

No. 13986

Supreme Court of Illinois

Pahlman et al

vs.

Shumway et al

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 195

Attest

13056

195

SUPREME COURT OF ILLINOIS, THIRD GRAND DIVISION.

APRIL TERM, 1860.

JOHN D. PAHLMAN;
Ex'r of A. ROSSETTER, dec'd.,
HENRY L. RUCKER and
JAMES CAMPBELL, Guardians
of minor heirs of A. ROSSETTER, and
MARTHA A. ROSSETTER, Widow,

vs.

HORATIO G. SHUMWAY,
MILLER & DAVIS,
JOHN B. KING,
E. BLACKMAN, Adm'r., and
H. H. MAGIE, survivor of HIGH & MAGIE,
H. STEVENS, Adm'r. of F. M. KERWIN.

Error to Superior Ct.
of Chicago.

Filed May 8, 1860
L. Leland
Clerk

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

WALTER B. SCATES,

Of Counsel for Plaintiffs.

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POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

ROSSETTER made a deed of trust to Shumway with a power of sale and notice, to secure Wheeler the sum of \$16,000, with interest. Before his death, and before any sale was made, Miller and Davis, King, Blackman, Magie, and Stevens recovered judgments against Rossetter and had executions issued.

One of the judgment creditors, Stevens, administrator, had his execution levied upon the premises and sold them, and they were redeemed from that sale. After Rossetter's death Shumway sold under the trust deed, and after paying off the debts secured, has now in his hands a balance of \$11,408.53. Campbell having been appointed guardian of minor children, advanced the sum of \$2,300 in full of interest,

in order to postpone the sale one year, to save the estate from being sacrificed ; and Pahlman agreed to make a conveyance, also, to the purchaser, for the same reason.

Now the question comes up as to questions of liens upon the surplus, in favor of these judgment creditors.

I make the following points in the case :

I.

The grantor in a deed of trust with a power of sale to pay a debt, has no such interest in the land as is meant by the term "real estate," and upon which a judgment will operate as a lien under the Act concerning judgments and executions.

Cook's Stat. page 602, Sec. 1.

II.

Where land is conveyed in trust to sell and pay \$3,000 out of the proceeds, and the trustee is to have the balance of the proceeds, a creditor of the trustee may have a judgment lien on that surplus.

White vs. Carpenter, 2 Paige, 265-6-7.

In the matter of *Howe and Wife*, 1 Paige, 125, it was held that judgment creditors have no preference over prior equitable claims against the estate of the debtor.

So it was further held in *White vs. Carpenter*, above, that there was no resulting trust in favor of the creditor entitled to the \$3,000 debt secured by the deed of trust.

Neither did the Court hold that when there was a resulting trust of the surplus to the grantor, that such surplus could be the subject of a lien as land. In that case the resulting trust of the surplus was to the grantee himself. The fee and the right in part of it, was in the trustee as well as the trust for another part. His wife might be endowed even of this part.

But suppose the case of marriage with the grantor after the execution of the trust deed, could any one contend that the wife could be endowed of that land ? And yet the Statute gives her dower of "equitable estates" of which the husband is seized during the coverture.

Now, here there can be no seizin in fact or law, not even under the Statute of Uses, because, to execute back the seizin or possession to a supposed use or trust in the grantor himself for any surplus, would defeat the grant which was made for the ex-

press purpose of *sale* and conversion into personality for the very purpose of paying debts. That is the reason that the second creditor has no interest in the land; but his interest is in the money into which it is to be turned by the express provision of the grantor. And this is not to the extent simply of the secured debt, but the whole is to be sold. The whole land is to be converted into personality.

There is, then, no interest left in the grantor in the land itself. There is no estate. There is an interest, by way of resulting trust, in any surplus of proceeds after paying the debt fulfilling the trust. But this interest is a mere contingency—a mere possibility dependent upon there being a surplus arising from the sale.

2 Story Eq. Jurisp., Sects. 1215-16, 1216 a, 1229.

III.

The case is essentially different from a mortgage. There is left in the mortgagor an equity of redemption, which is liable to attachment or to levy and sale under an execution at law. Though the naked fee passes, it passes in the nature of a mere security, and for all practical purposes, the grantor or mortgagor is regarded as the real owner of the land. The wife will be entitled to dower in the land, and creditors may obtain judgment liens.

But the case of trust property is essentially different, when it is conveyed to be sold for the payment of debts, or for re-investment for the benefit of third persons other than the grantor. The intention of the grantor is to govern, and by it the property is to be considered as converted into money; for equity considers as done what ought to be done.

IV.

Again, admitting that such an interest or estate remained in Rossetter after the deed of trust as could become liable to lien, levy, and sale, still there is no right of priority of payment out of the surplus in Court.

To illustrate this position, it will be necessary to advert to several decisions.

The inheritable estates of a decedent, upon his death, descend to his heirs, subject to be divested and taken by the particular execution creditor who may have a right of levy, or for the general creditors by order of sale to administrator.

But where land is sold on execution in the lifetime of the judgment debtor, and is redeemed by a judgment creditor after his death, it becomes the estate of the decedent, and the title is vested in the heirs; and it cannot be divested out of the

heirs by a mere levy and sale, but they must have notice by some proceeding against them.

Turney et al. vs. Young, 22 Ill. 253.
Turney vs. Gates, 12 Ill. 141.

There is no notice or proceeding here to give the heirs a day in court and allow them to make a defence against this attempt to appropriate their inheritance.

Now, there were six judgments recovered against Rossetter in his life-time—the first 5th Nov., 1857, the last 11th January, 1858.

The oldest lien was in favor of the judgment of 5th Nov. An execution issued on that judgment on 18th Nov., 1857, and this land was levied on and sold under that execution.

Afterwards Pahlman, executor, redeemed from that sale.

This redemption had the effect simply to clear the land of these judgment liens in the hands of the heirs, to whom it had in the meantime descended, incumbered with this sale.

This sale had not only exhausted the lien of the judgment under which it was sold, but would cut off all the other judgment liens, unless they should come in *by redemption as judgment-creditors*.

When the oldest judgment lien is enforced by a sale under it, all junior judgment liens must cease and fall, for they cannot continue as liens against the purchasers. All, then, that remains to such creditors is,—not a lien, but a statute right of redemption as judgment-creditor. A lien any longer is at war, and inconsistent with the purchaser's right.

The principle I contend for is well illustrated by the case of *Warren vs. The Icarian Community*, 16 Ill. 114. Two attachments were levied and returned to the same term. Judgment was obtained on one and a sale of the land was made under it.

The Court held that this sale exhausted the debtor's estate in the land. The other attaching creditor could not sell again under his judgment, but his only remedy was a division of the proceeds of the first sale.

So here the *lien* and the *right of redemption* are both statutory rights. But the right to a lien, and a sale to enforce it, is one thing—and that is forever gone by a sale under a *prior* judgment lien—and all that is left after such enforcement of a prior lien, is the second statute right of redemption. All that a creditor, under such circumstances, can do, is to redeem and sell under his redemption.

But suppose that the judgment-debtor, who has the prior right, should first redeem; then I suppose that it will not revive the lien of the old judgments which had been destroyed by the sale, but the land thus re-acquired by the debtor, by redeeming, would become liable to seizure, levy, and sale, just as any other estate acquired after the rendition of a recovery.

But in relation to such after-acquired property, the doctrine of priority of liens would not apply, but it would depend upon a priority of seizure by levy.

For the judgment lien declared by the estate does not attach or exist upon any after-acquired real estate, but is confined alone to such real estate as the debtor may own at the time of the rendition of judgment.

If the doctrine applied to all after-acquired land, then might the same judgment become a lien with its priority over juniors as often as the judgment-debtor might redeem from sales under. Whereas, on the contrary, I contend that a sale under the oldest judgment-lien exhausts not only the lien of that judgment, but also of all junior judgments, and a redemption will not revive either of those liens. It might be again liable to be taken, levied on, and sold, but it would be without any lien. The first levy would hold as between judgment-creditors.

15 Arkansas R. 73.
8 English, 74.
25 Miss. R. 484.
1 Smith R. 100, 128.
1 Greene Iowa R. 131.

V.

But then there was no estate liable to levy.

2 Story Eq. Jurisp., Sec. 790, 1212, 1215, 1216, 1216 a.
1 Williams on Executors, 551-2.
3 Wheat. R. 577 to 588.

In the case of *Lowry et al. vs. Wright et al.*, 15 Ill. 95, the Court held that an equitable interest in land was not liable to attachment.

5 Inda. R. 180.
1 Carter, Ind. R. 246.
1 Greene Iowa Rep. 131, 275.

This is not an equitable interest in land in Rossetter.

It falls within the analogy of the rule laid down in *Baker vs. Copenbarger*, 15 Ill. 109, where the Court say that where, by the provisions of the will, real estate is to be converted into money, and that money distributed among distributees, it must be

created as money and not as land; and such an interest in one of the devisees cannot be sold on execution.

This is a strong and illustrative case, for the Court held that the devisee might elect to take the land itself instead of the money, and yet it cannot be taken on execution.

Neither could dower be claimed in either, although that lies in "equitable estates."
Cook's Statute, page 151, Sec. 1.

The judgment and execution law does not embrace less estates than equitable ones, by its terms "real estate."

See Cook's Statute, p. 602, Sec. 1.

See on this subject,—

Hill & Denio R. 181, *Arnot vs. Beadle*.
19 Ga. R. 452.
6 Inda. R. 380.
27 Miss. R. 589, 679.
6 Barber S. C. R. 19.

VI.

Lastly, the priority here claimed by these creditors is in violation of the Statute of Wills (Cook's Stat. p. 1206, Sec. 115,) which classifies all demands and puts these creditors upon a *pro rata* distribution.

By their present claim they will obtain full pay to the injury of others falling into the same class.

WALTER B. SCATES,
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ABSTRACT OF THE RECORD.

Page of Rec.

3 BILL charges that Asher Rosseter and wife made a deed of trust to Shumway, on 12th March, 1857, to secure certain indebtedness and the performance of certain covenants, on the S. quarter of B. 69, in School Section Addition to Chicago. The indebtedness was on 8 notes dated 12th March, 1857, each for \$2,000, due 12 months with interest, and certain taxes and liens
4 were also secured by same deed. It was duly recorded and is made exhibit; see pp. 12 to 17 of Record.

5 That default being made, on application of Bacon Wheeler, owner of the indebtedness, on or about 14th March, 1859, Shumway caused the premises to be advertised, according to the provisions of the deed of trust, in the *Chicago Daily Journal*, and on the 25th March, 1859, he sold the same according to the power in said deed, at public auction at north door of the Court House in Chicago, to E. J. Chapin, Alex. Marsh, and Robert H. Foss, for the sum of \$30,000 cash.

6 That out of proceeds he paid the indebtedness amounting to the sum of \$18,591.47, and after deducting costs, expenses and commissions, now holds the balance subject to the direction of the Court, which he prays.

7 That the purchasers were induced to pay that sum for the property by the understanding and agreement of the executor of said Rosseter that he would, as executor, also make a deed for the estate to the purchaser at said sale, and without which the land would have been sold at a great sacrifice, and that said deed is now ready for delivery upon payment being made to him of the said surplus now in Shumway's hands.

That after said sale, the executor transferred all his right and interest in the surplus to Henry L. Rucker, who now claims the same, or as much as the estate is entitled to receive, after deducting costs, &c., and subject to the claim of James Campbell, under the following state of facts, viz:

8 That at the maturity of the notes, Wheeler applied to Shum-

Page of Rec. way for a sale. James Campbell, being the guardian of two of the infant children of said Rossetter, entered into an agreement with said Wheeler to pay, and did pay out of his own private moneys the interest amounting to \$2,000, in order to stay the sale, and which was so stayed for one year thereby; said payment being endorsed on said notes, in full of interest up to 12th March, 1859, and Campbell now claims to be subrogated to Wheeler's rights, to have the same refunded.

That Rossetter died about 25th February, 1858, leaving a widow and three children, heirs at law; all of whom claim to have some right to the surplus in Shumway's hands.

That Rossetter made his will, and Pahlman is the sole qualified acting executor, and said executor and his assignee claims said surplus.

That Edwin Blackman, in his own right, and as executor of John High, Jr., H. H. Magie, survivor of said High, Jno. B. King, Buckner S. Morris, John F. Miller and Gilbert F. Davis, Henry Stevens, administrator of F. M. Kerwin, Geo. Scoville, John D. Pahlman, Geo. C. Smith, John E. Smith, Francis A. McIntyre, assignee of Rossetter, and Pahlman and Smith, all have a claim to have a lien upon, or some other interest in, the surplus, and all which are undetermined, but all of which should be proven in this Court, for the protection of said Shumway.

That said Shumway is and always has been ready to pay over said surplus, after deducting costs, &c., to such persons as may be legally entitled.

Prays that persons before named be made defendants, answer, &c., and that an order be made for the distribution of the surplus, &c.

Trust Deed set out in usual form with power of sale under notice.

Notes and advances and interest and expenses set forth, showing balance due of \$18,591.47.

B. Wheeler's receipt for indebtedness.

Summons and service.

Answers of Miller and Davis.

Admit deed trust, that a default was made and sale of premises for \$30,000, and the payment of the secured indebtedness.—

Also that balance remains as alleged. Do not know whether Pahlman assigned, or whether H. L. Rucker now claims the surplus, nor whether Campbell paid said Wheeler, or whether he extended the time of sale, but parties to prove same.

But they deny that Pahlman had any right to assign the over-

Page of Rec. plus, and that Rucker or Campbell has any right to the same.—

- 30 They say that, at November term, 1857, they recovered a judgment against said Pahlman, Geo. C. Smith, J. E. Smith, and said Asher Rossetter in his life time, for \$1,037.18, and that on 5th April, 1858, they sued out an execution directed to the Sheriff
31 of Cook county, and delivered to him, and in July it was returned unsatisfied; that same judgment remains unpaid and in full force, with interest from the 19th November, 1857.

They insist that, by that judgment, they acquired a lien on the premises in the deed of trust, subject to the indebtedness in the deed of trust, and now have an equitable lien on the surplus in
32 the hands of said Shumway, the amount of their judgment, and that it is prior and better than the claims of Pahlman, Rucker & Campbell.

Answer of Blackman, Ex'r. of High, and Magie, as survivor.

- 35, 36 Admit substantially all the facts admitted in the foregoing answers, and claim that High, in his life time, commenced suit against Rossetter and others, and that he, as executor, after his death on the 11th January, 1858, Blackman, as executor, ob-
37-8 tained judgment against Rossetter and others, \$1,000.83 and costs, which is still due and unpaid.

39 That Blackman, as such executor, on 11th January, 1858, recovered another judgment against Rossetter, in his life time, and others, for \$1,018.00 and costs, and that is still due and unpaid.

40 That Magie, as survivor, &c., on the 19th November, 1857, recovered judgment against Rossetter and others for \$1,210.66 and costs, which remains in full force and unpaid.

They each insist that these judgments are liens on these premises, and the surplus in Shumway's hands, to the extent of their judgments, and prior to the lien or right of said Pahlman, Rucker, Campbell, or the heirs of said Rossetter.

43-4 General replication,

Answer of Jno. B. King.

47-8 Admits substantially as in above answers.

That on — November, 1857, he recovered a judgment against Rossetter and others for \$1,210, and costs, \$9.20.

50, 51 That on 7th December, 1857, execution issued and delivered to Sheriff of Cook County, and which was returned unsatisfied, and same remains in full force and unpaid.

That he acquired a lien on said premises, subject to the trust deed, &c., and he insists that Shumway holds the same subject
52 to his lien, to the extent of his judgment prior to the claim of said Campbell.

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5 General replication.

57-8

Admits substantially as first answers above. Charges assignment by Pahlman to Rucker as being fraudulent. Denies that Campbell or Pahlman or Rucker is entitled to said moneys.

59, 60

61 That Kerwin commenced suit in his life time, and he, as administrator, recovered a judgment against Rossetter and others, on the 5th November, 1857, for \$1,206 and costs, \$8.25.

62

That on 18th November, 1857, execution issued and was delivered to the Sheriff of Cook County, and he made the sum of \$10.50 and returned the same unsatisfied for the remainder, and same remains unpaid.

63

64 That the judgment was a lien on the premises in the trust deed, and on the surplus in Shumway's hands in equity, and said Stevens is lawful administrator.

