
N. J. Court of Errors and Appeals.

ON APPEAL FROM COURT OF CHANCERY OF NEW JERSEY.

Between

JOHN SMITH,

Complainant,

and

THOMAS ALTON et al.,

Defendants.

} On Bill, &c.

Petition.

[Filed March 16, 1870].

The petition of Thomas Alton, of the city of Newark, county of Essex, and state of New Jersey, respectfully sheweth, that by virtue of the final decree made in the above cause on the twenty-fifth day of October last, eighteen hundred and sixty-nine, and execution pursuant thereto, directed to the sheriff of the county of Essex aforesaid, the said sheriff on the fourth day of March, instant, offered for sale and sold the premises of the defendant and petitioner in the above 10 stated cause, situated at Newark aforesaid, to David A. Ryerson, solicitor of the complainants in the cause, for the sum of four thousand and fifty dollars; and your petitioner further sheweth, that shortly after the return of the subpœna in the above stated cause, and during the pendency of the

suit, to wit, on the tenth day of August last, eighteen hundred and sixty-nine, the said John Smith, complainant, became and was adjudged a bankrupt, under the laws of the United States, and by operation of law, all assets and rights of action aforesaid of John Smith at and from that date passed into the hands and became the assets and rights of Samuel T. Freeman, of Philadelphia, in the state of Pennsylvania, who was the assignee for the creditors of said John Smith, appointed in accordance with the bankrupt laws of
10 the United States; and your petitioner further showeth, that on the tenth day of August, last past, eighteen hundred and sixty-nine, he had a conversation with said David A. Ryerson, with regard to the bankruptcy of said Smith, and stated to said Ryerson that he was informed by counsel that this suit would have to be discontinued on account of Smith's bankruptcy, and said Ryerson did not deny the same; and your petitioner was advised by counsel that the fact of bankruptcy would operate as a bar to the prosecution of said suit, and that your petitioner could only safely settle with the
20 assignee before mentioned; and your petitioner further showeth and saith, that supposing that said suit was discontinued, he paid no further attention to the same, but relied upon his said counsel to keep him advised if any action were necessary on his part, and that he has never seen any advertisement of the notice of the sale of his said property, and did not know or hear of the same, nor did his counsel, (neither of them were present at the sale) until informed of it by the sheriff; that had he supposed it would be necessary for him to put in an answer to the complainant's bill he would have done so; that he had a defence to
30 the same, and could have shown that he was indebted to said Smith in a very small amount, if any, and he believes that he was not nor is indebted to said Smith in any amount, but that the balance of account is in favor of your petitioner; and your petitioner further showeth, that the mortgage for the foreclosure of which the said suit was brought, was given as collateral security for moneys to be collected by your petitioner for said Smith, which moneys were paid to said Smith as fast as collected, and your petitioner is informed
40 and believes that on the day of sale the sheriff informed the

said David A. Ryerson, the solicitor of complainant in said bill named, that neither your petitioner, the defendant named therein, nor any person in his behalf was present, and asked his consent to adjourn said sale, which, being refused, the sale proceeded and said premises were sold to said David A. Ryerson, solicitor as aforesaid, for the sum of four thousand and fifty dollars.

And your petitioner further showeth, that said sale and said amount realized are inadequate, being not more than one-third of the value of the premises in question. 10

And upon petition further showeth, that the original amount of said mortgage was two thousand and five hundred dollars; that payments have been made and were allowed thereon, so that the amount for which decree was entered exclusive of interest (which, as your petitioner insists and could show, were he permitted, he is not obligated to pay,) was five hundred and thirty-six dollars, besides costs.

And your petitioner further showeth, that the said mortgage is subsequent to, and said sale was made subject to a prior mortgage of two thousand and eight hundred dollars, 20 held by the Peoples Insurance Company, of Newark, New Jersey, and said company were and are willing to continue the loan secured by said mortgage, and to allow the same to remain upon said premises.

And your petitioner further showeth, that since said sale, and immediately upon being informed of the same, he waited upon the said David A. Ryerson and offered to make a fair settlement of the matter, subject to the consent of the assignee in bankruptcy, and offered in such settlement to pay whatever was due, if anything, from your petitioner to 30 said Smith or to said assignee, and all reasonable costs incurred in the same, and also made similar proposals to him through counsel. And the said David A. Ryerson refused to make such settlement, or to name any terms upon which he would settle, but desired your petitioner to make him an offer for the re-purchase of the property.

And your petitioner further showeth, that the said John Smith, complainant in said suit named, died on the twenty-third day of September last, eighteen hundred and sixty-nine,

and that no substitution of any representative has ever been made.

