DAVISON & CO., PRINTERS, 27 Montgomery Street, Jersey City.

N. J. Court of Errors and Appeals.

Between

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Appellant,

and

HARRIET DOWNING, and others,

Respondents.

On Appeal.

POINTS FOR APPELLANT.

Statement of Facts.

In this case two demurrers were filed to the bill of complaint, one by Elizabeth Hopper and the other by Harriet Downing and all the other defendants, jointly and severally. Both demurrers were sustained and the complainant has appealed from so much of the order as sustains the demurrer of Harriet Downing and the other defendants joining in it with her.

The substantial facts set forth in the bill are that in January. 1872, Thomas Hopper, now deceasd, borrowed from the complainant $4,500 and gave his bond therefor, payable March 1st 1873, secured by a mortgage on real estate in Essex County, New Jersey. This mortgage was afterwards foreclosed in the Court of Chancery, and on January 27, 1880, a decree of foreclosure and sale of the mortgaged premises was made which contained a clause that the said Thomas Hopper should pay to the complainant here any deficiency which might arise in case the mortgaged premises should not on the sale thereby decreed produce sufficient money to pay the amounts thereby decreed to be due. That the mortgaged premises were sold by the Sheriff of Essex County on May 4th, 1880, for $2,000, and after deducting expenses of said sale, there remained a deficiency of $3,205.21 between the amount due to the complainant as adjudged by said decree, and the amount so realized from the net proceeds of said sale, "*as appears by the Sheriff's return*" "*to said writ of fieri facias now on file in this Court.*" No abstract of the decree was filed and no execution issued to collect the deficiency in the lifetime of Thomas Hopper. Thomas Hopper died in 1882, intestate, leaving the defendants in this action, his widow and heirs at law, and also being seized of certain real estate described in the bill which real estate is now in the possession of the defendants. Thomas Hopper left no personal property, and no letters of administration have ever been issued on his estate.

The bill here was filed to collect from that real estate of which Thomas Hopper died seized the deficiency arising on the foreclosure sale. General demurrers were interposed by all the defendants and have all been sustained. The complainant has appealed from so much of the order as sustains the demurrer of the heirs at law, and has submitted to the demurrer interposed by the widow Elizabeth Hopper, as it is admitted that her estate in dower as widow of Thomas Hopper cannot be sold for the payment of his debts.

The opinion of the Vice Chancellor proceeds upon two grounds, neither of which it is sbmitted is tenable. The first ground he takes is that even though the Sheriff's return shows the exact amount of the deficiency, yet that in the absence of an order fixing and ascertaining the amount of the deficiency which had already been fixed by the Sheriff's return, the decree is not one for the payment of *a sum of money* within the meaning of §56 of the Chancery Act, and therefore is not a lien; and the second, that if the decree is not a lien, the bill cannot be sustained.

Point First.

The decree of January 27, 1880, containing among other things a provision that Thomas Hopper should pay any deficiency arising on the foreclosure sale, was a final decree, and no further judicial action was required to establish his liability or to fix the amount of the deficiency. The computation of the deficiency was a mere clerical act performed by the Sheriff, as an officer of the Court, and his return, showing the amount of the deficiency, established the fact that there was a deficiency, and the amount thereof, and a decree against Thomas Hopper for that amount then became complete and perfect, and was a lien the same as a judgment at law as to Thomas Hopper and all persons in privity with him, although not so as to persons not parties or privies to the suit.

There are several provisions of the statute which bear upon the question here, and for convenience they are here quoted.

By §76 of the Chancery Act it is provided:

"That it shall be lawful for the Chancellor in any suit for the foreclosure or sale of mortgaged premises to decree the payment of any excess of the mortgaged debt, above the net proceeds of the sale, by any of the parties to such suit who may be liable, either in law or in equity, for the payment of the same; *provided*, that there be a prayer to that effect in the bill of complaint."

By §56 of the Chancery Act it is provided:

"That the decree of the Court of Chancery shall, from the time of its being signed, have the force, operation and effect of a judgment at law in the Supreme Court, from the time of the actual entry of such judgment; and all decrees and orders of the Court of Chancery, whereby any sum of money shall be ordered to be paid by one person to another, shall have the force, operation and effect of a judgment at law in the Supreme Court, from the time of the actual entry of such judgment, and the Chancellor may order such executions thereon as in other cases; *provided*, that no decree of the Court of Chancery hereafter to be made shall, as against any person not a party thereto, become a lien upon or bind any lands, tenements or hereditaments, or real estate, other than those specifically mentioned and described in such decree, or in the bill of complaint on which the same is founded, until the parties interested in such decree, or some or one of them shall have filed in the office of the Clerk of the Supreme Court a statement or abstract of such decree, containing the names of all the parties thereto, designating particularly those against whom it is rendered, with the state and county in which they respectively resided, at the time at which the said decree was signed, and the amount of the debt, damages, costs, or other sum of money thereby directed to be paid; which statement or abstract the said Clerk shall forthwith record in a proper book, to be by him provided and kept in his office for that purpose; which book shall be properly indexed by said Clerk, and be a public record, to which all persons desirous to examine the same shall have access."

The records of the Court of Chancery and the forms in use ever since the passage of the Act of 1866, *authorizing decrees for deficiencies, show very clearly that the practical construction of that Act has been that the amount of the deficiency is fixed prima facie by the Sheriff's return of the sale, without any further order fixing the amount. These records and forms to which I refer, are as follows:*

(*A*) *The decree for deficiency.*

The form of the deficiency clause as given in Potts' Chancery Precedents, p. 145 (a book published in 1872), is as follows:

"And in case the proceeds of such sale shall be insufficient to satisfy and discharge the said mortgage debt, then it is hereby further ordered, adjudged, and decreed, that the said deficiency shall be made of the lands and tenements, goods and chattels of the said . defendant, as specifically prayed in the bill of complaint filed in this case; it appearing to the Court by affidavit (*or otherwise*), duly filed, that notice that such relief was sought by said bill has been duly served and given to said defendant according to law and the rules and practice of this Court, and that a writ of *fieri facias* therefor do issue accordingly out of this Court against said defendant for that purpose, payment of said deficiency being hereby decreed to be made by him, the said defendant, and that the Sheriff make return to this Court of his proceedings by virtue of the said writ."

