

In the Court of Errors and Appeals
OF NEW JERSEY.

Between—

ALICE BUCKINGHAM as sole Ex-
ectrix of JAMES HORNER, decd.,
and JOHN M. BUCKINGHAM, her
husband,

Appellants,

and

JAMLS LUDLUM AND CATHERINE
LUDLUM and others,

Respondents.

Brief of Appellants.

This is an appeal from a decree of the Court of Chancery sustaining the demurrers of the respondents James Ludlum and Catherine Ludlum to the complaint.

Statement of Facts.

This Bill was filed in or about the month of April, 1883, in the Court of Chancery, by the appellants, against James Ludlum, Susan H., his wife, Catherine Ludlum, Andrew Kirkpatrick as Receiver of the partnership estate of James Horner &

Co., and Susan Horner, respondents. The prayer of this Bill is that a contract made by appellants with James Ludlum, known to this Court as the give-and-take contract, be declared void. (See contract on page 6 of case, et seq.)

Also to have the deed of the Elizabethport property mentioned therein and alluded to on page 12 of case from appellants to James Ludlum declared void, and to have a mortgage made by James Ludlum to the defendant Catherine Ludlum, his mother, on or about the 19th day of July, 1876, of the same property, declared void as to the partnership estate; and that the property covered by said mortgage be declared the property of the partnership estate.

The execution of the mortgage and the description of the lands affected by it is set out on pages 17 and 18 of case.

To this bill the respondents James Ludlum and wife interposed a general demurrer. (See page 23 of case).

The respondent Catherine Ludlum appeared by the solicitor of the defendant, James Ludlum, her son, and filed a separate demurrer to the bill. (See case, pp. 24 and 25).*

After many adjournments, and great delay, the hearing on the demurrers came on before Vice Chancellor Van Vliet, on the 17th day of December, 1884, who sustained the demurrers, and dismissed the bill.

The leading facts set out in the bill and admitted by the demurrers upon which this argument is based are as follows:

1st. That the firm of James Horner & Company composed of James Horner, now deceased, and James Ludlum, were doing business in Pompton, in the State of New Jersey, as manufacturers of steel and files, as partners. (Par. 1 of Bill; see case).

2d. That the said firm was dissolved June 9th,

1874, by the death of James Horner, leaving James Ludlum sole surviving partner. That Mr. Horner left a will, which was duly proved on the 21st of August, 1874, in which the complainant was made sole executrix, and sole residuary legatee and devisee in her own right, and as trustee for her sister Susan Horner, of all his title, right and interest in said partnership estate. (Par. 2 of Bill; see case).

3d. That complainant could obtain no settlement of the partnership affairs, and but little information about them; she was compelled to and did, on or about the 21st of August, 1874, file a bill against James Ludlum, as surviving partner, for an accounting and for a settlement of the partnership estate, and for a Receiver, which action is still pending; that in this action Ludlum was appointed Receiver Nov. 17th, 1874, and at once entered upon the duties of his office. (Par. 2 and 3 of Bill; see case).

4th. At this time he had overdrawn his account with the estate in the sum of \$73,975.47, as was afterwards decreed by the Court of Chancery in the action above stated, on or about the 22d day of August, 1876, and by said decree he was directed to pay the said amount to the estate, with interest from June 9th, 1874, until paid.

The decree was affirmed by this Court in *Buckingham v. Ludlum*, 2 Stewart, 360; see also case, page 13.

5th. That no part of this large sum so found to be due by the said Ludlum to the said firm estate at the time of its dissolution has ever been paid by him, or turned over by him to the Receiver appointed in his stead; but he claims he is unable to pay the same, and is insolvent and refuses to pay it, (see case, p. 4, at the end of paragraph 5); that after his appointment as Receiver he refused to furnish any reliable information as to the affairs of the estate to complainant. That he used the moneys

of the estate, and combined and colluded with its creditors to prevent a settlement of its affairs and concealed from Mr. Buckingham the true situation and condition of the real property of the estate, which was the subject of the contract above referred to (see case, pp. 2 and 3, par. 4).

6th. The contract was made under the foregoing circumstances, and the deed from Mrs. Buckingham to Ludlum, executed and delivered in escrow to Hon. Amzi Dodd, who delivered the same to Ludlum, who placed the same upon the Land Records of Union County. (See case, p. 12).

7th. That Ludlum, by his own fraud, prevented the completion of this contract by withholding the large amount of the moneys of the estate in his hands as receiver, and that it had been so decided by the judgment of the Court of Chancery. This action and proceedings and decree therein are made a part of the complaint. (See case, pages 14 and 15, *Ludlum v. Buckingham*, 5th Stewart, 71, since affirmed in this Court, 39th N. J. Eq., 564.)

That about one year after Ludlum obtained possession of the deed of his cestui que trust, he executed the mortgage in question to his mother, Catherine Ludlum, for the consideration of \$15,000, as therein expressed, and caused the same to be recorded in the land records of Union County, and that it now stands as an apparent lien on this Elizabethport property (see p. 17 of case); that said mortgage was for a sum largely in excess of the whole value of said property.

And the bill further charges that this was done to prevent this property from being used as a part of this estate or for its benefit, and to prevent the heirs of Mr. Horner from receiving any benefit therefrom, and in pursuance of his fixed purpose to appropriate the same to his own use. That this mortgage was not made to secure any loan of money from Catherine Ludlum to James Ludlum, and that

Catherine Ludlum was never a bona fide purchaser or mortgagee of said property for value. (See pp. 18 and 19 of case).

The foregoing prominent facts, charged in this bill and admitted by the demurrers, present the questions of law involved therein for the consideration of the Court.

Assignment of Errors.

The Court below erred on four principal grounds:

1st. In holding that the parties to this contract, deed and mortgage in question had any title to the property affected thereby which they could convey to each other or to third persons while the same was in the possession of the Court of Chancery, and the debts of the partnership were unpaid and the accounts of the respective parties in interest here unsettled and unadjusted as between themselves and the estate. For inasmuch as the Court should have held that the only title or interest the parties had was in such surplus as might remain after the debts had been paid and the accounts of the respective parties with the estate settled and adjusted, and the accounts of the parties with each other had been settled and adjusted. And inasmuch as the Court should have further held that this property, having been sequestered by the Court and taken possession of by the order of the Court for the purposes of administration under lawful process, the title became vested in the Court and its receiver, and that it could not thereafter be divested except by the order or decree of the Court made in the action in which it acquired the title.

2d. The Court erred in holding that the contract in question could be made between Mr. Ludlum and the executrix of Mr. Horner while the title to the property was in Ludlum as receiver, and while the

relation of trustee and *cestui que trust* existed between them, and while the subject matter of the contract was trust property, and in the sole possession of Ludlum as receiver and trustee, without the sanction or order of the Court, and as the contract was made in order to settle a portion of the estate, Ludlum, as trustee, could not retain to himself a portion of the trust estate as a bonus.

3d. The Court erred in not holding that Ludlum, by his fraudulent conduct in relation to said contract, both before and after its execution, in withholding the knowledge in his possession of the condition of the real estate which was the subject of the contract and of the affairs of the partnership from the executrix of Mr. Horner, and of the position and value of its assets, and by withholding from her the means wherewith to complete the contract, had estopped himself from claiming any benefit under it, and by means thereof had destroyed all consideration for said deed and all benefit which the executrix of Mr. Horner was entitled to under it; and in not holding that, though Ludlum obtained the deed so held in escrow and placed it upon the record, yet it was never delivered to him in contemplation of law, and passed no title. And in not holding that inasmuch as Ludlum was unable to perform the contract on his part, there was never any consideration for the deed in question, and that the contract was *nudum pactum* and void. (See pages 4 and 5 of case; also 39 N. J. Eq., 564).

4th. The Court erred in holding that Ludlum could convey any specific portion of the partnership estate as his own, by deed or mortgage, while it was in the possession of the Court and while its debts remained unsettled and unpaid, and the accounts of the respective partners with the estate and themselves remained unadjusted and unsettled, and while he owed the estate upwards of \$80,000. And

in holding that Catherine Ludlum, by her mortgage from James Ludlum, acquired any lien on said property as against the receiver, or that she acquired any lien except on such surplus which James Ludlum may have in the property of the partnership estate. after its debts have been paid and the accounts of the respective parties adjusted, settled and balanced, and the action discontinued by the order of the Court and the receiver discharged.

Point I.

AT THE TIME OF THE EXECUTION OF THIS CONTRACT, AND THE EXECUTION OF THE DEED OF THE EXECUTRIX IN PURSUANCE THEREOF, AND THE MORTGAGE BY LUDLUM TO HIS MOTHER, NEITHER PARTY TO THE CONTRACT HAD ANY SPECIFIC RIGHTS OR TITLE IN THE PROPERTY IN QUESTION, AND THE SOLE LEGAL AND EQUITABLE TITLE WAS IN LUDLUM AS RECEIVER UNDER THE ORDER OF THE COURT OF CHANCERY, AND HE WAS IN ABSOLUTE AND SOLE POSSESSION OF ALL THE ASSETS OF THE PARTNERSHIP ESTATE OF JAMES HORNER & Co., INCLUDING THE PROPERTY IN QUESTION.

As the surviving partner he was a trustee, and when he was appointed a Receiver, he took the estate as any other Receiver, since his relation to the estate as surviving partner became merged in his new relation as Receiver.

“ A plaintiff, partner in an action for the dissolution of the firm, has sometimes been appointed a Receiver, although the practice in this country is an unusual one and only to be justified upon the implied condition that he will discharge the duties of his trust free of charge. The English practice seems to be, to give each of the parties liberty

“ to propose to act as Receiver, without charge or
 “ salary, but the party who may be appointed no
 “ longer acts in the capacity, or sustains the relation
 “ of a partner, but is an officer of the Court, having
 “ given due security to account for the money he
 “ may receive in his official capacity, and being re-
 “ sponsible directly to the Court for his conduct.”
 High on Receivers, section 540 and cases cited, see
 also Kerr on Receivers, page 109. In other words,
 a partner appointed Receiver stands in exactly the
 same position, and holds by the same title as if a
 stranger had been appointed, and is subject to the
 same liabilities.

To establish conclusively that Ludlum as Re-
 ceiver became vested with the whole partnership es-
 tate both legal and equitable, the following cases
 are cited in support of the proposition :

In this State this identical question came before
 the Court of Chancery in an action where a Receiver
 was appointed over an insolvent Corporation ; there
 the question arose whether or not the Receiver ap-
 pointed over the insolvent Corporation took the
 whole title to the estate or whether it still remained
 in the Corporation, The question arose on the fol-
 lowing state of facts : The State of New Jersey
 claimed the Crown's common law prerogative to
 have its debts paid in preference to the debts of
 other creditors. The Vice-Chancellor held that the
 State had not such right, but if it ever had such
 right it became divested of the same when the Re-
 ceiver was appointed, and Vice-Chancellor Van
 Vleit, in rendering the decision, said, “ That the
 “ authorities of both countries unanimously agree
 “ that the right dies the moment the debtor's title is
 “ divested. No claim was made by the State in this
 “ case until after the Receiver had been appointed.
 “ That appointment invested him with full power to
 “ sell, assign and convey all the property of the
 “ Corporation * * * No Act by the Corporation was

“ necessary to complete either the title of the Receiver or that of his purchaser and, like proceedings under bankrupt laws, no assignment by the debtor or commissioner is required. *Title is divested by force of law, and such divestiture is perfect and absolute.*” See

Freeholders of Middlesex County v. State Bank of New B., 29 New Jersey Eq., p. 268.

This case was unanimously affirmed on the opinion of the Vice-Chancellor by this Court.

See 30 New Jersey Eq., 311.

The mere fact that the Receiver in this case cited was appointed over an insolvent Corporation, while in the case at bar the Receiver was appointed over a partnership, in no way affects the application of the principle thus decided to the case at bar. True, in the case cited, the Receiver was appointed under and by virtue of the Statutory Law of the State on this subject. The Statute, however, does, in no manner, define the estate or quantum of interest which the Receiver should take; the powers and duties only are specified. But the Court on principle decided that the legal estate to the property became vested in the Receiver.

There is no Statute Law in this State in reference to the appointment of Receivers over partnership estates; the subject depends wholly upon equitable principles and vests in the Court of Chancery a discretion to appoint Receivers as the exigency of the occasion demands. In either case, therefore, when a Receiver is appointed the title he holds in respect to the property so turned over to him is determined upon the broad principles of trust which underlie the case.

In High on Receivers, Section 539, page 356, the rule is stated to be as follows :

“ A receiver of the effects of a partnership estate,
 “ appointed in an action for the settlement of the
 “ firm’s business, is regarded as vested with the
 “ whole equitable title to the partnership, without
 “ any assignment for that purpose, and in an action
 “ to obtain possession of the property, he represents
 “ the interests of all parties to the suit in which he
 “ was appointed, and since a receiver’s authority is
 “ conferred by law, and not like that of a voluntary
 “ assignee of the parties, a receiver of a partnership
 “ succeeds not only to the legal title of the partners
 “ as joint tenants, but also to the equitable rights
 “ and remedies of the firm.”

“ This precise question came up in the Supreme Court of Michigan in the case of *Lewis v. Campan*, 14th Michigan, 201.

This was a bill filed by the executor of a deceased partner, for an account of the partnership transactions, and for a Receiver, and the question arose upon the force and effect of the order appointing the Receiver, it being claimed on one side that it was an interlocutory order which, under the laws of Michigan, was not appealable, and by the other side that it was, as it was in the nature of a final decree, which divested the surviving partner of all title or control of the property, and was therefore appealable. The Court, in deciding the question, uses these words :

“ The effect of this order (appointing the Receiver,) is to divest the entire legal estate of defendant in property over which he had exclusive control, as well as exclusive title, in which he was equitably as well as legally interested, and in which no one else had any, except to receive the amount which might belong to the deceased

“ partner’s estate after the accounts should be closed
 “ and the funds converted. The specific property
 “ and its disposal belonged to the defendant, a cer-
 “ tain share of the net proceeds would belong to the
 “ executor. The order divests the whole body of
 “ the property and puts its management as well as
 “ ownership into other hands. It does very nearly
 “ all that could be done under the bill by a decree
 “ upon the hearing. * * * * An adjudication
 “ which produces such important effects and which
 “ actually transfers the entire estate to the defen-
 “ dant is to all intents and purposes a decree as far
 “ as it goes.”

See also *Iddings v. Bruen*, 4 Sandford’s Ch.,
417, 424.

Mann, Receiver, &c., v. Puntz, 2 Sandford’s
Ch., 257, 272.

Tillinghast v. Champlin, 4 Rhode Island,
173.

The soundness of the rule as enunciated by High
 in his work, cited *supra*, is undoubted, and the deci-
 sions in support of it (cited *supra*) establish that
 there is no question but that a Receiver im-
 mediately upon his appointment becomes vested
 by operation of law with the whole title both legal
 and equitable. Ludlum, the receiver, having been
 appointed by the Court of Chancery and ordered
 to take possession of the partnership assets, no as-
 signment was necessary to transfer the same to him,
*The effect of the order appointing him was to vest
 the property absolutely and as effectually in him*
 as if an assignment was made in due form; the
 assignment operates by force of the order itself.
 and when that was made, Ludlum’s title as receiver
 became complete. Even in the case of a corporation
 where real and personal estate is transferred to a
 receiver, though the practice is to assign the real
 estate to the receiver, to vest the legal title to the
 same in him, and even though it is absolutely
 necessary in law so to transfer the real estate to

him still a Court of Equity, which looks at the substance of the transaction, will not consider it necessary to require such assignment, but will, notwithstanding this omission, consider the receiver vested with the same."

