

New Jersey Court of Errors & Appeals.

FANNIE E. MOUNT,

v.

THE PRESIDENT AND DIRECTORS OF THE
MANHATTAN COMPANY and WILLIAM
S. MOUNT.

On three Ap-
peals.

BRIEF OF BEDLE, MUIRHEID & MCGEE FOR THE PRES-
IDENT AND DIRECTORS OF THE MANHATTAN COM-
PANY.

The facts of this case are so well stated in the opinion of the Vice-Chancellor, case, page 57, that it is unnecessary to recite them here.

As will be seen by reference to the pleadings, the original bill made a claim on behalf of Mrs. Mount as administratrix of Andrew Mount, and prayed relief to her in that capacity. To that bill we filed a plea on behalf of the bank, in which we pleaded Andrew Mount's bankruptcy, and alleged that whatever rights he possessed, if any in the claim in controversy, passed by the bankruptcy to his assignee in bankruptcy, and that she had no equity therein.

Case, pp. 2-17.

This plea after argument, was sustained by the Vice-Chancellor.

Then Mrs. Mount obtained leave to amend her bill, and did so by setting up the bankruptcy and its various proceedings, and alleged that under an order of the bankrupt court the assignee in bankruptcy sold the lands of the bankrupt at auction; that William S. Mount, one of the defendants, bought them and took a conveyance from the assignee of said lands and all rights and equities of redemption of said assignee and said bankrupt therein, and of all the claims, rights, estates, and interests of every nature of the said assignee, as well as of said bankrupt in and to said lands, and that he conveyed the same to Mrs. Mount.

The amended bill then charged that by reason thereof Mrs. Mount stood in the same position as the assignee had theretofore stood, and prayed in her individual right for an accounting and payment to her of any balance found due.

The other defendant, William S. Mount, filed an answer in the nature of a cross bill, making the same case as Mrs. Mount, excepting that he alleged himself to be the purchaser from the assignee in bankruptcy, omitted all reference to any deed to her, and prayed for himself the same relief that Mrs. Mount had prayed for herself.

Case, pp. 21-33.

To this new case the bank obtained leave to file three pleas.

Case, pp. 53 and 54.

And under that leave did file the three pleas now in question.

Case, pp. 34-36.

Three similar pleas *mutatis mutandis* were filed by the bank to Wm. S. Mount cross answer under the same leave.

Case, pp. 53 and 54.

Both the complainant, and William S. Mount moved to strike out the pleas filed to their respective pleadings.

The Vice-Chancellor sustained the first plea to the bill, and struck out the other two, on the ground that the first plea being good, the other two were unnecessary.

He did not consider or rule upon the pleas filed to W. S. Mount's answer, but under our motion, struck out the whole cross part of his answer.

All parties appealed.

The complainants from the order sustaining our first plea.

W. S. Mount from the order striking out his cross answer.

The bank from the order striking out their second and third pleas.

They did this as a measure of safety. They regarded both pleas as good, and in case this Court should overrule the Court of Chancery on the first plea, they wanted the benefit of these two pleas, each of which they conceived to be a perfect answer to the bill of complaint.

This being the status we respectfully contend that the Vice-Chancellor was right in sustaining our first plea to the bill, and in striking out William S. Mount's cross-answer, and wrong in striking out our second and third pleas to the bill.

I.

The Chancellor was right in sustaining the first plea.

It alleges :

That in the life time of Andrew Mount, and before the filing of the petition in bankruptcy.

And on May 28, 1875, the bank filed its bill to foreclose.

That Andrew Mount, William S. Mount and many others, naming them and covering all interested parties were made defendants.

It sets out the substance of the foreclosure bill, and shows that all necessary allegations were contained therein.

It alleges amendments bringing in afterward parties who had subsequently acquired interests, and among them Mrs. Mount, then Fannie E. Collis.

It alleges each step in the proceeding in detail, and shows that all defendants were brought into Court and that all proper steps were taken to final decree.

It alleges appearances by Andrew Mount, William S. Mount and Fannie E. Mount the complainant, and answers by Andrew Mount and William S. Mount.

It shows reference to a master and proofs and report.

That the amount found to be due was \$80,241.26, with interest from July 21, 1876, besides costs and counsel fee.

It shows decree for foreclosure and sale to make that amount, and provision for a decree for deficiency.

It shows the issue of a fieri facias to the Sheriff of Monmouth.

Due advertisement and sale by that officer.

Purchase by the bank for \$10,000—and finally conveyance to them for that consideration. It avers that the petition in bankruptcy was filed March 14th, 1876, and that all proceedings thereunder were subsequent to that date. That all the parties now before the Court were then before the Court, and had

due notice, and that the alleged conveyances by the assignee were all subsequent to the commencement of said suit.

It avers that by said foreclosure proceedings and sale and conveyance, all title to said lands passed from Andrew Mount, and all persons interested therein, to the bank, and that Andrew Mount and his assignee and all claiming under either, were thereby

(1) foreclosed of all equity of redemption in said lands, and

(2) That the deeds by which complainant claims, were subsequent and subject thereto, and passed no title as against said decree, execution, sale and conveyance, and

(3) That by reason thereof, her right, if she ever had any, was cut off.

This made a case.

ONE. The mortgage in question was in the New York form, and differed from our usual New Jersey mortgages only in that it provided that in case of default it should be lawful for the mortgagees to enter and sell without process of law, or the intervention of a Court.

But this clause was not intended to abridge the mortgagee's right to enforce his security by foreclosure in a court of equity and sale under execution. It was meant to and by law did enlarge, not diminish his remedy.

It created no new trust. It laid no new duty upon him. It was not compulsory. It gave him the right to enforce his mortgage by seizure and sale, if indeed our New Jersey law would permit him so to

do, but it did not divest him of his ancient right to enforce it by suit. There was then nothing in the mortgage itself which created any trust greater than every mortgage creates, namely, that after the mortgage debt is satisfied, the proceeds of the sale in foreclosure shall be returned by the sheriff to the mortgagor or paid into court for his benefit.

Two. But it is contended that some new trust was created by the letter of the president of the bank of January 2, 1874, case p. 11.

That letter acknowledged the receipt of sundry mortgages, this among the number, stated that they were held as collateral security for the note in question and renewals thereof, and that upon realizing the amount due with interest and all expenses the balance was to be returned to Andrew Mount or his order.

We submit—

1. That this letter created no trust not already expressed in the mortgage.
2. That the word realize used there meant the selling price realized at the judicial foreclosure sale.
3. That it did not change the status of the parties as to the method of ascertaining the proceeds of sales.
4. And, finally, that whatever may be its force, it did not bind the bank because it was not executed by the corporation, nor is any authority shown or alleged, in the president to execute a declaration of trust for the bank, or to bind the bank by so doing.

The only effect which this letter could be held to have was that it was an admission by the president of the bank, that the real indebtedness was \$75,000 and interest, and not \$275,000, as stated in the mortgage. Beyond that it did not change the status in any respect whatever.

THREE. We further submit that the selling price realized at the foreclosure sale, namely \$10,000, was as to all the parties to said suit, and all claiming under any of them, the amount realized from that mortgage, and there is nothing disclosed in any paper in the case, which gives the defendants any right to go further and inquire what was realized from it afterwards, by any subsequent sale, by the purchaser at that sale.

If the selling price was grossly inadequate, it could have been questioned in that suit, if questioned in time, but in any collateral suit it is a thing at rest, it is not subject to attack.

It does not in this suit admit of argument. All parties to the suit are bound by the decree, and by the proceedings taken thereunder.

Snyder vs. Blair, 6 Stew. 208, and cases cited.

Dinsmore vs. Wescott, 10 C. E. G., 302.

Hewitt vs. Montclair Ry. Co., 10 C. E. G., 100.

McGee vs. Smith, 1 C. E. G., 462.

It appearing then that the mortgage in question has been realized upon, that the amount realized was greatly less than the debt owing, and it not appearing that anything had been realized from anything else, and the attack being made

only as to this particular mortgage, the plea is a complete answer to the bill, and, if true in fact, entitles the bank to a decree of dismissal of the bill with costs.

FOUR. It was contended before the Vice-Chancellor that the assignee in bankruptcy, not being made a party to the foreclosure, was not cut off thereby.

It will be remembered that the petition in bankruptcy was filed after the beginning of the foreclosure suit.

But the Supreme Court of the United States, which is final authority on all questions arising under the bankrupt act, has held :

1. That where bankruptcy arises after suit for foreclosure brought in a State Court, the assignee in bankruptcy stands as any other purchaser would.
2. That if the assignee desires to be heard, he must himself apply to the State Court to be admitted as a party defendant.
3. That a court cannot take judicial notice of proceedings in another court and that it is its duty to proceed with the parties before it, until by proper pleadings it is informed of the changed relation of parties to the subject matter of the suit.
4. That the jurisdiction conferred upon the Federal Courts for the benefit of the assignee in bankruptcy is concurrent with and does not divest the State Courts, in suits in which they had cognizance.
5. That in such a case, the decree of the state court would be binding and conclusive against the assignee, the same as it would against any other

person on whom the title had fallen since the suit was commenced.

Eyster v. Gaff et al, 91 U. S. 521, and cases there cited.

This court has held the same doctrine.

Davis v. Sullivan, 6 Stew. 569.

And therein affirmed the Court of Chancery which had previously held it.

Esterbrook Co. v. Ahern, 3 Stew. 3.

These cases are conclusive on this point and seem to me to leave no room for further discussion of the question.

There was therefore no error in the decree of the court below, in sustaining the first plea and I submit that the complainant's appeal should be dismissed with costs and the record remitted to be proceeded with accordingly.

II.

The cross-answer of William S. Mount was properly stricken out.

1. The cross bill makes a new case not germane to the case made in the bill.

a. It claims that the defendant, Wm. S. Mount, and not the complainant, is entitled to the accounting and payment.

b. It grounds its right to relief on the assertion that at the foreclosure sale somebody

on behalf of the bank induced W. S. Mount not to bid, on the promise that if he refrained from so doing the bank would hold the property in trust for him, and were, by reason of that promise, bound to account and pay to him.

c. It seeks to litigate matters foreign to the bill of complaint between the answering defendant and the bank, which is also a defendant.

It is therefore irregular and cannot be maintained.

Carpenter v. Gray, 10 Stewart, 389.

Krueger v. Ferry, 14 Stew. 432.

BEASLEY, C. J., sitting as Master in } Jackson v. Grant, 3 C. E. G. 145.

2. The cross bill does not disclose any equity. The gravamen of the cross bill is the alleged promise made at the time of the foreclosure sale. This, if true, presents a case for an action at law, in assumpsit or covenant and not a ground for a suit in equity.

3. It appears on the face of the cross bill that the bank acquired title at the foreclosure sale and took possession thereunder, that they did it under execution in said foreclosure issuing out of the Court of Chancery, by virtue of said mortgage.

This being so they were under the decision of the Court of Chancery in this cause, and by all the cases in equity, bound by the foreclosure decree, and their action in this case barred.

For all these reasons their cross bill can not be maintained.

4. The proper way to dispose of it is by motion to strike out.

Carpenter v. Gray, 10 Stew. 389.

Krueger v. Ferry, 14 Stew. 432.

There was therefore no error in the decree dismissing the cross bill and William S. Mount's appeal should be dismissed with costs.

III.

The second and third pleas of the bank to the complainant's bill, ought not to have been stricken out.

1. They were filed by leave of the Court.

Case, p. 53.

2. They each constituted a complete defence.

See on this head, page 12 of this brief.

3. They were necessary to the Bank's defence, in case the decree sustaining the first plea should be overruled.

4. Being good pleas, it was illegal for the Vice-Chancellor to strike them out. If the allegations therein made were true, the cause was at an end, and it was not competent for the Court to say that they were unnecessary, because something else was, in his opinion, sufficient to determine it.

It was not the case of a final decree, founded on one of several equities.

In that case a reversal would open the whole case,

and permit all questions to be considered; whereas here, the defence itself was being stricken out, and that too, without consideration on the part of the Court.

Meeker v. Marsh, Sax. 198.

McEwan vs. Broadhead, 3 Stock. 129.

5. The motion to strike out the plea was not correct practice. The defendants were entitled to have them set down for argument, and to have a decree on each.

Corlies vs. Corlies Exec., 8 C. E. G. 197.

The pleas each constituted a complete defence.

The second plea constituted a complete defence.

It averred that the alleged deed from the assignee in bankruptcy to William S. Mount did not by its terms convey any title to the lands or claims set up in the amended bill, and that the deed by W. S. Mount to the complainant did not. This was a good plea.

The bill alleged a deed from the assignee to W. S. Mount of the lands and all rights and equities of redemption of the assignee and bankrupt therein, and of all the claims, rights, estates and interests of every nature of the assignee, as well as of the bankrupt to said lands and a conveyance thereof by said W. S. Mount to the complainant, and that by virtue thereof the complainant became vested with the same interest, equities, rights of redemption, claims, choses in action and rights in action, property and rights of property as became at any time vested in the assignee under the bankruptcy proceedings.

Case, pp. 19 and 20.

Now, no matter if all the rest of the bill were true and potential, if this one fact were untrue the complainant had no case.

But the bank could not demur to this allegation for that would be an admission of its truth, and denial only of its effect.

1 *Barbour's, Chy. Prac., Sec. Ed. p. 105.*

The plea puts in issue this one jurisdictional fact.

It was the proper and the only safe way to raise this question of fact.

It says, the deed did not by its terms convey any title to the equity in question in the suit.

It reduces the defence to a single point and from thence creates a bar to the suit.

This is the legitimate office of a plea, and is proper practice.

1 *Bar. Chy. Prac., 2d Ed. p. 114.*

It is a negative plea, and is strictly within the rules.

1 *Bar. Chy. Prac., 2d Ed. p. 114.*

If true it ends the case.

The Vice-Chancellor, therefore, had no power to strike it out. It was his duty to hear and determine it, and any other course was error.

The third plea constituted a complete defence.

The bill of complaint was filed 24 Oct., 1885.

Case, p. 17.

It alleges that the petition in bankruptcy was filed by Andrew Mount 14 March, 1876, that is, upwards

of nine years before the suit was begun. Case, p. 18. That the deed from the assignee in bankruptcy to William S. Mount was made about 20th December, 1878, that is, nearly seven years before the suit was begun.

Case, p. 19.

The plea, after reciting the bankruptcy, alleges that the bankruptcy acts in force during the whole time of all the transactions in question, provided that *no suit at law or in equity should in any case be maintainable by or against an assignee in bankruptcy, or by or against any person claiming an adverse interest, touching the property and rights of property of said bankrupt transferable to or vested in such assignee in any court whatsoever unless the same should be brought within two years from the time the cause of action accrued for or against such assignee.*

It recited the various acts, alleged that they were not in this respect repealed or in any wise abrogated or annulled, and that the claim in question was within its provision. It recited the various proceedings and dates, made sufficient averments as to what constituted the time when the cause of action arose, and that the cause of action in question was covered thereby and was barred by said statutes before the beginning of the suit.

This was a good plea and if true was a complete bar to the suit.

The court will observe that the limitation of two years applies to suits by two classes of persons.

1. Suits by or against an assignee in bankruptcy.

2. Suits by or against any person claiming an adverse interest touching property and rights of property of the bankrupt.

Also that the latter class of suits embraces property and rights of property of two classes.

1. Property transferable to the assignee.

2. Property vested in the assignee.

This suit comes under the second class of persons, namely, those claiming an adverse interest touching rights of property, and refers to rights of property covered by both heads as to kind.

The claim in question was transferable to the assignee, else the complainant has no case. It was at one time vested in him, else she has no case, for she claims under him.

Notice also the sequence of events.

The petition in bankruptcy was filed March 14, 1876.

Case, p. 18.

The assignee was appointed May 31, 1876.

Case, p. 18.

The deed by the sheriff to the bank was made December 12, 1879.

Case, p. 41.

The alleged deed by the bank to the Navesink Park Company was made February 9, 1880.

Case, p. 12.

The deed by the assignee to William S. Mount was made December 20, 1878.

Case, p. 19.

This suit was commenced October 24, 1885.

Case, p. 17.

Now the cause of action arose either when the petition in bankruptcy was filed, or when the assignee was appointed, or when the deed by the sheriff was given to the bank.

But the first and second of these dates were each more than nine years, and the third more than five years before the commencement of this suit.

The statute had therefore run against this action, whichever time shall be determined to be the controlling date.

The following authorities are in point.

The time begins to run when the assignee is appointed.

Bank v. Sherman, 101 U. S. 405.

The assignment relates back to the filing of the petition, and the title of the assignee to all the property and effects of the bankrupt vests from and as of that date.

Bank v. Sherman, 101 U. S. 405.

The two years limitation runs against purchasers from an assignee, seeking to maintain by suit their title to property purchased of him.

Gifford v. Helms, 98 U. S. 248.

The assignee became vested with all the rights of the bankrupt as of and from the date of the filing of the petition, which was March 14, 1876, and actually held them from his appointment, which was May 31, 1876.

The bank claimed adversely from at least the date of the sheriff's deed, which was December 12, 1879, so that from at least December 12, 1879, the cause of action, if any, existed.

Gifford vs. Helms, 98 U. S. 253.

The act applies to suits to recover debt as well as to a controversy concerning property.

Jenkins vs. International Bank, 106 U. S. 571.

It applies to all judicial contests touching the property or rights of property of the bankrupt, transferable to or vested in the assignee, when the interests are adverse and have so existed for more than two years from the time the cause of action accrued.

Bailey vs. Glover, 21 Wall. 346.

Harvey, Assg. vs. Gage, 31 Fed. R. 275.

An assignee in bankruptcy held notes secured by a mortgage given by the bankrupt. Third parties held notes secured by the same mortgage.

The assignee foreclosed in an equity court and sold under decree. By leave of the Court he bought at the sale.

He paid their shares to everybody but the defendant, one of the third parties. More than two years after the foreclosure sale the defendant instituted suit to avoid the foreclosure.

The assignee filed a bill to quiet title. The defendant filed a cross bill praying that the sale might be set aside.

Held—That her suit was barred by this statute.

(E. D. Missouri, 1882.) Phelan v. O'Brien,
12 Fed. R. 428.

Also, that the same doctrine would apply if the purchaser had been a stranger.

Phelan v. O'Brien, 12 Fed. R. 430.

This case was affirmed by the Circuit Court on appeal.

Phelan v. O'Brien, 13 Fed. R. 656.

These cases establish beyond controversy the contention of the plea, namely, that the complainant's right of action, if she ever had any, on the claims in question, was barred before the beginning of the suit, and that by reason thereof she cannot maintain the suit.

These two pleas then, being good, and each being if true, a complete defence to the suit, the bank was entitled to have them sustained and to have the benefit of them, and it was error to strike either of them out.

We, therefore, respectfully contend that the decree striking out the second and third pleas of the bank to the complainants bill should be reversed and the record remitted to be proceeded with accordingly.

And finally we repeat that the decree sustaining the first plea of the bank, and the decree striking out William S. Mount's cross-answer should both be affirmed and their appeals dismissed with costs, and that the decree striking out the second and third pleas of the bank to the amended bill of complaint should be reversed with costs and the record remitted to be proceeded with accordingly.

BEDLE, MUIRHEID & McGEE,

Of Counsel with The Pres. & Directors
of the Manhattan Co.

New Jersey Court of Errors & Appeals.

MOUNT
VS.
MANHATTAN Co. }

SUPPLEMENTAL BRIEF FOR THE MANHATTAN CO.

Gillette, assignee in bankruptcy, seven years after his appointment, obtained an order to sell lands of the bankrupt, and thereunder sold and conveyed the same to Wisner.

Brown claimed under tax titles obtained before the bankruptcy and a deed from the bankrupt after the bankruptcy.

Wisner brought ejectment. Brown pleaded several pleas, and among others section 5057 U. S. Rev. Statutes.

The U. S. Supreme Court, on writ of error to the Supreme Court of Michigan,

Held, as follows :

" Now the assignee in the present case received
" his appointment on the 15th of February, 1873,
" and the property in question was at that time ad-
" versely held by the defendants under tax sales
" made by the auditor general of the state of Mich-
" igan, and continued to be so held until the com-
" mencement of this suit.

" It is clear therefore that from and after the fif-
" teenth of February, 1875, the assignee himself was
" precluded by the statute from bringing an action
" to recover the lands ; and he could not, after that
" time, SELLING THEM TO A THIRD PERSON, ENABLE THE
" LATTER TO MAINTAIN AN ACTION THEREFOR. *The sale*
" *made by the assignee in April, 1880, could have no*
" *such effect.*

Wisner vs. Brown, 122 U. S. 214.

MA

U

Be

V

T

ass

mo

ed

for

ba

NEW JERSEY
Court of Errors and Appeals.

Between

WILLIAM S. MOUNT, Appellant,

and

THE PRESIDENT AND DIRECTORS OF
THE MANHATTAN COMPANY,

Respondents.

On Bill, &c.

POINTS OF WILLIAM S. MOUNT, APPELLANT.

I.

The Manhattan Co., by its letter of January 2, 1874, assumed a special trust to account upon "*realizing*" on the mortgage, for any balance in its hands after paying indebtedness to it,

Colebrook on Col. Sec., § 183;

Jones on Pledges, § 659;

Slee v. Manhattan Co., 1 Paige Ch. 48.

II.

The assignments of the mortgage being confessedly only for collateral security, a special trust to account for the balance is implied by law.

4 *Kent's Com.* (2d Edition), p. 305;

Hill on Trustees, pp. 65, 66, 91, 96, 103, 144, 173;

Lorrillard v. Silver, 35 Barb. 32;

Wilkins v. Wright, 6 McLean 340.

Warren v. Emerson, 1 Curtis C. C. (Me.), 239;

Blennerhasset v. Day, 2 Ball & B. 133.

III.

The Manhattan Co., by its representations and acts at time of the sale, is *estopped* from denying the existence of the special trust.

Bigelow on Estoppel (4th Ed.), pp. 578, 655, 656, 657, 661;

Den v. Baldwin, 1 Zab. 395, 403;

Martin v. Richter, 2 Stock. 510, 526;

Morris & Essex R. R. v. Green, 2 McCart. 470;

Morris Canal Co. v. Lewis, 1 Beas. 323;

Diercks v. Kennedy, 1 C. E. G. 210;

Onderdonk v. Gray, 4 C. E. G. 65;

Kuhl v. Jersey City, 8 C. E. G. 84;

Brinkerhoff v. Brinkerhoff, 8 C. E. G. 477;

Mutual Life Insurance Co. v. Norris, 4 Stew. 583;

Colebrook on Col. Sec., p. 413, § 312;

IV.

This special trust was not cut off by foreclosure of the assigned mortgage.

Colebrook on Col. Sec., p. 238, § 183;

Jones on Pledges, § 659;

Jones on Mortgages, § 1931-1934;

Brown, Admr. v. Tyler, 8 Gray 135;

Slee v. Manhattan Co., 1 Paige Ch. 52, 79;

Rue v. Dillingham, 73 Me. 59;

Davoue v. Fanning, 2 Johns. Ch. *268;

Hollbridge v. Gillespie, 2 Johns. Ch. *30;

Moses v. Murgatroyd, 1 Johns. Ch. *119;

Bergen v. Bennett, 1 Cames Cas. *1;

Monro v. Allaire, 2 Cames Cas. *183;

Hall v. Henderson, 84 Ill. 611;

Hoyt v. Martense, 16 N. Y. 231;

Fulton v. Whitney, 66 N. Y. 548;

Bennett v. Austin, 81 N. Y. 308;

Dalton v. Smith, 86 N. Y. 176.

V.

Andrew Mount and William S. Mount, as beneficiaries under the declaration of trust contained in the letter of the President of the Bank, and as claimants under the resulting trust implied by law, are not cut off from their rights by the foreclosure decree because such trust was not set forth in the foreclosure bill and they were not made defendants to the foreclosure suit in that capacity.

Wade v. Miller, 3 Vr. 296.

VI.

It is a rule of law that a trustee shall not, by purchase of his trust property at a sale, be permitted to make profit to himself at the expense of his *cestui que trust*.

Whithcote v. Lawrence, 3 Ves. 740 ;

Michoud v. Girod, 4 How. 503 ;

Wormley v. Wormley, 8 Wheat. 421 ;

Sloo v. Law, 3 Blatch. 459 ;

Staats v. Bergen, 2 C. E. G. 297 ;

Creveling v. Fritts, 7 Stew. 134 ;

Marshall v. Carson, 11 Stew. 250.

VII.

Wm. S. Mount, by purchase and conveyance from the assignee in bankruptcy, became the owner of the land and of the trust attached thereto.

4 Kent Com. (2d Ed.), pp. 303, 304.

VIII.

The averment of the first plea of the Manhattan Co. that the trust did not pass to William S. Mount by the terms of the assignee's deed cannot be set up by plea, but must be presented by answer or demurrer. To deny that we have the trust or the use is to deny that we have the deed.

IX.

The second plea of the Manhattan Co., that the claim of William S. Mount is barred by the U. S. Statute of Limitations contained in the Bankrupt Act, should be set up by demurrer rather than plea, as all the facts on which it is founded are set forth in the bill.

As to what are proper subjects of pleas, see

Story's Eq. Pleadings, §§ 647, 660;

Lube on Pleadings, 341.

X.

The U. S. Statute of Limitations does not apply to such claims.

In Re Fred J. Conant, 5 Blatch. 54;

Stevens v. Hauser, 39 N. Y. 302;

Sedgwick v. Carey, 4 Benedict 562;

Notes to Bump on Bankruptcy (8th Ed.) pp. 544-547;

Price v. Phillips, 3 Robt. 448;

~~*Clark v. Brown*~~ ~~11 Allen 101~~;

" " ~~22 Allen 101~~;

" " ~~11 " 101~~;

Dorley v. Va. F. and Marine Ins. Co., 2 Hughes 482.

XI.

The statute only begins to run from the time the action "accrued," and the cause of action only accrued to William S. Mount when the money was realized by the bank, by sale February 9th, 1880, to the Navesink Park Co. for \$125,000.

Brown Admr. v. Tyler, 8 Gray 535;

Clark v. Clark, 17 How. (U. S.) 315;

Phelps v. MacDonald, 99 U. S. (9 Otto) 298;

Carpenter v. Bank of Rahway, N. J. Sup. Ct., Nov. Term, 1887.

XII.

The matter set up by Wm. S. Mount in his answer by way of cross-bill, was the proper subject of a cross-bill and should not have been stricken out.

