thereto, nevertheless, say and admit that three certain orders were, on January 18, 1919, January 28, 1919, and March 11, 1919, respectively, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated: but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said orders and each of them are agreeable to equity, and it prays that the same may be affirmed with costs to be adjudged to this respondent.

PITNEY, HARDIN & SKINNER,
Solicitors for and of Counsel with Respondent, Chester Realty Company.

Addenda.

Filed June 7, 1919.

In Chancery of New Jersey

Between JOHN A. STEWART, *et als.*, Trustees, etc., *Complainants,* *and* FAIRCHILD-BALDWIN COMPANY, *et als.*, *Defendants.*	*On Bill to Foreclose, Etc.* *Stipulation.*

It is hereby stipulated and agreed by and between the respective solicitors for the complainants and for the defendant, Chester Realty Company, and for the defendant, American Real Estate Company, that neither complainants' mortgage (being the mortgage in the course of foreclosure in this cause), nor the mortgage of the defendant, Chester Realty Company (being the mortgage particularly mentioned in complainants' bill filed in this cause), contains any provision or agreement that upon the commencement of proceedings to foreclose said mortgages or either of them, the said mortgagees or either of them shall be entitled to the appointment of a Receiver to collect the rents, issues and profits arising out of the mortgaged premises, and that neither of said mortgages contains any assignment to the mortgagee of the rents, issues and profits arising out of the mortgaged premises.

Dated May 7, 1919.

McCARTER & ENGLISH,
Solicitors for Complainants.

PITNEY, HARDIN & SKINNER,
Solicitors for Defendant, Chester Realty Company.

SAMUEL F. LEBER,
Solicitor for Defendant, American Real Estate Company.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

JOHN A. STEWART, *et als.*, trustees, etc.,
Complainants-Respondents,

and

FAIRCHILD-BALDWIN COMPANY,
Defendant.

On Bill to Foreclose.

CHESTER REALTY COMPANY,
Defendant-Respondent,

and

AMERICAN REAL ESTATE COMPANY,
Defendant-Appellant.

On Appeal from Chancery.

BRIEF FOR COMPLAINANTS-RESPONDENTS AND DEFENDENT-RESPONDENT, THE SECOND MORTGAGEE.

This is an appeal from an order advised by Vice-Chancellor Lane, continuing a receiver with power to collect rents, previously appointed by him on the petition of Chester Realty Company, the holder, by assignment, of a second mortgage on the premises foreclosed in the main case.

There was no objection to the appointment of the receiver by any of the parties, and the only question on this appeal, as stated in the appellant's brief, is, whether or not the Court erred in so much of his order filed March 11, 1919 (case, pages 34-35) as provided:

> "That the Receiver herein proceed to collect the rents accrued and unpaid at the time of his appointment; that he keep the same in a separate fund and apply them to the payment of the taxes and municipal liens which have accrued and remain unpaid, and, second, to the payment of interest on the first mortgage; and that he hold the balance, if any remains after so doing, until the further order of the court."

When the case was argued before the Vice-Chancellor, two questions were discussed; first, the right of the receiver in the ordinary case to collect rents which had accrued and remained

unpaid at the time of his appointment, and second, the right of the receiver in this particular case, considering the facts and applying the equities, to collect the rents which had accrued and remained unpaid at the time of his appointment.

The first proposition was carefully considered by the Vice-Chancellor and decided against the contention made on behalf of the respondents to this appeal—the then petitioners. The second question was decided in favor of the respondents, and, for that reason, the appellant has come into this court.

In his brief, the appellant's solicitor dwells almost entirely upon the abstract question of whether or not a receiver can collect back rents in the ordinary case, and confines himself, with his authorities, to showing that he cannot, but he fails to meet this particular question squarely with reference to this particular case, and it is that alone which concerns us.