Mann *v.* Puntz, *supra*.

In the case at bar, as we have shown by abundant authority, all the partnership estate, whether it consist in the main of real estate, in the absence of an agreement to the contrary, it is considered personally, and vests, as already stated, by virtue of the decree and order, the whole title in the receiver on his appointment.

And this doctrine was sustained in Kirkpatrick receiver *v.* Corning, et al., in the action to set aside the foreclosure proceedings and sales of personal estate. On the argument of the appeal, it was claimed by the appellant that the whole title to the premises was in Ludlum as receiver, and inasmuch as he was not made a party as such receiver, the foreclosure proceedings were void, and it was held by this Court that assuming the title to the premises to be in the Receiver, yet as the executrix of Mr. Horner failed to set it up as a defense, she was now estopped in equity from so doing.

See 11 Stewart's Equity, 234.

And in this same litigation on the motion to strike out portions of the bill of complaint, it was again held that the title to the property was in Kirkpatrick as Receiver.

See opinion of the Court in Kirkpatrick *v.* Corning, not yet reported.

If we are right in this first proposition, it ends this litigation, because neither party had any right to convey to the other any specific interest in any portion of the partnership property.

And if they had any future or contingent rights

which could be made the subject-matter of such a contract it could only be done by order of the Court.

Point II.

NO SUCH CONTRACT AS THE ONE IN QUESTION
COULD BE MADE WITHOUT THE ORDER OF THE COURT.

Even if the debts had been paid, and the accounts of the respective partners remained unadjusted and unsettled, and even if it was made by agreement between the parties, and its purpose was to aid in the final distribution of the estate, it could only be done by a supplemental bill or petition in the action, in which the Receiver was appointed, setting out the proposed arrangement so as to bring all the matters before the Court, and the rights of the respective partners in the assets, and the Court would then, upon due hearing, make the final adjustment, upon which a decree would be entered which would distribute the estate, discharge the Receiver and discontinue the action. Such a decree would divest the title of the Court in the property, and it is submitted this is the only way it could be done, and the deeds which carried out this decree would have to recite it in substance. The Court will keep in mind that this contract was made by a trustee who had a personal interest in subject matter of it, with his cestui que trusts, and it could be made but only in the manner above stated.

In the American Notes to *Fox v. Mackreth*, in vol. 1, *Leading Cases in Equity*, Hare & Wallace's Notes, Third American edition, 1859, 217, top page, the rule is laid down as follows :

“ It is admitted, however, in all the cases, that a
“ trustee may purchase by consent of the Court of
“ Chancery, to be obtained by filing a bill and show-

“ing the circumstances, and making out a sufficient case.”

See *Davone v. Fanning*, 2 John. Ch., 252, 261 and 262; citing with approval.

Campbell v. Walker, 5th Vesey, 678.

“ 13 “ “ 600.

Dobson v. Racey, 3d Sanford Ch. 61.

Brackenridge v. Holland, 2 Blackford, 377 and 381.

“ But the Court upon such application will always require such facts to be shown as justify a departure from the general rule. Where it is made to appear that the trustee had a personal interest in procuring a fair price for the property, which interest would be sacrificed if he were not permitted to bid, it is very much a matter of course to give him leave to purchase, but even in these cases the Court must always be satisfied that the interests of the cestui que trusts will not suffer by the permission; and the trustee, from his connection with the property, has had superior advantages of information as to the situation and value, so he will not come to the sale on terms of equality with other bidders. The Court will not put him in a position which make it for his interest to keep the information to himself, but will require him to obtain the consent of his cestui que trusts.” (See *De Caters v. Le Ray De Chaumont*, 3d Paige 178.)

And in the order appointing Ludlum Receiver in this litigation this doctrine was recognized, and the order provided as follows: “ And it is further ordered that in case of a public or private sale of any of the said partnership property or effects, except sales of manufactured stock in the ordinary course of business * * * The said Receiver, notwithstanding his position as trustee, may in person or by agent, bid at such sale and buy in any of said property in his own name, but

“ such purchase shall not be carried into effect without the sanction and order of the Court. See order referred to in second paragraph of complaint, page 2 of case.”

It is therefore submitted that this so-called contract was never made by order of the Court, or sanctioned by the Court, but that it was an unjust and oppressive arrangement, proposed by Ludlum for his own benefit and to the damage of his cestui què trusts, and is obnoxious to fair play and honest dealing between Ludlum as trustee and the executrix of the deceased partner, Mr. Horner, and to the rule of law as laid down in the foregoing decisions, and that it was such a contract as no Court would sustain. (See *Ludlum v. Buckingham*, 12th Stewart Equity, 564). But if we are wrong in this, then it is insisted that this so-called contract is void by reason of the wrongful acts of Ludlum in relation thereto, both before and after its execution, which will be considered under the third subdivision of this argument.

Point III.

THE AGREEMENT BETWEEN COMPLAINANT AND LUDLUM IS NULL AND VOID, BY REASON OF THE LATTER'S WRONGFUL ACTS IN PREVENTING ITS PERFORMANCE.

(A.) The complainant and Ludlam having entered into an agreement by the terms of which either party was to give or take a sum in gross for his or her share in certain of the firm's property, and Ludlum having made a written offer what he would give or take for his interest, and the complainant having accepted the offer, and having, pursuant to the agreement, executed a deed which was delivered in *escrow*, dependent on the performance of certain conditions on the part of Ludlum, and Ludlum

having, after the execution of such deed, prevented the performance of plaintiff's part of the contract, the same is null and void, and of no force or effect whatever.

Such a contract cannot be enforced, for the reason that Ludlum would be permitted to commit a wrong and then to take advantage of it. *The familiar rule of law applies, that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned.*

Risley *v.* Smith, 64 N. Y., 576-582.

Gallagher *v.* Nichols, 60 N. Y., 438-448.

Homer *v.* Guardian Life Ins. Co., 67 N. Y., 478.

Jencks *v.* Robertson, 58 N. Y., 621.

Hawley *v.* Keeler, 53 N. Y., 114.

This Court, in a proceeding depending before it, growing out of this very matter, and between the same parties, in which it was sought to compel a specific performance of the contract, refused to enter such a decree and held, *inter alia*, that Ludlum, through his wrongful and wanton conduct towards complainant and the estate, brought on the very disaster for which he sought to be compensated, and by such conduct prevented the performance of the contract on the part of the complainant.

See Ludlum *v.* Buckingham, 35 N. J. Eq., 71.

(B.) The deed executed by complainant to Ludlum pursuant to the terms of the contract made between them vested no title in Ludlum to the property conveyed, for the reason that such conveyance was dependent on the complete performance of the whole contract, and inasmuch as that was never done the deed is a nullity and of no effect.

Green *v.* Reynolds, 2 Johnson, 207.

Jones *v.* Gardner, 10 Johnson, 266.

Parker *v.* Parmele, 20 Johnson, 130.

Johnson *v.* Wygan, 11 Wendell, 48.

3 Denio, 59.

Fry *v.* Johnson, 22 How. Pr., 316.

(C.) The deed executed by complainant to Ludlum pursuant to the terms of the contract made between them was delivered in *escrow* upon certain conditions in said agreement expressed, and inasmuch as the conditions in the contract mentioned were never fulfilled, the delivery of the deed to Ludlum before the completion and performance of all the conditions vested no title to the property in him, and the conveyance is a nullity and without force or effect.

Jackson *v.* Catlin, 2 Johnson, 248-259.

Shepherd's Touch., 55.

Hinman *v.* Booth, 21 Wendell, 267.

Titus *v.* Philips, 3 C. E. Green, 541.

Duncan *v.* Pope, 47 Ga., 445.

Hagood *v.* Hurley, 8th Richards, (S. C.) 325.

The contract expressly declares as one of the conditions dependent on the vesting of the Elizabethport property, that all conveyances must be made between the parties so that the interest of one or the other in the Pompton property should be extinguished, and also for the payment of the difference in money in Court, &c., &c., all of which has not been done (see contract at the bottom of page 10 of case). In *Ludlum v. Buckingham*, in 39 N. J. Eq., 564, the Court, in discussing the contract, held that Ludlam was unable to perform on his part.

(D.) The conveyance of the Elizabethport property to Ludlum was on a condition precedent, and it is a well-settled rule of law that no title can vest until the condition is performed, and even if the condition is impossible it will prevent a vesting of the estate.

Washburn on Real Property (Ed. 1860),

Vol. 1, p. 548, § 8.

Taylor *v.* Mason, 9 Wheaton, 325.

(E) The delivery of the deed and recording of the same, if the condition is unperformed, still vests no title in Ludlum as vendee.

Gilbert *v.* North Am. Fire Ins. Co., 23 Wendell, 43.

Jackson *v.* Perkins, 2 Wendell, 308, and cases cited.

12 Johnson, 418-421.

2 Blackstone, 307.

Shephard's Touch., 57-58.

(F) The execution by Ludlum of a mortgage on the property conveyed to him is void *ab initio*, inasmuch as the condition precedent to the vesting of the estate in him remains unperformed. This is in analogy to the conveyance of an estate on a condition subsequent; if the condition is broken, and the grantor re-enters and becomes seized as of his first estate, all intermediate charges and incumbrances are avoided.

It has been held by this Court, as between these parties relation to this said contract, that Ludlum was never at any time in a position to perform the contract on his part, by reason of defects in the title to the Pompton property, known only to himself.

Ludlum *v.* Buckingham, *supra*.

Kent Com., Vol. 4 (top p. 139).

Sheperd's Touch. by Preston, Vol. 1, 121, 155.

(G) The bill charges that the mortgage was placed on record to prevent the property from being used as part of the firm's assets, that it was executed without any consideration, that it was given to enable Ludlum to use same for his own use and benefit that Mrs. Ludlum is not a bona fide purchaser or mortgagee, and that she took with knowledge that it was firm property, &c.

See case, pp. 17 and 19.

This allegation is admitted by the demurrer. It is submitted that this single allegation is sufficient to constitute a good ground of complaint.

(H) But independent of any condition on which the vesting of the property conveyed depended, no title to the same ever vested in Ludlum, for the reason that the contract under which the same was executed is void, and became so through his wrongful acts.

Cases, *supra*, under Point I., even the possession of a deed acquired by fraud is not such a delivery as will vest any title in the grantee. See *Ritter v. Worth*, 58 N. Y., 627. *Story's Equity*, § 308 to 328 inclusive. *Gage v. Gage*, 291 N. H., 533. *Young v. Pate*, 4, *Yeager* (Tenn.), 164. *Montgomery v. Pickering*, 116 Mass., 229.

The contract is void and the conveyance of the property under it is a mere nullity, for the reason that there was no consideration moving from Ludlum to sustain the contract. Ludlum was unable to perform his part of the contract (see *Ludlum v. Buckingham*, 39 N. J. Eq., 564, *supra*), where all the facts were stated in the opinion and discussed. The charge in the present Bill is "That he (Ludlum) was bound fully to disclose the situation of the said estate and the amount and value of its assets, which he failed to do." See paragraph 14 on page 16 of case.

2 Kent Comm., p. 464 (star) *et seq.*

(I.) This contract in question is void as against public policy. The facts in this case show that it was made between Ludlum as receiver and trustee with the heirs of the deceased partner who were his *cestui que trusts*.

That it was proposed by Ludlum to his *cestui que trusts* for the purpose of taking advantage of

his position as trustee to get possession of a portion of the trust estate to their damage and for his benefit.

Such contracts have been declared void by every Court of Equity where they have been discussed.

Chancellor Walworth states the rule in *Torry v. Bank of Orleans*, 9th Paige, 633, as follows: "That
 " it is a rule of equity of universal application that
 " no person can be permitted to purchase an interest in property where he has a duty to perform
 " which is inconsistent with the character of purchaser."

In *Michoud v. Girod*, "The general rule," said the learned Judge, "stands upon one great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self interest and integrity. It restrains all agents, public or private, *but the value of the prohibition is most felt and its application more frequent in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them which implies on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him.*"

Sec. 4th Howard, S. C., 503.

In this Court this principle has been uniformly sustained and the doctrine laid down in unmistakable language. In *Statts v. Bergen*, 2 C. E. Green, 554, this Court says: "*I think upon general principles a trustee in no case or in any crisis can become the purchaser of property when the fact of his making such purchase has a tendency to promote his own interests at the expense of his cestui que trusts.*"

This so-called contract is obnoxious to every one of these decisions. And it is held by this Court

in *Ludlum v. Buckingham*, *supra*, in disussing the propriety and validity of this contract, that “*if the relation between Ludlum and Mrs. Buckingham was that of trustee and cestui que trust it is clear that the parties did not treat together with equal knowledge and upon equal terms and no Court would sustain a contract so obtained.*”

That Ludlum was sole surviving partner of this firm and as such was by law the trustee for the heirs of the surviving partner, and when he was appointed receiver his trust continued, need not be argued here. This question has been recently considered in the Supreme Court of New York in *Nelson v. Tenney*, where it was held that the surviving partner is a trustee for the heirs of the deceased partner.

See *Nelson v. Tenney*, 36 Hun, 327; p. 329 of opinion.

Point IV.

IN THE CASE AT BAR THERE WAS A MISUNDERSTANDING AS TO THE SUBJECT MATTER OF THE CONTRACT, AND THE MINDS OF THE PARTIES DID NOT MEET THEREIN, AND THERE WAS NO VALID CONTRACT.

(a.) In the 12th paragraph of the bill (p. 14 of case), set out and pleaded as an allegation therein is the “*Judgment Record and proceedings in an action in the Court of Chancery, wherein this respondent, James Ludlum, was complainant, and the appellants were defendants,*” in which the subject matter of the action was the same as in this, and in which the force and effect of the contract set out in the bill at bar and the legal effect of the same, as between the parties thereto, was discussed and decided by this Court—See *Ludlum v. Buckingham*, *supra*,

and it was held. 1st. "That the contract in
 "question was one that Ludlum was unable to per-
 "form on his part. 2d. That at the time it was to
 "be performed Ludlum could not give such a title
 "for the water power as this contract required for
 "the Schuyler land (which was the key to the
 "whole) he could only give a term of years soon to
 "expire with the right to acquire a fee by paying
 "for it."

That when this contract was made the respondents were ignorant of the situation of the title in this respect.

"And that in the view of this Court, the contract was the result of a misunderstanding, and
 "the minds of the parties did not meet therein."
 See *Ludlum v. Buckingham*, (*supra*.)

(b.) This being so, renders the contract and all proceedings under it wholly void.

This doctrine was discussed in the Court of Errors of New York, in the case of *Cutts v. Guild*, 57 N. Y., 229, (see p. 234 of opinion), where the Court says :

"The case is one of error as to the subject matter
 "of the contract. To make a valid contract the
 "minds of the parties must meet and both must in-
 "tend to enter into the engagement expressed by
 "the terms of the contract," citing *Dana v. Monroe*,
 "38 Bar., 528; *aldwin v. Middleberger*, 2 Hall,
 "176.; *Saulters v. Pruyn*, 18 Howard Pr. Reports,
 "512; *Sorantora v. Booth*, 29 Bar. 171; *Booth v.*
 "*Bierce*, 38 N. Y., 463; *Fullerton v. Dalton*, 58th
 "Barbour, 236.

(c.) "What is done under the supposed contract
 "where there is such error or mutual misunder-
 "standing that the minds of the parties do not
 "meet is not binding."

Fullerton v. Dalton, 58 Barbour, 236,
 (*supra*.)