Storg Eq. Pleadings, §§ 389-394 ;

Nelson v. Dunn, 15 Ala. 501 ;

Josey and als. v. Rogers & Andulf, 13 Georgia 478 ;

Chandler v. Herrick, 3 Stock. 497 ;

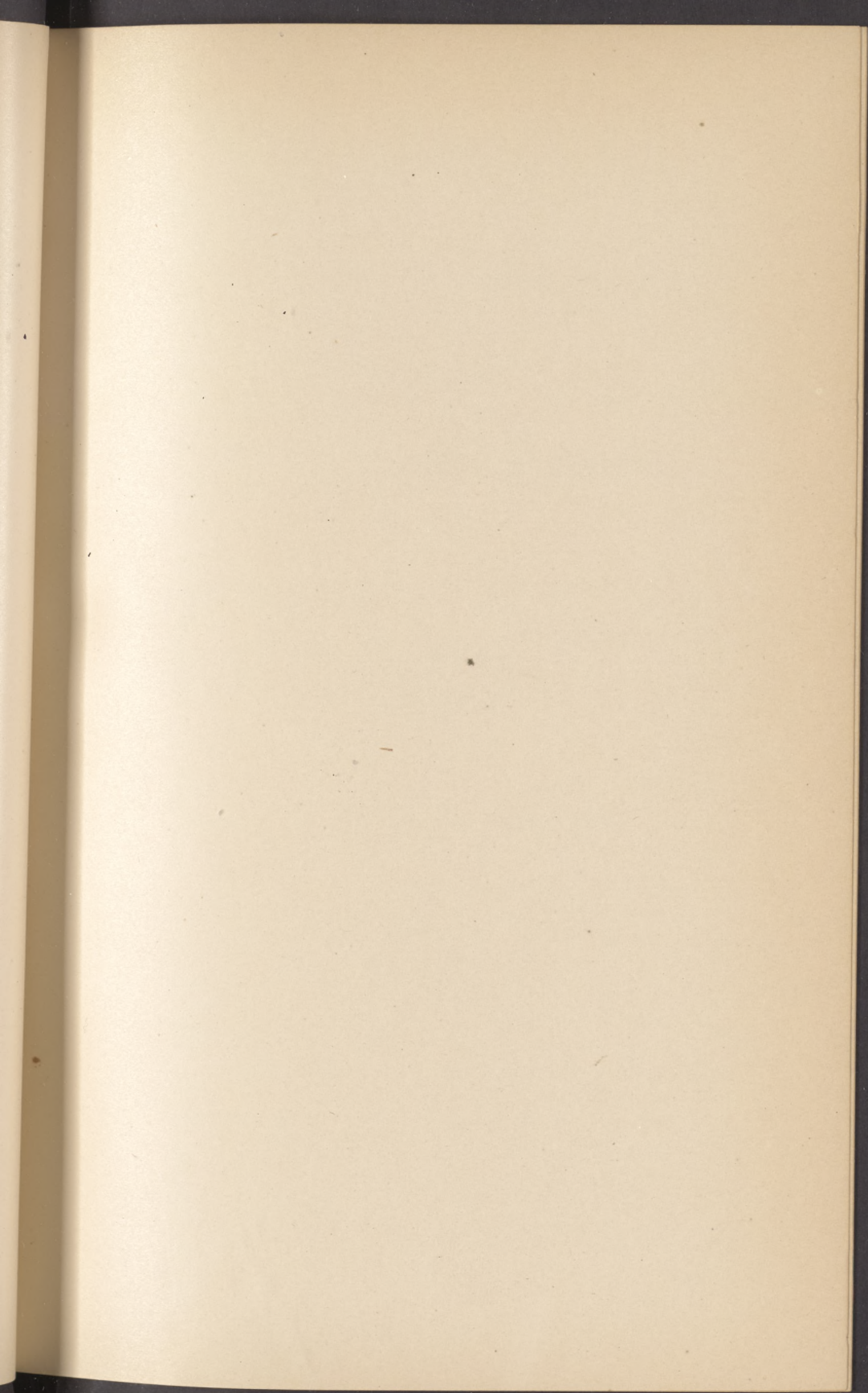
Hoff v. Burd, 2 C. E. G. 201 ;

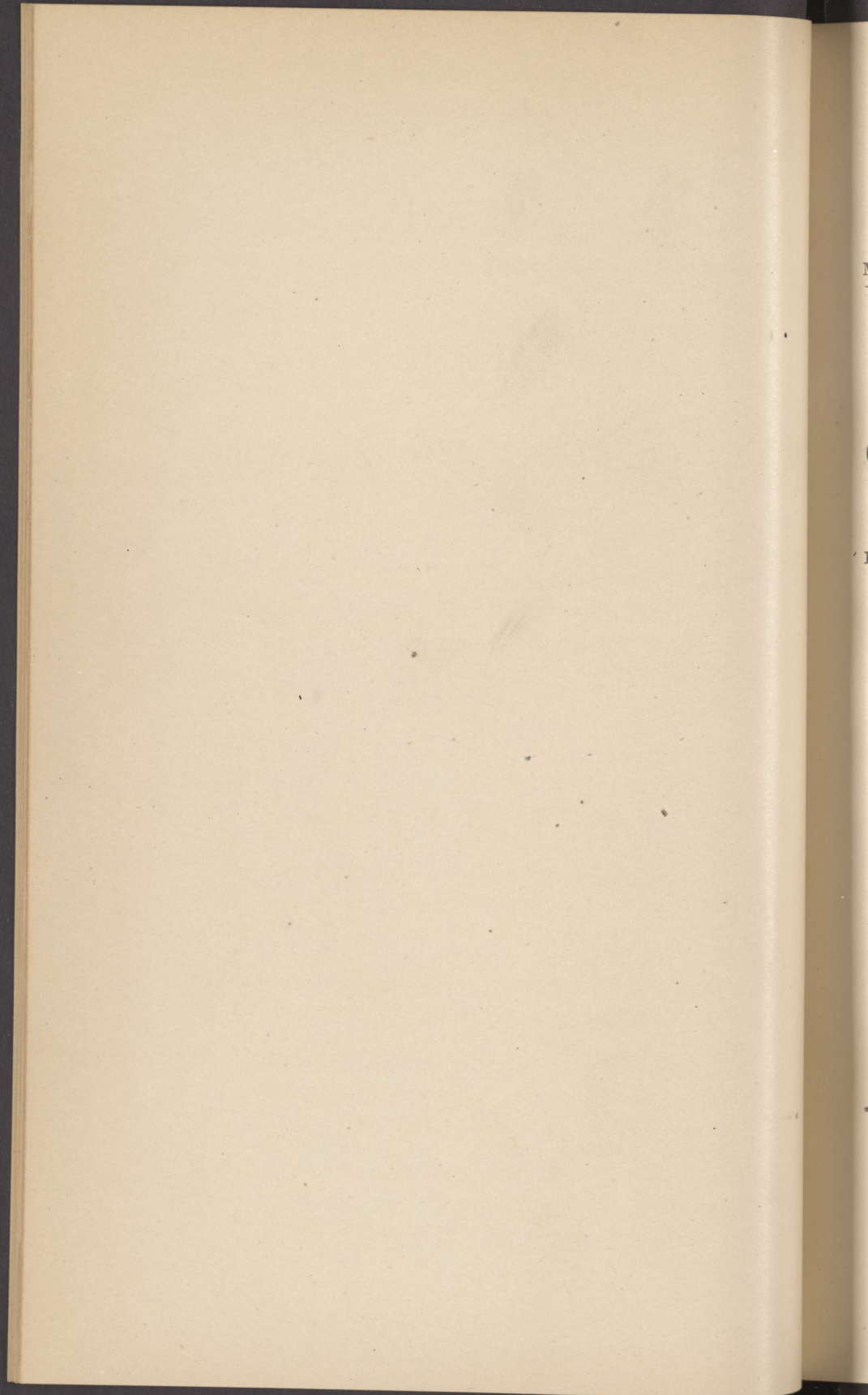
Kirkpatrick v. Corning, 13 Stew. 255 ;

Chester Iron Co. v. Beach, 13 Stew. 63 ;

Beck v. Beck, N. J. Law Journal, Sept., 1887, Vol. X, p. 269.

WILLIAM L. DAYTON,
Counsel for Wm. S. Mount, Appellant.





NEW JERSEY

Court of Errors and Appeals.

Between

WILLIAM S. MOUNT, Appellant,

and

THE PRESIDENT AND DIRECTORS OF
THE MANHATTAN COMPANY,

Respondents.

} On Bill, &c.

POINTS OF WILLIAM S. MOUNT, APPELLANT.

William S. Mount, in his cross-answer, alleges that the Manhattan Bank, in Dec. 1873, discounted the promissory note of Wilmerding & Mounts for \$75,000. Andrew Mount, the senior member of the firm, being a director of the bank at that time, caused four mortgages, previously executed to other parties, upon property of the estimated value of at least \$443,000, to be assigned to the bank to secure it against any loss upon said note. One of these being a mortgage for \$275,000 made by Andrew Mount and William S. Mount upon a large tract of land in Monmouth county. To guard against any misunderstanding, and to secure himself against any possibility of this large amount of property being sacrificed to his loss, Andrew Mount caused a declaration of trust to be written and delivered to him by the

president of the bank, in which he acknowledged the receipt of these mortgages, and declared that the bank held them as collateral security for said note, and that upon realizing the amount due on the note with expenses, the balance was to be returned to Andrew Mount or his order.

Here was a distinct declaration of trust. Neither the bonds nor the mortgages were made directly to the bank, but to other parties and assigned to the bank. The mortgages were in terms given as security for the bonds. The bonds and mortgages were distinct evidences of indebtedness, assigned over to, and expressly in writing received by, the bank in trust to secure the \$75,000 note. In 1879, the bank, under foreclosure proceedings commenced in 1875, and by virtue of a *fi. fa.* issued in 1876, which had lain in the hands of the sheriff for over three years, caused the largest of these mortgaged premises to be sold. Andrew Mount had, in the meantime, become bankrupt and died, and my client, the former part owner of the same premises had, at the assignee's sale, bought in the property and become the legal owner of it and of the equity of redemption in it. At the sale, however, two directors of the bank, acting as its agents, induced my client to refrain from bidding, representing to him that it would only cause unnecessary additional expense in the way of commissions, &c., for him to bid against them, because if they bought the property they would continue to hold it for his benefit, and he could still have the right to redeem it by effecting a sale on his own account or by paying the note, thus recognizing and affirming the trust and its effect by words and acts which not only confirm and enforce the trust character of the written declaration before given, but the acts and words being done and said, for the purpose of influencing the action of my client at the sale, and for the purpose of inducing him not to bid and protect his interests, as he would otherwise have done, *estop* the bank from now denying the trust above set forth, and at the sale confirmed.

Colebrook on Collateral Security, pages 585, 586 ;

Bigelow on Estoppel, 4th Ed., pages 655, 656, 667 ;

Den v. Baldwin, 1 Zab. 395, 403 ;

Hartwell v. Cameron, 2 Stock. 128 ;

Martin v. Richter, 2 Stock. 510, 526 ;
Morris & Essex R. R. Co. v. Green, 2 McCart. 470 ;
Morris Canal Co. v. Lewis, 1 Beas. 323 ;
Diercks v. Kennedy, 1 C. E. G. 210 ;
Kuhl v. Jersey City, 8 C. E. G. 84 ;
Brinkerhoff v. Brinkerhoff, 8 C. E. G. 477 ;

It may be broadly said that when one *sui juris* induces another to contract lawfully with him, or to change his position under circumstances which, at the time, would justify a man of care or prudence in acting as was done, the person inducing such action, and taking and retaining the benefit of it, can neither in whole nor in part repudiate the effect of his conduct.

Bigelow on Estoppel, 4th Ed., p. 661.

Corporations are held responsible under the doctrine of estoppel the same as natural persons.

Colebrook on Col. Sec., p. 413, sec. 312.

Acts and admissions of one of several administrators will amount to estoppel against them all.

Bigelow on Estoppel, p. 578.

The decisions of the Vice-Chancellor now appealed from are based wholly upon the assumption that there was no special trust entered into by the bank; that the assigns of Andrew Mount stand in the same position as if the bond accompanying the mortgages had been the primary indebtedness; as if there had been no declaration of trust, no representation and affirmance of that special trust, and no undertaking or agreement in its prosecution.

The Vice-Chancellor holds that Andrew Mount and the bank occupied simply and solely the relations of mortgagor and mortgagee, and that all the rights and equities of the former were entirely cut off by the foreclosure.

If there was such a special trust as we insist, then the whole argument of the Vice-Chancellor fails, and the whole fabric he has constructed falls completely to the ground. This he virtually himself admits. He says in his opinion

that he is unable to see that any special trust existed other than that of a mortgagee to a mortgagor, and that this was barred by foreclosure.

It is just here, and upon this point, that we respectfully submit the Court below has erred.

The Vice-Chancellor has failed to read between the lines and to see clearly the actual equities of the case. He speaks of this idea of an equitable trust as a fanciful creation and, on the other hand, would seem to hold that the execution of the mortgage to other parties, and the assignment subsequently to the bank of property valued at six times the amount of the note and the special receipt, with its declaration of trust, were all steps taken in the prosecution of this transaction, without any meaning, and without intent or effect upon the construction of the contract; that all these measures had no more effect upon the transaction than if Mr. Andrew Mount had given a bond and mortgage for \$75,000 directly to the Manhattan Company.

It will not answer to say it was simply to show the real amount of indebtedness for which the mortgages were held.

Had this been the sole object, the language would have been inserted in the assignments.

The Vice-Chancellor, possessed of the idea that there was no special trust which the bank was obliged to consider, decides first, as to complainant, that all her alleged rights (which are our rights) were cut off by the foreclosure proceedings. From this decision she has appealed. The Vice-Chancellor, still basing his opinion upon the idea that there was no special trust assumed by the bank, by a further decision, ordered to be stricken out with costs all that part of the answer of William S. Mount as sets up matter which, prior to Chancery Rule No. 212, could only be set up by cross-bill. From this decision William S. Mount appeals.

There cannot, it seems to me, be any question but that this order, in its full comprehensiveness, is undoubtedly wrong. William S. Mount sets up in his answer that he, and not the complainant, is the actual owner of the claim against the Manhattan Company, denying that it has ever been assigned to the complainant, as alleged by her, and asking affirmative relief against the bank. Certainly the

defendant, William S. Mount, was strictly within his rights and Rule No. 212 when he set up such a claim against his co-defendant by way of cross-answer. Before the rule, he could only have obtained such relief by a cross-bill. It would seem as if it must have been an act of inadvertence on the part of the Vice-Chancellor to have stricken out that part of the cross-answer.

His Honor directs to be stricken out all the cross-answer which sets up the representations of the bank to William S. Mount at the sale; the affirmance of the trust by it, the undertaking by it at that time to hold the property as before for his benefit and subject to his redemption, only as security for the debt. All this is ordered to be stricken from the cross-answer because, in the judgment of the Court, there was no trust other than that created by the mortgage itself, and that was cut off by the foreclosure. There being no other trust, in his judgment, the representations, conversation, agreement, &c., set up by William S. Mount as affirming the trust, constituted a new and separate transaction, had no connection with the original claim of William S. Mount and of the complainant, consequently could not have been set up in this suit by cross-bill, and therefore was inappropriate to a cross-answer.

Considering this decision, in the first place, we respectfully insist that the Vice-Chancellor ought not to have precluded us from proving, by extraneous evidence, that a separate trust did exist. That we have the equitable right to show by parol what construction was placed upon the letter of the bank by both parties; such construction not being contradicted by the terms of the letter. We insist that we had a right to be allowed to prove a special trust by parol with the letter as written evidence of its existence. Such proof would be within the requirements of the statute of frauds. Upon a simple inspection of the papers the Court below decides there is no trust, and by striking out the cross-answer, deprives the defendant, William S. Mount, from the further prosecution of his claim.

A trust of land may be created by parol, and may be proved by written evidence long subsequent.

Mc Vay v. Mc Vay 8 Cent. Law Rep. (V.-Ch. Van Fleet),
p. 596.

Resulting trusts are such as are implied by law, and they are excepted from the operation of the statute.

A trust need not be created by writing, but must be evidenced by writing.

4 Kent Com., 2d Ed., 305.

Collateral securities are considered as trusts.

Ibid. 307.

The very terms of the declaration of trust contained in the letter from the president of the bank were that it should continue until the bank *realized* upon the mortgages assigned—realized not in land, but in money—and that the bank would then hand over the surplus, if any. The bank did not *realize* when it acquired the land, but only when it afterwards received the money for it. The word *realize* has been construed by the Courts in the cases of

Lorrillard v. Silver, 35 Barb. 132;

Hall v. Henderson, 84 Ill. 611.

In deciding upon the effect of an executory or informal instrument not of a testamentary nature the Court will adopt the same principles of construction as have been established respecting wills. Any expression manifesting an intention that the donee of the property is not to have the beneficial enjoyment of the whole or some part of it, will be binding on the conscience of the trustee, and will in equity effectually exclude any claim by him to the beneficial interest.

Hill on Trustees, *65.

A trust may be created by implication or construction of law. Trusts of this description are either implied or presumed, from the supposed intention of the parties and the nature of the transaction, and are known as “resulting or presumptive trusts;” or they are raised independently of any such intention and forced on the conscience of the trustee by equitable construction and the operation of law, and such may be distinguished as “constructive trusts.”

These trusts are exempted from the operation of the statute of frauds.

*Hill on Trustees, *91, *96.*

In every case the general purpose and intention of the donor, and not the use of one particular term or another, will decide the question whether the party does or does not take in a fiduciary character.

*Hill on Trustees, *66.*

It is not essential to have an actual declaration or admission of the trust, either in writing or by parol; there may be other circumstances which, when established in evidence, will support the inference that the nominee was intended to take as a trustee for the purchaser.

*Hill on Trustees, *103.*

Wherever the circumstances are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity, the court will immediately raise a constructive trust.

*Hill on Trustees, *144.*

Where the legal interest is vested in a mortgagee to secure a debt which is afterwards paid, he becomes a trustee for the mortgagor immediately.

*Ibid. *173.*

The distinction between a debt of trust and a mortgage is somewhat technical.

Wilkins v. Wright, 6 McLean 340.

But in the second place, we submit that the court below erred altogether in deciding that no special trust relations existed in favor of Andrew Mount or his assigns, different from those sustained by any other mortgagee to the mortgagor.

First—

The very language of the letter of the president of the bank recites that the mortgages are to be held as collateral security—not as first security only for the payment of the mortgage debt, but as collateral for another indebtedness. It must be admitted, therefore, that the bank does not stand exactly and solely in the position of a mortgagee. Some new character has been assumed by it.

What kind of a character is it? The cases tell us that by such a change of position the assignee of the collateral mortgage stands not in the same position as the original mortgagee of the land, but holds the position of pledgee of the mortgage; that if such assignee forecloses the original mortgage, he obtains, of course, the legal title to the land, but so long as he holds the land his title is subject to the assignor's equity of redemption in his mortgage.

Slee v. Manhattan Co., 1 Paige Ch. 48;

Fulton v. Whitney, 66 N. Y. 548;

Bennett v. Austin, 81 N. Y. 308;

Blennerhasset v. Day, 2 Ball & B. 133.

Where a mortgage was assigned as collateral for a loan with the agreement that the lender, upon receiving payment of the mortgage, would pay the borrower the excess, and subsequently the lender foreclosed, purchased the property for the amount of his loan, and afterwards sold for an excess, the borrower was adjudged entitled to recover this excess of the lender. *Jones on Pledges*, § 659; *Dalton v. Smith*, 86 N. Y. 176; and see, also, *Slee v. Manhattan Company*, and *Hoyt v. Martense*.

A transfer of a negotiable note and mortgage to plaintiff to indemnify him, he agreeing to re-transfer them if indemnified, has been held to be not a legal mortgage, but a conveyance in trust.

Warren v. Emerson, 1 Curtis C. C. (Me.), 239;

Secondly—

A trust in the mortgage being assumed, the Court erred in deciding that a foreclosure of the mortgage cut off the rights of equities of the *cestui que trust* and his assigns.

(1.) This special trust was not set up in the bill to foreclose, and neither Andrew Mount nor Wm. S. Mount were by it made defendants in their capacities of beneficiaries under that trust. The foreclosure could not, therefore, affect their interest as such beneficiaries.

Wade v. Miller, 3 Vr. 296.

(2.) Foreclosure proceedings on a mortgage held as collateral security and entry and possession thereon do not change the relations of the parties to the contract of pledge, the land being simply substituted as collateral security in place of the note or mortgage and remaining subject to redemption. * * * * *

It is only from the time of the *realization* in money after foreclosure of the mortgage securities held in pledge that the statute of limitations begins to run against the pledgor, where the debt being paid a surplus remains in the hands of the pledgee.

Colebrook on Col Sec., p. 235, § 183 ;

Jones on Mortgages, § 1931-1934 ;

Brown, Admr. v. Tyler, 8 Gray 135 ;

Slee v. Manhattan Co., 1 Paige Ch. 52, 79 ;

Rue v. Dillingham, 73 Me. 59 ;

Hoyt v. Martense, 16 N. Y. 231 ;

Dalton v. Smith, 86 N. Y. 176.

In *Slee v. Manhattan Co.*, 1 Paige Ch. 48, the defendant agreed to hold the bond and mortgage and mortgaged premises as security for the payment of the note, and in trust to pay back to the pledgor the surplus collected therefrom above his note, and to re-assign and re-convey to him the bond and mortgage, together with such right and interest as they might have in the mortgaged premises. Judge Betts, in his opinion, says: "These allegations are sufficiently comprehensive and distinct to denote a trust. (3 Bro. Ch. Cas. 646, Eng. Ed., Note.) Equity considers collateral securities to creditors as trusts for the better protection of their debts, and will compel the fulfillment of the instructions. 1 Johns. Ch. R. 119." *Slee* was allowed to redeem the property two years after final foreclosure ; and

see *Munro v. Allaire*, 2 *Cames Cas.* *183; *Holbridge v. Glespie*, 2 *Johns. Ch.* *30.

Before the statute passed in New York State expressing allowing the mortgagee to purchase at the foreclosure sale his right to do so was questioned upon the ground that he was a trustee, and although not deciding the case on that ground, in the case of *Bergen v. Bennett* (1804), 1 *Cames Cas. in Error*, p. 1, Judge Kent seemed to be of that opinion, and it is said that it was the objection raised in this case which caused the passage by the New York Legislature of the 5th section of the New York act concerning mortgages allowing mortgagees to buy at the foreclosure sales; and see *Davoue v. Fanning*, 2 *Johns. Ch.* *268. In Massachusetts, it has been distinctly held, in the case of *Brown, Admr. v. Tyler*, 8 *Gray* 135, that where the holder of a mortgage or collateral foreclosed the same and entered into possession of the property, as well after the foreclosure as before, was equally held in trust for the benefit of both the pledgor and the pledgee and was to be disposed of for the benefit of all parties.

The Vice-Chancellor thinks the force of this decision is broken by the fact that precedent rulings in this State have held that unless a sale ^{is} directly attacked the amount bid at the same shall be taken as its value. I respectfully submit that the Court is mistaken in drawing such a conclusion from the premises stated. The principle which we insist is established by this case of *Brown v. Tyler* is, that where the holder of a collateral mortgage security enters into possession himself under foreclosure proceedings, he continues to hold the property in trust for the benefit of the pledgee. This being established, it follows as a necessary sequence that if he sells it for more than the amount of the indebtedness for which it is held as security he must account to his *cestui que trust* for the balance, and that is just what, and all that we claim in this suit.

Thirdly—

We insist that the bank, in its position of trustee, had no right to make a profit for itself at the expense of the *cestui que trust* by itself purchasing at the foreclosure sale.

The case of *Hoyt v. Martense*, 16 N. Y. 231, in the line of which numerous other cases have followed, is so nearly parallel to the one in question, and the ~~opinion~~^{decision} of the N. Y. Court of Errors and Appeals thereon, without a dissenting voice, as expressed in the opinion delivered by Judge Bowen, covers so completely the points here at issue that I am constrained more at length to call the special attention of the Court to it.

The plaintiff, Hoyt, brought his action to compel the defendant, Martense, to account for the money received by him upon the sale of certain lots of land, and to convey to him certain other lots remaining in his hands unsold, claiming that the lots, and the proceeds of such as had been sold, were held by Martense as security for the payment of a debt by one Charles Hoyt, who had assigned all his rights to this plaintiff.

The facts were these: Charles Hoyt, being indebted to Martense in the sum of \$3,000, with interest from May, 1839, assigned to him a bond for \$3,500 with a mortgage as its collateral, both executed by one Corbitt.

Martense, by a written instrument of the same date, acknowledged that he had received such assignment from Charles Hoyt as collateral security for Hoyt's indebtedness to him, and agreed to re-assign the bond and mortgage on the payment of certain notes also assigned to him by the plaintiff at the same time and for the same purpose, accounting to him for the principal and interest which may be collected thereon.

In 1842 a bill to foreclose the Corbitt mortgage was filed, and in 1842 and 1844, under the decree, all the mortgaged premises were sold and were bid in by Martense for \$2,785.

In 1847 Charles Hoyt assigned all his interest arising out of this transaction to the plaintiff in the suit; the defendant, Martense, having in the meantime made sales of some of the lots bid in by him, for sums exceeding by several thousand dollars the debt as security for which the Corbitt mortgage was assigned to him.

Judge Bowen says: "This case cannot be distinguished in principle from *Slee v. Manhattan Co.*, 1 Paige 48. * * *

"In the case cited the foreclosure was by advertisement under the statute, while in this case it was by action, the

assignor and assignee being the plaintiffs; and it is claimed that these circumstances, especially the fact that the plaintiff in this action was a party plaintiff to the foreclosure suit, distinguish the two cases."

"But I do not understand how or upon what principle the rights of Hoyt, the plaintiff in this action, are affected by his being made a party to the foreclosure suit. The assignment to Martense was, in effect, a mortgage of the mortgage. The object of the action in favor of Hoyt and Martense was solely to foreclose the equity of redemption of Corbitt, the original mortgagor, in the mortgaged premises, and had no reference whatever to the right of Hoyt to redeem the mortgage by the payment of his debt to Martense. Hoyt's right of redemption was wholly unaffected by the foreclosure and sale. Had the premises been purchased at the sale under the decree in the foreclosure suit, by a third person, for an amount exceeding the debt due to Martense, the latter would have been liable to account to Hoyt for the excess, or at least for such amount of the excess as, together with the amount of the debt to Martense, would be equal to the amount the original mortgage was given to secure. *But as Martense purchased the premises at the sale, he, after the purchase, held the land in place of the mortgage, as security for his debt. He held the mortgage and the proceeds and avails of it, as trustee for Hoyt, after what was due him was paid, and equity will not permit him to purchase in the premises for his own benefit and speculate therefrom at the expense of his cestui que trust.*"

And see *Fulton v. Whitney*, 66 N. Y. 548;

Bennett v. Austin, 81 N. Y. 308;

Dalton v. Smith, 86 N. Y. 176.

While there is no general rule that a trustee to sell shall not be himself the purchaser, there is a rule, and an admitted principle in equity, that he shall not thereby gain profit to himself.

In the case of *Whichcote v. Lawrence*, 3 Ves. 740, Lord Rosslyn (1795-1798), one of several trustees to sell, having purchased, and afterwards sold at a profit, he was decreed to account for the profit with costs. And the rule is applicable whether the sale be made by a trustee of his own authority or under a judicial order or decree.

Staats v. Bergen, 2 C. E. G. 297.

A trustee is disqualified from purchasing or acquiring an interest in the trust property adverse to that of the *cestui que trust*.

Michoud v. Girod, 4 How. 503;

Wormley v. Wormley, 8 Wheat. 421;

Sloo v. Law, 3 Blatch. 459;

Wakeman v. Dodd, 11 C. E. G. 484;

Lead. Cas. in Eq., Vol. 1, p. 148.

This Court has already decided and placed upon record that—

“Executors charged with the sale of lands to pay debts, purchasing such lands at a sheriff’s sale, under execution against the testator, will, at the instance of the *cestui que trust*, be decreed to hold such lands by a continuing trust, or held to account for the proceeds if the same have been re-sold to *bona fide* purchasers. No trustee can, directly or indirectly, become a purchaser in his own behalf, of the trust property, and hold it against the *cestui que trust*.”

