

New Jersey Court of Errors and Appeals

Between

PAULINE STERNBERGER,

Complainant-Respondent,

vs.

BERTHOLD SUSSMAN,

Defendant-Appellant.

On Appeal
from
Chancery.

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BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

This suit was brought to foreclose a mortgage made by Clarence S. Sternberger, now deceased, to his mother, Pauline Sternberger, the complainant-respondent (now deceased), dated May 29, 1896, given to secure the sum of \$9000 and covering the equal undivided eighth part of the lands and premises of which Simon Sternberger, the father of Clarence S. Sternberger, died seized, situate at West End and Long Branch, in the County of Monmouth, in the Township of Union, Union County, New Jersey, and also certain valuable parcels of real estate in the City of New York. The bill prays for a sale of the property situated in the County of Monmouth.

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The Will of Simon Sternberger was introduced in evidence in the court below. Under it Clarence S. Sternberger, the mortgagor, is given an undivided one-eighth interest in the aforesaid lands and premises, subject to a power of sale given to said Pauline Sternberger (now deceased), Edwin Sternberger and Samuel Riker, the Executors. Samuel Riker did not qualify. This power of sale

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is contained in Paragraph 17 of the Will of Simon Sternberger, and reads, in part, as follows:

10 "I authorize and empower my said executors, or such of them as shall qualify, and the survivors and survivor of them, whether acting as executors or as trustees, at any time in their, his or her discretion, to sell all or any part of the real property which may be owned by me at the time of my death, whether held in severalty or in common with any other person or persons, either at public or private sale, free and clear of any charge thereon under this my last Will and Testament, and to execute valid deeds therefor to the purchasers thereof * * * " (Case, p. 53).

20 Under Section 12 of this Will the executors were authorized to invest the proceeds of any sales of real estate and to pay \$6000 from the income thereof to his wife for life, and the residue to his children living at his death (Case, p. 51; Exhibit C-3).

Both Pauline Sternberger, the widow, and Clarence S. Sternberger, the son, survived Simon Sternberger, but both are now dead, leaving Wills.

Under the Will of Clarence S. Sternberger all of his estate is devised to his sisters, Maud M. and Minnie H. Sternberger, and to his niece, Blanche Reitlinger.

30 Under the Will of Pauline Sternberger the mortgage under foreclosure is bequeathed to her son, Edwin Sternberger, who is also the Executor under the Will of his father, Simon Sternberger (Par. 8 of Will).

Edwin Sternberger is named as one of the Executors in his mother's Will.

40 Subsequent to the execution of the mortgage under foreclosure, Clarence S. Sternberger, now deceased, made two mortgages to Berthold Sussman, the defendant-appellant, to secure the respective sums of \$2000 and \$340.05, covering his

equal undivided one-eighth interest in the lands and premises aforesaid (Exhibit D-1, Case, p. 54).

Berthold Sussman instituted proceedings in the Court of Chancery for the foreclosure of his mortgages in a cause wherein he was complainant and Morris Sternberger and others were defendants, and on December 18, 1903, a final decree was entered in that cause, directing a sale of the premises located at West End and Long Branch, in Monmouth County, to satisfy unto the said Berthold Sussman the sum of \$3042.64 with interest (Exhibit D-4, Case, p. 55). Pursuant to this decree the mortgaged premises situate at West End and Long Branch, Monmouth County, were sold by the Sheriff on February 15, 1904, to Berthold Sussman, for \$1000, the deed conveying an equal undivided one-eighth part of the said premises (Exhibit D-5, Case, p. 56).

Complainants in the present foreclosure suit pray for a sale of the premises at West End and Long Branch, which were sold to Berthold Sussman on the foreclosure of his mortgages. The defendant-appellant insists that before the premises at West End and Long Branch are directed to be sold, the complainant should be compelled to resort first to the valuable parcels situate in New York City and included in complainant's mortgage.

Complainant-respondent on pages 2 and 6 of brief states that defendant-appellant has a first lien on the Union County property and failed to resort to it. This statement is disingenuous. The defendant in his answer insisted that complainant should first resort to the property of her son Clarence Sternberger in the City of New York and in Union County, N. J. In an effort to defeat this claim complainant's counsel placed a formal admission on the record that the Sussman mortgage, although subsequent in date, was prior in point of priority because first recorded

in Union County. This admission was followed by an insistent on the part of defendant that the Monmouth County property should be last resorted to. There is no evidence whatever in the case to warrant this clever admission on the part of complainant. The ancient suggestion to beware the Greeks in an attitude of generosity, is not outworn and has application here. No real attention was paid to the Union County property during the hearing and no evidence was introduced to indicate its value or the encumbrances prior to complainant and defendant. As a matter of fact there is at least one large mortgage made by Clarence Sternberger and recorded in Union County a long time before that of defendant.

I.

The property situate in New York City and included in complainant's mortgage is adequate to satisfy complainant's debt.

Edwin Sternberger testified on cross-examination as to the value of the New York City parcels as follows:

"Q. Yes, I want the property, 43 East 16th Street—what is the value of that—the fair value? A. I should judge about \$60,000.

"Q. What about the property on Charlton Street? A. That is valued at about \$25,000.

* * * * *

"Q. Now, the property on Broadway and Spring Street, has that been sold? A. No, sir.

"Q. Does your father's estate own all of that? A. Yes, sir.

"Q. What is the value of that? A. The value of that, with the 'L' running into Spring Street, I value that property at about \$125,000" (Case, pp. 31, 32).

He also testified that another parcel, not enu-

merated above, was sold by himself and his mother, as executors, realizing for his father's estate \$62,000.

"Q. The amount realized then for your father's estate was something like \$62,000?

A. Thereabouts" (Case, p. 29, line 5).

This property was situated at the corner of Mercer and Spring Streets (Case, p. 31, line 33).

Clarence S. Sternberger, the mortgagor, has an eighth interest in the foregoing parcels, or in the proceeds thereof something over \$30,000. 10

II.

Berthold Sussman having purchased the premises under foreclosure in this suit at a sheriff's sale, under a foreclosure of a subsequent mortgage, may require the complainant to satisfy her debt out of the residue of the mortgaged premises not included in the sheriff's deed. 20

The general principle is well stated in *Shannon v. Marselis*, Saxt., 413, 421, as follows:

"Where a man gives a mortgage upon his property and after having done so sells a part of it to a third person for a valuable consideration, justice demands that the residue of the mortgaged premises in the hands of the mortgagor should satisfy the mortgage debt; and the purchaser acquires a right, even against the mortgagee, so far as to compel him to have recourse to such residue for the satisfaction of his debt, if it shall be sufficient for that purpose." 30

This general principle is not disputed by the complainant; but she contends that the doctrine applies only in the case of a conveyance by the mortgagor, where the mortgagor indicates an intention to hold the residue of the land not conveyed as security for the debt. 40

(a) The rule that where a part of mortgaged premises has been sold, equity may require the mortgagee to resort to the residue, applies not only to conveyances by the mortgagor but to all conveyances and dealings on the part of subsequent grantees or mortgagees of a part of the mortgaged tract.

10 "So in the case of successive mortgagees, and as between a mortgagee and subsequent bona fide purchasers from the mortgagor of portions of the mortgaged premises, it may be stated as a general rule that everyone taking a mortgage on real estate is bound to know that by law there still remains an estate in the mortgagor subject to sale and transfer, either in its entirety or in parcels; such estate may be remortgaged, voluntarily sold and conveyed or subjected to sale on execution; and in such case the subsequent mortgagee or purchaser may insist that the portion of the estate retained by the mortgagor shall first
20 be subject to the mortgage debt, and that the interest of subsequent mortgagees or purchasers shall be liable thereon in the inverse order of alienation." (Citing cases.)

Boone v. Clark, 5 L. R. A. (Ill.), 276, 287.

In *Hiles v. Coult*, 30 N. J. Eq., 40, the mortgagor conveyed parcels of the mortgaged tract; the grantee of one of these parcels also conveyed his land in sub-parcels. It was held that the rule of liability to a mortgagee of the whole tract applied in the inverse order of alienation as to the conveyances made by the grantee of a parcel.
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"And this rule applies, though the sales in parcels were made not by the mortgagor but by a person claiming under him. * * * It is applicable to a case such as the present" (p. 41).

To the same effect is *Shannon v. Marselis*, *supra*. In this case it is stated, at page 422:

40 "Harmon and John Marselis were the owners of the mortgaged premises and made the

mortgage to Marselis which is known by the name of the first mortgage. * * * By separate conveyances and at different times they sold their interest in the larger lot to Henry Griffin, so that on the 1st of August, 1823, he was the purchaser of the lot for a valuable consideration, having title from both. He then had a right to protection and to throw the mortgage debt upon the residue of the mortgage premises. Having this right he sells a small part of the six acres and forty-hundredths of an acre lot to Morrell, a small part to Vanderbeck and the residue to Carrick. Some right to protection vests in these purchasers; it is not personal, as was supposed at the bar, but attaches to the purchaser of the property, whoever he may be, and is connected with the property itself." 10

In *Wikoff v. Davis*, 4 N. J. Eq., 224, 226, it is stated:

"The distinction set up in the present case is that the sale of land in parcels was not made by Davis, the mortgagor, but by Woodhull, who became the purchaser of the whole farm at the administrator's sale. The difference is supposed to consist of this, that in the one case the mortgagor is personally liable for the debt to the mortgagee, and not in the other. * * * " 20

At page 227:

"I confess I do not perceive the force of the reason upon which the distinction is taken, between a sale made directly to the mortgagor or by a purchaser from the mortgagor. It is not only because the mortgagor is personally liable for the money, that the rule is adopted, but because the property is bound as security for the debt, and in case a part is sold the residue remaining in the hands of the mortgagor should first be applied." 30

In *Briese v. Busby, Morse, et al.* 13 How. Pr. 485 (N. Y.), the first mortgage covered four parcels and a second mortgage made by the same mortgagor to Morse covered one of these parcels. 40

Morse foreclosed his second mortgage and bought in the property covered by it. The mortgagor sold part of the remaining property. On the foreclosure of the first mortgage Morse insisted that the parcels still held by the mortgagor should be first sold. This contention was sustained.

10 Morse requested that the parcels still held by the mortgagor should be first sold, and that the residue should be sold in the inverse order of alienation, which complainant and the Referee refused to do. The Referee then sold the Morse property first and Morse moved to set aside the sale. The motion was granted. At page 487 the Court said:

20 "It is not disputed that the mortgagor is still the owner of half the premises covered by the mortgage and that the title to the residue is in third persons—the defendant Morse owning one-fourth by title acquired from the mortgagor subsequent to the plaintiff's mortgage. The rule is very well settled at law in cases thus situated, that it is the duty of the creditor to enforce his claim in the first instance against that portion of the property which the debtor has not aliened, and if necessary to go beyond that then to resort to the parcels conveyed in the inverse order of alienation—and the rule is the same in equity." (Citing *York & Jersey v. Jersey Company*, Hopkins 460.) The sale was set
30 aside for the reasons stated.

The rule of liability in the inverse order of alienation was applied in this State in the case of a sale under judgment. *Dawes v. Cammus*, 32 N. J. Eq. 456. In that case Henry Silvers and wife executed two mortgages to Joseph Ely, deceased. Henry Silvers conveyed a tract of thirteen acres sought to be sold under foreclosure by these mortgages to Esbon R. Cole, on March 28, 1866. In November, 1866, Cole and wife conveyed a part of that property to the Pemberton
40 & Hightstown Railroad Company, and on Feb-

ruary 11, 1871, another part was conveyed to Casper H. R. Cammus. The residue of the thirteen acre tract was conveyed to John H. Silvers by sale under a judgment recovered on April 8, 1872 by John H. Silvers against Cole. Silvers conveyed the latter parcel on May 5th, 1874 to Abraham H. Harris, and under a judgment against Harris it was sold to Reuben Norris, who conveyed to Charles Burk on April 8, 1875, and a few days later he conveyed to Samuel Burk, Jr., who mortgaged it to Charles Burk. It was held that the rule of liability in the inverse order of alienation applied to the parcel sold under the judgment recovered by Silvers against Cole.

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From the foregoing it is evident that the doctrine of marshalling securities in the inverse order of alienation does not depend exclusively upon the act or intent of original mortgagor, and that a subsequent grantee or a subsequent mortgagee (a mortgagee being in effect a grantee) may, by his act, indicate an intent to marshal the securities in a certain way.

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The effect of the Sheriff's sale to Berthold Sussman was more than a mere conveyance of the right, title and interest of the mortgagor in the premises. It was in effect a conveyance by the mortgagor, coupled with a release by the second mortgagee, releasing the premises sold by the Sheriff from the lien of the Sussman mortgage, in consideration of \$1,000 paid on account of the amount due on the Sussman mortgage. Since the subsequent grantee or mortgagee may influence the marshalling of assets in favor of the land conveyed or released by him, it is clear that the action of Berthold Sussman in bringing about the foreclosure sale of the West End and Long Branch Property indicated an intent to so marshal the assets as to hold the remainder of the land primarily liable for the balance due on the first and second mortgages.

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III.

Where a creditor has a lien on two funds, and another creditor has a lien on only one of the two funds, equity will require the creditor holding the doubly secured lien to first resort to the singly charged fund, even though that fund is outside the jurisdiction of the Court.

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The rule of liability of mortgaged land in the inverse order of alienation is an off-shoot of the principle that where a creditor has a lien on two funds and another creditor has a lien on one, the more favored creditor will be compelled to first resort to the singly charged fund. It is immaterial whether this singly charged fund is outside the jurisdiction of the court.

20 In *Hayes v. Ward, et al.* 4 Johns. Ch. 122 (N. Y.) plaintiff was an accommodation endorser on notes on which Cyrenus Beach was primarily liable. Beach borrowed money from T. Ward and gave the notes in consideration of the loan and also gave him a mortgage on real estate in New Jersey. Ward arrested the plaintiff in New York in a suit on the notes, and plaintiff sought to enjoin the suit and compel Ward to first exhaust his remedy on the mortgage in New Jersey. This

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the court did. The Court said:
 "I shall continue the injunction until further order, to the end that the defendant Ward may make a fair experiment with his remedy upon the mortgage before he applies for leave to proceed in his suit at law."

In *York & Jersey Steamboat Ferry Co. v. Jersey Co.*, Hopkins Ch. 522 (N. Y.), the first mortgagee had a mortgage on ferryboats crossing the Hudson, and on lands in New Jersey; a

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second mortgagee had a lien on the boats only. It was held that the first mortgagee was required to first exhaust his remedy against the land in New Jersey. At page 532:

“The York and Jersey Steamboat Ferry Company mortgaged the boats and lands to the Associates of the Jersey Company in November, 1823; in February 1824 they mortgaged the boats to Barretto. This then is in substance the ordinary case in which a creditor has a lien on two funds and another creditor has a posterior lien on one of the same funds. In such case equity requires that the creditor who was secured by two funds shall first resort to that fund which is not bound to the other creditor, in order that the other may receive the benefit of his single security so far as may be practicable. * * * It is objected that the fund mortgaged to the Associates of the Jersey Company and not mortgaged to Barretto is in the State of New Jersey, but it is nevertheless in the power of the mortgagee to pursue and exhaust their remedy in that state. In the case of *Hayes v. Ward* the late Chancellor suspended the proceedings of a creditor until a mortgage on lands in another state should be pursued and exhausted.”