In Dickinson's Chancery Precedents, published in 1879, the form is substantially the same, being as follows—(p. 422) :

"And it is further ordered, adjudged and decreed that in case the proceeds of such sale shall be insufficient to satisfy and discharge the complainant's said mortgage debt with interest and costs, the said defendant pay the deficiency and that it be made of (*his, her or their*), goods and chattels, lands and tenements, and that a writ of *fieri facias* do therefor issue accordingly out of this Court, and that the Sheriff make return to this Court of his proceedings by virtue of that writ."

It will thus be noticed that the decree of sale ordinarily directs payment of the deficiency when it shall arise, and also awards a *fieri facias* to collect that deficiency, and this is done upon the theory that the Sheriff's return will show the deficiency, if any, and that no further judicial action will be required and that the Clerk, upon the filing of the Sheriff's return of sale, can issue an execution to collect the deficiency thereby shown.

This is done in very much the same way in which the decree of sale directs the mortgaged premises to be sold to pay in part the complainant's costs to be taxed. When the decree of sale is made these costs have not been taxed, and their amount is not entered in the decree, but they are afterwards taxed by the Clerk and the amount entered in the *fieri facias* and no further judicial action is necessary, but as soon as they are taxed they immediately become a lien upon the mortgaged premises, in the same way that the original mortgage was.

And so, in the case of a deficiency, as soon as the Sheriff has made his return of sale showing that there is a deficiency, and the amount of it, this amount immediately becomes a lien, the same as a judgment at law.

B The usual form of fieri facias for deficiency which recites the issuing of a *fi. fa.* for the sale of the mortgaged premises and "that the said sheriff has duly "executed the said writ and has made a return there-"of to this court with his proceedings thereon *where-"by it appears that the proceeds of said sale were insuffi-"cient to satisfy and discharge said mortgage debt and "that the said deficiency is the sum of* $." See Dickinson's Chancery Precedents, p. 289.

(*C*) *The form of statement of sale made by the sheriff under the act of* 1847.

By the act of 1847 (Rev. Title Sheriff sec. 25), it was made the duty of the sheriff who makes an execution sale to file in the office of the clerk of the court out of which the execution issued a true statement of the execution or executions in his hands upon which such sale was made, and the amount due thereon respectively at the time such sale was made, mentioning the time or times of sale, as also the amount of sale, certified under his name, together with his bill of costs or execution fees.

Thus we perceive that when the act of 1866 was passed which empowered the Chancellor to decree the payment of any excess of the mortgage debt above the net proceeds of sale, without providing any method of determining the amount of that excess, there was in force another act imposing on the sheriff the duty of making a return which from necessity would fix the amount of the deficiency with exactness.

And ever since the act of 1866 the sheriffs of New Jersey have in making return of a foreclosure sale reported the amount of the deficiency.

See the form in Dickinson's Chancery Precedents (published in 1879), p. 296, where the form of a statement or return of sale by the sheriff gives in detail the amounts due for principal of the decree, the amounts due for interest up to the day of sale, the gross proceeds of sale, the net proceeds of sale and the amount of the deficiency.

(*D*) *No book of precedents contains the form of any order to fix the amount and there has never been made in any cause such an order so far as can be ascertained by an examination of the records in the chancery office.* The books do contain a form of order that a *fi. fa.* for the deficiency do issue but that is because by the rules and practices in chancery an execution can issue to collect a deficiency only by order of the court. That order incidentally and I think unnecessarily fixes the amount to be raised; unnecessarily, because an order merely that execution do issue upon the decree for the payment of deficiency as shown by the sheriff's return would on reason and principle be sufficient.

Do not these forms show what has been the practical construction of the act? And is not that construction a reasonable one?

With such a return as it has been the practice to make there can be no possible utility in an order to fix the amount of the deficiency in order to make it a lien. It is not to be expected that the Chancellor will of his own motion if he makes such an order cause inquiry to be made as to the amount realized by the sale, or will tax the sheriff's bill of costs to see that it is correct or will check his addition of the items due or his calulation of interest. The officer upon whom the law imposes that duty will already have performed it. But the Chancellor can at the instance of the defendant correct any error in the sheriff's statement by which the defendant may be injured.

But the vice Chancellor in his opinion in the court below cites the case of Dawes v. Wheeler, 16 Vroom, p. 67, in which he thinks the Supreme Court decided that an order to fix the amount of the deficiency is necessary to create a general lien. The report of the case itself does not bear such a construction and the decree docketed in that case was the final decree for foreclosure and sale and payment of the deficiency, if any, which might arise, and it was docketed in the Supreme Court before a sale was made and of course did not purport to show the amount of the deficiency.

Annexed hereto is a copy of the abstract filed in that case and it speaks for itself. A certified copy of the abstract is handed to the court herewith.

It may therefore be said that the question before the court and now under discussion has never been decided by the courts of New Jersey, but that there has been a long continued practical construction of the act of 1866 since its passage, to the effect that if the sheriff's return shows the amount of the deficiency an order to fix the amount is not a prerequisite to the decree becoming a lien. And the court will not establish a construction of that act which is against and reverses a long continued usage and practice, but will follow the practical and long established construction unless it be unreasonable in itself. That is the rule this court established in *Poineer* vs. *Bagnall*, 20

Vroom, p. 227, in which it went as far as to overrule the previous case of *Matthews* vs. *Miller*, 18 Vroom, p. 414 upon the ground that the latter case had been decided against and reversed a general practice under a statute extending back to its passage in 1848, and of which practice the court in deciding *Matthew* vs. *Miller* had been ignorant.

The reasonable construction of the act and the decisions of other Courts upon similar statutes show that no order to fix the amount of the deficiency is necessary, if the sheriff's return shows the amount.

In New Jersey, in 1880, the Sheriff, in executing a *fi. fi. fa.* for the sale of the mortgaged premises proceeded in the same way as he did in other executions, for at the time of the Sheriff's sale in question, no confirmation of the sale was necessary. His report of sale was *prima facie* evidence of the fact and validity of the sale, and his duty was without further order of the Coart to execute a deed to the purchaser, upon receiving the amount bid.

Suppose, thrrefore, that a Sheriff under an ordinary money judgment had levied on real estate of a defendant and sold it and had made a return showing that he had collected so much money on the judgment leaving due a balance of a certain amount, would not this return prima facie ~~conclusively~~ determine the amount for which the judgment was a lien upon other lands of the defendants and would not the balance be *a sum certain?* Clearly this would be so, because if the Sheriff made return that he had collected the whole judgment this would cancel the lien of it and a return that he had collected a part of the judgment would have the same effect proportionately.