Marshall v. Carson, 11 Stew. 250;

Creveling v. Fritts, 7 Stew. 134;

Dodd v. Wakeman, 12 C. E. G. 564.

Fourthly—

The bank pleads that even if such a trust exists, it did not pass to William S. Mount by the terms of the assignees’ deed of the land to him.

The terms of the deed include the land and all its appurtenances. This trust was appurtenant to the land, and necessarily passed with it, *as any equity of redemption would have passed, whether specifically named in terms or not.* Trusts are now what *uses* were before the statute abolishing them so far as they are mere fiduciary interests, distinct from the legal estate, and to be enforced only in equity. The difference only consists in a more liberal construction of them and a more guarded care against abuse. "*The cestui que trust is seized of the freehold in the contemplation of equity. The trust is regarded as the land, and the declaration of trust is the disposition of the land.*"

A trust in the general and enlarged sense is a right on the part of the *cestui que trust* to receive the profits and to dispose of the lands in equity.

4 *Kent Com. (2d Ed.)*, pp. 303, 304.

To deny that we have a *use* or *trust* which runs with and is attached to the land is equivalent to denying that we have any deed. Such a denial cannot be set up by plea, but must be presented by answer.

Fifthly—

The third plea of the bank is the U. S. Statute of Limitations contained in the bankrupt act, requiring that actions by the assignee against any person claiming an adverse interest touching the property or rights of the bankrupt, transferable to or vested in such assignee, shall be brought within two years from the time the action accrued.

(1.) In the first place, our claim does not come within the description as being for an adverse interest touching property transferable to or vested in the assignee.

See *In Re Fred J. Conant*, 5 *Blatch.* 54;

Stevens v. Hauser, 39 *N. Y.* 302;

Notes to Bump on Bankruptcy (8th Ed.) pp. 544-547.

(2.) The assignee only held the equity, and the bank had no adverse claim against this equity. It held a mortgage lien against the property, but this was not adverse to any right in the same claimed by the bankrupt or his assignee. It

was a lien "*in rem*," but not an adverse claim against the assignee.

Sedgwick v. Carey, 4 *Benedict* (U. S. C. Ct.) 562.

It has been judicially decided that a mortgage is not a claim within the meaning of the U. S. Statute, but a lien "*in rem*."

Price v. Phillips, 3 *Robt.* 448;

~~Winkler v. Hann~~ ~~in Hann~~;

" " ~~in Hann~~;

" " ~~in Hann~~;

Dorley v. Va. F. and Marine Ins. Co. (E. Dist. of Va., 1877), 2 *Hughes* 482.

(3.) To be within the statute the cause of action must have "*accrued*" for or against the assignee.

This cause of action never *accrued* to the assignee. It never accrued at all until months after all right to the land and its incidents and appurtenances were sold by the assignee to William S. Mount.

The cause of action only *accrued* when the bank, by selling the property for \$125,000 to the Navesink Park Company, February 9th, 1880, realized thereby more than sufficient to pay the indebtedness for which the land was held as security, and thereby became liable to account to the owner of the equity for the balance in its hands.

This cause of action never having "*accrued*" to the assignee, it is not within the statute.

For construction of the word *accrue*, see

Brown Admr. v. Tyler, 8 *Gray* 535;

Clark v. Clark, 17 *How.* (U. S.) 315;

Phelps v. MacDonald, 99 *U. S.* (9 *Otto*) 298.

These last two cases were upon claims against National Governments, and it was held that the claims did not accrue or the statute of limitations begin to run until a definite award on the claim had been made by the respective governments; and see *Carpenter v. Bank of Rahway*, decided at last term of our Supreme Court.

Sixthly—

The appeal of Wm. S. Mount is especially made to the order of the Court below, directing that so much of his cross-answer as sets up matter against the Manhattan Company, which, by the practice existing prior to the promulgation of the 212th Rule of the Court of Chancery, could only be set up by means of a cross-bill, and which prays such relief as under said practice could only be obtained by means of a cross-bill, be stricken out with costs.

(1.) Wm. S. Mount bought the legal title and all the accompanying equities in this property from Andrew Mount's assignee in bankruptcy, at public sale. He holds a deed for the same, and is the beneficiary of the trust in question. In his answer he denies ever having parted with this interest in favor of the complainant, but affirms that the same remains exclusively in him.

As before stated, it seems clear, beyond any question, that a defendant can, by cross-bill or under the rule by cross-answer, deny that the claim as set up by the complainant exists in her, insist that it remains in said defendant, and thereupon claim affirmative relief against a co-defendant. By the order of the Court appealed from we are debarred even from this right, which we confidently submit is an error.

(2.) William S. Mount, in his cross-answer, sets up, in addition to the matter alleged in complainant's bill, the fact that at the foreclosure sale referred to the Manhattan Company, by its duly authorized agents, represented to this appellant, William S. Mount, that it was unnecessary and useless for him to bid at the sale; that such course would only serve to increase expense; that if permitted by him to buy in the property, the bank would continue to hold it for his benefit; thus construing, acknowledging and affirming the trusts under which the bank held the land, and recognizing that the same were at that time vested in said defendant; that by such arguments they urged and induced this defendant not to bid for or to buy the said property at said sale.

The Vice-Chancellor holds that as no special trust existed before the foreclosure sale, the representations of the directors, agents of the bank, at the sale can only be regarded in the light of a new undertaking or agreement on its part, which cannot be set up by cross-bill, but must be made the subject of an original bill by William S. Mount.

It is respectfully submitted that His Honor has erred in this conclusion. In his opinion in the case of *Krueger v. Ferry*, 14 *Stew.* 432, he says that "Matters auxiliary to or a graft or dependency upon the original suit, are proper subjects of a cross-bill."

The existence of a special trust declared in writing, as well as a resulting trust implied by law from the acts and circumstances of the parties, we believe to have been established. The acknowledgment of the existence of this special trust by the bank at the time of the sale; the representations by its agents that it would continue after purchase of the land by them, these representations to William S. Mount to that effect inducing him not to bid, and preventing him thereby from protecting the trust, we insist, are all so connected with and grafted upon the original claim, that they are eminently proper subjects of a cross-bill, and consequently, of a cross-answer under Rule 212.

To judge fairly of the equities of this appellant's claim it must be remembered that William S. Mount joined with his father in the execution of the mortgage; and that the bank, in giving their declaration of trust to Andrew Mount, must, in equity, be held to have been dealing also with William S. Mount, so far as his interest in the land was concerned. Andrew Mount subsequently becoming bankrupt, William S. Mount bought from the assignee, at public sale, his whole interest in the land, and now holds the same. These facts are all alleged in the cross-answer of William S. Mount.

By Chancery Rule No. 212 any defendant may set up in his answer any matter which would formerly have been the proper subject of a cross-bill and obtain relief thereon.

A cross-bill implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, *touching the matters in question in the original bill.*

Story Eq. Pleadings, Sec. 389.

If, on a bill for specific performance, the defendant should insist upon a different agreement from that stated by the plaintiff, and should offer to perform the specific agreement which he represents to have been made, the old course would have required that the defendant should file a cross-bill to entitle himself to a decree for the performance of the agreement, as set up and proved by the defendant. Now a cross-bill is unnecessary, and the Court will decree performance of the agreement set up by the defence.

Story Eq. Pleadings, Sec. 394.

Though the allegations of a cross-bill must relate to the subject matter, it is not restricted to the issues of the original bill.

Nelson v. Dunn, 15 Ala. 501.

Thus, where the plaintiff sets up any special matter by way of estoppel, or in bar, it is not obnoxious to the objection of introducing new matter into the suit.

Josey and als. v. Rogers & Andulf, 13 Georgia 478.

If a defendant sets up a new state of facts as a defence, and asks distinct relief upon it, he must do so by cross-bill and not by answer only.

Chandler v. Herrick, 3 Stock. 497.

In *Hoff v. Burd, 2 C. E. G. 201*, the Court said, if (in a foreclosure suit) a defendant wished to set up new facts upon which to establish his claim, and a different issue from that tendered by the bill, he must file a cross-bill.

To decide whether any part of a bill should be stricken out under Rule 215, it is necessary to consider whether the alleged objectionable parts of the bill have a tendency, or

would be admissible in evidence, to show the truth of any allegations in the bill, that is material with reference to the relief sought. If so they should stand, if not, they may be stricken out.

Kirkpatrick v. Corning, 13 *Stw.* 255;

To a bill to foreclose, judgment creditors, by answer, claimed priority over a conveyance of the premises by the mortgagor to his wife, because they were prior in fact, and also by way of cross-bill, they alleged that the conveyance was made fraudulently. Held, that it was properly introduced by way of cross-bill.

Chester Iron Co. v. Beach, 13 *Stew.* 63.

Resulting trusts may be established by cross-bill.

Beck v. Beck, *N. J. Law Journal*, Sept., 1887, Vol. X, p. 269.

In conclusion, we object to the filing of the three several pleas of the Manhattan Company because—

The facts on which they are founded are set forth in the cross-answer of William S. Mount.

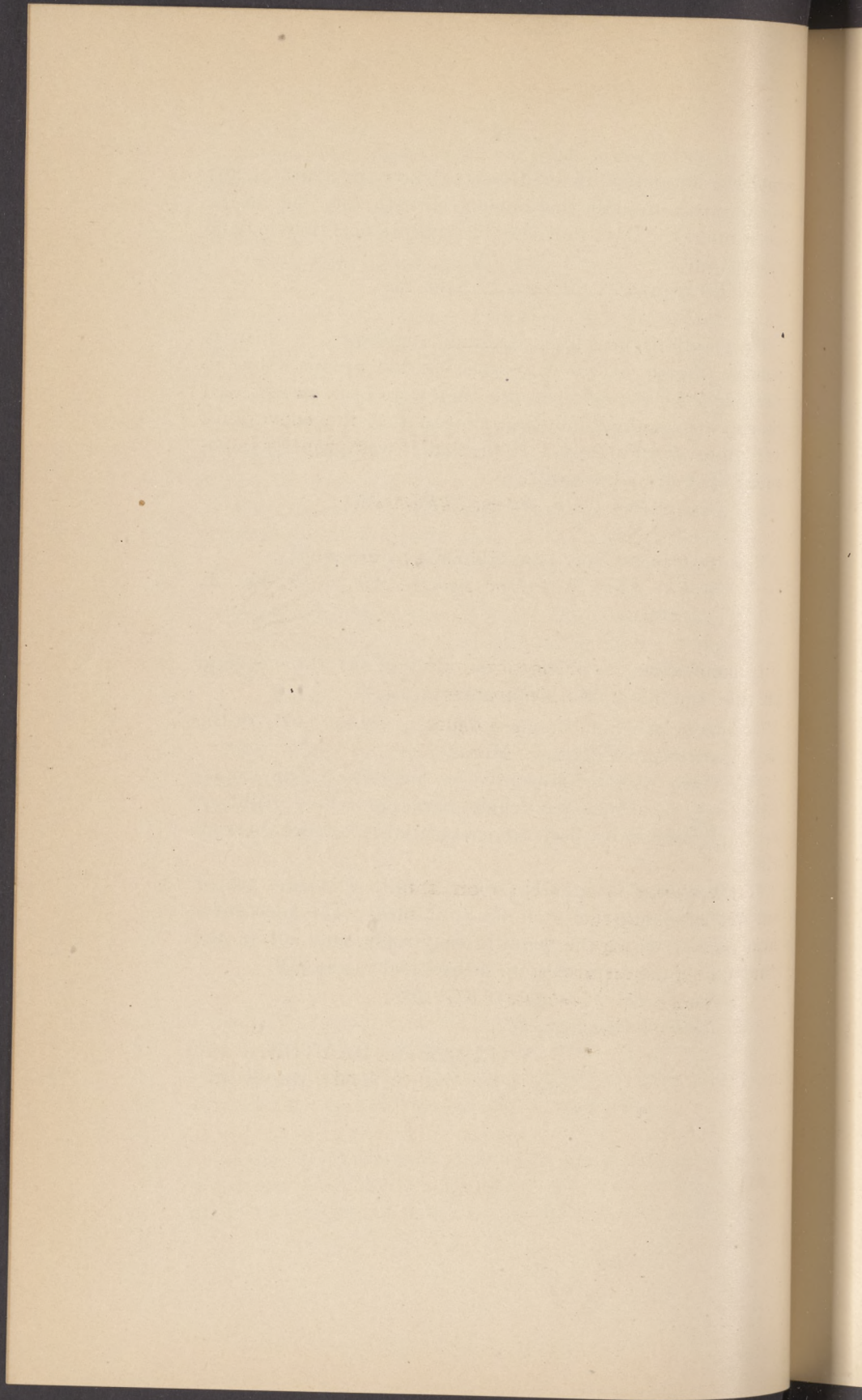
Pleas are either affirmative or negative. They must either set up a new *fact* which bars the whole right of action, or they must deny some essential *fact* which bars all right.

If the matter is apparent on the bill, it is the proper subject of demurrer, and not of a plea. The plea must aver *facts* to which the plaintiff may reply, and not in the nature of a demurrer rest on facts stated in the bill.

Story's Eq. Pleadings, §§ 647, 660;

Lube on Pleadings, 341.

WILLIAM L. DAYTON,
Counsel for Wm. S. Mount, Appellant.



NEW JERSEY
Court of Errors and Appeals.

FANNIE E. MOUNT, Appellant,

vs.

MANHATTAN BANK OF NEW YORK and
ALS.,

Respondents.

} Appellant's
Points.

Mrs. Fannie Mount, who presses this appeal, respectfully claims that her husband's assignee sold and conveyed to her grantor, and thence to her, certain property, to which adhered an undertaking in the nature of a trust, entered into by the defendant (the bank) with her late husband, Andrew Mount, in reference to that property, and which she asks shall be performed by the defendant.

She charges that the bank, having a note against her husband and others, assumed an agency, or trust, for him or his order, and took certain steps through which it obtained possession of and realized, by private sale, out of certain property (which had been pledged to it by way of security for such note), the amount of \$125,000, leaving a balance over its debt of about \$40,000 in hand, which it refuses to return as agreed.

She insists that, without regard to the form of proceedings or the instrumentalities which the bank adopted, in order to realize the money out of the pledged property that the bank became lawfully possessed of that property during the life of that trust undertaking, and that it cannot escape its express obligation therein, that it would, if it realized its debt out of that property, return any balance beyond such debt to her husband's order.

The important words of that paper, which was addressed to Andrew Mount, and delivered by the bank to him, are, after acknowledging the receipt of certain bonds and mortgages, as follows: (See book, page 11, bottom.)

"The Manhattan Company holds said mortgages as collateral security for a note made by Wilmerding and Mounts for \$75,000, dated January 2d, 1874, payable in six months from date, as collaterals for and renewals thereof in whole or in part, and upon realizing the amount due with interest upon said note or renewals thereof, together with all expenses, the balance to be returned to you or to your order."

I.

The proper and equitable construction of this undertaking, in the light of the circumstances in which it originated, becomes the important question to be settled on this appeal.

The relation between Andrew Mount and the bank was one of great confidence and trust on his part. He was about to entrust to it his whole fortune, consisting of property of the value, as charged in the bill of complaint (which must now be taken as true as charged), of not less than \$275,000, to secure a debt of himself and others of only \$75,000.

And first, it is to be noted, that by this agreement the bank promised to return the "balance," not to the mortgagors, but to Andrew Mount, one of the mortgagors, or his order.

Andrew Mount was but one of the two mortgagors, who executed the bond and mortgage passed to the bank, and

on the face of the papers was only entitled to the undivided one-half of any "balance." Why did the bank undertake to return to him *alone* the *whole* surplus?

Such a promise was in direct opposition, not only to the settled equity, but also to the express terms of the mortgage compact, under seal. See book, page 8, bottom, which reads as follows :

"And out of the money arising from such sale to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the said premises, *rendering the overplus of the purchase money* (if any there shall be) *unto the said parties of the first part*, their executors, administrators or assigns."

Why, then, was this paper, given by the bank, made to violate the express terms of the sealed instrument by promising to pay that "overplus" to only *one* of the parties of the first part in the mortgage, instead of to *both*?

It will hardly be assumed that the bank intended to give any secret advantage to one of the mortgagors at the expense of the other, or to violate the terms of the mortgage it was about to take.

That "overplus or balance" amounted, in fact, as we charge, to more than \$40,000, and thus its ownership became an important matter. The explanation of this can rest upon only one hypothesis, which is that the "realizing" referred to in this paper did not mean a forced judicial sale by act of the law, but to a sale, or realization, to be made by the bank to a third party, after the title to the pledged property had become completed in the bank.

It did not refer to a sheriff's sale, because there the balance, if any, over the debt, must be collected by the *sheriff*, must be paid by the *sheriff* to the mortgagors, not to the bank. This paper did not contemplate anything short of a *realization of money* by a sale by the *bank itself to a third party*. No "balance" could be portioned out of the mortgage or the land. The *land* must become *money* first, before there could possibly arise any "balance." At any sheriff's sale

to the bank, if the property had brought \$125,000 instead of \$10,000, and the bank had bought it, it would have been obliged to pay the balance to the sheriff, and could not have paid such balance to the mortgagors, or either of them.

It did not contemplate a *profit* to the agent. Mount had a right to infer that the bank, under its charter as a banking company, would not be a speculator in land, especially in lands situate in a foreign State.

Doubtless he had in mind, what afterwards turned out to be only too true, that if he should die there would be no one to protect his interest at a forced sale of those lands, and the bank might buy them at a great sacrifice; and if he had no written arrangement with it, a great loss might in future fall upon him or his representatives. We have a right to assume, in the light of this paper, that the bank said to him, "we are engaged in a regular banking business, not in speculating in lands; all we desire is to make our debt and expenses out of this property, and we will try to manage it so as to realize not only our debt and expenses, but a balance for you." Such are almost the exact terms of the paper in question.

Did not this paper impose a duty upon the bank in addition to its relations as a holder of the mortgage? And did not this duty partake of a fiduciary character? Here our position takes sharp contrast with the construction of this paper by the Court below. Did the bank perform its *whole* agency in this matter by forcing a judicial sale of the property, and by bidding, buying and taking conveyance to itself?

That foreclosure sale occurred after more than three years of delay, and after death had prevented Andrew Mount from personally protecting his interest there. His assignee in bankruptcy was not upon the record to protect the equity of redemption, and after repeated adjournments (see book, page 41), the bank had such sale completely in its power, and purchased the property for less than one twenty-seventh of its value.

THAT FORECLOSURE WAS A PART OF THE CASE MADE BY THE
BILL.

The charging part of the bill of complaint puts the matter of the foreclosure and purchase by the bank itself of the mortgaged premises, after making this undertaking with Andrew Mount, in this language (book, page 14, line 24), viz.: "And at other times defendants pretend that the said possession taken by said banking company of the above described lands was so taken by virtue of a sale, for the sum of ten thousand dollars, to said banking company, by the sheriff of the said county of Monmouth, at public auction, under the direction of a certain final decree in a foreclosure suit instituted by said company upon the \$275,000 mortgage, and was not taken under the power contained in the terms of said mortgage, and that the sum of ten thousand dollars, at which said lands were so sold to it, was a full, fair and adequate consideration therefor; and that said sale was fair, equitable and without fraud or illegal combinations on the part of the said banking company, with other bidders thereat; and at other times pretend that such proceedings were taken in the Court of Chancery by it in the foreclosure of said mortgage against the said Andrew Mount, as that the said trust was extinguished and declared void, and said trustee relieved therefrom; whereas, your oratrix charges the contrary thereof, and of each and all of said pretences to be the truth; and that the said taking of possession of said lands by said company was done by it in the execution of said trust undertaken by it, and in the performance of the duty vesting upon it in that behalf, and not in antagonism to said trust; and that equity will presume that said defendant intended to do right rather than wrong, and to act conscientiously rather than in bad faith, and to perform said duty rather than to violate it; *and that the subject matter of said possession and sale, whether had through the assistance of the decree of the said Court, or by the act of said defendant alone, without the assistance of any such decree, was acquired with the design and purpose of the performance of said trust; and that in consequence of such purpose an equit-*

"able estate in the amount realized by said defendant be-
"longed to the said intestate."

The bill elsewhere (on page 3, line 20) alleges that the mortgaged lands were of a value of not less than two hundred and seventy-five thousand dollars, and on page 4, line 10, that the parties assumed that the real value of the lands so mortgaged was the sum of two hundred and seventy-five thousand dollars. The office of the charging part of the bill (*See Daniell Ch. Pl., Vol. 1, page 376.*) enables the plaintiff "to state his case and to bring forward the matters to be alleged in reply to the defence at the same time, and that without making any admission on the part of the plaintiff of the truth of the defendant's case, and there is no doubt that in many cases it is still convenient and may be made the means of enabling the plaintiff to state his answer to some anticipated defence, or to guard his statement by allegations which could not conveniently be inserted in the text, and there are cases where it may still be useful."

In short, the bill states that lands of the value of \$275,000 were sold to the defendant at its foreclosure sale for ten thousand dollars, and that the defendant pretends and claims that such sale was fair, equitable and without fraud or illegal combination on its part with other bidders thereat, and was a performance of its said trust, whereas the complainant charges the *contrary thereof* to be the truth.

The theory of the bill is that the foreclosure proceedings might be used by the defendant in order to set up an adverse title to the mortgaged premises, *relieved from the trust agency*, set forth in the bill, but the complainant, anticipating such defence, attacked such position and denied its correctness, thus making the foreclosure a part of complainant's case without admitting it.

The instance given by Daniell and other writers on Chancery practice where such charges are useful is, "if a bill were filed on any equitable ground by an heir who apprehended his ancestor had made a will, he might state his title as heir, and, alleging the will by way of pretence on the part of the defendants claiming under it, make it a part of his case without admitting it."

Although these charges might not be sufficiently specific in a bill filed solely to set aside that sale on account of fraud, yet, in a bill filed for specific performance or to enforce a trust, where the meaning or effect of the terms used in the instrument sought to be enforced are the subject matter of controversy, it is respectfully submitted that such charges are sufficient.

The question then is, was that sale to the bank itself, under the circumstances, the kind of "realizing" contemplated by that instrument.

The learned Vice-Chancellor argues on that subject (Book, page 61) that the mortgagees adopted the foreclosure as a lawful method to realize, and that this was a full performance of their duty in that behalf.

But I respectfully answer to this view, *first*, that this was but one step in the performance of their duty; it was not the final step; and *second*, that even if it was a final act that in taking that step they were bound to do so fairly, and without fraud, and without illegal combination with others, and that, as in *Dodd v. Wakeman* (cited below), the gross inadequacy of price as charged is evidence of such unfairness and fraud, and that the above charges in the bill sufficiently raise that question on the record.

I respectfully insist that, in fact we must *presume* that it was in the execution of the undertaking of the mortgagees, as expressed in this instrument, that they bought the property themselves.

It enabled them better to perform their duty of realizing the most money from the property. It gave them immediate possession without the risks of taking possession, by their own acts, under the power contained in the mortgage. That judicial method of foreclosing their mortgage was the *safest* mode, and protected them against third persons, but did not change or affect their situation with relation to the trust property, or their *cestui que trust*.

It assisted the bank to select its own time for realizing, and aided it to pass over a more marketable title to any purchaser, and thus realize the best price for the interest of all parties. And after it had "realized" its debt and expenses neither it nor its stockholders could fairly or

equitably claim more, and such was its written proposition to Mount.

See *Colebrook on Collateral Securities*, page 235, sec. 183.

If this writing was nothing more than was already contained in the mortgage, why did Mount insist upon this additional instrument, and why did the bank give it?

Under the construction given to this paper by the Court below, it was a mere *repetition* of the powers contained in the mortgage, and was entirely uncalled for and unnecessary.

This paper created a *fiduciary* relation between the parties. Overton, in his late work on the Law of Liens (1883), page 612, Par. 584, says, "A trustee, in the most extended meaning of the term, is a person in whom some estate, interest or power, in or affecting property of any description, is vested for the benefit of another."

And such relation is created by a "simple letter or memorandum, or anything of a similar, untechnical and informal character." See *Brown Ads. Combs*, 5 *Dutch*. 39.

Pomeroy says (2 *Pom. Eq. Ed.* 1881, page 572): "No particular technical words need be used, even the words 'trust' or 'trustee' are not essential; any other words which unequivocally show an intention that the legal estate was vested in one person, but to be held in some manner, or for some purpose in behalf of another, if certain as to all other requisites, are sufficient."

See instances of such trusts cited in note 1, page 573 and 574 of same authority.

A receipt as follows: "Received of S. P. \$800 in trust for S. P., minor, to be kept and used for his benefit to the best of my ability," creates a valid trust which cannot be varied by parol evidence.

In *Kitchen v. Bedford*, 13 *Wall.* 413, the Court held that a receipt of a "sum" in railroad bonds, with a promise to expend said sum in the purchase of certain lands, constituted a trust of the securities.

In *Spear v. Whitfield*, 2 *Stock*. 108, a similar paper was construed to be a trust.

Perry, in his first volume on Trusts, section 13, quoting

Sir Edward Coke's definition, that "a trust is a confidence reposed in some other, not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land, and the person touching the land, for which *cestui que trust* has no remedy but by subpoena in Chancery," says: "The confidence here spoken of need not be *expressly* reposed by one party in another, for the law frequently implies or construes it to arise out of the transactions between parties, *when neither party suppose, at the time, that a trust was created between them.*"

In deciding the construction to be placed upon this paper, it will assist us to look at the maxim that "equity imputes an intention to fulfill an obligation."

Pomeroy (Vol. 1st *Eq. Jur.*, p. 461, sec. 420,) says: "The principle is applied to these cases where a court of equity is called upon to determine whether an equitable estate or interest in certain subject matters belongs to A, in pursuance of an obligation which rested upon B, although B, in acquiring the subject matter, has not expressed or indicated in any manner an intention on his part of performing such obligation, that is, he did not acquire the subject matter for the *avowed* purpose of fulfilling his duty. Notwithstanding the absence of such *avowed* intention, a court of equity may proceed upon the presumption that B did *intend* to perform his duty; may hold that the subject matter was acquired with *that design*, and that, in consequence of such purpose, an *equitable estate* in it belongs to A."

It is not a question of honesty on the part of the trustee. Fraud need not be established to compel the trustee or agent to account for profits realized out of the trust property, or his office:

1 Story's *Eq. Jur.*, page 312, sec. 321 (8th Ed.);

Staats v. Bergen, 2 C. E. Gr. 297, 554;

Marshall v. Carson, 11 *Stew.* 250;

Davoue v. Fanning, 2 *Johns. Ch.* 255, 260;

N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co., 14 *N. Y.* 85, 91;

Conkey v. Bond, 36 *Id.* 427, 429;

Gillett v. Peppercorne, 3 *Beav.* 78, 84;

Currier v. N. Y. &c. Rd., 35 *Hun. N. Y.* 355;

Marsh v. Whitmore, 21 Wall. 178, 183 ;
Michoud v. Girod, 4 How. 503 ;
Flagg v. Manhattan Ry. Co., 21 Am. L. Reg. (N. S.)
 787, 788 ;
Greenlaw v. King, 3 Beav. 49, 61 ;
Ex Parte James, 8 Ves. 337, 344 ;
Metropolitan Elevated Rd. v. Manhattan Elevated Rd.,
 11 Daly's Rep. 373, 473, *Et Seq.*

In equity, the estate of the *cestui que trust* is considered as a legal estate, and is subject to the same rules, incidents and consequences.