Your petitioner therefore prays, that said sale may be set aside and the decree opened, and your petitioner be admitted to defend such said suit, and that the sheriff of Essex in the meantime be restrained from making a deed for said property. And that your petitioner may have such other and further relief in the premises as shall seem meet to your Honor, and your petitioner as in duty bound will ever
10 pray, &c.

SAMUEL H. BALDWIN,
Solicitor and of counsel for petitioner.

New Jersey, ss.—Thomas Alton, of full age, being duly sworn, on his oath saith—that he is the petitioner named in the above petition; that the matters and things therein set forth, so far as they relate to his own acts and deeds, are true, and so far as they relate to the acts and deeds of others, he believes them to be true.

THOMAS ALTON.

20 Sworn and subscribed before me, this fifteenth day of March, A. D. eighteen hundred and seventy.

ERNEST E. COE, *M. C.*

Order to Show Cause.

[Filed March 16, 1870.]

On reading and filing the petition of Thomas Alton, the defendant in the above stated cause, it is, this sixteenth day of March, A. D. eighteen hundred and seventy, ordered that the complainant's solicitor, David A. Ryerson, esq., do show cause before the Chancellor at his chambers in Jersey
30 City, at ten o'clock in the forenoon of Munday, the fourth day of April next, eighteen hundred and seventy, why the prayer of the petition should not be granted, and the sale

therein referred to set aside, the decree opened, and the defendant, Thomas Alton, be admitted to defend the same; and it is further ordered that in the meantime the sheriff refrain from delivering any deed pursuant to the sale had under execution in his cause, and if he shall already have delivered said deed, then that the grantee therein named be precluded from recording the same, and from transferring the property, and in the meantime that both parties be allowed to take depositions to be used upon the hearing of this rule.

A. O. ZABRISKIE, C.

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Affidavits and Notice.

New Jersey, Essex county, ss.—Thomas Alton, being duly sworn saith—that he is the defendant named in the above stated cause; that he was served with a subpoena in said cause in July, eighteen hundred and sixty-nine; said subpoena was returned August second, eighteen hundred and sixty-nine, and deponent had an appearance entered for him on July twenty-third, eighteen hundred and sixty-nine, by Samuel H. Baldwin, a solicitor of this court; there were present with the defendant at the time he called at said Baldwin's office, Lewis W. Mason and a Mr. Hale, of the firm of Hale, Goodman & Company, of Philadelphia, and state of Pennsylvania; these parties heard and took part in the conversation had with Baldwin at the time; deponent wished an appearance entered because he thought the amount claimed was too much; Hale offered at this interview to see Smith and get from him an assignment of mortgage for the foreclosure of which said suit was instituted, to him Hale, and would give deponent all necessary time to pay the same, and the said solicitor informed and promised deponent that he would loan him the money, if a satisfactory account and balance could be agreed upon; Hale told deponent at this time that he had a claim against Smith, the complainant in the above stated cause, and had put the same in said Baldwin's hands for collection, and would like to secure the debt in that way; a few

days after in the early part of August, deponent again called on said Baldwin, who informed him that proceedings in the Hale suit had been stopped by a decree of bankruptcy, made by the United States District Court of Pennsylvania, and that the assets and effects of said Smith were now in the hands of an assignee, with whom he should settle, if any one, and also informed him that the effect of said decree in bankruptcy would be to stop this suit also, and deponent went immediately to said Ryerson and informed him of said bankruptcy, and that he could not settle with him, and said Ryerson agreed to see deponent's counsel and make some arrangement, and the deponent supposed, until informed by the sheriff of Essex county of the sale of his property, March fifth, eighteen hundred and seventy, that the suit had been discontinued, and that he should receive notice of claim from the assignee of the bankrupt. And deponent further says, that the foregoing statement embraces all the reasons that controlled his action in the matter, and that the sale and all proceedings subsequent to the last above mentioned conversation with said Ryerson, were a total surprise to deponent; that he never heard anything further from said Ryerson, from his own solicitor, or from any other person concerning the matter until informed by the sheriff on the fifth day of March, eighteen hundred and seventy, that the property had been sold on the day previous. And deponent further says, that from the time of the service of said subpoena to this date, he has been willing and able to settle the said claim at any time when he could do so with the proper parties, and deponent never has requested said Ryerson to raise one dollar on this or upon any other account, and has never considered himself in need of such assistance from said Ryerson since said suit was commenced, and deponent has never refused or objected to, but desired an amicable settlement, if the same could be made. And deponent denies, that said Ryerson on the day after the sale, or at any time subsequent to said sale, or at any other time, told him he could have his property back on settlement of his accounts, and the payment of a fee for his, Ryerson's, trouble, but says, "that he made an express and specific offer to said Ryerson to pay the entire amount, including his costs, and the sheriff's