65

General replication.

Answers of Pahlman, Ex'r., M. A. Rossetter and James Campbell.

67-8

Admits substantially as in above answer first made, and they insist that Pahlman agreed to execute a conveyance as executor, upon the express condition that the surplus should be paid over to him to pay debts; that he did assign the same to H. L. Rucker in writing, made an exhibit, authorizing him as attorney to receive the same for him as executor, after deducting his reasonable fees due for services rendered the estate.

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70

Campbell says he was and is guardian of the minor heirs of said Rossetter, and was, at the maturing of the notes, secured by the deed of trust, and to prevent a sale and sacrifice of the premises, and to gain time until the premises would sell better, he, as guardian, entered into an arrangement with Wheeler to pay up all interest to March, 1859, and did pay Wheeler \$2,300, and procured an extension accordingly.

71

Pahlman, executor, claims that he and H. L. Rucker, or either of them, were justly entitled to the surplus in the hands of said Shumway, after deducting the expense of said sale and the amount due said Campbell, and said Rucker is entitled to receive said surplus under said assignment, and who demanded the same before said defendants had any knowledge thereof or made any demand or claim therefor, nor did they, for a long time thereafter, nor did they know anything of such surplus until informed by said Shumway.

72

They have no knowledge of any such heirs as are claimed by the other defendants herein, and they wholly deny that any such heirs exist, or that they, or either of them, have any right or title to any portion of said surplus. They wholly deny that there was any occasion for filing this bill, and ask to have their answer

Page of Rec. taken regarded as a demurrer, and disclaim any admission thereby.

73 Exhibit "A." Pahlman's order on Shumway for said surplus and assignment thereof to Rucker, dated March 25th, 1859.

75 Demurrer by Rucker, and for cause shows that no grounds sufficient in law are set forth in said bill for maintaining the same.

76, 85-6 B. S. Morris disclaims all claim or interest.

77 Demurrer overruled.

79, 80 Summons and service.

Amendments to bill—charges as follows, viz :

To Miller & Davis, judgment for \$1,027.83, dated Nov. 17th, 1857.

To Magie, survivor, judgment Nov. 19, 1857, \$1,210.66.

To J. B. King, judgment Nov. 24, 1857, \$1,210.

82 To F. McKerwin, judgment Nov. 5th, 1857, \$1,206.

To E. Blackman, ex'r., judgment Nov. 6th, 1857, \$1,000.83.

To E. Blackman, judgment Jan. 11th, 1858, \$1,018.

83 Geo. Scoville disclaims all interest.

84 H. L. Rucker adopts as his own the answers of Pahlman and Campbell, and claims such right as may justly belong to him by virtue of said assignment.

Decree.

The decree awards that said Shumway, out of the surplus, pay as follows :

88	First, to himself two per cent. of \$30,000, is	-	\$600.00
	Second, for service and summons, &c.,	-	29.70
	Third, the several judgment creditors or their assigns, mentioned in the several answers, as follows,		
89	to wit:		
	First, H. Stevens, Nov. 5th, 1857,	-	1,195.20
	Costs,	-	8.25
	Second, Miller & Davis, Nov. 19th, 1857,	-	1,037.00
	Costs,	-	10.55
	Third, H. H. Magie, Nov. 19th, 1857,	-	1,210.66
	Costs,	-	9.20
90	Fourth, J. B. King, Nov. 24th, 1857,	-	1,210.00
	Cost,	-	9.20
	Fifth, E. Blackman, Jan. 11th, 1858,	-	1,018.00
	Cost,	-	11.55
	Sixth, E. Blackman, Jan. 11th, 1858,	-	1,000.00
	Cost,	-	8.80
			\$7,358.44
	Seventh, J. D. Pahlman, ex'r., the balance of said surplus,	-	4,050.42
			\$11,408.53

Bill of Exceptions.

91

Shows that the case was heard upon bill, answers, replications, disclaimers and deposition of B. S. Morris, and following agreed state of facts, namely :

92

Deed of trust as set forth in bill.

The following judgments:

F. M. Kerwin, Nov. 5th, 1857,	-	-	-	-	\$1,214.25
Miller & Davis, Nov. 19th, 1857,	-	-	-	-	1,047.73
H. H. Magie, Nov. 19th, 1857,	-	-	-	-	1,219.86
J. B. King, Nov. 24th, 1857,	-	-	-	-	1,219.20
E. Blackman, Jan. 11th, 1858,	-	-	-	-	1,029.55
E. Blackman, Jan 11th, 1858,	-	-	-	-	1,009.63
					\$6,740.22

93

That executions were issued and left with Sheriff for service in all said judgments.

That said execution of Kerwin was levied on these premises and they were sold on by Sheriff, on 25th February, 1858, for \$10.50. That the judgments all remain unpaid, except the said \$10.50 so made on Kerwin's.

That on Nov. 7, 1857, Rossetter conveyed said premises by warranty, to B. S. Morris, without consideration paid, or knowledge of Morris.

That Morris conveyed said premises to Pahlman, as executor.

94

H. L. Rucker, being sworn, says that on or about 4th Feb., 1859, Morris conveyed the premises, by quit-claim, to John D. Pahlman, executor of Rossetter. That affiant prepared the deed, and again came into his hands after it was executed and acknowledged and delivered by said Morris. That he has made diligent search for it in his office, where papers of the kind are usually kept, but he has been unable to find the same, and he believes the same has been misplaced, and cannot be found, to be used as evidence.

That Rossetter died leaving as heirs the parties mentioned in said bill; that he left a will, which was duly proven, and J. D. Pahlman is the sole qualified acting executor.

That James Campbell is the legal guardian of the infant heirs, and that, at Pahlman's request, at the maturity of said notes under the trust deed, and for the purpose of preventing a sale and sacrifice of said premises, he, Campbell, entered into an arrangement with Wheeler, by which, as his own voluntary act, without any order of any Court, and without taking any assignment to subrogate himself as owner or assignee of any part of the claim, paid one year's interest on said notes, and other charges amounting to \$2,300, by which the time of payment on said notes was extended one year, until March 12, 1859.

Page of Rec. That on February 14th 1859, the premises were redeemed from the sale under Kerwin's execution, by Pahlman, as executor.

That, on 25th March, 1859, Shumway sold the premises under the deed of trust, as set forth in the bill, for \$30,000.

That the surplus, after paying Wheeler, &c., was assigned the same day of the sale to H. L. Rucker, who made a demand upon Shumway for it; but he, having been previously notified by John B. King, one of the judgment creditors, not to pay over the surplus, and knowing from the records of the Court of Cook County, that there were other judgments similarly situated, refused so to do, and thereupon filed said bill for the purpose of having the rights of the parties adjudicated.

That the estate of Ashur Rossetter is *insolvent*.

96 Decree recited as before, from which Pahlman, Campbell, Martha A. Rossetter, and H. L. Rucker then and there excepted.

ASSIGNMENT OF ERRORS.

FIRST. The Court decided that A. Rossetter, in his lifetime, had such an estate as was subject to a judgment lien.

SECOND. That the several judgments became liens upon the premises.

THIRD. The Court decreed that out of the surplus these judgments should be first paid, and remainder to be paid to Pahlman.

FOURTH. The Court rendered a decree in favor of the judgment creditors, and against the said J. D. Pahlman, executor.

SCATES, McALLISTER & JEWETT,
Of Counsel for Plaintiffs in Error.

195

195

Pahlman

File Apr. 30, 1860
Leland
Ch.

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ABSTRACT OF THE RECORD.

Page of Rec.

3 BILL charges that Asher Rosseter and wife made a deed of trust to Shumway, on 12th March, 1857, to secure certain indebtedness and the performance of certain covenants, on the S. quarter of B. 69, in School Section Addition to Chicago. The indebtedness was on 8 notes dated 12th March, 1857, each for \$2,000, due 12 months with interest, and certain taxes and liens were also secured by same deed. It was duly recorded and is made exhibit; see pp. 12 to 17 of Record.

5 That default being made, on application of Bacon Wheeler, owner of the indebtedness, on or about 14th March, 1859, Shumway caused the premises to be advertised, according to the provisions of the deed of trust, in the *Chicago Daily Journal*, and on the 25th March, 1859, he sold the same according to the power in said deed, at public auction at north door of the Court House in Chicago, to E. J. Chapin, Alex. Marsh, and Robert H. Foss, for the sum of \$30,000 cash.

6 That out of proceeds he paid the indebtedness amounting to the sum of \$18,591.47, and after deducting costs, expenses and commissions, now holds the balance subject to the direction of the Court, which he prays.

7 That the purchasers were induced to pay that sum for the property by the understanding and agreement of the executor of said Rosseter that he would, as executor, also make a deed for the estate to the purchaser at said sale, and without which the land would have been sold at a great sacrifice, and that said deed is now ready for delivery upon payment being made to him of the said surplus now in Shumway's hands.

That after said sale, the executor transferred all his right and interest in the surplus to Henry L. Rucker, who now claims the same, or as much as the estate is entitled to receive, after deducting costs, &c., and subject to the claim of James Campbell, under the following state of facts, viz:

8 That at the maturity of the notes, Wheeler applied to Shum-

Page of Rec. way for a sale. James Campbell, being the guardian of two of the infant children of said Rossetter, entered into an agreement with said Wheeler to pay, and did pay out of his own private moneys the interest amounting to \$2,000, in order to stay the sale, and which was so stayed for one year thereby; said payment being endorsed on said notes, in full of interest up to 12th March, 1859, and Campbell now claims to be subrogated to Wheeler's rights, to have the same refunded.

That Rossetter died about 25th February, 1858, leaving a widow and three children, heirs at law; all of whom claim to have some right to the surplus in Shumway's hands.

That Rossetter made his will, and Pahlman is the sole qualified acting executor, and said executor and his assignee claims said surplus.

That Edwin Blackman, in his own right, and as executor of John High, Jr., H. H. Magie, survivor of said High, Jno. B. King, Buckner S. Morris, John F. Miller and Gilbert F. Davis, Henry Stevens, administrator of F. M. Kerwin, Geo. Scoville, John D. Pahlman, Geo. C. Smith, John E. Smith, Francis A. McIntyre, assignee of Rossetter, and Pahlman and Smith, all have a claim to have a lien upon, or some other interest in, the surplus, and all which are undetermined, but all of which should be proven in this Court, for the protection of said Shumway.

That said Shumway is and always has been ready to pay over said surplus, after deducting costs, &c., to such persons as may be legally entitled.

Prays that persons before named be made defendants, answer, &c., and that an order be made for the distribution of the surplus; &c.

Trust Deed set out in usual form with power of sale under notice.

Notes and advances and interest and expenses set forth, showing balance due of \$18,591.47.

B. Wheeler's receipt for indebtedness.

Summons and service.

Answers of Miller and Davis.

Admit deed trust, that a default was made and sale of premises for \$30,000, and the payment of the secured indebtedness.—

Also that balance remains as alleged. Do not know whether Pahlman assigned, or whether H. L. Rucker now claims the surplus, nor whether Campbell paid said Wheeler, or whether he extended the time of sale, but parties to prove same.

But they deny that Pahlman had any right to assign the over

Page of Rec. plus, and that Rucker or Campbell has any right to the same.—
 30 They say that, at November term, 1857, they recovered a judgment against said Pahlman, Geo. C. Smith, J. E. Smith, and said Asher Rossetter in his life time, for \$1,037.18, and that on 5th
 31 of Cook county, and delivered to him, and in July it was returned unsatisfied; that same judgment remains unpaid and in full force, with interest from the 19th November, 1857.

They insist that, by that judgment, they acquired a lien on the premises in the deed of trust, subject to the indebtedness in the deed of trust, and now have an equitable lien on the surplus in
 32 the hands of said Shumway, the amount of their judgment, and that it is prior and better than the claims of Pahlman, Rucker & Campbell.

Answer of Blackman, Ex'r. of High, and Magie, as survivor.

35, 36 Admit substantially all the facts admitted in the foregoing answers, and claim that High, in his life time, commenced suit against Rossetter and others, and that he, as executor, after his
 37-8 death on the 11th January, 1858, Blackman, as executor, obtained judgment against Rossetter and others, \$1,000.83 and costs, which is still due and unpaid.

39 That Blackman, as such executor, on 11th January, 1858, recovered another judgment against Rossetter, in his life time, and others, for \$1,018.00 and costs, and that is still due and unpaid.

40 That Magie, as survivor, &c., on the 19th November, 1857, recovered judgment against Rossetter and others for \$1,210.66 and costs, which remains in full force and unpaid.

They each insist that these judgments are liens on these premises, and the surplus in Shumway's hands, to the extent of their judgments, and prior to the lien or right of said Pahlman, Rucker, Campbell, or the heirs of said Rossetter.

43-4 General replication.

Answer of Jno. B. King.

47-8 Admits substantially as in above answers.

That on — November, 1857, he recovered a judgment against Rossetter and others for \$1,210, and costs, \$9.20.

50, 51 That on 7th December, 1857, execution issued and delivered to Sheriff of Cook County, and which was returned unsatisfied, and same remains in full force and unpaid.

52 That he acquired a lien on said premises, subject to the trust deed, &c., and he insists that Shumway holds the same subject to his lien, to the extent of his judgment prior to the claim of said Campbell.

5 General replication.

57-8

Admits substantially as first answers above. Charges assignment by Pahlman to Rucker as being fraudulent. Denies that Campbell or Pahlman or Rucker is entitled to said moneys.

59, 60

61 That Kerwin commenced suit in his life time, and he, as administrator, recovered a judgment against Rossetter and others, on the 5th November, 1857, for \$1,206 and costs, \$8.25.

62

That on 18th November, 1857, execution issued and was delivered to the Sheriff of Cook County, and he made the sum of \$10.50 and returned the same unsatisfied for the remainder, and same remains unpaid.

63

64 That the judgment was a lien on the premises in the trust deed, and on the surplus in Shumway's hands in equity, and said Stevens is lawful administrator.

65

General replication.

Answers of Pahlman, Ex'r., M. A. Rossetter and James Campbell.

67-8

Admits substantially as in above answer first made, and they insist that Pahlman agreed to execute a conveyance as executor, upon the express condition that the surplus should be paid over to him to pay debts; that he did assign the same to H. L. Rucker in writing, made an exhibit, authorizing him as attorney to receive the same for him as executor, after deducting his reasonable fees due for services rendered the estate.

69

70

Campbell says he was and is guardian of the minor heirs of said Rossetter, and was, at the maturing of the notes, secured by the deed of trust, and to prevent a sale and sacrifice of the premises, and to gain time until the premises would sell better, he, as guardian, entered into an arrangement with Wheeler to pay up all interest to March, 1859, and did pay Wheeler \$2,300, and procured an extension accordingly.

71

Pahlman, executor, claims that he and H. L. Rucker, or either of them, were justly entitled to the surplus in the hands of said Shumway, after deducting the expense of said sale and the amount due said Campbell, and said Rucker is entitled to receive said surplus under said assignment, and who demanded the same before said defendants had any knowledge thereof or made any demand or claim therefor, nor did they, for a long time thereafter, nor did they know anything of such surplus until informed by said Shumway.

72

They have no knowledge of any such heirs as are claimed by the other defendants herein, and they wholly deny that any such heirs exist, or that they, or either of them, have any right or title to any portion of said surplus. They wholly deny that there was any occasion for filing this bill, and ask to have their answer

Page of Rec. taken regarded as a demurrer, and disclaim any admission thereby.

- 73 Exhibit "A." Pahlman's order on Shumway for said surplus and assignment thereof to Rucker, dated March 25th, 1859.
- 75 Demurrer by Rucker, and for cause shows that no grounds sufficient in law are set forth in said bill for maintaining the same.
- 76, 85-6 B. S. Morris disclaims all claim or interest.
- 77 Demurrer overruled.
- 79, 80 Summons and service.
- Amendments to bill—charges as follows, viz :
- To Miller & Davis, judgment for \$1,027.83, dated Nov. 17th, 1857.
- To Magie, survivor, judgment Nov. 19, 1857, \$1,210.66.
- To J. B. King, judgment Nov. 24, 1857, \$1,210.
- 82 To F. McKerwin, judgment Nov. 5th, 1857, \$1,206.
- To E. Blackman, ex'r., judgment Nov. 6th, 1857, \$1,000.83.
- To E. Blackman, judgment Jan. 11th, 1858, \$1,018.
- 83 Geo. Scoville disclaims all interest.
- 84 H. L. Rucker adopts as his own the answers of Pahlman and Campbell, and claims such right as may justly belong to him by virtue of said assignment.