And the Court of Errors in *Cutts v. Guild*, *supra*, quoting from Domat on Civil Law, sec. 234, and adopting it, states the rule as follows :

“ The rule as it existed in the Roman law, is well stated in Domat on Civil Law, sec. 234. The covenants in which the persons * * * did not know what was necessary to be known, in order to form their engagement, are null. Thus the covenants in which the contractors mistake one another’s meaning, the one meaning to treat of one thing, and the other of another, are null through want of knowledge and of consent to one and the same thing.”

This Court having declared in relation to the contract in question, “that it was the result of a misunderstanding, and the minds of the parties did not meet therein, the result is that the contract and everything done in pursuance of it is wholly void.” (See *Ludlam v. Buckingham*, *supra*.)

This doctrine is discussed in Pomeroy on Contracts and Specific Performance as to the assent of the party being necessary (see page 90, sec. 64, and authorities cited.)

See also section 224 and cases cited, as the cases cited on this point are similar to the one at bar.

Section 219 speaks of fraudulent concealment and says: “A fraudulent concealment is therefore where one party in the preliminary negotiation, or at the time of entering into the agreement, knowingly and intentionally conceals, or in other words suppresses a material fact, which, under the relations existing between them, it was his duty to disclose to the other party, and the contract thus made cannot be enforced against the party who was misled, and will be rescinded at his suit * * * if there is a relation of trust and confidence between the parties. If the person knowing the fact occupies a fiduciary position towards the other, the position is clear. It is not necessary that such fidu-

ciary relation should be express. In many decided cases, it has been held to exist from very general circumstances."

Point V.

LUDLUM, BY HIS MORTGAGE TO CATHARINE LUDLUM, COULD NOT CONVEY ANY TITLE OR ANY SPECIFIC PORTION OF THE PARTNERSHIP ESTATE OR CREATE ANY LIEN THEREON AS AGAINST THE RECEIVER WHILE THE PROPERTY WAS IN THE POSSESSION OF THE COURT, AND THE DEBTS OF THE PARTNERSHIP ESTATE REMAINED UNPAID, AND THE ACCOUNTS OF THE RESPECTIVE PARTNERS WITH THE ESTATE AND EACH OTHER REMAINED UNSETTLED AND UNADJUSTED, AND WHILE THE ESTATE REMAINED IN THE POSSESSION OF THE RECEIVER, NO MATTER WHAT HIS INTEREST IN THE ESTATE WAS OR HOW IT WAS ACQUIRED.

1. The whole estate was in the possession of the Court of Chancery through Ludlum, who was the Trustee and Receiver.

2. The contract had not been completed, but the executrix of Mr. Horner had left her deed in escrow in pursuance of it and as part performance.

3. Ludlum obtained possession of it and had it recorded July 8th, 1875.

4. On July 19th, 1876, he executed the mortgage in question as an individual and caused it to be placed upon the records of Union county.

5. At this time the estate owed various debts, to a large amount, including the amounts claimed to be due on the Corning mortgages, which amount was only known by Ludlum.

6. Ludlum owed the estate for over-drafts \$73,-975.47, with interest from June 9th, 1874, amounting then to upwards of \$80,000.

7. The partnership estate had not then been settled nor the large debt which Ludlum owed the estate been paid, and has never since been settled, and Ludlum's debt still remains wholly unpaid, and this judgment alone, with interest, amounts at this time to upwards of \$128,000, and then and now Ludlum claims to be insolvent.

And it necessarily follows that under these circumstances the only lien Mrs. Catharine Ludlum obtained by means of the mortgage in question was upon the surplus of the partnership estate which would belong to Mr. Ludlum after the partnership debts had been paid and the accounts of the partners with the estate and with themselves had been adjusted, and such as he would receive in the final settlement and distribution of the estate. This doctrine was ably discussed in the Court of Appeals of New York in the case of *Menaugh v. Witwell*, 52 N. Y., 146, Judges Rapallo and Allen writing concurring opinions. On page 158 of the opinion, Judge Rapallo says: "It would be a superfluous labor to trace
 " the history of the changes which have from time
 " to time taken place in the views of courts, re-
 " specting the nature of the interests of the indi-
 " vidual partners in the common stock of a firm,
 " and the respective rights of separate and joint
 " creditors; that it is sufficient to observe that they
 " have resulted in a general recognition of the doc-
 " trine *that as between a firm and its creditors the*
 " *property is vested in the firm, and that no indi-*
 " *vidual partner has an exclusive right to any*
 " *part of the joint stock until the firm debts are*
 " *paid and a balance of account is struck between*
 " *him and his copartners, and the amount of his*
 " *interest accurately ascertained.*"

"The *corpus* of the effects is joint property and
 " neither partner separately has anything in that

“ *corpus* ; but the interest of each is only his
 “ share of what remains after the partnership debts
 “ are paid and accounts are taken ; citing :

West *v.* Skip, 1st Ves. Sen., 239.

Fox *v.* Hanbury, Cowp., 445.

Taylor *v.* Fields, 4 Ves., 396.

Young *v.* Keighly, 15 Ves., 557. (Note 559.)

Pierce *v.* Jackson, 6th Mass., 243.

Doner *v.* Stauffer, 1st Penn. (Penrose *v.*
 Watts, 198.)

Collyer on Partnerships, 3 Am. ed. Per-
 kins' Notes, § 882, pp. 704 to 710.

Story on Partnership, Notes to §§ 261, 262,
 263.

Crane *v.* French, 1 Wendell, 311.

Witter *v.* Richards, 10 Conn., 37.

See Lewis *v.* Campan, 14 Michigan, 201
 (*supra*).

“ Partnership effects cannot be taken by attach-
 “ ment or sold on execution to satisfy a creditor of
 “ one of the partners only, except it be to the ex-
 “ tent of the interest of such separate partner in
 “ the effects, after settlement of all accounts. 3d
 “ Kent's Com., 65. See also Note 6, same page.

“ Purchasers of the share of an individual can
 “ only take his interest. That interest and not a
 “ share of the partnership effects is sold, and it
 “ consists merely of the share of the surplus which
 “ shall remain after the payment of the debts and
 “ the settlement of the accounts of the firm.”
 Menagh *v.* Whitwell (*supra*.)

“ No more property can be carried out of the firm
 by the assignee of one partner than the partner
 himself could extract after all the accounts are tak-
 en.” See West *v.* Skip, and Young *v.* Keighly (*su-
 pra*.)

In Bently *v.* Bates, 4th Young and Coll., 190, Bar-
 ron Abinger says: “ If you look to the Constitution
 “ of a mercantile partnership, what is the meaning

“ of a partner mortgaging his share? Nothing more
 “ than he covenants to pay the amount borrowed.
 “ The mortgage is nothing more than a personal
 “ covenant; it conveys no interest in the partner-
 “ ship effects.”

This doctrine was again affirmed in *Staats v. Bristol*, 73 N. Y., 264, and cases cited.

See also Story's Equity Jurisprudence,
 §§ 677, 678.

See also *Miller v. Jones*, 39 Ills., 54.

Talcott v. Dudley, 5 Ills., 427.

Jones on Mortgages, Sec. 1416.

Cullum v. Batre, 1st Alabama, 126.

Pfefer v. Steiner, 27th Michigan, 537.

Cited under 1st Point (*supra*).

The result is, that whether the mortgage by Ludlum to his mother Catherine Ludlum of a portion of this partnership estate in his possession as Receiver, while the estate was unsettled and its assets uncollected, and its debts unpaid, and while he was owing the estate upwards of \$80,000, was made in good faith and for a valuable consideration, or made in fraud of the estate and the heirs of Mr. Horner as alleged in the bill, Mrs. Ludlum obtains no lien on the partnership estate whatever, and the only lien she gets is upon the surplus which James Ludlum may have in the estate upon its final settlement and distribution under the rules of law above stated.

Point VI.

THE JUDGMENT APPEALED FROM SHOULD BE REVERSED, AND FINAL JUDGMENT RENDERED OVERRULING THE DEMURRER, AND FOR THE RELIEF DEMANDED IN THE COMPLAINT.

A. It is respectfully suggested that under the circumstances surrounding this transaction, and

under the decision of this Court, as between the complainant and the defendant, Ludlum, on the validity of the contract in question, and the relations which the parties thereto sustained each other, and to the property embraced therein, as decided in *Ludlum v. Buckingham*, 39 N. J. Eq., 564, *supra*, it would be impossible for him to frame an answer that would be any defence to this suit.

B. This mortgagee, as has been shown in Point V., *supra*, could get no better equity or title than the mortgagor had to give, and could get no equities which were older or prior to those already attached to the property in favor of creditors, and *cestui que trusts* of this partnership estate, and the equity which required this mortgagor, Mr. Ludlum, to first pay his debts before he could have any equity in the partnership estate whatever.

See *Trustees of Union College v. Wheeler*, 61 N. Y., 88,

where the effect of a mortgage upon lands to which were attached equities older and prior to the mortgage is considered, holding that the mortgagee under such circumstances only took a lien subject to such prior equities, and got no greater security than the mortgagor had to give.

This case discusses the question at great length. See the authorities cited, among which is *Andrews v. Torry*, 1st McCarter, 355. *Peabody v. Fenton*, 3 Barbour Ch., 451.

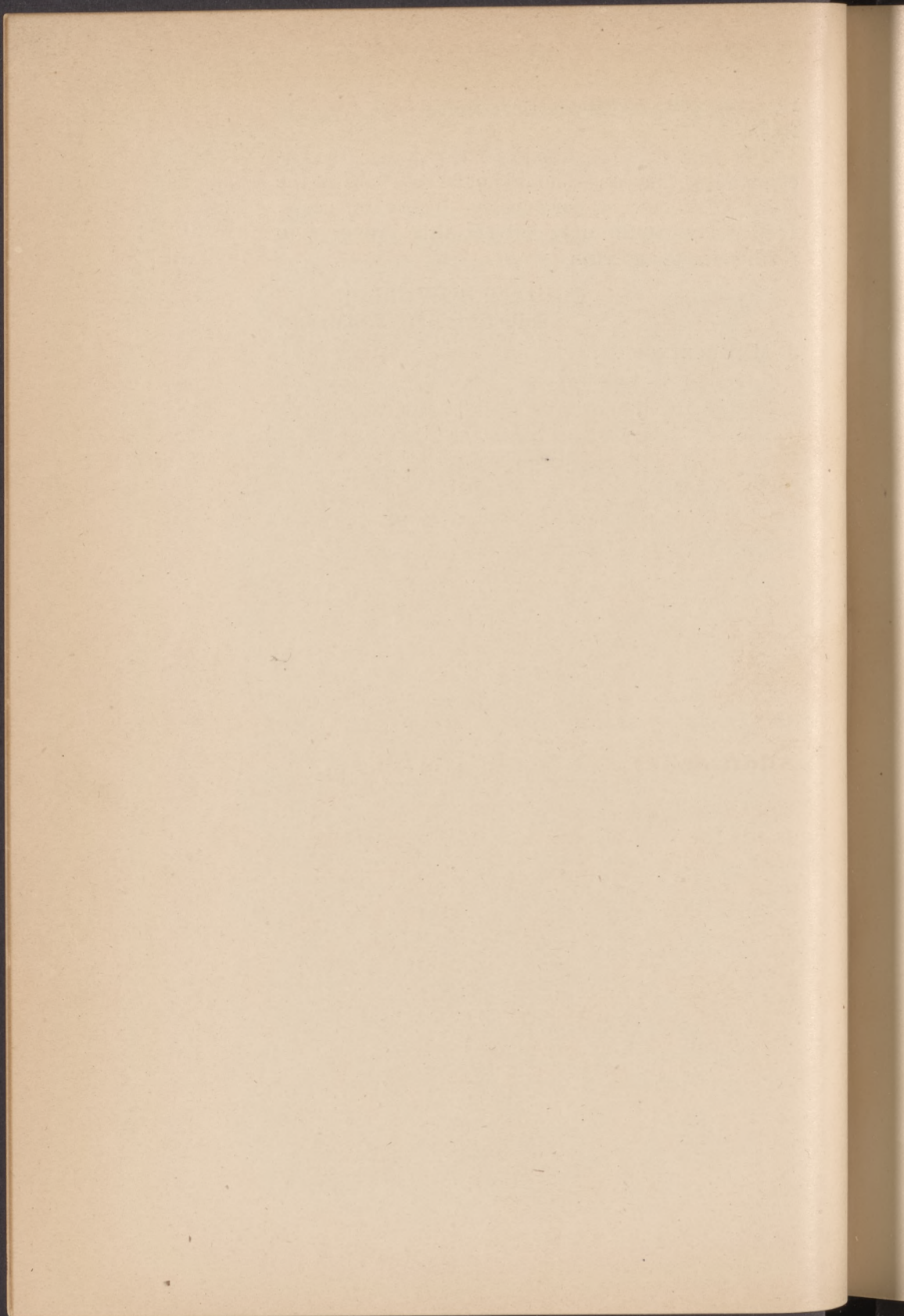
Should this cause go back to the Court of Chancery, and this mortgagee answer and say that she loaned this money to Ludlum in good faith, and should prove it, we would come back to the same proposition hereinbefore discussed. She could get what security the mortgagor had to give and nothing more, which security, as has been shown, is a lien on what surplus Ludlum may have in this partnership estate after its debts are paid and the accounts of

the respective partners therein adjusted and settled.

It is respectfully submitted that under the circumstances this cause should not be sent back to the Court of Chancery for another decade of years. This delay would only subject this property to further waste and ruin.

COULT & HOWELL,
Solicitors for Complainant.

J. M. BUCKINGHAM,
Of Counsel.



In the Court of Errors and Appeals of
New Jersey.

Between—

ALICE BUCKINGHAM, as sole Execu-
trix of JAMES HORNER, deceased,
and another,

Appellants,

against

JAMES LUDLUM and others,
Respondents.

Additional Brief of the Appellants.

Reference is prayed to the statement of facts contained in the exhaustive brief of Mr. Buckingham, counsel for the appellants, prepared for the last term of this Court.

The attention of the Court is respectfully invited to the following Point, now presented in more isolated form than in the before mentioned brief, and which seems to be controlling. It is hoped the following suggestion will enable the Court to dispose of this controversy in a summary manner by the application of the most elementary of legal principles :

Point I.

The deed from Mrs. Buckingham to Ludlum was void for want of consideration, and no title passed thereby to him. Having no title himself, his grantees and mortgagees take nothing and have no interest in the land in question.

It appears from the agreement set out in the bill commencing on page 6, at line 30, that the conveyance of the Elizabethport property was the consideration for Mr. Ludlums' making the so-called give-and-take offer, and that such offer was the consideration for the conveyance in question.

Now this Court has decided in the case of Ludlum v. Buckingham, 39 New Jersey Eq., 564, in a litigation growing out of this very transaction, that the agreement embodying the provisions above referred to, for the conveyance of the property in question, was null and void, that Ludlum as surviving partner and receiver had no right to make such a contract and that the minds of the parties never met by reason of the concealment by Ludlum of certain material facts concerning the situation of the property. The state of facts upon which this last mentioned case was decided is distinctly charged in the bill in the case at bar, both as regards the relation of trustee and *cestui que trust*, p. 16, line 10, and as regards the Ludlums' concealment of the condition of the partnership estate at the time of the making of the agreement in question, p. 16, line 27, &c.