fees, and a bonus of forty dollars, if he would transfer the property back to this deponent," and said Ryerson refused to accept said offer, or to state any terms upon which he would allow deponent to take it back, or make any settlement, but said, when deponent asked him what he, Ryerson, wanted, "That is not for me to say; you must make me an offer." And deponent denies, that the account was correct, or that he ever admitted its correctness, but says, on the contrary, that the calculation of interest was made from week to week, and, in some instances, from day to day, 10 and compounded, and that the balance due, upon the complainant's own statement, was only three hundred and twenty-one dollars, that from this was to be deducted a commission of ten per cent. upon twenty-three hundred dollars, collected and paid over by deponent to said Smith, being the sum of two hundred and thirty dollars, and a further sum of two hundred dollars, paid by deponent to said Smith, July fifteenth, eighteen hundred and sixty-seven, for which deponent holds said Smith's receipt, but which is not credited to deponent on the account for which said foreclosure suit 20 was brought. And deponent further saith, that in equity he owes nothing upon said mortgages, for that the same was given as collateral security for the collection and return of moneys due said Smith from various customers, amounting in the aggregate to the sum of two thousand and five hundred dollars, which deponent undertook to collect for him, the said Smith, and the said mortgage was understood and agreed as having that effect, and no other or further, and an agreement in writing, at length, to that effect, was drawn by said Smith, signed and placed in the hands of 30 deponent by him, but the same has been lost and cannot be found, although deponent has made diligent search for the same. And deponent further says, that all the money he ever collected for said Smith has been paid to him by deponent. And deponent further says, that the sole consideration which he received from said Smith for said mortgage, was a list of accounts due said Smith, amounting to the sum of twenty-five hundred dollars; that said mortgage was collateral security solely for the collection by deponent of said accounts. And deponent further says, that the sum of four 40

thousand and fifty dollars is greatly inadequate for the property in question ; that in July, 1867, he was offered, and refused eight thousand dollars in cash ; that property in his neighborhood has greatly advanced in value within two years past, and is worth, and deponent can get for his property, ten thousand dollars at any time—deponent thinks it is worth more—and since said sale the Peoples Insurance Company, who hold a prior mortgage upon the premises, have informed him that they did not want their money, but
10 that the same might remain after the settlement of this affair. And deponent further says, that since the sale referred to he received a notice from Samuel T. Freeman, assignee, which notice was dated at Philadelphia, March nineteenth, eighteen hundred and seventy, and is in the following words :

In the matter of John Smith, a bankrupt ; in bankruptcy.

Dear Sir:—There appears to be due by you to the estate of the above named bankrupt, the sum of four hundred and sixty-nine dollars and eighty cents, no part of which you
20 have yet paid. The law requires me to proceed with all possible dispatch to collect in the assets of the estate, and as I desire to avoid the expense, both to you and myself, incident to legal proceedings, I hope you will at once attend to the matter. Ten days is the utmost limit that I can delay proceedings, if the account is not adjusted. I hope you will immediately let me hear from you in reference to the matter.

Yours respectfully,

S. T. FREEMAN, *Assignee.*

To THOMAS ALTON.

30 That immediately after the receipt of this notice, upon the advice of his solicitor, deponent went to Philadelphia and saw said Samuel T. Freeman, to whom he narrates the history of the above stated cause and the proceedings had thereon ; and said Freeman then told deponent that he, Freeman, was the assignee and the only party to settle with ; that Ryerson had no instructions or authority from him, and again demanded a settlement in accordance with his notice. Deponent then asked, and said Freeman agreed to send a

particular statement of the account, with proofs of his authority in the matter. This was on the twenty-sixth day of March last past, since which date deponent has been shown by his counsel proofs in the form of affidavit, served by said Ryerson or his counsel. And deponent further says, that he believes the date of said Smith's death was the eighth day of November, eighteen hundred and sixty-nine. Deponent further says, that he never executed any mortgage in the favor of said Smith, except the one in question; that this was done in May, eighteen hundred and sixty-seven. 10

THOMAS ALTON.

Sworn and subscribed, before me, at Newark, N. J., this sixth day of April, eighteen hundred and seventy.