Decree.

The decree awards that said Shumway, out of the surplus, pay as follows :

88	First, to himself two per cent. of \$30,000, is	-	\$600.00
	Second, for service and summons, &c.,	-	29.70
	Third, the several judgment creditors or their assigns, mentioned in the several answers, as follows,		
89	to wit:		
	First, H. Stevens, Nov. 5th, 1857,	-	1,195.20
	Costs,	-	8.25
	Second, Miller & Davis, Nov. 19th, 1857,	-	1,037.00
	Costs,	-	10.55
	Third, H. H. Magie, Nov. 19th, 1857,	-	1,210.66
	Costs,	-	9.20
90	Fourth, J. B. King, Nov. 24th, 1857,	-	1,210.00
	Cost,	-	9.20
	Fifth, E. Blackman, Jan. 11th, 1858,	-	1,018.00
	Cost,	-	11.55
	Sixth, E. Blackman, Jan. 11th, 1858,	-	1,000.00
	Cost,	-	8.80
			\$7,358.44
	Seventh, J. D. Pahlman, ex'r., the balance of said surplus,	-	4,050.42
			\$11,408.53

Bill of Exceptions.

91 Shows that the case was heard upon bill, answers, replications, disclaimers and deposition of B. S. Morris, and following agreed state of facts, namely :

92 Deed of trust as set forth in bill.

The following judgments :

F. M. Kerwin, Nov. 5th, 1857,	- - - - -	\$1,214.25
Miller & Davis, Nov. 19th, 1857,	- - - - -	1,047.73
H. H. Magie, Nov. 19th, 1857,	- - - - -	1,219.86
J. B. King, Nov. 24th, 1857,	- - - - -	1,219.20
E. Blackman, Jan. 11th, 1858,	- - - - -	1,029.55
E. Blackman, Jan 11th, 1858,	- - - - -	1,009.63
		\$6,740.22

93 That executions were issued and left with Sheriff for service in all said judgments.

That said execution of Kerwin was levied on these premises and they were sold on by Sheriff, on 25th February, 1858, for \$10.50. That the judgments all remain unpaid, except the said \$10.50 so made on Kerwin's.

That on Nov. 7, 1857, Rossetter conveyed said premises by warranty, to B. S. Morris, without consideration paid, or knowledge of Morris.

That Morris conveyed said premises to Pahlman, as executor.

94 *H. L. Rucker*, being sworn, says that on or about 4th Feb., 1859, Morris conveyed the premises, by quit-claim, to John D. Pahlman, executor of Rossetter. That affiant prepared the deed, and again came into his hands after it was executed and acknowledged and delivered by said Morris. That he has made diligent search for it in his office, where papers of the kind are usually kept, but he has been unable to find the same, and he believes the same has been misplaced, and cannot be found, to be used as evidence.

That Rossetter died leaving as heirs the parties mentioned in said bill ; that he left a will, which was duly proven, and J. D. Pahlman is the sole qualified acting executor.

That James Campbell is the legal guardian of the infant heirs, and that, at Pahlman's request, at the maturity of said notes under the trust deed, and for the purpose of preventing a sale and sacrifice of said premises, he, Campbell, entered into an arrangement with Wheeler, by which, as his own voluntary act, without any order of any Court, and without taking any assignment, to subrogate himself as owner or assignee of any part of the claim, paid one year's interest on said notes, and other charges amounting to \$2,300, by which the time of payment on said notes was extended one year, until March 12, 1859.

Page of Rec. That on February 14th 1859, the premises were redeemed from the sale under Kerwin's execution, by Pahlman, as executor.

That, on 25th March, 1859, Shumway sold the premises under the deed of trust, as set forth in the bill, for \$30,000.

That the surplus, after paying Wheeler, &c., was assigned the same day of the sale to H. L. Rucker, who made a demand upon Shumway for it; but he, having been previously notified by John B. King, one of the judgment creditors, not to pay over the surplus, and knowing from the records of the Court of Cook County, that there were other judgments similarly situated, refused so to do, and thereupon filed said bill for the purpose of having the rights of the parties adjudicated.

That the estate of Ashur Rossetter is *insolvent*.

96 Decree recited as before, from which Pahlman, Campbell, Martha A. Rossetter, and H. L. Rucker then and there excepted.

ASSIGNMENT OF ERRORS.

FIRST. The Court decided that A. Rossetter, in his lifetime, had such an estate as was subject to a judgment lien.

SECOND. That the several judgments became liens upon the premises.

THIRD. The Court decreed that out of the surplus these judgments should be first paid, and remainder to be paid to Pahlman.

FOURTH. The Court rendered a decree in favor of the judgment creditors, and against the said J. D. Pahlman, executor.

SCATES, McALLISTER & JEWETT,
Of Counsel for Plaintiffs in Error.

195-197
Pahlman stat
7
Shumway stat
at start

54
195

To Apr. 30. 1860
Shelton
Ch.

195

United States of America.
State of Illinois County of Cook &c.

(1)
Hear before the Honor-
able the Judges of Superior Court of Chicago
within and for the County of Cook and
State of Illinois, at a Regular Term of said
Superior Court of Chicago, begun and holden
at the Court House in the City of Chicago,
in said County and State, on the first Mon-
day being the third day of October in the
Year of our Lord eighteen hundred and
fifty nine, and of the Independence of the
United States of America the eighth fourth
Present the Honorable John M. Wilson

Chief Justice of Superior Court of Chicago.
Law H. Higgins & Grant Gordon Judges
Charles Warren Prosecuting Attorney
John Gray Sheriff of Cook County.

vs
Walter Kimball
clerk.

Be it remembered that heretofore to wit:
on the 14th day of April in the year of our
Lord one thousand eight hundred and fifty
nine, Notaris G. Shumway filled in the
office of the Clerk of the Superior Court of
Chicago. his certain Bill of Complaint in
the words of figures following, to wit:

(2)

115 folios
To The Honorable

The Judges of the Superior Court of Chicago

In Chancery Sitting:

(3)
Humbly complaining sheweth unto your Honors
Your Orator Horatio G. Shumway of the City of Chicago
in the county of Cook and State of Illinois that Ascher
Rossitter (formerly of the said City of Chicago, since deceased)
and Martha A. his wife, made and executed to your
Orator a certain deed of trust bearing date on the
twelfth day of March, in the year One Thousand Eight
Hundred & fifty seven in and by which the said Ascher
Rossitter and wife, conveyed to your Orator as trustee
and in trust to secure certain indebtedness, and the
performance of certain covenants in said deed of
trust particularly mentioned all the following
mentioned and described premises and property
situated in the said city of Chicago, in the county
of Cook and State of Illinois, to wit: The South
Quarter of Block Sixty nine (69) in the School
Section addition to Chicago known as Tracts
subdivision of said Block, more especially to
secure the payment of Eight certain promissory
notes made by the said Ascher Rossitter, bearing the
same date with said deed of trust. Each for the sum
of Two Thousand Dollars, payable to the Order of the said
Ascher Rossitter, at the office of R. K. Swift, Brother
& Johnston (then doing business in the said City of
Chicago) twelve months after the date thereof, with

interest on the same after maturity at ten per centum per annum, and also to secure the payment of certain taxes & other liens upon said premises & property, which said deed of trust was duly ~~Recorded~~ in the Recorder's office for the record of Deeds &c: in and for the said County of Cook and State of Illinois, in Book 120 of Deeds at page 455. as will more fully and at large appear on reference to the said deed of trust now in the possession of your Orator, ready to be produced as this court may direct, and a copy of which is annexed to this your Orator's Bill of Complaint, marked Exhibit "A" which he prays may be taken as part of this his said Bill.

(4) And your Orator further shews unto your Honors that on or about the fourteenth day of March A.D. 1859. application was made to your Orator by Bacon Wheeler the holder and owner of the indebtedness mentioned in the said deed of trust, for a sale of the premises and property described therein, on account of the default in the payment of the said indebtedness, and the non performance of certain covenants contained in the said Deed, and in pursuance of such application, your Orator as such Trustee caused the premises mentioned and described in said Deed of Trust to be advertised for sale, by notice published in the Chicago Daily Journal for the time and in the manner specified in the said Deed of Trust.

And your Orator further shews unto your Honors that on the twenty fifth (25) day of March in the year Eighteen Hundred and fifty nine, the premises and property mentioned in said Deed of Trust, were sold at Public Auction, at the North Door of the Court House at the hour named in said notice of sale in pursuance thereof by your Orator for the sum of Thirty Thousand (\$30,000.) Dollars, cash in hand paid to your Orator for the same, being the amount of the bid of E. J. Chapin, Alexander March and Robert H. Foss, the purchasers at such sale, & to whom your Orator has delivered his Deed for said premises in pursuance of such sale. —

(5)

And your Orator further shews unto your Honors that out of the proceeds of said sale, he has paid to Bacon Wheeler the holder of the indebtedness, secured in by the said Deed of Trust the sum of Eighteen Thousand, Five hundred & Ninety One Dollars and forty seven Cents (\$18,591.47) the amount due and unpaid for principal and interest on the promissory notes mentioned and described in the said Deed of Trust, and of certain other indebtedness for prior liens and taxes, as will more fully and at large appear on reference to the Statement of said indebtedness, and the receipt of said Bacon Wheeler, now in the possession of your Orator ready to be produced as this Court may direct, and a copy of which is annexed to this your Orators Bill of Complaint.

marked Exhibit "B." and which your orator prays may be taken as part of this his said bill.

And your orator further shews unto your Honor that the surplus of said proceeds of said ^{after said} sale, above mentioned payments after deducting therefrom, the costs, commissions & expenses of said sale, remains to be distributed by your orator, and your orator prays the aid and ~~direction~~ of this Honorable Court as to the mode and manner of the proper distribution thereof, for which purpose this your orators Bill of Complaint is filed in this Court.—

(6) And your orator further shews unto your Honors that as he is informed & believes the said Chapin, March and Fox, were induced to make their said bid for said premises at said sale, and make said payment thereon upon an understanding that John D. Pohlman sole qualified Executor ^{of the estate} of said Asker Rossetten, that the purchaser at such sale should in addition to the deed from your orator, receive a deed from said Executor of the right & interest of the said estate of said Rossetten of in and to said premises without any other consideration being paid therefor, than the amount of said bid, which understanding was entered into ^{by} and on the part of said Pohlman upon the very reasonable supposition that otherwise said property would be sacrificed and the excess of the value of said property, over & above the amount of the liens and indebtedness

thereon as aforesaid, would be wholly lost to the said estate;— and your orator is further informed and believes to be true that the said deed from said Executor of said Estate is now executed and ready for delivery to the said purchasers at said Trustees' Sale upon payment being made to said Executor or to his order, of the said Overplus at sale, after deducting therefrom the costs and expenses of said sale.

(7) And your Orator further shews unto your Honors that as your Orator is informed and believes to be true, that after the said sale was made, the said Executor assigned and transferred all his right & interest in said surplus to Henry L. Rucker a defendant herein who claims said overplus of your Orator by virtue of said assignment and transfer, or as much thereof as said estate would be entitled to receive, after the payment of Costs and Expenses of sale, and the allowance to James Campbell, also hereinafter named, of the amount which he may be entitled to, which claim of said James Campbell is founded upon the following state of facts as your Orator is informed, but of which your Orator has no personal knowledge — that is to say, after the maturity of the Eight promissory notes in the above mentioned Deed of Trust, described the same being unpaid, and the said Bacon Wheeler then being the legal holder & owner thereof and of other indebtedness provided for therein, applied to your

erator for the purpose of having a sale of the said premises made by your orator on account of default in payment of said indebtedness, and the said premises were duly advertised for sale in pursuance of such request.

(8) And your orator further shows, that prior to the day of sale, the said James Campbell, who was at that time and is now the General Guardian of George W. Rosseter and Charles D. Rosseter, minor children and heirs at law of the said Asher Rosseter, made and entered into an arrangement with the said Bacon Wheeler, whereby the said James Campbell paid or caused to be paid out of his own funds the interest then unpaid on said indebtedness, and the interest for one year in advance, and some additional costs amounting in the aggregate to the sum of Two Thousand (\$2,000) Dollars, or thereabouts, and the time for the payment of said indebtedness was thereupon by the mutual agreement and understanding of all the parties in interest extended till the twelfth day of March A.D. 1859. being for one year from the time of the maturity of said promissory notes - and the interest endorsed as paid on said notes till said time, as will more fully and at large appear on reference to the said Notes, now in the possession of your orator, ready to be produced and proved as this Honorable Court may direct.

And your orator is informed & believes that the

said James Campbell claims & insists that inasmuch as he made the said advance for the benefit of said estate he ought in Equity and good conscience to have the same refunded to him with the interest thereon —

(9.) And your orator further shews unto your Honors that the said Ascher Rossetter, died at the said City of Chicago on or about the 25th day of February A.D. 1858. leaving Martha A. Rossetter, his widow, Mary S. Leavitt wife of Frank A. Leavitt, George W. Rossetter, and Charles D. Rossetter his children and heirs at law, all of whom have a claim to have some right or interest in said surplus, and that the above named John D. Pohlman is the sole qualified executor of said estate of said Ascher Rossetter, under and by virtue of his last will and Testament, probated in the County Court of Cook County in the said State of Illinois, and that the said executor or his assignee of said surplus, above named, claims the sum subject to the payment of the costs & expenses of such said sale, and the above sum claimed by the defendant James Campbell as above set forth. —

And your orator further shews unto your Honors that Edwin Blackman, personally, and also as Executor of the Estate of John High Jr. late of the said City of Chicago, now deceased, Haines H. Magie, Survivor of said John High Jr., John B. King, Buckner S. Morris, John F. Miller and Gilbert F. Davis, Henry Stevens, administrator of the Estate of Frank W. Herwin deceased

George Scoville, John D. Pohlman, George C. Smith, John E. Smith, Frances A. W. Intyre assignee of Rosseter, Pohlman & Smiths, have a claim to have a lien upon or other interest in said Overplus, which claims or interests if any are undetermined, and should for the protection of your Orator be proven and substantiated in this Court if any such they have.

(10) And your Orator further shews unto your Honors that he is now and has at all times since said Sale been ready and willing to pay over such share or portion of said Overplus, arising from said Sale over and above his costs, charges and expenses to such person or persons as are or may be legally entitled to the same, and your Orator well hoped that the subject matter of this his Bill of Complaint, might have been adjusted without the interposition & aid of this Court. But now, so it is, that on account of the conflicting claims to said property as aforesaid your orator is unable to make payment without such aid. — In tender consideration whereof, and forasmuch as your Orator is remediless in the premises by the strict rules of the Common Law and can only obtain relief in this Honorable Court, where matters of this sort are properly cognizable & relievable

To the End therefore that the said John D. Pohlman, Executor of the Estate of Ascher Rosetter, deceased Henry L. Packer, Buckner S. Morris, Martha A. Rosetter, Mary S. Leavitt & Frank A. Leavitt her husbands, George W.

James Campbell personally and as guardian of said George W. Rosseter & Charles
 Rossetter and Charles D. Rossetter, Waines H. Mogie, Edwin
 Blackman, personally and as Executor of the Estate of
 John High Junr. deceased George C. Smith, John E. Smith
 Francis A. M. Intyre, John B. King, John F. Miller, Gilbert
 F. Davis, Buckner S. Morris, George Scoville, Henry Stevens,
 administrator of the estate of Frank McKerwin deceased;
 may full, true, and perfect answers make to all and
 singular the matters hereinbefore stated and charged,
 Your Orator hereby craving the necessity of
 the answers of such defendants being put in under
 the oath of such defendants or of either of them
 and that as fully & particularly as if the same were
 here repeated & they thereto severally and specifically
 interrogated thereto and that they shall so answer
 not only as to the best of their knowledge and remem-
 brance respectively, but also as to their several and res-
 pective hearsay, information, and belief" and that
 a distribution of said surplus, over and above
 the amount which may be found to be due to your
 Orator for commissions, costs, and expenses, in and
 about said sale, and the conveyance thereof as afore-
 said, to be determined by this Honorable Court. And
 that your Orator may have such further relief
 or may have such other relief as the nature of
 the case may require and shall be agreeable to
 Equity.

