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# New Jersey Court of Errors and Appeals

NEW JERSEY PREROGATIVE COURT 10

IN THE MATTER  
of  
The Estate of John Staiger, de-  
ceased.

On Appeal  
Transcript.

STIPULATION. 20

It is on this 22d day of June, 1926, stipulated by and between James J. McGoogan, proctor for the appellant Sadie V. Staiger, and William J. Connor, proctor for the respondent, John Staiger, in the above-entitled matter, that:

(1) Annexed hereto is a transcript of all of the proceedings before the Mercer County Orphans' Court in the above-entitled matter. 30

(2) The deposit of \$100.00 required by the rules of this court to answer the costs of appeal, is hereby waived.

(3) The facts admitted as proved before the Orphans' Court are:

(a) On November 20, 1924, John E. Reynolds and Alice M. Reynolds, his wife, conveyed a house and lot of land known as No. 1517 Brunswick 40

*Stipulation*

Avenue, Trenton, to John Staiger and Sadie V. Staiger, his wife, by deed recorded in the Mercer County Clerk's office in Book 549 of Deeds, on pages 173 &c.

10 (b) The purchase price was \$7,000.00, and was paid by John Staiger giving to Reynolds \$1500.00 in cash, and two purchase-money mortgages, one for \$3,000.00, and the other a second mortgage, for \$2500.00, securing the bonds of himself and his wife Sadie V. Staiger, who also joined in the two mortgages.

(c) The whole principal of the mortgage for \$3,000.00 is unpaid, and the principal of the sec-  
20 ond mortgage has been reduced by five payments of \$75.00 each with accrued interest, leaving a balance of \$2,125.00 due and unpaid.

(d) John Staiger died intestate on February 5, 1926, seized of the mortgaged premises, leaving him surviving his widow Sadie V. Staiger (in whom the title then vested), who is also his administratrix, and John Staiger, a son by a former  
30 marriage. This son is of age, and with the widow, is the only person interested in the estate of said decedent.

(e) John Staiger left personal estate valued at \$13,915.99, and his debts amount to about \$4,000.-00, exclusive of the two mortgages.

(f) Sadie V. Staiger contributed no part of said purchase price, she had no personal or real estate at the time of the purchase, nor has she  
40 since acquired any personal or real estate, except

*Petition*

such as she will receive by virtue of her said husband's death.

JAMES J. McGOOGAN,  
Proctor and counsel for  
Sadie V. Staiger.

WILLIAM J. CONNOR, 10  
Proctor and counsel for  
John Staiger.

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**PETITION.**

MERCER COUNTY ORPHANS' COURT

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<p>IN THE MATTER of The Estate of John Staiger, deceased.</p>	}
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*To his Honor Erwin E. Marshall, Judge of the  
Mercer County Orphans' Court:*

Your petitioner Sadie V. Staiger, of Mercer County, in this state, administratrix of John Staiger, deceased, respectfully shows: 30

1. I was appointed by the Surrogate of Mercer County administratrix of my late husband John Staiger, who died intestate and a resident of the County of Mercer and State of New Jersey.

2. I have recently filed my inventory and appraisement of said estate, a statement of the items 40

*Petition*

being hereunto annexed, and showing a total appraisal of \$13,915.89.

3. The debts of the estate I estimate to be about \$4,000.00 not including \$5125.00 due on two mortgages securing the bond of the decedent.

4. The only persons interested in said estate are John Staiger, a son of decedent by a former marriage, who is above the age of 21 years, and myself, the widow of decedent.

5. On November 20, 1924, a deed of conveyance was made to my said husband and me, as husband and wife, by John E. Reynolds and Alice M. Reynolds, his wife, recorded on November 21, 1924, in Book 549 of Deeds, on pages 173 &c; this conveyance was of a house and lot known as No. 1517 Brunswick Avenue, near Trenton, in this state, where my said husband and I lived at the time of his death on February 5, 1926.

6. In part payment of the purchase price of said premises, my husband and I gave to the said grantors, two mortgages one (the first mortgage) for \$3,000.00 at 6% interest, and the other (a second mortgage) for \$2500.00 at 6% interest, securing two bonds of my said husband and me. The second mortgage is payable at the rate of \$75.00 quarterly, and there has been paid to date on account of the second mortgage \$375.00, leaving \$2125.00 due and unpaid, no part of the principal of the first mortgage having yet been paid.

7. I respectfully pray leave of the court for advice and directions in the premises, and for

*Petition*

leave to sell all the securities described in the inventory, at the best price that I can obtain, and to apply the proceeds thereof to the payment of the principal and accrued interest of both of said mortgages, on the ground that the said two bonds given by my said husband and me are debts of his estate and should be paid from his personal estate. 10

SADIE V. STAIGER,  
Administratrix of John Staiger,  
dec'd, petitioner.

Dated Trenton, N. J., April 20, 1926.

(a) Cash in bank, Trenton Trust Co., Trenton, N. J.	42.09	20
(b) 30 shares capital stock, Sanitary Ice & Coal Co., Trenton, N. J.	11,400.00	
(c) Dodge automobile 1920 model	50.00	
(d) 45 shares Thompson's Malted Food Co., @ \$1.00	45.00	
(e) 150 shares American Malted Food Co. @ \$1.00	150.00	
(f) 288 shares Central Copper Co., of Arizona, @ \$0.10	28.80	30
(g) 10 shares Tuxedo Park, Incor- porated, @ \$70.00	700.00	
(h) 15 shares of East Orange Ter- race Incorporated, @ \$100.00	1,500.00	
	\$13,915.89	

**AFFIDAVIT OF SADIE V. STAIGER.**

**MERCER COUNTY ORPHANS' COURT**

IN THE MATTER  
of  
10 The Estate of John Staiger, de-  
ceased.

