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No. _____

Supreme Court of Illinois

Hurd et al

vs.

Case

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STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 229

Hurd

vs
Case

1863

1434

1863

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

HARVEY B. HURD AND DANIEL TRACY, *Complainants in Error,*

VS.

THEODORE P. CASE, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

Filed May 7. 1863
J. Leonard
eM

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

HARVY B. HURD AND
DANIEL TRACY,
COMPLAINANTS IN ERROR,
vs.
THEODORE P. CASE,
DEFENDANT IN ERROR.

ARGUMENT FOR DEFENDANT IN ERROR.

The material facts appearing upon this record are briefly these: Theodore P. Case, of Auburn, in the State of New York, held a bond of John H. Brown, of Chicago, for \$2,500, secured by a mortgage containing a power of sale, of certain property in that city. The last payment of the semi-annual interest was made in February, 1861. In November, 1862, Mr. Case filed a bill to foreclose the mortgage, making the complainants in error, who were subsequent incumbrancers of the property, and numerous other persons parties to the suit. On the same day affidavit of the non-residence of several of the defendants, among the rest Tracy, was

filed and publication was made under the statute. The complainant Hurd was personally served with process. One could not be found. Subsequently Mr. Case advertised the property, in pursuance of the power of sale in the mortgage, and on the 5th of February, 1863, sold it to James Otis, at public auction, to satisfy the debt. Several days after the sale, the suit for foreclosure not having yet been dismissed, the complainants in error filed an answer and a cross bill in that suit, admitting by their answer the existence of the mortgage and the indebtedness, and that the debt was due. Their cross bill, after setting forth the deed of trust, by which their charge upon the property was created, and the sale by Mr. Case under his mortgage while the bill for the foreclosure was pending, prays that Case *may render account of what was due on his bond and mortgage; that Otis be decreed to release and convey to Hurd and Tracy or to the mortgagee the said premises; that the sale be set aside as fraudulent and void; that they may be let in to redeem the premises upon payment of the amount due to Case, and that Case be decreed to assign the mortgage to them as security for the redemption money.*

The answer of Otis, which is embodied in the transcript and abstract of the record, denies all the allegations in the cross bill of collusion or unfairness.

To this cross bill the defendant in error demurred, alleging three causes of demurrer.

1st. That the bill, on the face of it, is a cross bill, and as such ought to be confined to the matters in controversy in the original bill.

2d. That it ought to be confined to matters in defence to the said original bill.

3d. That it ought not to introduce new parties, having no connection with the matters in controversy in the original bill.

The demurrer was sustained in the court below, and the cross bill dismissed, and subsequently the original bill was dismissed. The case comes to this Court on the demurrer.

While there are many things better settled in the law than the precise purview of a cross bill, two things seem to be thoroughly established.

1. That it is a *defence*.
2. That it should be confined to matter growing out of the original suit.

Justice Story thus defines a cross bill: "A bill of this kind is usually brought either to obtain a necessary discovery of facts *in aid of the defence* of the original bill, or to obtain full relief to all parties *touching the matters of the original bill*."

Story Eq. Pl., § 389.

"A cross bill is a bill brought by a defendant against a plaintiff or co-defendant, or both, before publication is passed, for equitable relief *touching the matter in litigation*. * * It may be brought by a defendant against a plaintiff and any or all of the other parties to the original bill *touching matters in question in that bill*. And it lies, where a question arises between two defendants, and the Court cannot, *upon the original bill, do complete justice*, or in order to obtain a discovery of facts *in aid of the defence* to the original bill; or to obtain *full relief* to all parties" (*Welford's Eq. Pl.*, 223). "A cross bill should not introduce new and distinct matters not embraced in the original suit; for as to such matters *it is an original bill*, and they cannot properly be examined at the hearing of the first suit" (*Ib.* 228). "If a cross bill is not confined to the matters in litigation in the original suit, but seeks to bring before the Court other distinct matters and rights, it is no longer entitled to be deemed a cross bill, but is an original suit. If, therefore, a bill affecting to be a cross bill, but containing distinct and independent matters, be filed, it would seem to be open to a demurrer for this cause" (*Ib.* 230).

A cross bill is a *matter of defence*. It cannot introduce new and distinct matters, and if it does so, *no decree can be founded on those matters*.

Adams Eq., 304, n. 2.