May it please your Honors to grant unto
 your Orator the people writ of summons to be directed

to the said John D. Pohlman, Henry L. Rucker, Buckner
 S. Morris, Martha A. Rosseter, Mary S. Leavitt, Frank
 A. Leavitt, George W. Rosseter, Charles D. Rosseter
 James Campbell, Haines H. Magie, Edwin Blackman
 George C. Smith, John C. Smith, John B. King, John F.
 Miller, Gilbert F. Davis, Henry Stevens, George Scoville
 & Francis A. W. Intyre

Commanding them and each of them by a certain day
 to be and appear before this Honorable Court of
 Chancery and then and there to answer the premises
 and to stand to and abide such order and decree
 therein as shall be agreeable to Equity and good
 Conscience

And your Orator will ever pray for

H. C. Shumway

(12) Shumway, Waite Towne }
 Sole for Campb }

"Exhibit A"

This Indenture made this twelfth day of March in the year
 One Thousand, Eight Hundred and Fifty Seven, between
 Ascher Rosseter and Martha A. his wife, of the City of Chicago
 in the County of Cook and State of Illinois party of the
 first part, and Horatio G. Shumway, Chicago, in the County
 of Cook, and State of Illinois, party of the second part
 Witnesseth; Whereas Ascher Rosseter hath executed
 Eight (8) certain promissory notes for the several

sums of Two Thousand (\$2,000) each bearing even date herewith, payable to his own order at the office of H. H. Swift, Brother & Johnston, twelve months after the date thereof, with interest therein after due at ten per cent per annum, said notes being numbered from number one (1) to number eight (8) inclusive and amounting in all to the sum of Sixteen Thousand (\$16,000) Dollars.

(13) Now Therefore, the said party of the first part, in consideration of the premises, and in the further consideration of One Dollar, to them in hand paid by said second party the receipt whereof is hereby confessed, have and hereby do grant, bargain, sell and convey unto said party of the second part, his heirs, assigns or successors in trust forever, all the premises situate in the City of Chicago County of Cook and State of Illinois, and known and described as follows, to wit:

The South quarter ($\frac{1}{4}$) of Block Number Sixty Nine (69) in the School Section Addition to Chicago, known as Garretts Subdivision of said Block.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining; and also all the estate, interest, claim and demand whatsoever, in Law as well as in Equity, which the said party of the first part, ha in and to the premises hereby conveyed unto the said party of the second part, his heirs, assigns

or successor in Trust, hereinafter named, Forever: —

(14) In Trust, Nevertheless, to wit: In Trust, That in case of default in the payment of the said Notes or any of them, or any part thereof, or in case of a breach of any of the covenants or stipulations herein contained, then on the application of the legal holder of said Notes, or any or either of them, it shall and may be lawful for the said party of the second part, his heirs, assigns or successors in Trust, to enter into and upon all and singular the premises hereby granted, or intended so to be, or any part thereof, and as Attorney for said party of the first part for such purpose duly constituted, Irrevocably, on in the name of said second party, to receive all rents, issues and profits thereof, and to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of said party of the first part, their heirs or assigns therein, at public auction, at the North door of the Court House in the City of Chicago, in the State of Illinois, for the highest and best price the same will bring in Cash, ten (10) days public notice having been previously given of the time of such sale, by advertisement in one of the Newspapers at that time published in said City of Chicago to adjourn such sale from time to time as may be thought expedient, and to make execute and deliver to the purchaser or purchasers at such sale good and sufficient, deed or deeds of conveyance for the premises sold; and out of the proceeds or avails of such sale

and the purchase money paid thereon, after first paying all costs of advertising and sale, Commissions and all other expenses of this Trust, including all moneys advanced for taxes or other liens and assessments, with the interest thereon, to pay the principal and interest due on said Notes according to the tenor and effect thereof, rendering the overplus (if any) unto the said party of the first part, their legal representatives or assigns, on reasonable request; and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to ~~the~~ the application of the purchase money, which sale or sales so made, shall be a perpetual bar, both in law & equity, against the said party of the first part, their heirs and assigns, and all other persons claiming the premises aforesaid, or any part thereof, by, from, through or under said party of the first part or any of them.

(15)

And the said Asker Rossiter, party of the first part, for himself, his heirs, Executors and Administrators covenant and agree to and with said party of the second part, his legal representatives or successor in Trust, that at the time of enrolling and delivering of these presents, he is well seized of said premises, and has good right, full power, and lawful authority, to grant bargain and sell the same in manner and form as aforesaid; that the same are free and clear of all liens and incumbrances whatsoever (unless as hereinafter specified) that he will pay, or cause to be paid, the

(16) said above mentioned indebtedness, when and as the same becomes due and payable, and until said indebtedness is fully paid, or said premises are sold by virtue hereof, will in like manner pay all taxes and assessments thereon, when and as the same become due and payable. And that he will cause any buildings upon said premises to be insured in some safe and responsible Insurance Company for the insurable value thereof, and upon the request of said second party, or the legal holder of any of said indebtedness, assign the Policy or Policies of such Insurance to said party of the second part as collateral hereto, and keep the same so insured and the policies assigned as aforesaid: Provided, however; That such Insurance shall not be required for a greater sum than the amount of said indebtedness then unpaid.

And it is stipulated and Agreed, That in case of default in any of said payments of principal or interest as aforesaid, or of a breach in any of the covenants and agreements herein, then and in that case, the whole of said principal sum hereby secured, and the interest to the time of sale, according to the tenor and effect of said indebtedness, shall and may at once become due and payable and the said premises be sold in like manner and with the same effect as if the said indebtedness had matured; And further, that in case of the death, resignation, removal from the said City of Chicago, or other inability to act

of said party of the second part, then Edward P. Towns
of the said City of Chicago, shall be and hereby is
appointed and made the Successor in Trust herein,
with like power and authority as the said party
of the second part hereby has in and about the man-
agement of the said Trust Estate, and the said premises
shall become vested in such new Trustee according

(17) This Deed is subject to a certain mortgage
bearing date the twenty third day of December A.D.
1852. executed by George W. Noble and wife to Jared Gage
and John E. Haines to secure certain notes, which notes
said Rosetter hereby agrees to pay as they shall severally
mature, and the interest thereon, but if default be
made in the payment thereof by said Rosetter, then
the legal holder of said notes first herein described
shall have power to pay said notes of said Noble to
said Gage & Haines with the interest thereon, and all
moneys so paid, shall be an additional lien on said
property, and shall be paid out of the proceeds of sale
of said property by the Trustee to the party paying
the same, with interest thereon at the rate of ten
(10) per cent per Annum.

In Witness Whereof, The said party of the first part
have hereunto set their hands and seals the day and year
first above written.

Signed, Sealed and } (Signed) A. Rosetter
Delivered, in presence of } (Signed) M. A. Rosetter
W. W. Stewart }

LS
LS

State of Illinois
Cook County

ss. I. W. Stewart a Notary
Public in said County in the State
aforesaid do hereby Certify, That Asher Rossitter and
Martha A. his wife, who are personally known to
me as the person whose names are subscribed
to the within Trust Deed, as having executed the
same, appeared before me this day in person, and
acknowledged that they signed, sealed, and delivered
the said instrument of writing as their free and
voluntary act, for the uses and purposes therein
set forth.

(18)

And the said Martha A. Rossitter, wife
of the said Asher Rossitter, having been by me
Examined, separate and apart, and out of the hearing
of her said husband, and the contents and meaning
of the said Trust Deed, having been by me known
and fully explained to her, acknowledged that she
had freely and voluntarily executed the same, and
relinquished her dower, and all right, title and
interest to the lands and tenements therein men-
tioned, without the compulsion of her said husband
and that she does not wish to retract the same.

L. S.

Given under my hand and Notarial Seal,
this twentieth day of March in the year of our
Lord One Thousand Eight Hundred and fifty seven

W. H. Stewart

Not Public

"Exhibit B."

Statement of Bacon Wheeler's Claims on South
2nd of Block sixty nine, Sch¹ Sec² Admⁿ to Chicago
under the virtue of Deed of Trust to H. G. Shumway
made by Ascher Rossitter & wife, bearing date the 12th
day of March A.D. 1857. Recorded in Recorder's Office
of Cook Co. Illinois in Book 120. of Deeds page 455.
to wit:

Rossitters notes of \$2,000 each	\$16,000.00
14 Days int from 12 th to 25 th March @ 10 per cent	62.22
Note of Geo. W. Noble to Gage & Haines being the last note mentioned in the mortgage referred to in said Deed of Trust, paid & cancelled by Wheeler	2000.00
Interest on same for 14 days from 12 th to 25 th March at 6 per cent	5.00
Amount paid for Tax Certificate, Sale City Taxes March 23. 1857. by Wheeler to J. Taylor the purchaser	
Amount Sale \$120.35	
Double same 120.35 =	240.70
Amount paid by Wheeler State, County, & Town Taxes for year 1856.	\$100.47
2 years interest on same @ 10 per cent	20.08
Amount paid J. Taylor for advertising & affidavit of serving of notice on above tax sale	2.00
Amount paid for City taxes for 1858.	\$134.20
Charges & interest on same @ 10 per cent	26.80
	161.00
	<u>\$18,591.47</u>

In so far as the above statement shows payments

made by Mr. Wheeler on account of taxes and redemption money & charges on account thereof, the above statement is correct.

Chicago March 26. 1859.

(Signed) John D. Pohlman
Sole Qualified Executor of
Asker Rossetter. Deceased

(20)
Rec^d Chicago March 26th 1859 of Horatio
G. Shumway, Trustee named in the Deed of Trust
referred to in the above statement, Eighteen Thousand
Five Hundred and Ninety One & ⁴³/₁₀₀ Dollars, being the
amount of the several claims referred to in the
above statement of account of the claims referred
to in the above statement and in satisfaction
thereof, And in consideration of such pay-
ment, I agree that the several claims above
mentioned are due and unpaid, and that sums
set forth in said statement, as paid on account
of taxes and for the redemption of the same
were actually paid by me, except the items of
interest on such taxes paid by me, and that
I am justly entitled to the above sum so paid
by said Trustee

Witness my hand & seal this 26th day
of March A.D. 1859.

(Signed) Bacon Wheeler (L.S.)

And thereupon, to wit on the day & year last
aforesaid, then issued out of the Office of the Clerk
of said Court, the certain writs of Summons, which
said writs, with the Sheriffs returns thereon, are in the
words & figures following, to wit:

State of Illinois
County of Cook ^{County of Cook} The People of the State
of Illinois to the Sheriff of
said County, Greeting:

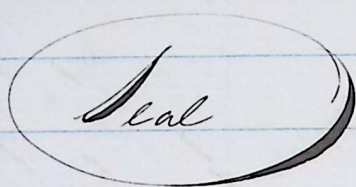
(23) We Command you, that you Summon John
R. Fahlman, Henry L. Rucker, Gustav S.
Morris, Martha M. Rossetter, Mary E. Leavitt,
Frank N. Leavitt, George M. Rossetter, Charles
R. Rossetter, James Campbell, George C. Smith,
John E. Smith, Edwin Blackman, Henry H.
Mayer, John C. King, John J. Miller,
Gilbert J. Davis, Henry Stevens, George
Scoville & Francis W. McIntyre.

if they shall be found in your County, personally
to be and appear before the Superior Court of
Chicago, of said County of Cook, on the first day of
the next term thereof, to be holden at the Court House
in the City of Chicago, in said County, on the first
Monday of May next, to answer unto Horatio
G. Mumway, in his certain Bill of Complaint, filed
in the said Court on the Chancery side thereof.
And have you then and then this writ, with an

recognition thereof, in what manner you shall
have executed the same.

Walter Kynball

Clk of our said Court, and
the seal thereof, at the City of
Chicago, aforesaid, this 14th
day of April A. D. 1859.
Walter Kynball Clk.



We hereby waive service of process on us
in the within entitled suit & enter our ap-
pearance therein.

John A. Pahlman,

Henry L. Rucker

& James Campbell

By Rucker & Page
Sols.

(24)

State of Illinois }
County of Cook }

The People of the State of Illinois to
the Sheriff of ~~Kane~~ County Greeting:

(25) We command you that you summon John
D. Pahlman, Henry L. Pucker, Buckner C. Morris,
Martha A. Rosseter, Mary S. Leavitt, Frank A. Leavitt,
George W. Rosseter, Charles D. Rosseter, James Campbell,
George A. Smith, John C. Smith, Edwin Blackman, Horatio
H. Magic, John B. King, John F. Miller, Gilbert Davis,
Henry Stevens, George Scoville & Francis A. McIntyre, if
they shall be found in your County, personally to be and
appear before the Superior Court of Chicago of said
County of Cook, on the first day of the next term thereof, to
be holden at the Court House in the city of Chicago,
in said County, on the first Monday of May next, to
answer unto Horatio S. Shumway in his certain Bill
of Complaint filed in the said Court on the Chancery
side thereof.

And have you then and there this writ with an
endorsement thereon, in what manner you shall have
executed the same.

(Seal) Witness Walter Kimball, Clerk of our said
Court, and the seal thereof, at the City of
Chicago aforesaid this 14th day of April
A.D. 1859

Walter Kimball, Clerk

Endorsed. Executed this writ April 16th 1859 by reading
the same to the within named Henry Stephens and
at the same time, ^I delivered to said Stephens a correct
copy of this writ

E. G. Allen Sheriff Kane County

I further executed this writ April 19th 1859 by reading
the same to the within ^{named} Defendant Martha A.
Rosseter and Charles D Rosseter and at the
same time I delivered to each of said Defendants
Martha A. Charles D Rosseter a true copy of the
same the other named Defendants not found in
my County

E. G. Allen Sheriff of
Kane County

(26)

And after wards to wit, on the 31st day of
May in the year aforesaid, John F. Miller &
Gilbert F. Davis filed in the office of said Clerk
their certain Answer, in the words of figures following
to wit:

State of Illinois
Superior Court
of the City of Chicago } In Chancery

Horatio G. Shumway
as
John G. Miller
Gilbert H. Davis
et al }

(27) The first and several answers
of John G. Miller and Gilbert H. Davis to the
bill of Complaint of Horatio G. Shumway
Complainant.

These defendants now and at all times
saving and reserving to themselves all benefit
of exceptions to the insufficiency of the bill
of complaint of the said Complainant for answer
thereunto or unto such parts thereof as they are
advised is material for them to make answer
unto answering say that they admit that
Asahel Rossiter in his lifetime but now deceased
and the said defendant Martha E. Rossiter on the
12th day of March A.D. 1856. executed and delivered
to the said complainant and the deed of trust
on the South Quarter of Block 69 in School Section

addition to Chicago in said Bill alleged and described to secure the indebtedness in said deed of trust and Bill of complaint mentioned, and that a true copy of said deed of trust is annexed to said bill of complaint -

These defendants further answering admit a default having accrued in the payment of the money secured by said trust Deed that on the 30th day of March A.D. 1859 the said premises were sold by the said complainant as such Trustee for the sum of thirty thousand dollars as in said Bill alleged -

(28)

These defendants further answering admit that afterwards and on the day and year last aforesaid the said Complainant paid to the holder of the indebtedness secured by said trust deed the sum of Eighteen thousand five hundred and ninety one dollars and forty seven cents as in said bill alleged - and that the balance of said sum of thirty thousand dollars now remains in the hands of the said Trustee - but whether or not the purchaser at said sale expects to get a deed from the said defendant Pahlman executor of the said estate of the said Asher Rossiter deceased these defendants do not know and cannot state or

(25)

whether the said Pahlman has assigned the
overplus now in the hands of the said complainant
to Henry L. Rucker or whether the said Rucker
now claims the same or whether the said de-
fendant Campbell paid to the said Wheeler
two thousand dollars or whether the indebted-
ness of the said Wheeler was extended to the
12th day of March A.D. 1859. these defendants
do not know and have not been informed except
by said Bill and leave the complainant to prove
all these matters as he may be advised. but these
defendants deny that the said Pahlman had any
right or authority to assign said overplus to said
H. L. Rucker or that the said Rucker has now any
right or title to the same & they also deny that the
said Campbell has any right title or interest in and
to the said overplus by means of or by reason of the said
pretended claim in said Bill mentioned -

These defendants further answering say that heretofore
and in the Term of November 1854 of Cook County
Circuit Court by the consideration and judgment
of said Court these defendants recovered against
the said defendants John D. Pahlman, George C. Smith
& J. E. Smith and the said Asher Rossiter in his
life time, since deceased the sum of ten hundred
and thirty seven dollars and eighteen cents for their
damages which they had sustained as well by

reason of the non performance of certain promises & undertakings then lately made as for the costs and charges of these defendants about their said suit in that behalf sustained whereof the said Rossiter in his life-time and the said Pahlman & George C. Smith & J. E. Smith were then and there connected as by the record of said judgment in the office of the clerk of the said Court reference being thereto had & to which these defendants pray leave to refer will more fully and at large appear -

(30)
And these defendants further answering say that on or about the fifth day of April A.D. 1858. for the purpose of obtaining satisfaction of said judgment said and prosecuted out of the said Court a writ of the people called a *Fieri Facias* directed to the Sheriff of Cook County that being the County in which the defendants in said judgment at the time resided, by which said writ the Sheriff was commanded that of the goods & chattels, lands and tenements of the said Asher Rossiter, John D. Pahlman, George C. Smith & J. E. Smith in his County, cause to be made the sum of ten hundred and thirty seven dollars and eighteen cents recovered by these defendants as above stated -

And these defendants further answering say that the said writ of *Fieri Facias* before the delivery

thereof to the said Sheriff was duly endorsed and was afterwards, and on or about the said fifth day of April in the Year of our Lord 1858. was delivered to the said Sheriff to be executed in due form of law and afterwards and on the third day of July 1858. was returned into the Office of the Clerk of said Circuit Court by said Sheriff of Cook County wholly unsatisfied as by ^{reference} to the return of the Sheriff upon said writ will more fully appear

(311) And these defendants further answering say that said judgment still remains in full force and effect not reversed or satisfied or otherwise vacated and that there is now actually due upon said judgment the said sum of ten hundred & thirty seven dollars and eighteen cents together with the interest thereon from the 19th day of November 1857.