The doctrine is stated in 19 Am. & Eng. Enc. of Law, 2d Ed. 1262, as follows:

“The question of the location of the different properties or funds affected by the operation of the doctrine is of considerable importance in regard to the application of the principle in a jurisdiction where only one of the funds is situated. Even where the fund bound alone by the paramount lien is situated beyond the jurisdiction of the court, the paramount creditor nevertheless will ordinarily be required first to exhaust that security before resorting to the doubly charged fund within the jurisdiction, if the proper parties are before the court, and if such a case will not operate to delay him in

the collection of his debt or prejudice him in any of his rights."

The case of *Willey v. St. Charles Hotel Co.*, 28 So. 182 (La. 1899) contains an elaborate and exhaustive discussion of the foregoing doctrine. Three attaching creditors of Fraser claimed a fund in the hands of a garnishee in Louisiana; a senior creditor, The Connecticut Mutual Life Insurance Company was also secured by a mortgage on Fraser's home in Minnesota. The Court after a careful and keen analysis of the law directed the insurance company to first foreclose the Minnesota mortgage and then enforce its lien for the balance on the fund under the control of the Louisiana court. The Court said at page 186:

"This creditor then holding to its mortgage right which constitutes one fund has seized for the same debt in a remote state another fund belonging to this debtor. As first attaching creditor it claims the privilege on this latter fund of a priority of right to be paid out of it. If this be permitted and the debt is satisfied, it relieves Fraser's home property in a distant state at the expense of other creditors of his, who are invoking the aid of the court in the assertion of just rights. Just there arises a demand for the marshalling of assets. * * * Where a court is called upon to enforce a right it may avail itself of its jurisdiction over the person to do justice relative to a subject matter beyond its territorial jurisdiction. And this is so even though lands be affected by the decree." (Citing Cases.) "The insurance company in the instant case by the institution of its attachment suit and the seizure of a fund subject to the jurisdiction of the court, whose aid it invokes, brought itself within the limits of that jurisdiction and amenable to its decrees by process in *personam quoad* the enforcement of any right it seeks here. That is to say, having invoked the aid of the court here to seize under writ

of attachment certain credits of its debtor located here, it brought itself within the jurisdiction of the court to the extent that the court may say to it 'Before you are permitted to make amenable to your claim the fund here as to which you had no other status than that of ordinary creditor on a footing with other ordinary creditors seeking to be paid out of the same fund, you must first proceed to exhaust your recourse against the property in Minnesota upon which you exclusively have a mortgage or pledge. And should any balance remain due to you after such action in Minnesota then you will be heard here to assert your claim to be paid such balance by priority as first attaching creditor out of the fund here.' See *Cunningham v. Butler*, 142 Mass. 47, 6 N. E. 782. 10

* * * We maintain the authority of a court to restrain persons who come within its territorial limits and submit themselves to its jurisdiction from doing anything abroad which, if done, would work hardship and injustice to others here equally entitled to the protection of the court and who are seeking to invoke its aid. And on the same grounds we maintain its authority to deny to such persons its (the court's) aid to do what is sought to be done here until such time as they cease and abstain from doing abroad that which if done would prevent injustice and hardship to others here who seek the protection and aid of the court. *Phelps v. McDonald*, 99 U. S. 298, 25 Law Ed. 473; *Massie v. Watts*, 6 Cranch. 148, 3 Law Ed. 181; *Pennoyer v. Neff*, 95 U. S. 17, 24 Law Ed. 566; *Corbett v. Nutt*, 10 Wall 464, 19 Law Ed. 576; *Allen v. Buchanan*, (Ala.) 11 So. 777. * * * Story's Eq. Jurisp. par. 899, 900. In the first case cited it was held that, 'Although a court of equity has not within its territorial jurisdiction the real or the personal property which is the subject matter in controversy, it may, having the necessary parties before it, compel by appropriate process the performance of every act which if done voluntarily by them according 20

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to the *lex loci rei sitae* give full effect to its decree in *personam*. * * * A creditor must first exhaust its security in Minnesota and apply the proceeds to the diminution of its claim before it can litigate to final determination here its priority of payment over other creditors out of the fund over which the court here is seized, and for this purpose a reasonable time should be given it."

10 In *Wright v. Nutt*, 1 Hy. Blackstone, 136, the same doctrine was applied. The property of James Wright, Governor of the Province of Georgia, had been confiscated by Georgia and a law was passed authorizing the sale of his property by the State, the proceeds to be held subject to the payment of claims of citizens of Georgia. A citizen of Georgia, through his attorney Nutt, sued the representatives of Wright in England on a promissory note. Wright's representatives
20 filed a bill to enjoin the suit on the note and to compel Nutt to resort to the fund in Georgia arising from the sale of Wright's property confiscated by the State. The injunction was granted.

In 2 Jones on Mortgages, 1620, 6th Ed. the author referring to the doctrine of liability of mortgaged land in the inverse order of alienation, says:

30 "This rule is applicable where a part of the residue of land not sold is situated in another State", citing *Welling v. Ryerson*, 94 N. Y. 98.

In *Welling v. Ryerson*, supra, the mortgage covered a farm situated partly in New York State and partly in New Jersey. The mortgagor subsequently conveyed five acres of that part of the farm which was situated in New York. The court, referring to the doctrine of marshalling assets, said at page 103:

40 "After the conveyance by Jeffers (the mortgagor) of the five acres to Ryerson, according to a well established rule of equity, he could

have required that the balance of the whole farm covered by the prior mortgage should be first sold before resorting to his portion thereof. That was an equity which Welling was bound to respect and which in some way he could be compelled to respect. The fact that the land was situate in two states does not affect the matter."

IV.

The application of the foregoing doctrine will not work hardship upon the complainant.

The complainant (now deceased) was a resident of New York. The real estate which we seek to compel her representatives to resort to is also situate in New York. One of the parcels of real estate in New York was sold by Edwin Sternberger and his mother, Pauline Sternberger, as executors of the estate of Simon Sternberger under the power of sale contained in the will. Edwin Sternberger is the sole surviving executor under his father's Will; he is also one of the executors under his mother's Will; and he is also the devisee of the mortgage under foreclosure under the terms of his mother's will. Part of his father's property having been sold under the power of sale in the father's Will, free of the mortgage made by Clarence S. Sternberger, the proceeds of that sale may be followed by the mortgagee, Edwin Sternberger, who is also executor under the father's will and in control of the funds upon which he has a right to claim a lien as mortgagee. He has the power under his father's Will to sell more of the real estate free of the mortgage and apply part of the proceeds in payment of the mortgage under foreclosure. Edwin Sternberger is at the same time the holder of the mortgage

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and in personal control of the funds with which to pay it. It would surely work no hardship to compel him to resort to a fund which is not only in the state of his domicile but actually is in his own hands. It is simply a matter of proper debits and credits on his part.

This is a much stronger case than *Willey v. St. Charles Hotel Co.* supra and in that instance the court took into consideration the fact that the creditor with the two funds was a resident of the State where the singly charged fund was situated, and based its decision partly on that ground. In *Hayes v. Ward*, supra, the same situation existed.

The fact that some delay might result by the application of the foregoing doctrine, is not in itself sufficient to defeat the equities.

In *Shannon v. Marselis*, supra, at p. 421, it is stated:

“Nevertheless, where new rights or interests have originated since the execution of the mortgage, although the mortgagee is no party to them and they may tend to delay him in the prosecution of his remedy, yet the court will protect them; and will direct the mortgagee to be paid out of such parts of the property and in such way as may be most equitable to all parties concerned.”

In *Stowe v. Powers*, 116 Pacific 576 referred to in respondents brief, the court compelled the senior credit to marshal the mortgaged land for the benefit of a subsequent mortgagee saying (at page 579):

“To say that mere delay as where foreclosure way be necessary, unaccompanied by any other injury, requires a denial of the relief places too strict a limitation we think upon the application of the general principle. In a Wisconsin case, when this question was considered, the court say: ‘It is true that de-

lay to the prior credit has been sometimes spoken of as a bar to the relief here asked but we are not ready to subscribe to the doctrine that mere delay is sufficient to compel the court to deny the relief when no other injury is involved. Some delay is a necessary consequence of the enforcement of all rights and if a possible delay would defeat the right of a junior creditor to have the assets of his debtor marshaled, such marshaling would rarely, if ever take place."

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V.

The court should not compel appellant to take an assignment of complainant's mortgage.

The court will not invoke the doctrine of subrogation where it is not clear that the party seeking equity will secure the protection he seeks. Clarence Sternberger, or his devisees, are not parties to this foreclosure suit. If appellant took an assignment of complainant's mortgage and instituted foreclosure proceedings in New York, the representatives of Clarence Sternberger, not being bound by this suit, will be able to set up any defenses arising either prior or subsequent to the institution of this suit. The mortgage under foreclosure is a family affair and the transactions giving rise to it are peculiarly within the knowledge of the Sternberger family. It is a mortgage given by a son to a mother. If the mother, or subsequently Edwin Sternberger, has done anything to impair the validity of that mortgage, either prior or subsequent to the beginning of this suit, the representatives of the mortgagor may set up such a defence with impunity, if appellant takes an assignment of the mortgage.

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In *Hayes v. Ward*, supra, the court discussed

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the question as to whether complainant should be compelled to take an assignment of the mortgage in New York. There was some suspicion as to the validity of the mortgage because of alleged usury, and although there was not sufficient evidence of usury, the court refused to compel complainant to take an assignment of a security which may have been impaired by the act of the mortgagee, the facts being peculiarly within the
 10 knowledge of the mortgagee. At page 134:

“The defendant, Ward, ought to be obliged under such a just suspicion of this case to try the validity of his mortgage at home and not to compel the plaintiff to pay and then turn over to him a pledge which if frail and insecure has been rendered so by his own illegal act.”

We submit in this case appellants should not be compelled to take an assignment of a mortgage
 20 which, if insecure, may have been rendered so by the act of the mortgagee, and the facts being peculiarly within the knowledge of Pauline, Edwin and Clarence Sternberger.

As indicated under Point 4, Edwin Sternberger, the holder of the mortgage under foreclosure, is executor of his father's estate, and in control of the funds with which to pay the mortgage. It is his duty to pay over to the representatives of Clarence Sternberger (the mortgagor) the latter's interest in the father's estate. Pursuant to his father's will Edwin was not required to furnish a bond as executor. Should appellant, take an assignment of the mortgage it would be possible for the executor and mortgagee to so distribute marshal or dissipate the assets of the father's estate, as to make it practicable, if not impossible for appellant to trace the funds or enforce the payment of the mortgage. And this is especially so in view
 30 of the fact that Edwin Sternberger, holder of the
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mortgage and executor of his father's will may under the executor's power of sale, sell the interest of the mortgagor, Clarence Sternberger, free and clear of the mortgage under foreclosure and free of any other subsequent encumbrances, including appellant's mortgages and compel appellant to trace the proceeds.

Respondent comes into this court seeking equity. The court thereby acquired jurisdiction over the person of the respondent, and may say to the respondent. "We will not allow you who seek equity here, to be in a position to dissipate the funds under your *personal* control in New York, to the prejudice of appellant." 10

In *Stowe v. Powers*, supra, referred to in respondents' brief the court held that the junior creditor's right to compel the first mortgagee to marshal the assets was not defeated or impaired because the junior creditor refused the offer of the first mortgagee to turn over the securities to the junior creditor. At p. 580: 20

"It is true, that upon a familiar equitable principle, the plaintiff (the junior creditor) might pay off the prior debt of Stowe (the senior creditor) and be thereby subrogated to his rights. And under some circumstances, it may doubtless be equitable to require the party holding a junior lien upon only a portion of the property covered by the senior lien to pursue that course. But we do not understand it to be the law that the second incumbrancer must in all cases offer to pay off the debt of the first and take the latter's securities to entitle him to demand that the latter resort in the first instance to the singly charged fund or property, or that he is barred of the right to make such demand by declining an offer of his securities upon his payment of the debt. To hold that to be the absolute rule under all circumstances would in effect deny any other relief than subroga- 30 40

tion, at least whenever the prior lienor is willing to turn over his securities to the party having a lien upon only a part of the property upon being paid the entire amount due him from the common debtor. Such a rule might in many cases work great injustice. The party has two remedies—either subrogation or marshalling securities.”

The equities being clearly with appellant, the decree of the Court of Chancery should be reversed.

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McDERMOTT & ENRIGHT,

Solicitors of Defendant-Appellant.

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Addenda.

Copies of Wills referred to in foregoing brief.

The will of Simon Sternberger was offered in evidence, and the paragraphs which were read by complainant's counsel are printed on pages 50-51 of book, but not the whole will which should be before the court.

The will of Clarence Sternberger is made a part of the foreclosure proceedings brought by Berthold Sussman against Morris Sternberger and others, offered in evidence and referred to on page 25 of book. 10

Last Will and Testament of Simon Sternberger.

I, Simon Sternberger, of the City of New York, do hereby make and declare this as and for and to be my Last Will and Testament, hereby revoking all former and other wills by me made, and intending hereby to dispose of all the property which I may have the right or power to dispose of at the time of my death. 20

I. I direct that all my just debts and funeral and testamentary expenses shall be paid as soon after my decease as practicable.

II. I give and bequeath unto the United Hebrew Charities all the coupons which have matured before my death then remaining uncollected by me, of a \$500 bond of the Hebrew Benevolent and Orphan Asylum Society. 30

III. I give and bequeath the said bond mentioned in the second clause hereof, including all coupons maturing after my death, unto the said Hebrew Benevolent and Orphan Asylum Society.

IV. I give and bequeath to the Mt. Sinai Hospital two bonds of \$250 each of the Verein Freundschaft (at present situated at number 102 East 72nd Street in the City of New York). 40

V. I give and bequeath to the Montefiore Home for Chronic Invalids two other bonds of \$250 each of said Verein Freundschaft.

VI. I give and bequeath to the Hebrew Free Schools one bond of \$250 of the Harmonie Club (at present situated at number 43 West 42nd Street in the City of New York).

VII. I give and bequeath to the Home for Aged and Infirm Hebrews one other bond of \$250 of said Harmonie Club.

VIII. I give and bequeath to the Society for the Relief of the Destitute Blind of the City of New York and its vicinity, one other bond of \$250 of said Harmonie Club.

IX. I give and bequeath unto my wife, Pauline Sternberger, all my household furniture, linen, bedding, clothing, jewelry, articles of personal use, plate, pictures, engravings, bronzes, printed books and household stores contained in the premises mentioned in the tenth clause of this my will.

X. I give, devise and bequeath to my executors hereinafter named, or such of them as shall qualify, and to the survivors or survivor of them, the house and lot known as number 43 East 60th Street in the City of New York, and the property which I am in the habit of occupying as my summer residence, situate at West End (Long Branch), in the County of Monmouth and State of New Jersey, IN TRUST, to let and lease the same, to collect and receive the rent and income thereof, and to pay the net rent and income to my said wife for and during her natural life, but my said executors are directed to permit my said wife to take possession of and occupy either or both of the said pieces of property at and during her pleasure.