So, in this case, the return of the Sheriff that he has collected a certain part of the amount ordered to be raised by him leaving still due a balance of a certain stated sum, establishes the amount of the deficiency, and when this return is filed in Court without any further judicial action, the liability is fixed.

It ought to be carefully noted here that according to the practice of the Court of Chancery, as it was in 1880, a sale by the Sheriff was perfect and complete without any order of confirmation by the Court, and, therefore, as soon as the Sheriff had sold the premises he immediately made a deed of them, and this deed conveyed a good title to the purchaser, and when he made his return of the sale this return conclusively established the amount of the deficiency, because no judicial action by the Court was necessary to confirm the sale. The Sheriff's return established the deficiency just as conclusively as the Clerk's taxation of costs establishes the amount of costs. This fact is to be borne in mind in examining any decisions of other states upon this point, because, according to the ordinary course and practice in equity, a sale in foreclosure, like other judicial sales, was of no force or effect until confirmed, and no title could pass to the purchaser until such confirmation took place.

Rorer on Judicial Sales, §2.

In New Jersey, in 1880, the Sheriff, in executing a *fi. fa.* for the sale of the mortgaged premises proceeded in the same way as he did in other executions.

The further order, which is made after the filing of the Sheriff's report of sale is not for the purpose of decreeing payment of the deficiency, or of fixing the amount of the deficiency, but solely for the purpose of giving the party entitled thereto process to collect the deficiency already awarded him. And the necessity for the order is found in the practice of the Court and the statutory provisions requiring an order to be made before execution can issue. The statute (Chancery Act, §56), provides that on decrees for the payment of money, "*the Chancellor may order such executions thereon as in other cases.*" This is a clear statutory provision to the effect that an execution shall not issue on a decree directing payment of a sum of money except upon an order of the Court.

The principle underlying the foregoing argument is a familiar one, and is found in the maxim : "*Id certum est quod certum reddi potest.*"

Broom's Legal Maxims, p. 626, 7th ed.

This maxim is most frequently used for the interpretation of deeds, wills and other documents, but it is also applicable to the construction of decrees and judgments of courts. Thus, it has been held that where it was awarded that the costs of certain actions should be paid by the plaintiff and defendant in specified proportions, the award was sufficiently certain since it would become so upon taxation of oosts by the proper officer.

Cargeys v. *Aitcheson*, 2 B. & C., 170.

A very familiar illustration is a decree dismissing a bill with costs. This is a final judicial disposition of the suit, and without any further application to the Court judgment is entered up for the amount of costs as taxed by the Clerk. Another illustration of the maxim is found in the rules of pleading; thus it is a well settled rule of pleading at common law that an action of debt lay only to recover a sum certain, yet it is well settled that an action of debt will lie to recover a sum of money which can be rendered definite and certain by computation or which can readily be reduced to a certainty, as e. g., in an action by the government against an importer to recover a penalty of double the value of goods illegally imported. *Stockwell* v. U. S., 13 *Wall*, 531.

The decisions in *Bell* v. *Gillmore*, and *Mutual Life Insurance Company* v. *Southard* cited by the Vice Chancellor in his opinon, are not inconsistent with the view here claimed, because all that was decided in them was that a deficiency decree could not be docketed against a defendant so as to make it a lien on his other real estate *until the filing of the Sheriff's report of sale determining whether there was* any deficiency and the amount of it. The order referred to

by the Chancellor in *Mutual Life* vs. *Southard*, is one for an execution to raise a sum already *ascertained;* for, observe his language (10 C. E. G., p. 339): "*An order after sale* RECITING *the proceedings under the execution, and the existence and amount of the deficiency,* AS ASCERTAINED BY THE STATEMENT OF THE OFFICER BY
and an award of execution to make the amount" &c
WHOM THE WRITS WERE EXECUTED." The utmost decided by either *Bell* vs. *Gillmore*, or *Mutual Life* vs. *Southard*, is that a decree of deficiency is not a lien until *after sale;* no doubt that is the law.

The decision in *Bell* v. *Gillmore*, is founded largely on the decision in the California case of *Chapen* v. *Broder*, 16 Cal., 403, which it professedly follows, and the California decisions are directly in favor of the appellant here. The Supreme Court of California in the case of *Chapen* v. *Broder* decided that a decree for deficiency did not become a lien until the fact of deficiency became fixed and established by the sale, but the question did not directly arise in that case whether any order of Court was necessary to fix the amount. But that question did arise in the later case of *Hubbard* v. *Smith*, 50 Cal., 511.

In that case the question was whether a decree adjudging that in case of a deficiency the defendant pay to the plaintiff the amount of the deficiency, be-
the filing of the return of
came a lien upon the Sheriff, showing that a deficiency had been created without any order fixing or adjudging what the amount of the deficiency was. The Court explained the case of *Chapin* against *Broder* and said: "We see no reason for departing from the rule as laid down in *Chapin* v. *Broder*, and therefore hold that on the return of the deficiency in the action of *Hepburn* v. *Chapman* a lien attached on all the property of the defendant within the county."

Other decisions of the Courts of California upon the same point.

Rollins v. *Forbes*, 10 Cal., 299.
Bowe v. *Table Mountain Water Co.*, Id., 441.
Cormerais v. *Genella*, 22 Cal., 116.

The decisions in the State of New York, on a similar statute bear out the contention made by the complainants. The statute there provides that in a foreclosure suit "Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action and the final judgment may award payment by him of the residue of the debt remaining unsatisfied after the sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained therein."

New York Code of Civil Procedure, Sec. 1627.

Under this statute it has been held in New York that immediately upon filing the report of the referee (who there makes the sale as the officer of the Court in the ordinary cases,) the amount reported by him as the deficiency becomes immediately a judgment on which execution can be issued.

Moore v. *Shaw*, 15 Hun.,430.
Springsteene v. *Gillett*, 30 Hun., 263.