(1) Hopk., 48, *S. C. Galatian v. Erwin*.

(4) Sandf., Ch. 210, *Draper v. Gordon*.

14 Vermont, 208, *Slason v. Wright*.

25 " 181, *Rutland v. Paige*.

In 3 *Dan's Ch. Pr.*, 1742, it is said that a cross bill is treated as a mere auxiliary suit, or as a dependency upon the original suit, and can be sustained only on matters "*growing out of the original bill*." In 6 *Dana*, 186, it is said, new matter "cannot be litigated" in the cross bill, which can only bring up matter growing out of "the original bill."

There are some apparent qualifications of the rule as thus stated. A cross bill may, under certain circumstances, pray independent relief, as if a bill be filed for specific performance a cross bill lies to have the agreement so sought to have performed delivered up and canceled (*Welford*, 226). But this is plainly a measure of protection, for the more completely effectuating defence, and grows directly out of the original matter in controversy. So, on the same principle, on offer to pay what is due, a cross bill lies to have usurious securities delivered up. (*Ib.*) So "a cross bill may be filed to answer the purpose of a plea, *puis darrein continuance* where a new defence arises after answer" (*Adams Eq.*, 402). Instances of which are where the plaintiff has released the defendant; or where there has been a subsequent award on a reference; or where the defendant has subsequently obtained a certificate in bankruptcy. But all this is matter *directly in defence*, and in resistance of the prayer of the original bill. So, too, Ch. KENT said he was not clear that a cross bill might not set up new facts *when they constitute part of the same defence relative to the same subject matter*. 2 John, Ch. 335. *Underhill v. Van Cortlandt*.

Also in an Alabama case, it is said that though the allegations of a cross bill must relate to the subject matter, it is not restricted

to the *issues* of the original bill (15 *Ala.*, 501). But in *Adams Eq.* (403, n. 2) the illustration is given: "Thus, when the plaintiff in the cross bill seeks discovery *in order to enable him to protect himself against discovery*, or sets up any special matter *by way of estoppel or in bar*, it is not obnoxious to the objection of introducing new matter into the suit (13 *Geo.*, 478).

This language of various authorities has been thus collated with the view of indicating as accurately as possible the office and scope of a cross bill. But this seems to be the farthest limit of the ground which can be covered by the cross bill when stretched to the utmost. Whenever a defendant finds discovery necessary, in order to enable him to *defend against* the original bill, he may have it by a cross bill. Whenever there are additional facts growing out of the matter in controversy in the original bill, but not disclosed thereby, but without which complete justice cannot be decreed on that bill, they may be introduced by cross bill. Whenever there are matters in controversy between defendants relative to the subject matter of the original bill, and growing out of it, which would *affect the decree* sought by that bill, they may be properly introduced by cross bill. Whenever, indeed, there are additional facts, growing out of the matter in controversy in the original bill, which a defendant finds necessary to be introduced into the suit either in absolute resistance, in *bar*, of that suit, or for the purpose of *qualifying or changing the decree to be made on the original bill*, so as "to obtain *full relief* to all parties touching the matters of the original bill," he may introduce *such* matters for *such* purpose by cross bill. But this seems clear that the matter of the cross bill must be matter in *defence* against the original bill, either in *absolute resistance*, or tending to *qualify the decree to be made thereon*.

Now, in this case a bill was filed setting up the mortgage and the condition broken, and praying an ordinary foreclosure. There appeared some difficulty as to proper parties and the service of them, and the proceeding was abandoned. The mortgage contained a provision for an entirely distinct and independent remedy

based on the special contract of the parties. The foreclosure was a legal right incident to the nature of the mortgage. The power of sale existed solely by agreement. The mortgagee chose to avail himself of the remedy thus provided. He advertised the property for sale, complied with all the requirements of the agreement, sold it, and satisfied his debt. The property, it is true, was the same upon which the foreclosure was sought, but the right exercised was based upon an entirely separate and distinct agreement, and the purchaser was a stranger to the subject of the original bill. Now they come and file a pretended cross bill, not by way of *defence* against the suit, nor for the purpose of qualifying the decree sought by the original bill; but praying that the sale to Otis may be declared void, and set aside, not so that they may be permitted to resist the claim of the original bill, but that they may still pay off the amount claimed by that bill, and redeem from the sale to Otis. Now, the cross bill and the original bill are but *one suit*; as much so as the original bill and an answer thereto. The cross bill is merely an appendage in *defence* to the original bill, and the decree when made, modified, perhaps, by the facts of the cross bill, is to be *made on the original bill* as really as if there were only a bill and answer on file. It is for this reason that if a cross bill introduce new and distinct matters, "*no decree can be founded on those matters.*"

A cross bill lies to obtain discovery necessary to the defence against the original bill; or to introduce matter growing out of the original bill either in *resistance in bar* of that bill or to *qualify the decree* to be made thereon.