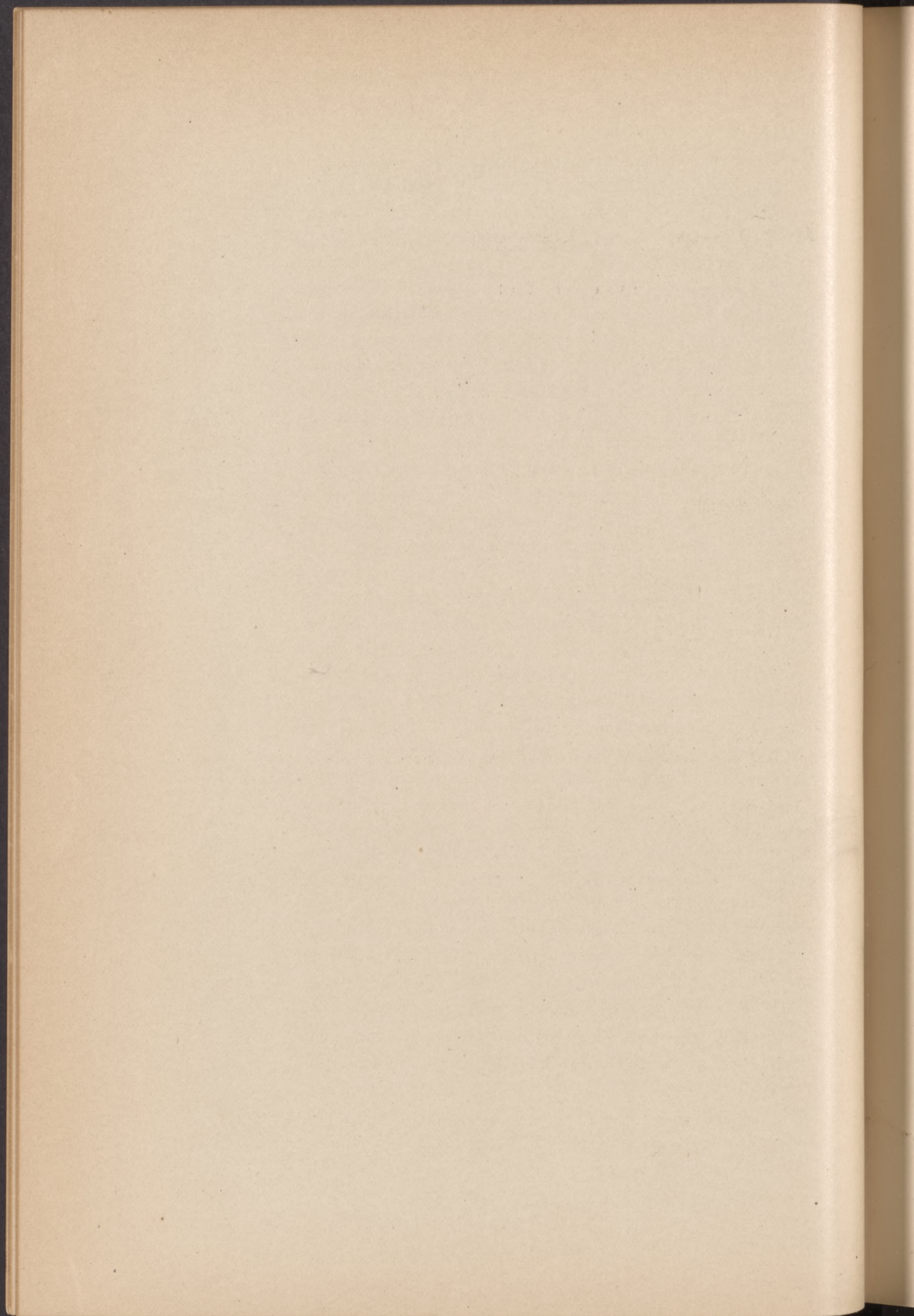
The consideration for the deed was the contract in question. This contract was void, therefore the deed was void and no title passed. Ludlum having no title could convey nothing by his pretended mortgage. It will not be seriously contended that Mrs. Catherine Ludlum, whether a *bona-fide* mortgagee for value or not, took anything more than the pretended mortgagor had to give. Except in cer-

tain cases utterly alien to the present discussion, the purchaser or mortgagee takes exactly such title as the seller or mortgagor has to give him and no more.

Point II.

The judgment appealed from should be reversed and final judgment rendered overruling the demurrer and for the relief demanded in the complaint.

WM. JAY,
of Counsel for the Appellants.



N. J. Court of Errors and Appeals.

ALICE BUCKINGHAM, *et al.*,

Appellants,

vs.

JAMES LUDLUM, *et al.*,

Respondents.

10

On Appeal.

POINTS FOR APPELLANT.

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James Horner died June 9, 1874. At the time of his death he was a member of the firm of James Horner & Co., composed of himself and James Ludlum. He left a will, by which he bequeathed and devised to his daughter Alice, in her own right and as trustee for her sister, Susan Horner, his entire property, except three acres of land, which he gave to Susan H. Ludlum. (Page 1 of Case.) He constituted Alice his sole executrix.

In August, 1874, Alice Buckingham exhibited her bill against James Ludlum for a settlement of the affairs of the late firm. On November 17, 1874, Ludlum was appointed receiver, and continued to act as such until July 31, 1879, when he was removed, and Andrew Kirkpatrick appointed in his stead.

Ludlum, while receiver, "put himself in open antagonism to Alice Buckingham and her interests, using his position as receiver and the moneys which came to his hands belonging to the estate, to prevent her from obtaining any settlement of its affairs." (Page 3, l. 17.) He 40

owed the late firm \$73,975.47, (p. 3, l. 37,) but he disputed his indebtedness to it, and no decree was made establishing the debt until August 22, 1876.

In April, 1875, the Court had directed a sale of the real and personal property. To obviate the necessity of selling the real estate, however, Ludlum, on April 26, 1875, made the following alternative offer :

10 " 1. Either party to say what he will give or take for the Pompton real estate, excepting the Cape May property, the party making such offer to take the Elizabethport property as a consideration for making such offer.

" 2. Mr. Ludlum will give \$2,500 in addition to the Elizabethport property to Mrs. Buckingham, if she will offer to give or take a certain price for the Pompton real estate, except Cape May, and also all the unfinished personal property thereon.

20 "The above to be carried out in good faith ; details as to time and mode of payment to be agreed on and fulfilled fairly."

With a view to ending the controversy, Alice Buckingham agreed to the first of the offers in a modified form and subject to certain contingencies. The terms of this agreement, *which was the only one the parties ever made on this subject*, are contained in the writing found on pages 6 to 12 of the printed Case.

This writing, after reciting that Ludlum had made a proposition to the effect that "either party should say what he would give or take for the Pompton real estate, 30 excepting Cape May, and the party to take the Elizabethport property as a consideration for making said offer," and after further reciting that "the said executrix did

* * * elect to receive the offer of said Ludlum as above, and to convey to him the Elizabethport property as the consideration for the same," goes on to provide (1) that the parties of the first part, (Alice and John M. Buckingham,) in consideration of one dollar, *and of the promises and agreements of the parties of the second part*, (James Ludlum and his wife,) hereinafter contained, will 40 execute a conveyance of "the Elizabethport property,

"and place said conveyance in the hands of the Hon. Amzi Dodd, to be held in *escrow*, and to be by him delivered to said James Ludlum upon the fulfilment of the agreements of the parties of the second part, as hereinafter contained."

The agreement then further provides (2) that Ludlum will, within two weeks from its date, deposit with the Hon. Amzi Dodd, a written offer for all the real estate, except Cape May and a church lot; (3) that the offer shall contemplate no other terms than cash or its equivalent, and that the Buckinghams shall make their decision whether they will buy or sell before the hour of 4 P.M. of the day following the day when Ludlum so deposits his offer; (4) that on a day to be fixed by said Amzi Dodd, not less than ten nor more than twenty days subsequent to said decision, all the parties shall appear in person or by counsel at his office, "and shall execute and deliver all necessary conveyances for the full and perfect fulfilment of all agreements herein contained in the way and manner hereinafter stated as follows: The party selling the Pompton real estate to make such full conveyance of his or her share in the same as shall constitute the purchaser sole owner and possessor of all the right, title and interest as held and enjoyed by the firm of James Horner & Co., at the date of its dissolution;" (5) that the sale was to be for the benefit of the firm; (6) that "should the executrix elect to purchase said Pompton real estate, then, upon the execution of the necessary papers as aforesaid by the parties of the second part and the deposit of the same with the said Amzi Dodd, said Ludlum shall receive the said Elizabethport conveyance as the consideration agreed upon for his give or take offer, and the conveyance of the parties of the second part shall be given to the parties of the first part, upon the fulfilment on their part of the terms and conditions of the offer;" (7) that should Alice Buckingham, the executrix, elect to sell her interest in said real estate and the parties of the first part execute the necessary papers as aforesaid and leave them with the said Amzi Dodd,

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then the said Elizabethport conveyance and the conveyance of the Pompton real estate before mentioned, shall only be delivered to said Ludlum on the fulfilment by the parties of the second part of the terms and conditions of the offer.

The agreement further stipulates that each party shall have a shop right; that the personal property might remain stored on the real estate, that the object and intention of it is "to eliminate from the Chancery proceeding
10 "all questions hindering the disposition and sale of the
"real estate," and that the Court shall have power to issue any order necessary to enforce its terms.

This agreement was executed June 9, 1875. Within the time limited, Ludlum offered to procure releases from the mortgagees of the real estate, and to pay into the assets of the firm \$30,000. Mrs. Buckingham thereupon elected to take the said real estate on those terms, having previously executed a deed for the Elizabethport property, and delivered it to Amzi Dodd in *escrow*. She
20 then offered to indemnify Ludlum against the mortgages which were a charge upon the real estate, and to charge herself with \$30,000 on account of her share of the surplus assets of the partnership. This proposition being declined by Ludlum, she proposed that he should become the purchaser upon the terms proposed by him, and this he also declined, (p. 12.)

After its deposit in *escrow*, but precisely when it does not appear, Mr. Dodd delivered the deed for the Elizabethport property to Ludlum, who recorded it, (p. 12,
30 l. 36.) He subsequently executed a mortgage upon the property to his mother, Catherine Ludlum, for \$15,000, (p. 17, l. 3,) but the mortgage was not *bona fide*, nor for value, (p. 18, l. 35; p. 19, l. 11.)

In July, 1876, Ludlum filed a petition asking the Court of Chancery either to decree a specific performance of this agreement or to award damages against Mrs. Buckingham for its non-performance. This, both the Court of Chancery and this Court refused, (p. 13, l. 28.)
40 Then Ludlum filed a supplemental bill, asking a com-

pensation in damages for the same alleged non-performance. This was also refused, both by the Court of Chancery, (p. 14, l. 28,) and by this Court. The refusal in the Court of Chancery was based upon the ground that Ludlum's conduct toward Mrs. Buckingham was such as to disentitle him to relief. In addition to that reason, *this* Court held him not entitled to the relief he prayed because he was not able to perform the contract on his part by reason of his inability to transfer a water right which he had suffered to expire for the time being, and which he afterwards procured in his wife's name, (*Ludlum vs. Buckingham*, 8 Stew., 71; 12 Stew., 563, page 29, ll. 38 *et seq.*, of printed case,) and also because the contract was the result of a misunderstanding, the minds of the parties not having met. (12 Stew., on p. 567.) 10

On this state of facts, the question arises whether Ludlum can retain the Elizabethport land, worth \$8,000, (p. 6, l. 20,) the deed for which was never delivered by Mrs. Buckingham, except in *escrow*.

It seems plain that he cannot. 20

1. When this agreement was made, as Vice-Chancellor Van Fleet admits, "the relation of trustee and *cestui que trust* existed between Mr. Ludlum and Mrs. Buckingham, both before and after his appointment as receiver." (8 Stew., on p. 79.) This relationship arose from his being surviving partner and receiver, and he continued in the uninterrupted performance of his duties as such from November, 1874, to July, 1879. The agreement in controversy was made in April, 1875. 30

The case, then, stands thus: Ludlum, being trustee, obtains from his *cestui que trust* an agreement to the effect that she will convey to him the Elizabethport property, and this agreement is made without the order of the Court and during the existence of the trust relationship. It is true that the paper recites that the preliminary proposal was made in the presence of the Vice-Chancellor, the Hon. Amzi Dodd, and that the deed was delivered in *escrow* to the Hon. Amzi Dodd; but it is nowhere suggested that it was officially or unofficially approved by 40

him, nor even that its contents were communicated to him, nor that in any part of the transaction it received his sanction. It is true that he delivered the deed to Ludlum, but he did it merely as an individual in the performance of an act which any other individual might have performed, and which must be judged of in the same way. It was not a judicial act, and whether it was warranted, is the question now to be considered. It was not authorized by Mrs. Buckingham, except in so far as
 10 the contract authorized it. Even if it had been a judicial act, it would be open to review.

In *Staats vs. Bergen*, 2 C. E. Gr., 559, the Chief Justice, delivering the opinion of this Court, says: "I think, upon correct principle, a trustee in no case nor in any crisis can become the purchaser of property when the fact of his making such purchase has a tendency to promote his own interest at the expense of his *cestui que trust*."

20 It may be said that, from the nature of the case under consideration, this language refers merely to transactions in which the *cestui que trust* does not directly participate; but, in *Condit vs. Blackwell*, 7 C. E. Gr. 486, the transaction was one confessedly between attorney and client or principal and agent; and Mr. Justice VAN SYCKEL, delivering the opinion of this Court, says: "In the case of trustee and *cestui que trust*, the rule goes to the extent of creating a positive incapacity on the part of the trustee to purchase the trust estate, and gives the *cestui que trust* power to avoid the conveyance at his option."
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This is also the doctrine of the leading case of *Fox vs. Mackreath*, 1 Lead. Cas. in Eq., *125. It is there said: "The well-known and thoroughly discussed case of *Fox vs. Mackreath* is usually referred to as having established the rule ever since recognized and acted on by courts of equity, viz, that a purchase by a trustee for sale from his *cestui que trust*, although he may have given an adequate price and gained no advantage, shall be set aside at the option of the *cestui que trust*, unless the connection
 40 between them most satisfactorily appears to have been

dissolved, and unless all knowledge of the value of the property acquired by the trustee has been communicated to his *cestui que trust*." (*p. 125.)

If this be the rule, then the agreement between Mrs. Buckingham and Ludlum, in reference to the Elizabethport property, at once and without more becomes voidable at her option.

In answer to this view of the case, the Vice-Chancellor refers us to his opinion in *Ludlum vs. Buckingham*, (8 Stew., 71,) where he seeks to distinguish the case in hand from *Colgate vs. Colgate*, 8 C. E. Gr., 372. There the Court held that a surviving partner, being also an executor of his deceased co-partner, could not take a conveyance of the partnership estate from the other executors of such copartner. The distinguishing circumstance in the opinion of the Vice-Chancellor, consists in the surviving partner's being one of the executors of the deceased copartner. But, though Ludlum was not one of the executors of James Horner, he was, by virtue of his appointment as receiver, bound as fully to guard the interests of Horner's estate as if he had been one of his executors. He was under the same obligation, as receiver, to dispose of Horner's interest in the property for the highest price, and on the most advantageous terms, as if he had been his executor. By stipulating for a conveyance of the trust property to himself and for his personal benefit, he voluntarily assumed,—to use the expression of the Vice Chancellor—two characters radically opposite in their duties and interests; and this the law will not permit. As receiver of the property whose proceeds should have all gone into Horner's estate, by reason of Ludlum's enormous indebtedness to the firm, he was bound to secure the highest price for it; as purchaser on his *own* behalf, it was his interest to obtain the lowest. See *Lewin*, and cases cited by the Vice-Chancellor.