In the first of these cases (15 Hun., p. 430) the the Court said: "The referee made his report of sale "specifying the deficiency just in accordance with the "provisions of the judgment. There is under such a "judgment no further occasion for the intervention of "the Court, except perhaps to see that the referee has "correctly performed the process of subtracting one "sum from another, any more than when a sheriff has "sold property under an ordinary money judgment, "and made return of the amount made by the sale, "and subsequently another execution is issued to re-"cover the balance of the judgment. Indeed the "sheriff may as well be, and outside of the cities gen-"erally, appointed by the Court to sell the mortgaged "premises. Whether done by referee or sheriff, the "duty is the same, and is purely ministerial in the "execution of the judgment."—*Citing People ex. rel., Day* v. *Bergen*, 53 N. Y., 404.

In the latter case, (30 Hun. 263), the Court said: "The judgment did not reserve any questions to be "determined by the Court. The report was, there-"fore, a ministerial act authorized to be performed "by the referee who made the sale, and such report "was made in accordance with the requirements "of the judgment, and in accordance with the prac-"tice of this Court in respect to ascertaining the "amount of any deficiency remaining after the appli-"cation of the proceeds of sale. As no questions "were reserved the judgment was final. Had any "questions been reserved requiring further judicial "action of the Court it would have been interlocuto-"ry."

In short: neither the statute itself, nor any applicable principle of law requires that there shall be an order fixing the amount of the deficiency before the lien of the decree shall attach; on the contrary, every applicable and analogous principle of law is against the necessity of such an order. The precedents, too, show that the amount is fixed by the return. The protection of the defendant does not require such an order, because no execution can issue without an order which incidentally states the amount to be raised.

Point Second.

Even if this decree for a deficiency never became a lien upon any lands of which Thomas Hopper died seized, for lack of an order fixing the amount due upon it, yet the Demurrer should have been overruled upon the ground that the bill is a good one to revive the decree and to carry it into execution against any lands of which Thomas Hopper died seized.

The demurrer was general, and if any relief can be granted to the complainant upon the facts stated in the bill and the prayer for relief, the demurrer must be overruled.

The bill alleges the making of the final decree of foreclosure, containing a clause fixing indisputably the liability of Thomas Hopper to pay to the complainant any deficiency which might arise upon the sale of the mortgaged premises. It also alleges that Thomas Hopper died intestate and without personal property, and leaving the defendants his heirs at law, and that at the time of his death he was seized of lands situate in the State of New Jersey which are described, and that by reason of the death of Thomas Hopper the decree can neither be docketed nor can it be executed by process of this Court, and prays, that the said decree, suit and proceedings which so became abated as aforesaid, by reason of the death of Thomas Hopper, may stand revived as against the defendants and be in the same plight and condition as the same were at the death of the said Thomas Hopper, and that the complainant may have such benefit thereof against the defendants as to said lands, as they might have had against said lands if the said Thomas Hopper were living.

This is a bill to revive a suit which became abated by the death of a sole defendant and to carry into execution a decree rendered in that suit and is, therefore, what is known as a bill of revivor, and to execute a decree. Such forms of bills are often used. Thus, Story, speaking of bills to execute decrees, says: "A bill for this purpose is generally partly an "original bill, partly a bill in the nature of an original "bill, although not strictly original, and sometimes it "is a bill of revivor or a supplemental bill, or both; "the frame of the bill is varied accordinly."

Story's Eq. Pleading, sec. 432.
See also Mitford & Tyler's Pleadings in Eq., p. 194.

In this view of the case made by the bill, it seems a matter of indifference whether the decree ever became a lien, because whether it is a lien or not, the complainant is entitled to have it revived, and if necessary, perfected and carried into execution.

One of the necessary consequences of reviving the decree and executing it, is the making of just such an order as the Vice-Chancellor has decided should have been alleged to have been made. It will not be called an order to fix the amount, but will be an order that execution issue for a certain amount as already ascertained by the sheriff.

The Court will perceive that even if an order for execution had been made in the lifetime of Thomas Hopper, the decree could not have been executed without having been first revived by this bill or some proceeding looking to the same end. And in any view of the bill it is maintainable as one to revive the suit, proceedings and decree, and continue the suit to conclusion by doing whatever is necessary for that purpose, and the mere fact, if it be true, that the decree is inchoate, has nothing whatever to do with a revivor of the suit.

E. D. GILLMORE,
Counsel for Appellant.

APPENDIX.

[Abstract of Decree Filed in Case of *Dawes* v. *Wheeler*, 16 Vroom 67].

IN CHANCERY OF NEW JERSEY.

Between DANIEL C. DAWES, Trustee, *Complainant,* and LEUCIEN F. WHEELER, MRS. LEUCIEN F. WHEELER, and J. WYMAN JONES, *Defendants.*	*Abstract of Decree to be Filed and Recorded under an Act of March* 8, 1839.

A final decree was filed in the above cause against the defendants therein in favor of the above complainant in the said Court of Chancery of New Jersey, on the eighteenth day of November, A. D. eighteen hundred and seventy-four. The Defendant, J. Wyman Jones, resided, at the time of signing said decree in the County of Bergen and State of New Jersey.

The amount decreed to be paid to the complainant by the decree aforesaid is four thousand two hundred and eighty-nine dollars and thirty-four cents with lawful interest thereon to be computed from the thirteenth day of November, eighteen hundred and seventy-four, and the costs of suit, which have been taxed at the sum of one hundred and twenty-five dollars and one cent.

And it was further ordered, adjudged and decreed, that in case the proceeds of sale be not sufficient to pay the said mortgage debt to the said complainant that the said J. Wyman Jones do pay such deficiency and that the complainant do recover the same against him.

The foregoing abstract and statement of the final decree in the foregoing suit, is made to the end that the same may be recorded by the Clerk of the Supreme Court in his office in pursuance of the fifty-ninth section of the Act of the Legislature of this State entitled "An Act respecting the Court of Chancery."

Dated February 19, 1875.

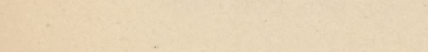
G. ACKERSON, Jr.
Solicitor.

A true copy.

BENJ. LEE,
Clerk.

This decree stricken from the records and files made void and for nothing holden.

See Litigation Minutes, February Term, 1883 page 53.



STARBUCK & DUNHAM, Law and Commercial Printers, 165 Market Street, Newark.

NEW JERSEY

Court of Errors and Appeals.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Appellants.

and

ELIZABETH HOPPER, *and others,*
Appellees.

On Appeal.

Brief for Appellees.