This is plainly neither the one nor the other. It is in no sense an equity growing out of the claim set up in the original bill; nor has it any possible bearing in defence or qualification of the claim set up therein. It is rather in *furtherance* of that claim. All the facts alleged upon which that claim is founded are admitted without any modification; and this sale, the only thing which arrested the granting, just as sought, of the relief prayed in that bill, it is desired may be set aside, not in order that they may be let in to resist or qualify the claim of that bill, but that they may redeem from Otis, and have the same benefit they would have if the claim of the bill

were granted precisely as as is there prayed. They ask *discovery* of Mr. Case, as to the amount due on his bond, but confessedly not for the purpose of defending against the claim of his bill but that they may know how much they must tender to redeem from Otis. Besides the record shows already at what time default was made in the payments upon the mortgage, and how much was due at the filing of the bill.

Nor is it possible that they have been debarred by the sale of exercising their intention of paying off to Mr. Case the amount due on his mortgage, and taking an assignment of it as alleged in the cross bill. They had no such intention; for when the sale was made the defendants had been more than a month in default for want of answer to the original bill, and a decree might at any time have been taken against them, which they *knew*, for they allege they were carefully watching the progress of that suit. Yet they never took such an assignment or asked for it, or offered the amount due. So this discovery cannot be wanted for this purpose. It was probably asked in the hope that the discovery prayed would sustain the bill, and for that reason only, being otherwise unnecessary. The whole matter was always open to their information, yet they allowed default more than four weeks. The discovery prayed, therefore, is *not in aid of the defence* against the original bill, nor is discovery the purpose of the bill nor was it necessary. They had it all before. The amount due on the mortgage at the sale was \$3,023.80.

The sole object of this bill, therefore, is that the sale to Otis may be set aside and they permitted to pay the debt and take the assignment of the mortgage; in effect to redeem from this sale and have the same privilege they would have had if the prayer of the original bill had been granted precisely as prayed. This is not in *resistance* or in *qualification* of the claim made in the original bill; and the matter is so extrinsic that *no decree thereon can be made in the original suit.*

The real character of the relief prayed, and its connection with the original bill in this suit, is disclosed by the results which would attend any action the Court might take, as thus:

1. If the cross be not well founded, and the demurrer be still sustained, then it appears from the record that the complainants debt is satisfied, and that the original bill should be dismissed, which, is precisely what the complainant therein desired to do, and has done.

2. If on the contrary the cross bill be well founded, and be supported, and the sale set aside as prayed, even then this would not operate, nor is it sought through this means to *resist* the original bill or in any way to *qualify* the claim made in it, which claim is fully admitted. The decree they seek would have to be made *on the facts of the cross bill alone*, and would be in furtherance of the original bill. The complainant in the original bill would still be entitled to his decree of foreclosure precisely as prayed, unless the debt were paid, *wholly unaffected* by the decree on the cross bill.

3. If the cross bill be not seeking to resist or to qualify the claim of the original bill, nor on the other hand to further that claim which is fully admitted, and to obtain the results attaching to the the decree prayed in the original suit, then it has no reference at all to the decree to be made on the original bill ; but it is seeking separate and independent relief unconnected with the original suit, founded on the cross bill alone. But no decree can be made *on a cross bill alone*. This cannot be the office of a cross bill, but of an original bill. It is the office of a cross bill to *resist* or *modify* the decree to be made *in the original suit*.

For these reasons the cross bill not presenting any equity growing out of the matter in controversey in the original bill nor any additional facts relative thereto, tending to resist or qualify the claim set up by that bill it has no connection with the original suit, is demurrable, and the demurrer was properly sustained below.