Cushing v. Blake, 3 Stew. 689 ;
Skellenger v. Skellenger, 5 Stew. 662.

Equity deals with equitable estates as though they were legal estates.

In equity they are alienable, devisable and descendible in the same manner as legal estates.

Kip v. Kip, 6 Stew. 215.

II.

The further insistment is made by the defendant that the foreclosure decree and sale *extinguished* the present right sought to be enforced by the complainant.

That the mortgagor's right to redeem these lands would have perished with the decree and sale if the bank had been free of all that obligation, it is not necessary to argue.

But the present claim is not a right to redeem the lands, it is the very opposite of that right. It contemplates the conversion and realization of the trust property into money, by the agent, and looks only to the trust proceeds in the hands of that trustee.

Again, the bill to foreclose was framed against Andrew Mount as a joint mortgagor, whose joint equity of redemption it sought to cut off. *He was not made a party in respect to his exclusive rights under this instrument, and such rights remain unaffected by that foreclosure decree.*

There are no allegations in the bill (set forth in the plea) relating to this instrument.

This was the fault of the bank if it expected to cut him off from its benefits. It certainly knew of its own undertaking with Mount, and is chargeable with full notice thereof.

Whatever rights he had, peculiar to that instrument, were not involved in that foreclosure decree, and are not affected by it.

See *Wade v. Miller*, 3 Vr. 296 ;

Lewis v. Smith, 11 Bar. 152 ;

Elliot v. Pell, 1 Paige 269 ;

Chadwick v. Island Beach Company, 15 Stew. 602.

In *Wade v. Miller* the Supreme Court say :

"The usual and salutary rule is that a defendant is not called upon, nor in strictness permitted, to set up in the answer matters not embraced in the suit. I know of no way in which a defendant can properly put in issue facts which are not charged in the bill, or which are not related to such facts by way of being an answer to them."

It certainly would not have been responsive to any facts charged in the foreclosure bill, for either Andrew Mount or his assignee to have set up this undertaking of the bank towards him.

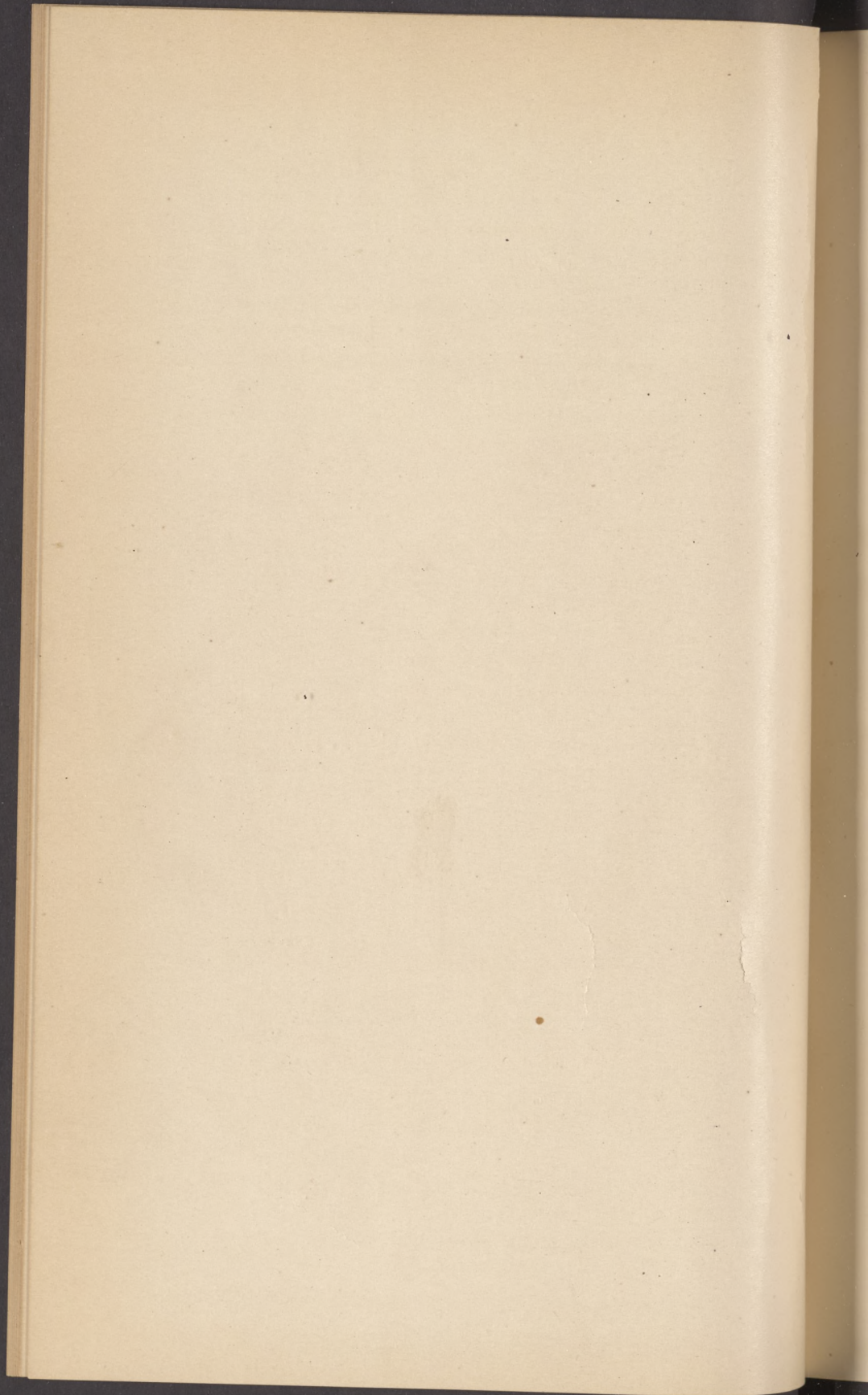
The records of that foreclosure suit show that a decree *pro confesso* therein, was taken (January 21st, 1876), and that the petition in bankruptcy was not filed until afterwards (March 14th, 1876), and neither Andrew Mount or any one representing him had been brought into Court to answer this instrument in question. And his rights under it were not at issue.

So that, to use the language of the same opinion, "if Andrew Mount had advanced such claim in his answer, it would have been mere impertinence, and could have been struck out on motion of the complainant."

While the bank held title to that land, unrelieved from the performance of that undertaking by any judicial decree, it will not be permitted in a court of equity to retain any advantage then gained by it, "whether it is the fruit of performance or of violation of duty towards its principal."

Dodd v. Wakeman, 11 C. E. Gr. 485, and cases cited on page 488.

Same Case on Appeal, 12 C. E. Gr. 564.



It declined to come within the jurisdiction of bankruptcy so as to subject the value of its pledge to a fair test, but it is quick now to invoke that jurisdiction and its severe laws, in order to interpose the bar of those laws against the complainant's claim.

Again, that statute does not apply because the cause of action on which the present suit is founded did not accrue to the assignee, nor for him, nor until long after he had parted with all his interests in the property (see section 5057 of bankrupt act). Until the bank realized this balance, no right of action accrued to any one.

The decisions in the United States Courts on this statute will be found to turn upon the point of the time when the causes of action "accrued."

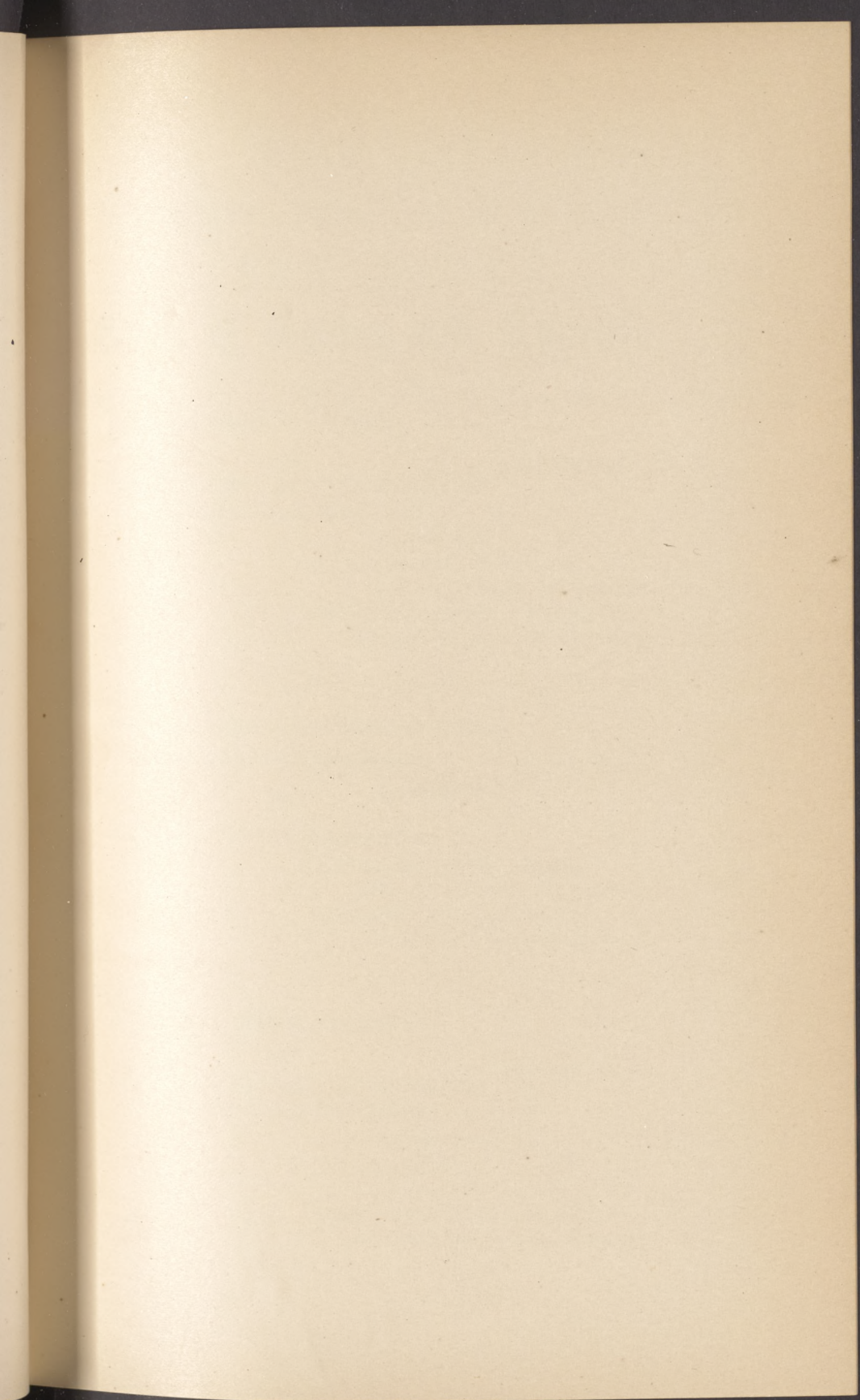
The cases of *Clark v. Clark*, 17 Howard 315, and *Phelps v. MacDonald*, 9 Otto 298, held that the right of action against the claimants first accrued when the amount of the claims were awarded; so in the case in hand the complainant's rights of action did *not accrue* until the bank had realized this balance, now sought to be recovered.

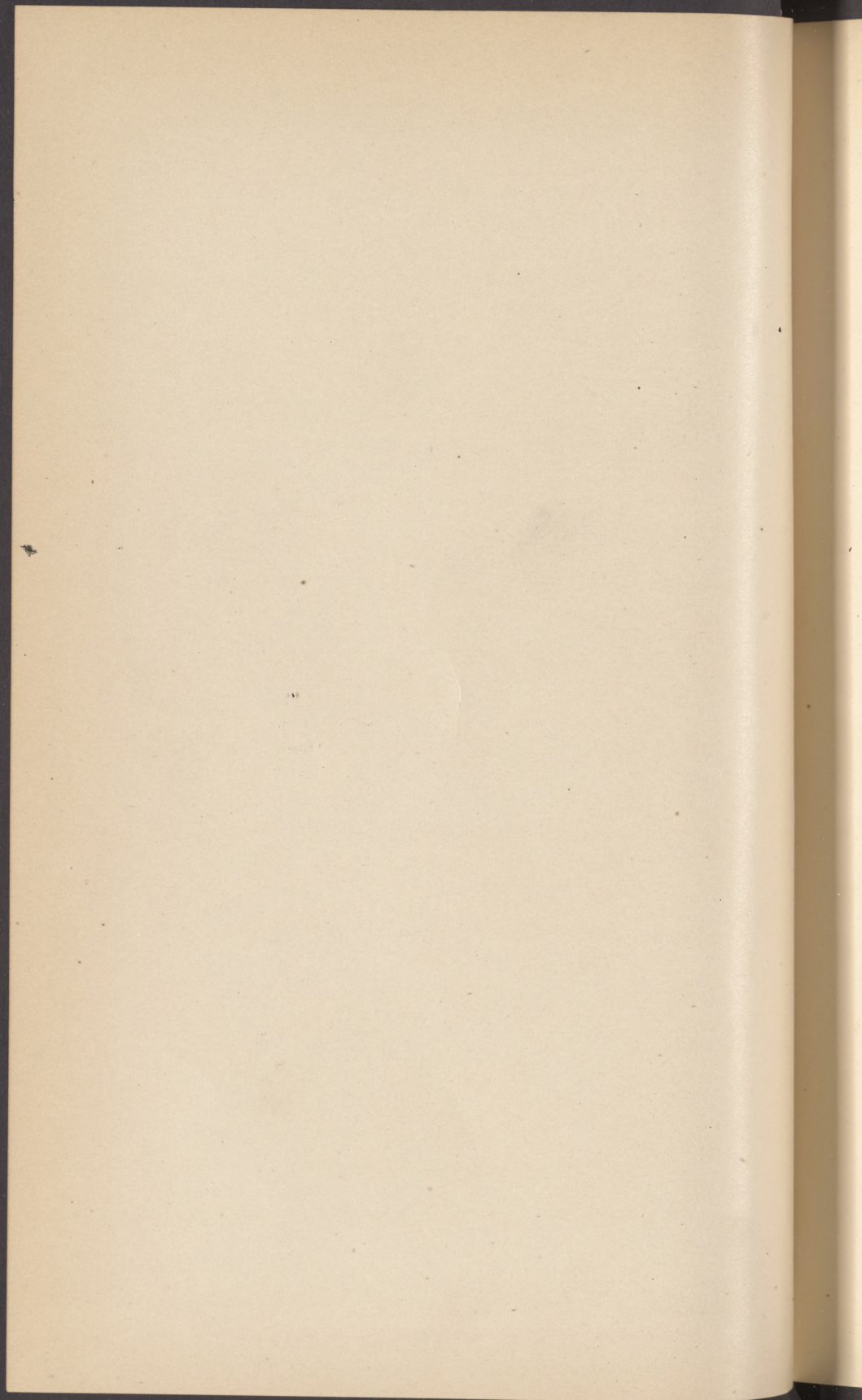
Under the principle contended for by defendants, every note not yet matured, every bond not yet due, if sold by an assignee, as his assets, to the highest bidder, are placed on the same footing, are tainted with only two years of life, and are extinguished within two years after their maturity, in whosoever's hands they may fall, at any remote period.

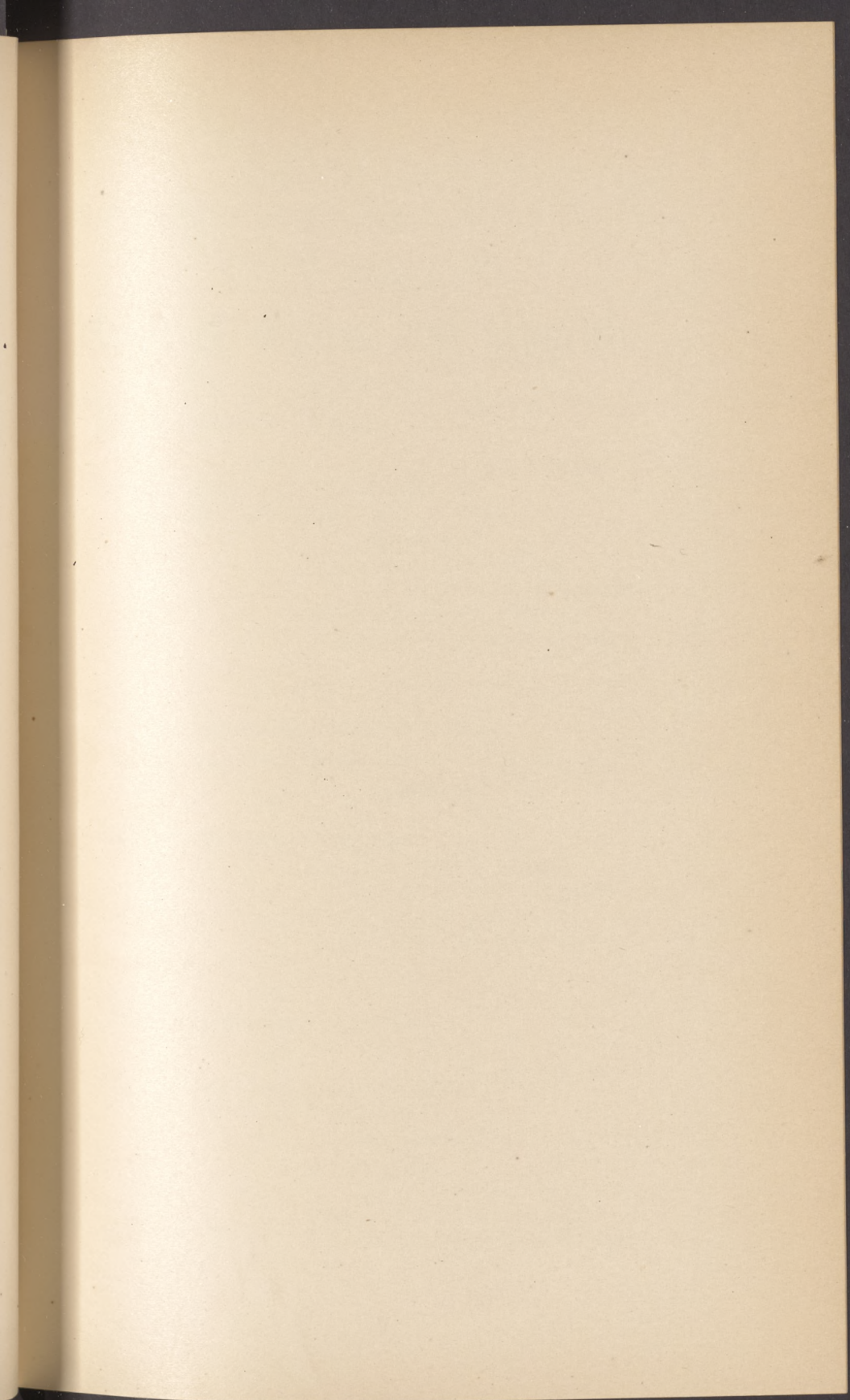
The purchaser at an assignee's sale, instead of getting such note with six years of life after it is due, gets it with only two years of life, and of a bond under seal, with sixteen years of life after maturity, gets it with only two years of legal existence.

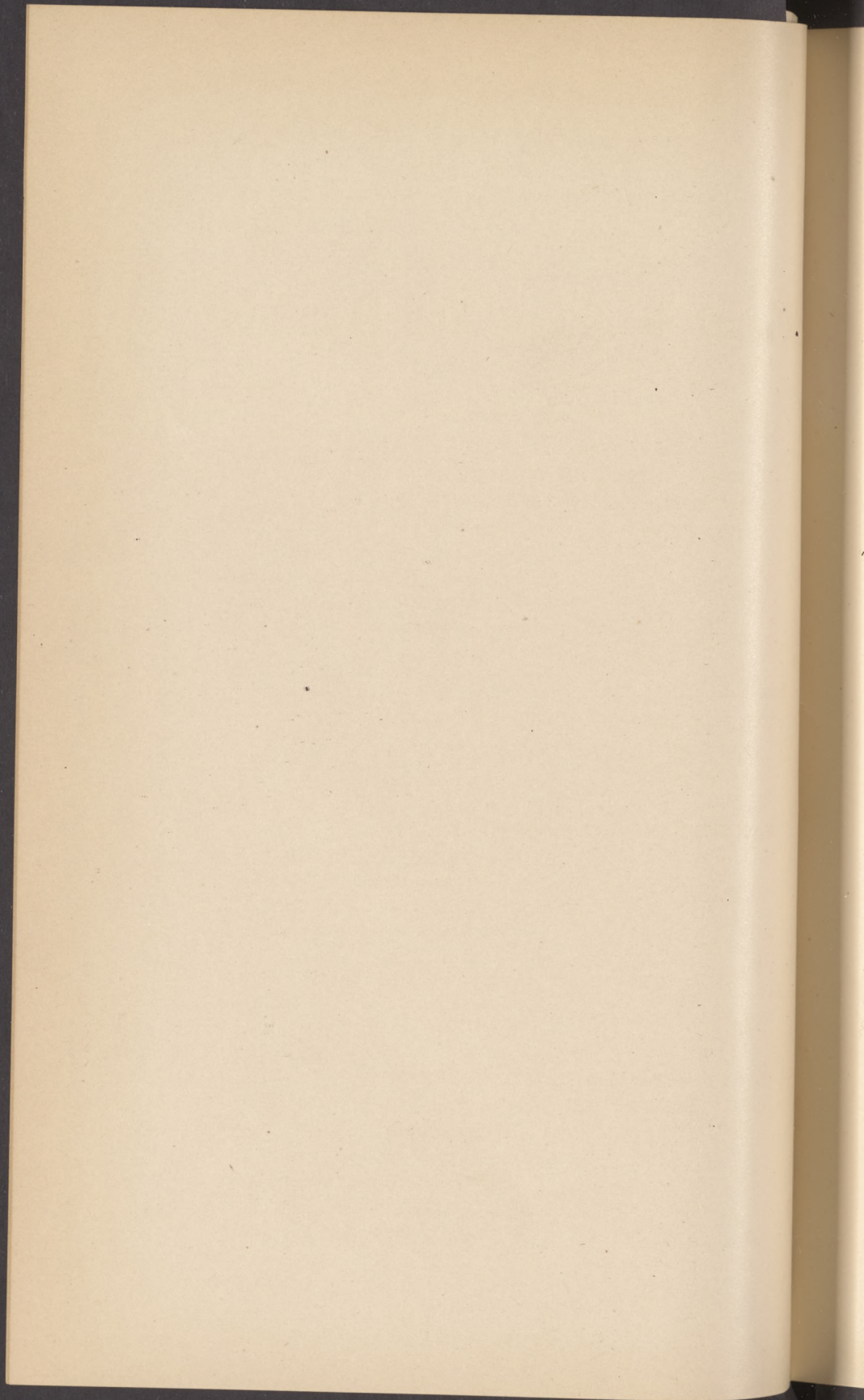
The very statement of such consequences would rob the assets of an assignee of their real value in any market, and shows the error of the defendant's position in this regard.

W. H. VREDENBURGH,
Of Counsel with Complainant.









NEW JERSEY Court of Errors and Appeals.

Between

FANNIE E. MOUNT, Appellant,

and

THE PRESIDENT AND DIRECTORS OF

THE MANHATTAN COMPANY,

Respondents.

On Bill, &c.

VREDENBURGH & PARKER,

Sol'rs and of Counsel with Appellant.

BEDLE, MUIRHEID & MCGEE,

Sol'rs and of Counsel with Respondents.

Between

THE PRESIDENT AND DIRECTORS OF

THE MANHATTAN COMPANY,

and

Appellants,

On Bill, &c.

FANNIE E. MOUNT, Respondent.

BEDLE, MUIRHEID & MCGEE,

Sol'rs and of Counsel with Appellants.

VREDENBURGH & PARKER,

Sol'rs and of Counsel with Respondent.

Between

WILLIAM S. MOUNT, Appellant,

and

THE PRESIDENT AND DIRECTORS OF

THE MANHATTAN COMPANY,

Respondents.

On Bill, &c.

W. L. DAYTON,

Sol'r and of Counsel with Appellant.

BEDLE, MUIRHEID & MCGEE,

Sol'rs and of Counsel with Respondents.

AMENDED BILL.

IN CHANCERY OF NEW JERSEY.

FANNIE E. MOUNT, Administratrix, and THE PRESIDENT AND DIRECTORS OF THE MAN- HATTAN COMPANY <i>et als.</i> ,	}	Complainant, Defendants.	On Bill, &c.
---	---	-------------------------------------	--------------

To His Honor Theodore Runyon, Chancellor of the State of New Jersey:

Humbly complaining, shows unto your Honor your oratrix, Fannie E. Mount, of the city of Newark, county of Essex, and State of New Jersey, that she is the widow of Andrew Mount, deceased, who was late of the county of Monmouth and State aforesaid, and who died *intestate* on the 18th day of September, 1877, at the age of seventy-one
 10 years; that letters of administration upon the estate of said deceased were duly granted to your oratrix by the Surrogate of the county of Monmouth aforesaid, on 31st day of August, 1885, and that your oratrix has taken upon herself the burthen of said administration; that your oratrix was duly married to the said Andrew Mount on the 22d day of April, A. D. 1875, and thereafter lived and cohabited with him as his wife continually until his death; that no children were born of said marriage, but that by a prior marriage the said Andrew Mount had the following named children
 20 and grandchildren, who are now living, viz.: Josephine M. Gray, Georgia A. Worrell and William S. Mount, who are his children, and Andrew M. Platt and William M. Platt, who are his grandchildren; that on or about the second day of January, in the year eighteen hundred and seventy four, the said Andrew Mount, together with George G. Wilmerding and William S. Mount, partners, trading

under the name of Wilmerding & Mount, being indebted to a corporation transacting a banking business in the city and State of New York, existing under the laws of that State by the name of The President and Directors of the Manhattan Company, for a loan of the sum of seventy-five thousand dollars, and; being desirous of extending the day of payment thereof, made and delivered their promissory note to the said banking company, whereby the said partnership promised to pay to the said banking company the said sum of seventy-five thousand dollars in six months 10 from that date.

That the said makers of said note then paid to the said banking company the interest for said six months in advance on said sum, being the discount thereof; that the same time the said Andrew Mount and William S. Mount, for the purpose of securing the payment of said debt, made and extended their bond, and also their deed of mortgage accompanying said bond (a copy of which is hereinafter set forth), to George D. H. Gillespie and John K. Myers, who were directors of and acted therein as the agents and trus- 20 tees of said banking company.

That the said deed of mortgage by its terms embraced and described therein certain large tracts of land situate at the Highlands of Navesink, in the county of Monmouth aforesaid, which were of a value of not less than two hundred and seventy-five thousand dollars, as are hereinafter particularly described by metes and bounds.

That on the same occasion Gillespie and Myers, the directors aforesaid, at the request of said banking company, duly assigned, transferred and conveyed (by their deed of assign- 30 ment, a copy of which is hereinafter set forth,) the said bond together with the said mortgaged lands and premises, together with other property, to the said President and Directors of the Manhattan Company, which was then accepted and received by said company, upon the special trust and confidence hereinafter stated, of realizing therefrom the amount of the said debt of \$75,000.00 and interest and all expenses, and of returning the balance to the said intestate or his order.