XI. In the event of the sale of both or either of said properties during the life of my wife, as hereinafter provided, then the proceeds of such

sale or sales shall be invested by my said executors as trustees for my said wife under this my will, and the interest and income thereof shall be collected by them and be paid and applied to the use of my said wife during her natural life.

XII. I give, devise and bequeath all the rest, residue and remainder of my property, real and personal, which I may die seized or possessed of, whether acquired before or after the execution hereof, and the proceeds of sales thereof, unto my said executors, IN TRUST, to lease the real estate, to invest and keep invested the personal estate, and the proceeds of any sales of real estate, to collect and receive the rents, interest and income of the real and personal estate, and to pay to my said wife from the net rents, interest and income thereof, yearly and every year during her natural life, the sum of Six Thousand Dollars, in equal quarter-yearly payments, the first payment to be made on the day which shall be three months after my decease, and to pay the residue and remainder of said net rents, income and profits to my children living at my decease, and to the issue then living per stirpes of any deceased child or children who may have died before me leaving issue, but excluding nevertheless, such children (or such issue of them) as have had advanced to them an amount exceeding their shares of my estate, as set forth in the thirteenth and fourteenth clauses hereof; and in the event of any such children or the deceased parent of such issue having had advanced to them an amount less than their shares of my estate, then such children or such issue are to receive the income of so much of their shares as shall not have been advanced to them, as set forth in the said thirteenth and fourteenth clauses of my will.

XIII. The property devised and bequeathed to my executors in trust in and by the tenth, eleventh and twelfth clauses of this my Will I give, devise

and bequeath upon the death of my wife, unto my children living at my decease and to the issue surviving me, per stirpes, of any child or children who may have died before me leaving issue; but it is my Will that there shall be deducted from the shares of each of my children, or of the said issue, the advancements made to such children or to the parents of such issue as set forth in the fourteenth clause hereof.

- 10 XIV. Having heretofore advanced to my children hereinafter named various sums, which sums respectively amount to the sums mentioned after each of their names, viz: to my son Morris S. Sternberger \$23,270; to my son Clarence S. Sternberger \$13,594; to my son Louis Sternberger, \$87,233; to my son Julian Sternberger \$3,577; to my son Dr. Edwin Sternberger \$3,216; to my daughter Jennie Reitlinger \$6,000; which statement of advances is to be taken and deemed con-
- 20 clusive; and desiring that the said sums shall be deemed and taken as advances to the said children, respectively, it is my Will, and I do hereby direct, that for the purpose of making a just distribution of the property devised and bequeathed by me in and by the thirteenth clause of this my Will, unto my children (or their issue aforesaid), and for no other purpose, the said sums, without interest, shall be reckoned as part of the prop-
- 30 erty devised and bequeathed by the said thirteenth clause hereof, and I direct that from the respective shares of principal devised and bequeathed to each by the thirteenth clause of this my Will, to which my said sons Morris Sternberger, Clarence S. Sternberger, Louis Sternberger, Julian Sternberger and Dr. Edwin Sternberger, and my said daughter Jennie Reitlinger, or their said issue will be entitled, there shall be charged and deducted without interest the said amounts as afore-
- 40 said advanced or paid to my said sons and daughters, respectively, but neither of my said sons or

my said daughters or their issue shall be required to pay the excess, if any, of such advances as aforesaid over their respective shares; and I further direct that the income to which under the twelfth clause hereof my children who may survive me, or the issue me surviving, of such as may die before me, shall be entitled, shall be paid over to them proportionately to their shares of principal so to be determined as provided in this the fourteenth clause of my Will; the children, if any (or in case of their death before me, then their issue me surviving) whose advancements as aforesaid shall exceed their shares of said principal, to be entirely excluded from participation in such income. 10

XV. The provisions hereinbefore made for my wife are intended to be and are hereby declared to be in lieu and bar of dower in my estate.

XVI. It is my Will, and I do hereby direct that all investments made by the executors and trustees hereunder shall be on bond and mortgage upon unencumbered and productive real estate in the City of New York. 20

XVII. I nominate and appoint my said wife, Pauline Sternberger, my said son Dr. Edwin Sternberger, and my friend Samuel Riker, the executors of this my Last Will and Testament, and do authorize and empower my said executors, or such of them as shall qualify, and the survivors and survivor of them, whether acting as executors or as trustees, at any time in their, his or her discretion to sell all or any part of the real property which may be owned by me at the time of my death, whether held in severalty or in common with any other person or persons either at public or private sale, free and clear of any charge thereon under this my Last Will and Testament, and to execute valid deeds therefor to the purchasers thereof; also to partition any and all real property which at the time of my 30 40

death may be held by me in common with any other person or persons, and to execute and receive all such instruments and assurances in the law as may be necessary or proper to carry such partition into full effect, and thereafter to sell the real property allotted on the said partition for my share, or any part thereof, free and clear of any charge thereon under this my Last Will and Testament, either at public or private sale, and to execute valid deeds therefor to the purchasers thereof, but it is my Will and I hereby direct that the real property devised by the tenth clause hereof in trust for the benefit of my wife shall not be sold during her lifetime, except upon her consent, to be evidenced by her joining in the deed or deeds conveying the whole or any part of such real estate. And I further direct that the purchaser or purchasers of the whole or any part of my real estate shall not be required to look to the application or investment of the proceeds thereof.

XVIII. In case any of my said Executors and trustees shall be non-residents of the State of New York it is my Will and I hereby direct that such non-residents or non-resident shall act without giving security.

IN WITNESS WHEREOF, I, Simon Sternberger, have hereunto set my hand and seal the seventh day of February, Eighteen hundred and ninety-five.

SIMON STERNBERGER, (L. S.).

Signed, sealed, published and declared by the said testator, Simon Sternberger, as and for and to be his Last Will and Testament, in our presence, and we, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses to such execution thereof.

The words "contained in the premises mentioned

in the tenth clause of this my Will" added to the ninth clause before execution.

JOHN SPENCER, 108 Montague St., Brooklyn, N. Y.

MORRIS COOPER, 42 East 114th Street, New York City.

Admitted to probate by Frank T. Fitzgerald, a Surrogate of the County of New York, August 20th, 1895, as the Last Will and Testament of the said Simon Sternberger, deceased, valid to pass real and personal property. **10**

Letters Testamentary issued to Pauline Sternberger and Edwin Sternberger August 20th, 1895.

Exemplified copy filed in Monmouth County Surrogate's Office October 31st, 1902, and recorded in Book K-2 of Wills, (page 349 &c.).

Clarence S. Sternberger's exemplified copy of will. **20**

Dated Feb. 14, 1898.

Received and filed September 28, 1900. Book G-2 of Wills page 369 etc.

In the Name of God, Amen: I, Clarence S. Sternberger, a citizen and resident of the City, County and State of New York, being of sound and disposing mind and memory, do make publish, and declare this my last Will and Testament, that is to say: **30**

1. I hereby revoke any and all wills and codicils thereto or to any of them by me heretofore executed.

2. I hereby give, bequeath and devise unto my sisters Maud M. and Minnie H. and my niece Blanch Reitlinger, all of my property and estate real, personal and mixed of every kind and nature, share and share alike.

3. I hereby appoint Leopold Kayser and Wilson **40**

W. Hoover of said City of New York, my executors, to act as such without being required to give bonds.

In witness whereof, I have hereunto set my hand and seal the 14th day of February, 1898.

CLARENCE S. STERNBERGER (L. S.).

10 The foregoing instrument, consisting of one page was executed by the above named Clarence S. Sternberger in our presence and he then and there declared to us, that he executed the same as and for his last Will and Testament, and we in his presence, and the presence of each other, and on the date last aforesaid, have subscribed our names and residences hereunto as subscribing witnesses.

JOHN KEARNEY, 280 West 115th Street, N. Y. C.

HAROLD W. HOOVER, 224 West 133rd Street, N. Y. City.

20 Admitted to probate in N. Y. March 6th, 1899.

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New Jersey Court of Errors and Appeals

PAULINE STERNBERGER, <i>Complainant-Respondent,</i> <i>vs.</i> BERTHOLD SUSSMAN, <i>Defendant-Appellant.</i>	}	<i>On Appeal from Chancery.</i>
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Brief for Complainant-Respondent.

1.

The Facts.

This is a suit to foreclose a mortgage made by one Clarence Sternberger to the complainant upon an undivided interest in lands in Monmouth County. It was admitted in the court below that the mortgage is a valid instrument and a first lien on the premises in question, and that the money is due.

The complainant's mortgage is dated May 29th, 1896, and was recorded in the office of the Register of the City and County of New York on the 19th day of June, 1896, and in the office of the Clerk of Monmouth County on the 16th day of July, 1896. The mortgage was never recorded in Union County, although it covered property in that county.

The defendant's two mortgages were dated respectively the 20th day of October, 1896, and 13th day of September, 1897, which mortgages were recorded respectively in the County Clerk's office of Monmouth County on the 26th day of October, 1896, and on the 31st day of January, 1898. It was also in evidence that these two mortgages were recorded in Union County as well as in New York.

Prior to the commencement of this suit, the defendant herein foreclosed his two mortgages and at the foreclosure sale purchased the interest of the mortgagor in the Monmouth County property for one thousand dollars (\$1,000), completely ignoring the fact that his mortgage was a first lien upon the Union County property.

The only defense to this suit in the court below was that the complainant's mortgage was also a lien upon lands in the City of New York and that as these lands were presumably a sufficient security for the money, the mortgage should be first foreclosed in the State of New York.

The decree in the Court of Chancery was in favor of the complainant, and the defendant now appeals from so much thereof as adjudges and decrees that the complainant may proceed to sell the land situated in the County of Monmouth.

2.

The Law.

THE DOCTRINE OF MARSHALLING OF ASSETS DOES NOT APPLY.

A.

BOTH FUNDS MUST BE WITHIN THE JURISDICTION.

At the argument of the case in the court below, the defendant invoked the doctrine laid down in *Aldrich vs. Cooper*, 8 Vesey, p. 382, that "he who has two funds for the satisfaction of his claim shall not, by his election, disappoint him who has only one, and that equity, to satisfy both, will throw him who has the two upon the fund which he alone possesses, so that the other fund may remain clear to him who has but the one."

No attempt is made to deny the equity of this rule, but we do deny its application to the case at bar.

During the many years since the rule was laid down, many modifications and qualifications have been engrafted upon it as the exigencies of the various cases demanded. Thus we find in *Blair vs. Ward*, 2 Stockton, 119, Chancellor Williamson, in speaking of this general rule, says: "This is a principal of equity to be applied as each case arises, according to its circumstances, and for the purpose of doing equity between the parties. It is not an inflexible rule of law, which a party has a right to ask may be applied without regard to the circumstances of the case or its consequences upon third parties. *The court will never put in jeopardy the interest of the first encumbrancer by applying this principle.* It will refuse to do so when it can be seen that such will be the case."

The Supreme Court of the State of Wyoming in 1911 laid down the principle and exceptions which are stated in *Stowe vs. Powers*, 116 Pacific Reports, page 576. The equitable remedy of marshalling securities depends on the principle that a person having two funds to satisfy his demands shall not by his election disappoint a party having but one fund, the general rule being that if one creditor by virtue of a lien or interest can resort to two funds, and another has only one, the former must seek satisfaction out of the fund which the latter cannot touch though such relief will not be granted if it will materially delay or inconvenience the paramount incumbrancer in the collection of his debt or prejudice him in any manner, or in case the fund first to be resorted to is of dubious availability, or one which might involve the creditor in litigation.

One of the qualifications to which the general rule has become subject is that *both funds must be within the jurisdiction and control of the court.*

Post vs. Mackall, 3 Bland, 515.

Lewis, Trustee, vs. U. S., 92 U. S., 623, and cases cited.

Morton vs. Grafflin, 13 Atl. Rep., 341.

Adams, Equity, page 272 (Note 8th Am. Ed.).

Aldrich vs. Cooper, 2 Leading Cas. Eq. Am.,
Note, p. 276, (3rd Am. Ed.).

In *Post vs. Mackall*, *supra*, the Chancellor says, "If the two funds cannot be embraced within the scope of the same suit, and much more, if they both be not within the jurisdiction of the court it would be impracticable to make such arrangement in favor of one set of creditors against another, whose claims may be thus greatly endangered and the satisfaction of which must be necessarily delayed and consequently lessened."

In the case at bar the appellant is trying to compel the respondent to reach by litigation, and therefore with delay and additional expense, funds which are without the jurisdiction of this court. He has not proved that if the respondent were compelled to bring her suit in New York that the funds in that State are adequate to liquidate her claim. The evidence is that the mortgagor was the owner of an undivided interest in New York property, but what that interest was or how far encumbered does not appear.

The most that can be gathered from the evidence is that the New York property *might* be adequate security for the complainant's claim.

Surely no court of equity would compel a litigant to discontinue his proceedings in one suit, where he has expended time and money, and force him to commence new proceedings, in a new jurisdiction, at additional expense when he has only a *possibility* of a successful issue.

Jones Mtges., paragraph 1628.

B.

THE PURCHASER MUST BE A PURCHASER
FOR VALUE OR UNDER GENERAL COVE-
NANTS OF WARRANTY.

Another qualification to which the general rule has become subject is that the purchaser must be a purchaser for value or under general covenants of warranty.

Jackson vs. Condict, 12 Dick., p. 522, at p. 526.

Mills vs. Kelley, 17 Dick., p. 213.

In *Jackson vs. Condict*, *supra*, Vice-Chancellor Emery says, after quoting the above rule: "Where the deed is upon a nominal consideration and there is no agreement either express, as by warranty in the deed or other covenant, and no agreement can be implied from the circumstances of the case, that the portion conveyed was to be free from encumbrances. I see no equitable reason for holding that there should be any marshalling of the different portions for the discharge of the common burden."

In the case at bar the appellant had notice of the first mortgage when he took his own security. He foreclosed and bought in with notice for a nominal consideration. All he obtained by such purchase was his own legal title divested of the mortgagor's equity of redemption and prior liens.

Laws 1902, page 529, Sec. 54.

Boorum vs. Tucker, 6 Dick., 135.

Boorum vs. Tucker, affirmed, 7 Dick., 587.

Podesta vs. Binns, 69 Eq., 387, at 394.

It would, therefore, follow that the appellant, not being a purchaser for value without notice, stood in no better position after his purchase from the sheriff than he did before. Prior to the sheriff's sale he could not have asked that the first mortgagee be compelled to foreclose first in New York, and it certainly

cannot now be claimed that the mere act of transfer by the sheriff will give him this additional security.

“As between different portions of the premises subject to the common charge, the general and fundamental rule of equity is that the burden is to be borne by the different portions ratably; that this rule would only be departed from where the intention of the parties was shown to be otherwise. Consequently the burden would, in the absence of evidence to the contrary, remain as it was.”

Jackson vs. Condict (supra).

Why the second mortgagee should be allowed to strengthen his own position by his own act to the detriment, annoyance and cost of the first mortgagee is incomprehensible.