State of New Jersey, }  
County of Mercer. } ss:

Sadie V. Staiger being duly sworn according to law on her oath says:

20 1. I am the petitioner named in the annexed petition, and the contents thereof are true, according to the best of my knowledge, information and belief.

SADIE V. STAIGER.

Subscribed and sworn to before me  
at Trenton, N. J., this  
30th day of April, 1926.  
Martha McGoogan,  
A Notary Public of New Jersey.

## ORDER.

## MERCER COUNTY ORPHANS' COURT

IN THE MATTER  
of  
The Estate of John Staiger, de-  
ceased.

10

Upon reading and filing the verified petition of Sadie V. Staiger, administratrix of John Staiger, deceased, late of the County of Mercer, wherein said administratrix prays for advice and direction of the Court in regard to selling securities of the estate and using the proceeds thereof to pay two mortgages aggregating \$5125.00 covering certain real estate that had been conveyed to the decedent and his wife; and it appearing thereby that the petitioner and John Staiger, a son of decedent, are the only persons interested in the matter:

20

It is, on this 23d day of April 1926, ordered, that all persons in interest in said estate, show cause before this Court on Friday, April 30, 1926, at the Court House in Trenton, at 10 o'clock in the forenoon, or as soon thereafter as the court can attend to the same, why the said administratrix should not be advised and directed to sell said securities at the best price obtainable, and apply the proceeds thereof to the payment of the principal and the accrued interest of said two mortgages.

30

And it is further ordered, that a copy of said petition and of this order, which need not be certified, be served personally on John Staiger (or

40

*Order of Continuance*

his attorney), at least five days before said return day.

ERWIN E. MARSHALL,  
Judge.

10

ORDER OF CONTINUANCE.

MERCER COUNTY ORPHANS' COURT

<p style="text-align: center;">IN THE MATTER of The Estate of John Staiger, deceased.</p>	}	<p>On Petition, etc.</p>
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It appearing to the Court that a copy of the petition and a copy of the order to show cause entered in the above entitled matter on April 23, 1926, were served on the same date on William J. Connor, Esquire, attorney for John M. Staiger; and that said William J. Connor is desirous of a continuance of the hearing on said order to show cause to May 14, 1926; and James J. McGoogan attorney for the petitioner Sadie V. Staiger consenting hereto:

It is on this 30th day of April, 1926, ordered, that the hearing on the said petition and order to show cause be and the same is hereby continued to May 14, 1926, at 10 o'clock in the forenoon.

ERWIN E. MARSHALL,  
Judge.

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## ORDER.

## MERCER COUNTY ORPHANS' COURT

<p style="text-align: center;">IN THE MATTER of The Estate of John Staiger, de- ceased.</p>	}	10
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This matter coming on to be heard in the presence of James J. McGoogan, attorney for Sadie V. Staiger, administratrix of the above-entitled estate, and William J. Connor, Esq., attorney for respondent John Staiger; and the administratrix having presented her petition praying for the instruction and direction of the court to pay two certain mortgage encumbrances on real estate that vested in her by virtue of the death of her husband the said John Staiger, out of the personal estate of the said decedent; and after hearing the arguments of said counsel and considering the same: 20

It is, on this 14th day of May, 1926, ordered, that the permission sought by the said petitioner, be and the same is hereby denied. 30

ERWIN E. MARSHALL,  
Judge.

NOTICE OF APPEAL.

MERCER COUNTY ORPHANS' COURT

IN THE MATTER  
of  
10 The Estate of John Staiger, de-  
ceased.

Sadie V. Staiger, widow and administratrix of  
John Staiger, deceased, hereby appeals to the  
New Jersey Prerogative Court from the order  
and every part thereof entered herein on May 14,  
1926, denying permission to the said adminis-  
20 trator to exonerate certain real estate, with the  
personal estate.

Dated Trenton, N. J., June 18, 1926.

JAMES J. McGOOGAN,  
Proctor for Appellant.

## CONCLUSIONS.

## NEW JERSEY PREROGATIVE COURT

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IN THE MATTER	}	
of		On Appeal
The Estate of John Staiger, de- ceased.		from Mercer Orphans' Court. 10

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Mr. James J. McGoogan, for Appellant.

Mr. William J. Connor, for Respondent.

## BUCHANAN, V. O.

This is an appeal by Sadie V. Staiger, widow and Administratrix of John Staiger, deceased, from an order of the Mercer County Orphans' Court denying her petition for leave to pay out of the personal estate of decedent the amounts due on two bonds secured by mortgages. 20

On November 20th, 1924, a house and lot were conveyed by one John Reynolds and wife to the said John Staiger and Sadie V. Staiger, his wife, for the purchase price of \$7000.00, which was paid with \$1500.00 in cash by John Staiger and two purchase money bonds secured by mortgages on the property. The bonds and mortgages were made by John Staiger and Sadie Staiger—one for \$3000.00, and the other for \$2500.00 (on which \$375.00 has been paid). 30

John Staiger died intestate, February 5th, 1926, leaving his widow and a son (by a former marriage) his only heir-at-law and next-of-kin. His 40

*Conclusions*

estate consisted of about \$14,000.00, all in personal property; and his debts, exclusive of the bonds, amounts to about \$4000.00. The residence was the only real estate, and that of course passed to Sadie Staiger by operation of law.