CORRA DRAKE, *M. C.*

New Jersey, Essex county, *ss.*—Samuel H. Baldwin, being duly sworn, saith—In the month of July, eighteen hundred and sixty-nine, he was called upon by a Mr. Hale, of the firm of Hale, Goodman & Company, of Philadelphia, in the state of Pennsylvania, who represented himself as a creditor of one John Smith, and deponent issued an attachment at 20 his instance against the effects of John Smith as a non-resident debtor, and while preparing a bond to be given to the sheriff, said Hale went out and shortly returned with Lewis W. Mason and Thomas Alton, and deponent says that the statement contained in the affidavit of said Alton hereto annexed, is true as to the offer of said Hale made at that time to take said mortgage and give Alton time, and deponent made the same offer; this was between the twentieth and twenty-third of July; deponent entered an appearance in above stated cause for said Alton on the twenty-third day of 3) July, eighteen hundred and sixty-nine, a few days after this, about a week after the time of the return of the writ of attachment, which was returned August third, eighteen hundred and sixty-nine, deponent was informed by the sheriff of Essex county, that Smith had been adjudged a bankrupt and the assignee had demanded the effects, then in his, the sheriff's, hands under said attachment; said demand was repeated and notice served upon sheriff by John W. Taylor,

esq., as attorney for such assignee; deponent instructed sheriff to surrender the same, and instructed said Alton about the same time, as to the state of affairs, and advised him to see Mr. Ryerson, the solicitor of said Smith, and inform him of the same, and further advised him not to settle except with the assignee or with said John W. Taylor, his attorney; and said Alton started for the office of said Ryerson, and as he informed deponent, advised him as instructed by deponent, and deponent does not now remem-
10 ber what answer he brought from said Ryerson, but it was of such a tenor and purport that deponent regarded said suit as discontinued, and told said Alton not to trouble himself until he heard from the assignee in bankruptcy; and deponent and said Alton parted with this understanding; deponent also promising to notify said Alton in case he heard anything new in the matter, and deponent as he believes did not see said Alton or said Ryerson again until the fifth day of March, when he was informed of the sale of the previous day; Alton informed him deponent was then on his way to
20 Washington, and had only time to see John W. Taylor, esq., attorney as aforesaid of the assignee, and get an order from him to the sheriff to delay the delivery of the deed until the eleventh of March; deponent returned to Newark on the twelfth day of March, eighteen hundred and seventy, when said Taylor informed him that he was authorized by the assignee to use his judgment in the matter; that Ryerson had no right or concern in the matter whatever, but he, Taylor, as attorney for the assignee, would allow deponent to make any arrangement with said Ryerson he thought just,
30 and which should be in accordance with the facts as between Smith and Alton; and deponent immediately went to see Ryerson, informing him that he was there on behalf of Mr. Alton, and that he wished to make a settlement. Ryerson asked deponent, "What do you," or "What does he want to do;" deponent's reply was, "Pay;" Ryerson's next question was, "What will you pay," deponent replied, "Whatever the amount of the judgment is, with costs, and a reasonable fee to you;" Ryerson's reply was, "I won't settle on those terms, or anything like them; he (referring to Alton) made
40 me a similar offer two or three days since;" deponent said,

“What will you do;” to which Ryerson replied, “I have nothing to say about it; Alton must make me an offer; I will only say I won’t take anything like what you offer; I have had a great deal of trouble; I have the property now, and before Alton gets it back he must pay me well;” this was the only conversation deponent has ever had with said Ryerson on this subject; deponent is not positive at this time whether this conversation was immediately after that mentioned with said Taylor, or immediately after one in which said Taylor informed deponent that he had settled with said 10 Ryerson; and deponent saith that his understanding of the discontinuance of the suit in consequence of the bankruptcy of the complainant, Smith, was the only reason he did not file an answer on behalf of said defendant, and contest the same; and deponent believes that said Alton had and has an equitable and perfect defence to said bill, and to said suit; and deponent believes this from an examination of the accounts rendered by said Smith, as shown him by Alton; and deponent saith that he has never seen any advertisement of the sale in the above cause, and that it is not usual to sell 20 property on the “first day,” and believes and is so informed by the sheriff that he has never before sold, except at an adjourned day, except in a single instance.

SAMUEL H. BALDWIN.

Sworn and subscribed before me, at Newark, New Jersey, this sixth day of April, A. D. eighteen hundred and seventy.

ERNEST E. COE, *M. C.*

New Jersey, Essex county, ss.—John W. Taylor, being sworn, saith—I am attorney-at-law, practicing in this state; I am the attorney for the assignee, Samuel T. Freeman, in 30 the matter of the bankruptcy of John Smith, of Philadelphia, in the state of Pennsylvania; I first became connected with the matter last summer in July and August; I demanded on behalf of the assignee certain goods in the hands of the sheriff of Essex county, under a writ of attachment issued by Baldwin and Salmon as attorneys for Hale, Goodman & Company, of Philadelphia, who claimed to be creditors of

said Smith; the goods were delivered to me; the first knowledge I had of any other credits or assets of said Smith in this state was obtained from the said Baldwin, who informed me of the sale in the above stated cause; I requested the sheriff to postpone the delivery of the deed until March eleventh, eighteen hundred and seventy; this was on the morning of March fifth; I communicated with the said Freeman at once; he informed me that he had no knowledge of this suit, and instructed me generally to look after the matter; I was subsequently instructed that one Walter B. Mitchell, an attorney of Philadelphia, had been holding the mortgage in question under an attorney's lien, and had sued the same to secure moneys due him from Smith, but that he was willing if Mr. Ryerson's fees were paid to let it go to the assignee without any dispute; after giving Baldwin time to settle with Ryerson and being informed by him of his failure, I called upon Ryerson and claimed the amount due on the decree; he informed me that the amount due was four hundred and sixty-four dollars and ninety-three cents, exclusive of costs, and paid me four hundred and fourteen dollars and ninety-three cents; this was on the sixth day of March, eighteen hundred and seventy.