That neither the said sum of two hundred and seventy- 40

five thousand dollars inserted in said bond and deed of mortgage, or any other sum of money whatever, was then due from the said mortgagors to the directors, said Gillespie and Myers, but your oratrix is informed and believes, and upon such information states the fact to be, that their names were used at the request of said banking company as a mere method of vesting said property in said banking company, and that said inserted sum of two hundred and seventy-five thousand dollars was assumed to be the real value of
10 the lands so mortgaged by the said parties to said instruments.

That the following is a true copy of the said deed of mortgage above referred to, viz. :

“This indenture, made the thirty-first day of December, in the year one thousand eight hundred and seventy-three, between Andrew Mount and William S. Mount, of the city, county and State of New York, of the first part, and George D. H. Gillespie, of the said city of New York, and John K. Myers, of Westchester county, in the State of New York, of
20 the second part, Whereas, the said Andrew Mount and William S. Mount and George G. Wilmerding are justly indebted to the said parties of the second part in the sum of two hundred and seventy-five thousand dollars, lawful money of the United States of America, to be paid by their certain bond or obligation bearing even date with these presents in the penal sum of five hundred and fifty thousand dollars, lawful money, as aforesaid, conditioned for the payment of the said first mentioned sum of two hundred and seventy-five thousand dollars on demand, as by the said bond or
30 obligation, and the condition thereof and the said agreement therein contained, reference being thereunto had may more fully appear. Now this indenture witnesseth, that the said parties of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation with the interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is

hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said parties of the second part, their heirs and assigns forever,

"All that certain tract of land situate at the Highlands of Navesink, in the township of Middletown, county of Monmouth, and State of New Jersey, beginning at a stone in the center of the new public road leading from Riceville to the Highlands, it being the southeast corner of John Hopping's land; thence south sixty-two degrees and thirty-six minutes east, thirty-two chains and ninety links to a stake in the center of said road, a corner of Robert Hartshorne's land; thence north twenty-nine degrees and twenty-four minutes east, three chains and sixty links to a heap of stones; thence north one degree and forty minutes west, fifty-one chains to a stone planted for a corner on the beach; thence the same course one chain and thirty links to the bay, or fifty chains and thirty links to the bay levelling the bank; thence northwesterly along the bay to John Hopping's line; 20
thence along the same south seventeen degrees and forty-seven minutes west, fifty chains and fifty links to the place of beginning, or forty-eight chains and fifty links levelling the bank; containing one hundred and twenty-four acres and ninety-two hundredths of an acre, agreeably to a survey made by Alfred Walling August 27th, 1858; bounded on the east by Robert Hartshorne and others, on the south by center of said road, on the west by John Hopping, and on the north by Raritan bay at low water mark.

"And also, all that tract of land beginning at a stake in 30
the line of Thomas Leonard's land distant fourteen chains and ninety-five links south seventeen degrees and forty-seven minutes west from a stone in said Leonard's line; thence north fifty-six degrees and four minutes west, twenty-six chains and seventy-five links to line of James Patterson's land; thence along the same and the line of said Mount's land north nineteen degrees and twelve minutes east, twenty-six chains and ninety links to Raritan bay or twenty-four chains and ninety links levelling the bank; thence southeasterly along the bay to said Leonard's line; 40

thence along the same south seventeen degrees and forty-seven minutes west, passing over said stone twenty-six chains and ninety links over surface or twenty-four chains and ninety links levelling the bank to the beginning; containing sixty acres, agreeably to a survey made by Alfred Walling, August 28th, 1858, bounded on the east by said Leonard's land, on the south by lands of said Hopping, on the west by lands of said Patterson and Mount, and on the north by Raritan bay at low water mark.

- 10 "And also, all that tract of land beginning at a stake distant twelve chains and thirty links on a course of north twenty-four degrees six minutes east from a stone, a corner between said Patterson and William Brown; thence as the needle pointed on the 8th day of June, 1857, north twenty-four degrees six minutes east, along the line of Andrew Mount and others, eighteen chains and sixty links to Raritan bay; thence easterly along said bay to the line of Captain John Hoppings' land; thence along the same south nineteen degrees and nine minutes west, twenty chains and
- 20 sixty links to a stake in said Hopping's line, which bears south seventy-one degrees and seventeen minutes east from the aforesaid beginning; thence north seventy-one degrees and seventeen minutes west, twenty-seven chains and twenty-five links to the place of beginning; containing fifty acres calculated from horizontal measurement, as by reference to a map and survey of the same made by Alfred Walling, surveyor, June 8th, 1857, will more fully appear.

- "And also, that tract of land beginning in the southeast corner of lot number 3, as set off to Elizabeth Seward's
- 30 heirs in 1815, by Nimrod Woodward and others, Commissioners; from thence running as per said partition, north sixty-four degrees west, one chain and ninety-five links to a stone; thence north thirty-five and a half degrees east, one chain and sixty-five links to a stone; thence north sixty-nine degrees and thirty-five minutes west, seven chains and sixty-nine links to the southeast corner of Mrs. Worrel's land; thence north twenty-two degrees and fifteen minutes east, along said Mrs. Worral's land about twenty-six chains and forty links to the bay shore; thence easterly along the
- 40 said bay shore nine chains and sixty-eight links; thence

south twenty-two degrees and five minutes west along the line of said lot number 3, and partly along the line of land of the late James Patterson, deceased, about thirty chains and ten links to the beginning, containing $25\frac{12}{100}$ acres, more or less, and being lot No. 3 and part of lot No. 4, as made in the aforesaid allotment and delineated on a map entitled 'Map divided for the heirs of David Stout in 1815.'

"And, also, all that tract beginning in the middle of the old road leading from the lighthouses to Middletown, and in the southwest corner of land formerly of Colonel Wil- 10
liam Jones, and from thence running along the line of said Jones' land north eleven degrees east, nine chains; thence still along said land north four degrees east, to the bay shore; thence westerly along the bay shore to the corner of Michael Fay's land; thence along his land south fifty-eight degrees thirty minutes west, ten chains; thence along land of Andrew Mount south one degree and forty-five minutes east, seventeen chains and thirty links to the aforesaid road; thence easterly along the said road to the corner of lot sold by Anthony Q. Keasbey to Catharine Leonard; 20
thence along her line north one degree and forty-five minutes west, two chains; thence still along her line parallel to said road two hundred and forty-one feet; thence south eleven degrees west, two chains to said road, and thence easterly along the said road sixty feet to the place of beginning, containing in all about sixteen acres, excepting thereout a lot on the beach of about one acre, on which a brick factory stands, the tract lastly thereby conveyed being part of the premises conveyed to said Anthony Q. Keasey by Jordan Woolley, Sheriff, by deed dated 14th September, 30
1863, recorded in Book 170 of Deeds for Monmouth county, page 389, &c., this deed conveying the whole thereof, except the said lot on the beach, which belongs to Joseph B. Thompson, and a lot on said road conveyed to Catharine Leonard, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in 40'

equity, of the said parties of the first part of, in and to the same and every part and parcel thereof, with the appurtenances; to have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, their heirs and assigns, to their own proper use, benefit and behoof forever; provided, always, and these presents are upon this express condition, that if the said parties of the first part, their heirs, executors or administrators, shall well and truly pay unto the

10 said parties of the second part, their executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents and the estate hereby granted shall cease, determine and be null and void; and the said Andrew Mount and William S. Mount, for themselves, their heirs, executors and administrators, do covenant and agree to pay unto the said parties of the second

20 part, their executors, administrators or assigns, the said sum of money and interest as above mentioned and expressed in the condition of the said bond, and if default shall be made in the payment of the said sum of money above mentioned, or the interest that may grow due thereon, or if any part or either, that then and from thenceforth it shall be lawful for the said parties of the second part, their executors, administrators and assigns, to enter into and upon all and singular the premises hereby granted or intended so to be, and to sell and dispose of the same, and

30 all benefit and equity of redemption of the said parties of the first part, their or either of their heirs or assigns therein, at public auction, according to the act in such case made and provided; and as the attorneys of the said parties of the first part for that purpose, by these presents duly authorized, constituted and appointed to make and deliver to the purchaser thereof a good and sufficient deed or deeds of conveyance in the law for the same in fee simple, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said

40 bond or obligation, together with the costs and charges of

advertisement and sale of the said premises, rendering the overplus of the purchase money (if any there shall be) unto the said parties of the first part, their executors, administrators or assigns, which sale so to be made, shall forever be a perpetual bar, both in law and equity, against the said parties of the first part, their heirs and assigns, and against all other persons claiming or to claim the premises or any part thereof, by, from or under them, or any of them.

"In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first 10 herein written.

"ANDREW MOUNT. [L. S.]

"WM. S. MOUNT. [L. S.]

"Signed, sealed and delivered in the presence of, — the thirty-day and interest clause on the first page, and insurance clause on third page, having been stricken out; the words 'and George G. Wilmerding' being interlined on first page.

EZRA A. OSBORNE."

That the said condition of the said bond is therein expressed; that if the said Andrew Mount, George G. Wilmerding and William S. Mount, their heirs, executors or administrators, should well and truly pay or cause to be paid unto the said Gillespie and Meyers, their executors, administrators or assigns, the just and full sum of two hundred and seventy-five thousand dollars, lawful money, on demand, then the said obligation should be void; otherwise, to remain in full force and virtue.

That the said mortgage was, after its execution, acknowledged in due form of law by the said Andrew Mount and William S. Mount before Ezra A. Osborne, Esq., one of the 30 Masters of this Court, and was duly recorded in the office of the Clerk in and for the said county of Monmouth, in Book I 3 of Mortgages, page 113, &c., on the first of January, 1874.

That the following is a true copy of the deed of assignment of said mortgaged premises above referred to, viz. :

- “Know all men by these presents, that we, George D. H. Gillespie and John K. Myers, parties hereto of the first part, in consideration of the sum of two hundred and seventy-five thousand dollars, lawful money of the United States, to us in hand paid by The President and Directors of the Manhattan Company, parties of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned and transferred and set over, and by these presents
- 10 do grant, bargain, sell, assign, transfer and set over unto the said party of the second part, a certain indenture of mortgage bearing date the 31st day of December, in the year one thousand eight hundred and seventy-three, made by Andrew S. Mount and William S. Mount to us to secure the payment of two hundred and seventy-five thousand dollars, and recorded in the Monmouth County Clerk's office at Freehold in Book I 3, of mortgages, pages 113, or together with the bond or obligation therein described, and the money due or to grow due thereon, with the interest.
- 20 To have and to hold the same unto the said parties of the second part, their successors, legal representatives and assigns, for their own use and behoof forever, subject only to the proviso in the said indenture of mortgage mentioned; and we do hereby make, constitute and appoint the said parties of the second part our true and lawful attorneys, irrevocable in our names or otherwise, but, at their proper costs and charges, to have, use and take all lawful ways and means for the recovery of the said money and interest, and, in case of the payment, to discharge the same as fully as
- 30 we might or could do if these presents were not made.

“This assignment is made without any covenant or guarantee expressed or implied on the part of us, the said assignees.

“In witness whereof we have hereunto set our hands and seal the thirty-first day of December, in the year one thousand eight hundred and seventy-three.

“GEO. D. H. GILLESPIE, [L. S.]

“JNO. K. MYERS. [L. S.]

“Sealed and delivered in the presence of

WILLIAM H. CLARKSON.”

That said deed of assignment was acknowledged in due form of law by the said Gillespie and Myers and was afterwards, on the 25th day of October, 1874, duly recorded in said Monmouth County Clerk's office, in Book 1 of Assignments, page 467. Although said assignment recited that the sum of two hundred and seventy-five thousand dollars was received by said Gillespie and Myers as the consideration of said transfer, no money was, in fact, paid to or received by them for said transfer, but the said recital was made therein for purposes of form merely. That on the 10 same occasion and forming a part of the same transaction the said banking company accepted and took possession of the said bond and deed of mortgage, and, in consideration of the property so transferred in excess of the amount so as aforesaid intended to be secured to it, did, upon the request and insistment of the said Andrew Mount, execute and deliver to him a written declaration of trust, of which the following is a true copy, namely :

“MANHATTAN COMPANY,
“NEW YORK, JANUARY 2, 1873. } 20

“ANDREW MOUNT, ESQ. :

“*Dear Sir*—I have received assignments executed to The President and Directors of the Manhattan Company by Geo. D. H. Gillespie and John K. Myers, as follows :

“1. Assignment of bond and mortgage of Andrew and William S. Mount to said Gillespie and Myers, dated December 31, 1873, to secure \$275,000.

“2. Assignment of bond and mortgage of William S. Mount to said Gillespie and Myers, dated December 31, 1873, to secure \$50,000. 30

“3. Assignment of bond and mortgage of Andrew Mount, Geo. G. Wilmerding and William S. Mount to said Gillespie and Myers, dated December 31, 1873, to secure \$18,000.

“4. Assignment of mortgage of Wisner H. Townsend and Emily, his wife, and William E. Gowdy and Mary J., his wife, dated November 18, 1872, to secure \$100,000.

“The Manhattan Company holds said mortgages as collateral security for a note made by Wilmerding and Mount for \$75,000, dated January 2d, 1874, payable in six

months from date, and as collaterals for renewals thereof, in whole or in part, and upon realizing the amount due with interest upon said note or renewals thereof, together with all expenses, the balance to be returned to you or to your order.

Respectfully yours,

J. M. MORRISON, *President.*"

That the date of said writing was, by a clerical or other error, written thereon "1873" instead of 1874, and that said error is apparent on its face.

- 10 That afterwards and at the maturing of said \$75,000 note the makers thereof failed to pay the same, and your orator is informed, and upon information states the fact to be, that a renewal note for the payment of the same sum in six months from that time was given by said partnership and accepted by said banking company in the place of said original note. And your orator is informed and believes, and states the fact to be, that afterwards, on or about the 24th day of August, 1874, the said Andrew Mount paid to the said banking company the sum of two thousand and
- 20 five hundred dollars as and for a part payment of the said note of indebtedness.

- That the said renewal note was not paid at its maturity, and that afterwards, on or about the 12th day of December, 1879, the said banking company, in the exercise of the powers conferred upon them in and by the terms of the said deeds of mortgage and assignment, entered into, took possession of the said lands above described, in pursuance of the said special trust so as aforesaid declared by said company, and thereafter received the rents, issues and profits of said lands,
- 30 and continued in such possession and receipt from the date last aforesaid up to the 9th day of February, 1880, or about that time.

That afterwards, on or about the 9th day of February, 1880, the said banking company bargained and sold the said lands to the Navesink Park Company, a corporation existing under the laws of this State, for the consideration of one hundred and twenty-five thousand dollars, and did, on or about that date, sell, alien and convey said lands, by its deed of conveyance then duly executed for that purpose, to

the said The Navesink Park Company, and did thereupon deliver its said deed to the said Navesink Park Company, and thereupon did receive and realize from said grantee the said sum of one hundred and twenty-five thousand dollars, as and for the consideration money of said lands.

And your oratrix, further complaining, expressly shows and states the fact to be that the said grantee of said conveyance, the Navesink Park Company, had full, due and complete notice and knowledge of the matters hereinbefore stated in this bill, and of the said trust in favor of said intestate, under which the said lands were held and controlled by the said The President and Directors of Manhattan Company, and took said deed of conveyance with notice of the rights of the said intestate in the lands so conveyed to it; and your oratrix respectfully insists that the said Navesink Park Company held the title of said lands subject to the said equities of the said intestate; and your oratrix therein and your oratrix further respectfully insists that the said Navesink Park Company is bound in equity to see to the application of the said consideration money of said lands to the purposes of said trust. 10 20

And your oratrix further shows unto your Honor that the said The President and Directors of the Manhattan Company have, since the said taking of the possession of said lands by it, received and realized from the said sale thereof and from the said rents, issues and profits thereof, large sums of money greatly in excess of the said debt, interest and expenses so as aforesaid intended to be secured to the said banking company by the said intestate; and that the said banking company, notwithstanding it has in its possession said sums of money of such excess, has, on divers occasions, refused to account to your oratrix for the same or any part thereof, or to pay over to her any balance or residue of said moneys after satisfying its said claim, interest and expenses, although your oratrix has, on said occasions, requested it so to do, and has refused to come to any accounting whatever with your oratrix, although she has frequently requested it so to do; and has refused to return to your oratrix the balance of said moneys due to her; and your oratrix well hoped that the said defendant banking company would have complied 30 40

with such reasonable requests of your oratrix as in equity and good conscience it ought to have done; but now so it is, may it please your Honor, the said defendant continuing here to injure and aggrieve your oratrix in the premises, neglect and refuse to comply with such reasonable requests and perform said trust, or to account to your oratrix for the balance of said moneys so as aforesaid realized by the said defendant, or to return or to pay to your oratrix any balance whatever of the amounts of money realized by it out of
 10 said receipts after making all proper deductions.

And the said President and Directors of the Manhattan Company at times pretend that no written trust was ever made or entered into by it relating to the matter set forth in said bill; and at other times pretend that the said writing set forth in said bill and purporting to be signed by J. M. Morrison, as president of the said banking company, was not signed by the same James M. Morrison who was then president of said company, and if signed by him at all was not signed by him as such officer; and at other times pre-
 20 tend that James M. Morrison was not the president of the said banking company at the time of the signing and delivery of said writing; and at other times pretend that said president had no authority or agency to sign or execute said writing, and that his acts therein was ultravires; and at other times pretend that the said possession taken by said banking company of the above described lands was so taken by virtue of a sale for the sum of ten thousand dollars to said banking company by the sheriff of the said county of Monmouth, at public auction, under the direction of a
 30 certain final decree in a foreclosure suit instituted by said company upon the \$275,000 mortgage, and was not taken under the power contained in the terms of said mortgage, and that the sum of ten thousand dollars at which said lands were so sold to it, was a full, fair and adequate consideration therefor, and that such sale was fair, equitable and without fraud or illegal combinations on the part of the said banking company with other bidders thereat; and at other times pretend that such proceedings were taken in Court of Chancery by it in the foreclosure of said mortgage against
 40 the said Andrew Mount as that the said trust was extin-

guished and declared void and said trustee relieved therefrom; whereas your oratrix charges the contrary thereof and of each and all of said pretences to be the truth, and that the said writing was executed by the authority of the said banking company, and that the said writing was signed by the said James M. Morrison as the president of the said company, and that he was at the signing thereof its duly elected president, and that as such officer he had not only express authority and agency to sign and execute the same for the said company, but also had an implied authority 10 arising from the nature and necessities of that transaction, and that his act therein was not beyond the scope of his power, and that the said taking of possession of said lands by said company was done by it in the execution of said trust undertaken by it and in the performance of the duty resting upon it in that behalf, and not in antagonism to said trust, and that equity will presume that said defendant intended to do right rather than wrong, and to act conscientiously rather than in bad faith, and to perform said duty rather than to violate it, and that the subject matter 20 of said possession and sale, whether had through the assistance of the decree of the said court or by the act of said defendant alone without the assistance of any such decree, was acquired with the design and purpose of the performance of said trust, and that in consequence of such purpose an equitable estate in the amount realized by said defendant belonged to the said intestate.

All which actings, doings and pretences of the said banking company are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of 30 your oratrix in the premises; in tender consideration whereof, and for as much as your oratrix is without adequate remedy in the premises at and by the strict rules of the common law, and can only have adequate relief in this Honorable Court where matters of this nature are properly cognizable and relievable; to the end, therefore, that the said defendants, The President and Directors of the Manhattan Company and the Navesink Park Company and their confederates, when discovered, may answer, but without oath or affirmation, all and singular the premises, and each fact 40

above stated according to the best of their respective knowledge, information and belief, and more especially that the said defendant, The President and Directors of the Manhattan Company, may answer the interrogatories addressed to it next below under oath, fully, directly and responsively confining its answer to the interrogatories proposed.

First. Whether James M. Morrison was, in the month of December, 1873, and in January, 1874, the President of the said banking company.

10 *Second.* If yes, whether he acted as the authorized agent of said banking company in the making of the loans of money and in the securing thereof and the taking of collateral for such security.

Third. If yes, whether he so acted in the making and securing of the said loan and debt of seventy-five thousand dollars, due to the said company from the said Wilmerding and Mounts.

Fourth. Whether the said banking company claimed legal possession and title to the lands above described at any
20 time; if so, when and how long.

Fifth. If yes, then state whether they so claimed title under the deed of mortgage above copied exclusively, and if not, then state under what deed they claimed to have the legal title to said lands.

And your orator further prays that the said defendant banking company may be decreed by this Honorable Court and compelled to fully perform their said trust, and that an account may be taken and stated of the amounts of money received or realized by the said defendant under said trust,
30 and particularly of the amount of the consideration money mentioned in the said deed from the said banking company to the said Navesink Park Company, or of the amount or consideration money for said lands which, by reasonable and proper care and attention to the duties of its said trust, said company should have received for said lands, and of the amount of rents, issues and profits which the said banking company received from said lands, or which, by reasonable and proper diligence they should have received, and that said banking company be decreed to return and pay over
40 to your oratrix such balance of said moneys as may be found

upon such accounting, and that such balance may be declared to be a lien upon the said lands above particularly described, and that your oratrix may have such further and other relief in the premises as the nature of the case may require and as may be agreeable to equity and good conscience. May it please your Honor, the premises considered, to grant unto your oratrix the State's writ of subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said The President and Directors of the Manhattan Company, the Navesink Park Company, Josephine M. Gray, Georgia A. Worrell, William S. Mount, Andrew M. Platt, William M. Platt, and Ezra A. Osborne, late assignee of Andrew Mount, commanding them and each of them by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, and that the said The President and Directors of the Manhattan Company and the Navesink Park Company and Ezra A. Osborne may appear according to law and the course of this Court, then and there to answer all and singular the said premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience. And your oratrix, as in duty bound, will ever pray, &c.

VREDENBERGH & PARKER,

W. H. VREDENBURGH,

Solicitors of Complainant.

Of Counsel.

A true copy.

G. S. DURYEE, *Clerk.*

IN CHANCERY OF NEW JERSEY.

Between	} On Bill, &c. Bill filed Oct. 24, 1885. Amendment.
FANNIE E. MOUNT, Administratrix, &c., of	
Andrew Mount, dec'd,	
Complainant,	
and	
THE PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY and others,	
Defendants.	

The plea of the defendant, The President and Directors of the Manhattan Company, to the bill of complaint in this cause having been, on argument, sustained, and the complainant having made a motion to amend her said bill upon notice to the said defendant and to the defendants The Navesink Park Company, and the motion being now opened to the Court by W. H. Vredenburgh, of counsel with the complainant, in the presence of F. McGee, Esq., of counsel with the defendant, The President and Directors of the
10 Manhattan Company,

It is, on this twenty-sixth day of July, 1886, on motion of the counsel of the complainant, ordered that the complainant have leave to amend her bill of complaint by adding and inserting the following allegations, namely :

And your oratrix further shows unto your Honor, that she is informed and states the fact to be that on or about the fourteenth day of March, eighteen hundred and seventy-six, the said Andrew Mount presented and filed in the office of the Clerk of the District Court of the United States for
20 the District of New Jersey, his voluntary petition in bankruptcy under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and the acts amendatory thereto.

And that afterwards, on or about the thirteenth day of April, 1876, an adjudication in bankruptcy was made by said District Court on said petition, wherein it was found and declared, among other things, that the facts set forth in said petition of said Andrew Mount were true, and it was
30 adjudged and declared that the said Andrew Mount became and was bankrupt within the true meaning and intent of the said act of Congress and its amendments before the filing of the said petition.

That afterwards, on or about the thirty-first day of May, 1876, Ezra A. Osborne was duly chosen assignee of the estate and effects of the said Andrew Mount, and thereupon duly accepted the trust of assignee of the estate of the said bankrupt, and thereby became and was in law the assignee of said estate.

40 That afterwards, on or about the fifth day of June, 1876,

Charles E. Green, the register in bankruptcy, by virtue of the authority vested in him by the fourteenth section of the said act of Congress, by an instrument in writing under his hand, did duly convey and assign to the said Ezra A. Osborne, assignee, in the usual form, all the estate, real and personal, of the said bankrupt, including all property of whatever kind of which he was possessed or in which he was interested or entitled to have on the said fourteenth day of March, eighteen hundred and seventy-six, together with all deeds, books and papers relating thereto, in trust nevertheless for the uses and purposes and with the powers and subject to the conditions and limitations prescribed and set forth in said act. 10

That afterwards, on or about the twentieth day of December, eighteen hundred and seventy-eight, the said District Court did duly order that the said assignee have leave and be authorized to sell at public vendue all the said lands and real estate of the said bankrupt. And that afterwards the said assignee, in pursuance of his said authority and of his powers under said act of Congress, having duly advertised 20 and given notice of the sale of the said lands, being all the lands in this bill of complaint particularly described, did duly and legally offer and expose said lands for sale at public vendue to the highest bidder therefor, on the twenty-first day of February, eighteen hundred and seventy-nine, at Red Bank, in the said county of Monmouth, and did, on the same day, having received from William S. Mount a bid of ten dollars for the same, and he being then and there the highest bidder therefor, did strike off and sell said lands to the said William S. Mount for said sum, and 30 did then and there, by a deed of conveyance under the hand and seal of said assignee duly executed and delivered, grant, bargain, sell and convey to the said William S. Mount, his heirs and assigns forever, all of said lands and all rights and equities or redemption of the said assignee and bankrupt therein, and all of the claims, rights, estates and interests of every nature of the said assignee, as well as of said bankrupt in and to said lands.

That afterwards, on or about the second day of October, eighteen hundred and eighty-five, and before the commence- 40

ment of this suit, the said William S. Mount sold, released, assigned and transferred to your oratrix all of said lands and all of the rights, claims, estates and interest, and all property and rights of property, and rights and equities of redemption of the said William S. Mount in and to said lands.

And your oratrix expressly charges the fact to be that by virtue of said several sales and conveyances your oratrix became entitled to, invested with and possessed of the same
10 interest, equities and rights of redemption, claims, choses in action and rights in action, property and rights of property in said lands, as became at any time vested in said assignee under said adjudication and proceedings in bankruptcy.

And your oratrix shows unto your Honor that on or about the fifteenth day of November, eighteen hundred and seventy-one, the said William S. Mount conveyed and duly transferred to the said Andrew Mount, by deed executed and delivered on that day, all his estate, title and interest in
20 the said lands and real estate particularly described in the said bill of complaint.

And that said bill be also amended by inserting the name of Ezra A. Osborne, late assignee of Andrew Mount, in the prayer for process, as a defendant to said bill of complaint.

And by striking out of said bill, and the writs of subpoena and process to appear, and the record of this cause, the words "administratrix of the goods, chattels, rights and credits which were of Andrew Mount deceased," so far as
said words express the character in which the complainant
30 brings and prosecutes this suit, and so that said process, bill and record shall show that this suit is brought and prosecuted in complainant's individual right and behalf, and not as said administratrix; and that the words in the prayer of said bill, as follows, "*to the estate of said intestate,*" may be stricken out of said bill of complaint; and the motion of complainant to strike out the plea of the said The President and Directors of the Manhattan Company is hereby denied, with costs, and said plea allowed as if on final argument; and that the said pleading defendants plead, answer or

demur to the amended bill of complaint within sixty days from the service of a copy of this order upon their solicitors.

THEODORE RUNYON, *C.*

A true copy.

ALLAN McDERMOTT, *Clerk.*

ANSWER OF WILLIAM S. MOUNT, IN FORM OF CROSS-BILL.

[Filed July 20th, 1886.]

IN CHANCERY OF NEW JERSEY.