10 Sadie Staiger claims the right to have the real estate exonerated from the mortgage indebtedness by payment thereof out of the personalty.

At common law the personal estate of a decedent was the primary fund for the payment of his debts, and an heir, devisee or widow had the right to insist that mortgage indebtedness created by the decedent and affecting real estate passing to  
20 them, be paid out of the personalty. *Krueger v. Ferry*, 41 N. J. Eq. 432; aff'd 43 *Id.* 295; *Hill v. Hill*, 93 N. J. Eq. 567; aff'd 95 *Id.* 233; *Saling v. Saling*, 95 N. J. Eq. 611.

In the present instance the person claiming the right of exoneration is neither heir, devisee nor widow claiming dower; she is the survivor of a pair who together owned the real estate as husband and wife. The respondent heir contends  
30 that she does not come within the category of the common law rule and is not entitled to exoneration. Counsel have cited no authorities on this particular point, nor have any come to the attention of the Court.

It is said that the reason for the common law rule was that the personal estate had had the benefit of the money for the security of which the mortgage was given, and hence should bear the  
40 burden of payment. *Washburn Real Property*,

*Conclusions*

6th ed. p. 177. This is perhaps a rough and ready way of putting the matter, as regards the equitable situation between those succeeding to the real estate and those succeeding to the residuary personal estate. Possibly a more logical explanation would lie in the fact that the mortgage debt was the primary obligation of the mortgagor and the mortgage only collateral security therefor. Any unsecured debt or liability was, in the eyes of the law, primarily payable out of a debtor's personalty, as well in the debtor's lifetime as at his decease—(*vide* the form of the writ of execution which directs that the money be made out of the judgment debtor's personalty or if that be insufficient, then out of the realty). Even though security were given for the debt, so that the creditor might, if he chose, make his money out of the security, instead of suing on the debt, the debt still remained the primary obligation, and so far as the mortgagor was concerned, was, in legal conception, primarily payable out of his personal estate. So, on the death of the debtor, intestate, his next-of-kin would succeed to such personalty as was left after the payment of all debts, including that for which the collateral mortgage security had been given; or if he died testate, the payment of that debt would be deemed to have been intended to be included in the express or implied testamentary direction to pay debts, and the residuary legatee would take subject thereto. See *Cope v. Cope*, 2 Salk, 449.

The result of this of course would be that at the death of the debtor, whether intestate or tes-

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*Conclusions*

10 tate (unless he expressly or impliedly provided otherwise by his will), the persons succeeding to the real estate would take it freed of the encumbrance, or with the right to have it so freed. Logically then a wife who, by such death, became solely seized of real estate formerly owned by both as husband and wife, would be just as entitled to the right of exoneration as an heir or devisee. Her new estate in fee simple comes into being at the debtor's death by operation of law, just as does that of an heir or devisee. (The right of exoneration does not extend to a grantee, for reasons that need not here be discussed).

20 In modern times a change has come with the development of law. First came statutes requiring a mortgagee to seek satisfaction of his mortgage debt out of the mortgaged real estate before he could sue the mortgagor on the debt. In this State such a statute was enacted in 1880—see 3 *Comp. Stat.*, 3421. This statute was held not to affect the common law right of exoneration—*Hill v. Hill, supra*.

30 Later however came legislation in England and in many of our States, expressly depriving the heir or devisee of the right of exoneration. In New Jersey the statute is P. L. 1924, p. 375. It will be observed however that our statute refers only to heir and devisee. Being in derogation of the common law it must be strictly construed, and hence must be held to have no effect in so far as concerns a widow or a survivor of husband and wife having an estate by the entirety.

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*Conclusions*

So far the question has been considered as though the decedent husband was the sole mortgage debtor. It will be remembered however that both husband and wife executed the bonds as well as the mortgages. Prima facie therefore the debt is hers as well as his; and the respondent contends that because thereof she is not entitled to have it paid out of the decedent's personalty. It would seem however that it sufficiently appears from the evidence and stipulation that as between decedent and herself she was not a co-obligor but a surety—that the intent and agreement of both was that the debt was his alone and not hers. Decedent paid the \$1500.00 cash at the purchase; she contributed nothing. She had not then nor at any time since any other real or personal property of her own whatever. The husband paid the interest on the bonds and the partial payments made on account of principal.

It is concluded that appellant is entitled to the exoneration claimed by her, and that the decree of the Orphans' Court be accordingly reversed.