The third ground of demurrer is that the cross bill introduces new parties not connected with the subject matter of the original bill. In the 14. Ill., 229, *Jones vs. Smith*, certain judgment creditors were allowed to be made parties by the cross bill, who were not parties to the original suit. But they were directly connected with

the subject matter of the original suit, and the cross bill presented questions *growing out of that subject matter*, with which they were connected, affecting their interests. In the present case the cross bill does "introduce new and independent matter and new parties for the purpose of answering that new matter." And then it is not done for the purpose of resisting or qualifying the claim of the original bill in any sense whatever. The office of the cross bill cannot be extended so far. The complainants in error should have brought an original bill, and the demurrer below was properly sustained and the complainant therein properly dismissed his original bill.

EDWARD S. ISHAM,

Solicitor for Def't in Error.

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the 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 Monday, being the Second day of March in the year of our Lord One Thousand Eight Hundred and Sixty Three and of the Independence of the United States of America the Eighth Month

Present, The Honorable John M. Wilson Chief Justice of the Superior Court of Chicago. }

Van H. Higgins
Saml Goodrich } Judges.

Joseph Knapp Prosecuting Attorney.

David S. Hammond Sheriff of Cook County.

Attest, Thomas O. Carter Clerk.

Be it remembered that heretofore to wit on the Third day of November in the Year of our Lord One Thousand Eight Hundred and Sixty Two Thudson Place Complainant herein by E. S. Johnson his Solicitor filed in the office of the Clerk of the Superior Court of Chicago his Certain Bill of Complaint in words and figures following to wit:

State of Illinois
County of Cook 3^d

To the Honorable Judge
of the Superior Court of Chicago in Chancery
sitting.

Humblly complaining Shows unto your Honor
your orator Theodore P Case of Newbarn in the
State of New York, that on or about the twenty third
day of February in the year of our Lord 1859 John
St. Brown defendant herein became and was justly
indebted to your orator in the sum of twenty five
Hundred (\$2500) dollars which said indebtedness
was specified in and secured to be paid by the
certain Bond or obligation of the said John St. Brown,
bearing date the said 23 day of February A.D. 1859 in the
penal sum of Five thousand dollars conditioned for the
payment unto your orator, his ^{ex}ecutors, adminis-
trators or assigns of the sum of twenty five hundred
dollars on the Twenty third day of February A.D.
1863 with interest for the same to be computed from the
day of the date thereof at and after the rate of ten (10)
per centum per annum, payable half-yearly, to wit,
on the Twenty third day of each of the months of February
and August in each and every year until the said prin-
cipal sum should be fully paid; the said payments
both of principal and interest to be made at such place
in the City of New York in the state of New York as your
orator his ~~ex~~ executors, administrators or assigns might

in writing, from time to time appoint, and in default of such appointment then to the credit of said Theodore P. Case, his executors, administrators, or assigns in the Bank of the State of New York in said City of New York.

Nevertheless with a proviso thereunder written whereby it was expressly agreed and fully understood that in case default should be made in the payment of any of the interest or the principal sum above mentioned payable half-yearly as aforesaid and any portion thereof should remain over and unpaid for the space of thirty (30) days after the same should become due and payable according to the conditions herein before set forth, then and in that case the principal sum above mentioned together with all arrears of interest thereon should at the option of the said Theodore P. Case, his executors, administrators or assigns thereupon become due and payable and might be demanded and should be collectable immediately or at any time after such default, any thing therein before contained to the contrary notwithstanding,

And your Orator further shews unto your Honor that for the better securing the payment of the said sum of money mentioned in the condition of the said bond with interest thereon according to the true intent and meaning thereof, the said defendant John W. Brown on the said twenty third day of February A.D. 1859 made and executed under his hand and seal, and delivered to your orator a certain Indenture of Mortgage bearing date the day and year last aforesaid and thereby for the consideration also of one dollar to him in hand