(2.) Mr. Pomeroy, in his *Equity Jurisprudence*, Vol. II. § 958, appears to lay down a somewhat less rigid rule. He says that a purchase by a trustee from his

- cestui que trust*, even for a fair price and without any undue advantage, or any other transaction between them by which the trustee obtains a benefit, is generally voidable and will be set aside on behalf of the beneficiary; but that there is no imperative rule that a transaction between the parties is necessarily in every instance voidable. "*It is possible*," he says, "*for the trustee to overcome the presumption of invalidity*." To do this, he must, among other things, show that the price paid was fair and adequate;
- 10 that he made a perfectly honest and complete disclosure, and that he has obtained no undue or inequitable advantage." But, if we adopt this rule, can Ludlum overcome this presumption of invalidity? The bill charges and the demurrer admits that Ludlum denied his indebtedness to the estate, although it was afterwards proved to exist (p. 13, § 9.)—Mrs. Buckingham then supposing that Ludlum was entitled to some part of the estate. (p. 6, l. 10.) It further appears from the agreement itself
- 20 Elizabethport lands was the agreement on Ludlum's part to make an offer for the rest of the real estate. Will the Court say that the mere agreement to make an offer was, under the circumstances, a fair and adequate consideration for lands worth \$8,000—all of which in equity belonged to Horner's estate? The question is not, as the Court below seems to assume, whether, if no trust relationship had subsisted between the parties, and they were in all respects dealing at arm's length and upon a perfectly equal footing, with the same means of knowl-
- 30 edge, such a bargain would be upheld on the principle that no matter how small the consideration, it will support any promise as between persons thus circumstanced; but whether such trust relationship being admitted, the bare agreement to make an offer is a perfectly fair and adequate consideration for a property worth \$8,000. So far from its being adequate, it should seem that Ludlum, with his long and intimate acquaintance with the affairs of the partnership and his superior knowledge, could well have afforded to make his "give or take" offer on
- 40 the bare promise of Mrs. Buckingham to give or take

in the manner offered. At all events, it lies upon Ludlum to establish that the making of the offer was, under the circumstances, worth \$8,000—not for Mrs. Buckingham to show that it was not.

(3.) But by the terms of the agreement itself, Ludlum was not entitled to receive the deed held in *escrow* until he had performed or was ready to perform his part of it. This proposition involves a mere question of interpretation.

In the recitals it is said that, as the consideration for Ludlum's offer, the Buckinghams will convey the Elizabethport property; but when or under what circumstances, is not recited. The time when, and the circumstances under which, the conveyance will be made are, however, especially provided for in the body of the agreement, as will now appear.

It is agreed, in the first place, that Mr. and Mrs. Buckingham will convey the Elizabethport property "in consideration of one dollar *and of the promises and agreements of the parties of the second part* (Mr. and Mrs. Ludlum) *hereinafter contained.*" The consideration, then, as stated in the body of the agreement, is not merely the offer to be made by Ludlum, but all the promises and agreements made by him.

It is agreed, in the second place, that the deed for the property shall be placed in the hands of the Hon. Amzi Dodd, to be held in *escrow*, and by him delivered to the said Ludlum, "upon the *fulfilment* of the agreements of the parties of the second part as hereinafter contained." (p. 8, l. 38.) This clause expressly and explicitly provide that the deed shall not be delivered until Ludlum has fulfilled his agreements,—the plural of this word being specially significant, pointing, as it does, not only to the agreement to make an offer, but also to the complete performance of all the stipulations into which he enters.

In the third place it is stipulated that, on a day to be fixed by the Hon. Amzi Dodd, not less than ten nor more than twenty days after Mrs. Buckingham's decision,

all the parties are to appear, in person or by counsel, at Mr. Dodd's office, "and shall execute *and deliver* all necessary conveyances for the full and perfect fulfilment of all agreements herein contained." (p. 9, ll. 37, *et seq.*)

By this clause a time is fixed for the delivery of the conveyances, and by it Mr. Ludlum was as much bound to deliver his conveyance of the Pompton real estate as Mrs. Buckingham was bound to deliver her conveyance of the Elizabethport property. *The delivery of both was*
 10 *to be simultaneous.*

The only other clauses relating to this subject are the following:

"Should the executrix elect to *purchase* said Pompton real estate, then, upon the execution of the necessary papers as aforesaid by the parties of the second part, and the deposit of the same with the said Amzi Dodd, said Ludlum shall receive the said Elizabethport conveyance as the consideration agreed upon for his 'give or take'
 20 offer, and the conveyance of the parties of the second part shall be given to the parties of the first part, upon the fulfilment on their part of the terms and conditions of the 'offer.'"

"But should the executrix elect to *sell* her interest in said Pompton real estate, and the parties of the first part execute the necessary papers, as aforesaid, and leave them with the said Amzi Dodd, then the said Elizabethport conveyance and the conveyance of the Pompton real estate, before mentioned, shall only be delivered to said
 30 Ludlum on the fulfilment by the parties of the second part of the terms and conditions of the 'offer.'"

The first of these clauses indicates the course to be pursued in case Mrs. Buckingham should elect to *purchase*; the second, in case she should elect to *sell*. Both carry out the idea, before expressed, that the mutual conveyances are to be simultaneously delivered.

It is, however, with the first of these clauses that we now have to do, Mrs. Buckingham having elected to *purchase*. From this clause, read in connection with the
 40 preceding, it appears that Ludlum was to deposit with

the Hon. Amzi Dodd the papers necessary to vest in Mrs. Buckingham a good title to the Pompton real estate, and not until these papers were so delivered was the deed for the Elizabethport property to be delivered to him (Ludlum). Immediately after Mr. Dodd delivered the Elizabethport deed, he was also to deliver to Mrs. Buckingham the deed for the Pompton real estate, she then paying the money. This is evident, not only from the use of the word "then," following the words "Pompton real estate," and from the reference of the words "as aforesaid," to the preceding clause above adverted to, but also from the fact that, unless the clause under consideration be read in connection with its predecessor—which fixes a time not only for the execution but also for the *delivery* of the deeds—no time whatever is fixed for the performance by Mrs. Buckingham of her part of the agreement. 10

If it be suggested that the delivery referred to, on p. 10, l. 2, of the Case, is merely the delivery of the deed by Mrs. Buckingham to Mr. Dodd, this suggestion is completely met by the context, which calls for a delivery of "all necessary conveyances for the full and perfect fulfilment of all agreements herein contained," and then declares the effect of the conveyance of the Pompton real estate to be such as to "constitute the purchaser sole owner of the * * * title * * * as held and enjoyed by the late firm, * * * and place him or her in the untrammelled possession thereof,"—a result which would be impossible if the deed remained in *escrow*. 20 30

The conclusion is that it is clearly apparent from the face of the agreement that the delivery to Ludlum of the deed for the Elizabethport property was to be simultaneous with the delivery to Mrs. Buckingham of a deed for the Pompton property.

This conclusion carries with it the most important consequences.

(a.) Both the Court of Chancery and this Court have held that Ludlum could not recover damages against 40

Mrs. Buckingham for her alleged breach of contract, for the reason that he himself by his own misconduct had deprived her of the means of performing it. Now, if he was the cause of her not performing it he certainly will not be allowed to profit by his own wrong. The Elizabethport property was the consideration which he was to receive for making the "give or take" offer, but the offer was an offer to be carried out in good faith.

10 Suppose that at the time he made the offer and signed the agreement, it had been his purpose not to carry it out in good faith, but merely to use it as a means of getting into his own hands the Elizabethport property. Would the Court then say that such an offer would, without full performance of the agreement on his part, give him an indefeasible title in equity? And wherein does the case supposed differ in principle from that before us?

20 The Vice-Chancellor, at the conclusion of his opinion, very shortly dismisses the subject by saying that he knows of no rule of law which empowers the Court, for wrongs or fraud which Ludlum has committed against Mrs. Buckingham *since the deed was delivered*, to take the land from the defendant and restore it to the complainant. Now it is evident that this proposition is based upon an entire misapprehension of the facts. Undoubtedly, if Ludlum had perpetrated the grossest wrongs against Mrs. Buckingham after he had become entitled to his deed, the commission of them would be no answer to his claim to have it delivered. But the agreement was an entirety. By its terms, as has been seen, Ludlum 30 was to obtain nothing until he had performed it on his part or was ready at the time appointed to perform it. But before that time, his own wrongful act was the cause of Mrs. Buckingham's non-performance. At latest, Ludlum ought to have paid the money which he owed, at the time fixed by Mr. Dodd for the execution and delivery of the necessary conveyances. (p. 10, l. 2.) Until this time he was not, under any circumstances, entitled to his deed. He was then, however, in complete default. How is it possible, therefore, for the Court

below to say that his wrongs and frauds were committed after the delivery of the deed. The exact time of the delivery does not appear, but we cannot suppose that Mr. Dodd would have delivered it prior to the earliest day appointed for its delivery by the terms of the agreement.

(b.) Again: As Ludlum himself utterly defeated every purpose which Mrs. Buckingham had in view when she agreed to give him this property, has not the consideration upon which its conveyance depended entirely failed, and will not a court of equity restore it to her? If its delivery by Mr. Dodd was unauthorized, she has in fact never parted with the title. But what was this property, worth \$8,000, given for—for a bare offer, divorced from any performance? Will Ludlum be permitted to “keep the word of promise to the ear, and break it to the hope?” Will he be permitted to make promise for the sake of getting the property, and then prevent the performance of that which formed the sole consideration for the conveyance of the property so promised?

(c.) This Court has already decided that Ludlum himself was not able to perform his part of the contract; that he had led Mrs. Buckingham to suppose that the title to the water power was good, whereas, in point of fact, he had allowed the Schuyler lease, upon which the title largely depended, to expire without renewal. What he did, then, was to obtain from Mrs. Buckingham a valuable piece of property, on the representation that he would do that which he had, through his own neglect, disabled himself from doing. Can he claim this property under these circumstances?

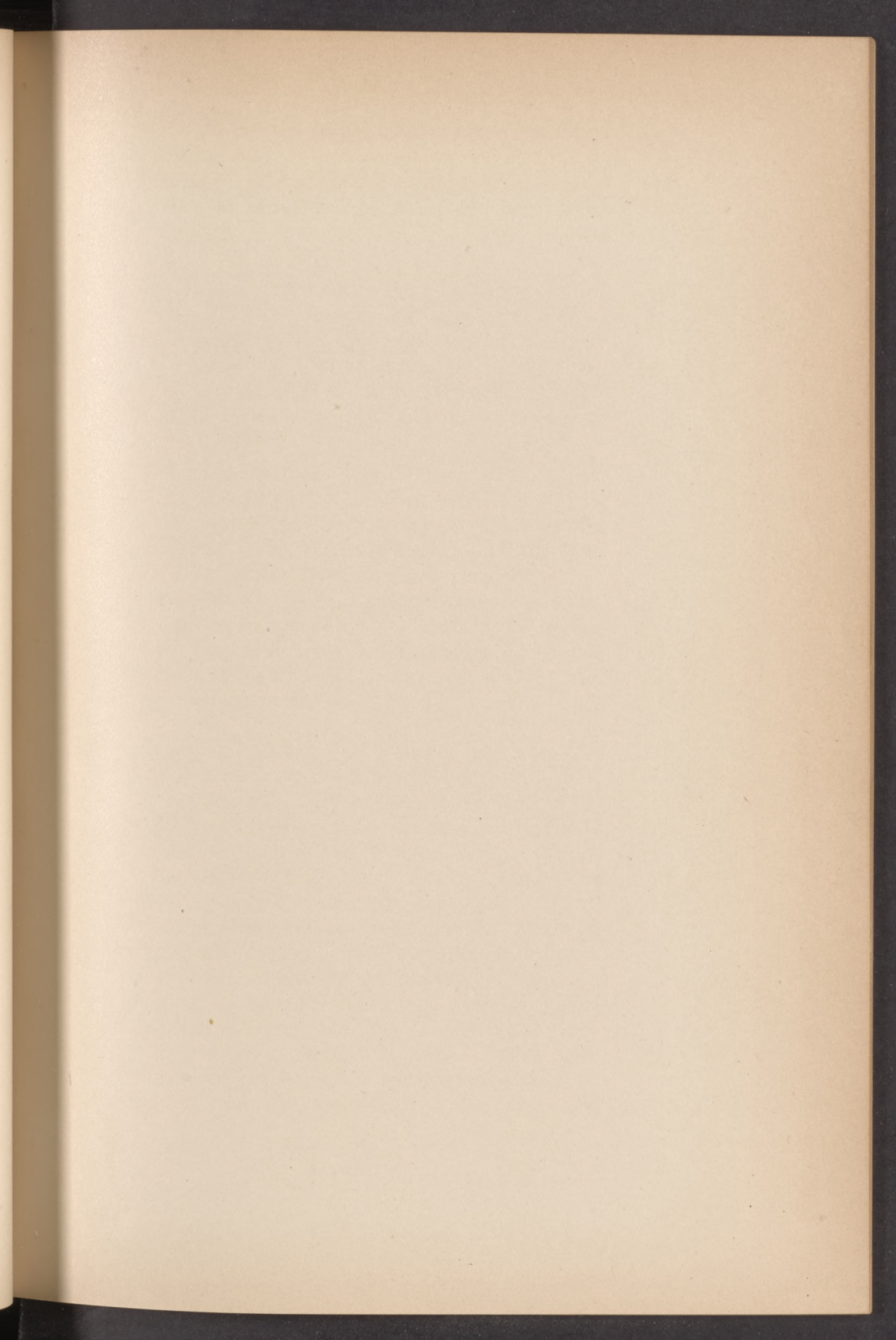
(d.) Further, this Court has considered the contract inoperative, for the reason that the minds of the parties never met. Says Mr. Justice MAGIE on this head, (*Buckingham vs. Ludlum*, 12 Stew.) referring to statements made by Mr. Ludlum, “Such a statement would