The necessary facts appear in the State of the Case, at pages 35 to 37, in the form of two stipulations. The stipulation on pages 36 to 37 shows conclusively that the equities lie with the respondents, and we direct particular attention to it. Further, it must at all times be remembered that the petition for the appointment of the receiver was made by the second mortgagee, whose mortgage was for $90,000, with unpaid interest thereon at five per cent. from June 1, 1918, and in addition to its mortgage there was also unpaid as a prior encumbrance against the property the first mortgage for $350,000, with interest at four and one-half per cent. from June 1, 1918. The stipulation referred to shows, also, and in detail, that in addition to the above two mortgages, taxes were due the city from as far back as 1916, as well as paving assessments from 1914 and street assessments from 1917, amounting to upwards of $36,000.

Considering those facts, we now turn to so much of the opinion of the Vice-Chancellor as has to do with the point in dispute, and submit that the order should be affirmed.

The cases in support of the holding of the Vice-Chancellor have been thoroughly set forth by him in the second half of his opinion and we respectfully invite the Court's attention to a careful reading of it from page 31, line 34, to page 34, line 31, for we feel that we can do no better than reiterate what he has said there so forcefully.

In conclusion, there is this to be said. In the ordinary case, the probabilities are that a receiver will not be permitted to collect rents which accrued and remained unpaid at the time of his appointment, but that question in this case is more academic than real. It is the extraordinary case that is now before the Court, and, with the extraordinary facts in mind, the Vice-Chancellor has, in our judgment, properly concluded that the receiver should be permitted to collect the unpaid rents in this instance and apply them as directed in his order. We contend that in a court of equity, with the strong equities existing that have been mentioned above, the order was made properly, and we submit respectfully that it should be affirmed and the appeal dismissed.

PITNEY, HARDIN & SKINNER,
Solicitors for Defendant-Respondent, Chester Realty Company.

The above brief is also submitted on behalf of and with the consent of

McCARTER & ENGLISH,
Solicitors for Complainants-Respondents.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

JOHN A. STEWART, *et als.*, trustees, etc.,
Complainants-Respondents,

and

FAIRCHILD-BALDWIN COMPANY,
Defendant,

CHESTER REALTY COMPANY,
Defendant-Respondent,

and

AMERICAN REAL ESTATE COMPANY,
Defendant-Appellant.

On Bill to Foreclose.

On Appeal from Chancery.

BRIEF FOR APPELLANT.

Statement of Facts.

This is an appeal from an order advised by Vice-Chancellor Lane in the above entitled suit, empowering a receiver *to collect rents that had accrued prior to his appointment.*

All the facts appear from the bill of complaint, the petition for receiver and affidavits, and stipulations entered into between counsel for the respective parties interested.

The opinion of Vice-Chancellor Lane is reported in 106 At. Rep., pages 406, etc.

The facts are these: The appellant is the owner of a valuable parcel of real estate located at the northeastern part of Broad and Mechanic streets in the City of Newark. The building on it is the oldest office building in the city and is known as the London & Liverpool & Globe Building. The complainant-respondent is the holder of the first mortgage securing the principal sum of $350,000.00. The defendant-respondent, Chester Realty Company, is the holder of a second mortgage securing the principal sum of $90,000.00. A third mortgage given to Hyman Rosensohn as trustee, to secure an issue of gold notes amounting to $15,000.00 also encumbered the property. In addition to the foregoing liens the locus was subjected to unpaid taxes and assessments amounting to about $36,000.00. The

building was occupied by a number of tenants, who collectively were obligated to pay an annual rental of about $40,000.00.