The only consideration remaining is, what would be the position of the appellant should the decree of the Court of Chancery be confirmed? He will still have his first mortgage on the property in Union County and his position in regard to the New York property will be very much stronger than it is at the present time.

J. BAYARD KIRKPATRICK,
Solicitor of Complainant-Respondent.

NEW JERSEY
Court of Errors and Appeals

BETWEEN

PAULINE STERNBERGER,
Complainant-Respondent,

AND

BERTHOLD SUSSMAN,
Defendant-Appellant.

To His Honor William J. Magie, Chancellor of the
State of New Jersey:

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Humbly complaining, shows unto your Honor your orator Pauline Sternberger, of the City of New York, in the County of New York and State of New York, that on the twenty-ninth day of May, Eighteen Hundred and Ninety Six one Clarence S. Sternberger of the City, County and State of New York, became and was justly indebted unto your orator in the sum of Nine Thousand Dollars, and being so indebted the said Clarence S. Sternberger, in order to secure the payment of the said sum of money, with interest, did make and execute under his hand and seal and deliver unto your orator a certain bond and obligation in writing bearing date the day and year first aforesaid, in the penal sum of Eighteen Thousand Dollars lawful money of the United States, with a condition thereunder written that if the said Clar-

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ence S. Sternberger, his heirs, executors or administrators should well and truly pay or cause to be paid unto the said Pauline Sternberger, your orator, or to her executors, administrators or assigns the sum of Nine Thousand Dollars on the First day of May, Nineteen Hundred, and the interest thereon to be computed from the Twenty-ninth day of May, Eighteen Hundred and Ninety Six, at the rate of six per cent. per annum, to be paid on the first days of
10 July and January in each year, then the said bond or obligation to be void, otherwise to remain in full force and virtue.

And your orator further shows that in and by the said bond or obligation in writing it was thereby expressly agreed that the whole of the said principal sum of money should become due, at the option of your orator, after default in the payment of interest for thirty days, as in and by said bond or obligation and the condition thereof, reference being thereunto
20 had will more fully and at large appear.

And your orator further shows that the said Clarence S. Sternberger, in order to secure the payment of the said sum of money above mentioned, with the interest thereon, executed and delivered unto your orator a certain indenture of mortgage, bearing date the day and year first aforesaid, made by the said Clarence S. Sternberger to Pauline Sternberger, your orator, of the second part, whereby the said party of the first part did grant and release unto
30 your orator and to her heirs and assigns forever, all that one equal undivided eighth part of all those certain lands and premises of which Simon Sternberger, the father of the said Clarence S. Sternberger, party of the first part, died seized, situated at West End, Long Branch, in the County of Monmouth and State of New Jersey, and also situated in the Township of Union, in Union County and State of New Jersey; together with certain other lots, lands and parcels of which the said Simon Sternberger died seized, in and to which the said Clarence S. Sternberger had

an undivided interest, as set forth in said indenture of mortgage, situate, lying and being in the City of New York, County of New York and State of New York, as in said indenture of mortgage set forth, together with the appurtenances and all the estate and rights of the said party of the first part in and to the said premises; to have and to hold the said granted and described premises unto the said party of the second part, her heirs and assigns forever; provided always, that if the said party of the first part, his heirs, executors or administrators should pay unto the said party of the second part, her 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, that then the said indenture of mortgage and the estate thereby granted, should cease, determine and be void.

And your orator further shows that the said Clarence S. Sternberger, the party of the first part aforesaid, in and by the said indenture of mortgage, did expressly agree that the whole of the said principal sum should become due at the option of the said party of the second part, your orator, after default in the payment of the interest therein provided for thirty days, as in and by the said indenture of mortgage, now in the possession of your orator or the record thereof as hereinafter set forth, reference being thereunto had, will more fully and at large appear.

And your orator further shows that after the execution of the said indenture of mortgage, the same was in due form of law acknowledged by the said Clarence S. Sternberger on the day of the date thereof before E. Ritzema De Grove, a Notary Public of New York County, in the State of New York, with certificate filed in the County of New York, in the State of New York, to which said acknowledg-

ment was attached a certificate of Henry D. Purroy, Clerk of the City and County of New York aforesaid, and also Clerk of the Supreme Court thereof, that the said E. Ritzema De Grove, Notary Public as aforesaid, was at the time of taking such acknowledgment a Notary Public in and for said County, duly commissioned and sworn and authorized by the laws of said State of New York to take the acknowledgments and proofs of deeds or conveyances for lands, tenements and hereditaments in said State of New York, and that he believed that the signature of said Notary Public to the said certificate was genuine, which said indenture of mortgage was thereupon duly recorded in the office of the Clerk in and for the said County of Monmouth in Book 201 of Mortgages, page 416, &c., on the Sixteenth day of July, in the year Eighteen Hundred and Ninety Six, as by the certificate endorsed on the said indenture of mortgage more fully appears.

And your orator further shows that at the time of the death of the said Simon Sternberger, father of the said Clarence S. Sternberger, he the said Simon Sternberger was seized and possessed of all the following described lots, tracts and parcels of land and premises, situated, lying and being in the County of Monmouth aforesaid, the undivided one-eighth part of which said lots, tracts and parcels of land and premises was intended to be covered by the mortgage of your orator above set forth, to wit:

FIRST: All that certain piece or parcel of land and premises hereinafter particularly described, situate, lying and being at West End, in the Township of Ocean, County of Monmouth and State of New Jersey:

BEGINNING at a corner in the middle of the public highway, and at the Northwest corner of a lot of land belonging to Charles H. Green and known as the Station House Lot; thence (1) along his line South seventy-six degrees and twenty minutes East, about eleven chains and eighty-five links to the At-

lantic Ocean at low water mark; thence (2) North fourteen degrees and twenty minutes East, two chains and Seventy-three links along the said Ocean to a corner; thence (3) along the line of land belonging to James Brown North seventy-six degrees and thirty minutes West, about eleven chains and eighty-nine links to the middle of the aforesaid highway which leads over the Whale Pond Bridge to Deal; thence (4) along the middle of said highway North thirteen degrees and thirty minutes East two chains and-seventy-three links to the place of BEGINNING; containing three acres and twenty-four one-hundredths of an acre agreeable to a survey made by Frederick H. Kennedy, September 9, 1863; excepting and reserving thereout the following described portions thereof which were conveyed to Thomas T. Eckert by the said Simon Sternberger, prior to his death, by deed dated April 13, 1886, and recorded in the aforesaid Clerk's Office of Monmouth, in Book 403, pages 194 and 199, and more particularly described as follows, to wit: 10 20

All that certain tract or parcel of land and premises situate, lying and being in the Township of Ocean, County of Monmouth and State of New Jersey, at Long Branch:

BEGINNING at a stake in the center of Ocean Avenue, at the Northwest corner of a lot of land conveyed by Charles H. Green and wife to William Henderson, by deed dated April Fourth, eighteen hundred and sixty-six; thence (1) along the center of said Ocean Avenue North thirteen degrees and thirty minutes East twenty-five feet; thence (2) South seventy-six degrees and thirty minutes East six hundred and sixty feet, more or less, to high water mark on the Atlantic Ocean; thence (3) along the line thereof North fourteen degrees, twenty minutes West, twenty-five feet more or less to the Northerly side of said Henderson's land; thence (4) along the Northerly line thereof North seventy-six degrees twenty minutes West six hundred and sixty feet 30

more or less, to the place of Beginning; being intended to be a tract of land twenty-five feet in width and six hundred and sixty feet more or less in depth.

SECOND: Also all that parcel of land floated by tide water, lying at Long Branch, in the Township of Ocean, County of Monmouth, and State of New Jersey, described as follows:

BEGINNING at a point in the high water mark in the Atlantic Ocean where the same is intersected by the exterior line, one thousand and twenty-two feet to said exterior line established by the Commissioners W. and J. Curtis, and lands of said Sternberger; and from thence running Easterly at right angles with the exterior line established by the Commissioners appointed under the authority of the act entitled "An act to ascertain the rights of the State and of Riparian Owners in the lands lying under the waters of the Bay of New York and elsewhere in this State," approved April 11, A. D. 1864, and the supplements thereto; thence Southerly along said exterior line one hundred and eighty feet; thence West-
 20 erly and parallel with the line first run down to said exterior line one thousand and ten feet to the high water mark of the Atlantic Ocean, where the same is intersected by the division line between lands of William Henderson and lands of said Sternberger; thence Northerly along said high water mark to the place of BEGINNING.

THIRD: Also all of lots numbers one, three, five
 30 and twenty-three situate on the Southerly side of Cedar Avenue and the Westerly side of Ocean Avenue at Long Branch, New Jersey, as laid down upon a "Map of Property belonging to M. and S. Sternberger, situate at Long Branch, County of Monmouth, and State of New Jersey," surveyed October 19, 1881, and filed in the office of the Clerk of the County of Monmouth aforesaid.

FOURTH: Also all of the following stable lots, to wit, numbers four, seventeen, nineteen, twenty and twenty-one, situate at Long Branch, New Jer-

sey, and as laid down upon a "Corrected Map of Stable Lots, on plot 18-b to M. and S. Sternberger property at Long Branch, New Jersey," surveyed November 18, 1884, and filed in the office of the Clerk of the County of Monmouth aforesaid.

FIFTH: Also all the undivided one-half interest in the following lots, to wit, Numbers ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen-a, situate on the Northerly and South-erly sides of Garfield Place, at Long Branch, as laid down upon a "Map of property belonging to M. & S. Sternberger, situate at Long Branch, County of Monmouth, and State of New Jersey," surveyed October 19, 1881, and filed in the Clerk's Office of the County of Monmouth aforesaid. 10

SIXTH: Also all the undivided one-half interest in the following stable lots, to wit: Numbers three, ten, twelve, thirteen and fourteen, as laid down upon a "Corrected Map of stable lots on plot 18-b of M. and S. Sternberger, property at Long Branch, New Jersey, as filed in the Office of the Clerk of the County of Monmouth aforesaid. 2)

And your orator further shows that on or about the Twentieth day of October, Eighteen Hundred and Ninety Six, the said Clarence S. Sternberger executed and delivered a mortgage upon the same premises described in your orator's said mortgage, to one Berthold Sussman, to secure the sum of Two Thousand Dollars or some other sum unknown to your orator, which mortgage appears of record in Book 205 of Mortgages, pages 44, &c., in the aforesaid Clerk's Office, but your orator charges that the last mentioned mortgage was executed and recorded subsequent to your orator's said mortgage and with full notice thereof. ;0)

And your orator further shows that afterwards, to wit, on or about the Fifteenth day of February, Nineteen Hundred and Four, under a decree of foreclosure made in a suit wherein Berthold Sussman was complainant and Morris Sternberger et al. were

defendants, the Sheriff of the County of Monmouth, conveyed all the right, title and interest which the said defendants in the above mentioned suit had or claimed to have in said premises, to one Berthold Sussman, by virtue of which conveyance the said Berthold Sussman claims to have some interest in the said premises, but your orator expressly charges that the said conveyance was made subsequent to and with full knowledge of your orator's said mortgage.

10 And your orator further shows that the said principal sum of Nine Thousand Dollars mentioned in your orator's said bond or writing obligatory has now become due and payable, as by reference to the said bond and writing obligatory in the custody of your orator and ready to be produced when and where this Honorable Court may direct, reference being thereunto had will more fully and at large appear.

2) And your orator further shows that there is now due unto your orator the said principal sum of Nine Thousand Dollars mentioned in the condition of the said bond or writing obligatory, together with interest thereon from the first day of July, Nineteen Hundred and Two, and the estate of your orator in the said mortgaged premises has become absolute in your orator and her heirs and assigns.

30 And your orator further shows that the said Clarence S. Sternberger in his lifetime and the said Berthold Sussman and Mrs. Berthold Sussman his wife, or some one of them since the death of the said Clarence S. Sternberger, have at all times since the execution and delivery of your orator's said mortgage, possessed and enjoyed and still do possess and enjoy said mortgaged premises and every part thereof, and have at all times received and still do receive the rents, issues and profits thereof, and that the said premises are a slender and scanty security for the payment of the principal and interest monies so due and growing due to your orator.

And your orator further shows that she has frequently and in a friendly manner applied to the said Berthold Sussman and requested him to pay to your orator the amount of principal and interest monies so remaining due to your orator on the said bond or writing obligatory and indenture of mortgage so as aforesaid given by the said Clarence S. Sternberger in his lifetime to your orator, or that they would suffer your orator to enter into the possession of the said mortgaged premises and permit her to receive and take the rents, issues and profits thereof, and that they would release to your orator all their right, title and equity of redemption of, in and to the said mortgaged premises and deliver unto your orator all deeds, evidences, muniments of title relating to and concerning the same. 10

And your orator well hoped that the said defendants would have complied with such reasonable requests, as in justice and equity they ought to have done. 20.

In Tender Consideration Whereof, and forasmuch as your orator has not a complete remedy in the premises at the common law, nor can foreclose the equity of redemption in the said mortgaged premises or safely sell the same for the payment and satisfaction of the said principal and interest money without the aid of this Honorable Court, where matters of this nature are particularly cognizable and relievable. 30

To the end therefore that the said defendants hereinafter named may, but without oath, true, full and perfect answer make to all and singular the premises as fully as if here repeated and they thereto particularly interrogated, and that they or some of them may be decreed to pay to your orator the said principal sum so due on the said bond and mortgage and the interest due and to grow due thereon, with your orator's costs and charges in this behalf sustained by a short day to be appointed by this Honorable

Court, and that in default thereof the said defendants and all persons claiming or to claim under them or any of them may 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 may deliver unto your orator the possession thereof and all deeds, demises and muniments of title relating to or concerning the same; or that the said mortgaged premises with
10 the appurtenances may be sold, and that out of the monies arising from such sale, your orator may be paid the said principal, interest and costs and that your orator may have such further and other relief in the premises as 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 orator a writ or writs of subpoena issuing out of and under the seal of this Honorable Court, to be directed to the said Berthold
20 Sussman and Mrs. Berthold Sussman his wife, therein and thereby commanding them on a certain day and under the penalty that may fall thereon, to be and appear in this Honorable Court in the manner and form required by law, and then and there to answer the premises and to stand to, abide by and perform such decree therein as to your Honor may seem meet and agreeable to equity and good conscience.

And your orator will ever pray, &c.

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GALLAGHER & KIRKPATRICK,
Solicitors for and of Counsel with Complainant.

STATE OF NEW JERSEY }
 COUNTY OF ESSEX } ss.

J. Bayard Kirkpatrick, the solicitor of the complainant in the above stated cause, being duly sworn on his oath deposes and says, that the wife of Berthold Sussman, one of the defendants in said suit, is a necessary party therein and that notwithstanding due inquiry has been made therefor, the Christian name of such married woman cannot be ascertained.

J. BAYARD KIRKPATRICK. 10

Subscribed and sworn to before me
 this 27th day of April, 1904.

AGNEW B. VANLIEW,

Master in Chancery of New Jersey.

Filed April 28th, 1904.