Between

FANNIE E. MOUNT, Administratrix, &c., of

Andrew Mount, dec'd,

Complainant,

and

THE PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY and others,

Defendants.

10

On Bill, &c.

This defendant, now and at all times hereafter, saving and reserving to himself all and all manner of benefit and advantage of exception to the many errors, uncertainties and imperfections in the said bill of complaint contained, 20 for answer thereunto or unto so much thereof as this defendant is advised it is material or necessary for him to make answer unto, answering and setting up his cross-claim as follows, says:

That he admits that Andrew Mount died intestate on the eighteenth day of September, eighteen hundred and seventy-seven, at the age of seventy-one years, and that letters of administration upon his estate were granted by the surrogate of Monmouth county to said complainant on the

thirty-first day of August, eighteen hundred and eighty-five. And further, that said complainant was duly married to said Andrew Mount on the twenty-second of April, 1875, and afterwards lived and cohabited with him as his wife until his death, and that no children were born of said marriage, but that by a prior marriage the said Andrew Mount had the following named children and grandchildren who are now living, viz.: Josephine M. Gray, Georgia A. Worrall and William S. Mount, who are his children, 10 and Andrew M. Platt and William M. Platt, who are his grandchildren.

And this defendant further admits that on or about the second day of January, in the year eighteen hundred and seventy-four, to wit, on the 31st day of December, 1873, the said Andrew Mount, together with George G. Wilmerding and William S. Mount (this defendant), partners trading under the name of Wilmerding & Mounts, being indebted to a corporation transacting a banking business in the city and State of New York, and existing under the laws of that 20 State by the name of The President and Directors of the Manhattan Company, for a loan of the sum of seventy-five thousand dollars, and being desirous of extending the day of payment thereof, made and delivered their promissory note to the said banking company whereby the said partnership promised to pay to the said banking company the said sum of seventy-five thousand dollars in six months from that date.

That the said makers of said note then paid to the said banking company the interest for six months in advance on 30 said sum, being the discount thereof; that at the same time the said Andrew Mount and William S. Mount, for the purpose of securing the payment of said debt, made and executed their bond, and also their deed of mortgage accompanying said bond (a copy of which is hereinafter set forth) to George D. H. Gillespie and John K. Myers, who were then directors of and acted therein as the agents and trustees of said banking company; that the said deed of mortgage by its terms embraced and described certain large tracts of land situated at the Highlands of Navesink, in the 40 county of Monmouth aforesaid, which were of the value of

not less than two hundred and seventy-five thousand dollars, and are hereinafter particularly described by metes and bounds.

And this defendant further shows unto your Honor that on or about the fifteenth day of November, eighteen hundred and seventy-one, this defendant conveyed and duly transferred to the said Andrew Mount, by deed executed and delivered on that day, all his estate, title and interest in the said lands and real estate.

And this defendant, further answering, says that on the 10 same occasion of the giving of said bond and mortgage to said Gillespie and Myers, they the said Gillespie and Myers, directors aforesaid, at the request of the said banking company, duly assigned, transferred and conveyed (by deed of assignment, a copy of which is hereinafter set forth,) the said bond and deed of mortgage with the said mortgaged land and premises to the said The President and Directors of the Manhattan Company, which was then accepted and received by the said company upon the special trust and confidence hereinafter stated of realizing therefrom the 20 amount of the said debt of seventy-five thousand dollars and interest and all expenses, and of returning the balance to the said Andrew Mount, or to his order.

And this defendant, further answering, admits that neither the said sum of two hundred and seventy-five thousand dollars, inserted in said bond and deed of mortgage, nor any other sum of money was then due from the said mortgagors to the said Gillespie and Myers, but this defendant avers the fact to be that their names were used at the request of the said banking company as a mere method of vesting said 30 property in said banking company, and that said inserted sum of two hundred and seventy-five thousand dollars was assumed to be the real value of the land so mortgaged by the said parties to said instruments. That the following is a true copy of the said deed of mortgage above referred to, viz.:

[Same as in bill.]

That the condition of the said bond is therein expressed, that if the said Andrew Mount, George G. Wilmerding and William S. Mount, their heirs, executors or 40

administrators, should well and truly pay or cause to be paid unto the said Gillespie and Meyers, their executors, administrators or assigns, the just and full sum of two hundred and seventy-five thousand dollars, lawful money, on demand, then the said obligation should be void; otherwise, to remain in full force and virtue.

That the said mortgage was, after its execution, acknowledged in due form of law by the said Andrew Mount and William S. Mount before Ezra A. Osborne, Esq., one of the
 10 Masters of this Court, and was duly recorded in the office of the Clerk in and for the said county of Monmouth, in Book I 3 of Mortgages, page 113, &c., on the first of January, 1874.

That the following is a true copy of the deed of assignment of said mortgaged premises above referred to, viz.:

[Same as in bill.]

That said deed of assignment was acknowledged in due form of law by the said Gillespie and Myers and was afterwards, on the 25th day of October, 1874, duly recorded in
 20 said Monmouth County Clerk's office, in Book 1 of Assignments, page 467. Although said assignment recited that the sum of two hundred and seventy-five thousand dollars was received by said Gillespie and Myers as the consideration of said transfer, no money was, in fact, paid to or received by them for said transfer, but the said recital was made therein for purposes of form merely. That on the same occasion and forming a part of the same transaction the said banking company accepted and took possession of the said bond and deed of mortgage, and, in consideration
 30 of the property so transferred in excess of the amount so as aforesaid intended to be secured to it, did, upon the request and insistment of the said Andrew Mount, execute and deliver to him a written declaration of trust, of which the following is a true copy, namely:

“MANHATTAN COMPANY,
 “NEW YORK, JANUARY 2, 1873. }

“ANDREW MOUNT, ESQ.:

“*Dear Sir*—I have received assignments executed to The President and Directors of the Manhattan Company by
 40 Geo. D. H. Gillespie and John K. Myers, as follows:

"1. Assignment of bond and mortgage of Andrew and William S. Mount to said Gillespie and Myers, dated December 31, 1873, to secure \$275,000.

"2. Assignment of bond and mortgage of William S. Mount to said Gillespie and Myers, dated December 31, 1873, to secure \$50,000.

"3. Assignment of bond and mortgage of Andrew Mount, Geo. G. Wilmerding and William S. Mount to said Gillespie and Myers, dated December 31, 1873, to secure \$18,000.

"4. Assignment of mortgage of Wisner H. Townsend and 10 Emily, his wife, and William E. Gowdy and Mary J., his wife, dated November 18, 1872, to secure \$100,000.

"The Manhattan Company holds said mortgages as collateral security for a note made by Wilmerding and Mounts for \$75,000, dated January 2d, 1874, payable in six months from date, and as collaterals for renewals thereof, in whole or in part, and upon realizing the amount due with interest upon said note or renewals thereof, together with all expenses, the balance to be returned to you or to your order.

Respectfully yours,

J. M. MORRISON, *President*."

20

That the date of the said writing was, by a clerical error, written therein "1873" instead of 1874, and that said error is apparent on its face; that afterwards, and at the maturing of the said seventy-five thousand dollars note, the makers thereof failed to pay the same, and a renewal note for the same sum, payable in six months from that time, was given by said partnership and accepted by said banking company in the place of said original note, and this defendant admits that said renewal note was not paid at its maturity.

30

And this defendant, further answering, shows unto your Honor that at the time of the making of the said note first aforesaid, in addition to the said bond and mortgage upon the Highlands property aforesaid, the said Wilmerding and Mounts, as further collateral security for the payment of said note and its renewals, made and delivered to said Gillespie and Myers, in manner aforesaid, a bond with mortgage for \$18,000, upon certain real estate in Brooklyn, New York;

also, a bond with mortgage for \$50,000 upon 640 acres of land in the State of Missouri, belonging to this defendant, and also assigned to said Gillespie and Myers a bond and mortgage for \$100,000 held by them upon mill and other property at Walden, Orange county, New York. All of which said bonds and mortgages were, as part of the same transaction, in the same manner and upon like terms as the first aforesaid mortgage of the Highlands property, assigned and transferred over by said Gillespie and Myers to said
10 banking company as collateral security for said note of Wilmerding & Mounts.

But this defendant, further answering and setting up his cross-claim, shows unto your Honor that afterwards, on or about the 24th day of August, 1874, the said Andrew Mount paid to the said banking company the sum of twenty-five hundred dollars, as and for a part payment of the said note of indebtedness, the said banking company, in consideration of said payment, releasing from the lien of the said mortgage certain lots of land in Brooklyn belonging to him, held
20 as aforesaid by it as collateral security for said note.

And further, this defendant shows unto your Honor that afterwards, in the year 1877, the said banking company, in the exercise of the rights and powers conferred upon it by the said assigned mortgage on the mill and other property at Walden, New York, foreclosed the said mortgage, and, purchasing the said property at foreclosure sale, realized thereon the sum of at least six thousand dollars, which it appropriated as part payment on account of the amount due on said note. And further, that under like provisions
30 and powers, in the year 1877, the said banking company took possession of and by foreclosure suit or otherwise caused to be sold certain of the lots in Brooklyn aforesaid, formerly belonging to said George G. Wilmerding, from which was realized the sum of five hundred dollars, which was appropriated by said banking company as part payment and on account of said note. And further, that in the fall of 1877 or spring of 1878, the said banking company in like manner caused the six hundred and forty acres of land in Missouri, formerly belonging to William S.
40 Mount, to be sold, realizing therefrom the sum of twelve

hundred dollars, which was also appropriated by said banking company in part payment of said note. And further, that said banking company received for rent on the mill property at Walden aforesaid, the sum of five hundred dollars, and appropriated the same in part payment of said note, making in all the sum of ten thousand seven hundred dollars received by the said banking company on account of the said note of Wilmerding and Mounts for seventy five thousand dollars aforesaid.

And this defendant, further answering, admits and says 10 that on or about the twelfth day of December, 1879, the said banking company, in the exercise of the powers conferred upon them in and by the terms of the said deed of mortgage and assignment, entered into and took possession of the lands in said mortgage in said bill of complaint described, situated on the Highlands of Navesink, in the county of Monmouth aforesaid, in pursuance of the said special trust so as aforesaid declared by said company, and thereafter received the rents, issues and profits of said lands, and continued in such possession and receipt from the date last 20 aforesaid up to the ninth day of February, 1880, or about that time.

And this defendant, further answering, admits and avers that on or about the ninth day of February, 1880, the said banking company bargained and sold the said lands at the Highlands of Navesink described in the said mortgage to the Navesink Park Company, a corporation existing under the laws of this State, for the consideration of one hundred and twenty-five thousand dollars, and did, on or about that date, sell, alien and convey said lands by its deed of convey- 30 ance then duly executed for that purpose, to the said Navesink Park Company, and did thereupon deliver said deed to the said Navesink Park Company, and thereupon did receive and realize from said grantee the said sum of one hundred and twenty-five thousand dollars as and for the consideration money of said lands.

And this defendant, further answering, admits and avers that the said grantee of said conveyance, the Navesink Park Company, had full, due and complete notice and knowledge of the matters hereinbefore stated, and of the said trust in 40

favor of said Andrew Mount under which the said lands were held and controlled by the said The President and Directors of the Manhattan Company, and that the said grantee took said deeds of conveyance with notice of the rights of the said Andrew Mount in the lands so conveyed to it, and this defendant also insists that the said Navesink Park Company hold the title of said lands subject to the said equities formerly of Andrew Mount and hereinafter stated, vesting in and appertaining to this defendant; and
10 this defendant also insists that the said Navesink Park Company is bound in equity to see to the application of the said consideration money of said lands to the purposes of said trust.

And this defendant, by way of cross-claim against the said defendants, The President and Directors of the said Manhattan Company and The Navesink Park Company, and claiming any and all benefit and advantage of said cross-claim as if the same had been set up in the form of a cross-bill, further shows unto your Honor that on or about
20 the fourteenth day of March, 1876, the said Andrew Mount presented and filed in the office of the Clerk of the District Court of the United States for the District of New Jersey, his voluntary petition in bankruptcy under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and the acts amendatory thereto.

And that afterwards, on or about the thirtieth day of April, 1876, an adjudication in bankruptcy was made by said District Court on said petition, wherein it was found
30 and declared among other things that the facts set forth in said petition of said Andrew Mount were true, and it was adjudged and declared that the said Andrew Mount became and was bankrupt within the true meaning and intent of the said act of Congress and its amendments before the filing of the said petition.

That afterwards, on or about the thirty-first day of May, 1876, Ezra A. Osborne was duly chosen assignee of the estate and effects of the said Andrew Mount, and thereupon duly accepted the trust of assignee of the estate of the said

bankrupt, and thereby became and was in law the assignee of said estate.

That afterwards, on or about the fifth day of June, 1876, Charles E. Green, Register in Bankruptcy, by virtue of the authority vested in him by the fourteenth section of the said act of Congress, by an instrument in writing under his hand, did duly convey and assign to the said Ezra A. Osborne, assignee, in the usual form, all the estate, real and personal, of the said bankrupt, including all property of whatever kind of which he was possessed or in which he 16 was interested or entitled to have, on the fourteenth day of March, in the year eighteen hundred and seventy-six, together with all deeds, books and papers relating thereto, in trust, nevertheless, for the uses and purposes and with the powers and subject to the conditions and limitations prescribed and set forth in said act.

That afterwards, on or about the twentieth day of December, 1878, the said District Court did duly order that the said assignee have leave and be authorized to sell at public vendue all the said lands and real estate of the said bank- 20 rupt, and that afterwards the said assignee, in pursuance of his said authority and of his powers under said act of Congress, having duly advertised and given notice of the sale of the said lands, being the lands in the said bill of complaint particularly described, situated on the Highlands of Navesink, in said county of Monmouth and State of New Jersey, did duly and legally offer and expose said lands for sale at public vendue to the highest bidder therefor, on the twenty-first day of February, 1879, at Red Bank, in the said county of Monmouth, and on the same day, having 30 received from this defendant, William S. Mount, a bid of ten dollars for the same, and, he being then and there the highest bidder therefor, did strike off and sell said lands to this defendant for said sum, and did then and there, by a deed of conveyance under the hand and seal of said assignee, duly executed and delivered, grant, bargain, sell and convey to said William S. Mount, this defendant, his heirs and assigns forever, all of said lands and all rights and equities of redemption, and all other equities of the said assignee and of said bankrupt therein, and all the claims, 40

rights, estates and interests of every nature of the said assignee as well as of the said bankrupt in and to said lands.

And this defendant, by way of cross-claim, expressly charges the fact to be that by virtue of said sale and conveyance this defendant became entitled to, invested with and possessed of, the same and all interest, equities, rights of redemption, claims, choses in action and rights in action, property and rights of property in and to said lands, as were formerly in said bankrupt and as became at any time
10 vested in said assignee under said adjudication and proceedings in bankruptcy.

And this defendant further shows unto your Honor, that by virtue of a decree and writ of execution issuing out of said Court of Chancery at the suit of said banking company, acting in the exercise and by virtue of the powers conferred in said mortgage, the said lands therein described were advertised for sale by the sheriff of Monmouth county, aforesaid, on the twelfth day of February, 1879, and the said banking company recognizing the aforesaid trust under
20 which they held the said mortgage and mortgaged lands, and that the equities and rights appertaining and appurtenant thereto had, by virtue of the said purchase by this defendant and of the deed of the said assignee become vested in this defendant, urged and induced this defendant not to bid for or to buy the said property at said sale, but to allow the said banking company to secure the same at a nominal price, representing to this defendant that, as bound in equity to do, it would continue to hold the said property in and under the special trust aforesaid for this defendant;
30 and this defendant charges that the said banking company having, in consequence of such representations to this defendant, bought the said property at said sheriff's sale for the nominal sum of ten thousand dollars, afterwards sold and disposed of the said lands to the said Navesink Park Company for a large sum of money, to wit, one hundred and twenty-five thousand dollars, and in violation of the special trust under which the said lands were held, the said banking company, out of said sum of money so received by it, not only repaid itself the amount of indebtedness remain-
40 ing unpaid on said note, and for which said lands were

held as security, but appropriated to itself and to other uses the large balance remaining in its hands, and although frequently requested so to do by this defendant, has at all times refused to account for or to deliver over to this defendant the said balance, as in justice and equity it ought to do.

And this defendant, by way of cross-claim, further shows unto your Honor that the said The President and Directors of the Manhattan Company have, since the taking possession of the said lands by it received, have realized from the said 10 sale thereof and from the said rents, issues and profits thereof, large sums of money greatly in excess of the said debt, interest and expenses, so as aforesaid intended to be secured to the said banking company, and notwithstanding it has in its possession said sums of money of such excess, it has unlawfully neglected and failed to account to this defendant for the same or any part thereof, or to pay over to him any balance or residue of said moneys after satisfying its said claim, interest and expenses. And the said banking company has refused to come to any account whatever with this 20 defendant, although this defendant has requested it so to do, and has refused to return to this defendant the balance of said moneys due to this defendant as aforesaid.

And this defendant well hoped that the said defendant banking company would have complied with such reasonable requests of this defendant, as in equity and good conscience it ought to have done, but now so it is, may it please your Honor, the said The President and Directors of the Manhattan Company contriving how to injure and aggrieve this defendant in the premises, neglect and refuse to comply 30 with such reasonable requests and perform said trust or to account to this defendant for the balance of said moneys so as aforesaid realized by the said banking company, or to return to or pay to this defendant any balance whatever of the amounts of money realized by it out of said receipts after making all proper deductions.

And the said The President and Directors of the Manhattan Company at times pretend that no written trust was ever made or entered into by it relating to the matters above set forth, and at other times pretend that such proceedings were 40

taken in said Court of Chancery by it in its foreclosure of said mortgage against the said Andrew Mount, as that the said trust was extinguished and declared void, and said trustee relieved therefrom, whereas this defendant charges the contrary thereof and of each and all of said pretences to be the truth, and that possession of said lands was taken by said company in the execution of said trust undertaken by it and in performance of the duty resting upon it in that behalf and not in antagonism to said trust, and that the subject matter of said possession and sale, whether had through the assistance of the decree of said Court of Chancery or by the act of said banking company alone, without the assistance of any such decree, was acquired with the design and purpose of the performance of said trust, and that in consequence of such purpose, an equitable estate in the amount realized by the said banking company belonged and belongs to this defendant. And this defendant denies that the said complainant has any right or claim to the performance of said trust for her benefit, or to the balance of money received as aforesaid by said banking company in trust, as aforesaid, or to any part thereof, or to an accounting of the same from any of said defendants, or to any relief as prayed for in her said bill.

All which actings, doings and pretences of said defendant banking company are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of this defendant in the premises.

In tender consideration whereof, and forasmuch as this defendant is without adequate remedy in the premises at and by the strict rules of the common law, and can only obtain relief in this Honorable Court, where matters of this nature are properly recognizable and relievable, and by rule (209) of this Court, cross-claims as above against co-defendants may be set up and relief prayed for and obtained in and on the answer of this defendant, the same as if a cross-bill for that purpose were filed by him

May it please your Honor, the premises considered, to grant to this defendant an accounting from the said The President and Directors of the Manhattan Company and the said the Newark Park Company, and such relief in the premises

as the nature of the case may require and shall be agreeable to equity and good conscience.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill of complaint charged without that, that any other matter or thing in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed or avoided, traversed or denied, is true to the knowledge or belief of this defendant; all which 10 matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct.

WILLIAM L. DAYTON,

Solicitor for and of Counsel with William S. Mount, Defendant.

STATE OF NEW JERSEY, }
MERCER COUNTY, } ss.

William S. Mount, the above-named defendant, being duly sworn, on his oath saith that the matters and things set forth in the above answer, so far as relates to his own acts, are true, and so far as relates to the acts of others he 20 believes them to be true.

WM. S. MOUNT.

Sworn and subscribed this 20th day of July, A. D. 1886, before me,

M. R. HAMILTON,

M. C. C. of N. J.

A true copy.

ALLAN McDERMOTT, *Clerk.*

REPLICATION.

[Filed October 12th, 1886.]

30

The complainant joins issue in the answer of the defendant William S. Mount.

VREDENBURGH & PARKER,

Solicitors of Complainant.

TITLE: PLEAS TO AMENDED BILL OF COMPLAINT.

The Plea of The President and Directors of the Manhattan Company to the amended bill of complaint in the above entitled cause.

These defendants, The President and Directors of the Manhattan Company, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's amended bill contained to be true in such manner and form as the same are therein and thereby
10 set forth and alleged, for a plea thereunto say:

That in the life-time of the said Andrew Mount, and after the making of the bond and mortgage mentioned in the said amended bill of complaint, and before the filing in the office of the Clerk of the District Court of the United States for the district of New Jersey on the voluntary petition in bankruptcy of said Andrew Mount, set forth in said amended bill of complaint, and on the twenty-eighth day of May, eighteen hundred and seventy-five, these defendants, The President and Directors of the Manhattan Company,
20 being then the owners of the mortgage for two hundred and seventy-five thousand dollars mentioned in said amended bill of complaint, and of the bond therein described, filed their bill of complaint in the Court of Chancery of New Jersey for the foreclosure of said mortgage and the sale of the land therein described against the said Andrew Mount, George Wilmerding, William S. Mount and Samuel K. Platt, guardian of Andrew H. Platt and William H. Platt, Mrs. Samuel K. Platt, Charles Spicer, executor of Mary B. Spicer, deceased, The New
30 York State Bank of Albany, New York, Patrick Donohue and George G. Wilmerding and John McKesson, guardians and trustees of the estate of Margaret Ireland Wilmerding, Catherine Wilmerding, Edward Marturin Wilmerding and Louis E. Wilmerding, children of William E. Wilmerding, deceased, in which bill of complaint, after reciting the

giving of said bond and mortgage and the recording thereof, and that the same had been assigned on the thirty-first day of December, eighteen hundred and seventy-three, by said Gillespie and Myers, the grantees therein named, to these defendants, and that said assignment had been recorded on the twenty-fourth of October, eighteen hundred and seventy-four, in Book 1, page four hundred and sixty-seven of Assignments, in the Clerk's office of Monmouth county, and several conveyances by Andrew Mount to different persons therein named of parcels of said land, and the making of certain mortgages therein named by the said Andrew Mount on said lands, and the recovery of certain judgments against the said Andrew Mount by persons therein named as defendants, and the issuing of an attachment against the said Andrew Mount by persons therein named as defendants, it was alleged that all the liens so recovered and described were subsequent to the making of said mortgage and to the lien thereof; that frequent demands had been made upon the said Andrew Mount and the other defendants therein named to pay the moneys due and owing upon said bond and mortgage, but that all of them had refused to make such payments, and that the moneys therein and thereby secured were due and owing, together with large arrears of interest; and that the estate granted by said mortgage had become absolute in the complainants and their successors; and that since the execution of said mortgage the defendants, or some of them, had enjoyed and possessed, and still do enjoy and possess, the mortgaged premises, and had always received, and still did receive, the rents, issues and profits thereof; and that said premises were a scanty security for the payment of the moneys so due to the complainants as aforesaid; and that the complainants, or some other person or persons for them, had frequently applied to the said defendants, or one of them, and requested them to pay and discharge the said principal and interest moneys so due to the complainants on said bond and mortgage, and that they had refused to do so; and that the complainants had not a complete remedy in the premises at the common law, nor could foreclose the equity of redemption of said

mortgaged premises or safely sell the same for payment and satisfaction of the said principal and interest moneys without the aid of said Court of Chancery, where matters of that nature were properly cognizable and relievable; the said bill of complaint prayed that the said defendants might full, true and perfect answer make to all and singular the premises thereof, and that they might be decreed to pay to the complainants the principal sum so due on said bond and mortgage, and the interest due and to grow due thereon, 10 with the complainants' costs, by a short day, to be appointed by the Court, and that in default thereof the said defendants, and all persons claiming or to claim under them, or any of them, might be foreclosed of and from all right, title and equity of redemption in and to the said mortgaged premises and every part thereof, with the appurtenances, and might deliver unto the complainants the possession thereof, and all deeds, demises and muniments of title relating to or concerning the same; and that the said mortgaged premises, with the appurtenances, might be sold, and 20 that out of the moneys arising from such sale the complainants therein named might be paid the said principal and interest and costs, and that if the proceeds of said sale should not be sufficient to pay said amount, with interest and costs, said Andrew Mount and William S. Mount might be decreed to pay the deficiency, and that the complainants therein named might have such other and further relief in the premises as the nature of the case might require and as should be agreeable to equity and good conscience; and that writs of subpoena might be issued directed to the said 30 defendants commanding them to be and appear before the said Court of Chancery to answer the premises and to stand to, abide by and perform such decree therein as to the said Court might seem meet and agreeable to equity and good conscience.

And these defendants aver that the bond and mortgage set forth in said amended bill of complaint is the same bond and mortgage as that mentioned in said amended bill of complaint of the complainant in this cause, and is the bond and mortgage under which the said complainant claims to 40 have a cause of suit herein against the said defendants, and

further, that the said Andrew Mount and William S. Mount mentioned in said amended bill of complaint are the same Andrew Mount and William S. Mount mentioned in the amended bill of complaint herein.

That on the sixth day of October, eighteen hundred and seventy-five, there was an amendment of said bill of complaint filed in said Court changing the name of Charles Spicer, executor, &c., to Charles B. Spicer, and alleging a conveyance by Andrew Mount to one Fannie E. Collis of lands specified therein, which lands the complainant therein alleged that they could not tell whether they were part of the mortgaged premises or not, but that if they were, the conveyance thereof was subsequent to and subject to the said bond and mortgage, and also alleged that the said Fannie E. Collis had at that time become the wife of the said Andrew Mount and inserted her name as a defendant to said bill of complaint. And these defendants allege that the said Fannie E. Collis Mount is the complainant in this cause.

That on the nineteenth of October, eighteen hundred and seventy-five, another amendment to said bill of complaint was filed in said Court alleging that by virtue of said conveyance to Samuel K. Platt, guardian as aforesaid, the said Andrew H. Platt and William H. Platt, his wards, might claim some title in the premises, and alleging that their rights were cut off by the mortgage, and inserted their names in the prayer for process.

That on the 10th day of January, eighteen hundred and seventy-six, the said Andrew Mount and William S. Mount filed their answer to the said foreclosure bill, in which they admitted all the formal allegations of said bill, and alleged that said bond and mortgage were really for seventy-five thousand dollars only, and not for two hundred and seventy-five thousand dollars, as stated in said bond and mortgage; that twenty-five hundred dollars had been paid and some interest, and that only seventy-two thousand five hundred dollars and interest then remained due; that the loan for which said bond and mortgage were given was a loan to the whole firm of Wilmerding & Mounts; that the mortgaged premises were the private property of Andrew Mount and Wil-

liam S. Mount; that that firm had assigned to complainants, as security for said loan, a mortgage of one hundred thousand dollars on lands in Orange county, New York, made by Wisner H. Townsend and Emily H., his wife, and William E. Gowdy and Mary J., his wife; that that mortgage was worth at least seventy-five thousand dollars; that complainants ought to be compelled to exhaust that partnership mortgage before resorting to the individual property of said Andrew Mount and William S. Mount; that said Orange
10 county mortgage was actually delivered to and was then in full possession of the complainants and could be enforced by them; denied all unlawful combination and confederacy, tendered proof of the allegations of the answer, and prayed to be dismissed from the Court with costs.