And these defendants further answering ~~allege~~ and insist that by virtue of the rendition & entry of said judgment these defendants acquired a lien upon the said premises in said bill of complaint and trust deed described subject to the payment of the indebtedness in said trust deed described and by reason thereof these defendants now have an equitable lien on the surplus now remaining in the hands of the said complainants as in

said bill stated to the amount of the judgment of these defendants herein before stated and these defendants insist that the said Complainant holds said ~~surplus~~ ^{or} the money now remaining in his possession arising from the sale of said premises after the payment of the costs and expenses of said sale and the payment of the indebtedness secured by said trust deed or so much thereof as may be necessary for that purpose in trust for the payment of the damages interest and costs of the defendants now due and owing to them upon the judgment herein before mentioned, and these defendants also insist that their said lien upon said overplus is prior to any claim of the said defendant Campbell upon said overplus.

(32)

And these defendants deny all unlawful combination and confederacy in the said bill charged, without that any other matter or thing material or necessary for these defendants to make answer unto and not herein or hereby well or sufficiently answered unto confessed or avoided traversed or denied is true to ^{the} knowledge or belief of these defendants - all which matters and things these defendants are ready to aver maintain and prove as this honorable Court shall direct; and humbly pray to be hence dismissed with their reasonable costs & charges in that behalf most wrongfully sustained.

Walker Van Arman & Dexter
Sols for Deft. Miller & Davis

John H. Miller -
Gilbert H. Davis -

And afterwards, to wit on the 8th day of June
in the year aforesaid. Edwin Blackburn & H. H.
Magee filed in the office of said Clerk their
certain answer, in the words of figures following
to-wit:

(33)

In the Superior Court of Chicago

In Chancery

The joint and several answers of -
Edwin Blackman as executor of the
last Will and testament of John High
of late of Chicago in the County of Cook
deceased and of Haines H. Magic as
Survivor of said High who were partners
in business during the lifetime of said
High under the name style & firm of
Magic and High to the Bill of Com-
plaint Horatio G. Shumway Com-
plainant.

(35)
These defendants now and at all times hereafter
saving and reserving to themselves all and all man-
ner of benefit and advantage of Exemption &c. for
answer unto the said Complainant's bill or unto so
much and such parts thereof as these defendants are
advised as material for them to make answer
unto. They answer and say they admit the state-
ments of the Complainant's said bill of Complaint so
far as relates to the execution of the several Notes and
Trust deed to secure the same made and executed
by Asahel Rissitter in his lifetime and the foreclosures
thereof on said thereon at the instance of Bacon Wheeler

(36)

the Holder of said Notes so far as includes the proper acts of said complainant himself in the business aforesaid. But they have no knowledge, and do not admit any of the statements touching the action of the defendant John D. Pahlman as executor of said Asher Rossitter deceased and they expressly deny the legal validity of any of said acts and doings of said Pahlman as such executor as aforesaid or otherwise whereby he has set himself by contract with the purchasers of the premises under said trust deed or with H. L. Rucker in said bill named or with any other person or persons to control or give any direction to or lien upon any portion of the residue of the proceeds of said sale in the hands of the Complainant over and above payment of Bacon Wheeler's debt therein mentioned and they deny that any understanding or agreement whatever ~~by~~ made by the purchasers under said Trust Deed can or ought to be allowed or of any controlling force or binding authority whatever to prejudice or override the claims of judgment Creditors of Asher Rossitter who held valid lien by judgment or otherwise upon the premises so sold as aforesaid by the complainant under said trust deed.

These defendants know nothing and admit nothing touching the readiness of said Pahlman to execute a deed to the purchasers under said trust deed & they deny the necessity of any such deed being executed

They know nothing of H. L. Ruckers claim as assigned
of Pahlman or otherwise and ^{therefore} deny the same and in-
sist that in no event can it be allowed to interfere with
prejudice or in any way lessen the just ^{or} lien ~~of~~ claim
which these defendants severally have and hold upon
said surplus as hereinafter ^{stated} ~~mentioned~~.

(37) These defendants know nothing of James Campbell's
claim as stated in said bill of complaint and therefore
deny the same and insist that even if the facts are truly
stated in the said bill touching said Campbell's claim
(of which they know nothing) the same are not sufficient
in law or in equity to found any claim thereupon to
be allowed in prejudice of or in preference to the order
of payment of the judgment liens existing against the
premises so sold under said trust deed ^{which were junior to said Trust Deed}, being judg-
ments against said Asha Rostetter or against him
and others which these defendants insist are to be
paid next in order to said trust deed ~~it~~ in the order
of their date or priority.

And these defendants claim all full manner of ad-
vantage and exception to the several unfounded claims
above specified in the same manner & to the same
extent as if they had demurred to the same.

And the said Edwin Blackman saith further in
answer that in the life-time of said John High Jr

and about the 8th of October A.D. 1857. the said John High Jr commenced a suit at law in the Court of Common Pleas of Cook County aforesaid, in his own favor in an action of assumpsit on promises against said Asha Rossitter & others which suit was pending at the time of the decease of said High on the 19th day of October 1857. And on the sixth day of November thereafter the death of said High being suggested on the Record the said suit was continued in the name of said Blackman as executor of said High (he the said Blackman in the mean time having proved the will of said High and received letters testamentary thereof and on the Estate of the said High) & judgment was then rendered in said suit in favor of said E. Blackman as such Executor against the defendants John D. Pahlman & George B. Smith who only of the four defendants was served with process to appear for the sum of One thousand dollars and eighty three cents damages besides costs, and afterwards on the eleventh day of January A.D. 1858. Asha Rossitter aforesaid in his lifetime and John B. Smith the two other defendants in said suit having in the mean time been duly served with process of *Hinc Facias* to appear &c. and thus brought into Court in said suit said judgment was thereupon in due form of law rendered against them and they made party to said judgment, the said Asha Rossitter & John B. Smith with costs and execution by *fiere facias* issued

4

3

against them in the life time of said Rossiter as well as the said other defendants which remains as well as the said judgment as yet wholly unpaid and unsatisfied

(391) And the said Edwin Blackman further answering says that in the Circuit Court of Cook County on the eleventh day of January A.D. 1858. as executor of ^{said} John High Is deceased he this defendant in an action of assumpsit on promises ~~made~~ ^{recovered another} ~~judgment~~ judgment against the said Asa Rossiter in his life-time together with said John D. Pahlman John E. Smith and George C. Smith defendants for the sum of one thousand and eighteen dollars damages besides costs on which execution was speedily issued in the life time of said Rossiter but the same was not ^{collected} ~~collected~~ but remains still wholly unpaid & unsatisfied the said Asa Rossiter having been duly served with process to appear in said suit.

And the said Haines H. Magic further answering says that as survivor of said John High Is on the 19th day of November A.D. 1857. in the said Circuit Court of Cook County aforesaid in a suit by him instituted as such survivor in assumpsit on promises made to the firm of Magic & High in the life time of said High, he as such survivor recovered a judgment against said Asa Rossiter -

John D. Pallman John E. Smith and George C. Smith
who were all duly served with process in said suit
for twelve hundred and ten dollars & sixty six
cents damages besides costs on which execution was
issued speedily and in the life time of said Rossiter
but the same was not collected & remains still wholly
unpaid & unsatisfied.

(40)
And these defendants jointly and severally insist &
claim that said several judgments were respectively
liens upon the premises mentioned in said trust
deed & sold by the complainant in the order of
their date as above stated and were and are en-
titled to priority of lien & payment from those several
dates before any other claim, and said judgments
as the lien of the same for payment attaches equally
to the moneys remaining over in the hands of the
complainant as surplus proceeds of the sale of the
premises in said bill mentioned and these defendants
insist upon a decree or order of this Court to be
made and entered in this cause directing and
requiring the complainant to pay over from said
surplus money, sufficient to satisfy and discharge
said judgment liens with all the costs of suit
and the reasonable costs and charges of these defend-
ants in answering the complainant's bill if there
be and remains sufficient for that purpose & in
preference to all or any other claims upon the funds

And these defendants deny that either the personal
representatives or heirs at law or devisees of the
said Asher Rossiter have or can have any claim to
or lien upon the surplus money arising on said
sale and in the hands of the complainant until the
judgments above specified are fully paid

These defendants deny all confederacy & combination
&c

without this &c

(41)

Edwin Blackman
V. H. Magic

Melcher & Taft Solicitors

Sworn and subscribed
before me this 8th day
of June 1859.

Walter Kimball

Clerk

Horatio G. Thurnway
Complainant

vs
John D. Pahlman
Others Defendants

In the Superior
Court of Chicago
In Chancery.

State of Illinois }
Cook County } ss.

(42)

Edwin Blackman and
Harris N. Magic the former of whom is executor
and the latter survivor of John High Jr deceased
two of the defendants in the above entitled cause
came this day personally appeared before me and
being severally and duly sworn upon their oath
did say that they had read or heard read the fore-
going answer signed by them & know the contents
thereof, and that the same is true of their own know-
ledge (so far as is stated by them jointly) and each
for himself so far as the statements are severed
except as to facts stated on information and belief
and as to those facts they believe the same to be
true

And after noon, to wit, on the 18th day of June
in the year aforesaid. John F. Miller, Gilbert F.
Davis, Edwin Blackman & H. W. May in files in
the office of said Clerk, their certain replications
in the now office following, to wit:

Horatio G. Shumway } In Superior Court of Chicago
vs } In Chancery
John D. Pahlman et al }

(43) The Replication of Horatio
G. Shumway complainant, to the joint and several
answer of John F. Miller, Gilbert F. Davis two of the
defendants to the Bill of Complaint of the above
Complainant.

This repliant saving and reserving ^{to} ~~unto~~
himself all & all manner of advantage & exception
to the manifold insufficiencies of the said answer
for replication thereunto says. That he will aver
and prove his said bill to be true certain and
sufficient in the law to be answered unto and that
the said answer of the ^{said} defendant is uncertain untrue
& insufficient to be replied unto by this repliant, with-
out this that any other matter or thing whatsoever in
the said answer contained material or effectual in
the law to be replied unto confessed & avoided tra-
versed or denied is true - All which matters and

things this repliant is and will be ready to aver and prove as this Honorable Court shall direct and humbly prays as in and by his said bill he has already prayed.

Shumway Waite & Towne
Sols for Compt

Horatio G. Shumway In Superior Court of Chicago
vs In Chancery
John D. Pahlman et al

(44) The replication of Horatio G. Shumway complainant, to the joint and several answer of Edwin Blackman as executor of the last will and testament of John High Jr deceased and Haines H. Magie as survivor of the said High defendants to the bill of complaint of the above complainant.

This repliant saving & reserving to himself all & all manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereto says That he will aver & prove his said bill to be true certain & sufficient in the law to be answered unto and that the said answer of the said defendants is uncertain untrue & insufficient to be replied unto by this repliant without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be

replied unto confessed and avoided traversed or denied is true - All which matters and things this repliant is and will be ready to aver & prove as this Honorable Court shall direct and humbly prays as in & by his said bill he has already prayed -

Shumway Waite & Towne
Sols for Complt

(45)

And after war or to wit, on the 27th day of the month & year aforesaid, John B. King files in the office of said Clerk, his certain answer in the words & figures following, to wit:

Horatio G. Thurnway
 vs
 John D. Pahlman
 Etal

Superior Court of Chicago
 In Chancery.

The answer of John B King one of the defendants to the above Bill of Complaint filed against him and others by Horatio G Thurnway Complainant.

(47)

This defendant now and at all times saving and reserving to himself all benefits of exceptions to the insufficiencies of the Bill of Complaint of the said complainant for answer thereunto or unto such parts thereof as he is advised is material for him to make answer unto answering says that he admits that Asher Rossiter in his life time, but now deceased, and the said defendant Martha E Rossiter on the 12th day of March A.D. 1856, executed and delivered to the said complainant the deed of Trust on the South quarter of Block 69 in School Section addition to Chicago in said bill alleged & described to secure the indebtedness in said deed of Trust and bill of Complaint mentioned, and that a true copy of said Deed of Trust is annexed to said Bill of Complaint -

This defendant further answering admits a default having accrued in the payment of the money secured by said deed of Trust, that on the 30th day of March A D 1859. the said premises were sold by the said complainant as such Trustee for the sum of Thirty thousand dollars as in said bill alleged —

(48)
This defendant further answering admits that afterwards and on the day and year last aforesaid the said complainant paid to the holder of the indebtedness secured by said deed of Trust the sum of eighteen Thousand five hundred ~~dollars~~ and ninety one dollars and forty seven cents as in said bill alleged and that the balance of said thirty thousand dollars, now remains in the hands of said Trustee but whether or not the purchaser at said sale expects to get a deed from the said defendant Pahlman Executor of the said Estate of Asher Rossiter deceased this defendant does not know and cannot state or whether the said Pahlman has assigned the overplus now in the hands of the said complainant to Henry L. Rucker, or whether the said Rucker now claims the same, or whether the said defendant Campbell paid to the said Whaler two thousand dollars, or whether

the indebtedness of the said Wheeler was extended to the 12th Day of March A.D. 1859. this defendant does not know and has not been informed - except by said Bill and leave the complainant to prove all these matters as he may be advised but this defendant denies that the said Pahlman had any right or authority to assign said overplus to said Rucker or that the said Rucker has now any right or title to the same, or that the said Campbell has any right title or interest in and to the said overplus by means of or by reason of the said pretended claim in said bill mentioned -

(491)

This defendant further answering says that heretofore & in the term of November A.D. 1857, of the Circuit Court of Cook County by the consideration and judgment of said Court this defendant recovered against the said defendants John D Pahlman, George C Smith and John E Smith and the said Asher Rosseter in his life time since deceased the sum of Twelve hundred and ten dollars for his damages which he had sustained as well by reason of the non performance of certain promises & undertakings then lately made as for the costs and charges of this defendant about his said suit in that behalf sustained to the amount of nine dollars

and twenty cents whereof the said Rossiter in his lifetime and the said Pahlman & George & Smith & John E. Smith were then and there convicted as by the record of said judgment in the office of the clerk of the said Court reference being thereto had and to which this defendant prays leave to refer will more fully appear.