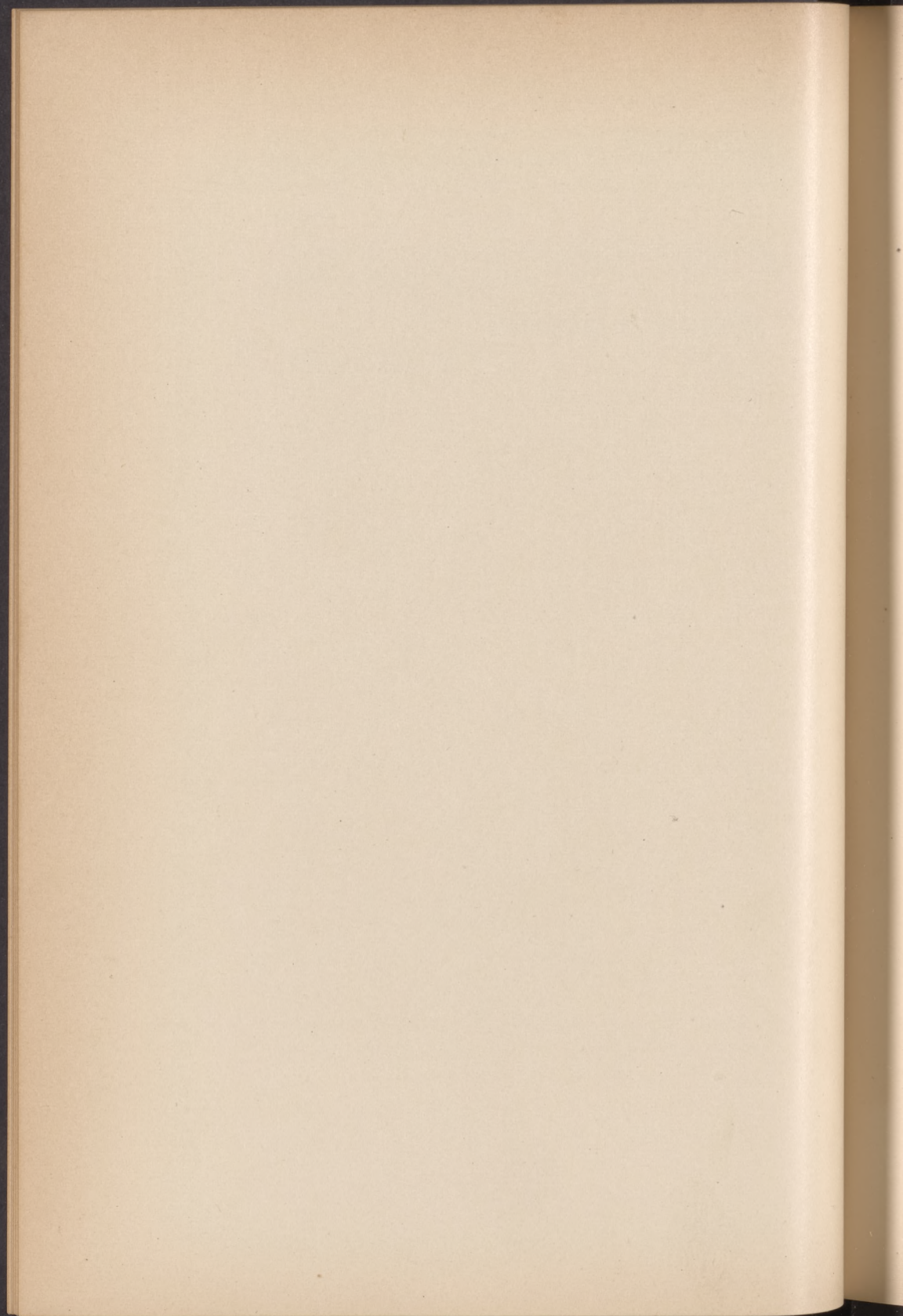
justify respondents in believing, as testified to, that the Schuyler title" (to the water power,) "had been acquired. In that view, the contract was the result of a misunderstanding, and the minds of the parties did not meet therein."

For all these reasons it is confidently submitted that the decree should be reversed.

FREDERIC W. STEVENS.

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March Term, 1886.





To his Honor, THEODORE RUNYON, Chancellor of the State of New Jersey, humbly complaining shows unto your Honor, your oratrix, Alice Buckingham, wife of John M. Buckingham, of the City, County and State of New York, and said John M. Buckingham, who joins with her as party defendant: 10

1st.—That her father, James Horner, now deceased, late of the said City of New York, and James Ludlum, of Pompton, in the County of Passaic, and State of New Jersey, heretofore composed the firm of James Horner and Company, and that under that name they, for a long time prior to the dissolution 20 of the said firm, carried on the business of manufacturing files and steel at Pompton, aforesaid, having been at the time of the dissolution of the said firm equal partners therein.

2d. That on the 9th day of June, 1874, the said firm was dissolved by the death of her said father, who by his last will, duly executed, devised and bequeathed to your oratrix, in her own right, and as trustee for her sister, Susan Horner, his entire interest in the assets, and the property of the said firm 30 of James Horner & Company, excepting a small plot of land situate at or near Pompton aforesaid, containing about three acres of land, on which a dwelling was then being erected, which lot he devised to Susan H. Ludlum, wife of James Ludlum, and in and by the said will made your oratrix sole executrix thereof, and she having duly proved the said will, letters testamentary were issued to her, and she entered upon the trusts and 40

duties thereby imposed about the 21st day of August, in the year last stated; that soon after your oratrix had taken upon herself the execution of the said trusts, and finding it was impossible otherwise to obtain a settlement of the partnership affairs of the late firm, she exhibited her bill in this Court against the said James Ludlum, surviving partner, for an account and settlement of the partnership estate, and with other relief asked for the
 10 appointment of a receiver in the said suit, and that after the said bill had been filed, this Court, at the instance of the said James Ludlum, the said surviving partner, appointed him the receiver of the said partnership estate, by its order made therein on the 17th day of November, 1874, now on file, as by reference thereto will more fully appear; and your oratrix shows that the said suit is still pending, no final determination therein having been had.

20 3rd. That the said James Ludlum continued to act as receiver of the said estate in the said suit from the day of his appointment until the 31st day of July, 1879, when he was removed from the said office, by the order of this Court, and Andrew Kirkpatrick, of the City of Newark, was appointed in his place and stead, and that the said Andrew Kirkpatrick is now serving in that capacity, and has in his hands as such receiver a small portion of the assets of the said estate.
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4th.—That as surviving partner and receiver of the said estate, the said James Ludlum had in his possession and under his control all the books and accounts of the said firm, and had, from his position and situation, full knowledge of the character and value of the assets of the said firm, but that your oratrix had very little knowledge or information with reference thereto, except such as she obtained
 40 from time to time from the said Ludlum, and was

able to form only an imperfect judgment in relation to the assets and their value. That the books of account of the said firm had been kept in such a manner that they could not be easily understood, and that it was with great difficulty that your oratrix could obtain any information to guide her in relation to what was the value of her interest in the said estate; that although the said Ludlum by his appointment as receiver, and his acceptance of that office, became trustee for your oratrix in the administration of the said estate and was bound to administer the same in her interest and to act openly, fairly and justly towards her, he not only failed and neglected so to do, but on the contrary, from the time of his appointment as Receiver, as aforesaid, and during the whole time of his office, put himself in open antagonism to her and her interests, using his position as Receiver and the moneys which came to his hands belonging to the estate to prevent her from obtaining any settlement of its affairs, and as your oratrix charges and shows, combined and colluded with the creditors of the said estate and with others who had pretended claims against the same, to cause the property and assets of the said estate to be sacrificed and sold below their fair and reasonable value, and that he by these and other methods endeavored to prevent your oratrix from receiving her fair share of the assets of the said estate and proceeds thereof.

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5th—That it has been adjudged and decreed in the said suit brought by your oratrix against the said James Ludlum that at the death of James Horner, the father of your oratrix, and the dissolution of the said firm, the said James Ludlum was indebted to the said partnership estate in the sum of \$73,975.47, and that he had very little, if any, actual interest therein, except his equity as a partner in said firm, to secure the application of

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the firm assets to the liquidation and discharge of the firm liabilities, and your oratrix charges and shows that at the dissolution of the said firm there were ample assets, easily convertible into cash, to discharge all the firm liabilities and leave a considerable sum as the share and portion of your oratrix, as the executrix and devisee of the said James Horner, deceased, but that the said Ludlum, by his administration of the said estate

10 while the same was in his hands as surviving partner and receiver thereof, so grossly mismanaged the same and so fraudulently disposed of the assets of the same, and suffered and permitted them to be disposed of, that but a few thousand dollars of assets remain in the hands of the receiver recently appointed by the Court to take the place of the said James Ludlum, while the real and personal estate of the said firm, together comprising a large and

20 and so manipulated by the said Ludlum and certain creditors of the estate that the same have become the property of a company composed of the said Ludlum and the said creditors of the said estate, with whom your oratrix charges he collusively and fraudulently combined, of which company the said Ludlum is the president and principal manager; that no part of the large sum found to be due by the said Ludlum to the said firm at the time of the dissolution thereof has ever been paid by him or

30 turned over by him to the Receiver appointed in his stead, but that he claims he is unable to pay the same, and refuses to make payment thereof.

6th.—That during the progress of the said suit brought by your oratrix as aforesaid, and about the month of April, in the year 1875, on the application of your oratrix, an order was entered in the said suit directing the said Receiver to make sale of the property and assets of the said estate, undisposed

40 of, consisting of a large amount of personal proper-

ty, used for manufacturing purposes, and in the various processes of manufacture, and the real estate owned by the said partnership, consisting of a large tract of land at Pompton aforesaid, containing about 500 acres, upon which were situated the large and valuable manufacturing establishments lately owned and operated by the said firm, and connected with which were the water rights owned and controlled by it; that soon after the making of the aforesaid order the said defendant, James Ludlum, 10 proposed that instead of and in lieu of a public sale of that part of the real estate, the same should be divided and disposed of by agreement between the parties interested therein, and so eliminated from the other matters litigated in the said suit and for that purpose proposed that an offer should be made or given, either by him or the said Alice Buckingham, for the same, which proposition was in writing, and is as follows :

“ April 26th, 1875, Mr. Ludlum makes these al- 20
 ternative offers :

“ 1. Either party to say what he will give or take
 “ for the Pompton real estate, excepting the Cape
 “ May property, the party making such offer to
 “ take the Elizabethport property as a consideration
 “ for making such offer.

“ 2. Mr. Ludlum will give \$2,500 in addition to
 “ the Elizabethport property to Mrs. Buckingham 30
 “ if she will offer to give or take a certain price for
 “ the Pompton real estate, except Cape May, and
 “ also all the unfinished personal property thereon.
 “ The above to be carried out in good faith ; de-
 “ tails as to time and mode of payment to be agreed
 “ on and fulfilled fairly.”

And your oratrix shows that the property mentioned as “Cape May” is a small tract, parcel of said Pompton property, upon which a dwelling 40

house was erected, or being erected, at the time of the dissolution of the firm of James Horner & Company as stated.

7th. That your oratrix supposed and believed at the time that the offer was made in good faith and for the purpose of settling to a great extent the controversy then pending, and dividing in a fair way a portion of the assets of the said estate, she supposing and believing at that time that said L. was entitled to some part thereof, and that, influenced by this consideration, and for the purpose of saving time and expense and ending an unfortunate controversy, your oratrix consented to enter into the arrangement proposed, and in pursuance of that purpose, on the 10th day of May following, she agreed to convey to said Ludlum the real estate situate at Elizabethport, consisting of about five and a half acres of dock property, then valued at about the sum of \$8,000, on condition that he should name a price which he would give or take, as she should elect, for the real estate belonging to the late firm, situate in Pompton; and in pursuance of this preliminary arrangement, on the 9th of June following, a written contract or agreement, expressing in detail the arrangement thus made was formally executed, of which the following is a true copy :

30 “Whereas, James Horner and James Ludlum
 “were for many years co-partners in business under
 “the name, style, and firm of James Horner & Co.,
 “and as such became possessed of about five acres
 “of land at Elizabethport, New Jersey, and of
 “about 500 acres of land in the Townships of
 “Pompton and Wayne, in the County of Passaic,
 “and State of New Jersey, and also of certain water
 “rights at the latter place.

“ And whereas, the said firm of James Horner &
 “ Co. was dissolved on the 9th day of June, 1874,
 “ by the death of James Horner, who previous
 “ thereto did by his last will and testament devise
 “ all his interest in said property to his daughter
 “ Alice (the wife of John M. Buckingham), except
 “ a devise in said will in the words following :

“ ‘ 4th. I will, devise and bequeath unto
 “ ‘ Mrs. Susan H. Ludlum, the wife of James 10
 “ ‘ Ludlum, my partner, all my right, title
 “ ‘ and interest in the land on which she is
 “ ‘ now erecting a dwelling house, being a
 “ ‘ portion of my estate in Pompton, New
 “ ‘ Jersey, which she has selected for that
 “ ‘ purpose, the said plot not to exceed three
 “ ‘ acres of land, the same to be her’s absolu-
 “ ‘ tely and forever.’ ”

“ And in a church lot previously conveyed to 20
 “ Christ Church, also at Pompton, and did name
 “ the said Alice Buckingham sole Executrix of said
 “ last Will and Testament.

“ And whereas the said Alice Buckingham did
 “ immediately after the probate in New Jersey of
 “ said Will, in which she was made residuary
 “ devisee and sole Executrix, commence an action
 “ in the Court of Chancery, against James Ludlum,
 “ the surviving partner, for a final accounting and 30
 “ settlement of the affairs of said firm.

“ And whereas it is desirable to eliminate from
 “ the Chancery proceedings all possible questions
 “ so as to simplify the case, and to this end, and at
 “ the invitation of the Vice-Chancellor, a consulta-
 “ tion between the parties was had at the Chambers
 “ and in presence of said Vice Chancellor, on the
 “ 26th of April, at which the said James Ludlum
 “ made to the Executrix, through her counsel and 40

“ husband, John H. Buckingham, the following
 “ proposition :

“ ‘ Either party to say what he will give or
 “ ‘ take for the Pompton real estate (except
 “ ‘ the Cape May) and the party to take
 “ ‘ the Elizabethport property as a con-
 “ ‘ sideration for making said offer, and
 “ ‘ give to said Executrix two weeks
 10 “ ‘ time in which to decide whether she would
 “ ‘ make or receive the offer.

“ And whereas the said Executrix did within the
 “ two weeks elect to receive the offer of said Ludlum
 “ as above and to convey to him the Elizabethport
 “ property as the consideration for the same.
 “ Now therefore this agreement, made the ninth
 “ day of June, 1875, between Alice Buckingham, Ex-
 “ cutrix, and John M. Buckingham, her husband,
 20 “ both of the City and State of New York, parties
 “ of the first part, and James Ludlum, and Susan
 “ H. Ludlum, his wife, of the Township of Pompton,
 “ County of Passaic and State of New Jersey,
 “ parties of the second part, witnesseth that the
 “ parties of the first part, for and in consideration of
 “ one dollar to them in hand paid, the receipt where-
 “ of is hereby acknowledged ; and of the promises
 “ and agreements of the parties of the second part
 “ hereinafter contained, will execute and convey to
 30 “ the said James Ludlum, all their right, title and
 “ interest, in the real estate situated at Elizabethport
 “ as aforesaid, the same being all that possessed by
 “ James Horner in his life time, as part owner with
 “ James Ludlum, and that on or before the 10th
 “ day of June, they will place said convey-
 “ ance in the hands of the Hon. Amzi Dodd, to
 “ be held in escrow, and to be by him delivered to
 “ said James Ludlum, upon the fulfilment of the
 “ agreements of the parties of the second part, as
 40 “ hereinafter contained.

“ And the parties of the second part for, and in
 “ consideration of, one dollar to them in hand paid,
 “ the receipt whereof is hereby acknowledged, and
 “ of the promises and agreements of the parties of
 “ the first part hereinbefore contained, covenant
 “ and agree that the said James Ludlum shall and
 “ will, within two weeks from the date hereof, de-
 “ posit with the Hon. Amzi Dodd, a written offer
 “ for all the real estate of the late firm of James
 “ Horner & Co., lying and being in the township 10
 “ of Wayne and Pompton in the county of Passaic,
 “ together with all the buildings and manufactories
 “ and fixed machinery with duplicate castings for
 “ furnaces and finished rollers as heretofore used,
 “ mills, flooring and water power, and water rights
 “ connected therewith, as fully and completely as
 “ heretofore ever owned and enjoyed by said late
 “ firm of James Horner & Co., excepting and re-
 “ serving only the lot heretofore deeded to Christ
 “ Church at Pompton, and the property known and 20
 “ designated as ‘Cape May’ and indicated on a
 “ map of the property by a yellow color, and marked
 “ J. Ludlum, containing $6\frac{29}{100}$ acres, the title to
 “ which is in dispute and in litigation in this ac-
 “ tion.