That such proceedings were had in said suit that all of said defendants were brought into Court in said cause, either by service of subpoena *ad respondendum* or by publication according to law, or otherwise; that guardians *ad litem* were appointed for the infant defendants in said suit mentioned,
20 and that on the eighth day of December, eighteen hundred and seventy-five, appearances were entered in said cause for the said Andrew Mount and Fannie E. Mount, his wife, and the said William S. Mount, by William H. Vredenburg, Esq., their solicitor.

That afterwards and on the twenty-fourth day of February, eighteen hundred and seventy-six, a general replication was filed by the complainants therein named, to the said answer of the said Andrew Mount and William S. Mount, and on the eighth day of May of that year an order was
30 made and filed in said cause, referring the said cause to the Vice-Chancellor.

That on the twenty-first of January, eighteen hundred and seventy-six, a decree *pro confesso* in said cause against all of said defendants, except the said defendants Andrew Mount and William S. Mount, was made and filed in and by which it was referred to William S. Gummere, Esq., one of the Masters of said Court, to report the amount due to the said complainants on the said mortgage and whether the whole premises should be sold to make the amount of the

same or whether they should be sold in parcels, and if in parcels, in what order.

That on the twenty-first day of July, eighteen hundred and seventy-six, the said Master reported that there was due the sum of eighty-thousand two hundred and forty-one dollars and twenty-six cents on said mortgage, and that the whole of the said premises should be sold, which report was filed on the eighth day of August of that year.

That on the seventh day of July, eighteen hundred and seventy-six, a decree was made in said cause reciting that 10
argument had been had on due notice before the Vice-Chancellor by complainant's solicitor; that nobody had appeared for said Andrew Mount or William S. Mount, and that the said mortgage was security for a note of seventy-five thousand dollars; that the defense set up in the said answer of the said Andrew Mount and William S. Mount was not a valid defense; that the matter has been referred to the said Master, William S. Gummere, to report; and ordered that the case be further referred to said Gummere in order that he might summon the answering defend- 20
ants, Andrew Mount and William S. Mount, in order that they might, if they desired, appear before him in reference to the amount due on the note secured by the mortgage, and that all further equity should be reserved until the coming in of said report.

That on the ninth day of August, eighteen hundred and seventy-six, a rule *nisi* was filed in said cause, reciting that said Master had reported and directed that said report be confirmed, unless exceptions were filed thereto within eight 30
days.

That on the nineteenth day of August, eighteen hundred and seventy-six, a final decree was made in said cause, confirming said Master's report and directing a sale of the mortgaged premises to raise eighty-thousand two hundred and forty-one dollars and twenty-six cents, with interest thereon from the twenty-first day of July, eighteen hundred and seventy-six, and costs and counsel fee, and also directing that a writ of *feri facias* do issue for the sale of said lands, and that the surplus thereof be brought into Court, and also decreeing that any deficiency remaining 40

thereof after exhausting the proceeds of said sale should be paid by the said Andrew Mount and said William S. Mount. To which proceedings in the Court of Chancery, now remaining on file and of record in that Court and ready to be proven when and where this Court shall direct, these defendants beg leave for greater certainty to refer.

And these defendants allege that the said seventy-five thousand dollar note mentioned in said report of said Master, William S. Gummere, was the same note; that
10 said bond and mortgage were the same bond and mortgage, and that the premises therein foreclosed were the same lands mentioned in the pleadings in this cause.

That on the thirty-first of August, eighteen hundred and seventy-six, a writ of *fieri facias* was issued in said cause out of said Court, returnable at the October term of said Court, for the year eighteen hundred and seventy-six, and directed to the sheriff of the county of Monmouth, in which, after reciting said decree and describing the mortgaged premises, the said sheriff was commanded that he cause to be made
20 of the said premises by selling so much thereof as might be needful and necessary for the purpose, the said sum of eighty thousand two hundred and forty-one dollars and twenty-six cents, together with lawful interest thereon as aforesaid, and also the sum of four hundred and twenty-four dollars and forty-seven cents of costs, besides sheriff's execution fees, and that he should have those moneys before the Chancellor, in the Court of Chancery aforesaid, in Trenton, on the third Tuesday of October then next, to render unto the said complainants, and also the surplus money if any there be, and
30 to abide the further order of the said Court according to the said decree. Which writ was duly tested in the name of Theodore Runyon, Esq., the then Chancellor, on the thirty-first day of August, eighteen hundred and seventy-six, and was signed by H. S. Little, the then clerk, and by McCarter & Keen, the complainant's solicitors in said cause, and was duly delivered to the said sheriff. To which writ, ready to be proved when and where this Court shall direct, these defendants for greater certainty beg leave to refer. And these defendants aver that said proceedings in the said Court

of Chancery still remain of record in said Court, not reversed, vacated, or in any wise altered.

That in pursuance of said writ the said sheriff, after due advertisement according to law, and after a number of adjournments duly made, did, on the fourteenth day of November, eighteen hundred and seventy-nine, under and by virtue of said writ, sell the said lands at public auction to these defendants, The President and Directors of the Manhattan Company, they being the highest bidders at said sale, for the sum of ten thousand dollars. And afterwards, 10
and on or about the twelfth day of December, eighteen hundred and seventy-nine, did convey the same to these defendants, the said The President and Directors of the Manhattan Company, by his deed of conveyance, dated on that day, and duly executed according to law, and recorded on the thirteenth day of December, eighteen hundred and seventy-nine, in the office of the Clerk of the county of Monmouth, in Liber three hundred and twenty of Deeds for that county, on pages three hundred and forty-nine, &c., as by reference to said deed or the record thereof will more 20
fully appear. In and by which said deed the said sheriff, after reciting the said writ of *feri facias* and the advertisement of said sale by him under the said writ, and the various adjournments thereof made by him, and the sale thereof at public auction as aforesaid, in accordance with the terms of said writ and said sale, and in consideration of the said sum of ten thousand dollars, the receipt whereof he did thereby acknowledge, did grant, bargain sell and convey by the said deed unto the said The President and Directors of the 30
Manhattan Company, these defendants, their successors and assigns, all the lands therein described, together with the hereditaments and appurtenances to the same belonging, to have and to hold the thereby granted land and premises, with the appurtenances, unto the said The President and Directors of the Manhattan Company, their successors and assigns forever, according to the force, power and effect of the statutes in such case made and provided. To which deed or the record thereof, ready to be produced and proved when and where this Court shall direct, these defendants beg leave to refer.

These defendants aver that the said petition in bankruptcy filed in the United States District Court for the District of New Jersey by the said Andrew Mount and mentioned in the said amended bill of complaint, was filed on the fourteenth day of March, eighteen hundred and seventy-six, and all the proceedings thereunder were subsequent to that date. That the said Andrew Mount, Fannie E. Mount and William S. Mount were all parties to said bill of complaint and said suit, had notice of all the proceedings therein, and
10 were bound by the decree therein, and the execution and sale and conveyance thereunder made.

That the sale of said premises alleged in said amended bill of complaint to have been made on the twenty-first day of February, eighteen hundred and seventy-nine, by the said Ezra A. Osborne to the said William S. Mount and the conveyance thereof, if made, and the sale of said premises by said William S. Mount, alleged in said amended bill of complaint to have been made on or about the twenty-second
20 day of October, eighteen hundred and eighty-five, to the said Fannie E. Mount, were as to both of said alleged sales and both of said alleged conveyances, subsequent to the filing of said bill in foreclosure.

And these defendants aver that by virtue of the said foreclosure proceedings and the decree therein made and the execution thereon issued and the sale had and conveyances made under and in pursuance thereof, all title to said lands passed from the said Andrew Mount and all other parties interested in said lands, to these defendants, and that said Andrew Mount and his assignee in bankruptcy, the said
30 Ezra A. Osborne, and all persons claiming under either, including the said defendant William S. Mount and the complainant Fannie E. Mount, were foreclosed of, and cut off from, all equity of redemption in said mortgaged premises, and that the deed alleged in said amended bill of complaint to have been given by said assignee in bankruptcy, Ezra A. Osborne, to said William S. Mount, if given, and the deed alleged therein to have been given by said William S. Mount to said Fannie E. Mount, if given, were both subject to said decree, execution, sale and conveyance, and passed
40 no title to said lands as against said decree, execution, sale and conveyance or as against these defendants.

And these defendants aver that by reason of the premises there is no title in said lands remaining in said complainant and no foundation for the claim made by her in her said amended bill of complaint, and that the alleged right on which the complainant's action is founded, if any such ever existed, was cut off and foreclosed by the foreclosure and sale aforesaid.

Wherefore these defendants aver that the said complainant has no claim against them by virtue of anything alleged in said amended bill of complaint.

10

And for a further plea in this behalf, by leave of the Court for that purpose first had and obtained, these defendants, The President and Directors of the Manhattan Company, by protestation, not confessing or acknowledging all or any of the matters and things in said amended bill of complaint to be true, in such manner and form as the same are therein and thereby set forth and alleged, for a plea thereunto say:

That the said deed alleged in the said amended bill of complaint to have been given by the said Ezra A. Osborne, assignee in bankruptcy, to the said William S. Mount, on 20 or about the twenty-first day of February, eighteen hundred and seventy-nine, if any such deed was made, did not, by its terms, convey to the said William S. Mount any title to said lands, or in the claims set up in said amended bill of complaint as against these defendants.

And that the said deed alleged in the said amended bill of complaint to have been given by the said William S. Mount, on or about the twenty-second day of October, eighteen hundred and eighty-five, to the said complainant, Fanny E. Mount, did not convey to said complainant, 30 Fanny E. Mount, any title in said lands or in the claim set up in said amended bill of complaint as against these defendants.

Wherefore these defendants aver that the said complainant has no claim as against these defendants by virtue of anything alleged in said amended bill of complaint.

And for a further plea in this behalf, by leave of the Court for that purpose first had and obtained, these defendants,

The President and Directors of the Manhattan Company, by protestation, not confessing or acknowledging all or any of the matters and things in said amended bill of complaint to be true, in such manner and form as the same are therein and thereby set forth and alleged, for a plea thereunto say:

That the petition in bankruptcy mentioned in the said amended bill of complaint of the said Fannie E. Mount was filed by the said Andrew Mount on the fourteenth day of March, eighteen hundred and seventy-six; that the conveyance alleged in the said amended bill of complaint to have been made by the said Ezra A. Osborne, assignee in bankruptcy, to the said William S. Mount, is therein alleged to have been made on the twenty-first day of February, eighteen hundred and seventy-nine; and that the conveyance alleged in said amended bill of complaint to have been made by said William S. Mount to the said Fannie E. Mount is therein alleged to have been made on or about the twenty-second day of October, eighteen hundred and eighty-five.

20 And these defendants aver that by the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March second, eighteen hundred and sixty-seven, it is provided that no suit at law or in equity shall in any case be maintainable by or against an assignee in bankruptcy, or by or against any person claiming an adverse interest, touching the property and rights of property of said bankrupt transferrable to or vested in such assignee, in any Court whatsoever, unless the same shall be brought within two years from
30 the time the cause of action accrued for or against such assignee.

This same provision was afterwards incorporated into and became a part of the Revised Statutes of the United States, Title sixty-one, Section 5057, which statute was in force at the time said petition in bankruptcy was filed.

Afterwards and by an act of Congress entitled "An act to repeal the bankrupt law," approved June seventh, 1878, said bankrupt act was repealed, but by said repealing act it was expressly provided that in respect of all rights of debtors
40 and creditors (except the right of commencing original

proceedings in bankruptcy) and all rights of and suits by or against assignees, under any or all of the acts thereby repealed, in any matter or case which should have arisen prior to the day when said act should take effect (which should be the first day of September, Anno Domini eighteen hundred and seventy-eight,), or in any matter which should arise after said act took effect, in respect of any matter of bankruptcy authorized by said act to be proceeded with after said last named day, the acts thereby repealed should continue in full force and effect until the same should be fully disposed of in the same manner as if said acts had not been repealed. 10

And these defendants aver that said bankrupt act was in force at the time said petition in bankruptcy was filed, and as to the said provisions thereof relative to the limitations of actions, remained in full force at the time of the making, execution and delivery of said deed by said assignee to said William S. Mount and of said deed from William S. Mount to the complainant, as alleged in the said amended bill of complaint, if any such deeds were made, and at the time of the beginning of this suit, and that it still remains as to said provision in full force to this time, and has at no time since its said original enactment been repealed or in anywise abrogated or annulled. 20

And these defendants aver that the claim in question in this suit is within the claims excepted from the provisions of said repealing act above mentioned, and that as to them said act still is, and during all the time herein mentioned has been, in full force.

And these defendants aver that the said Ezra A. Osborne, assignee in bankruptcy, mentioned in said amended bill of complaint, was nominated and chosen at a meeting of the creditors of said bankrupt Andrew Mount, held on the thirty-first day of May, eighteen hundred and seventy-six, and that such appointment was approved by John T. Nixon, Esquire, Judge of the United States District Court for the District of New Jersey, wherein the said case was pending, by an approval made on the second day of June, eighteen hundred and seventy-six, and that the election and appointment of said assignee in bankruptcy was certified to him by Charles E. Green, register in bankruptcy for said district, 30 40

on the thirty-first day of May, eighteen hundred and seventy-six, and that said appointment was duly accepted by said Ezra A. Osborne, by a written acceptance under his hand, dated on the second day of June, eighteen hundred and seventy-six, and duly filed in said matter and Court, and that the assignment in bankruptcy of the property of said bankrupt to said Ezra A. Osborne, as such assignee in bankruptcy, was made and dated on the fifth day of June, eighteen hundred and seventy-six.

- 10 And these defendants aver that the time when the cause of action, if any there was, on the claim set up in said amended bill of complaint, arose to the said assignee in bankruptcy, was on or before the execution of the said assignment in bankruptcy.

- And these defendants further aver that the said assignment in bankruptcy was executed and delivered more than two years before the execution and delivery of said deed from said Ezra A. Osborne, assignee in bankruptcy, to said William S. Mount, and more than two years before the beginning of this suit. Wherefore, and by virtue of said statutes and said lapse of time, the complainant's right of action, if she ever had any, on the claims mentioned in said amended bill of complaint, and each of them, was barred before the beginning of this suit, and by reason thereof said complainant cannot maintain this suit therefor.
- 20

- All which matters and things these defendants aver to be true, and plead the same to the said amended bill of complaint, and humbly ask the judgment of this Honorable Court whether they ought to be compelled to make any answer or reply to the said amended bill of complaint of the said Fannie E. Mount, and humbly pray to be hence dismissed with their reasonable costs in this behalf most wrongfully maintained.
- 30

BEDLE, MUIRHEID & MCGEE,
Solicitors for and of Counsel with the Defendants,
The President and Directors of the Manhattan
Company.

[CO.'S SEAL.]

THE PRESIDENT AND DIRECTORS OF
THE MANHATTAN COMPANY,

Attest:

40 J. T. BALDWIN,
Cashier.

By D. C. HAYS,
President.

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

The pleas of the defendants, The President and Directors of the Manhattan Company, were taken this third day of December, in the year eighteen hundred and eighty-six, before me, John A. Hillery, a Commissioner for the State of New Jersey in New York, under the common seal of said corporation, as by their said seal thereto affixed appears.

In witness whereof I have hereunto set my hand and official seal the day and year aforesaid. 10

JNO. A. HILLERY,
[L. S.] *A Commissioner of Deeds for the State of
New Jersey, at No. 56 Wall St., N. Y.*

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

Dewitt C. Hays, of full age, being duly sworn according to law, on his oath saith that he is the President of The President and Directors of the Manhattan Company, the defendants in the foregoing pleas named. That the foregoing pleas are not interposed for delay, but in good faith for the causes 20 therein set forth.

D. C. HAYS.

Sworn and subscribed, at the city of New York, before me, a Commissioner for New Jersey in New York, this third day of December, A.D. 1886.

JNO. A. HILLERY,
[L. S.] *A Commissioner for New Jersey
in the city of New York.*

We certify that we have perused the complainant's bill of complaint and amended bill of complaint in the above-stated 30 cause, and that the above pleas are well founded in point of law.

BEDLE, MUIRHEID & MCGEE,
*Of Counsel with the Defendants, The President
and Directors of the Manhattan Company.*

The pleas of The President and Directors of the Manhattan Company to the cross-answer of William S. Mount were similar to the foregoing.

Conclusion to first of said pleas being:

And these defendants aver that by virtue of the said foreclosure proceedings, and the decrees therein made, and the execution thereon issued, and the sale had and conveyance made under and in pursuance thereof, all title to said lands passed from the said Andrew Mount, and all other parties
10 interested in said lands, to the defendants, and that said Andrew Mount and his assignee in bankruptcy, the said Ezra A. Osborne, and all persons claiming under either, including the said defendant William S. Mount, and the complainant Fannie E. Mount, were foreclosed of and cut off from all equity of redemption in said mortgaged premises, and that the deed alleged in said cross-answer to have been given by said assignee in bankruptcy, Ezra A. Osborne, to said William S. Mount, if given, was subject to said decree, execution, sale and conveyance, and passed no title
20 to said lands as against said decree, execution, sale and conveyance, or as against these defendants, and these defendants aver that by reason of the premises there is no title in said lands remaining in said William S. Mount, and no foundation for the claim made in his said cross-answer, and that the alleged right on which said cross-answer is founded, if any such ever existed, was cut off and foreclosed by the foreclosure and sale aforesaid.

Wherefore these defendants aver that the said William S. Mount has no claim against them by virtue of anything
30 alleged in said cross-answer.

And for a further plea in this behalf, by leave of the Court for that purpose first had and obtained, these defendants, The President and Directors of the Manhattan Company, by protestation, not confessing or acknowledging all or any of the matters and things in the said cross-answer to be true, in such manner and form as the same are therein and thereby set forth and alleged, for a plea thereunto say:

That the said deed alleged in the said cross-answer to have been given by the said Ezra A. Osborne, assignee in bankruptcy, to the said William S. Mount, on or about the twenty-first day of February, eighteen hundred and seventy-nine, if any such deed was made, did not by its terms convey to said William S. Mount any title in the said land or in the claim set up in said cross-answer as against these defendants, wherefore these defendants aver that the said William S. Mount has no claim against these defendants by virtue of anything alleged in said cross-answer.

10

And for a further plea in this behalf, by leave of the Court for that purpose first had and obtained, these defendants, The President and Directors of the Manhattan Company, by protestation, not confessing or acknowledging all or any of the matters and things in said cross-answer to be true, in such manner and form as the same are therein and thereby set forth and alleged, for a plea thereunto say:

That the petition in bankruptcy mentioned in the said cross-answer of the said William S. Mount, was filed by the said Andrew Mount on the fourteenth day of March, 20 eighteen hundred and seventy-six.

That the conveyance alleged in said cross-answer to have been made by the said Ezra A. Osborne, assignee in bankruptcy, to the said William S. Mount, is therein alleged to have been made on the twenty-first day of February, eighteen hundred and seventy-nine.

And these defendants aver that by the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March second, eighteen hundred and sixty-seven, it is provided 30 that no suit at law or in equity shall in any case be maintainable by or against an assignee in bankruptcy, or by or against any person claiming an adverse interest touching the property and rights of property of said bankrupt transferable to or vested in such assignee in any Court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee.

This same provision was afterwards incorporated into and became a part of the Revised Statutes of the United States, Title sixty one, Section 5057, which statute was in force at the time said petition in bankruptcy was filed; afterwards, and by an act of Congress entitled "An act to repeal the Bankrupt Law," approved June 7th, 1878, said bankrupt act was repealed, but by said repealing act it was expressly provided that in respect of all rights of debtors and creditors (except the right of commencing original proceedings in
10 bankruptcy), and all rights of and suits by or against assignees, under any or all of the acts thereby repealed, in any matter or case which should have arisen prior to the day when said act should take effect (which should be the first day of September, Anno Domini eighteen hundred and seventy-eight), or in any matter which should arise after said act took effect; in respect of any matter of bankruptcy authorized by said act to be proceeded with after said last-named day, the acts thereby repealed should continue in full force and effect until the same should be fully
20 disposed of in the same manner as if said acts had not been repealed.

And these defendants aver that said bankrupt act was in force at the time of the filing of said petition in bankruptcy, and as to the said provisions thereof, relative to the limitations of actions, remained in full force at the time of the making, execution and delivery of said deed by said assignee to William S. Mount, as alleged in said cross-answer, if any such deed was made, and at the time of the beginning of this suit, and that as to said provisions it remains in force to
30 this time, and has at no time since its said original enactment been repealed or in any wise abrogated or annulled; and these defendants aver that the claim in question in this suit is within the claims excepted from the provisions of said repealing act above mentioned, and that as to them said act still is, and during all the time herein mentioned has been, in full force.

And these defendants aver that the said Ezra A. Osborne, assignee in bankruptcy, mentioned in said cross-answer, was nominated and chosen at a meeting of the creditors of said

bankrupt Andrew Mount, held on the thirty-first day of May, eighteen hundred and seventy-six, and that such appointment was approved by John T. Nixon, Esquire, the United States District Court Judge for the District of New Jersey, wherein the said case was pending, by an approval made on the second day of June, eighteen hundred and seventy-six, and that the election and appointment of said assignee in bankruptcy was certified to him by Charles E. Green, register in bankruptcy for said district, on the thirty-first day of May, eighteen hundred and seventy-six, and 10 that said appointment was duly accepted by said Ezra A. Osborne by a written acceptance under his hand, dated on the second day of June, eighteen hundred and seventy-six, and duly filed in said matter and Court, and that the assignment in bankruptcy of the property of said bankrupt to said Ezra A. Osborne, as such assignee in bankruptcy, was made and dated on the fifth day of June, eighteen hundred and seventy-six.

And these defendants aver that the time when the cause of action (if any there was, on the claim set up in said cross- 20 answer,) arose to the said assignee in bankruptcy was on or before the execution of the said assignment in bankruptcy.

And these defendants aver that the said assignment in bankruptcy was executed and delivered more than two years before the execution and delivery of said deed from said Ezra A. Osborne, assignee in bankruptcy, to said William S. Mount, and more than two years before the beginning of this suit.

Wherefore and by virtue of said statutes and said lapse of time, the right of action of said William S. Mount, if any 30 he ever had, on the claims mentioned in said cross-answer, and each of them, was barred before the beginning of this suit, and by reason thereof said defendant, William S. Mount, can not maintain his said cross-action therefor.

All which matters and things these defendants aver to be true, and plead the same to the said cross-answer, and humbly ask the judgment of this Honorable Court, whether they ought to be compelled to make any answer or reply to the said cross-answer of the said William S. Mount, and

humbly pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

BEDLE, MUIRHEID & MCGEE,
Solicitors for and of Counsel with the Defendants,
The President and Directors of the Manhattan
Company.

[CO.'S SEAL.]

THE PRESIDENT AND DIRECTORS OF
THE MANHATTAN COMPANY,

Attest:

J. T. BALDWIN,
Cashier.

By D. C. HAYS,
President.

10

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

The pleas of the defendants, The President and Directors of the Manhattan Company, were taken this third day of December, in the year one thousand eight hundred and eighty-six, before me, John A. Hillery, a Commissioner for the State of New Jersey in New York, under the common seal of said corporation, as by their said seal thereto affixed appears.

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

JNO. A. HILLERY,
[L. S.] A Commissioner of Deeds for the State of
New Jersey, at No. 56 Wall St., N. Y.

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

30 Dewitt C. Hays, of full age, being duly sworn according to law, on his oath saith that he is the President of The President and Directors of the Manhattan Company, the defendants in the foregoing pleas named. That the foregoing pleas are not interposed for delay, but in good faith, for the causes therein set forth.

D. C. HAYS.

Sworn and subscribed at the city of New York, before me, a Commissioner for the State of New Jersey in New York, this third day of December, A.D. 1886.

JNO. A. HILLERY,

[L. S.]

*A Commissioner of Deeds for the State of
New Jersey, at No. 56 Wall St., N. Y.
City.*

We certify that we have perused the complainant's bill and amended bill of complaint, and the cross-answer of William S. Mount in the above stated cause, and that the 10 above pleas are well founded in point of law.

BEDLE, MUIRHEID & MCGEE,
*Of Counsel with the Defendants, The President
and Directors of the Manhattan Company.*

[TITLE.]

ORDER FOR LEAVE TO FILE PLEAS TO THE AMENDED
BILL.

[Filed December 3d, 1886.]

Due notice of the application for this order having been given, and the matter having been heard in the presence of 20 William H. Vredenburg, Esquire, of counsel with complainant, of Flavel McGee, Esquire, of counsel with the defendants The President and Directors of the Manhattan Company, and of William L. Dayton, Esquire, of counsel with the defendant William S. Mount.

It is, on motion of Bedle, Muirheid & McGee, solicitors of said defendants, ordered on this second day of December, eighteen hundred and eighty-six, that the said defendants have leave to file three pleas to the complainant's amended bill of complaint as follows:

30

1. A plea that the alleged right on which the complainant's

action is founded was cut off and foreclosed by a foreclosure of the mortgage mentioned in said amended bill of complaint, and a sale thereunder of the premises therein mentioned.

2. A plea that the alleged right on which the complainant's action rests did not pass by the deed from Ezra A. Osborne, assignee in bankruptcy, to said William S. Mount, set out in said amended bill of complaint, and, consequently, could not have passed to the complainant by his deed to
10 her in said bill mentioned.

3. A plea that the complainant's alleged right of action was barred by the statute of limitations before suit brought, namely, by the bankrupt acts of the United States.

It is further ordered that the same defendants be allowed to file similar pleas to the answer in the nature of a cross-bill against the complainants, filed in the same cause by the defendant William S. Mount.

The said defendants shall file said pleas within five days from the date of this order.

20 Respectfully advised.

A. V. VAN FLEET, V. C.

[TITLE.]

NOTICE TO STRIKE OUT PLEAS.

[Served December 7th, 1886.]

SIRS—Please take notice, that under Rule No. 215 of this Court, we shall move said Court, on Monday, the thirteenth instant, at eleven o'clock A. M., at the Vice-Chancellor's rooms, in Newark, to strike out the pleas filed by you for said defendants, and that the particular grounds of objection
30 thereto are :

That the matters and things stated in said pleas, and in each and all of them, are, even if true, insufficient in law to bar the complainant's right of relief; and because the fore-

closure sale, set up in said first plea, did not extinguish or divest the complainant's right of relief; and because the complainant's right of action did pass by said assignee's deed, through said Mount, to the complainant; and because complainant's right of action was not barred by the United States bankrupt acts for the reason that such right did not accrue to said assignee, and did not accrue until the ninth day of February, 1880, to the complainant.

And because in divers other respects said pleas are defective and insufficient. Yours respectfully, 10

VREDENBURGH & PARKER.

Solicitors of Complainant.

TO MESSRS. BEDLE MUIRHEID & MCGEE,

Solicitors of said Defendants.

CONCLUSIONS OF VICE CHANCELLOR.

I think the defendants should be allowed to file three pleas.

1. That the right on which the complainant's action is founded was cut out and foreclosed by the foreclosure and sale. 20

2. That the right on which complainant's action rests did not pass by the deed to William S. Mount, and consequently could not have passed to the complainant.

3. That the complainant's right of action was barred by the statute of limitations before suit brought.

The defendant will be allowed to file the same pleas to the cross-bill of William S. Mount, but not a plea that he has no right of action, because the right on which he seeks to found his claim was conveyed by him to the complainant. That is the foundation fact of the complainant's case, and I 30 suppose unless she establishes it that this whole litigation must be dismissed. A mere interloper should not be allowed to inaugurate a litigation of this kind between two defendants.