## NOTICE TO SETTLE FORM OF DECREE.

## NEW JERSEY PREROGATIVE COURT

<p style="text-align: center;">IN THE MATTER of 10 The Estate of John Staiger, de- ceased.</p>	}	<p>On Appeal. Decree Revers- ing Order of Orphans' Court.</p>
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This matter coming on to be heard in the pres-  
ence of James J. McGoogan, proctor for the ap-  
pellant Sadie V. Staiger, widow of the above-  
named John Staiger, deceased, and William J.  
Connor, proctor for the respondent John M.  
Staiger; and the court having examined the plead-  
ings and having taken proofs in open court, and  
having heard and considered the arguments of  
counsel thereon; and it appearing to the satis-  
faction of the court that the decedent John Stai-  
ger and his wife the appellant Sadie V. Staiger,  
had title as husband and wife to certain real es-  
tate in this state; that they had in his lifetime,  
executed and delivered two mortgages one for  
\$3,000.00, and the other for \$2,500.00 covering  
said premises; that said two mortgages were  
given to secure said decedent's debts; that ap-  
pellant Sadie V. Staiger, as said decedent's ad-  
ministratrix, petitioned the Mercer County Or-  
phans' Court for leave to exonerate said real es-  
tate from the lien of said two mortgages by pay-  
ing them out of the personal estate; that such re-  
lief was denied by said Mercer County Orphans'  
Court, by an order entered therein on May 14,  
1926; that said Sadie V. Staiger appealed to this  
court to set aside said order:

*Notice to Settle Form of Decree*

And the court, being of the opinion that such relief should be granted to said Sadie V. Staiger and that said order of the Mercer County Orphans' Court entered May 14, 1926, should be reversed:

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It is, thereupon on this first day of May, 1928, ordered, adjudged and decreed, that said order of the Mercer County Orphans' Court made on the fourteenth day of May, 1926, denying the petition of said Sadie V. Staiger for leave to exonerate said real estate from said mortgage indebtedness by the payment thereof out of the personal estate of said decedent, be and the same is hereby reversed.

20

And it is further ordered, adjudged and decreed, that said Sadie V. Staiger, administratrix of the estate of John Staiger, deceased, be and she is hereby authorized and empowered to pay, out of the personal estate of said decedent, the whole amount of the principal of said two mortgages and the interest thereon, that remained due and unpaid on the date of the death of said John Staiger.

30

It is further ordered, that a counsel fee of one hundred dollars be allowed to James J. McGoo-gan, proctor for the appellant, and a like counsel fee of seventy-five dollars to the proctor for respondent, together with the costs of this appeal to be taxed by the Register, for services rendered in this court in the above-entitled matter, and to be paid by the administratrix out of the personal estate.

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Resp. Adv.  
MALCOLM BUCHANAN,  
V. O.  
E. R. WALKER,  
O.

## NOTICE OF APPEAL.

## NEW JERSEY PREROGATIVE COURT

<p style="text-align: center;">IN THE MATTER</p> <p style="text-align: center;">of</p> <p>The Estate of John Staiger, de- ceased.</p>	}	<p>On Bill &amp;c.</p> <p>On Appeal from the New Jersey Preroga- tive Court to the Court of Errors and Appeals</p>
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*To James J. McGoogan, Esq., Attorney for Sadie  
V. Staiger:*

20 Sir:

Please take notice that the defendant John M. Staiger appeals to the Court of Errors and Appeals from the decree entered in this cause on the first day of May, 1928, by his Honor, Edwin Robert Walker, Ordinary, upon the advice of Malcolm G. Buchanan, Vice-ordinary, as adjudges and decrees that the order of the Mercer County Orphans' Court, made in this cause on the four-  
30 teenth day of May, 1926, denying the petition of Sadie V. Staiger for leave to exonerate said real estate from said mortgage indebtedness by the payment thereof out of the personal estate of the said decedent, be and the same is hereby reversed; and ordering that the said Sadie V. Staiger, Administratrix of the Estate of John Staiger, deceased, be authorized and empowered to pay out of the personal estate of said decedent the whole  
40 amount of the principal of two mortgages and

*Notice of Appeal*

interest thereon that remained due and unpaid on the date of the death of the said John Staiger, on the following grounds:

FIRST: That the said Sadie V. Staiger was the owner with her husband of said lands, being an estate by the entirety. 10

SECOND: That the widow and her husband John Staiger were tenants in common of said property during his lifetime, and that the whole estate became hers upon his death.

THIRD: That the bonds given, secured by mortgages on said real estate, were executed by both John Staiger and his wife Sadie V. Staiger. 20

FOURTH: That the said debts represented by the said bonds were her debts and secured by mortgages executed by her on her own property.

FIFTH: That the real estate in this case is primarily liable for the payment of the mortgages and until the security of the mortgages fail there can be no action on the bonds.

SIXTH: That the doctrine of exoneration does not apply to an estate by the entirety because it is not an estate of inheritance. 30

Respectfully yours,

WILLIAM J. CONNOR,  
Attorney for John M. Staiger.



*Petition*

And it is further ordered, adjudged and decreed that said Sadie V. Staiger, administratrix of the estate of John Staiger, deceased, be and she is hereby authorized and empowered to pay, out of the personal estate of said decedent, the whole amount of the principal of said two mortgages and interest thereon, that remained due and unpaid on the date of the death of said John Staiger. 10

And your petitioner humbly appeals from that part of the decree of the Ordinary which decrees as aforesaid upon the ground that the same is erroneous, for that:

FIRST: That the said Sadie V. Staiger was the owner with her husband of said lands, being an estate by the entirety. 20

SECOND: That the widow and her husband John Staiger were tenants in common of said property during his lifetime, and that the whole estate became hers upon his death.

THIRD: That the bonds given, secured by mortgages on said real estate, were executed by both John Staiger and his wife Sadie V. Staiger. 30

FOURTH: That the said debts represented by the said bonds were her debts and secured by mortgages executed by her on her own property.

FIFTH: That the real estate in this case is primarily liable for the payment of the mortgages and until the security of the mortgages fail there can be no action on the bonds. 40

*Answer to Petition of Appeal*

SIXTH: That the doctrine of exoneration does not apply to an estate by the entirety because it is not an estate of inheritance.