The bill of complaint was filed by the first mortgagee to foreclose their mortgage for default in the payment of interest, taxes and assessments, and the second and third mortgagees, as well as the tenants were brought in court. The bill was filed January 7th, 1919. On January 8th, 1919, the second mortgagee, Chester Realty Company, filed its petition praying for the appointment of a receiver. The petition set forth the encumbrances, the defaults, and stated that the mortgaged premises were not worth more than $525,000.00 and would not bring more than $450,000.00 at a forced sale. It stated the rentals and prayed for a receiver. On filing this petition Vice-Chancellor Lane advised an order appointing a temporary receiver to "take charge of the mortgaged premises and manage the same, with power to sue for and collect the rents, issues and profits thereof, and it is further ordered, that the tenants in possession of the said premises be and they are hereby ordered and directed to pay the rents *now in arrears, if any,* and the rents due and to grow due, to the said receiver until the further order of the Court."

The defendants named in the order were directed to show cause on January 28th, 1919, why the appointment of the receiver should not be continued and the directions as to the disposal of the proceeds should not be confirmed.

On the return day of the order no contest was made as to the right of the Court to appoint the receiver. The only question raised was whether the receiver could be empowered to collect rents accrued prior to his appointment or prior to the filing of the foreclosure bill. The order made on January 28th, 1919, directed the receiver to keep in a separate fund rents collected by him that had accrued prior to his appointment, pending the further order of the Court. Further argument was had upon this question and briefs submitted. Thereafter, to wit, March 6th, 1919, the Vice-Chancellor filed an opinion in which he held that under the circumstances of the case the receiver should collect rents accrued prior to his appointment and on March 11th, 1919, the Vice-Chancellor ordered "that the receiver herein proceed to collect the rents accrued and unpaid at the time of his appointment, that he keep the same in a separate fund and apply them to the payment of the taxes and municipal liens which have accrued and remain unpaid, and second to the pay-

ment of interest on the first mortgage, and that he hold the balance, if any remains after so doing, until the further order of the Court."

This appeal contests the accuracy and legality of the decision of the Vice-Chancellor on the point whether the receiver could be empowered to collect rents that had accrued prior to his appointment.

Appellant's Reasons for Reversal.

The order appealed from is erroneous and should be reversed for the following reasons:

(1) The order is made contrary to the great weight of authority in this country.

(2) The Vice-Chancellor's decision is contrary to the law of this State.

(3) The decision in effect appoints a receiver of the owner of the property, a corporation of this State, and confiscates its assets without due process of law.

POINTS.

I.

The respondents will, no doubt, refer to the same authorities they relied upon in the Court below. We will, therefore, first examine their contentions. They refer the Court to Beach on Receivers, High on Receivers, and Jones on Mortgages, and cited the cases found in the foot notes to the texts. An examination of the cases will show that they do not support the rule laid down by the foregoing writers. A quick illustration is from Jones, who cites *Conover* v. *Grover* in our state as authority in favor of his proposition, and if anything, it is against it.

Now, the cases referred to are as follows:

One a Wisconsin case, (*Gaynor* v. *Blewett,* 82 Wis. 313, 52 N. W. 313), one an Illinois case, (*Ortengren* v. *Rice,* 104 Ill. App. 428), another Illinois case, (*Stephen* v. *Reibling,* 45 Ill. App. 40) and three New York cases, namely, *Rider* v. *Bagley,* 84 N. Y. 461; *Wyckoff* v. *Scofield,* 98 N. Y. 478, and *Lofsky* v. *Maujer,* 3 Sanf. Ch. 69. In none of these cases did the Court have to pass upon a controversy concerning rents which had accrued prior to the appointment of the receiver; in none of these cases was the question adjudicated.

In the *Gaynor case,* the Court held that the receiver was entitled to rent collected by the owner from a tenant for a year in advance, under a lease, where the lease was made after the foreclosure bill was filed, and after a *lis pendens* was placed on record. The Court there holds that the tenant had constructive notice of the rights of the mortgagee to the rents, and that the receiver was entitled to them. The Court uses dictum which would seem to support complainant's contention. That was entirely unnecessary to the adjudication.

The *Ortengren case* is entirely out of point. There the mortgage itself pledged the rents. Nowheres in the case, does there appear any question as to rents accrued before the appointment of the receiver. Neither is there any dictum in that case with reference to such rents.