JOHN W. TAYLOR.

Sworn and subscribed, before me at Newark, N. J., this sixth day of April, eighteen hundred and seventy.

JOSEPH L. MUNN, *M. C.*

New Jersey, Middlesex county, ss.—Thomas S. McIlvain, of full age, being duly sworn, saith—I reside in New Brunswick; I know Thomas Alton and know John Smith, the complainant named; I knew of the giving of the mortgage by Alton to Smith in May, eighteen hundred and sixty-seven, and that the same was given as collateral security for the proper return of moneys which Alton was to collect for Smith; the moneys were then due on accounts; I know the agreement was made to that effect; I was present in Alton's place in Market street, in the city of Newark, when the thing was talked over before the execution of the mortgage; I know from Smith and Alton that such an agreement was

afterward reduced to writing by said Smith, and signed and delivered by him to Alton; I was well acquainted with Smith—was at the time mentioned in the employ of Alton as a collector and salesman; Mr. Alton had charge of Smith's collections; I was interested in the arrangement as collector, and paid attention to the conversation; I had ten per cent. commission on all collections; the arrangement spoken of was on those terms as to commission; I knew it at the time from both parties; I collected the portion of Smith's accounts which were due in Elizabeth, in this state; I mean the ac- 10
counts embraced in the list given Alton on this occasion for collection; I received ten per cent. on what I collected.

THOS. S. McILVAIN.

Sworn and subscribed before me, at New Brunswick, in the county of Middlesex, and state of New Jersey, this fifth day of April, eighteen hundred and seventy.

G. B. ADRAIN, *M. C.*

New Jersey, Essex county, ss.—Andrew Teed, being sworn, saith—I am the sheriff of Essex county; I have previously made an affidavit to be used in the hearing of an argument 20
connected with this cause; I sold the property as stated therein; the execution in favor of the complainant named above was for thirty-three hundred and eight dollars and eighteen cents, exclusive of costs and interest; I sold the property for the price named in my previous affidavit; I usually adjourn sales of real estate once or twice, unless the defendants in execution, or some representatives in their behalf, are present; that is my rule; I was desirous of attending this sale, but at the solicitation of D. A. Ryerson, esq., who appeared on behalf of the complainant named, I 30
finally agreed to sell, provided the property brought enough to pay all the claims; neither Mr. Alton nor any person representing him, or representing the Peoples Insurance Company, were present to my knowledge; I inquired; there were not many persons present; I was authorized by Mr. Alton shortly after the sale to offer Mr. Ryerson fifty dollars over and above the amount of his claim and expenses of suit to settle; Mr. Ryerson declined this offer.

ANDREW TEED, *Sheriff.*

Sworn and subscribed, before me, at Newark, this sixth day of April, eighteen hundred and seventy.

JAMES D. CLEAVER, *M. C.*

New Jersey, Hudson county, *ss.*—D. A. Ryerson, of Newark, N. J., being duly sworn, on oath saith—That he served a true copy of the affidavits hereto annexed upon S. H. Baldwin, esq., solicitor of Thomas Alton, the above named defendant, on the thirtieth day of March, eighteen hundred and seventy, and that upon the said affidavits was a
10 notice that the same were true copies of the affidavits to be used at the hearing of the rule to show cause why the sale made in said suit should not be set aside, to be heard April fourth, eighteen hundred and seventy.

D. A. RYERSON.

Sworn and subscribed, before me, this fourth day of April, eighteen hundred and seventy.