ANSWER

The Answer of Berthold Sussman and Mrs. Berthold Sussman, his wife, to the bill of complaint of Pauline Sternberger, complainant. 20

These defendants, for answer unto the said bill of complaint, or unto so much thereof as they are advised it is material or necessary for them to make answer unto, answering say, that they admit that on the Twenty-ninth day of May, eighteen hundred and ninety-six, Clarence S. Sternberger, named in the said bill of complaint, executed a bond and mortgage to the complainant, Pauline Sternberger, to secure the sum of Nine Thousand Dollars, which said mortgage was recorded in the Clerk's Office of the County of Monmouth, New Jersey, on the Sixteenth day of July, eighteen hundred and ninety-six, in Book 201 of Mortgages, page 416, &c.; but these defendants do not admit that the said Clarence S. Sternberger was indebted to the said Pauline Sternberger in the sum of Nine Thousand Dollars, or in any other sum, and leave the said complainant to make such proof thereof as she may be advised. 30

And these defendants, further answering, admit that on or about the Twentieth day of October, eighteen hundred and ninety-six, the said Clarence S. Sternberger executed and delivered to this defendant Berthold Sussman a mortgage upon the same premises described in the mortgage of the said complainant, to secure the sum of Two Thousand Dollars, which mortgage was recorded in the Clerk's Office of Monmouth County in Book 205 of Mortgages, page 44, &c.

And, further answering, we admit that on or about the Fifteenth day of February, nineteen hundred and four, under a decree of foreclosure made in a suit wherein this defendant Berthold Sussman was complainant and Morris Sternberger and others were defendants, the Sheriff of the County of Monmouth conveyed all the right, title and interest which the defendants in said cause had or claimed to have in said premises to this defendant Berthold Sussman, by virtue of which conveyance this defendant Berthold Sussman claims to have some interest in the said premises situate in the County of Monmouth.

And these defendants, further answering, say that it may be true that there is due on the said complainant's bond and mortgage the sum of Nine Thousand Dollars, with interest as stated in said bill of complaint, but these defendants have no information concerning the same except as derived from the bill of complaint, and can neither admit nor deny the same, but leave the said complainant to make such proof thereof as she may be advised.

And these defendants, further answering, say that the premises set out and described in the mortgage executed by Clarence S. Sternberger to the said complainant are not fully or adequately described in the said bill of complaint; that the said mortgage covers certain lands and real estate of the said Clarence S. Sternberger, therein described as follows:

"ALL the one equal, undivided eighth part of all

that certain lot, piece or parcel of land with the buildings thereon erected, situate, lying and being in the Nineteenth Ward of the City of New York, and bounded and described as follows, to wit:

Beginning at a point on the northerly line of Sixtieth Street, distant two hundred and nine feet and one inch more or less easterly from the northeasterly corner of Madison Avenue and Sixtieth Street, running thence northerly and parallel with Madison Avenue and part of the distance through the center of a party wall one hundred feet and five inches to the center line of the block between Sixtieth and Sixty-first Streets, running thence easterly along said center line twenty feet, thence southerly again parallel with Madison Avenue and part of the distance through the center of a party wall one hundred feet and five inches to the northerly line of Sixtieth Street, thence westerly along same twenty feet more or less to the point or place of beginning, said property being known by the street number as number 33 (thirty-three) East Sixtieth Street. The above described premises lie in Section 5 (five) in Block 1375 (one thousand three hundred and seventy-five) on the land map of the City of New York.

Also all the one equal undivided eighth part of all those certain lots, pieces or parcels of land with the buildings thereon situate, lying and being in the City of New York, which taken together are bounded and described as follows, viz:

Beginning at a point on the easterly side of West Street distant sixty-two feet and six inches southerly from the southeasterly corner of West Street and Charlton Street, running thence southerly along the easterly side of West Street forty-one feet and eight inches, thence easterly and parallel with Charlton Street, one hundred and forty-seven feet and six inches, thence northerly and at right angles to Charlton Street forty-four feet, thence westerly and nearly parallel with Charlton Street eighty-seven feet and eight inches, thence southerly and parallel

with West Street two feet and six inches, thence westerly and parallel with Charlton Street sixty-three feet to the point or place of beginning. The above described premises lie in Section 2 (two) in Block 596 (five hundred and ninety-six) on the Land Map of the City of New York.

10 Also all the one equal undivided eighth part of all that lot, piece or parcel of land with the buildings therein and the appurtenances thereunto belonging situated in the City of New York, and now known as number 525 (five hundred and twenty-five) Broadway, as now in possession and which is bounded and described as follows:

20 Beginning at a point on the westerly side of Broadway, distant twenty-five feet six inches southerly from the southeast corner of Broadway and Spring Street, running thence westerly parallel with Spring Street through a party wall seventy-five feet, thence southerly parallel with Broadway through another party wall twenty-four feet eleven inches, thence easterly again parallel with Spring Street through another party wall seventy-five feet to Broadway, thence northerly along Broadway twenty-four feet ten inches to the place of beginning.

30 Also all the one equal undivided eighth part of all that certain lot of ground with the buildings thereon now known as number 94 (ninety-four) formerly 88 (eighty-eight) Spring Street, in the City of New York, and described as follows: Bounded northerly in front by Spring Street, southerly in the rear by the northerly line of a lot of ground now or formerly known as 523 (five hundred and twenty-three) Broadway, easterly by the rear of lots fronting on Broadway, and now or formerly known as number 525 (five hundred and twenty-five) 527 (five hundred and twenty-seven) and 529 (five hundred and twenty-nine) Broadway and westerly on the other side by lot number 96 (ninety-six) formerly known as lot number 90 (ninety) Spring Street, containing in breadth in front and rear each, twenty-five feet and

in length on each side forty feet and five inches, be the said several dimensions more or less. The easterly and southerly walls of the buildings on said premises being party walls.

Also all the one equal undivided sixteenth part or parcel of land with the buildings thereon erected, situated in the City of New York, and bounded and containing as follows, to wit: Beginning at the southeasterly corner of Mercer and Spring Streets, running thence easterly along Spring Street one hundred feet, thence southerly and parallel with Mercer Street sixty-one feet one inch and one-half of an inch, thence westerly and parallel with Spring Street one hundred feet to the easterly side of Mercer Street, and thence northerly along Mercer Street sixty-one feet one inch and one-half of an inch to the place of beginning. Being now known by the Street numbers 96 (ninety-six) and 98 (ninety-eight) Mercer Street, and 96 (ninety-six) 98 (ninety-eight) 100 (one hundred) 102 (one hundred and two) and 104 (one hundred and four) Spring Street. The last three lots, pieces or parcels of land above described lie in Section 2 (two) in block 484 (four hundred and eighty-four) on the Land Map of the City of New York.

And also all the one equal undivided eighth part of all those certain lands and premises of which Simon Sternberger, father of the party of the first part, died seized, situated at West End, Long Branch, in the County of Monmouth and State of New Jersey, and also situated in the Township of Union, in Union County and State of New Jersey."

And these defendants, further answering, say that the mortgaged premises situate in the City of New York, and hereinabove and in the said mortgage described are of great value, the one-eighth interest of the said Clarence S. Sternberger therein being worth, as these defendants are informed, and believe, somewhere between Fifty Thousand and Eighty Thousand Dollars; that the premises covered by said

mortgage situate in the Township of Union, in the County of Union and State of New Jersey, are very valuable—the interest of the said Clarence S. Sternberger therein being worth the sum of Ten Thousand Dollars or thereabouts.

10 And these defendants, further answering, charge and insist that in view of the fact that the lands and premises covered by said mortgage situate in the County of Monmouth have been conveyed to this defendant Berthold Sussman, and the other lands and real estate embraced in said mortgage remain unconveyed, that the said complainant should be required in a Court of equity to first sell the lands and real estate in the City of New York and in the County of Union in the State of New Jersey, for the satisfaction of her said bond and mortgage before resorting to the lands and real estate so conveyed to this defendant Berthold Sussman situate in the County of Monmouth aforesaid.

2) And these defendants submit that no decree should be made for the sale of the lands situate in the County of Monmouth until the said lands situate in the City of New York and in the County of Union in the State of New Jersey shall have been sold to make whatever sum of money may be found to be due upon the mortgage of the said complainant.

30 And these defendants pray that a decree of this Court may be made accordingly, and that the rights of these defendants in the lands acquired by this defendant Berthold Sussman in the County of Monmouth may be duly protected; and that these defendants may be hence dismissed, with their reasonable costs in this behalf most wrongfully sustained.

H. S. TERHUNE,
Solicitor for Defendants Berthold Sussman and wife.
Filed June 24, 1904.

ORDER OF REFERENCE

IT IS, on this fifth day of July, nineteen hundred and four, on motion of Henry S. Terhune, Solicitor of the Defendants, ORDERED, that the above stated cause be referred to Honorable Frederic W. Stevens, one of the Vice-Chancellors, to hear the same for the Chancellor, and to report thereon to him and advise what order or decree should be made therein.

W. J. MAGIE. 10

We do hereby consent to the making of the foregoing order of reference.

GALLAGHER & KIRKPATRICK,
Solicitor of Complainant.
H. C. TERHUNE,
Solicitor of Defendants.

Filed July 6, 1904.

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SYLLABUS

1. He who has two funds for the satisfaction of his claim, shall not, by electing to resort to the singly charged fund, to disappoint him who has that fund only to resort to.

2. This rule is subject to this, among other, qualifications, viz: that both funds must be within the jurisdiction and control of the Court, except in the rare cases in which it is clear that the creditor having the two funds, will sustain no loss, delay or additional expense, if required to resort, first, to the fund without the jurisdiction. 30

3. Where there is a paramount mortgage upon land, part of which is conveyed by the mortgagor, equity will throw the burden upon the land that remains where the grantee has paid full value or where the grantor has covenanted against encumbrances. But the rule being based upon intention, expressed or implied, it will not obtain, in favor of a purchaser, at a sheriff's foreclosure sale.

OPINION

Mr. Kirkpatrick, for complainant;
Mr. Frank P. McDermott, for defendants.

STEVENS, V. C.

This is a suit to foreclose a mortgage upon an undivided interest in lands in Monmouth County. It is admitted that the mortgage is a valid instrument, and a first lien, and that the money secured is due. The only defence is that complainant's mortgage is also a lien upon lands in the City and State of New York; that, as these lands are apparently an adequate security for the money, the mortgage should be first foreclosed in the Courts of New York and that only in the event of a deficiency there should the first mortgagee be allowed to continue his suit here. This defence is made by a person who was, formerly, a second mortgagee of the land that is being foreclosed in New Jersey, but who has himself foreclosed here and became the purchaser at the foreclosure sale.

The principle invoked is that he who has two funds for the satisfaction of his claim shall not, by his election, disappoint him who has only one, and that equity, to satisfy both, will throw him who has the two upon the fund which he alone possesses, so that the other fund may remain clear to him who has but the one. *Aldrich v. Cooper*, 8 Ves., 382. This rule is subject to several qualifications, and among them, I think, to the qualification that, except in very special cases, both funds must be within the jurisdiction and control of the court. *Lewis, Trustee, v. United States*, 92 U. S., 623. *Aldrich v. Cooper*, 2 Lead. Cases in Eq. Amer. note p. 276 (3rd. Amer. Ed.), Adams Eq. *272, note, (8th Amer. Ed.). There seems to have been some divergence of view on this subject. In the *York & Jersey Steamboat Ferry Co., v. Associates of Jersey Co.*, Hopkins Ch., 522, it was held by Chancellor Sandford in New York, that

a mortgagee having a lien upon boats in that State and also upon lands in New Jersey, would be required, at the instance of a mortgagee of the boats only, to first proceed against the New Jersey land. The case has been questioned, and both on reason and authority it is clear that this course of procedure should be taken only where it is manifest that the creditor having the two funds will not sustain any loss, delay or additional expense by being required to adopt it. A case of this sort would rarely occur in practice. The second mortgagee may be protected by requiring the first mortgagee to place his remedies at the disposition of the second mortgagee, after they have served the purpose of satisfying his own debt. Lead. Cases in Eq., p. 276 (3rd Amer. Ed.) 10

In the case in hand it is argued by defendant that there are special circumstances. It is said that the property in New York is an adequate security for the complainant's claim. All that it seems to me that the evidence shows is that it *may* be. The mortgagor appears to have the legal title to an undivided interest in valuable New York property, but what his beneficial interest may be—how far it may be encumbered or available, does not clearly appear. It is evident that the foreclosure of the first mortgage there will necessarily be attended with delay and expense. The first mortgagee should not, therefore, be compelled to litigate in New York at his own costs, for the benefit of the answering defendant. Assuming that the facts of this case are such as to present the question, the defendant must fail in his contention. 20 30

It is argued further that the second mortgage, by reason of her purchase at the foreclosure sale, now stands in the position of a purchaser for value. The principle invoked is that where a mortgagor for valuable consideration conveys away a part of the mortgaged premises, the portion retained is, in general, primarily liable for the payment of the mort-

gage debt. *Mills v. Kelly*, 17 Dick., 214. But this principle has no application to the facts of the case. The defendant's grantor is not the mortgagor, but the sheriff. The statute provides that on a foreclosure sale by that officer no greater estate in the premises sold shall, at any time, be conveyed or granted "than would have vested in the mortgagee had the equity of redemption been duly foreclosed." Revision of 1902, p. 529, Sec. 54. Had a strict foreclosure been resorted to, the decree would have adjudged that the mortgagor be divested of his equity of redemption. That would have been all. The burden of the prior encumbrance would have adjudged that the mortgagor be divested of his equity of redemption. That would have been all. The burden of the prior encumbrance would have remained as before, because there would have been nothing done to vary it. But precisely the same result has been effected by the foreclosure sale. The second mortgagee purchased that legal title which he himself had all the time been holding, divested, however, of the equity of redemption. It is difficult to understand how this act alone could have had the effect of shifting the burden of the first mortgage—of throwing a heavier burden upon the New York land.

But there is another way of looking at it. It is said in *Mills v. Kelly* (*supra*) that the ground upon which equity throws the burden primarily upon the land that remains, after conveyance of a part, is, either, that the grantee having paid full value for what he buys ought not to pay any more, or, that where the consideration is not valuable, the grantor, having covenanted against encumbrances, is bound to make that covenant good. The rule, says Pitney, V. C., in *Gray v. Hattersley*, 5 Dick., 211, is based upon the intention of the parties, either expressed in the writing passing between them, or implied from the facts and circumstances of the case.

If it had been shown that a mortgagor had cov-

enanted with a grantee of property in New Jersey that the land was free from encumbrances, and if it had appeared that it was, in fact, encumbered by a mortgage which covered not only land in New Jersey but also land in New York, then a question would be presented, analogous, at least in some respects, to that first discussed. The question would have been whether, because of an act done by the mortgagor subsequently to the making of the first mortgage, the Court would have compelled the first mortgagee to exhaust his remedy in New York before allowing him to proceed in New Jersey. But the very foundation for the contention would be the *act* of the mortgagor—the act of an owner able, as between himself and the subsequent purchaser, to throw the burden of the first mortgage where he chose. No one would for a moment imagine that the mere act or intention of the purchaser could shift the burden. No one would assert that the statute gave the sheriff express authority to shift it. If then the burden were shifted, it would be by the inherent force of the conveyance—the mere act of transfer. But, as a matter of conveyancing, it is perfectly possible to convey title to land without changing the burden of prior encumbrances. Indeed, it is said by Emery, V. C., in *Jackson v. Condit*, 12 Dick., 522, 526, that, on a conveyance, “as between different portions of the premises subject to the common charge, the general and fundamental rule of equity is that the burden is to be borne by the different portions ratably”; that this would only be departed from where the intention of the parties was shown to be otherwise. Consequently, the burden would, in the absence of evidence to the contrary, remain as it was. And this conclusion is fortified by the statutory direction before quoted, that on a foreclosure sale, no greater estate will be conveyed “than would have vested in the mortgagee had the equity of redemption been duly foreclosed.” To regard the legal title of the first mortgagee as, in a measure, modified for the benefit

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of the purchaser, by the mere act of selling, would seem to be opposed to the spirit and purpose of the enactment.