The *Stephen* v. *Reibling case,* does not in the slightest degree support complainant's position. In that case the controversy was entirely over rents for a period beginning after the appointment of the receiver. In fact, the Court says:

> "The rents are for no period of time anterior to his appointment as receiver."

In the *Rider case,* there is dictum that by the appointment of a receiver, the plaintiff obtains an equitable lien upon unpaid rents, and points to the *Argall* v. *Pitts case,* 78 New York, page 239 as authority. The phrase "unpaid rents," could have reference only to rents accruing after the receiver's appointment, for, as will be shown below, the Argall case and the case of *Mutual Life Insurance* v. *Belknap,* 19 Abbott's New Cases, 345, denied to the receiver rents accrued prior to his appointment. Then, also, the Rider case was decided in 1881. The later case of *Mutual Life* v. *Belknap* settles the law of New York, in which case the question was directly passed upon.

In the *Wyckoff case,* there is dictum that the receiver may collect rents unpaid at the time of his appointment. That point was unnecessary to the decision. In fact, when making the point, the Court points to *Argall v. Pitts,* which latter case stands for the converse of the proposition. The Wyckoff case was decided in 1885, and must be deemed to have been overruled by the later case of the Mutual Insurance Company, since the Mutual case distinctly recognizes the above rules theretofore prevailing.

The *Lofsky case* was decided in 1885, and is also overruled by the Mutual case.

II.

It is important in the first place, to clearly bear in mind the relationship between mortgagor and mortgagee, and the rights of a mortgagee in this State.

The old common law rule, that a mortgage created an immediate estate in the mortgagee, and vested in him immediately upon the execution and delivery of the mortgage, an actual estate with a right of immediate possession, subject only to be defeated by the payment of the mortgage money, has not been adopted by our courts.

Woodside v. *Adams,* (E. & A.) 11 Vr. 417.
Shields v. *Lozear,* (E. & A.) 5 Vr. 496.
Sanderson v. *Price,* 1 Zabriskie 646.

We cite the following from the opinion of Mr. Justice Depue in *Woodside* v. *Adams, supra:*

> "At common law, a mortgage created an immediate estate in the mortgagee, and vested in him *eo instante,* an actual estate with a right of immediate possession, subject only to be defeated by the payment of the mortgage money. As a conveyance, its operation was to divest completely the title of the mortgagor, who, thenceforth, had no interest in the property except a mere equitable right of redemption. This rule of law was applicable alike to mortgages of real and personal property. In Sanderson *v.* Doe, *ex dem.* Price, 1 Zab. 646, note, it was held by the Court of Errors that an actual estate in possession did not vest in the mortgage of lands until the condition was broken by default in the payment of the mortgage money. This decision, though perhaps not satisfactory to the profession when it was promulgated, has come to be regarded as settled law, and it may now be considered the established doctrine of the courts of this state, that a mortgage of lands is not a common law conveyance on condition, but a mere security for the mortgage debt, the legal estate being considered as subsisting in the mortgagee only for that purpose. Jackson *v.* Turrell, 10 Vroom, 329; Kircher *v.* Schalk, *id.* 335. The consequence of these decisions is the separation, in legal contemplation, of the estate of the mortgagor, from that of the mortgagee, and the recognition of an actual and distinct legal estate in each. The legal estate of the mortgagee, after breach of condition, has all the incidents of a

common law title, for the purpose of an action of ejectment; but its existence is, nevertheless, regarded as compatible with a legal estate, at the same time, in the mortgagor. This legal estate of the mortgagor is capable of conveyance, mortgage, or a sale under execution against him, at any time before his estate is divested by foreclosure. For I think it is a legitimate deduction from the principles adjudged in the cases cited, that the estate of the mortgagor is susceptible of conveyance, mortgage and sale under execution, until it is actually divested by a release or foreclosure. The cases clearly recognize the equity of redemption of a mortgagor as a legal estate, and as such it must subsist until extinguished in the manner in which legal estates are by law extinguishable. Entry on the mortgaged premises does not work an extinguishment. *It merely operates to transfer the possession to the mortgagee, with all the rights that actual possession confers, leaving the ultimate rights of the parties unaffected.*"