10 Your petitioner therefore prays that the said decree may be reversed, rescinded and for nothing holden; and that your petitioner may have such further relief as may be meet, etc.

WILLIAM J. CONNOR,  
Solicitor for and of counsel  
with the Petitioner.

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**ANSWER TO PETITION OF APPEAL.**

## NEW JERSEY COURT OF ERRORS AND APPEALS

Between,	}	On Appeal.
SADIE V. STAIGER,		
	Respondent,	
and		
30 JOHN M. STAIGER,	}	
	Appellant.	

The answer of Sadie V. Staiger, the above-named respondent to the petition of appeal of John M. Staiger, the above-named appellant:

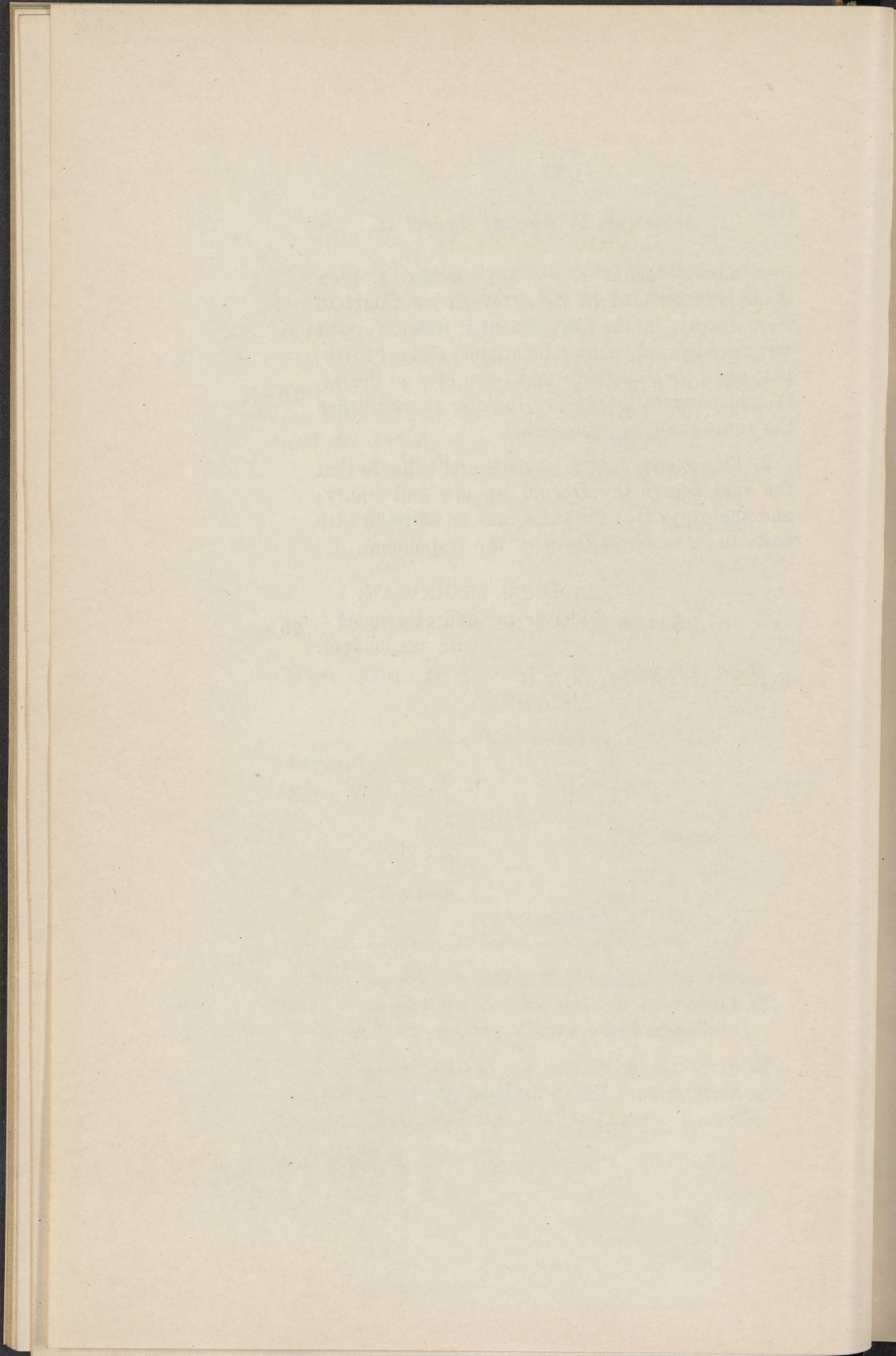
1. This respondent, not admitting the truth of all or any of the matters in the said petition of  
40 appeal contained, for answer thereto neverthe-

*Answer to Petition of Appeal*

less, admits that a decree was on May 1, 1928, made and entered in the Prerogative Court of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and set forth; but, as to the substance and form of said decree, this respondent begs leave to refer thereto when the same shall be produced. 10

2. This respondent is advised and believes that the said decree is agreeable to law and equity; and she prays that the same may be affirmed with costs to be taxed in favor of the respondent.

JAMES J. McGOOGAN,  
Solicitor for and of counsel 20  
with respondent.



# New Jersey Court of Errors and Appeals

ON APPEAL FROM NEW JERSEY PREROGATIVE COURT

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IN THE MATTER of The Estate of JOHN STAIGER, deceased.	}	On Appeal from Decree of the Prerog- ative Court.
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## BRIEF OF THE HEIR.