The appellant filed his bill against the widow and heirs at law of Thomas Hopper, deceased, to enforce a general decree of deficiency against the deceased, by the sale of lands of which he died siezed. This general decree declares him to be liable for the deficiency if any should arise by reason of the failure of mortgaged premises to pay a mortgage debt. The widow, also the heirs at law, demurred, and both demurrers were sustained by the Court of Chancery. The complainant appeals from the decree sustaining the demurrer filed by the heirs at law.

The decision of the Court below should be affirmed and the demurrer sustained, because

FIRST.

A general decree for deficiency is not a lien on defendants' lands.

The power of the Court of Chancery to make its decrees a lien on lands is contained in the 56th Section of the Chancery act, which provides:

"That the decree of the Court of Chancery shall, from the time of its being signed, have the force, operation and effect of a judgment at law in the Supreme Court, from the time of the actual entry of such judgment; and all decrees and orders of the Court of Chancery, whereby any sum of money shall be ordered to be paid by one person to another, shall have the force, operation and effect of a judgment at law in the Supreme Court from the time of the actual entry of such judgment, and the Chancellor may order such executions thereon as in other cases."

The counsel for the appellant, in his argument in the Court of Chancery, admitted that at the time of the entry of the decree it was not a lien, because of the contingency as to whether there would be a deficiency.

Now the act quoted fixes no time when it can become a lien afterwards. If that decree was not a lien "from the time of the actual entry of such judgment" it was not a lien at all.

It was not an *order whereby any sum of money* was ordered to be paid. The provision of the above section as to such a decree being a lien on land, as to persons not parties by filing abstract of same in Supreme Court, requires that such abstract *contain* the *amount* of the *debt*, &c., or other sum of money thereby directed to be paid.

It is clear that the intention of the Legislature in the said section was to make only such decrees or orders as directed a specific sum of money to be paid by one to another liens on defendants' land.

The power of the Court of Chancery to make a decree of personal liability for the deficiency, as contained in Section 76 of said act, was "of any excess of the mortgage debt above the net proceeds of sale." And the Court could not direct the payment of a sum until it was thus ascertained. An order or decree after the deficiency is ascertained by sale, and declaring the amount thereof, is contemplated by the Statute.

Bell v. Gilmore, 10 C. E. G., 104.

Mutual Life v. Southard, 10 C. E. G., 337.

Dawes v. Wheeler, 16 Vr., 67.

SECOND.

Unless the general decree for deficiency, set forth in complainant's bill, became a lien on the lands of Thomas Hopper, the Court of Chancery cannot enforce it against the lands which descended to the appellees.

The power conferred by the 76th Section is to make a personal decree for the payment of the deficiency by *any party to the suit liable at law or in equity*. The appellees were not parties to that suit. Even if the mortgagor, Thomas Hopper, had died before the foreclosure his heirs would have been necessary parties, and yet no decree could have been obtained against them for a deficiency, because not *personally liable.* Other property inherited by them could not have been thus reached by a decree of this Court even in a suit brought to foreclose the mortgage.

The complainant occupies the same position as other creditors of Thomas Hopper, deceased. It may have letters of administration issued and enforce 10
its claim through a sale of lands by the Orphan's Court, or a suit against the heirs at law may be brought under the statute "Heirs and Devisees."

I respectfully submit that the Decree of the Court of Chancery should be affirmed.

ELWOOD C. HARRIS,

Solicitor of Appellees.

DAVISON & CO., PRINTERS, 27 Montgomery Street, Jersey City.

In Chancery of New Jersey.

To His Honor THEODORE RUNYON,
Chancellor of the State of New Jersey.

Humbly complaining showeth unto your Honor, your *orator*, The Mutual Life Insurance Company of New York.

I. That your orator is a corporation organized and existing under the laws of the State of New York.

II. That heretofore and prior to the twenty-seventh day of January, 1880, your orator exhibited its Bill of Complaint against Thomas Hopper, then of the City of Newark, and others defendants, in this Court, for the foreclosure of a certain mortgage made by said Thomas Hopper, and Elizabeth, his wife, to your orator, upon cer ain lands in the City of Newark, New Jersey, to secure the payment of a certain bond made by the said Thomas Hopper to your orator, dated the third day of January, 1872, in the penal sum of nine thousand dollars, conditioned for the payment to your orator of four thousand five hundred dollars on the first day of March, 1873, with interest at the rate of seven per centum per annum, payable semi-annually, on the first day of March and September of each year; which said mortgage is recorded in the office of the Clerk of the County of Essex, in Book Z. 5, page 249, &c.

III. That process of subpoena to answer said bill was duly issued to the Sheriff of the County of Essex, New Jersey, and was duly served on said Thomas Hopper, and said other defendants named in said bill of complaint, and a ticket usually called a subpoena ticket, was served upon said Thomas Hopper, together with said subpoena, notifying him in substance that he was made a party defendant, because, among other things, the said bill of complaint prayed that he might be decreed to pay to the complainant any deficiency which might arise in case the proceeds of the sale of the mortgaged premises should prove to be insufficient to pay to the complainant the amount therein decreed in its favor.

IV. That the said Thomas Hopper did not appear, plead, or demur, or answer to said bill of complaint, and such proceedings were thereupon duly had in said suit, that on the twenty-seventh day of January, 1880, a final decree of foreclosure and sale of said lands and premises was made by this Court, wherein and whereby it was decreed that there was due and owing to your orator the sum of four thousand nine hundred and thirty-three dollars and thirteen cents, for principal and interest on said bond, together with interest thereon from the fifteenth day of January, 1880, and also the further sum of one hundred and twenty-one dollars and sixty-eight cents, for your orator's costs and charges in that suit, and interest thereon as aforesaid, and that the said Toomas Hopper should pay to your orator any deficiency which might arise in case the said mortgaged premises should not upon the sale thereby decreed produce sufficient money to pay the amounts thereby decreed, and that a writ of *fieri facias* should issue to the

Sheriff of the said County of Essex, commanding him to make sale, according to law, of said mortgaged premises, to raise and pay unto your orator the said sums so decreed.

V. That thereupon a writ of *fieri facias* was issued as directed by said final decree, and delivered to the Sheriff, who did on the fourth day of May, 1880, under and in pursuance of said writ sell said lands, in accordance with the directions of said writ, for the sum of two thousand dollars. That after deducting the expenses of said sale, there remained a deficiency of three thousand two hundred and five dollars and twenty-one cents between the amount due your orator, as adjudged by said decree, and the amount so realized from the net proceeds of said sale, as appears by the said Sheriff's return to said writ of *fieri facias* now on file in this Court, which said deficiency the said Thomas Hopper was by said final decree of January twenty-seventh, eighteen hundred and eighty, decreed to pay to your orator.