This result is perfectly just. The second mortgagee had notice of the first mortgage when she took her own security. She foreclosed and bought in with notice. She does not stand in the position of one who has paid a full price for an unencumbered property. She says in her answer that the sheriff conveyed to her all the rights of the defendants in the foreclosure
10 suit, but she does not say what price she paid. She does not, in her answer, base any right upon her payment. The sheriff's deed states that the consideration was one thousand dollars. The mortgagor's interest in the property is admittedly worth much more than that. If the burden of the mortgage be thrown on the New York land the second mortgagee will get the property for a very inadequate price.

But there is another difficulty with the defendants' case. Originally, the mortgages covered the same
20 property, both here and in New York. As matters now stand, the defendant has a second mortgage on property in New York, and the complainant a first mortgage on property there and here. The defendant could, with more plausibility, insist, in the New York courts, that the complainant should first exhaust his security here before he foreclosed there, than now insist that he must sue there before he can sue here. The defendants' case, in every aspect of
30 it, seems untenable.

Filed Feb. 28, 1905.

TESTIMONY

Before His Honor Vice Chancellor Stevens.

Mr. Bayard Kirkpatrick for the Complainant.
Mr. Henry S. Terhune and Mr. Frank P.
McDermott for the Defendant.

Transcript of shorthand report of the evidence
given upon the trial of the above stated cause, on 10
Thursday, the 1st day of December, 1904, at the
Chancery Chambers, Newark, N. J.

Complainant's counsel offers in evidence mortgage
made by Clarence S. Sternberger to Pauline Stern-
berger, dated the 29th of May, 1896, for \$9,000.

Marked Exhibit C. 1.

Also the bond accompanying the same.

Marked Exhibit C. 2.

COMPLAINANT RESTS.

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Defendants' counsel offer in evidence mortgage
made by Clarence S. Sternberger [the same person
who made the mortgage to the complainant] to Ber-
thold Sussman, dated October 20, 1896, recorded in
the Monmouth County Clerk's office in book 205 of
mortgages, page 105. Recorded in the New York
Register's office November 10, 1896, and recorded
also in the County of Union April 22, 1904.

Marked Exhibit D. 1.

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It is admitted by the counsel for the complainant
that the mortgage of the defendant Berthold Suss-
man, although subsequent in point of date, is prior
in point of priority, because recorded prior in Union
County, upon the lands and premises described in
both mortgages in the County of Union.

BY MR. McDERMOTT: Now I desire to insist that the other premises described in this mortgage should be sold first, and I base that upon the general principle—

BY THE COURT: Let me get at the facts first; how does the record stand?

BY MR. McDERMOTT: The mortgage of the
10 complainant, according to the endorsement upon it, was recorded in New York June 19, 1896.

The mortgage of the defendant Berthold Sussman was recorded in New York, November 10, 1896, and is therefore a subsequent mortgage there.

The general principle I invoke is that part of this property having been foreclosed upon, and having gone to a sale and having been sold and purchased and the title vested in Berthold Sussman, the defendant, that that property should be last resorted to for
20 the payment of this mortgage. There is no evidence that any other of the property has been sold at all. All of this vast estate, aggregating—the mortgagor's interest alone, being some fifty or sixty thousand dollars, I don't know just how much, but a very large sum of money; and this piece alone having been sold and conveyed, it ought to be last resorted to. The mortgagee, the complainant in this case, is evidently trying to save all the rest of this property.

I also offer a bond in evidence, accompanying the
30 mortgage which I offered.

Marked Exhibit D. 2.

I also offer mortgage made by Clarence Sternberger to Berthold Sussman, dated September 13, 1897, recorded in Monmouth County Clerk's office, January 31, 1898, in book 220 of mortgages, page 37.

Marked Exhibit D. 3.

It is apparently not recorded anywhere else, al-

though it covered lands in the city of New York.

I also offer the bond accompanying it.

Marked Exhibit D. 4.

Also in this connection, the proceedings which are in the papers in a suit in the Court of Chancery of New Jersey, wherein Berthold Sussman was complainant and Morris Sternberger and others were defendants, and in that connection the decree made by the Chancellor on November 25, 1903, and a further or final decree made by the Chancellor December 18, 1903. 10

Also an original deed made by Obadiah C. Bogardus, sheriff of the County of Monmouth, under date of the 17th day of March, 1904, reciting the sale of the premises in Monmouth County, made by him on the 15th day of February, 1904, for the consideration of \$1,000, acknowledged March 17, 1904, recorded in Monmouth County Clerk's office the 26th day of March, 1904, in book 727 of deeds for that County, page 303. 20

Marked Exhibit D. 5.

EDWARD STERNBERGER called on behalf of the complainant, and being conscientiously scrupulous of taking an oath, affirmed.

DIRECT EXAMINATION. By Mr. Kirkpatrick. 30

Q. You are the son of Pauline Sternberger, the complainant in this suit?

A. Yes, sir.

Q. Are you familiar with the affairs of Mrs. Pauline Sternberger?

A. I am, sir.

Q. I show you a mortgage, marked Exhibit C 1, and ask you what is the amount due upon that mortgage now?

A. The amount is fully due.

Q. Will you look at the mortgage and state what that amount is?

A. Yes, sir, that is the correct amount.

Q. \$9,000.

A. \$9,000.

Q. No part of that has been paid, has it?

A. No, sir, none of it.

10

CROSS EXAMINATION.

Q. Have you charge of the affairs of your mother in this suit?

A. Yes, sir.

Q. Has any proceeding been taken in the State of New York to collect this mortgage?

A. No, sir.

Q. You are positive of that, are you?

A. Yes, sir.

20

Q. Quite sure about it?

A. Yes, sir, I am sure about it.

Q. Has anything been raised in New York by the foreclosure, of any other mortgage; I mean on this property?

A. Not to my recollection; I have never been approached with reference to it.

Q. Have you had the mortgage in your charge?

A. I have had everything pertaining to my mother's affairs.

30

Q. I mean has this mortgage been in your charge?

A. Yes, sir.

BY THE COURT:

Q. Have you been appointed as her executor or administrator?

A. She is still living, your Honor.

FURTHER CROSS-EXAMINATION.

Q. Clarence was your brother?

A. Yes, sir.

Q. Your father is dead?

A. Yes, sir.

Q. And the will that has been mentioned here, was the will of your father?

A. Yes, sir.

Q. Do you know of any proceeding taken to fore- 10
close any mortgage of your brother on property cov-
ered by this mortgage?

A. Not in connection with this first mortgage,
no, sir.

Q. Well, any to which you were a party.

A. I don't grasp what you desire me to answer,
sir.

Q. Has any proceeding been taken to sell this
property in New York covered by this mortgage?

A. No, sir. 20

Q. Have none been taken by you?

A. No, sir.

Q. Nor by your mother?

A. No, sir.

Q. No foreclosure has been commenced by her?

A. No, sir.

Q. Or proceedings taken by her to collect it?

A. No, sir.

Q. The property remains still intact, does it?

A. Yes, sir. 30

Q. What I wish further to ask you is if any pro-
ceedings have been taken to which you were made
a party, to subject this same property to sale,
under any other foreclosure or any foreclosure of
any other mortgage?

A. No, sir.

Q. Have any of these properties which your
brother Clarence owned been sold?

A. No, sir.

Q. Has any of it been released by your mother?

A. Why there has been a parcel of property sold, one single piece has been sold in the City of New York which he used to own some years ago.

Q. Property covered by this mortgage?

A. Yes, sir.

Q. Has been released by your mother?

A. Yes, sir.

Q. Which property was that, doctor?

A. That is property on Spring street.

10 Q. Valuable property, was it?

A. Yes; held in conjunction with another estate.

Q. What was the value of it?

A. Well, there was a piece of property that sold for, if I remember correctly, \$208,000, subject to a mortgage

Q. Subject to a mortgage?

A. Yes, sir, there was a mortgage upon it.

Q. And it sold for \$208,000?

A. I think it was \$208,000.

20 Q. And your brother's interest in that was one-sixteenth?

A. One-sixteenth or one-seventeenth.

Q. One-seventeenth was it?

A. Well, I cannot give you that, without thinking over it, definitely.

BY THE COURT:

Q. Was \$208,000 in cash paid in excess of the mortgage?

30 A. No, sir, that was computing the mortgage.

FURTHER CROSS-EXAMINATION.

Q. How much was the mortgage upon it, I mean the mortgage ahead of the payment which was made—ahead of your father's interest?

A. I think it was \$80,000, I am not sure, but as far as I can remember I think it was \$80,000.

Q. Your father's estate owned a half of that property?

- A. Yes, sir.
- Q. And some other estate owned the other half?
- A. Yes, sir; I am not sure about that exactly, but I think it was \$80,000.
- Q. The amount realized then for your father's estate was something like \$62,000?
- A. Thereabouts.
- Q. Well, something like that. Was it \$64,000?
- A. Thereabouts.
- Q. Upon that sale being made your mother re-leased this mortgage? 10
- A. That never came up at all, sir.
- Q. What?
- A. It didn't enter into the deal at all.
- Q. Do you mean to say that the sale was made for that large price or large sum of money without you releasing this mortgage?
- A. Yes, sir, that question never came up.
- Q. Was the title searched?
- A. I suppose so, by the purchaser.
- Q. The sale was made by the executor, wasn't it? 20
- A. Yes, sir.
- Q. Who was the executor?
- A. I am the executor, sir.
- Q. With your mother?
- A. She is the executor, also, yes, sir.
- Q. She signed the deed?
- A. Yes, sir.
- Q. That was made for the property?
- A. Yes, sir.
- Q. Was any part of the proceeds of that applied to the payment of this mortgage? 30
- A. Absolutely nothing.
- Q. Why not?
- A. I don't know, sir.
- Q. The rents have been collected for this property by you and your mother?
- A. Which piece of property, sir?
- Q. Well, all the property?
- A. What properties?

Q. I mean only the properties embraced in the mortgage?

A. Yes, sir.

Q. I don't want to ask you anything about the affairs of the estate outside of that. Now they have all been collected?

A. Yes, sir.

Q. They have amounted to a large sum of money?

A. Yes, sir; the sum varied according to the
10 rentals.

Q. How much a year would you say they amounted to?

A. I cannot give it to you definitely; do you mean the gross rental of all the properties?

Q. Well, I will have the net rentals, if you please?

A. Well, I cannot give you that definitely, I don't know what the expenses were.

Q. As nearly as you can tell.

A. I should judge in the neighborhood of \$8,000.

20 Q. A year?

A. Yes, sir.

Q. The entire property covered by this mortgage is—you know what it covers. You know the general character of it?

A. You mean my mother's mortgage?

Q. Yes, sir, given by your brother Clarence.

A. It covered all the parcels that he owned.

Q. And the total value of that was very large?

A. Well, it just depends upon what your standard
30 of large is.

Q. What is the total value of the property?

A. Well, I am not an expert on that, sir.

Q. No, but you are an executor, and perhaps can form some general idea about it?

A. Well, I should judge about the real estate, it would amount to two hundred to two hundred and twenty-five thousand dollars.

Q. Do you include in that anything beyond the New York property?

A. No, sir, that includes the New York property.

Q. And I assume your rental value included the New York property?

A. No, sir, I didn't mean that; when I made that statement, to the best of my knowledge, I believe that included all the property in New York City and New Jersey.

Q. Well, I want to ask you about the New York property?

A. You want the value of that?

Q. Yes, I want the property 43 East 16th street, 10 what is the value of that—the fair value.

A. I should judge about \$60,000.

Q. What about the property on Charlton street?

A. That is valued at about \$25,000.

Q. Now the property on Broadway and Spring street, was that the one that was sold?

A. No, sir.

Q. Your father's estate only owns one-half of that?

A. Oh, yes, that has been sold; that property they owned jointly was sold.

Q. That was the one that was sold for \$208,000?

A. Yes, sir.

Q. And your father owned a half?

A. Yes, sir.

Q. Now the property at Mercer and Spring streets?

A. Well, that is the piece that was sold.

Q. Well, I was asking you about Broadway and Spring street?

A. Well, it is just off the corner of Spring street; we still own that. 30

Q. The property at the corner of Mercer and Spring street has been sold?

A. Yes, sir.

Q. And that is the one you have already referred to?

A. Yes, sir.

Q. Now the property on Broadway and Spring street, has that been sold?

- A. No, sir.
- Q. Does your father's estate own all of that?
- A. Yes, sir.
- Q. What is the value of that?
- A. The value of that altogether with the L running into Spring street—valued that property at about \$125,000.
- Q. The rental of the property at Long Branch has been very considerable?
- 10 A. We get a fair rate of income from it.
- Q. How much did that amount to, in the aggregate?
- A. You mean the income from the houses, without expenses?
- Q. Yes.
- A. A little over \$9,000. That is the gross without deducting taxes and the care and maintenance of the property.
- Q. I think I asked you if you knew of any sale
- 21 being made of Clarence's interest in any of these properties in any proceeding in New York. Has there been any such sale?
- A. No such sale, no, sir.
- Q. Within your knowledge.
- A. Within my knowledge there has been no such sale.

RE-DIRECT EXAMINATION.

- 30 Q. What value did you place on this West end property?
- A. That is hard to estimate.
- Q. What value has been placed on it at any time?
- A. Well, it is valued at \$25,000 according to the taxing officers, a little over \$25,000.
- Q. You paid taxes on it at that price?
- A. That is the amount of the tax bill. I only happened to look over them yesterday, and I think it was about \$25,000 or \$27,000.
- Q. What is the value of the homestead?

A. Well, if I might refer to the tax bills, because they are quite clear in my mind, as it was only yesterday I looked at them, to draw checks. I believe that is valued at something like \$15,000. I don't think I am more than a thousand or two thousand dollars out of the way.

Q. How many cottages are there at Long Branch?

A. Long Branch, three.

Q. What are they valued at?

A. Well, their value, with the furniture is \$11,000 10
each, \$33,000 for the cottages.

BY MR. KIRKPATRICK: I offer in evidence last will and testament of Simon Sternberger, deceased, dated the 7th day of February, 1875.

Marked Exhibit C. 3.

Counsel then read the tenth, twelfth and fourteenth and seventeenth clauses of said will. 20

REST ALL.