The facts as set forth in the brief of the administrator are agreed to and the only question before the Court is whether or not the first mortgage of three thousand dollars and the second mortgage of two thousand one hundred twenty-five dollars now a lien on the real estate left by the deceased John Staiger should be paid from his personal estate.

---

### POINT ONE.

The real estate was acquired by John Staiger and his wife November 20, 1924, and the deed was made to them as husband and wife. They, therefore, took an estate by the entirety and our contention is that Sadie V. Staiger, the wife of John Staiger, was the sole owner of this property, and the execution of bonds for the payment of part of the purchase price and the giving of mortgages

on said property to secure the payment of said bonds was a debt that she contracted for the payment of her property, and therefore, in as much as the property was hers, subject, however, to the life of her husband, after his decease whatever encumbrance might be upon said property she cannot have paid from his personal estate.

“At common law, owing to the doctrine of identity of husband and wife, a conveyance or devise of lands to them during coverture does not create a joint tenancy or a tenancy in common, which estates necessarily require more than one tenant, but such conveyance or devise creates an estate in entirety. This estate is confined to the relation of husband and wife and takes its name from the fact that neither spouse takes by shares, by moieties, but each is seized of the whole, or *per tout* and not *per my*, or, in other words, of the entire estate.”

#### POINT TWO.

The administrator relies on the rule laid down in the case of *Keen v. Munn*, 16 N. J. Eq. 400, where the heir-at-law may call upon the executor to exonerate the land by the payment of the mortgage from the personal estate.

The rule of exoneration applies only in the case of an heir or devisee. In the present case, Sadie V. Staiger is not an heir or devisee, but the surviving wife of John Staiger, who died intestate, so she cannot invoke the provisions of the rule in her favor.

“The principle is adopted in favor of the heir or devisee alone.”

Changed by Statute, Chapter 164, Laws 1924.

**POINT THREE.**

The real estate in this case is primarily liable for the payment of the mortgage and until the security of the mortgages fail, there can be no action on the bonds. The administratrix in this case cannot claim the payment of the bonds on the theory that they are debts of John Staiger until the security fails, then action on the bonds would be for the mortgagee and not for the administratrix.

The giving of the mortgages did not benefit the personal estate of John Staiger as they were mortgages given to secure a part of the purchase price of property conveyed to them by the entirety and the bonds and mortgages were made by both and the bonds made them jointly severally liable.

The cases cited by counsel for the administratrix in his brief, are only in favor of the heir or devisee and have no bearing on the question before the Court.

**POINT FOUR.**

The theory, however, of having the real estate exonerated by the payment of debts from the personalty seems to have been upset by the Act of 1924, which is as follows:

“Whenever any real estate which is subject to a mortgage shall descend to an heir or pass to a devisee, such heir or devisee shall not be entitled to have such mortgage discharged out of the personal estate or any other real estate of the ancestor or testator, but such real estate so received by him shall be primarily liable for the mortgage debt, unless there be a direction expressed or implied in the will of such testator that such mortgage be otherwise paid.

This Act shall take effect immediately.  
Approved March 11, 1924.”

Chapter 164, Laws of 1924 of the State  
of New Jersey, page 375.

This act applies only to an heir or devisee and not a widow or the survivor of a husband when the estate was held by the entirety.

The debts of a married woman holding an estate secured to her separate use by the Act of 1852, when contracted by her for the benefit of her separate estate, or for her own use on the credit of that estate, will be charged by a court of equity upon the separate estate and payment enforced out of it.

Armstrong v. Ross, 20 N. J. E. 109,  
p. 119.

**INTEREST OF HEIR OR DEVISEE.**

The common law rule that the personalty is the primary fund for payment of decedent's personal debts to the exoneration of the realty, has been extended so far as to allow the heir or devisee to call upon the executor or administrator to exonerate the realty from a debt constituting a lien thereon, unless the testator has expressed his intention to the contrary in plain and unequivocal terms. The rule relates, however, only the personal debts of the decedent, and if the decedent acquired the land already subject to a mortgage, the representative cannot be called upon to discharge it unless the decedent made the deed his own or directed by his will that his personal estate should discharge the lien.

The common law rule has been changed by statute in a few states so that the person who takes land by descent or devise must satisfy a lien thereon out of his own property without resorting to the representative unless the testator expressly directs that the lien be otherwise paid.

Respectfully submitted,

WILLIAM J. CONNOR,  
Solicitor of and of Counsel with  
the Appellant.

MEMORANDUM FOR THE RECORD

The following information was received from the  
Department of the Interior, Bureau of Land  
Management, on the 15th day of June, 1964.  
The land described in the above captioned  
instrument is situated in the County of  
[County Name], State of [State Name].  
The land is owned by [Owner Name],  
and is being offered for sale to the  
public by the Department of the Interior,  
Bureau of Land Management. The land is  
being offered for sale in accordance with  
the provisions of the Act of June 16, 1936,  
as amended, which provides that the  
Department of the Interior may sell  
public lands in severalty to the highest  
bidder for cash. The land is being  
offered for sale in accordance with the  
provisions of the Act of June 16, 1936,  
as amended, which provides that the  
Department of the Interior may sell  
public lands in severalty to the highest  
bidder for cash. The land is being  
offered for sale in accordance with the  
provisions of the Act of June 16, 1936,  
as amended, which provides that the  
Department of the Interior may sell  
public lands in severalty to the highest  
bidder for cash.