(50) And this defendant further answering says that on or about the seventh day of December A.D. 1857, for the purpose of obtaining satisfaction of said judgment he caused to be issued out of the said Court a writ of *Fieri Facias*, directed to the Sheriff of Cook County that being the County in which the defendants in said judgment at that time resided, by which said writ the Sheriff was commanded that of the goods and chattels, lands and tenements of the said Asher Rossiter John D. Pahlman George C. Smith and John E. Smith in this County, he cause to be made the sum of Twelve hundred and ten dollars recovered by this defendant as above stated, together with nine dollars and twenty cents costs;

And this defendant further answering says that the said writ of *Fieri Facias*, before the delivering thereof to the said Sheriff was duly endorsed

and afterwards and on or about the said seventh day of December A D 1857. was delivered to the said Sheriff to be executed in due form of law and afterwards and on or about the seventh day of March A D 1858 was returned to the office of the Clerk of said Circuit Court by said Sheriff of Cook County wholly unsatisfied as by reference to the return of the Sheriff upon said writ will more fully appear

(571) And this defendant further answering says that said judgment still remains in full force and effect not reversed or satisfied or otherwise vacated and that there is now actually due upon said judgment the said sum of twelve hundred and ten dollars together with costs to the amount of Nine dollars and twenty cents and interest thereon from the twenty fourth day of November A D 1857.

And this defendant further answering says and insists that by virtue of the rendition and entry of said judgment this defendant acquired a lien upon the said premises in said bill of complaint and trust deed described subject to the payment of the indebtedness in said trust deed described and by reason thereof this defendant has an equitable lien in the surplus

(52) now remaining in the hands of the said Com-
plainant as in said bill stated to the amount
of the judgment of this defendant herein before
stated and this defendant insists that the said
complainant holds said overplus or the
money now remaining in his hands arising
from the sale of said premises after the payment
of the costs and expenses of said sale and the
payment of the indebtedness secured by said
deed of trust or so much thereof as may be
necessary for that purpose in trust for the
payment of the damages interest & costs of
this defendant now due and owing to him upon
the judgment hereinbefore mentioned - and this
defendant further insists that his said lien upon
said overplus is prior to any claim of the said
defendant Campbell to said overplus -

And this defendant denies all unlawful com-
bination and confederacy in the said bill charged,
without that any other matter or thing material
or necessary for the defendant to make answer
unto and not herein or hereby well or sufficiently
answered unto confessed or avoided, traversed
or denied is true to the knowledge or belief of
this defendant - all which matters and things
this defendant are ready to aver maintain and
prove as this Honorable Court shall direct;

and humbly pray to be hence discharged with
their reasonable costs and charges in that behalf
most wrongfully sustained

John B. King
By Daniel Shepard
his solicitor

Daniel Shepard
Solicitor for Deft King

And afterwards, to wit, on the 24th day of the month of June aforesaid, Horatio G. Shumway filed in the office of said Clerk, his said and Replication to the answer of John B. King, in the words of figures following, to wit

Superior Court of Chancery
in Chancery
Horatio G. Shumway

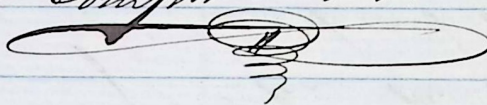
vs
John B. King

(55) The replication of Horatio G. Shumway Complainant to the separate answer of John B. King Defendant to the bill of Complaint of the above named Complainant.

This replicant saving & reserving to himself all & all manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereto says. That he will aver his said bill to be true, certain & sufficient in the law to be answered unto; and that the said answer of the said Defendant, is uncertain, untrue & insufficient to be replied unto by this replicant without this that any other matter or thing whatsoever in the said answer contained material or if factual in the law to be replied unto confessed

or avoided traversed or denied it to be.

All which matters & things this replicant
is & will be ready to aver & prove as this Hon-
orable Court shall direct and humbly prays
as in & by this said bill he has already prayed

Sheweth Wmto & Town
Compts Solrs


(56) And after more to wit, on the 3^d day of the
month of year aforesaid, Henry Stevens filed
in the office of said Clerk, his certain answer
in the above & figures following to wit:

5
State of Illinois.

1
In the Superior Court of
- Chicago -

The answer of Henry Stevens administrator of the Estate of Francis M. Herwin, deceased, to the bill of Complaint of Horatio G. Shumway, Complainant, filed in the Superior Court of Chicago in Cook County, State of Illinois.

(57) These defendants, now and at all times hereafter having and reserving to himself all benefit and advantage of exception to the said Complainants said bill of complaint, on account of the many errors and insufficiencies thereof, for answer thereto, or to so much and such parts thereof, as he is advised by Counsel is material or necessary for him to make answer unto, answering, says; that he admits on information and belief, the making and executing of the deed of trust by Asher Rosseter and Martha. A. his wife, as alleged in said bill of complaint for the purposes therein specified, and of the premises therein described; and this defendant also admits that said deed was recorded, as alleged: but whether said exhibit, A. is a true copy of said deed of trust, this defend^{ant}.

does not know, and cannot state, but leaves the complainant make proof thereof.

And further answering this defendant admits, on information and belief, that application was made to said complainant, by the holder and owner of the indebtedness secured by said deed of trust, to sell the premises thereby conveyed in trust to said complainant, for the purposes in said deed specified, as is alleged in said bill; and that said complainant in pursuance of such application, advertised and sold said premises, as alleged in said bill of Complaint.

(58)

And further answering, on information & belief, this defendant says, that he admits the payment, out of the proceeds of such sale by said complainant to Bacon Wheeler, the holder of said indebtedness, of the sum of eighteen thousand five hundred and ninety one dollars & forty seven cents, being the amount of principal and interest of said indebtedness, and of advances made by said Wheeler, as alleged in said bill.

And further answering, on information & belief, this defendant admits that the balance

of the purchase money of said sale is in the hands of said Complainant, as stated in said bill

(59) And further answering this defendant says he has no knowledge or information, except from said bill of Complaint, that said Chapin Marsh, & Foss, were induced to make any bid at said sale, or to pay money thereon, upon any understanding or agreement that John D. Pahlman executor of the estate of said Asher Rossiter, deceased, should give any deed to the purchaser at said sale, in addition to the deed from said complainant, and this defendant leaves the said complainant to his proof in that behalf.

But this defendant says that if said Pahlman, as such executor, made any such agreement, there is no reason why, to the knowledge of this defendant, that said Pahlman should not abide by and perform his said agreement, & deliver his said deed to said purchasers, in as much as this Honorable Court will see that the surplus of said purchase money shall not be lost to the said estate, represented by said Pahlman as executor.

And further answering this defendant says that he does not know, except from said bill of Complaint, whether or not said Pahlman, after said sale was made, assigned & transferred said surplus to said Henry L. Rucker, as stated in said bill; but this defendant insists that if he did so it was a misappropriation of said moneys, which should be used to pay the debts of said estate, of which there are several thousand dollars unpaid, as this defendant is informed and believes

(60)

And this defendant further says that he believes the said act of said executor, in assigning said moneys, if he did so, was done with a fraudulent intention, and to prevent the said moneys being used to pay valid and subsisting judgments against said Rossiter & his Estate.

And further answering this defendant says that he has no knowledge, except from said bill of Complaint, as to the payment of any money by said James Campbell, nor for what purpose nor to whom the same was paid, if any was paid by him, and leaves the said complainant to make proof thereof. But this defendant claims and insists that said Campbell is not, by reason of any such payment, or otherwise, entitled to any part of said surplus moneys, as

5
2
against the estate of Francis M. Herwin, deceased, which is represented by this defendant, as administrator, and the claims of which are fully stated herein-after.

Further answering this defendant admits, on information and belief, that said Rosseter departed this life, as alleged in said bill, leaving children and heirs at law as stated.

(61)
And this defendant further says, that Francis M. Herwin in his life time by the name style and description of Frank M. Herwin and on or about the tenth day of October 1857, caused suit to be commenced in the Cook County Court of common pleas, of Cook County, State of Illinois, upon a promissory note owned by him, against said Asker Rosseter, John D. Pahlman, John C. Smith, and George C. Smith, and that such proceedings were had in said suit that on or about the fifth day of November 1857, judgment was recovered in said suit in said Court in favor of said Herwin, against said Rosseter, Pahlman, and George C. Smith (the said John C. Smith not having been served with process in said suit) for the sum of twelve hundred and six dollars damages, besides costs of suit, taxed at eight dollars and twenty five cents.

That a writ of fiere facias was duly issued ^{said} out of said Court, on said judgment, against ^{said} Rosseter, Pahlman & George C. Smith, on or about the 18th day of November, 1857. to the Sheriff of Cook County, aforesaid, where said Rosseter, Pahlman and Smith resided, and on which said writ of fiere facias said Sheriff made the sum of ten dollars and fifty cents, and no more, as this defendant is informed and believes; and which sum of ten dollars and fifty cents was applied on said judgment, and is all that has been made or paid thereon in any manner; the said writ of fiere facias having been returned by said Sheriff unsatisfied except as to said sum of \$10.50.

And this defendant further says that no other payment or satisfaction whatever of said judgment has been made, and that the whole amount thereof, except the ten dollars and fifty cents, aforesaid, together with costs, is now justly & equitably due and owing to this defendant as administrator, as aforesaid; that said judgment continues in full force & effect, not reversed, satisfied, or in any manner vacated or annulled.

And further answering this defendant says, upon information and belief that said Pahlman, John E. & George C. Smith are all bankrupt and wholly unable to pay their debts, and have been so at all times since the recovery of said judgment; and that there is no way in which this defendant can recover the money due thereon except from the estate of said Rastetter, & no way to the knowledge of this defendant, in which he can collect the same out of said estate except this Honorable Court shall decree the payment thereof out of the said surplus moneys in the hands of said complainant.

(63)

And further answering this defendant claims and insists that the said judgment was a lien upon the right and interest of said Rastetter, during his life time & of his Estate after his death in & to the premises described in said trust deed; and that the same is such an equitable lien upon the surplus of the proceeds of said sale as entitles it to payment therefrom.

And further answering this defendant says that said Kerwin departed this life or or about the day of April, 1858; and that this defendant was afterwards, and on or about the day of 1858. duly appointed administrator.

of his estate by the County Court of Kane County,
State of Illinois, as by reference to the record and
proceedings of said Court, and the letters of
administration issued to this defendant ready
to be produced as this Honorable Court shall
direct, will fully appear.

And this defendant prays leave to refer to
the record of said judgment in favor of
said Kerwin, and to the files and papers in said
suit, should it be necessary so to do -

(64) And he denies all combination &c with-
out this, that any other matter or thing material
or necessary for this defendant to make answer
unto, & not herein & hereby well & sufficiently answer-
ed unto, confessed & avoided, traversed or denied,
is true, to the knowledge or belief of this defendant
all which matters and things this defendant
is ready to aver maintain & prove as this Honorable
Court shall direct, and humbly prays to be
hence dismissed with his reasonable costs &
charges in this behalf most wrongfully sus-
tained -

Geo Scoville
Collector for
Henry Stevens
Administrator &c

Henry Stevens
Adm^r of Estate of
Francis M. Kerwin Dec^d

And afterwards, to wit, on the 4th day of July in the year aforesaid, the said Complainant filed in the office of said Clerk his certain replication to the answer of Henry Stevens, in the words of figures following, to wit:

Superior Court of Chicago
In Chancery
Horatio E. Shumway

vs
John R. Pahlman et al

(65)

The replication of the Complainant to the answer of Henry Stevens and of Francis W. Kerwin to the bill of Complaint of the above complainant.

This replicant saving & reserving to himself all and all manner of advantage of exception to the manifest insufficiencies of the said answer for replication thereunto says, that he well over & proved his said bill to be true certain & sufficient in the law to be answered unto & that the said answer of the said defendant is certain untrue & insufficient to be replied unto by this replicant. without this that any other matter or thing in the said answer contains whatever, material or effectual in the law to be replied unto confessed or

avoided traversed or denied it true.

All which matters & things this applicant
is & will be ready to avow & swear as this
Honorable Court shall direct & pray as in
& by his said bill he has already prayed.

H. G. Shumway Waite
& Son

Sols for Compt



(66)

And afterwards to wit, on 10th day of October
in the year aforesaid, John D. Pahlman filed
in the office of said Clerk his certain answer, in
the words & figures following: To wit,

Superior Court of Chicago
In Chancery

H. G. Thumway
vs
J. D. Pahlman ex
~~the~~ et al

(67) The joint and several answer of John D. Pahlman executor of the Estate of Asher Rosseter deceased Martha A Rosseter and James Campbell personally and as Guardian of George W. Rosseter and Charles D. Rosseter to the bill of Complaint of said Horatia G Thumway complainant.

These defendants reserving to themselves all right of exception to the said bill of Complaint for answer thereto say, they admit the Execution of the said deed of trust by the parties at the time and for the purposes alleged in said bill of Complaint, admit that default was made in the payment of said indebtedness and non performance of certain other covenants in said deed of trust contained, that a sale of the said premises was duly had for the purposes, and in the manner and for the consideration as set forth in said bill of complaint.

These defendants further answering say they believe it to be true that with the said proceeds the said complainant has paid the amount of said indebtedness secured by said notes and trust deed but of the exact amount of said indebtedness & of any and all other indebtedness, if any, paid by said complainant these defendants are ignorant, and these defendants are also ignorant as to what amount or overplus now rightfully remains in the hands of said complainant.

(68)

And these defendants further answering say they believe it to be true that the said Chapin, Marsh and Foss made the purchase of said premises as aforesaid with the understanding that said J. D. Pahlman executor as aforesaid was to execute and deliver to them a quit claim deed of the interest of said Estate of said Asa Rissetter in and to the said premises without any additional consideration, but these defendants severally say that neither of them have given said purchases or either of them or any other person any ground for such understanding otherwise than with the understanding also that the said complainant as a condition precedent was to pay over said overplus to the said J. D. Pahlman executor of said Estate or to his assignee and agent the said H. L. Rucker.

they admit that the said J. D. Pahlman as executor of said has executed such deed to the said Chapin Marsh & Foss and state that he is ready and willing to deliver the same whenever the said overplus shall be paid to him as such executor of said or to his said assignee.

(69) And these defendants further answering say that it is true as alleged in said bill that after said sale, the said J. D. Pahlman, executor did assign and transfer all his right and interest in said overplus to the said Henry L. Roeder a copy of which assignment in writing is hereto annexed marked 'Exhibit A.' of defendant and made a part of this answer.

They further say that said assignment was made for the purpose of authorizing and empowering the said Roeder as the agent or attorney of the said Pahlman, executor as aforesaid, to receive the said overplus from the said complainant, & after retaining his reasonable fees as the attorney of the said Pahlman executor and Trustee of said Estate to hold the balance for said executor to be paid out by the order of the County Court to the creditors of said Estate in the due course of administration thereon.

And the said James Campbell guardian as

(70) aforsaid, states and these other defendants believe the statement to be true, that he was at the maturity of said notes, and now is the Guardian of said minors George W. Rosseter and Charles D. Rosseter, that after said notes had matured and the said complainant had advertised the sale of the said premises, he entered into an arrangement with the said Bacon Wheeler the holder of said notes, by which he paid from his own funds the interest in the said notes then due and some additional costs to the amount of \$2300. and thereby procured an extension of the payment of said notes for one Year, and thereby prevented a great sacrifice of said Estate. And the said James Campbell claims and insists that he ought justly to be refunded the said amount with interest

Further answering these defendants say it is true that Asker Rosseter died at the time & left as heirs the individuals as specified in said bill of Complaint, and that the said J. D. Pahlman is the sole qualified executor under & by virtue of the last will & testament of the said Rosseter.

And the said defendant J. D. Pahlman executor claims and insists that, as such executor he &

his said assignee the said H. L. Rucker or either of them were upon the payment of the said indebtedness to the said Baron Wheeler justly entitled to receive the said overplus in the hands of the complainant after payment of costs and charges of said sale and the amount due to said James Campbell as aforesaid, and that said H. L. Rucker by virtue of the aforesaid assignment was and now is fully authorized and justly entitled to receive the said overplus; and further, ^{that} soon after said sale, and after the complainant had received the payment therefor and paid the said indebtedness, and before any of the adverse defendants had made any claim to said overplus, or had any knowledge thereof, the said H. L. Rucker assignee as aforesaid, made a demand upon the said complainant for the payment of said overplus.

(71)

And these defendants further say that up to the time of making said demand and for some time thereafter neither of the said adverse defendants had ever claimed or pretended to claim any part or share in said overplus, and that they were first informed of their supposed rights thereto either directly or indirectly by or through the said complainant himself.