“And it is also agreed between the parties hereto
 “ that the said offer to be made as above by said
 “ Ludlum shall contemplate no other terms than
 “ cash, or its equivalent, and that it shall be op-
 “ tional with the parties of the first part whether 30
 “ they will buy or sell on the terms to be stated,
 “ and that they shall make their decision in writing
 “ and leave it with the Hon. Amzi Dodd on the day
 “ following the said deposit before the hour of 4
 “ P. M.

“And it is also understood and agreed between
 “ the parties hereto that on a day to be fixed by the
 “ said Amzi Dodd, not less than ten, or more than
 “ twenty days subsequent to said decision, to be
 “ made as last before mentioned, all the parties to 40

“ this agreement shall appear either in person or by
 “ counsel at his office, and shall execute and deliver
 “ all necessary conveyances for the full and perfect
 “ fulfilment of all agreements herein contained in
 “ the way and manner hereinafter stated, as fol-
 “ lows: The party selling the said Pompton real
 “ estate to make such full conveyance of his or her
 “ share in the same as shall constitute the pur-
 “ chaser sole owner and possessor of all the right,
 10 “ title and interest as held and enjoyed by the firm
 “ of James Horner & Co. at the date of its dissolu-
 “ tion and place him or her in untrammelled posses-
 “ sion thereof.

“ It is understood that the sale and transfer of
 “ said Pompton real estate is to be for the benefit
 “ of the late firm, that the consideration therefor is
 “ to be for the firm’s interest therein, and to be
 “ deposited with the Court having jurisdiction over
 “ the final settlement and accounting between the
 20 “ parties and subject to its orders.

“ Should the executrix elect to purchase said
 “ Pompton real estate, then upon the execution of
 “ the necessary papers as aforesaid, by the parties
 “ of the second part, and the deposit of the same
 “ with the said Amzi Dodd, said Ludlum shall re-
 “ ceive the said Elizabethport conveyance as the
 “ consideration agreed upon for his ‘give or take’
 “ offer, and the conveyance of the parties of the
 “ second part shall be given to the parties of the
 30 “ first part upon the fulfillment on their part of the
 “ terms and conditions of the ‘offer.’

“ But should the executrix elect to sell her in-
 “ terest in said Pompton real estate, and the par-
 “ ties of the first part execute the necessary papers
 “ as aforesaid, and leave them with the said Amzi
 “ Dodd, then the said Elizabethport conveyance
 “ and the conveyance of the Pompton real estate
 “ before mentioned, shall only be delivered to said
 “ Ludlum on the fulfillment by the parties of the

“second part of the terms and conditions of the
“ ‘offer.’

“ It is also understood and agreed between the
“ parties hereto, that the purchaser of the Pompton
“ Real Estate, shall have assigned to him or her,
“ one ‘shop right’ for the use of the Steel Pud-
“ dling Patent, as a consideration for his purchase
“ of the furnaces built and intended for its use, and
“ that the seller shall also be entitled to a like 10
“ ‘shop right,’ to be used in any one works with
“ which he or she may be actively connected as
“ owner or partner, said right to be for the benefit
“ of the heirs, and assigns of either party.

“ And it is further understood and agreed be-
“ tween the parties, that the personal property of
“ the late firm now lying on said real estate not in-
“ cluded in the foregoing agreement, shall be per-
“ mitted, without costs to the estate, to remain and 20
“ be stored upon the property, and cared for by the
“ Receiver until sold, but that it shall not by him
“ be allowed to obstruct, or interfere with the party
“ operating said works, except that the live stock
“ shall be by him removed and sold immediately
“ upon the completion of the foregoing agreement.

“The object and intention of the covenants and
“ agreements herein contained being, as heretofore
“ stated, to eliminate from the Chancery proceed- 30
“ ings all questions hindering the disposition and
“ sale of the real estate of the late firm of Horner J
“ & Co.

“ It is hereby agreed between the parties that
“ the Court shall have the power to issue any order
“ necessary to enforce the terms and conditions
“ thereof.

“In witness whereof the said parties to
 “these presents, have hereunto
 “set their hands and seals, the
 “ninth day of June, 1875.

“J. M. BUCKINGHAM, [L. s.]

“ALICE BUCKINGHAM, [L. s.]

“Sealed and delivered }
 in the presence of }

CHARLES THILS.

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8th.—Your oratrix further shows that within the time limited the said Ludlum made an offer in and by which he proposed to procure from the mortgagees who held mortgages on the said real estate, releases of their mortgage debts, and to pay into the assets of the said firm the sum of \$30,000 for said real estate; your oratrix thereupon elected to take the said
 20 real estate on the terms of the offer made by the said Ludlum, and on the day named, she having prior to that time made and executed a deed to the said Ludlum for her interest in the said Elizabethport property and delivered the same to the said Amzi Dodd in escrow, she offered in fulfilment of the contract on her part to indemnify said Ludlum against his liability for the said mortgage debts, and to charge herself with \$30,000 on account of her
 30 estate; that the proposition was declined by the said Ludlum, and that she then proposed to him to change places with him in regard to the said contract and allow him to become the purchaser upon the terms proposed, which he declined also to do; that the said deed for the Elizabethport property was delivered to the said Ludlum by the said Amzi Dodd and that he, soon after receiving the said deed, placed the same upon record in the County of Union, where the said lands are situate.

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9th.—Your oratrix further shows, that soon after the appointment of the said Ludlum as Receiver of the said partnership estate, he made and filed in this Court a partial inventory of the partnership estate which came to his hands and possession as such Receiver, and in and by the said inventory admitted that at the death of the said James Horner he (the said Ludlum) was indebted to the partnership estate according to the account of the firm in about the sum of \$74,000; but, as one of the defences made by him in the said suit, he claimed that he been released by the said James Horner from the payment of this sum, and that he should not therefore be charged therewith, and no settlement having been effected by the said proposed arrangement the issues in the said suit coming on to be heard before the said Amzi Dodd, sitting as Special Master, it was afterwards, and on the 22d day of August, 1876, in the said suit, by this Court adjudged and decreed that the said Ludlum was indebted to the said estate at the death of the said Horner in the sum of \$73,975.47, as before stated, and that the said firm was at the same time indebted to the said Horner in the sum of \$476.01, as by reference to the said decree on file in the said suit in this Court will more fully appear.

10th.—That in the month of July, 1876, the said Ludlum filed his petition in the said suit setting out the making of the said “give and take offer” and its acceptance, substantially as herein set forth, and asking the Court to decree or order specific performance of the same by your oratrix, or that damages be awarded to him for its non-performance, and after that hearing the relief sought by the said petitioner was, on the 20th day of August, 1876, denied by the order of this Court made therein as by reference to the said petition and the proceedings had

thereon, now on file in this Court, will more fully appear.

11th.—That the order of the Court, made as aforesaid, was afterwards appealed from by the said Ludlum, and the same was on the said appeal subsequently affirmed by the Court of Errors and Appeals of this State.

10 That pending the proceedings above mentioned, the Court, by an order made in the said suit of your oratrix about the 3d day of August, 1876, directed sale to be made of all the personal property of the said partnership estate, and the same was sold by virtue of the said order in the months of November and December following, and on the 5th day of July, 1877, the Pompton real estate mentioned in said offer was sold by virtue of a decree made by the Court on the 5th day of April, 1876, in certain
20 proceedings had therein for the foreclosure of certain mortgage liens thereon, and that the amount realized by the said sales was but little in excess of the amount due or claimed to be due upon the mortgage so foreclosed; your oratrix charges and insists, however, that the property thus sold was really worth a sum greatly in excess of the sum so realized for it, and that by the fraudulent conduct and gross mismanagement of the said Ludlum, who was then the Receiver of the said estate, the said sales were made at a grossly inadequate price,
30 and for less than the real value of the said property.

12th.—That after the disposition of the said property, as aforesaid, the said Ludlum, on application for that purpose, was allowed to file a supplemental bill in the nature of a cross-bill in said suit brought by your oratrix, in which he set out the proceedings in the said suit, the making of the said “give or take offer” and its acceptance, as hereinabove
40 set forth, and the sale and disposition of the said

personal and real estate, and asked that damages or compensation be allowed to him for loss, which he claimed he had suffered by reason of the failure or refusal of your oratrix to perform the same.

That your oratrix answered the said bill, claiming, *inter alia*, that the said contract was illegal and inequitable, and that by the unfair and unjust conduct and acts of the said Ludlum, her performance of the same, other than in the mode she had offered to perform it, was made impossible, and that 10
it was void and of no effect as against her. That the issues made on said bill and answer in said suit came on to be heard before His Honor Vice-Chancellor Van Fleet, to whom the same had been referred to hear and determine, and that at the October Term of said Court, 1881, it was declared and decreed that the said Ludlum was not entitled to the relief sought by him in the said bill by reason of the unjust and inequitable conduct of the said Ludlum, in that he did not, when appointed Re- 20
ceiver of the said estate, pay into the assets of the said estate the moneys due from him to the estate, as he was in duty bound to do, and that his said unjust and inequitable conduct had produced the consequences of which he then complained against your oratrix, and that the Court thereupon dismissed his said bill of complaint with costs, all which will more fully appear by reference to the proceedings in said suit now on file in this Court.

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13th.—That the said contract based upon what is called the “give and take offer” never was a binding obligation either in law or in equity, upon your oratrix; that at most it was an attempt to settle part of the controversy involved in the litigation then pending between your oratrix and the said Ludlum, but that it utterly failed and became, and was, and is, nugatory and void.

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- 14th.—That your oratrix, as executrix of the estate of the said James Horner, deceased, in which right and character she had brought said suit against said Ludlum, had no right or power to enter into any binding contract of that nature without the order and decree of some competent Court, having jurisdiction of her acts as executrix, and that no such order or direction had been given by any Court for that purpose.
- 10 That said James Ludlum was the receiver of the partnership estate, and as such was a trustee for your oratrix, both individually and as executrix, and that he could not, as such trustee, enter into a binding or valid contract with your oratrix, either as an individual or executrix, because the relation of trustee and *cestui que trust* then existed between them, and that if such a contract can be supported and held valid (which she denies), that by reason of the relation existing between them, the said Lud-
- 20 lam was bound to treat your oratrix with the utmost fairness; that he was bound fully to disclose to her the situation of the said estate, and the amount and value of its assets, and was bound to place at once at her disposal, or at the disposal of the said estate, any and all sums of money in his hands due to the said estate, or to make a proper appropriation thereof to the discharge of the debts of the said estate, all of which your oratrix charges he failed and neglected to do, and that by reason of
- 30 his unfair, unjust and inequitable conduct in the premises at the time of, and prior to the making of the said contract, the same then was and since has ever remained (if otherwise valid and enforceable) void and of no effect as against your oratrix.

14th.—That the title to the personal and real estate of the said partnership, on the appointment of said Ludlum as Receiver, by law passed to him and his successors in office, and that upon the appointment

of the said Andrew Kirkpatrick, as Receiver as aforesaid, the same vested in him.

15th.—That your oratrix has recently discovered that about one year after the delivery of the deed for the Elizabethport Dock property to the said Ludlum, in pursuance of one of the preliminary conditions of the “give or take offer” aforesaid, the said Ludlum made and executed a mortgage upon the said property, purporting to convey the same to his mother Catherine Ludlum, of Kingston, in the State of New York, to secure to her the payment of \$15,000, according to the condition thereof, and caused the said mortgage to be recorded in the said County of Union in this State, where the said lands are situate, and that the same now stands an apparent lien upon said real estate; and that the said property is in said conveyance described as follows:

All those two certain tracts or parcels of land and premises, more particularly described, situated, lying and being in the City of Elizabeth, in the County of Union, and State of New Jersey.

The first lot, beginning at a point in the southeasterly line of Mayo street as the same, is made out and designated on a certain map, now on file in the Clerk’s office of said Essex County, entitled “Map of the Water Front of the Mayo farm, in the Township of Elizabeth, Essex County, New Jersey,” which point is distant northeasterly along said line of Mayo street, seven hundred and twenty feet from the corner formed by the intersection of the said line or bay way, as the same is also laid out and designated on said map; thence running southeasterly at right angles to said Mayo street, and parallel to said bay way, three hundred and two feet to Staten Island Sound; thence northeasterly along the edge of said Staten Island Sound, the various courses thereof, to a point in the line of said Sound, where it would be intersected by a line running southeastwardly at right angles from said Mayo

street from a point distant three hundred and sixty feet northeastwardly along the southerly line of Mayo street from the beginning corner; thence parallel to the first above mentioned course, and at right angles to Mayo street, one hundred and ninety-eight feet to the north, southeasterly line of Mayo street; thence southwestwardly along said line of Mayo street, three hundred and sixty feet to the place of beginning, containing two acres and
 10 9-100 of an acre, more or less.

The second lot beginning at a point in the north westerly line of said Mayo street which is distant eight hundred and eighty feet northeasterly along said line of Mayo street from the corner formed by the intersection of the said northwesterly line of said Mayo street and the northeasterly line of said bay way; thence running northwestwardly at right angles to said Mayo street and parallel to said bay way six hundred feet; thence northeasterly at right
 20 angles to said last mentioned course and parallel to Mayo street two hundred feet; thence southeasterly parallel to said first mentioned course and at right angles to said Mayo street six hundred feet to the said northwardly line of Mayo street; thence southwestwardly along said line of said street two hundred feet to the place of beginning, containing two acers 75-100 of land, more or less.

Being the same premises conveyed to the said James Horner and James Ludlum by G. W. Ludlum, by deed bearing date November 28th, 1866, and
 30 recorded in the Union County Clerk's office, in Liber 22 of Deeds, page 212, the 10th day of December, 1866.

16th. That said Ludlum placed said mortgage on record for the purpose of preventing said real estate from being used as part of the assets of the estate and in order to prevent your oratrix, as devisee and legatee of said James Horner, from receiving any
 40 benefit therefrom, and in pursuance of what your

oratrix charges has been his fixed purpose and determination, to keep for himself and for his use and benefit all the assets of the said partnership estate. That said mortgage, when placed upon record, was for a sum greatly in excess of the whole value of the said property, and, as your oratrix charges, was not made to secure any advance of money or property from said Catherine Ludlum to said James Ludlum, but was made and given for the express purpose of enabling said Ludlum to use 10 the same for his own benefit. That said Catharine Ludlum is not and never was a bona fide purchaser of the said property for value. And your oratrix shows that by reason of the delivery of the said deed to the said James Ludlum, as aforesaid, it is claimed by him that he became seized as of his own estate of the lands and premises therein described and that his wife, Susan H. Ludlum, claims to have some right of dower therein.

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17th. And your oratrix shows that she has applied to the said James Ludlum and Catharine Ludlum, and requested them to remove the said mortgage lien from the said premises and cause the same to be cancelled of record, and that she has requested said James Ludlum to make conveyance of the said Elizabethport real estate to Andrew Kirkpatrick, the receiver of the said partnership estate, but that they have refused and neglected to comply with the requests of your oratrix, so made as 30 aforesaid, and that the said James Ludlum gives out and pretends that upon the delivery of the deed to him for the said Elizabethport property the title thereto vested in him absolutely as of his own estate, and that he had good right to convey the same, the contrary whereof your oratrix charge to be true, and that the said James Ludlum and Catharine Ludlum give out and pretend that the said mortgage made by the said James Ludlum to the said Catharine was to secure an actual advance of money made 40

by the said Catharine to the said James, and was made bona fide and without notice of the rights of your oratrix and of the receiver of the said partnership estate to the said premises, and that the said Catharine Ludlum was ignorant at the time of the making of the said mortgage of the fact that the said real estate was part of the said partnership assets, all of which pretenses your oratrix charges are contrary to the truth, all which actings, doings and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your oratrix in the premises.