AUGUSTUS ZABRISKIE, *M. C.*

New Jersey, Essex county, *ss.*—David A. Ryerson, of Newark, N. J., being duly sworn, on oath saith—That he is
20 the solicitor of the complainant in the above cause; that in the month of May, eighteen hundred and sixty-nine, he received for collection from W. B. Mitchell, esq., of Philadelphia, Pa., a counselor-at-law of that state, an account for merchandise sold by said John Smith to said Thomas Alton, amounting to about one hundred and twenty-five dollars, and a bond and mortgage given by said Alton and his wife to said Smith, upon which was alleged to be still due about four hundred dollars; that instead of immediately commencing suits and making costs, deponent notified said
30 Alton of the claims; said Alton came to the office of deponent and acknowledged that he owed complainant something, but not as much as claimed, and also insisted that the interest had not been correctly calculated; whereupon deponent wrote to the parties in Philadelphia, and after a number of letters had passed, Alton said he was satisfied that he had been allowed all the payments made by him, and that the amount claimed by complainant was correct, with the exception of the interest; to fully satisfy said Alton on this latter point deponent told him that he would

submit the matter to any lawyer he might select, and abide his decision; Alton brought John H. Meeker, esq., a counselor-at-law, residing and practicing at Newark aforesaid, to deponent's office, who, after examining the calculation, decided that it was right and in conformity with the law of the state; Alton then expressed himself as satisfied that the amount claimed by complainant was correct in every particular, and said that he would raise the money at once and pay the same in full to deponent; the said correspondence, &c., covered about a month of time. 10

Soon after, Alton brought a man to deponent's office whom Alton stated had promised to lend him the money; the matter was talked about, and after deponent had made out for them a statement of the amount required, they went away, giving deponent to understand that the money would be forthcoming in a few days; that about a week subsequent to said interview, Alton came to deponent and told him that his man had refused to lend him the money; Alton then earnestly requested deponent to raise the money for him, saying that if deponent was successful, he would pay him 20 the claims of Smith in full, besides fees for his trouble; deponent did, thereupon, endeavor to procure the money, and, first of all, applied to the Peoples Fire Insurance Company, of Newark, who already had a mortgage on the said property for two thousand eight hundred dollars, but they declined, stating that the property would not bear it, and on deponent saying to them that said Alton had told him the property was worth eight thousand dollars, replied that they were acquainted with the property, and did not think it was worth so much, and to put five or six hundred dollars 30 more upon it, that there would not be enough margin left for them to feel safe; after considerable trouble deponent succeeded in raising the money, and so notified Alton, who came to deponent's office and refused to take it, saying that Smith could sue just as fast as he pleased, that the costs would not amount to much any way; that he could keep him out of it for several months, and he would keep him out of it just as long as he could; that all hopes of an amicable settlement being at end, after working nearly two months at it, deponent commenced suit both on the merchandise 40

account and on the bond and mortgage; that the bill in this cause was filed July twentieth, eighteen hundred and sixty-nine, said Alton, his wife, and said insurance company being made defendants; that subpoena, &c., was delivered to the sheriff of Essex county, and by him returned duly served as deponent was informed, by said sheriff; afterwards, deponent being informed by the clerk of this court that no answer, plea, or demurrer had been filed by any of the defendants, except said insurance company, within the time limited by 10 law, deponent obtained from this court a decree of *pro confesso* and order of reference to a master against the said Alton and his wife, which decree was signed October second, eighteen hundred and sixty-nine.

The master's report was duly made and filed, and a final decree in the cause was signed October twenty-fifth, eighteen hundred and sixty-nine.

The execution not being forwarded in due time, deponent, on inquiry, was informed by the said clerk that S. H. Baldwin, esq., solicitor, had put in an appearance for said Alton, 20 and stayed the issuing of the said execution until December twenty-fifth, eighteen hundred and sixty-nine.

About December thirtieth, eighteen hundred and sixty-nine, deponent received said execution and placed it in the hands of the sheriff of Essex county, who appointed March fourth, eighteen hundred and seventy, at two P. M., as the day of sale.

That deponent informed said John H. Meeker, solicitor for said insurance company, several times of the day of sale, who stated that he would be present, and also so informed 30 the said insurance company, on the day of sale, after waiting at the place of sale from two o'clock P. M., the appointed time, until three and a half P. M. for the defendants to appear; the deponent instructed the said sheriff to sell, telling him in substance, that the matter had been delayed very much already; the sheriff proceeded to sell, the deponent starting it at five hundred dollars, and other bids running it up to four thousand dollars; the deponent bid four thousand and fifty dollars, and bought the property for that sum; the next day Alton came to deponent, and stating that he had not 40 been notified of the day of sale, or he would have been present, deponent told him that the time and place of the

sale, &c., had been regularly advertised and posted, and that he knew enough to obtain a lawyer to delay the issuing of execution for two months, yet if he, Alton, would now pay up both accounts, as he had once agreed to do, and pay deponent a fee for his trouble in the matter, he could have the property; and, furthermore, that deponent would give him a week to do it in; that deponent did wait for a week, and to be as accommodating as possible, and give Alton abundant time, waited until March seventeenth, eighteen hundred and seventy, when deponent was served with a rule 10 to show cause, &c.; that deponent did not at any time ask the said Alton to make him, deponent, an offer for the repurchase of the property, but simply and only told and said as above stated.