The papers left with me on Monday last have been handed to the sergeant-at-arms.

Mr. Vredenburg and Mr. Dayton should be notified of my conclusion.

A. V. VAN FLEET, V. C.

[TITLE.]

ORDER SUSTAINING PLEA, ETC.

[Filed June 3d, 1887.]

The motion to strike out the three pleas filed by the
10 defendants The President and Directors of the Manhattan Company to the amended bill of complaint of the complainants in the above entitled cause, having come up for argument in the presence of William H. Vredenburg, Esquire, of counsel with the complainants, of William L. Dayton, Esquire, of counsel with the defendant William S. Mount, and of Flavel McGee, Esquire, of counsel with the defendants The President and Directors of the Manhattan Company, and the matters at issue having been duly considered, it is on this sixth day of June, eighteen hundred and eighty-
20 seven, on motion of Bedle, Muirheid & McGee, solicitors of the defendants The President and Directors of the Manhattan Company,

Ordered, that the motion to strike out the first plea to said amended bill of complaint be and the same is hereby denied with costs, and that first plea to said amended bill of complaint do stand.

And it appearing to the Court that, in view of this result, the second and third pleas filed to said bill of complaint as aforesaid are unnecessary, it is further

30 Ordered, that said second and third pleas to said bill of complaint be stricken out, but without costs.

And it is further ordered, that the said complainant reply to said first plea to the said amended bill of complaint within thirty days after entry of this order.

ALEX. T. MCGILL, C.

Respectfully advised.

A. V. VAN FLEET, V. C.

IN CHANCERY OF NEW JERSEY, FEBRUARY TERM,
1887.

MOUNT *vs.* MANHATTAN Co.

OPINION.

[Filed May 15th, 1887.]

1. An assignee in bankruptcy, appointed pending a suit to foreclose a mortgage on lands of the bankrupt, will be bound by the decree and sale made in such suit, whether he is made a party to such suit or not.

2. If he desires to be made a party to such suit, he must ask to be substituted in the place of the bankrupt, and if he fails to do so, his failure will be considered as a waiver of any defence he may have had. 10

3. The title made under a decree condemning mortgaged premises to sale invests the purchaser with all the rights and equities inhering in either of the parties to the suit, whether complainant or defendant, at the time of the institution of the suit.

4. So long as a judicial sale stands the sum for which the property was sold must, as between the parties, be taken as a conclusive test of its value.

5. A defendant in an equity suit can only file two or more pleas on special leave granted, and such leave will only be granted on application 20 made on notice to the complainant, and in cases where it is made to appear that the defendant might suffer inconvenience if it was not granted.

On motion to strike out plea. Heard on notice under No. 215 of the rules.

Mr. William H. Vredenburg and Mr. William L. Dayton, for motion.

Mr. Flavel McGee, *contra*.

VAN FLEET, V. C.

The complainant moves to strike out a plea filed by the 30 defendants, on the ground that the matters stated in it constitute no bar to her right of action. In order to determine whether the plea is sufficient or not, it is necessary to know on what facts the complainant bases her right of action. They may be briefly stated as follows: On the thirty-first

day of December, 1873, Andrew Mount and William S. Mount executed a mortgage on real estate, situate in the county of Monmouth, to George D. H. Gillespie and John K. Meyers, to secure the payment of a bond, made on the same day, conditioned for the payment of \$275,000 on demand. Gillespie and Meyers, the mortgagees, were directors of the Manhattan Company, and the bond and mortgage were made to them to secure a debt which a firm, of which Andrew and William S. Mount were members, owed to the
10 Manhattan Company. The bond and mortgage were executed with the understanding that they were to be assigned to the Manhattan Company, and they were so assigned accordingly. The Manhattan Company, on the second of January, 1874, after obtaining title to the bond and mortgage, wrote a letter to Andrew Mount, acknowledging the receipt of the bond and mortgage, and also that three other bonds and mortgages had been delivered to them, and stating that the four were held as collateral security for a note
20 made by Wilmerding and Mounts for \$75,000, dated January 2d, 1874, payable at six months, and promising that upon realizing the amount due on the note, together with all expenses, the balance should be returned to him or his order. The mortgage executed by the Mounts to Gillespie and Meyers contained a clause giving the mortgagees the right, in case default should be made in the payment of the money secured by it, to take possession of the mortgaged premises and sell them, at public auction, and to convey them, as the attorney in fact of the mortgagors, and out of the proceeds to retain their debt, together with the expenses
30 of the sale, rendering the surplus to the mortgagors. The bill avers that the defendants took possession of the mortgaged premises on the twelfth of December, 1879, and held them until the following February, when they sold them for \$125,000, and that the sum thus realized, together with the profits with which they should be charged, greatly exceeds the sum due to the defendants at the time of the sale. This suit is brought to recover this excess.

The complainant traces her right to this excess in this wise: Andrew Mount was adjudged a bankrupt, under the
40 federal bankrupt law, in April, 1876; an assignee in bank-

ruptcy was subsequently appointed, to whom the estate of the bankrupt was duly assigned; he, in February, 1879, sold and conveyed the mortgaged premises, together with all his rights and equities therein, to William S. Mount, who, by a proper conveyance, executed in October, 1885, passed all his rights therein to the complainant. These are the facts on which the complainant's right of action rests.

The defendants meet the case made by the complainant by a plea which avers that, on the twenty-eighth of May, 1875, they filed their bill in this Court against Andrew 10 Mount, William S. Mount and others, for the foreclosure of their mortgage, by a sale of the mortgaged premises; that Andrew and William S. Mount appeared and answered the bill; that the case was put at issue by a replication and regularly brought to hearing, and a decree pronounced in favor of the complainants in that cause on the nineteenth of August, 1876, condemning the mortgaged premises to sale for the payment of their debt, and directing that a *fieri facias* issue for that purpose; and that a *fieri facias* was issued on the thirty-first day of August, 1876, and delivered to the 20 sheriff of Monmouth county, who, pursuant to its command, sold the mortgaged premises, at public auction, on the fourteenth day of November, 1879, to the defendants, for \$10,000, and subsequently, on the twelfth of December, 1879, executed a deed to them in consummation of the sale. The plea further avers that such decree, sale and conveyance effectually and absolutely barred and foreclosed all the rights and equities of both Andrew and William S. Mount in the mortgaged premises, and also the rights and equities of all persons claiming through them, or either of them, by 30 title acquired subsequent to the institution of the foreclosure suit.

This plea, it is contended, is faulty in two important particulars: First, because it does not show that the assignee in bankruptcy was made a party to the foreclosure suit, and not having been made a party, it is insisted that the rights with which he became invested, by force of the bankrupt law, were unaffected by the decree and sale made in that suit. And secondly, it is insisted that the defendants, by their letter of January 2d, 1874, to Andrew Mount, became 40

bound to exercise for his benefit the power of sale contained in the mortgage, and that they were not relieved from the performance of this duty by the foreclosure and sale of the mortgaged premises, inasmuch as they became the purchasers thereof at such sale; in other words, that they, by their letter, took on themselves a trust in favor of Andrew Mount to sell the mortgaged premises for his benefit, which was not destroyed or extinguished by the sale and conveyance under the decree of foreclosure, but was continued in full force by the fact that they acquired title to the mortgaged premises at such sale.

There is nothing in the first objection. The foreclosure suit had been pending nearly a year before Andrew Mount was adjudged a bankrupt. He had appeared to the suit and filed an answer before the proceeding in bankruptcy was commenced. His assignee took whatever right or interest he acquired in the mortgaged premises under the bankrupt law subject to that suit. The rule is now established that where a mortgagor is adjudged a bankrupt during the pendency of a suit for the foreclosure and sale of his mortgaged premises, and an assignee is appointed, the assignee stands, in respect to the mortgaged premises, in the same position as any other purchaser *pendente lite*. If the assignee desires to become a party to the suit, he must ask to be substituted in the place of the bankrupt; and if he fails to do so his non-intervention will raise an implication, either that he has no defence, or that he has elected to waive any defence he may have. If he fails to intervene, and a decree for sale is made, he will be concluded by it; and a sale made in execution of the decree will bar his rights as effectually as it does those of the bankrupt. *Eyster v. Gaff*, 91 U. S., 521. The Court, in the case just cited, says: "The bankrupt act expressly provides that the assignee may prosecute and defend all suits in which the bankrupt was a party at the time he was adjudged a bankrupt. If there is any reason for interposing, the assignee may have himself substituted for the bankrupt, or he may be made a defendant on his own petition. If he chooses to let the suit proceed without defence, he stands as any other person would on whom the title had fallen since the suit was commenced.

It is a mistake to suppose that the bankrupt law avoids, of its own force, all judicial proceedings in the State or other courts, the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition." The law, as thus declared, has been enforced by this Court in *Esterbrook Co. v. Ahren*, 4 *Stew.* 3; and by the Court of Errors and Appeals in *Davis v. Sullivan*, 6 *Stew.* 569, and must be considered as authoritatively settled in this State.

The second objection also seems to me to be without substance. The letter upon which it is founded did not, in my judgment, change the contract relations existing between the parties by force of the mortgage in the slightest degree, except that the mortgage purported to have been given to secure a debt of \$275,000, while the letter admits that the debt which it secures is only \$75,000. But in all other respects the terms of the mortgage and the letter appear to be substantially identical in their legal import. The mortgage conveyed the lands described in it as security for the payment of a debt. By the contract thus made the mortgagees acquired a right, if the mortgagors failed to pay the debt when it fell due, to enforce payment by a judicial sale of the mortgaged premises, and if more was realized by the sale than was sufficient to pay the debt, the surplus would belong to the mortgagors. Now that is just what the letter stipulates Andrew Mount shall be entitled to. It says that the four mortgages are held by the defendants as collateral security for the payment of a debt of \$75,000, and that if they realize out of these securities more than is sufficient to satisfy their debt, they will render the surplus to Andrew Mount. The method to be adopted to realize upon the securities or to enforce payment of their debt, is not defined or marked out. The mortgagees were left free to adopt any lawful method. They had an undoubted right to resort to a sale of the mortgaged premises by judicial process. That was a remedy which was inherent in their contract, and of which no power could deprive them. That is the method, which the plea avers, the defendants adopted. This method of realizing upon this particular security produced no surplus. The mortgage debt was over \$80,000,

and the mortgaged premises, it appears, were sold for \$10,000. It is true, it also appears, that the mortgaged premises were sold by the defendants within three months after they obtained title for \$125,000. It may be that the disparity between the actual value of the mortgaged premises and the sum for which they were sold at judicial sale was so great, that the Court, on application at the proper time, would have set the sale aside, but no relief of that kind is sought by the bill in this case; it raises no question either
10 as to the fairness or validity of the sale; indeed, the fact that the defendants had acquired title to the mortgaged premises by judicial sale is not mentioned in the bill. It is obvious, therefore, that no relief can be given to the complainant in this suit on the ground that the mortgaged premises were sold to the defendants for a price so grossly inadequate as to render their purchase fraudulent. So long as a judicial sale stands, the sum for which the property was sold must, as between the parties, be taken as a conclusive test of its value. *Snyder v. Blair*, 6 Stew. 208. If
20 the matters stated in the plea are true, it would seem to be indisputable that the defendants have not realized sufficient upon this particular security—and this is the only security which the bill shows anything has been realized upon—to satisfy their debt; there is, therefore, no surplus, and consequently nothing in the hands of the defendants for which they can be required to account.

The claim that the letter of January 2d, 1874, created a trust relation between the defendants and Andrew Mount, imposing upon the defendants the duty, if they purchased
30 the mortgaged premises at judicial sale, to hold and dispose of them for his benefit, is, in my judgment, purely fanciful. There is nothing in the letter, as I read it, which gives the least support to this claim. The only duty which the defendants assumed by the letter was, in case they realized more from the security than was sufficient to pay their debt, to render the surplus to Andrew Mount. As already remarked, the defendants were at liberty to adopt any method or remedy, for realizing upon the securities, which the law furnished. The remedy which they adopted was a
40 foreclosure of this particular mortgage by a judicial sale of

the mortgaged premises. Their right to resort to this remedy was, in my judgment, beyond dispute, and I regard as equally certain that the title that they thus acquired to the mortgaged premises invests them, so long as it stands, with all the rights and equities which inhered in the parties, whether complainant or defendant, at the time of the institution of the suit.

The case upon which the complainant wholly relies to vindicate her claim that the defendants took title to the mortgaged premises, under the sale in foreclosure, for the benefit of Andrew Mount, or those standing in his right, is *Brown's Admr. v. Tyler*, 8 Gray 138. It appeared in this case that the plaintiff's intestate had assigned a mortgage, which she held on the lands of one Gardener, to the Bank of Roxbury, as collateral security for a debt which the defendant owed to the bank. The assignment was a pure matter of favor to the defendant. The bank subsequently proceeded, by a course of practice peculiar to Massachusetts, to foreclose the mortgage. This was effected by an entry on the mortgaged premises pursuant to judicial authority 20 and holding possession for three years thereafter. The bank, two years after its title had become indefeasible, as against the mortgagor by three years' possession, sold the mortgaged premises for enough to satisfy its debt. After the bank sold the mortgaged premises the plaintiff brought an action against the defendant to recover the money which his intestate had paid, by force of the assignment and the subsequent proceedings, for the defendants' use, and the defendant set up the statute of limitations in bar of the action. The question which this condition of the pleadings 30 presented was, when should it be considered the money was paid—when the title of the bank to the mortgaged premises became indefeasible as against the mortgagor, or at the later period, and when the bank actually realized its money on the sale of the mortgaged premises? Chief Justice Shaw, who heard the case originally, held that payment should be considered to have been made on the expiration of three years after entry, when the title of the bank became indefeasible, and he, consequently, adjudged the action to be barred, but the Supreme Court, on a review of 40

the case, adopted the other view. They held that the property, as well after foreclosure as before, was equally held in trust for the benefit of both pledger and pledgee, and was to be disposed of for the benefit of all parties. They said, "On the one hand the assignee, who held the same as collateral security, was not, in consequence of the foreclosure, required to take the land in payment, if he was ready and willing to proceed to reduce the same to cash by a fair and proper sale of the same; nor, on the other hand, would he be permitted to retain the same in his own right exclusively regardless of what would be for the interest of the assignor." The judgment pronounced by the Supreme Court was due entirely to the effect which the law of Massachusetts attributes to a foreclosure, which is effected by entry and possession. Such a foreclosure does not operate as payment. Although the title of the mortgagee becomes indefeasible against the mortgagor after three years' possession, where his entry was by judicial authority, yet his debt is not thereby satisfied, at least only to the extent of the fair value of the mortgaged premises. He may still sue the mortgagor for the mortgage debt, and if, on a valuation of the mortgaged premises, it appears that at the time his title became indefeasible they were not worth a sum equal to the mortgage debt, judgment will be entered in his favor for the difference. *Newall v. Wright*, 2 Mass. 154; *Amory v. Fairbanks*, *Ib.* 562; *West v. Chamberlain*, 8 Pick. 336. The distinction between the legal consequence resulting from the two methods of foreclosure is so obvious that it need not be pointed out. The one passes the title to the mortgaged premises at a price which must, so long as the sale stands, be taken as a conclusive test of their value, while the other simply vests the title to the mortgaged premises in the mortgagee without fixing or determining the sum or price which he shall pay for them.

The facts stated in the plea constitute, in my judgment, a complete bar to the complainant's action. The motion to strike out must, therefore, be denied with costs.

The defendants have, without leave of the Court, filed two additional pleas. This is contrary to the settled practice. *1 Dan. Ch. Pr.* 609. A defendant in an equity suit

can only file two or more pleas on special leave granted, and such leave will only be granted on application, made on notice to the complainant, and in cases where it is made to appear that the defendant might suffer inconvenience if it was not granted. *Story's Eq. Pl., Sec. 657; Kay v. Marshall, 1 Keen 190; Salters v. Tobias, 7 Johns. Ch. 214.* The first plea having been adjudged to be sufficient, the additional pleas are useless, and should, for that reason, as well as because they were filed without permission, be struck from the record with costs. 10

A true copy.

ALLAN McDERMOTT, *Ck.*

NOTE.—The part about not having leave was subsequently erased or amended by the V. C.

F. M.

[TITLE.]

NOTICE OF MOTION TO STRIKE OUT CROSS-BILL.

[Served on W. L. Dayton, Solicitor, &c., June 9th, 1887.]

SIR—Please to take notice that on the 14th day of June instant, at the Chamber of the Vice-Chancellor, in Jersey City, we will move to strike out the cross-bill filed by you on behalf of the defendant William S. Mount, in the above entitled cause, on the grounds: 20

First. That under the order sustaining the first plea to the complainant's amended bill of complaint your cross-bill is not sustainable.

Second. That the cross-bill makes a new case, not germain to the case made in the amended bill of complaint.

Third. That the said cross-bill does not disclose any equity.

Fourth. That the matters alleged in the cross-bill are not within the jurisdiction of a court of equity. 30

Yours very respectfully,

BEDLE, MUIRHEID & MCGEE,

*Solicitors for the Defendants, The President and
Directors of the Manhattan Company.*

[TITLE.]

**ORDER TO STRIKE OUT CROSS-PART OF ANSWER OF
WILLIAM S. MOUNT.**

[Filed June 19th, 1887.]

Due notice of the motion for this order having been given, and the matter coming on to be heard in the presence of Flavel McGee, of counsel with the defendants The President and Directors of the Manhattan Company, and of William L. Dayton, of counsel with the defendant William S. Mount, and the arguments of counsel having been heard and considered, it is, on this fourteenth day of June, eighteen hundred and eighty-seven, on motion of Bedle, Muirheid and McGee, solicitors of the said The President and Directors of the Manhattan Company,

Ordered, that so much of the answer of the said William S. Mount, in the above entitled cause, as sets up matter against the said defendants The President and Directors of the Manhattan Company, which, by the practice existing prior to the promulgation of the two hundred and twelfth rule of this Court, could only be set up by means of a cross-bill, and which prays such relief as under said practice could only be obtained by means of a cross-bill, be and the same hereby is, both as to such allegations, charges and prayer, stricken out with costs.

Respectfully advised.

A. V. VANFLEET, V. C.

[TITLE.]

**NOTICE OF APPEAL BY COMPLAINANT FANNIE E.
MOUNT.**

30

[June 11th, 1887.]

The complainant hereby appeals from so much of the interlocutory order made in this Court, in the above stated

cause, as declares that the motion to strike out the first plea to said amended bill of complaint be denied with costs, and that said first plea to said bill of complaint do stand, to the Court of Errors and Appeals in the last resort in all causes.

VREDENBURGH & PARKER,

Solicitors of and of Counsel with the Complainant.

Dated June 10, 1887.

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

W. H. VREDENBURGH, 10

Of Counsel with Complainant.

[TITLE.]

NOTICE OF APPEAL BY THE PRESIDENT AND DIRECTORS OF THE MANHATTAN CO.

[June 15th, 1887.]

The defendants The President and Directors of the Manhattan Company hereby appeal from so much of the interlocutory order made in this Court in the above-entitled cause on the sixth day of June instant, as decrees that the second and third pleas filed to the amended bill of complaint in 20 said cause are unnecessary, and that said second and third pleas to said bill of complaint be stricken out, to the Court of Errors and Appeals in the last resort in all causes in New Jersey.

BEDLE, MUIRHEID & MCGEE,

Solicitors for and of Counsel with the defendants The President and Directors of the Manhattan Company.

Dated 11th June, 1887.

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

30

BEDLE, MUIRHEID & MCGEE,

Of Counsel with the President and Directors of the Manhattan Company.

[TITLE.]

NOTICE OF APPEAL BY WILLIAM S. MOUNT.

[Served June 23d, 1887.]

William S. Mount, one of said defendants in the above stated cause, hereby appeals to the Court of Errors and Appeals in the last resort in all causes, from so much of the interlocutory order made in this Court on the fourteenth day of June, A. D. eighteen hundred and eighty-seven, in said cause as delares "that so much of the said William S. Mount
10 in the above entitled cause, as sets up matter against the said defendants The President and Directors of the Manhattan Company, which by the practice existing prior to the promulgation of the two hundred and twelfth rule of this Court, could only be set up by means of a cross-bill, and which prays such relief as under said practice could only be obtained by means of a cross-bill, be, and the same hereby is, both as to such allegations, charges and prayer, stricken out with costs.

Dated June 23d, 1887.

20

WILLIAM S. DAYTON,

Solicitor and of Counsel of William S. Mount, Defendant

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

WILLIAM L. DAYTON,

Of Counsel with said Defendant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

FANNIE E. MOUNT,

Appellant,

and

THE PRESIDENT AND DIRECTORS OF THE MAN-

HATTAN COMPANY and others,

Respondents.

On Bill, &c.

PETITION OF APPEAL.

[Filed June 15th, 1887.]

10

The humble petition of Fannie E. Mount, the appellant in the above stated cause, respectfully shows that your petitioner finds herself aggrieved by an interlocutory order made in the Court of Chancery by His Honor, the Chancellor of New Jersey, bearing date the sixth day of June, eighteen hundred and eighty-seven, in a cause wherein the above named appellant was complainant, and the above named respondents were defendants, in this respect, to wit, that the said order declares that the motion to strike out the first plea to said amended bill of complaint be denied with costs, 20 and that said first plea to said bill of complaint do stand. And your petitioner humbly appeals from that part of the said order of the Chancellor which orders as aforesaid, upon the ground that the same is erroneous, for that the said first plea was no answer to the equity of said bill, and constituted, if true in fact, no defense to the complainant's said suit, and should have been stricken out with costs.

Your petitioner therefore prays that the said order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioner 30

map have such relief in the premises as to this Honorable Court shall seem meet.

VREDENBURGH & PARKER,
Solicitors of Appellant.

W. H. VREDENBURGH,
Of Counsel with Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	Between THE PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, and FANNIE E. MOUNT,	}	Appellants, Appellee.	On Bill, &c.
----	--	---	--	--------------

PETITION OF APPEAL.

[Filed June 16th, 1887.]

The petition of The President and Directors of the Manhattan Company, the appellants in the above stated cause, respectfully shows that the petitioners find themselves
 20 aggrieved by an interlocutory decree made in the Court of Chancery by his Honor the Chancellor of New Jersey, bearing date the sixth day of June, eighteen hundred and eighty-seven, in a cause wherein the above named appellee, Fannie E. Mount, was complainant, and the above named appellants, The President and Directors of the Manhattan Company and others, were defendants, in these respects, to wit:

First—That the second and third pleas filed to the amended bill of complaint in said cause were unnecessary.
 30 *Second*—That said second and third pleas to said bill of complaint be stricken out.

And your petitioners appeal from that part of said decree of the Chancellor which decrees as aforesaid, upon the ground:

First—That the said two pleas are, and each of them is, a complete defence to the said amended bill of complaint.

Second—That the facts alleged in said second plea constitute a complete defence to the complainant's said suit, and the motion to strike out said plea should have been denied with costs.

Third—Because the facts alleged in said third plea constitute a complete defence to the complainant's suit, and the motion to strike out said plea should have been denied with costs. 10

Wherefore, your petitioners pray that the said order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden; and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

BEDLE, MUIRHEID & MCGEE,
Solicitors for and of Counsel with the Defendants,
The President and Directors of the Manhattan Company.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

WILLIAM S. MOUNT,

Appellant,

and

THE PRESIDENT AND DIRECTORS OF THE

MANHATTAN COMPANY and others,

Respondents.

20

On Bill, &c.

PETITION OF APPEAL.

[Filed June 25th, 1887.]

The humble petition of William S. Mount, appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an interlocutory order 30

made in the Court of Chancery by His Honor the Chancellor of New Jersey, bearing date the fourteenth day of June, A. D., eighteen hundred and eighty-seven, in a cause wherein Fannie E. Mount was complainant and The President and Directors of the Manhattan Company and others were defendants, in this respect, to wit: that the said order declares that so much of the answer of the said William S. Mount in the said cause as sets up matter against the said defendants The President and Directors of the Manhattan Com-
 10 pany, which, by the practice existing prior to the promulgation of the two hundred and twelfth rule of the said Court of Chancery, could only be set up by means of a cross-bill and which prays such relief as under said practice could only be obtained by means of a cross-bill, be and the same hereby is, both as to such allegations, charges and prayers, stricken
 20 out with costs.

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

WILLIAM L. DAYTON,
*Solicitor and of Counsel with William
 S. Mount, Appellant.*

Dated June 23, 1887.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

FANNIE E. MOUNT,
and Appellant,

THE PRESIDENT AND DIRECTORS OF THE MAN-
HATTAN COMPANY et al.,
Respondents.

On Bill, &c.

ANSWER TO COMPLAINANT'S PETITION OF APPEAL.

[Filed June 16th, 1887.]

10

The answer of The President and Directors of the Manhattan Company, the above named respondents, to the petition of appeal of the above named appellant.

These respondents, not acknowledging all or any of the matter in the said petition of appeal contained to be true, for answer thereto, nevertheless, say and admit that a decree was, on the sixth day of June instant, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated; but, as to the substance and form thereof, these respondents 20 pray to refer thereto when the same shall be produced.

And these respondents are advised and believe that the said decree, in the respect in said petition of appeal mentioned, is agreeable to equity, and they pray that the same may be, in those respects, affirmed with the costs to be adjudged to these respondents.

BEDLE, MUIRHEID & MCGEE,
*Solicitors for and of Counsel with The President and Directors of
the Manhattan Company.*

ANSWER OF THE PRESIDENT AND DIRECTORS OF THE
MANHATTAN COMPANY TO THE PETITION OF APPEAL
OF WILLIAM S. MOUNT.

[Filed June 24th, 1887.]

10	Between	WILLIAM S. MOUNT,	}	On Bill, &c.
		Appellant,		
		and		
	THE PRESIDENT AND DIRECTORS OF THE			
		MANHATTAN COMPANY and others,		
		Respondents.		

The answer of The President and Directors of the Manhattan Company, the above named respondents, to the petition of appeal of the above-named appellant.

These respondents, not acknowledging all or any of the matters in the said petition of appeal contained to be true, for answer thereto, nevertheless, say and admit that an interlocutory order was, on the fourteenth day of June instant, made and entered in the Court of Chancery, in the
20 cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced.

And these respondents are advised and believe that the said decree in said petition of appeal mentioned is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents.

BEDLE, MUIRHEID & MCGEE,
*Solicitors for and of Counsel with the President
and Directors of the Manhattan Company.*

ANSWER OF FANNIE E. MOUNT.

[Filed June 29th, 1887.]

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

THE PRESIDENT AND DIRECTORS OF THE
MANHATTAN COMPANY,

Appellant,

and

FANNIE E. MOUNT,

Respondent.

On Bill, &c.

10

The answer of Fannie E. Mount to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matter in the said petition of appeal contained to be true, for answer thereto, nevertheless, says and admits that an interlocutory decree or order was, on the sixth day of June instant, made and entered in the Court of Chancery in this cause, as in said petition mentioned, but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is 20 advised and believes that said decree in the respects in said petition of appeal mentioned, so far forth as said decree adjudges that the said second and third pleas to said bill of complaint be stricken out, is agreeable to equity, and she prays that the same may be in that respect approved, with costs to be adjudged to this respondent.

VREDENBURGH & PARKER,

*Solicitors for and of Counsel with the Respondent,
Fannie E. Mount.*