Very truly yours,  
[Signature]  
[Title]  
Bureau of Land Management  
Department of the Interior

## New Jersey Court of Errors and Appeals

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IN THE MATTER OF THE ESTATE  
OF JOHN STAIGER, DECEASED.

On Appeal from  
Prerogative  
Court.

Brief for  
Respondent.

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On November 20, 1924, John E. Reynolds and Alice M. Reynolds, his wife, conveyed a house and lot of land known as No. 1517 Brunswick Avenue, Trenton, to John Staiger and Sadie V. Staiger, his wife, in fee. 10

The purchase price was \$7,000.00, and was paid by John Staiger giving to Reynolds \$1,500.00 in cash, and two purchase money mortgages, one for \$3,000.00 and the other a second mortgage, for \$2,500.00, securing the bonds of himself and his wife Sadie V. Staiger, who also joined in the two mortgages.

The whole principal of the mortgage for \$3,000.00 is unpaid and the principal of the second mortgage had been reduced at the hearing below, by five payments of \$75.00 each with accrued interest, leaving a balance of \$2,125.00 due and unpaid. 20

John Staiger died intestate on February 5, 1926, seized of the mortgaged premises, leaving him surviving the respondent, his widow Sadie V. Staiger (in whom the title then vested), who is also his administratrix, and John M. Staiger, a son by a former marriage. This son is of age, and with the widow, is the only person interested in this matter.

John Staiger left personal estate valued at \$13,915.99, and his debts amounted to about \$4,000.00,  
10 exclusive of the two mortgages.

Sadie V. Staiger contributed no part of the purchase price; she had no personal or real estate at the time of the purchase, nor had she since acquired any personal or real estate, except such as she will receive by virtue of her husband's death.

She petitioned the Mercer County Orphan's Court for leave to pay the two mortgages out of the decedent's personal estate. This petition was denied, and appeal was taken by her to the Prerogative  
20 Court from the decree refusing such permission, and the Prerogative Court reversed the decree of the Orphans' Court.

The heir at law, John M. Staiger, appeals from the decree of the Prerogative Court.

The principle of law applicable to the situation thus presented, is found in the cases holding that the personal estate of a decedent is the primary fund for the payment of his debts. See *Campbell v. Campbell*, 30 N. J. Eq. 415.

30 The reason for the rule is laid down in *Keen v. Munn*, 16 N. J. Eq. at page 400, where the court said that the "heir at law may call upon the executor to exonerate the land by discharging the mortgage debt out of the personal estate, upon the ground that the personal estate had the benefit of the money for which the mortgage was given."

This being the theory upon which the personal estate of a decedent can be called upon to pay his

mortgage debt; it follows that, in the instant case, the personal estate of John Staiger, deceased, has had the benefit, and now has the benefit of the money for which the two mortgages were given, and his personal estate is now \$5,125.00 greater than it would be if he had paid the purchase price in full.

While it is true that the property, by virtue of the estate by the entirety, passed to the survivor Sadie V. Staiger on the death of her husband, his death by no means abrogated or annulled his two bonds to secure which the two mortgages were given. These two bonds are alive at this time and are obligations of Mrs. Staiger and of her deceased husband's estate. 10

Authority for the relief asked in the petition is found in P. L. 1920, page 475.

The heir at law cites the act of 1924 (P. L. 1924, p. 375) as decisive of the question raised by the administratrix, but that contention is unsound, for prior to 1924, the common law doctrine of exoneration was in full force in New Jersey, and to find whether or not the statute passed in that year bars the widow's right to exoneration, it is essential to discover how far the doctrine went with respect to the classes of persons who might take advantage of it, and what classes it eliminated from the operation of the old rule. 20

In *Hill v. Hill*, 93 N. J. Eq. 567, *aff'd* 95 N. J. Eq. 233, it is declared by the Vice Chancellor that the heir, devisee, or *widow*, had that privilege (page 570). 30

If, therefore, prior to 1924, the heir, devisee or *widow* of a deceased mortgagor had the right to call upon the personal representative to pay the mortgage debt out of the personal estate, it must follow that the 1924 statute, limited to only "heirs and devisees," excludes widows from its operation, and the result is that Sadie V. Staiger, being neither

an "heir" nor a "devisee" but the widow of the deceased mortgagor, is entitled to the benefit of the common law rule.

After reading the Hill case, it will be seen that the 1924 act is in derogation of the common law; consequently it must be strictly construed (p. 573), and a strict construction of the act removes the widow of the deceased mortgagor from its scope.

10 It was held in *Krueger v. Ferry*, 41 N. J. Eq. 432, aff'd 43 N. J. Eq. 295, that: "The personal estate of a decedent is the primary fund for the payment of his debts, and an heir, devisee or widow has a right to have it so applied in relief of the land which they take, but this right belongs to them alone. Their alienee or mortgagee has no such right."

Between themselves, the husband and the wife were tenants in common. *Neubeck v. Neubeck*, 94 N. J. Eq. 167. Each was burdened with the payment of encumbrances on real estate owned by them.

20 The act of 1924 took effect March 11, 1924, and *Salling v. Salling*, 95 N. J. Eq. 611, decided seven days later, follows the common law rule of exoneration, but the opinion does not mention the 1924 act, and evidently it had not been brought to the attention of the court, because the case was submitted five days prior to the approval of the statute. The *Salling* case is the latest one found in this state having any relation to the question at issue.