Deponent further saith—that he has no recollection of having any conversation or even seeing said Alton after the first part of July, eighteen hundred and sixty nine, and believes Alton to be mistaken in his statement; that he, Alton, had a conversation with deponent August tenth, eighteen hundred and sixty-nine, relative to the bankruptcy 20 of said complainant, and for a further reason why deponent believes Alton mistaken, is the fact that he, deponent, had no knowledge of said bankruptcy, or that it was even apprehended until September, eighteen hundred and sixty-nine, when he was informed of the same by W. B. Mitchell aforesaid, of Philadelphia.

D. A. RYERSON.

Sworn and subscribed before me, this thirtieth day of March, eighteen hundred and seventy.

JOHN P. JACKSON, M. C. 30

New Jersey, Essex county, ss.—Andrew Teed, being duly sworn, deposes and says—that he is the sheriff of the county of Essex, and has been such for more than a year last past; that as such sheriff he received an execution issuing out of the above court, in the above cause, directing him in the usual manner to make sale according to law, of the lands and premises therein described; that deponent caused the said property to be advertised in the "Newark Daily Adver-

tiser," and the "New Jersey Frei-Zeitung," two newspapers of large circulation in the city of Newark, in said county; that the advertisements were made in the usual and regular manner, and were commenced in the first week in February, eighteen hundred and seventy, and continued thus once a week until the day of sale, *viz.* March fourth, eighteen hundred and seventy; that the ordinary and usual notices were also put up in five public places throughout the city: one being put up on the bulletin board in the sheriff's office
10 at Newark; that the said notices were put up on the third day of January, eighteen hundred and seventy; that all the proceedings by deponent were done in the usual manner in such cases, and all the requirements of the law complied with; that on the day of sale, *viz.* March fourth, eighteen hundred and seventy, the sale did not take place until about three and a half o'clock P. M., the solicitor of complainant, D. A. Ryerson, waiting at my office from about the ordinary time of sale, two and a half P. M., until after the sale; that
20 prior to the sale deponent suggested to said Ryerson his wish to adjourn said sale, on account of the absence of said Alton, but said Ryerson declined to do so, stating that he had waited long enough in the matter now; the sale was commenced, and after various bids the property was sold to said Ryerson for the sum of four thousand and fifty dollars; that said Ryerson paid deponent the per centage required, *viz.* eight hundred and ten dollars, which sum is now in the hands of deponent.

ANDREW TEED, *Sheriff.*

Sworn and subscribed, before me, this twenty-sixth day of
30 March, eighteen hundred and seventy, at Newark, New Jersey.

G. D. G. MOORE, *M. C.*

City and county of Philadelphia, state of Pennsylvania,
ss.—Samuel T. Freemaun, being duly sworn, on oath saith—that he is a resident in said city, county, and state; that he is the assignee of John Smith, the above named defendant, against whom an adjudication in bankruptcy was made by the District Court of the United States for the eastern dis-

trict of Pennsylvania, on the twenty-eighth day of July, eighteen hundred and sixty-nine; that on the sale of the property and foreclosure of the mortgage for which said suit was brought, that he received the amount in full which was decreed in said cause as due to said complainant on the said mortgage, which amount was paid to me through my attorney, by D. A. Ryerson, solicitor of said complainant, which amount I received and ratified, and confirmed all the proceedings in said cause as the assignee in bankruptcy of said complainant. 10

SAM'L T. FREEMAN,
Assignee of John Smith.

Sworn and subscribed, before me, this twenty-eighth day of March, A. D. eighteen hundred and seventy.

[L. s.]

CHAS. H. HART, *Notary Public.*

State of Pennsylvania, county of Philadelphia, ss.—I, Wm. K. Hopkins, Prothonotary of the District Court of said county, do certify that Charles H. Hart, before whom the annexed affidavit was made, was at the time of so doing a Notary Public of the Commonwealth of Pennsylvania, in 20 the city of Philadelphia, duly commissioned and qualified to administer oaths and affirmations, and to take acknowledgments, &c., and to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere, and that his signature thereto is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this twenty-

[L. s.] eighth day of March, A. D. eighteen hundred and seventy.

W. K. HOPKINS, *Prothonotary.* 30

State of Pennsylvania, city and county of Philadelphia, ss.—Walter B. Mitchell, being duly sworn, on his oath saith—That he is a conselor-at-law, residing at said city of Philadelphia, and in the practice of his profession at said city; that he was the counsel of said complainant in the above suit, and that as such counsel he forwarded for collection the mortgage and bond, for the foreclosure of which said suit

was brought, to D. A. Ryerson, of Newark, N. J.; that deponent further saith that he forwarded said bond and mortgage, and also an account of said Smith against said Alton to the said Ryerson in the month of May, eighteen hundred and sixty-nine; and further deponent saith, that he knows of his own personal knowledge that said complainant, John Smith, departed this life on the eighth day of November, eighteen hundred and sixty-nine, at the city of Philadelphia aforesaid; and further he saith that the John Smith
 10 mentioned and described in the annexed certificate from the registration department of said city, is the identical John Smith who was the complainant in the above cause.