The case of *Shields* v. *Lozear,* which is a Court of Errors and Appeals decision, and which was decided some nine years before *Woodside* v. *Adams,* lays down the same principle of law. The opinion is written by Judge Depue, and is a very instructive statement on the phase of the law of mortgages now under consideration.

Upon breach of condition, the mortgagee's estate has all the incidents of a common law title, and he has the right to the possession of the mortgaged premises. The estate of the mortgagor is called the equity of redemption, and although the cases speak of this estate as a legal one, yet it is only enforcible in a court of equity.

Woodside v. *Adams, supra.*
Shields v. *Lozear, supra.*
Merson v. *Castree,* 57 N. J. L. 484.
Howell v. *Schenck,* 24 N. J. L. 89.
Jones on Mortgages, 6th edition, section 702.
Breitenbucher v. *McElroy,* 2 N. J. L. J. 157.

The mortgagee, after breach of condition, having a title in the mortgaged premises, possessing all the incidents of a common law title, and only subject to be divested by the equitable proceeding to redeem, and having the right to possess the property, has the right, from the date of taking such possession, to

the profits arising or flowing from the estate. I suppose that at common law, he could not be compelled to account to the mortgagor for the value of the profits taken by him as aforesaid. This, evidently, was a hardship upon the mortgagor, and so, in a court exercising equitable jurisdiction, he could compel the mortgagee to credit to the debt the profits received by him. This was done upon the theory always obtaining in the Court of Chancery, that until the mortgagor has been foreclosed by decree of and from the right to redeem, the mortgage, even after default, was a security. This, however, is an equitable principle, and does not exist at common law, because, if the mortgagee has gone into possession after default, the mortgagor could not successfully maintain an action of ejectment against him. And it was held at an early date, that even after payment, the proper method of re-investing the mortgagor with the estate would be by deed of release.

Having determined beyond any doubt, that after default the mortgagee can take possession or obtain possession by ejectment of the mortgaged premises, it follows as a matter of course, that not until the mortgagee has obtained possession by either one of the above methods, can he take rents or profits arising from the lands. It has never been decided that the mortgagee who has obtained possession of the mortgaged premises after default, is entitled to the rents, issues and profits that had accrued and had become due and payable to the owner prior to taking actual possession. To hold that he could, would destroy the rights of the mortgagor up to the date of default and taking possession. The default of the mortgagor may be allowed to run for some time after its occurrence, without impairing the rights of the mortgagor. It is only when the mortgagee acts upon the default, and takes possession, that he puts to an end the rights of the mortgagor to the incidents that arise out of possession, subject, of course, to redemption by the mortgagor; and upon such redemption the mortgagee must account to the mortgagor for his possession. A receiver appointed by a court of equity in a foreclosure proceeding is a substitute for taking possession under the common law. It is a convenient substitute. It is a more complete substitute, because in cases where several mortgagees hold liens upon the premises in question, their rights in the rents and profits can better be adjudicated, and can be settled in one proceedings, whereas at common law, the rights between them would create a multiplicity of actions and cumbersome situations. Other reason pointing to the satisfactory pro-

ceeding of having a receiver appointed exist. Such a receiver has no more rights than would the mortgagee himself have, and if it is true that a mortgagee taking possession of mortgaged premises is not entitled to rents accrued before the date of taking possession, then it follows that a receiver could do no more. To be sure, the Chancellor is moved to appoint a receiver in a foreclosure proceeding only upon proof submitted to him that the security is insufficient to make the mortgage debt, and that if a deficiency should occur, the obligor on the bond could not, because of insolvency or for other reasons, respond; without such proof the Chancellor would no doubt leave the applicant to his common law remedy.