VI. That the said decree for the payment of said deficiency, by force of law, became a lien upon whatever lands the said Thomas Hopper owned in the State of New Jersey.

VII. That at, and for some time after the date of said final decree, and up to the time of his death, as hereinafter alleged, the said Thomas Hopper was seized and possessed of certain real estate, situate in the City of Newark aforesaid, and which is described as follows :

All that certain tract or parcel of land situate in the City of Newark, Essex County, New Jersey, which is described as follows :

Beginning at a point in the westerly line of South 11th street 230 feet southerly from the corner of the same and 8th avenue; thence running westerly at right angles to said South 11th street 100 feet; thence southerly parallel with said South 11th street 70 feet; thence easterly and at right angles to said South 11th street 100 feet to said street; thence northerly along the westerly line thereof 70 feet to the place of beginning. Being the same premises conveyed to one Wm. H. DeGroot, in two tracts, by deed recorded in Book No. 15 of Deeds for Essex Co., page 519, &c.

VIII. That said Thomas Hopper departed this life in the year eighteen hundred and eighty-two, seized and possessed in fee simple of the lands and premises described in paragraph seven hereof.

IX. That no abstract of said decree was during the lifetime of said Thomas Hopper filed in the office of the Clerk of the Supreme Court of New Jersey, and now such abstract cannot be filed, on account of the death of the said Thomas Hopper, nor can said decree for payment of said deficiency be executed without the aid of this Court, hereinafter prayed.

X. That no letters testamentary or of administration have been issued upon the estate of said Thomas Hopper, within the State of New Jersey, and your orator says that the said Thomas Hopper, in fact, died intestate.

XI. That the said Thomas Hopper was not, at the time of his death, possessed of any personal property, and there are now remaining no goods or chattels, or personal estate, of which the said Thomas Hopper died possessed.

XII. And your orator further shows: That the said Thomas Hopper left surviving his widow, Elizabeth Hopper, and the following persons, who are his heirs at law, *viz:*

Sarah E. Hart, who is the wife of George Hart; Harriet Downing, who is the wife of Michael Downing; William Hopper, who is the husband of Alfreda Hopper; Hatfield Hopper, who is the husband of Dora Hopper; Hiram Hopper, now deceased, who in his lifetime was the husband of Adelaide Hopper, who is still living; Harriet Bell, who is the wife of George Bell; Charles Thomas Hopper, Laura Hopper and Edwin Hopper.

Your orator is advised that it is entitled to have the said decree for the payment of said deficiency revived and to have the same benefit thereof against the said heirs of Thomas Hopper as it might have had against the said Thomas Hopper if living, and that it is entitled to prosecute the said decree, and collect from said lands the money due thereon.

In tender consideration whereof, and inasmuch as your orator is without remedy at and by the strict rules of the common law, and can neither file an abstract of said decree in the office of the Clerk of the Supreme Court of New Jersey, nor can execute the said decree by the process of this Court without the aid of this Honorable Court, as hereinafter prayed. To the end, therefore, that the said defendants hereinafter named, and each and every of them, may upon their respective oath or affirmation, full, true and perfect answer make to all and singular the matters hereinbefore alleged and set forth, as fully as if the same were here again repeated, and they particularly interrogated thereto, and that the said decree, suit and proceedings which so became abated, as aforesaid, by reason of the death of the said Thomas Hopper, may stand and be revived as against the defendants hereinafter named, and be in the same plight and condition as the same were at the death of the said Thomas Hopper, and that your orator may have such benefit thereof against the said defendants hereinafter named as to said lands described in paragraph VII hereof, as it might or could have had against the said Thomas Hopper as to said lands, if he had been living, and and that the said decree for the payment of said deficiency may be decreed to be prosecuted by a sale under the process of this Court, of the lands hereinbefore described.

May it please your Honor, the premises considered, to grant unto your orator the State's writ of subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said Elizabeth Hopper, Harriet Downing, Michael Downing, William Hopper, Alfreda Hopper, Hatfield Hopper, Dora Hopper, Sarah E. Hart, George Hart, Adelaide Hopper, Harriet Bell, George Bell, Charles Thomas Hopper, Laura Hopper and Edwin Hopper, comanding each of them that on a certain day, and under a certain penalty, they be and appear before your Honor, in this Honorable Court, and there to stand to. abide by and perform such decree as to your Honor may seem equitable and just.

And your orator, as in duty bound, will ever pray, &c.

E. D. GILLMORE,
Solicitor and of Counsel with Complainant.

A true copy.

ALLAN McDERMOTT,
Clerk.

In Chancery of New Jersey.

Between

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Complainant,

and

ELIZABETH HOPPER and others,

Defendants.

On Bill, &c.

Demurrer.

The Demurrers, jointly and severally, of Hatfield Hopper and Dora, his wife; William Hopper and Alfreda, his wife; Sarah E. Hart and George Hart, her husband; Harriet Downing and Michael Downing, her husband; Adelaide Hopper; Harriet Bell and George Bell, her husband; Charles Thomas Hopper and Laura Hopper, thirteen of the defendants to the Bill of Camplaint of The Mutual Life Insurance Company of New York, Complainant.

These defendants, by protestation, not confessing all or any of the matters and things in the complainant's Bill of Complaint contained, to be true, in such manner and form as the same are therein set forth and alleged, say that they are advised by their counsel, that there is no matter or thing in the said bill contained good and sufficient in law to call these defendants in question in this Honorable Court for same, but there is good cause for demurrer thereto; and therefor these defendants do demur thereunto, and for cause of demurrer, these defendants say: that the said Bill of Complaint (in case the allegations therein set forth were true, which these defendants do in no sort admit), contains not any of equity whereon this Court can ground a decree, or give the complainant any relief or assistance, as against these defendants.

Wherefore, and for divers other errors and imperfections in the said bill appearing, these defendants do demur in law thereunto, and humbly pray the judgment of this Honorable Court, whether they shall be compelled to put in any further or other answer to the said bill, and humbly pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

ELWOOD C. HARRIS,
Solicitor and of Counsel with said Defendants.