(72) And these defendants further answering say they have no knowledge save by the complainants bill of Complaint whether the other adverse defendants in said bill mentioned, or any or either of them, claim to have any lien or other interest in said overplus, but they deny that such defendants or any of them have any such lien or any lien whatever upon said funds. they deny that any or either of them have any interest in or title to said overplus or any part thereof, unless to receive a pro rate share thereof as general creditors of said estate of said Rostetter to be paid by said executor in the due course of administration thereon

And these defendants claim that there was no occasion for filing the said bill of interpleader, that said executor has thereby been greatly embarrassed in the management of said Estate, and the creditors thereof injured, and that said bill was improperly filed, and they ask the same benefit by this their answer that they would have been entitled to if they had demurred to said bill

And these defendants disclaim any admission by implication that any other material matter in said bill of complaint contained and not

herein well and sufficiently answered, unto is true
to their knowledge or belief and pray to be dis-
missed hence with their costs.

John D. Phalman Executor
James Campbell
George W. Rosseter
Charles D. Rosseter
By James Campbell Guardian
Martha A. Rosseter
By H. L. Rucker Secretary.

(73) Rucker & Page Solrs

H. G. Shumway Esq Trustee &c

Please pay to Henry L. Rucker the
surplus moneys realised at the sale of the
Rosseter lot and this shall be your receipt for
the same. The said surplus has been and is
herby assigned to said Rucker for a valuable
consideration received by me.

March 25th 1859

(Signed)

J. D. Phalman Executor
of Asher Rosseter Dec.

"Exhibit A"

And afterwards, to wit on the day & year
last aforesaid, W. L. Rucker filed in the office
of said Clerk his certain Return in the words
& figures following, to wit:

W. G. Shumway
" Superior Court
J. D. Pahlman et al. of Chicago.

The Remission of Henry
L. Packer one of the defendants to the bill
of Complaint of W. G. Shumway Complainant.

(75) This defendant by protestations not con-
fessing or acknowledging all or any of the matters
and things in the said Complainant's bill to be
true, in such manner and form as the said
are therein set forth and alleged as the demur-
rants and for cause of demurrer sheweth
that the said Complainant has not in and by
his said bill shown any claim or title whatsoever
to compel this defendant and the other said
defendants or either of them to interplead
Wherefore, this defendant humbly demands
the judgment of the Court whether he shall
be compelled to make any further, or other an-
swer to the said bill, or any of the matters therein
contained, and prays to be herein dismissed with his reason-
able costs in this behalf sustained, H. G. Rucker
Rucker & Page
sols.

And afterwards, to wit, on the day & year
last aforesaid, P. S. Morris, filed in the
office of said Clerk his certain disclaimer
in the words & figures following, to wit:

Superior Court of Chicago
The disclaimer of Packer S. Morris
one of the defendants to the bill of
Complaint of Horatio G. Shumway

(76)
This defendant saving to himself all right
of exception to the said bill of Complaint, saith
that he doth not know that he this defendant
to his knowledge or belief ever had, nor has
he claimed or pretended to have nor doth he
now claim any right, title or interest in, of, or
to the said overplus or sum of money or any
part or share thereof mentioned in the Complain-
ant's said bill of Complaint in any own right
and prays to be dismissed hence with his
reasonable costs in this behalf sustained.
But the heirs of Rossetter may have some
interest through me.

P. S. Morris
Packer & Page
Attorneys

And afterwards, to wit, on the 11th day of
the month of June aforesaid, said day being one of
the days of the October term of said Court the
following among other proceedings were had
& entered of record in this Court, to wit:

Horatio G. Shumway

John A. Pahlman Henry L. Rucker
Buckner S. Morris et al

(77)

This day comes said
Complainant by Shumway, Waite & Town his
solicitors and said Defendant H. L. Rucker
in person also comes. And counsel being heard
on said Defendants Demurrer to Complainants
Bill in this cause, and due deliberation being
thereupon had it appears to the Court that the
said Defendants Demurrer is sufficient an-
swer to the Bill, the Demurrer is therefore
sustained to Complainants Bill. Whereupon
on motion Complainant leave is given him
to amend his said bill.

And afterwards to wit, on the Thirtieth day
of the month of June aforesaid, thus issued out
of the office of said Clerk a certain writ of
Summons, which said writ, with the Sheriffs
return thereon, is in the words of figures following
to wit

State of Illinois
County of Cook ^{Illinois} ~~Illinois~~ ^{Illinois}

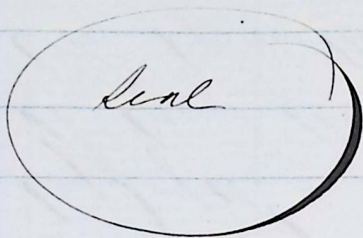
The People of the State of Illinois, to the Sheriff of
said County greeting:

(78) We ^{again} Command and give that you Summon John
R. Pahlman, Henry L. Rucker, Buckner S. Morris
Martha W. Rossetter, Mary S. Leavitt, Frank A.
Leavitt, George H. Rossetter, Charles R. Rossetter
James Campbell, George C. Smith, Edwin
Blackman Haines H. May Jr., John P. King, John
F. Miller, Gilbert F. Davis Henry Stevens George
Servino and Francis W. McIntyre.

if they shall be found in your County, personally
to be and appear before the Superior Court of
Chicago, of said County of Cook, on the first
day of the next term thereof, to be holden at
the Court House in the City of Chicago, in said
County, on the First Monday of November next,
to answer unto Hiram G. Thompson in his
certain Bill of Complaint, filed in the said Court on the ^{day thereof} ~~day thereof~~ ^{Chancery} ~~Chancery~~

And have you then and then this writ, with

an endorsement thereof, in what manner you shall
have executed the same.



Witness Walter Kimball, Clerk
of said Court, and the seal
thereof, at the City of Chicago
aforesaid, this Twentieth
day of October A. D. 1839.
Walter Kimball Clerk

(80)

Served this writ out the within named Mary S. Leavitt
Frank W. Leavitt, Charles A. Brewster, George
Sevillo, and Francis W. McIntyre by delivering
a true copy thereof to each of them the 21st day
of October 1839. And also served out the within
named George C. Smith by leaving a copy thereof
at his usual place of abode with John E. Smith
he being a white person and over ten years of age,
and also informing him of the contents thereof
the 21st day of October A. D. 1839.

John Gray Sheriff
By H. P. Gray Deputy

And afterwards to wit, on the 14th day of the month
of June aforesaid, the said Complainant, filed in the
office of said Clerk, his certain amendment to his former
pleints in the words of figures following to wit.

6
The State of Illinois }
Cook County } ss.

Horatio G. Shumway }
as }
John D. Pahlman & others }

In Chancery.

(81)
And now comes the complainant & amends the bill after the word undetermined 3 line from the bottom, by inserting the following words: he is informed and believes that said John H. Miller and Gilbert F. Davis recovered in the Circuit Court of the United States, within and for the County of Cook and State of Illinois a judgment against Asher Rosseter with others for the sum of \$1027⁸³/₁₀₀ besides costs of suit, on the seventeenth day of November A D. 1857. That in the same Court James Mague survivor of John High Jr recovered judgment as survivor of the late firm of High & Mague Nov^r 19. 1857 recovered judgment against Asher Rosseter & others for the sum of \$1210⁶⁶/₁₀₀ besides costs of suit: And 24 day of November A D. 1857. John B. King in the same Court recovered judgment against said Asher Rosseter and others in the same Court for the sum of 1210⁰⁰/₁₀₀ besides costs of suit - and on the fifth day of November

1857. One Frank M. Heroin recovered judgment against said Ascher Rosseter and others for the sum of \$1206 - and costs of suit - in the Cook County Court of Common Pleas within & for the County of Cook and State of Illinois - And in the last named Court Edwin Blackman executor of John High Jr recovered judgment against said Ascher Rosseter and others on the 6th day of November A.D 1857 for the sum of \$1000⁸³ besides costs of suit;

And said Blackman in the same Court and same capacity Jan'y 11: 1858. recovered judgment against said Rosseter for \$1018 besides costs of suit.

(82) And which judgments it is alleged are liens on said property and entitle the holders to a claim on the funds; on the contrary it is denied that the same constitute any lien on the same. That said Frank M. Heroin has departed this life since the rendition of said judgments and Henry Stevens has been appointed administrator on this estate

Shumway Waite Torrey
Solicitors for Complainants

And afterwards, to wit: on the 4th day
of April in the year of our Lord one thousand
eight hundred & sixty, Geo. Scoville filed
in the office of the Clerk aforesaid, his certain
disclaimer in the words & figures following
to wit:

Superior Court of Chicago.

(83) The disclaimer of George Scoville, one of
the defendants to the Bill of Complaint of
Horatio E. Shumway, filed in said Court.

This defendant saving to himself
all right of exception to the said bill of
Complaint, saith that he doth not know that
he, this defendant, hath or ever had, nor
does he claim or pretend to have, any right
title or interest in, of, or to the said sum of
money in the hands of said Complainant
in said bill mentioned, and he prays to be
hence dismissed with his reasonable costs.
in this behalf sustained

Geo. Scoville dep
in person

And afterwards, to wit, on the 11th day of the month of
year last aforesaid. Henry L. Rucker filed in the
office of said Clerk. his certain answer, in the words
& figures following, to wit:

Superior Court of Chicago
In Chancery
Horatio G. Shumway

J. D. Pahlman & 4^r
H. L. Rucker
James Campbell et al

(84) Henry L. Rucker
one of the defendants in the bill of Complaint
of Horatio G. Shumway complainant comes
into Court and reserving all right of exception
to the said bill of Complaint for answer thereto
suff. he hereby adopts and makes as his own.
the answer of said J. D. Pahlman and James
Campbell heretofore filed in this cause.

He further says that he claims such right
and interest in said fund now in the hands
of the said Complainant as he may justly be
entitled to by virtue of the said assignment of J.
D. Pahlman & 4^r to him as mentioned in said answer.

It is therefore the said defendant prays that
he may be dismissed hence, and for his costs

H. L. Rucker

And afterwards, to wit on the day and year last
aforesaid, there was filed in the office of said
Clerk, the certain Testimony of B. J. Morris
in the words & figures following, to wit:

Verdict of the Jury
John R. Pohlman et al. vs. The Superior Court
of Chicago.
In Chancery

(85) And now on this 11th day of April
A.D. 1866. being one of the days in April Term
1866. appeared in open Court Gustavus S. Morris
who is produced as a witness on the part of the
other defendants than himself who being ex-
amined in open Court first as to his interest
in the Cause, and who thereupon answered &
swore on oath that he had no personal interest
whatever in the above entitled cause and none
in the ^{subject} ~~proposed~~ matter personal to himself in
controversy in said suit and thereupon the
Court ordered that he be examined as a wit-
ness generally touching the conveyance to him
by Arthur Prescott deceased, of certain real
estate mentioned in the bill in this cause, and
thereupon the said affiant did depose & say that
he never knew of said conveyance at the time
it was executed, that he was absent at the time

The Qued bears date. in the State of Kentucky:
that he never paid any consideration for the prem-
ises or intended to do so. or for the Qued & was not
bound thereby by any voluntary act or Qued of his
own. & knows nothing why or wherefore it was
executed except conjecturally or from hearsay
of the writer of the Qued who informed him, that
it was given to him for the benefit of the heirs or
children of the decedent to protect their rights against
certain trust deeds to Wheeler or others, in the
event of the death of said decedent before the settle-
ment of said trust deeds.

(86) Subscribed & sworn to
before me this 11 day
of April A. D. 1860.

J. S. Morris.

H. Kimbrow Clerk

And afterwards, to wit on the 13th day of
the month of year aforesaid, said day being one
of the days of the April Term aforesaid Court
the following among other proceedings were had
& entered of record in this Court, to wit:

Noratio G. Sumner vs. In the Superior
Court of Chicago
John A. Pohlman Executor In Chancery
of the last will & Testament
of Peter Rossetter deceased
& others.

(87)

And now on the
thirteenth day of April 1860 the above entitled
Cause being brought on for hearing on bill &
answers & replications & disclaimers on file
and also on proofs taken in a few Court and
it appearing to the Court that all the parties
named as defendants are properly before the
Court either personally or by their proper solicitors
or guardians and it appearing to the
Court by proofs so far as the interest of infant
defendants are concerned and by both admissions
from parties or their solicitors & by proofs
so far as other parties are concerned, the several
findings specified in the several answers being
found in Court as matters of Record and on
hearing Mr. Waite as Counsel for the Complainant.

Messrs Rucker & Page & Mr Scates on the part
of Defendants Pohlman as executor & Campbell
in his own right & as Guardian of Messrs
Mather & Taft & others in behalf of said my
judgment Creditors. who have filed answers
in said Cause setting up Claims as judgment
Creditors as aforesaid. which judgments are
proved to have existed. as heirs at Law in the
life of said Peter Rucker against him and
prior to the sale of the Trust Fund mentioned
in the Bill.

(88) It is therefore ordered adjudged and
decreed, and this Court by virtue of the power
and authority therein vested doth now ad-
judge & decree that out of the surplus fund
in Court arising upon & from the sale of the
premises in said Trust Fund mentioned &
now held by the Complainant subject to the
order of this Court. touching the persons entitled
to claim the same & the order of their several
Claims the Complainant is first entitled
to be paid his costs expenses & disbursements
in selling and said Trust Fund, and in this
suit & taxed including a commission of
Two per cent on the sum of Thirty Thousand
Dollars raised by sale of the Trust Fund
& other items of expense allowed by the Court
as follows—

Commissions at 2 percent on \$30.00 = 60c. 00
Service of Summons & other taxable
items as shown on a bill allowed by the Court 29.90.

(89) Next in order of payment the several judgment
creditors (or their assigns) whose answers are filed
in this Cause showing judgments recovered &
liens created against said Asker Russell
in his life time remaining unpaid as stated in
answers & verified, are entitled to pay from
said surplus in the order of this date as liens
including costs & interest since the respective
recoveries as follows.

1st Judgment in favor of Henry Stevens Executor
of Will in 405. 1857. Damages \$1206. Costs taxed
\$8.25. Laid Redemption money \$10⁰⁰/₁₀₀ paid
by executor Feb'y 14. 1859. Sale was Feb
18. 1858.

2nd Judgment of Miller & Davis's Date Nov
19. 1857. Amount Damages \$1057¹⁸ Costs
taxed \$10.55. being of same date & standing
in equality of claim with the next judgment

3rd James H. Magie's Judgment Nov 19. 1857.
Damages \$1210.66 Costs taxed \$9.20.

4th John P. King. Judgment Nov 22. 1857.
Damages \$1210. Costs taxed \$9.20.

5th & 6th Cassin Blackman's 2 judgments of
Date Jan'y 11th 1858.

Due for \$1018.00
Costs taxed 11.55
Due for 1000.00
Costs taxed 8.80

Next in order of payment and last
of all the said John W. Pohlman as
executor of Arthur Rossett or his assignee
with whom it appears to the Court he is
acting in concert is entitled to any residue
that may remain of said surplus after
paying & fully satisfying the several claims
entitled to priority in their proper order
as aforesaid.

And afterwards to wit, on the 23rd day of April in the year of our Lord eighteen hundred & sixty, there was filed in the office of the Clerk of said Court, a certain Bill of Exceptions in the words & figures following to wit:

Superior Court of Chicago
Term 1860

Horatio G. Shumway
vs
John A. Pahlman Exr.
et al

In Chancery.

(91)

This cause came on to be heard before the Hon. John M. Wilson one of the Judges of the Superior Court of Chicago.

The case was submitted upon the bill the answer and bill, the several answers of the defendant and the replication thereto, the disclaimer and deposition of P. S. Morris and the following agreed statement of facts to wit:

Superior Court of Chicago

Horatio G. Shumway
vs
John A. Pahlman Exr.
et al

In Chancery

Agreed Statement of Facts.

That when Rositter men Marcha on his trip executed the and of trust as mentioned in said bill and that said Exhibit A. is a true copy thereof.

That the following judgments were obtained against the said Rositter jointly with J. B. Pahlman G. C. Smith and J. E. Smith.