Unless, therefore, there exists some special agreement between mortgagor and mortgagee, whereby the rents, issues and profits arising from the mortgaged premises are pledged as further security for the loan, there exists no equity in favor of the mortgagee for rents accrued prior to the appointment of a receiver; and as to such special agreements it may be observed that they ought also specifically to cover accrued rents. This practice is followed in large corporate mortgages. The mortgagee occupies no position of special favor before a Court of Chancery. He is a secured creditor, and has dealt with open eyes. He has loaned the mortgagor a certain sum of money, and has taken security for the loan. He must look to the security. Under the law of this State, he cannot even commence an action on the bond until he has sold the security. To be sure, he has the right, where the security is not in his possession, to stop waste, but if he has stood by and allowed the security to become of less value because of the accretion of taxes and assessments, he cannot be heard to complain—I mean to complain so as to move the Chancellor to give him an equity in rents that had accrued prior to the appointment of a receiver.

Rents that have accrued prior to the appointment of a receiver are debts, and belong to the general estate of the mortgagor or owner, and ought to go to his general and unsecured creditors.

If a receiver in foreclosure proceedings is entitled to collect rents accrued prior to his appointment, then it would follow that a mortgagee taking possession would be entitled to rents that had been received by the owner prior to the commencement of the foreclosure proceedings. But this proposition has never been the law. The opposite has been decided.

III.

We refer the Court to the following cases which support our contention:

Northrup v. *Roe,* 10 N. J. L. J., 334, decided by Vice-Chancellor Van Fleet, *Leeds* v. *Gifford,* 41 N. J. E. 464, affirmed in 45 N. J. E. 245, *Conover* v. *Grover,* 31 N. J. E., 539, *Mutual Life Insurance Company* v. *Belknap,* (New York Supreme Court), 19 Abbotts New cases, 345, and *Noyes, Receiver* v. *Rich,* 52 Me., 115.

In the case of *Leeds* v. *Gifford,* Vice-Chancellor Van Fleet says:

> "According to the rule now in force, a prior encumbrancer has an unquestionable right, as against the mortgagor and subsequent encumbrancers, in case his security is uncertain or precarious, to have the rents of the mortgaged premises *accruing subsequent to the appointment of the receiver* sequestered for his default."

It may be said that this statement was not necessary to the decision in the Leeds case, but when we have a statement of law laid down by an authority of the eminence of Vice-Chancellor Van Fleet, it is entitled to respectful consideration. The Court of Errors and Appeals adopted the Vice-Chancellor's opinion, 45 E. J. E. 245.

In the case of *Northrup* v. *Roe,* the same Vice-Chancellor had before him the sharp and direct question for decision. This was a foreclosure case, and a motion was made for the appointment of a receiver. It appeared from the petition that the mortgaged premises had been conveyed to the grantee, who had died intestate leaving a widow and children; that the widow died and the children were in possession, and that the mortgaged premises which consisted of a farm were worked by a tenant, Berry, for one-half the crop. Petitioner proved insolvency of obligor and the inadequacy of the security.

The Vice-Chancellor suggested that the administrator should pledge the crops he should receive for the payment of such sum as shall equal a reasonable rent from the time of the application for a receiver to the end of the term or the sale of the premises. Defendant's counsel declined.