I certify that I have perused the complainant's bill in the above stated cause, and that the above demurrer is well founded in point of law.

ELWOOD C. HARRIS,
Of Counsel with said Defendants.

State of New Jersey,
County of Essex. } *ss.*

Hatfield Hopper, Dora Hopper, William Hopper and Alfreda Hopper, four of the defendants named in the foregoing demurrer, being duly sworn according to law, on their respective oaths say: that the other defendants named in said demurrer reside outside of the State of New Jersey; that the foregoing demurrer is not interposed for delay, but in good faith for the causes therein set forth.

HATFIELD HOPPER,
DORA HOPPER,
WILLIAM HOPPER,
ALFREDA HOPPER.

Subscribed and sworn to, before me, April 4th, 1887.

WM. H. EMERSON, JR.,
Notary Public of N. J.

[L. S.]

A true copy.

ALLAN MCDERMOTT,
Clerk.

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1. The liability of an heir for the engagements of his ancestor is a legal liability, enforceable only by an action at law.

2. A decree in equity, except it is founded on a right or cause of action which makes the decree a lien, does not bind lands, unless such efficacy is given to it by the statute.

3. A decree for deficiency does not bind the lands of the debtor, as a lien, until the Court has, after sale, ascertained the amount of the deficit, and made an order or decree fixing its amount.

THE MUTUAL LIFE INTURANCE COMPANY OF NEW YORK,

v.

ELIZABETH HOPPER, and others.

On hearing on demurrer.

Mr. ELWOOD C. HARRIS, for demurrants.

Mr. E. D. GILLMORE, for complainants.

VAN FLEET, *V. C.*

The defendants deny, by general demurrer, that the facts stated in the complainant's bill make a case which shall entitle them to the relief they ask. The following are the material facts stated in the bill: Thomas Hopper made his bond to the complainants in January, 1872, conditioned for the payment of $4,500 on the first of March, 1873; the payment of his bond was secured by a mortgage on real estate executed by him and his wife; this mortgage was subsequently foreclosed, a final decree being entered thereon, in this Court, on the twenty-seventh of January, 1880; the final decree contained a clause, adjudging, that in case the mortgaged premises should not be sold for a sum sufficient to pay the amount decreed to be due on the mortgage, Hopper should stand liable for the payment of the deficiency; the mortgaged premises were sold in May, 1880, under a *fieri facias* issued under the final decree, for $2,000, leaving a deficiency of over $3,000, "as appears," as the bill states, "by the Sheriff's return to the said writ of *fieri facias*, now on file in this Court;" Hopper died intestate in 1882; he possessed no personal property at the time of his death, but held title to certain real estate situate in the City of Newark; he acquired title to this real estate prior to the time the final decree was entered in the foreclosure suit ; no administration has been granted upon his estate ; he left a widow and eight children ; no order or decree has been made fixing or ascertaining the amount of the deficiency for which Hopper was liable. The defendant's to this suit are the widow and children of Hopper. The relief which the complainants ask, is, that the decree, suit and proceedings against Hopper, which became abated by his death, may be revived against the defendants, and that they may be decreed to be in the same plight and condition that they were at the time of Hopper's death, and that the complainants may have the same benefit of them, against the defendants, in respect to the land descended, that they could have against Hopper if he were living, and that the decree for the payment of deficiency may be enforced by a sale of the lands descended under the process of this Court.

The ground on which the complainants rest their right to maintain this action is, that their debt is a lien on the lands, which, on the death of Hopper, descended to his heirs at law. Unless this claim is found to be, I think it must be admitted, that the bill does not state a single fact which lays the least foundation for equity cognizance. Heirs, under our statute, are, to the extent of the value of the lands descended, liable for the engagements of their ancestors, even to the extent of being answerable for damages resulting from a breach of their ancestor's covenant.

New Jersey Ins. Co. v. Meeker, 8 Vr., 282.

But their liability is purely legal, and enforceable only by an action at law. The argument which the complainants advance to maintain their proposition that their debt is a lien, is not that the decree adjudging, that, in case the mortgaged premises should not be sold for a sum sufficient to pay the mortgage debt, Hopper should stand liable for the payment of the deficiency, created a lien on the lands in question immediately on its entry, but they say, such decree having determined the fact of his liability, that the moment the mortgaged premises were sold, and it was thus demonstrated that a sufficient sum could not be realized by their sale to pay the mortgage debt, and the amount of the deficiency having been ascertained and fixed by the sale, so much of their debt as the net proceeds of the sale did not pay, became at once, in virtue of the final decree, and without further or other judicial action, a lien on all the lands which their their debtor then owned. A decree in equity, except it is founded on a right or cause of action which makes it a lien, does not bind lands, unless such efficacy is given to it by statute. Our statute makes decrees of a certain class liens on land. The fifty-sixth section of the act respecting the Court of Chancery, declares in substance, that all decrees and orders of that Court, whereby any sum of money shall be ordered to be paid by one person to another, shall have the force, operation and effect of a judgment at law in the Supreme Court, provided, that no such decree shall, as against a person not a party thereto, become a lien on any lands not described either in the decree or the bill on which it is founded, until an abstract of such decree shall have been filed and recorded in the office of the Clerk of the Supreme Court.

Rev. 113.

This statute is the only foundation on which a claim to a lien in this case can rest. The complainants have, unquestionably, a lien on the lands of which Hopper died seized, in common with his other creditors, in virtue of the statute making the lands of a decedent liable for the payment of his debts.

Haston v. Castner, 4 Stew, 697.

But this action is not founded on that right of lien, nor is it shown or pretended that such right cannot, in this instance, be fully wrought and adequately enforced in the ordinary legal method, and without the aid of this Court.

The statute above quoted furnished the test by which the right claimed by the complainants must be tried, and that test is, has this Court made a decree whereby Hopper was ordered to pay a sum of money to the complainants? In view of the statements of the complainants' bill, it seems to me, to state the question, is to decide it. The only decree the Court has made is one fixing Hopper's liability for deficiency, in case a deficiency should thereafter occur, and this the Court did, under a practice peculiar to this class of cases, before a right of action for deficiency had accrued, and before the fact, on which Hopper's liability to such an action depended, had occurred, but the decree neither fixed a sum to be paid, nor ordered Hopper to pay a sum. The Court has not, as yet, ascertained that a deficiency exists, nor ordered Hopper to pay it. The fact may be that a deficiency does exists, and that its exact amount may be proved by record evidence, but until the fact that a deficiency does exist has been judicially ascertained and declared, and its amount has been determined by the Court, and the judgment of the Court has been put in the form of a decree or an order, it would seem to be so plain as to be absolutely undeniable, that there is no decree or order in the case which can have the force, operation and effect of a judgment at law.