J. W. Kewin in Com. Pleas November 5th 1857.

for \$1206.00
Costs 8.25

(92) Miller & Davis in Cook Circuit Nov 19. 1857
for \$1037.18
Costs 10.55

N. N. Magie survivor of J. M. High Jr in Cook
Circuit Nov 19. 1857. for \$1210.66
Costs 9.20

L. B. King in Cook Circuit Nov 24. 1857 \$1210.00
Costs 9.20

E. Blackman Ex of J. M. High Jr in Com Pleas
January 11. 1858. for \$1018.00
Costs 11.55

Also at same time for \$1000.83
Costs 8.50

That after war was in the life time of said

Rosseter's executions were issued and left with the Sheriff for service in all said judgments that made the execution of Kevin the premises mentioned in said deed of trust now on the 25th of February 1857. sold by the Sheriff for \$10.50. That all said judgments and executions remain unpaid except as to said sum of \$10.50.

(93) That on Nov 7 1857 Rosseter conveyed said premises by Warranty deed to P. S. Morris without any consideration paid & without the knowledge of Morris at the time: And Buckner S. Morris conveyed the said premises to said John D. Pahlman as such Executor, as shown by affidavit annexed.

State of Illinois

Cook County, Ill. Henry L. Rucker being duly sworn deposes and says, that on or about the 4th day of February 1859. Buckner S. Morris executed and delivered to John D. Pahlman Executor of the estate of Ascher Rosseter deceased. a quit claim deed in the usual form, of the following premises to wit: The South quarter of Block sixty nine in the School Section Addition to Chicago, being the same premises as were conveyed by Ascher Rosseter trustee to said Morris by deed dated November 6 1857, and the same as were conveyed by said Rosseter trustee by deed of trust to Horatio G. Shumway dated March 12 1857. to secure an indebtedness

to Bacon Wheeler of about \$1600. That said Leib-
claim deed was prepared by this affiant and came
into the hands of this affiant, after the same had
been executed, acknowledged, and delivered by said
Morris. That said affiant has made diligent
search for said deed in his office, where papers
of that kind are usually kept. But has been unable
to find the same and believes said deed to be misplaced
so that it cannot at the present be produced as evidence
Sworn to before me

This 25th day of April A. D. 1860. H. L. Ryker
H. H. Hibbard clk

(94) That said A. Rosseter died leaving as heirs the
parties mentioned in said bill, and leaving a will
which has been duly probated and allowed. and
that said J. R. Pahlman is the sole qualified
and acting Executor of said Will.

That said James Campbell as Guardian of the
infant heirs of Rosseter and at the request of
said Pahlman Ex^r at the maturity of said note
to Bacon Wheeler and for the purpose of procuring
a sale and sacrifice of said premises entered into
an arrangement with said Wheeler by which
at his own voluntary act without any order of
any Court without taking any assignment to
subrogate himself as owner or assignee of any
part of the claim, paid one year interest on said

notes, and other charges amounting to \$3300.00
whereby the said notes were extended one year, to wit:
to March 12. 1839.

That on July 14. 1839. the premises were redeemed
from the sale under the aforesaid Sheriff's execution
by said Pahlman & Co.

(95) That on the 25th day of March 1839. the said
premises were sold under the said deed of trust for
the purposes and in the manner, and for the price
set forth in said bill of Complaint. That upon
the same day the surplus, after payment of said
indebtedness to Whaler, was assigned in writing by
said Pahlman & Co. to said H. L. Rosetter who thereupon
made a deed and therefor of the said Shumway, but
he having been previously notified by John B. King
one of the judgment creditors not to pay the said sur-
plus over, and knowing from the records of the Courts
of Cook County that there were other judgments sim-
ilarly situated, refused so to do, and thereupon filed
said bill for the purpose of having the rights of the
parties adjudicated.

That the estate of said Ascher Rosetter
is insolvent.

Wm. T. King Solicitor for
Mazis & Blackman (Debtors)
H. T. White
Solicitor for Shumway
Geo. Scoville Solicitor for

Henry Stevens
Administrator of Estate
of F. W. Newman Decd.
J. H. Walker
for Miller & Davis
Rucker & Page
for Pahlman Rucker & Campbell

(96) The Court after argument rendered a decree
ordering, after the payment of costs, a Commission
of two Justices out of \$3000.00 amounting to \$600.00
and other expenses amounting to \$29.70. to be
allowed to said Shumway, Secdly that from
the balance all said judgments & costs should
be paid in full. And lastly that the balance
be paid to said Pahlman or to his assigns
as more fully appears by the reference to said
decrees.

Which was and decreed the said defendants
J. R. Pahlman Exr Jas Campbell personally and
as guardian. Martha A. Rosseter & W. L. Rucker
Shew and then excepted.

And in as much as all the matters aforesaid
do not appear by the record of the cause, the
solicitors of said last mentioned defendants pray
that said Judge would set his hand and seal
to this Bill of exceptions containing said agreed
statement of facts according to the form of

The Statute in such case provided and thereupon
the said Judge hath so accordingly his hand
and seal unto this 13th day of April A. D. 1860.

John W. Wilson
Judge &c

(seal)

State of Illinois
Cook County

J. Walter Kimball,
Clerk of the Superior Court of Chicago, within
and for the County and State aforesaid.

(97)

Do hereby certify, the foregoing to be a full
true & complete Transcript of all the papers on
file in my office, & the proceedings of Court
entered of record, in a certain Cause wherein
Horatio E. Shumway is Complainant & John
D. Pohlman et al are Defendants.



Witness my hand and the
Seal of said Court at the
City of Chicago, this 22nd
day of April A. D. 1860.

Walter Kimball Clerk

Supreme Court of Illinois
Third Grand Division
April Term 1860

John D. Pahlman et al }
vs } Error to Superior
Horatio G. Shumway } Court of Chicago.

H. L. Rucker And now comes the said Plaintiff
in error by ^{Pahlman & Campbell, H. L. Rucker & Co.} Scales McAllister & Jewett
and Rucker & Page their Counsel
and say that in the record and
proceedings, and in the recitation
of the decree in this cause there
is manifest error in this

First The Court decided that Almer
Rossiter in his life time had such an
estate in the premises conveyed to Horatio
G. Shumway, as was subject to a judgment
lien

Second The Court decided that the several
judgments recovered against said
Rossiter became liens upon

the premises aforesaid -
Third The Court decided, awarded and
decreed that the surplus of said
Sale now in the hands of said H. J. Mun-
way as such Trustee, should be first applied
in payment in full of said several judg-
ments - and the remainder, if any, only
should be paid over to said plaintiffs.

Pahlman

Fourth The Court rendered a decree in favor
of the defendants & the judgment creditor
of Asher Rosseter ^{below} dec'd - and against
the said John D. Pahlman executor of
said Rosseter. Wherefore for the
errors aforesaid and others apparent upon the face
of the said Record of proceedings, the said plaintiffs
pray that the said decree may be reversed
annulled & for nothing esteemed - & for their
reasonable costs - and that plaintiffs be re-
stored to all their rights &c.

Scates McAllister & Jewett and
Rucker & Page of Counsel for Plffs.

195

H. G. Shumway
or
John W. Pohlman
et al.

Filed Apr. 25, 1860
C. Deland
Clk.

For fees

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

HORATIO G. SHUMWAY,
DEFENDANT IN ERROR,
ads.

JOHN D. PAHLMAN, Ex'r of
ASHER ROSSITTER, DECEASED,
PLAINTIFF IN ERROR,

POINTS AND BRIEF ON THE PART OF DEFENDANT IN ERROR.

POINT I.

The judgment creditors of Asher Rossitter, whose judgments were recovered and became liens on real estate in his life time, have a lien on the surplus remaining over after a sale of his real estate, on a senior trust deed, and this lien of judgment creditors is entitled to priority of payment, and takes precedence of all claims of Rossitter's personal representatives, heirs and devisees.

This point covers the whole ground of litigation in this cause.

A trust deed and the surplus arising on a sale under it, stand on the same ground in law and equity as *a mortgage, and surplus on mortgage sale.*

*Rev. stat. of 1845, chap. 57, "Judgments and Executions,"
page 300, sec. 1.*

Judgments are hereby declared to be "*a lien on lands, tenements and real estate of every person against whom the same are obtained,*" provided execution be issued within a year; and at the close of the same section it is provided as follows:

"The term 'real estate' in this section shall be construed to include all interest of the defendant, *or any person to his use*, held or claimed by virtue of any deed, bond, covenant or otherwise for a conveyance, or as mortgagee or mortgagor of lands in fee, for life or for years."

Rev. stat. 1845, chap. 24, "Conveyances," sec. 12, page 105.

"Every deed conveying real estate, which by anything therein contained shall appear to have been intended only as a security in the nature of a mortgage, *though it be an absolute conveyance in terms*, shall be considered as a mortgage."

Sec. 39, page 110, same Statute.

"The term 'real estate,' co-extensive in meaning with "lands, tenements and hereditaments."

14 Ill. 428, Miller vs. Amory.

"Where an absolute conveyance of land is made, and an agreement at the same time taken back by the grantor, for a resale and reconveyance upon payment of a certain sum at a certain day, held that such conveyance was only a mortgage and if a mortgage at the time, it must ever after bear that character."

15 Ill. 503, Bloom vs. Rensselaer.

Treat, J., says at page 506. "The principle has been too long settled to be now questioned, that where a mortgage authorizes a mortgagee to sell on default of payment, he may make a valid sale, and convey an indefeasible estate to the purchaser."

3 Gilm. 32.

4 Kent's Com. 146.

2 Sto. Eq. sec. 1027.

Coote on Mortgages 124.

1 Hilliard 90.

"The deed (T. deed) in question stands on as favorable footing in this respect as one empowering the mortgagee to sell and convey. The power may as well be confided to a third person as to the mortgagee. It is less liable to be abused in his hands than in that of the creditor. He acts as trustee for both parties."

3 Gilm. 32, Longworth vs. Butler.

This case decides that powers of sale given to the mortgagee are valid at common law as powers or appointments; that they are equally valid, and identical in effect, where vested in a trustee by a trust deed, which in some respects is the better or more unexceptionable mode; that in deciding upon their validity, the common law receives and incorporates into itself the substance and doctrine of the civil law; that statutes like

that in New York, regulating sales under such powers, do not confer any new power, but merely regulate the mode of its exercise. If the mortgage did not contain the power it was equally good security, but a court of equity would have to be resorted to for enforcement; if the mortgage contained a power, it was a good power at common law, to be enforced in pursuance of its own provisions in the absence of statutory regulations; and when a statute exists, that is to be followed. Not the least difference however exists, arising from the consideration whether the trust power is vested in the mortgagee personally, or in a third person selected by the parties. There is no difference in principle, and our statute declares every absolute deed given to secure a debt, to be a mortgage.

6 *Paige ch. R.* 355.

Sweet &c. vs. Jacocks.

"A judgment against the owner of an equity of redemption in mortgaged premises, obtained after decree but before sale of premises, by the master, has an equitable lien upon *the surplus* moneys, produced by sale under the decree."

Otherwise, if the judgment was docketed subsequent to the sale.

"And when a fund is in court, in such cases, or in the hands of the officers of the court, it is a matter of discretion with the court, to direct a bill to be filed to ascertain the rights of conflicting claimants, or to settle their rights by reference to a master without a bill filed."

7th *Paige* 167.

Is a case where the same privilege of lien on surplus after mortgage sales, is equally applicable in cases of sales under trust power of sale contained in the mortgage, as in case of sales under decree.

See also cases

11 *Paige* 71, *Snyder vs. Stafford.*

11 *Paige* 619, *Jencks vs. Alexander.*

"The power of sale in a mortgage, so far as relates to the equity of redemption, or *the surplus* beyond the amount of mortgage debt, is a power in trust," *uncontrollable* by the mortgagee, and the case shows that any arrangement he may make prejudicial to *creditors* interested in the surplus, is fraudulent, and void as to them.

This also is a case on statute foreclosures, which in New York are precisely like our sales on trust deeds in Illinois.

11 *Paige* 28, *Vanderkemp vs. Shelton.*

The surplus over mortgage debt after sale, is declared a *primary* fund for payment of amount due on a second mortgage, &c., and at page 35 *Ch. Walworth* says: that when incumbrancers are made parties to a

suit in equity, "*The whole proceeds of sale are applied to payment of incumbrances in the order of their priorities.*"

11 Paige 70, *Burchard vs. Phillips.*

"So long as a fund remains in court, the court can let in an incumbrancer to participate in the surplus, when the equity of the case is with him, but when the money has been *paid out on a regular order, it is too late.*" *Here a judgment claim was let in.*

11 Paige 77, *Snyder vs. Stafford.*

Here two judgments recovered, were let in to share in a surplus according to legal priority, and the law is fully stated.

11 Paige 66, *Burchard vs. Phillips.*

This case decides several points on this subject:

1st. That a person *paying* the whole or a part of an older incumbrance or lien, in order to protect himself effectually against a *junior* incumbrance by *judgment* or otherwise *must* take an assignment to the extent of his payment, so as thereby to *subrogate himself* in the place of the creditor whose lien he pays or cancels.

2nd. That if he neglects to take an assignment in consequence *even of a fraud of the mortgagor*, and only takes another mortgage instead of an assignment, the legal priority of the *judgment creditor* cannot be displaced to let him in.

But 3rd. If in such a case the judgment creditor is so remiss as not to bring his claim seasonably, and the other junior creditor with his junior incumbrance, gets a regular master's report in his favor by his superior vigilance, and an order of court for his money, before the judgment creditor wakes up, then the court will not interpose again to relieve *remissness.*

POINT II.

The conveyance of Rossitter just before his decease to B. S. Morris, was a voluntary deed without any consideration, made without the knowledge and in the absence of the grantee, and fraudulent, and void as against creditors.

It purported to show a consideration to the enormous amount of \$80,000, of which \$10,000 was paid down, (as it alleges) and the residue is payable in yearly payments.

Whereas, Morris swears he *paid nothing* and never intended to, was absent in Kentucky when it was executed, and that he never by any act of his was a party to it, and he knows not why executed, and besides all this, Morris *disclaims* all title under it.

22d Illinois 441, *Clark vs. Morris &c.*

Breese, J. says: "No consideration being shown for the deed of Lewis Clark to his sister Letty M., it was *voluntary* on his part, *in fraud of creditors, and void*. It was not a *bona fide* transaction, but shall be intended as designed to defraud creditors.

2 *Vesey* p. 10, *Townsend vs. Windham*.

1 *Sto. Equity Juris.* 384, and notes.

20 *Ill.* 58, *Curtis vs. Root*.

This last cited case decides that an equity of redemption (existing in a mortgagor) is an interest in real estate, saleable on execution, and

That if the mortgage be for purchase money it takes precedence to a prior judgment.

This doctrine is too familiar to need authority. Will the counsel on the other side contend that a person *mortgaging* in the form of a *deed of trust*, containing a covenant, as here, to reconvey the title on payment of the debt, and in case of sale to return him *the overplus*; that in such case the grantor has no equity of redemption? i. e. that he cannot redeem before sale, by paying his debt secured, and thus revest his title?

They must however, make out this position in order to sustain their case now before the court.

POINT III.

Jas. D. Campbell, the guardian of Rossitter's heirs, stands in no better position than Pahlman the executor. His payment to Wheeler, was *pro tanto* a cancellation of the debt paid. He had no order of any court requiring or authorizing the payment. It was a voluntary payment without any pretence of claim by way of *subrogation*, and he also representing the debtor or his heirs, could not be subrogated.

11 *Paige* 66, *Burchard vs. Phillips*,

Is directly in point.

POINT IV.

As regards the judgment of Kerwin on which a sale was made, on the execution for \$10.50, from which the executor of Rossitter redeemed within the year, there was no necessity of a new execution to be issued after that redemption.

See 5 Hills Reports 229, Wood vs. Calvin.

Where the court say: "On redemption by debtor the sale became *null and void* by statute, (our statute in Illinois is identical in this respect with the New York statute,) no need of any new levy. The original levy was good and remained good for a second sale. True, intermediate the first sale and the redemption, the execution could not be used to resell the same land, but the moment the redemption was made the execution was restored to all its original vigor," and here tho' the sheriff mean time went out of office, court say he may still resell, *as on his first levy*.

MATHER, TAFT & KING,
For Defendants in Error.

195-151

Pahlman case

vs

Shuman
and

Deft. Brief & Points

Filed May 11, 1860

L. Schmitt

clerk