FINAL DECREE

This cause coming to be heard in the presence of J. Bayard Kirkpatrick, of counsel with the complainant, and Frank P. McDermott, counsel with the answering defendants, and the pleadings and proofs having been read and the arguments of the respective counsel having been heard and considered, and the Court having duly considered the said pleadings, proofs and arguments, and it appearing that a portion of the lands and premises embraced in the mortgage of the complainant is situate in the City of New York in the State of New York, a portion in the Township of Union, in the County of Union, New Jersey, and a portion at West End, Long Branch, in the County of Monmouth, New Jersey; that the mortgages held by the defendant Berthold Sussman cover the same several premises, and that under a foreclosure of the mortgages of the said Berthold Sussman, the premises at West End, Long Branch, in Monmouth County were sold by the Sheriff of Monmouth County in said foreclosure proceedings to the said Berthold Sussman, and the Court finding the equities as hereinafter declared, and that the sale of the lands in this State should not be delayed until after the sale of the lands in the City of New York.

IT IS, on this Twenty-second day of April, Nineteen Hundred and Five, by his Honor William J. Magie, Chancellor of the State of New Jersey,

ORDERED, ADJUDGED AND DECREED, and the said Chancellor by virtue of the power and authority of this Court doth hereby order, adjudge and decree, that the said complainant may proceed in this cause to sell the mortgaged lands situate, lying and being in the County of Monmouth, in the State of New Jersey, without being required previously thereto to foreclose her said mortgage in the State of New York and to resort to the lands and real estate described in the mortgages of the com-

plainant and the answering defendant Berthold Sussman, situate, lying and being in the City of New York, in the State of New York, and to that end that the portion of said mortgaged premises situate, lying and being at West End, Long Branch, in the Township of Ocean, County of Monmouth and State of New Jersey, as set forth and described in the bill of complaint in this cause, be sold by an adequate description prior to a sale being required to be made under foreclosure proceedings or other appropriate method by said complainant of the lands and real estate embraced in her mortgage, situate, lying and being in the City of New York, to raise, pay and satisfy the several sums of money due to the said complainant on her mortgage set forth and recited in her bill of complaint, together with lawful interest thereon and her costs of suit to be taxed and that upon the ascertainment by a Master of this Court of the several amounts due to the said complainant on her said mortgage, a writ of *fieri facias* do issue for that purpose out of this Court, directed to the Sheriff of the County of Monmouth, commanding him to sell according to law, all the said mortgaged premises so as aforesaid situate, lying and being in West End and Long Branch in the Township of Ocean, County of Monmouth as set forth and described in the complainant's mortgage and the bill of complaint in this cause, and that out of the monies derived from said sale, he pay to the said complainant or her solicitor her said debt, interest and costs.

And in case more money shall be raised by the said sale than shall be sufficient to answer such several payments, that such surplus be brought into this Court, to abide the further order of this Court unless otherwise previously disposed of by this Court, and that the said Sheriff make return without delay of his proceedings by virtue of said writ.

And it is further ordered, adjudged and decreed that the defendants and each of them stand abso-

lutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid by virtue of this decree.

And it is further ordered, adjudged and decreed that it be referred to Alfred B. Van Liew, Esquire, one of the Masters of this Court, to ascertain and report the amount due to the said complainant for principal and interest upon the mortgage held by
10 her set forth and recited in the bill of complaint in this cause, and that said Master give notice to the solicitor of the answering defendant of his sitting to make such ascertainment.

And it is further ordered, adjudged and decreed that the said defendant Berthold Sussman may redeem the complainant's mortgage at any time within thirty days after the issuing of execution in this cause and notice thereof to his solicitor by paying the full amount due upon the same for principal and
20 interest together with the complainant's costs in this cause, and that upon making such payment to the complainant or her solicitors the said complainant shall assign, transfer and set over the said mortgage with the accompanying bond and her interest in the decrees in this cause to the said defendant, and if the said defendant Berthold Sussman shall fail or neglect to make such payment within the time aforesaid, that he may, within thirty days after the sale by the said Sheriff redeem the said mortgage if any
30 balance of principal, interest, costs and Sheriff's fees on sale shall remain due thereon, by paying such balance and upon such payment to said complainant or her solicitors the said complainant shall assign, transfer and set over the said mortgage and accompanying bond and any interest she may have in the decrees in this cause to said defendant.

W. J. MAGIE.

Respectfully advised.

FREDERIC A. STEVENS,

V.

Filed April 27, 1905.

NOTICE OF APPEAL

The defendant Berthold Sussman hereby appeals from so much of the final decree made in this Court in the above-stated cause as orders, adjudges and decrees that the said complainant may proceed in this cause to sell the mortgaged lands situate, lying and being in the County of Monmouth, in the State of New Jersey, without being required previously thereto to foreclose her said mortgage in the State of New York and to resort to the lands and real estate described in the mortgages of the complainant and the answering defendant Berthold Sussman, situate, lying and being in the City of New York, in the State of New York, and to that end that the portion of said mortgaged premises situate, lying and being at West End, Long Branch, in the Township of Ocean, County of Monmouth and State of New Jersey, as set forth and described in the bill of complaint in this cause, be sold by an adequate description prior to a sale being required to be made under foreclosure proceedings or other appropriate method by said complainant of the lands and real estate embraced in her mortgage, situate, lying and being in the City of New York, to raise, pay and satisfy the several sums of money due to the said complainant on her mortgage set forth and recited in her bill of complaint, together with lawful interest thereon and her costs of suit to be taxed and that upon the ascertainment by a Master of this Court of the several amounts due to the said complainant on her said mortgage, a writ of *feri facias* do issue for that purpose out of this Court, directed to the Sheriff of the County of Monmouth, commanding him to sell according to law, all the said mortgaged premises so as aforesaid situate, lying and being in West End and Long Branch in the Township of Ocean, County of Monmouth as set forth and described in the complainant's mortgage and the bill of complaint in this cause, and that out of the monies derived from said

sale, he pay to the said complainant or her solicitor her said debt, interest and costs; and in case more money shall be raised by the said sale than shall be sufficient to answer such several payments, that such surplus be brought into this Court, to abide the further order of this Court unless otherwise previously disposed of by this Court, and that the said Sheriff make return without delay of his proceedings by virtue of said writ; and that the defendants and each
 10 of them stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid by virtue of said decree; and that it be referred to Alfred B. VanLiew, Esquire, one of the Masters of this Court, to ascertain and report the amount due to the said complainant for principal and interest upon the mortgage held by her set forth and recited in the bill of complaint in this cause, and that said
 20 Master gives notice to the solicitor of the answering defendant of his sitting to make such ascertainment; to the Court of Errors and Appeals in the last resort in all causes.

H. C. TERHUNE,

Solicitor of Defendant Berthold Sussman.

Dated May 1, 1905.

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

FRANK P. McDERMOTT,

30 *Of Counsel with Defendant Berthold Sussman.*
 Filed May 6, 1905.

PETITION OF APPEAL

The petition of BERTHOLD SUSSMAN, the appellant in the above-stated cause, respectfully shows, that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor William J. Magie, Chancellor of the State of New Jersey, bearing date the Twenty-second day of April, in the year nineteen hundred and five, in a cause wherein Pauline Sternberger was complainant and your petitioner, Berthold Sussman, and his wife, were defendants, in this respect, to wit:

That the said decree adjudges and decrees that the said complainant may proceed in said cause to sell the mortgaged lands situate, lying and being in the County of Monmouth, in the State of New Jersey, without being required previously thereto to foreclose her said mortgage in the State of New York and to resort to the lands and real estate described in the mortgages of the complainant and the answering defendant Berthold Sussman, situate, lying and being in the City of New York, in the State of New York, and to that end that the portion of said mortgaged premises situate, lying and being at West End, Long Branch, in the Township of Ocean, County of Monmouth and State of New Jersey, as set forth and described in the bill of complaint in said cause, be sold by an adequate description prior to a sale being required to be made under foreclosure proceedings or other appropriate method by said complainant of the lands and real estate embraced in her mortgage, situate, lying and being in the City of New York, to raise, pay and satisfy the several sums of money due to the said complainant on her motrgage set forth and recited in her bill of complaint, together with lawful interest thereon and her costs of suit to be taxed and that upon the ascertainment by a Master of said Court of the several amounts due to the said complainant on her said mortgage, a writ of *feri facias* do issue for that purpose out of said Court,

directed to the Sheriff of the County of Monmouth, commanding him to sell according to law, all the said mortgaged premises so as aforesaid situate, lying and being in West End and Long Branch in the Township of Ocean, County of Monmouth, as set forth and described in the complainant's mortgage and the bill of complaint in said cause, and that out of the monies dervide from said sale he pay to the said complainant or her solicitor her said debt, interest and costs; and in case more money shall be raised by the said sale than shall be sufficient to answer such several payments, that such surplus be brought into said Court, to abide the further order of said Court, unless otherwise previously disposed of by said Court, and that the said Sheriff make return without delay of his proceedings by virtue of said writ; and that the defendants and each of them stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid by virtue of said decree; and that it be referred to Alfred B. Van-Liew, Esquire, one of the Masters of said Court, to ascertain and report the amount due to the said complainant for principal and interest upon the mortgage held by her set forth and recited in the bill of complaint in said cause, and that said Master give notice to the solicitor of the answering defendant of his sitting to make such ascertainment.

And your petitioner humbly appeals from that part of the said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that the said Chancellor should have ordered, adjudged and decreed that the said compalinant should be required to foreclose her said mortgage in the State of New York and resort to the lands and real estate described in the mortgages of the complainant and the answering defendant Berthold Sussman, situate, lying and being in the City of New York, in the State of New York, before proceeding in said cause to sell the mortgaged lands sit-

uate, lying and being in the County of Monmouth, in the State of New Jersey, and that the sale of the said mortgaged premises lying and being at West End, Long Branch, in the Township of Ocean, County of Monmouth and State of New Jersey, be postponed until after proceedings to sell and the sale of the lands and real estate described in said mortgages lying and being in the City of New York, in the State of New York, and that a writ of *feri facias* should not issue out of the said Court of Chancery directed to the Sheriff of the County of Monmouth commanding him to make sale as set forth in said decree, until after the proceedings to sell and the sale of the said mortgaged premises situate in the City of New York, in the State of New York, and that no reference to a Master of the said Court of Chancery be made until after the proceedings to sell and the sale of the said lands and real estate situate in the city of New York, in the State of New York aforesaid. 10

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

H. C. TERHUNE,
Solicitor of Appellant.
FRANK P. McDERMOTT,
Of Counsel with Appellant.

Filed May 24, 1905.

ANSWER

The answer of the above-named respondent to the petition of appeal of the above-named appellant:

10 The respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree was on the Twenty-second day of April, Nineteen hundred and five, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said decree is agreeable to equity, and she prays that the same may be affirmed, with costs to be adjudged to this respondent.

20

J. BAYARD KIRKPATRICK,

Solr. of Counsel with Compl. Respondent.

Filed June 10, 1905.

EXHIBITS OF COMPLAINANT-RESPONDENT

EXHIBIT C-1

CLARENCE S. STERNBERGER,
TO
PAULINE STERNBERGER.

This indenture, made
the twenty-ninth day
of May, in the year
Eighteen Hundred

and ninety-six, Between Clarence S. Sternberger,
(Unmarried,) of the City and State of New York,
Party of the First Part, and Pauline Sternberger,
of the City and State of New York, Party of the Sec- 10
ond Part, whereas the said Party of the First Part
is justly indebted to the said Party of the second
Part in the sum of nine thousand dollars, lawful
money of the United States of America, secured to
be paid by his certain bond or obligation bearing
even date herewith, conditioned for the payment of
the said sum of nine thousand dollars, lawful money
as aforesaid, on the first day of May, One Thousand
nine hundred, and the interest to be computed from 20
date, at the rate of six per centum per annum and
to be paid on the first days of July and January, in
each year, until the whole principal sum shall be
paid. It being hereby expressly agreed that the
whole of the said principal sum shall become due
after default in the payment of interest, taxes or
assessments, as hereinafter provided, Now, this In-
denture Witnesseth that the said Party of the First
Part, for the better securing the payment of the said
sum of money mentioned in the condition of the said 30
bond or obligation with interest thereon, and also
for and in consideration of One Dollar paid by the
said party of the second part, the receipt whereof
is hereby acknowledged, doth hereby grant and re-
lease unto the said Party of the second Part, and to
her heirs and assigns forever, All the one equal un-
divided eighth part of all that certain lot, piece or
parcel of land with the buildings thereon erected,
situate, lying and being in the nineteenth Ward of

the City of New York, and bounded and described as follows, to wit:

10 Beginning at a point on the northerly line of Sixtieth Street, distant two hundred and nine feet and one inch more or less easterly from the northeasterly corner of Madison Avenue and Sixtieth Street, running thence northerly and parallel with Madison Avenue and part of the distance through the center of a party wall one hundred feet and five inches to the center line of the block between Sixtieth and Sixty first Streets, running thence easterly along said Center line twenty feet, thence southerly again parallel with Madison Avenue and part of the distance through the center of a party wall one hundred feet and five inches to the northerly line of Sixtieth Street, thence westerly along same twenty feet more or less to the point or place of beginning, said property being known by the street number as number 33 (thirty three) East Sixtieth Street. The above described Premises lie in Section 5 (five) in Block 1375 (one thousand three hundred and seventy five) on the land map of the City of New York, Also all the one equal undivided eighth part of all those certain lots, pieces or parcels of land with the buildings thereon situate, lying and being in the City of New York, which taken together are bounded and described as follows, viz:

20
30 „Beginning at a point on the easterly side of West Street distant sixty two feet and six inches southerly from the southeasterly corner of West Street and Charlton Street running thence southerly along the easterly side of West Street forty one feet and eight inches, thence easterly and parallel with Charlton Street, one hundred and forty seven feet and six inches, thence northerly and at right angles to Charlton Street forty four feet, thence westerly and nearly parallel with Charlton Street eighty seven feet and eight inches, thence southerly and parallel with West Street two feet and six inches, thence wes-

tery and parallel with Charlton Street sixty three feet to the point or place of beginning. The above described Premises lies in Section 2, (two) in Block 596 (five hundred and ninety six) on the Land Map of the City of New York, Also all the one equal undivided eighth part of all that lot, piece or parcel of land with the buildings therein and the appurtenances thereunto belonging situated in the City of New York, and now known as number 525 (five hundred and twenty five) Broadway, as now in possession and which is bounded and described as follows: 10
Beginning at a point on the westerly side of Broadway, distant twenty five feet six inches southerly from the southwest corner of Broadway and Spring Street, running thence westerly parallel with Spring Street through a party wall seventy five feet, thence southerly parallel with Broadway through another party wall twenty four feet eleven inches, thence easterly again parallel with Spring Street through another party wall seventy five feet to Broadway, 20
thence northerly along Broadway twenty four feet ten inches to the place of beginning. Also all the one equal undivided eighth part of all that certain lot of ground with the buildings thereon now known as number 94 (ninety four) formerly 88 (eighty eight) Spring Street, in the City of New York, and described as follows: bounded northerly in front by Spring Street, southerly in the rear by the northerly line of a lot of ground now or formerly known as 523 (five hundred and twenty-three) Broadway, 30
easterly by the rear of lots fronting on Broadway, and now or formerly known as number 525 (five hundred and twenty five) 527 (five hundred and twenty seven) and 529 (five hundred and twenty nine) Broadway and westerly on the other side by lot number 96 (Ninety six) formerly known as lot number 90 (ninety) Spring Street, containing in breadth in front and rear each, twenty five feet and in length on each side forty feet and five inches, be the said several dimensions more or less. The east-

erly and southerly walls of the buildings on said Premises being party walls.