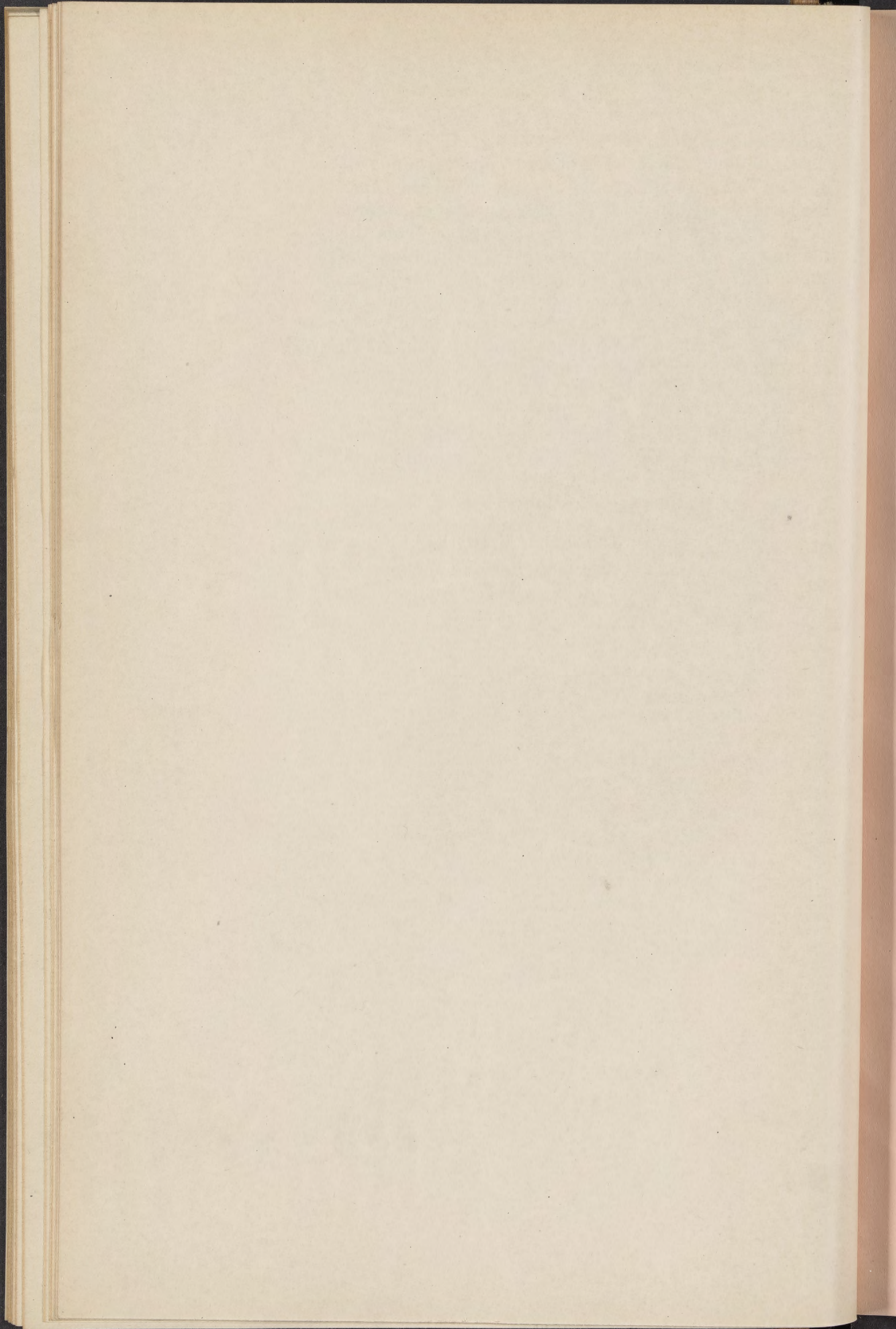
30 It would have been easy for the legislature of 1924 to include "widows" in the statute if it had been their intention to deprive them, as a class, of the benefit of what JUSTICE KATZENBACH calls "the fundamental doctrine of exoneration from the personal estate of lands from debts created by a testator or ancestor." See page 240 of the opinion in *Hill v. Hill*, 95 N. J. Eq.

Respondent does not dispute the facts set out in the appellant's first, second and third grounds of appeal. The fourth ground of appeal declares that the bonds were the debts of Sadie V. Staiger, whereas the Prerogative Court found otherwise from the testimony. The fifth ground is not disputed because that rule of law is applicable only to the relationship of mortgagor and mortgagee, and the sixth ground of appeal, that an estate by the entirety is not an estate of inheritance, finds no support in the authorities. "All freehold estates are estates of inheritance, except estates for life." *Cummings v. Cummings*, 76 *Eq.* at p. 570. 10

The administratrix should therefore be permitted to pay the mortgage debts from the personal estate.

Respectfully submitted,

JAMES J. McGOOGAN,  
*Solicitor and of Counsel*  
*with Respondent.*



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## TESTIMONY.

### Plaintiff's Witnesses.

#### John E. Cooper

Direct

#### John Washburn

Direct (by Mr. Palmer)

Cross (by Mr. Isaacs)

Re-ex (by Mr. Hauptman)

Cross (by Mr. Isaacs)

Re-ex (by Mr. Hauptman)

#### Defendant's Witnesses

Direct

Cross (by Mr. Hauptman)