WALTER B. MITCHELL.

Sworn and subscribed, before me, this twenty-eighth day of March, eighteen hundred and seventy.

B. O. FLETCHER,

Prothonotary District Court.

Sir:—Take notice, that the within are true copies of the affidavits to be used at the hearing of the rule to show cause,
 20 granted on petition in above cause, March sixteenth, eighteen hundred and seventy, and the said petition, a copy of which is annexed, will also be used at said hearing as an affidavit.

Respectfully

S. H. BALDWIN,

Solicitor, &c.

To STONE & JACKSON, or whom it may concern.

REGISTRATION DEPARTMENT, HEALTH OFFICE,

S. W. CORNER OF SIXTH AND SANSOM STREETS,

PHILADELPHIA, Penna., March 28th, 1870.

30 *To all whom it may concern:*

This is to certify, that the following is a correct copy of the certificate of the decease of John Smith filed in this department, as directed by the state laws:

1. Name of deceased—John Smith,
2. Color—White,
3. Sex—Male,

4. Age—Thirty-seven years.
5. Married or single—Married.
6. Date of death—November eighth, eighteen hundred and sixty-nine.
7. Cause of death—Suicide by hanging.

WM. TAYLOR, M. D.,
Coroner.

RESIDENCE.

8. Occupation—Store.
9. Place of birth—Ireland. 10
10. When a minor— } Name of father—
 } Name of mother—
11. Ward—Seventh.
12. Street and number—No. 240 So. Eighth street.
13. Date of burial—November eleventh, eighteen hundred and sixty-nine.
14. Place of burial—Cathedral Cemetery.

WM. BURK,
Undertaker.

Residence—925 Christian street.

For the health officer,

GEO. E. CHAMBERS,
Registrar.

[L. s.]

20

Petition.

[Filed May 18, 1870.]

John Smith and David A. Ryerson hereby appeal from the whole and every part of the interlocutory decree or order, made in this court on the twenty-fifth day of April, eighteen hundred and seventy, ordering that the sale made in the above cause be set aside, the final decree opened, and the defendant permitted to file an answer to the original bill, to the Court of Errors and Appeals. 30

Dated the twenty-fifth day of April, A. D. eighteen hundred and seventy.

STONE & JACKSON,
Solicitors for and of counsel with David A. Ryerson.

I conceive that there is good cause of appeal in the within stated cause.

I. HENRY STONE,
Of counsel with D. A. Ryerson.

To the Honorable the Court of Errors and Appeals :

The humble petition of David A. Ryerson, the appellant in the above cause, respectfully shows, that your petitioner is aggrieved by an interlocutory decree or order, made in the Court of Chancery, by Abraham O. Zabriske, esq., Chancellor 10 state of New Jersey, dated the twenty-fifth day of April, of the eighteen hundred and seventy, in a certain cause depending in said Court of Chancery, wherein said John Smith was complainant, and Thomas Alton was defendant, in this respect, to wit, that said decree ordered that the sale theretofore made in said cause be set aside, the final decree opened, and the defendant permitted to file an answer to the original bill filed in said cause, on the ground that the said order was erroneous and wrong.

Dated April twenty-fifth, eighteen hundred and seventy.

20

STONE & JACKSON,
Solicitors of and of counsel with D. A. Ryerson.

I certify the foregoing to be a true copy from the original filed in my office, July twelfth, eighteen hundred and seventy.

HENRY C. KELSEY, *Clerk.*

New Jersey Court of Errors and Appeals.

Between

JOHN SMITH *et al.*,
complainants

and

THOMAS ALTON, *et al.*,
defendants.

On Bill &c.

Appeal from

Court of

Chancery.

POINTS FOR COMPLAINANTS.

(1) In an open fair sale mere inadequacy of price is not sufficient to set aside the sale.

(2) When a complainant is declared a bankrupt *pendente lite*, it is proper to then make his assignee a party to the suit; but unless the assignee himself objects, the continuing of the suit in the complainant's name, is no ground for setting aside the decree.

(3) When complainant dies after final decree and before execution issued, no ~~review~~^{cor.} is necessary: even if a sale under the execution should thereby be set aside, the decree itself would remain good.

(4) A judicial sale will not be set aside nor decree opened on the ground of surprise where a party has had an opportunity of making his defence and has neglected doing so.

(5) Application to open decrees should be listened to with great caution, and should not be granted when the result must be injurious to the complainant.

STONE & JACKSON,
of Counsel with complainants