Hopper's liability was purely legal. He was the maker of the bond which the mortgage foreclosed was given to secure. The only authority which this Court ever possessed to enforce a pure legal liability in a foreclosure suit, by means of a judgment *in personam*, was that conferred by the statute of 1866, which declared, that it should be lawful for the Chancellor, in any foreclosure suit, to decree the payment of any excess of the mortgage debt, above the net proceeds of sale, by any of the parties to such suit who might be liable at law for the payment of the same.

Rev. p. 118, §76.

Doubts have been suggested whether this act did not attempt to transfer to the Chancellor judicial power, which, by the constitution, is vested exclusively in the common law courts, but, assuming the act to be valid, it is clear, that it does not give the Chancellor power to enforce a liability for a deficiency until a deficiency exists. The controlling words of the act, it will be observed, are : "to decree the payment of any excess of the mortgage debt, above the net proceeds of sale," so that until it has been demonstrated by a sale of the mortgaged premises that a deficit exists, the Court cannot know the amount of the deficiency, nor decree its payment. Such, I understand, to be the construction which this statute has always received.

Bell v. Gilmore, 10 C. E. G., 104 ;
Mutual Life Insurance Co. v. Southard, Ib. 337.

Chancellor Runyon, in the last cited case, said : "The practice of this Court, under decrees for deficiency, is to follow the decree by an order after sale, reciting the proceedings under the execution, and the existence and amount of the deficiency, as ascertained by the officer by whom the writs were executed, and an award of execution, to make the amount with interest and the costs of the order and the last mentioned writ. The first decree in such cases is an inchoate decree merely. Until the excess, if any, of the mortgage debt, over the net proceeds of sale, had been ascertained, it could not have the force, effect and operation of a judgment at law. The power which

the same effect is the decision of the Supreme Court in
v. Wheeler, 16 Vr., 67. It was there expressly held
a decree in a foreclosure case did not become a decree
he payment of money within the meaning of the fifty-
section of the chancery act, so that an abstract of
uld be filed in the office of the clerk of the Su-
Court, until the chancellor had ascertained the a-
of the deficiency and made an order fixing its amount"
e also Terhune v. White, 7 Stew., 98.

be liable at law for the payment of the same.

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The demurrers must be sustained with costs.

A true copy.

Allan McDermott,

Clerk.

IN CHANCERY OF NEW JERSEY.

Between

ELIZABETH HOPPER and others,

Defendants,

and

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Complainant.

Order Sustaining Demurrers

This matter being opened to the Court by Elwood C. Harris, of counsel for the defendants, demurrants, and E. D. Gillmore, of counsel for the complainant, and the Court being of the opinion that the demurrer of Elizabeth Hopper and the demurrer of Harriet Downing and Michael Downing her husband, William Hopper and Alfreda his wife, Hatfield Hopper and Dora his wife, Sarah E. Hart and George Hart her husband, Adelaide Hopper, Harriet Bell and George Bell her husband, Charles Thomas Hopper and Laura Hopper, are good and sufficient.

It is on this thirteenth day of February, eighteen hundred and eighty eight ordered that the same do stand and be allowed, and that the complainant pay to the said defendants their costs of the said demurrers to be taxed.

Respectfully advised.

A. V. VAN FLEET,
V. C.

ALEX. T. McGILL, JR.,
C.

A true copy.

ALLAN McDERMOTT,
Clerk.

IN CHANCERY OF NEW JERSEY.

Between THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Complainant, *and* ELIZABETH HOPPER, HARRIET DOWNING, *et al*, Defendants.	*On Bill, Notice of Appeal.*

The complainant hereby appeals from so much of the certain order or decree made in the above cause on the thirteenth day of February, eighteen hundred and eighty-eight, an order and decree that the demurrer of the defendants, Harriet Downing, Michael Downing, William Hopper, Alfreda Hopper, Hatfield Hopper, Dora Hopper, Sarah E. Hart, George Hsrt, Adelaide Hopper, Harriet Bell, George Bell, Charles Thomas Hopper and Laura Hopper, do stand and be allowed; and that the complainant do pay to the said defendants their costs of the said demuraer to be taxed, to the Court of Errors and Appeals in the last resort in all causes.

E. D. GILLMORE,

Solicitor for and of Counsel with Complainant.

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

E. D. GILLMORE,
Of Counsel with Complainant.

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

The humble petition of The Mutual Life Insurance Company of New York respectfully shows that your petitioner finds itself aggrieved by an order made in the Court of Chancery by his Honor Alexander T. McGill, Junior, Chancellor of New Jersey, bearing date the thirteenth day of February, in the year eighteen hvndred and eighty-eight, in a certain cause therein depending, wherein your petitioner is complainant and Elizabeth Hopper, Harriet Downing, Michael Downing, William Hopper, Alfreda Hopper, Hatfield Hopper, Dora Hopper, Sarah E. Hart. George Hart, Adelaide Hopper, Harriet Bell, George Bell, Charles Thomas Hopper, Laura Hopper and Edwin Hopper, are defendants, in this respect, to wit, that the said order orders and decrees that the demurrer of certain of the defendants in said cause, to wit, Elizabeth Hopper, Harriet Downing, Michael Downing, William Hopper, Alfreda Hopper, Hatfield Hopper, Dora Hopper, Sarah E. Hart, George Hart, Adelaide Hopper, Harriet Bell, George Bell, Charles Thomas Hopper and Laura Hopper, do stand and be allowed, and that your petitioner, the complainant in said cause, pay to said last mentioned defendants therein their costs of said demurrer to be taxed ; and your petitioner humbly appeals from that part of the said order which orders as aforesaid upon the ground that the same is erroneous, for that the said demurrer of said defendants should have been over-ruled, with costs to your petitioner.

Your petitioner therefore prays that the said order of the said Chancellor may be in the particnlars aforesaid reversed, set aside and for nothing holden, and that your petitioner may have such other and further relief in the premises as to this Honorable Court shall seem meet.

E. D. GILLMORE,

Solicitor for and of Counsel with Appellant.