On October 4th, the Vice-Chancellor handed down his conclusions, in which he finds that the premises are an inadequate security for the complainant's debt, and says:

> "The complainant is entitled to the aid of the Court. The mortgaged premises are occupied by a tenant, who in

lieu of a money rent, delivers a share of the produce of the land. The application in this case was not made until nearly all the labor required to put the crops in, care for them and gather them had been expended. It is obvious, I think, that the mortgagee should not, under such circumstances, be allowed to take the whole of the mortgagor's share of the produce. He should not be permitted, in a case where he does not ask for the appointment of a receiver until all the labor necessary to make the crops has been done, to take all. The just rule, to be applied in such cases, as it seems to me, is this: To consider the value of the produce, which the mortgagor or landlord receives, as the fair rental of the premises for the year, and then give the mortgagee such part thereof as represents, on the basis above stated, the rental value of the premises from the time a receiver is appointed, that is to say, if six months of the year have expired when a receiver is appointed, only six months' rent shall be sequestered for the benefit of the mortgagee. The rental of this mortgaged premises for the year ending April 1, 1888, will be apportioned in the manner indicated above."

In the case of *Conover* v. *Grover,* 31 N. J. E. 539 Chancellor Runyon on page 542, says:

"After the filing of the bill, application was made to the Court for the appointment of a receiver of the rents, issues and profits of the mortgaged premises, which was granted. The assignment by Grover to Leggett of the lease, was made October 30th, 1877, six days after the bill was filed. *The mortgagees are entitled to the rents and profits which have accrued since the appointment of the receiver,* if necessary, for the satisfaction of their mortgages."

Mutual Life Insurance Company v. *Belknap,* (New York Supreme Court, February 1887), Volume 19, Abbotts New Cases, page 345:

Motion that defendant be required to pay to the receiver rent alleged to have been due and in arrear at the time of the receiver's appointment. The main action is to foreclose a mortgage held by plaintiff upon the apartment house. Plaintiff's mortgage contained an agreement that upon foreclosure proceedings commenced, mortgagee should be entitled to the ap-

pointment of a "receiver of the rents and profits of said premises," etc. Defendant occupied two apartments in the mortgaged building. The receiver had been appointed August 1, 1886.

> Patterson, *J.* "Under the circumstances disclosed by the affidavits read in opposition to the petition of the receiver, I think the motion to require the defendant, Belknap, to pay over rents accrued prior to August 1st, 1886, should be denied.
>
> "It is extremely doubtful whether a receiver of the rents and profits in a foreclosure case can reach rents accrued prior to the commencement of the suit in which he was appointed. There is authority for the affirmative of the proposition in the many English cases, which have been cited, and in the decisions of the Court of Chancery of this State. But in Argall *v.* Pitts (78 N. Y., 239), the Court of Appeals has broadly stated the rule that such a receiver 'will be confined to the rents and profits accruing during the pendency of the suit.' Although the precise question involved here was not directly before the Court, the strong statement of the rule there made indicates the view of the Court of last resort to be against the practice of extending receiverships of the rents and profits accruing before suit. The receiver's clause in the mortgage does not in terms refer to the rents in arrear at the time of default, and the order of this Court appointing the receiver defines his rights and powers to be those of receivers in foreclosure cases. The motion is denied, but without costs."

Noyes, Receiver v. *Rich,* 52 Me. 115. In this case plaintiff had been appointed in foreclosure suit of *Mason* v. *Railroad.* This action is in assumpsit to recover money received by defendant as earnings of the Railroad while he was superintendent thereof, accrued before appointment.

> "It will hardly be contended that, while mortgagors remain in possession, they can be compelled to pay the rents and profits of the property to the mortgagees. Boston Bank *v.* Reed, 8 Pick, 459; Mayo *v.* Fletcher, 14 Pick, 525. And yet, that is just what is attempted in the case at bar. No one had ever rightfully taken possession under the mortgage, *until it was done by the receiver, in March, 1860. The money in the defendant's hands accrued from the earn-*

ing of the road prior to that time. The mortgage did not attach to it. Therefore it was not embraced in the subject matter of the suit in equity; and the receiver was not entitled to it." Plaintiff non-suited.

IV.