In tender consideration whereof, and forasmuch as your oratrix is without remedy by the strict rules of the common law, and can have adequate relief only in this Court of Equity, where matters of this nature are properly cognizable and relievable, to the end, therefore, that the said James Ludlum and Susan H. his wife; Catherine Ludlum, his mother; Andrew Kirkpatrick the said receiver; Susan Horner and John M. Buckingham may, without oath, full, free and perfect answer make to all and singular the premises as fully and particularly as if they were again repeated, and they and each of them personally interrogated thereto, not only to the best of their respective knowledge and remembrance, but to the best of their respective information, hearsay and belief, and more particularly that the defendants James Ludlum and Catherine Ludlum, may answer and set forth when, where and under what circumstances the said mortgage upon the said Elizabethport property, was made and executed, and when and where and by whom the same was delivered to the said Catharine Ludlum, if the same ever was delivered to her, when and by whom the said Catharine Ludlum was informed that the said mortgage was to be made; when the same came to her possession, if the same ever came to her possession, and how; who prepared the said mortgage, who paid for the same who

caused it to be recorded and paid for the recording of the same ; who delivered the same to the register for record, and to whom he delivered the same after it had been recorded ; what money, if any, was advanced by the said Catherine Ludlum to the said James Ludlum on account of the said mortgage and when and where such advances or payments were made, if made ; and if made, whether by check or in currency, and if by check, on what bank ; and that they set forth and discover 10 whether since the making of the said mortgage any part of the money therein stated to be secured thereby has been paid, and if any, what part and when ; and whether any interest has been paid upon said money, and if so, when and by whom and in what manner, and that they may set forth and discover whether the said mortgage was given to secure a debt contracted at the time of its execution or a pre-existing debt, and if a pre-existing debt, 20 whether the same was otherwise secured, and when and how it arose, and the amount thereof ; and generally that they may state all the facts and circumstances connected with the making of said mortgage, the delivery and recording thereof ; and of the consideration of the same ; and that the said Catherine Ludlum may set forth and discover what knowledge she had prior to the making of the said mortgage of the said Elizabethport property, its location and value, and what she knew, if anything, about the title to the 30 same, whether she caused any search to be made thereon and from whom she derived any information on either of the said matters, whether she knew that the same then was or ever had been part of the partnership property of the late firm of James Horner & Company, and what her knowledge on that subject was ; and that the said James Ludlum may be enjoined and restrained from conveying or in any manner disposing of the said Elizabethport real estate ; and that said Catharine 40

Ludlum be enjoined and restrained from making any transfer or assignment of her said mortgage thereon, and that the said contract or agreement, called the "give or take" contract, may be decreed or declared to be null and void and of no effect, and that the said mortgage given, as aforesaid, by the said James Ludlum to the said Catharine Ludlum, may be decreed to be of no validity, force or effect as against your oratrix, and the said receiver of the
 10 said partnership estate, and that the said James Ludlum be decreed to convey the said property to the said receiver freed, cleared and discharged from the lien of said mortgage, and that the same shall be decreed and declared to be a part of the said partnership estate, and that your oratrix may have such other and further relief as the nature of the case may require and as shall be agreeable to equity and good conscience.

20 May it please your Honor, the premises considered, to grant unto your oratrix and your orator, not only the State's writ of injunction issuing out of and under the seal of this Honorable Court, to be directed to the said James Ludlam and Catherine Ludlam, commanding the said James Ludlum to desist and refrain from making any sale or disposition of the said mortgaged premises, and the said Catherine Ludlum from making any transfer or assignment of the said mortgage, but also the State's writ of subpoena
 30 issuing in the same manner, to be directed to the said James Ludlum and Susan H. his wife, Catherine Ludlum, Susan Horner, and Andrew Kirkpatrick, commanding them and each of them, on a certain day and under a certain penalty therein to be named, personally to be and appear before this Honorable Court, then and there to answer all and singular the premises, and to stand to, abide by and perform such order and decree in the premises

defendants do in no sort admit) contains not any matter of equity whereon this Court can ground any decree or give the complainants any relief or assistance as against these defendants. Wherefore, and for divers other errors and imperfections in the said bill appearing, these defendants do demur in law thereunto, and humbly demand the judgment of this honorable Court whether they shall be compelled to put in any further or other answer to the
 10 said bill, and humbly pray to be hence dismissed with their reasonable costs, in this behalf most wrongfully sustained.

McCARTER, WILLIAMSON & McCARTER,
 Solicitors for and of Counsel with defendant
 James Ludlum and Susan H., his wife.

STATE OF NEW JERSEY, } ss.:
 Passaic County.

JAMES LUDLUM, being duly sworn according to
 20 law, saith: That the foregoing demurrer is not interposed for delay, but in good faith, for the causes therein set forth.

JAMES LUDLUM.

Sworn and subscribed before }
 me this 12th day May, }
 A. D. 1883.

GEO. W. COLFAX,
 Notary Public for State of N. J.

STATE OF NEW JERSEY, } ss.:
 30 County of Passaic,

SUSAN H. LUDLUM, of full age, being duly sworn according to law, saith that the foregoing demurrer is not interposed for delay, but in good faith, for the causes therein set forth.

SUSAN H. LUDLUM.

Sworn and subscribed before }
 me, this 12th day of May, }
 A. D. 1883.

GEO. W. COLFAX,
 40 Notary Public for State of N. J.

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

THOMAS N. McCARTER,
Of Counsel.

IN CHANCERY OF NEW JERSEY.

Between—

JAMES LUDLUM and SUSAN B. his
wife, CATHERINE LUDLUM, SUSAN
HORNER, and ANDREW KIRK-
PATRICK,

Defendants,

On Bill, &c.
Demurrer.

and

ALICE BUCKINGHAM and JAMES M.
BUCKINGHAM,

Complainants.

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The demurrer of Catherine Ludlum, one of the defendants, to the bill of complaint of Alice Buckingham and John M. Buckingham, complainants :

This defendant by protestation, not confessing all 30
or any of the matters and things in the complainants' bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged ; doth demur thereto, and for cause of demurrer shows that the complainants have not in and by their said bill made or stated such a case as entitles them in a Court of Equity to any discovery from this defendant or to any relief against her as to the matters contained in the said bill, or any of such matters ; wherefore and for divers other good 40

causes of demurrer appearing in the said bill this defendant doth demur thereto, and humbly prays the judgment of this honorable Court whether she shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with her costs and charges in this behalf most wrongfully sustained.

McCARTER, WILLIAMSON & McCARTER,
Solrs. of Defendant.

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STATE OF NEW JERSEY, } ss.:
Essex County. }

THOMAS N. McCARTER, of full age, being duly sworn on his oath, saith that he is the agent in this suit of Catherine Ludlum, the defendant above named, and that the foregoing demurrer is not interposed for delay, but in good faith for the causes therein set forth.

THOMAS N. McCARTER.

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Sworn to and subscribed before me }
this 25th day of June, A. D., 1883. }

JOHN R. HARDIN,
Notary Public.

I certify that I have pursued the complainants, bill in the above stated cause, and that the above demurrer is well founded in point of law.

THOMAS N. McCARTER,
of Counsel.

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THE HISTORY OF THE
REIGN OF KING CHARLES THE FIRST

By JOHN BURNETT, Esq.
Author of the History of the
Reign of King James the First
and the History of the
Reign of King James the Second

London, Printed by J. Sturges, at the
Sign of the Sun in St. Dunstons Church
Lane, 1724.

Printed by J. Sturges, at the
Sign of the Sun in St. Dunstons Church
Lane, 1724.

ALICE BUCKINGHAM

and

JAMES LUDLUM.

On hearing on demurrer.

Mr. JOHN M. BUCKINGHAM for Complainant.

Mr. THOMAS N. McCARTER for Defendant.

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VAN FLEET, V. C.

This suit presents another part of the protracted and extensive litigation in which these parties have indulged, in settling the disputes which have arisen between them in winding up the affairs of the late firm of James Horner & Company. The main object of the bill in the present case is to procure a decree setting aside a deed made by the complainant to the defendant. The bill asks for other relief, but the only question debated on the argument of the demurrer was, whether or not the bill contained sufficient facts, if undenied, to entitle the complainant to relief of the character just indicated. The demurrer denies that the bill contains sufficient equity to entitle the complainant to any relief whatever.

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No extended statement of facts need be made. A tolerably complete history of the transactions between these parties leading up to the subject of the present litigation will be found in *Ludlum v. Buckingham*, 8 *Stew.*, 71. For present purposes it will be sufficient to state that complainant, in August, 1874, brought a suit in this Court against the defendant, as the survivor of James Horner, deceased, to obtain an account and settlement of the affairs of James Horner & Company, in which the defendant was, on the seventeenth day of November following,

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appointed Receiver. In April, 1875, the complainant and defendant commenced negotiations with a view of eliminating from the suit in this Court "all questions hindering the disposition and sale of the real estate belonging to the partnership." The defendant, on the twenty-sixth day of April, 1875, proposed, as a means by which this end might be accomplished, that either he or the complainant should make an offer for the real estate belonging to the firm, which the one making the offer should be obliged to take or give as the other should elect, and that the one making the offer should receive, as a consideration for placing himself or herself in the position where he or she would be compelled to become either vendor or vendee, as the other should elect, a conveyance of the title of the other to a tract of land at Elizabethport, containing about five and a half acres, and constituting part of the partnership real estate. On the tenth of May following the complainant accepted the defendant's proposition, stipulating, however, that the defendant should make the give-or-take offer. On the ninth of June, 1875, an agreement in writing, expressing in detail the contract thus made, was executed by the parties, and the complainant on the same day or the day following executed a deed for the Elizabethport property and delivered it to a third person, to be held in escrow until the defendant made his offer. The defendant made an offer within the time limited by the contract, and the complainant thereupon elected to take the real estate on the terms offered by the defendant. The deed for the Elizabethport property was then delivered to the defendant. This suit is brought to avoid that deed. The complainant did not keep her contract, and the defendant subsequently brought a suit in this Court to compel her to specifically perform it, but he failed, because, in the opinion of the Court, his conduct towards the complainant had been such as to disentitle him to relief. (*Lud-*

lum v. Buckingham, 8 *Stew.*, 71) and he failed also in the Court of Errors and Appeals, because, in the opinion of that Court, he was not able himself to perform the contract which he was seeking to compel the complainant to perform (*S. C. on appeal*, 12 *Stew.*, 563).

This statement presents the complainant's whole equity so far as her bill exhibits any case upon which relief of the nature she asks can be given. Her bill contains many other charges against the defendant, imputing gross misconduct to him, both as surviving partner and as receiver, but having little or no legal or logical connection with the relief she seeks in this suit. They seem to have been inserted for the purpose of charging that the defendant's general course of conduct towards the complainant, in all their transactions in relation to the partnership affairs had been such as to justify the belief that he would defraud her whenever an opportunity to do so occurred, and thus making it easy for the Court to presume that he had done so in the particular transaction in respect to which relief is sought. Stripped of these impertinent averments, the complainant's bill seems to me to be destitute of the least speck of equity.

The deed the complainant seeks to invalidate was made by her in fulfillment of her contract obligation. She made the contract after full consideration. It was proposed to her on the twenty-sixth of April, 1875; she held the proposal under consideration until the tenth of May following and then agreed to it, but the formal written agreement was not signed until June the ninth. She had sufficient time for thorough investigation and the most mature consideration. In view of the hostility of the parties, and the period of time which elapsed between the inception and conclusion of their negotiations, I think the Court is bound to assume that the parties dealt cautiously and with full knowledge of all the facts which would be likely

to influence their action. The contract had a highly beneficial object. It was made in the interest of peace, to prevent, if possible, further litigation respecting the real estate. Its negotiation was initiated by Vice Chancellor Dodd. The contract declares, that the proposition which the defendant made to the complainant, and which afterwards became the basis of their formal agreement, was the result of the consultation between the parties
 10 which they held at the Vice Chancellor's Chambers, on the Vice Chancellor's invitation and in his presence. These facts appear on the face of the complainant's bill. Their legal effect is evident. They serve to fortify the validity of the instrument, assailed in the strongest possible manner. With these facts before it, it is manifest that it is the duty of the Court to see to it that the party holding the deed is not put to the expense and trouble of maintain-
 20 ing its validity, unless the case made by the bill against its validity is clearly sufficient, if unanswered, to make it the duty of the Court to set the deed aside.

The argument in support of the bill, though embracing ten different propositions, may be fully presented under three heads. They are: *First*, that the defendant by his wrongful conduct, in preventing the complainant from performing her part of the contract, made the whole contract void, not
 30 only that part of it which remained to be performed when his wrongful contract began, but also that part of it which had already been executed. *Second*, that both the contract and the deed were without consideration; and *Third*, that the deed to the defendant was prematurely delivered; in other words, according to true meaning of the contract, the defendant was required not only to make an offer for the real estate, which the complainant should be at liberty to take or give as she should
 40 elect, to entitle himself to a conveyance of the com-

plainant's interest in the Elizabethport property, but he was also required to perform, as a condition precedent to the delivery of the deed, all other parts of the contract on his part to be performed. Neither of these propositions possess, in my opinion, the slightest substance. The contract plainly provides, that the defendant, by merely offering a price for the real estate, which the complainant shall have a right to require him either to take or give, shall, at once, be entitled to a conveyance of 10 the complainant's interest in the Elizabethport property, as the consideration which should be given to him for placing himself in a position where he became bound to become either the vendor or vendee of the real estate, at the price he had offered, as the complainant might elect. The contract in this respect is free from the least obscurity, the intention of the parties is stated in the clearest and simplest words, and there can be no doubt, that the moment that the defendant had made his offer that 20 he had done all that the contract required him to do to entitle him to a conveyance of the Elizabethport property. His offer was the price he was to pay for the deed. The defendant's proposal in this regard was eminently fair. The complainant, by taking the place which she elected the defendant should take, would have entitled herself, from the defendant, to just what she gave him. It is entirely clear that both the contract and deed were founded upon sufficient considerations. A promise is a good con- 30 sideration for a promise. They must be mutual and concurrent, so that they create a reciprocity of obligation, but when that is the case they constitute as perfect a consideration as a contract can have. 1 *Chit. on Con.* (11 *Am. Ed.*), 50; 1 *Par on Con.*, 477. The deed has the support of a further consideration; the option which the contract gave the complainant to make the defendant either vendor or vendee of the real estate, as she might elect. There can be no doubt that the deed is valid. It 40

conveys the land described in it without consideration or limitation, vesting it in the defendant absolutely. That being the case, the deed being valid and the land having been conveyed by title absolute, I know of no rule of law which empowers this Court, or any other, for wrongs or frauds which the defendant has committed against the complainant, since the deed was delivered, to take the land from the defendant and restore it to the complainant.

- 10 The bill states a further ground why the deed should be set aside, namely, that the defendant having been appointed the receiver of the partnership assets became thereby the trustee of the complainant, and was thus placed in a position where it was impossible for him to acquire a title to any part of the partnership real estate, which the plaintiff could not successfully impeach. In a previous case between these parties, my views on this subject were fully expressed (*Ludlum v. Buckingham*, 8 *Stew.*, 71); and I need, therefore, now
20 do no more than say that nothing was suggested on the argument of this case which has induced a change in them.

The demurrer must be sustained, and complainant's bill be dismissed with costs.

Filed Oct. 20, 1885.