- Also all the one equal undivided sixteenth part of all that certain piece or parcel of land with the buildings thereon erected situated in the City of New York, and bounded and containing as follows, to wit: Beginning at the southeasterly corner of Mercer and Spring Streets, running thence easterly along Spring Street one hundred feet, thence southerly and parallel with Mercer Street sixty one feet one inch and one half of an inch, thence westerly and parallel with Spring Street one hundred feet to the easterly side of Mercer Street, and thence northerly along Mercer Street sixty one feet one inch and one half of an inch to the place of beginning. Being now known by the Street numbers 96 (ninety six) and 98 (ninety eight) Mercer Street, and 96 (ninety six) 98 (ninety eight) 100 (one hundred) 102 (one hundred two) and 104 (one hundred and four) Spring Street.
- 10 The last three lots, pieces or parcels of land above described lie in Section 2 (two) in block 484 (four hundred and eighty four) on the land map of the City of New York. And also all the one equal undivided eighth part of all those certain lands and premises of which Simon Sternberger, father of the Party of the First Part, died seized, situated at West End, Long Pranch, in the County of Monmouth, and State of New Jersey, and also situated in the Township of Union, in Union County, and State of New Jersey.
- 20
- 30

Together with the appurtenances and all the estate and rights of the Party of the First Part, in and to said Premises, To have and to hold the above granted Premises unto the said Party of the Second Part, her heirs and assigns forever, Provided always, that if the said Party of the First Part, his heirs, Executors or administrators, shall pay unto the said Party of the Second Part, her 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, that then these presents and the estate hereby granted shall cease, determine and be void, And the said Party of the First Part, doth covenant with the Party of the Second Part, as follows:

First. That the Party of the First Part will pay the indebtedness as hereinbefore provided and if default be made in the payment of any part thereof, the Party of the Second Part, shall have power to sell the Premises herein described according to law.

Second. That the Party of the First Part will keep 10
the buildings on the said Premises insured against loss by fire for the benefit of the Mortgagee.

Third. And it is hereby expressly agreed that the whole of said principal sum shall become due at the option of the said Party of the Second Part after default in the payment of interest, for thirty days, or after default in payment of any tax or assessment for ninety days after notice and demand.

Fourth. That the Party of the First Part will execute or procure any further necessary assurance of 20
the title to said premises and will forever warrant said title.

Fifth. And it is hereby further covenanted and agreed that the said Party of the Second Part, her legal representatives or assigns, Shall be at liberty immediately after any default in any of the conditions of said bond or mortgage upon a complaint filed, or any other proper legal proceedings commenced for the foreclosure of this mortgage to apply for, and shall be entitled as a matter of right and 30
without regard to the value of the Premises above described or the solvency of the Party of the First Part, or of any owner of said Premises, and on ten days notice to the Party of the First Part, his heirs or assigns to the appointment by any competent Court or tribunal of a receiver of the rents, issues and profits of said Premises, with the power to lease said Premises for a term to be approved of by the Court with power to pay taxes, assessments and

water rents, which are or may become liens on said Permisses, and keep the same insured, and with power to take proceedings to dispossess tenants, and make all necessary repairs, and with such other powers as may be deemed necessary, who after deducting all charges and expenses attending the execution of the said trust as receiver, shall apply the residue of the said rents and profits to the payments and satisfaction of this mortgage, and the bond accompanying the same, or to any deficiency which may arise after applying the proceeds of the sale of said Premises to the amount due, including interest and costs and expenses of the foreclosure sale.

In Witness whereof the said Party of the First Part hath hereunto set his hand and seal the day and year first above written.

In presence of
 E. RITZENA DeGROVE. | CLARENCE S. STERNBERGER
 (L. S.)

20 STATE OF NEW YORK, | ss. On this twenty ninth
 CITY AND COUNTY OF | day of May, in the
 NEW YORK. | year of our Lord One
 | Thousand eight hun-
 dred and ninety six, before me personally came Clarence S. Sternberger, to me personally known to be the individual described in and who executed the within mortgage, and acknowledged to me that he executed the same.

E. RITZENA DeGROVE,
Notary Public,
N. Y. Co.

30 STATE OF NEW YORK, | ss. Be it Remembered that
 CITY AND COUNTY OF | on this twenty ninth
 NEW YORK. | day of May, One thou-
 | sand eight hundred and
 six, before me, the subscriber, E. Ritzena DeGrove, a Notary Public appointed for and residing in the

County of New York, personally appeared Clarence S. Sternberger, who, I am satisfied, is the grantor in the within Indenture, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

(L. S.) E. RITZENA DEGROVE,
Notary Public,
 N. Y. Co. 10

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

ss. I, Henry D. Purroy,
 Clerk of the City and
 County of New York
 and also Clerk of the

Supreme Court for the said City and County, the same being Court of Record, Do Hereby Certify, That E. Ritzena DeGrove, whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed Instrument and thereon written, was at the time of taking such proof and acknowledgment a Notary Public, in and for said County duly commissioned and sworn and authorized by the laws of said state to take its acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in said state of New York, And further that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine. 20

In Testimony whereof I have hereunto set my hand and affixed the seal of the said Court and County the 13, day of July, 1896. 30

(L. S.) HENRY D. PURROY,
Clerk.

Recd. and Recorded July 16th 1896.

THEODORE AUMACK,
Clerk.

Book 201, page 416, &c.

Recorded also in the office of the Register of the City and County of New York, State of New York, June 19, 1896, in Sec. 2, Liber 60, page 354; Block Nos. 596 and 484. Also in Sec. 5, Liber 58, p. 180.

EXHIBIT C-2

10 Bond dated May 29th, 1896, made by Clarence S. Sternberger to Pauline Sternberger, to secure the sum of \$9000 on May 1, 1900, with interest at 6% per annum, payable on first days of July and January.

EXHIBIT C-3.

20 Last Will and Testament of Simon Sternberger, deceased (father of Clarence S. Sternberger, and husband of Pauline Sternberger), dated February 7th, 1875, and duly admitted to probate in the County of New York, State of New York. The clauses of said Will read by counsel of complainant at the final hearing, as pertinent, are 10, 12, 14 and 17, copies of which follow:

30 X. I give, devise and bequeath to my Executors hereinafter named, or such of them as shall qualify, and to the survivors or survivor of them, the house and lot known as Number Forty three East Sixtieth Street in the City of New York, and the property of which I am in the habit of occupying as my summer residence, situate at West End (Long Branch) in the County of Monmouth and State of New Jersey, in trust, to let and lease the same, to collect and receive the rent and income thereof and to pay the net rents and income to my said wife for and during her natural life, but my said Executors are directed to permit my said wife to take possession of and occupy either or both of the said pieces of property at and during her pleasure.

XII. I give, devise and bequeath all the rest, residue and remainder of my property, real and per-

sonal, which I may die seized or possessed of, whether acquired before or after the execution hereof, and the proceeds of sales thereof, unto my said Executors, in trust, to lease the real estate, to invest and keep invested the personal estate, and the proceeds of any sales of real estate, to collect and receive the rents, interest and income of the real and personal estate, and to pay to my said wife, from the net rents, interest and income thereof, yearly and every year during her natural life, the sum of Six thousand Dollars in equal quarterly-yearly payments, the first 10 payment to be made on the day which shall be three months after my decease, and to pay the residue and remainder of said net rents, income and profits to my children living at my decease and to the issue then living, per stirpes, of any deceased child or children who may have died before me leaving issue, but excluding nevertheless such children (or such issue of them) as have had advanced to them an amount exceeding their shares of my estate as set forth in the Thirteenth and Fourteenth clauses here- 20 of, and in the event of any such children or the deceased parent of such issue having had advanced to them an amount less than their share of my estate, then such children or such issue are to receive the income of so much of their shares as shall not have been advanced to them as set forth in the said Thirteenth and Fourteenth Clauses of my Will.

XIV. Having heretofore advanced to my children hereinafter named various sums, which sums respectively amount to the sums mentioned after such of 30 their names, viz: to my son Morris S. Sternberger, Twenty three thousand two hundred and seventy dollars; to my son Clarence S. Sternberger, Thirteen thousand five hundred and ninety four Dollars; to my son Louis Sternberger, Eighty seven thousand two hundred and thirty three Dollars; to my son Julian Sternberger, Three thousand five hundred and seventy seven dollars; to my son Dr. Edwin Sternberger, Three thousand two hundred and six-

teen Dollars; to my daughter Jennie Reitlinger, Six thousand Dollars; which statement of advancement is to be taken and deemed conclusive; and desiring that the said sum shall be deemed and taken as advancements to the said children respectively, it is my will and I do hereby direct, that for the purpose of making a just distribution of the property devised and bequeathed by me in and by the Thirteenth clause of this my Will, unto my children (or their issue aforesaid), and for no other purpose, the said

10 sums without interests shall be reckoned as part of the property devised and bequeathed by the said Thirteenth Clause hereof, and I direct that from the respective shares of principal devised and bequeathed to each by the Thirteenth Clause of this my Will to which my said sons Morris S. Sternberger, Clarence S. Sternberger, Louis Sternberger, Julian Sternberger and Dr. Edwin Sternberger and my said daughter, Jennie Reitlinger, or their said

20 issue, will be entitled, there shall be charged and deducted, without interest, the said amounts as aforesaid advanced or paid to my said sons and daughter respectively; but neither of my said sons or my said daughter or their issue shall be required to pay the excess, if any, of such advances as aforesaid over their respective shares, and I further direct that the income to which under the Twelfth Clause hereof, my children who may survive me or the issue me surviving of such as may die before me, shall be entitled, shall be paid over to them proportionately to

30 their shares of principal so to be determined as provided in this Fourteenth Clause of my Will, the children, if any, (or in case of their death before me then their issue me surviving), whose advancements as aforesaid shall exceed their shares of said principal to be entirely excluded from participating in such income.

XVII. I nominate and appoint my said wife, Pauline Sternberger, my said son, Dr. Edwin Stern-

berger, and my friend Samuel Riker, the Executors of this my last Will and Testament, and I authorize and empower my said Executors, or such of them as shall qualify, and the survivors and survivor of them, whether acting as Executors or as Trustees, at any time in their, his or her discretion, to sell all or any part of the real property which may be owned by me at the time of my death, whether held in severalty or in common with any other person or persons, either at public or private sale, free and clear of any charge thereon under this my last Will and Testament, and to execute valid deeds therefor to the purchasers thereof also to partition any and all real property which at the time of my death may be held by me in common with any other person or persons, and to execute and receive all such instruments and assurances of the law as may be necessary or proper to carry such partition into full effect, and thereafter to sell the real property allotted on the said partition for my share, or to any part thereof, free and clear of any charge thereon under this my last Will and Testament, either at public or private sale, and to execute valid deeds therefor to the purchasers thereof.

But it is my will and I hereby direct that the real property devised by the Tenth Clause hereof in Trust for the benefit of my wife, shall not be sold during her life-time except upon her consent to be evidenced by her joining in the deed or deeds conveying the whole or any part of such real estate.

And I further direct that the purchaser or purchasers of the whole or any part of my real estate shall not be required to look to the application or investment of the proceeds thereof.

EXHIBITS OF DEFENDANT-APPELLANT.

EXHIBIT D-1

- Mortgage made by Clarence S. Sternberger (the same person who made the mortgage to the complainant) to Berthold Sussman, dated October 20, 1896, recorded in the Monmouth County Clerk's Office in Book 205 of Mortgages, page 44, &c., recorded in the office of the Register of the City and County of New York in the State of New York November 10, 1896, and recorded also in the Clerk's Office of the County of Union April 22, 1904, in Book 204 of Mortgages, page 27, &c. This mortgage covers all the equal undivided eighth part of certain lands and real estate in the City of New York in the County and State of New York, described at length therein, and also all the one equal undivided eighth part of certain lands situated at West End and Long Branch in the County of Monmouth and certain lands in the County of Union, New Jersey, being the same premises described in the mortgage of the complainant made by Clarence S. Sternberger to Pauline Sternberger and marked Exhibit C-1; to secure the sum of \$2000 five years from date, with interest at 5% per annum.

EXHIBIT D-2.

- Bond, dated October 20, 1896, made by Clarence S. Sternberger to Berthold Sussman, to secure the sum of \$2000, on October 20, 1901, with interest at 5%.

EXHIBIT D-3.

Mortgage, dated September 13, 1897, made by Clarence S. Sternberger to Berthold Sussman to secure the sum of \$340.05, in one year from date,

with interest at 5%, recorded in the Clerk's Office of Monmouth County January 31, 1898, in Book 220 of Mortgages on page 37, &c. This mortgage covers the same premises as the mortgage exhibit D-1 and the mortgage made by Clarence S. Sternberger to the complainant Pauline Sternberger, Exhibit C-1.

EXHIBIT D-4.

Bond, dated September 13, 1897, made by Clarence S. Sternberger to Berthold Sussman to secure the sum of \$340.05 in one year from date, with interest at 5%. 10

UNMARKED EXHIBIT

The proceedings in the Court of Chancery of New Jersey in a cause wherein Berthold Sussman was complainant and Morris Sternberger and others were defendants, including the decree made by the Chancellor on November 25, 1903, and a further or final decree made by the Chancellor December 18, 1903. This was an action brought to foreclose the mortgages above recited made by Clarence S. Sternberger to Berthold Sussman, Exhibits D-1 and D-3. This action was defended and such proceedings were had that on November 25, 1903, a decree was made for the sale of the mortgaged premises situate, lying and being at West End and Long Branch in the Township of Ocean, County of Monmouth, as set forth and described in the amended bill of complaint, and an order of reference was made to ascertain and report the amount due on the two mortgages of the said Berthold Sussman. In the final decree of December 18, 1903, a sale was ordered of the said premises located at West End and Long Branch, to pay and satisfy unto the said Berthold Sussman the sum of \$3042.64, with interest 20 30

from December 8, 1903, together with the sum of \$266.66 of costs. By virtue of this decree an execution was issued to the Sheriff of the County of Monmouth, directing him to make sale of said mortgaged premises at West End and Long Branch.

EXHIBIT D-5.

10 Original deed made by Obadiah C. Bogardus, Sheriff of the County of Monmouth, to Berthold Sussman, dated March 17, 1904, consideration \$1000, recorded in the Monmouth County Clerk's Office March 26, 1904, in Book 727 of Deeds, page 303. This deed sets forth at length the execution issued out of the Court of Chancery of New Jersey on January 2, 1904, founded on the final decree of December 18, 1903, above mentioned. Under this execution the mortgaged premises situated at West End and Long Branch were sold by the Sheriff on February 15, 1904, to the said Berthold Sussman, for the sum of \$1000. .This deed conveys the equal undivided one-
20 eighth part of the said parcels of land situate at West End and Long Branch aforesaid, to the said Berthold Sussman, for the consideration of \$1000.