Vice-Chancellor Lane examined the cases to which he was refered by both sides re-stating them in his opinion and not until the very end thereof when he considers the unpaid taxes and assessments on the mortgaged premises, does he show the slightest inclination to give the receiver power to collect accrued rents prior to his appointment, and until he arrived at that point the learned Vice-Chancellor seems to have argued strongly in favor of the contention of the appellant.

What seems to have swerved the learned Vice-Chancellor towards the contention of the respondents was the fact that it seemed to him inequitable that the owner of the land had allowed taxes to accrue, and he, therefore, thought that to permit him to collect rents that had accrued before the commencement of the foreclosure suit and which remained uncollected would work a fraud upon the mortgagee. The mortgagee in the opinion of the learned Vice-Chancellor expects that the taxes will be paid and he expects further that the rents will be used for that purpose.

We submit that the reasons given by the learned Vice-Chancellor for his decision do not in any way comport with the legal or equitable relationship of mortgagor and mortgagee.

The learned Vice-Chancellor thought that the case at bar was an extraordinary one and he distinctly declared that this case must stand on its own bottom because of its extraordinary nature.

Now, what is there so extraordinary about this case? An examination of the reported cases on the question of the appointment of a receiver in foreclosure proceedings shows that the court of equity has always been of the opinion that before the mortgagee would be entitled to a receiver to take possession of the property and collect the rents, issues and profits therefrom, he must make out a strong, extraordinary case. He must prove the inadequacy of the security, the insolvency of the obligors on the bond and the misapplication of rents. In some cases all these elements were required to be shown before the Chancellor would be moved to appoint a receiver. The appointment of a receiver

is an extraordinary proceeding and will only go in an extraodinary case. There is, therefore, in the case at bar nothing more extraordinary than in any other case in which a receiver is asked. In *Courtleyou* v. *Hathaway,* 11 N. J. E. 39, Chancellor Runyon held that a receiver would not be appointed because of inadequancy in the value of the mortgaged premises, or of the mortgagor's insolvency; but that a receiver may be appointed if the mortgaged premises should burn down or be allowed to depreciate by waste or neglect of the mortgagor or tenant or for the mortgagor's fraud or misappropriation of the rents and profits. The Chancellor then expressly said that great caution should be used in the appointment of such a receiver. In the case before him the mortgaged premises were inadequate security, the mortgagor and the owner of the equity of redemption were both insolvent. Other equities were present and a receiver was appointed.

To the same effect as the foregoing case is *Frisbie* v. *Bateman,* 24 N. J. E. 28. See also the following cases:

Stockman v. *Wallis,* 30 N. J. E. 449.
Chetwood v. *Coffin,* 30 N. J. E. 450.
Brasted v. *Sutton,* 30 N. J. E. 462.
Minturn v. *Harms,* 3 N. J. L. J. 22.
Anonymous, 2 N. J. L. J. 176, and many other cases collected in Parker's Digest, Vol. 5, title mortgages, part 10, sections 271 to 278.

V.

The rents that had accrued prior to the appointment of the receiver became debts and the absolute property of the owner of the fee, the American Real Estate Company, a New Jersey corporation. If the mortgagee exercised the legal right of the taking of the mortgaged premises after default, it could not sue for, demand or collect the rents that had accrued prior to taking such possession. The mortgagee who takes possession after default is his own receiver. He is charged with the same obligations of accountability for rents collected. In fact he has greater rights than a receiver and if such a mortgagee could not sue for, demand or receive rents accrued prior to taking possession, how can a receiver have such rights?

In the case at bar the mortgagee received from the learned Vice-Chancellor the right to take the choses in action of the

American Real Estate Company before they were adjudged unto it in due process of law and was thus preferred over any other creditor that the company may have.

Altogether the decision of the Vice-Chancellor is brand new to the lawyers of this state and is not only contrary to the law pronounced by Vice-Chancellor Van Fleet as above indicated, but is not founded in good law or in equity.

It is respectfully submitted that the order appealed from should be reversed.

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