paid the receipt whereof is by the said Indenture of Mortgage duly acknowledged, did grant, bargain, sell, alien, release convey and confirm unto your Orator as the party of the second part in the said Indenture, his heirs and assigns, all those certain lots, pieces, or parcels of land situate lying and being in the City of Chicago in the County of Cook and State of Illinois, and known and described as being; Lots number nineteen (19) twenty (20) twenty one (21) twenty two (22) and twenty three (23) all in William J. Bunkers subdivision of Block number forty three (43) in Carpenters addition to Chicago, said premises taken together constituting a parallelogram of ground having a frontage of one hundred and twenty five (125) feet on Washington Street and extending back with a uniform width a distance of one hundred feet (100) to a fourteen (14) foot alley in the rear of said premises together with all and singular the tenements, hereditaments and appurtenances thereto belonging and appertaining and the reversion and reversions, remainder and remainders, rents issues and profits thereof, and also, all right, title, estate, interest, property, possession, claim and demand whatsoever as well in Law as in Equity of the said party of the first part in the said indenture of, in and to the same and every part thereof with the appurtenances, to have and to hold the above granted, bargained, and described premises with the appurtenances unto the said party of the second part, his heirs, and assigns forever.

Nevertheless with a proviso thereunder written that if the said party, of the first part, his heirs, executors, or administrators

should pay or cause to be paid to your Orator, his executor, administrator, or assigns the said principal sum of Money mentioned in the condition of said Bond herein before set forth and the interest thereon at the time and times and in the manner mentioned in the condition of said Bond according to the true intent and meaning thereof and should promptly and faithfully fulfill, keep and perform as well in spirit as in letter, all the covenants and agreements in the said Indenture thereafter mentioned, that them and from thenceforth the said Indenture and the Estate thereby granted should cease determine and be utterly null and void any thing therein before contained to the contrary notwithstanding.

And your Orator further shews unto your Honor that in and by the said Indenture, the said John H. Brown for himself, his heirs, executors and administrators did covenant, grant, and agree to and with your Orator, his executor, administrator and assigns that he would well and truly pay unto your Orator his executor, administrator or assigns the said principal sum of Money mentioned in the condition of said Bond and the interest thereon according to the said condition and that in the event that any or either of the Coupons given for the payment of the interest on said principal sum should remain unpaid after the same should respectively become due, whether with or without the consent of your Orator, his executor, administrator or assigns then such coupons so becoming due and remaining unpaid should thenceforth be deemed a new and additional principal

sum of money secured by the said Indenture and should be payable and might be collected immediately, or at any time thereafter together with interest thereon at the rate of ten (10) percent per annum from the time the same should respectively become due until fully paid, and that the said interest should be an additional charge upon the premises devised in said indenture, and should be secured and might be collected in the same manner as the said principal sum of Money above mentioned,

And your Orator further shews unto your Honor that the said John B. Brown did in and by the said Indenture, for himself, his heirs, executors, and administrators further covenant, grant and agree to and with your Orator his executors, administrators and assigns that he would at all times thereafter until said principal sum of Money and all arrears of interest thereon should be fully paid, in due season pay or cause to be paid all the taxes and assessments which might be levied or assessed upon said premises or any part thereof; and that he would not suffer said premises or any part thereof to be sold for any tax or assessment whatsoever nor would do or permit to be done to, in, upon, or about said premises any thing tending to impair the value thereof or to diminish or impair the security intended to be effected by the said Indenture of Mortgage; as in and by the said Indenture of Mortgage duly made and executed by ^{the} said John B. Brown under his hand and seal and by him duly acknowledged delivered and recorded and now in the possession of your Orator, ready here in Court to be shown, reference being thereunto had, will

more fully and at large appears.

And your Orator further shows that default was made in the payment of that installment of interest which become due as provided in the said Indenture on the twenty third (23) day of August A.D. 1861 and also in the payment of that installment which become due on the twenty third (23) day of February A.D. 1862 and also in the payment of that installment of interest which become due on the twenty third Day of August A.D. 1862; and that the said installment of interest still remains due and unpaid and that there is due on the said Bond and Indenture of Mortgage the sum of

And ~~as~~ your Orator further shows unto your Honors that by reason of the default in the payment of the said installment of interest the said Indenture of Mortgage and the said Bond have become forfeited at Law, and the Estate created and granted by the said Indenture of Mortgage has become Absolute in your Orator subject only to the Equity of redemption in this Honorable Court—

And your Orator further shows unto your Honors that he has caused examination to be made of the Records of Deeds and Mortgages in the Office of the Register of the County of Cook where said mortgaged premises are situated, and that from said several Examinations it appears and your Orator charge the fact to be that one Mary Ludlow widow and administratrix of Jacob W. Ludlow deceased and one James D. Ludlow administrator and heir at Law

of said Jamb D Ludlow, Beulah Ludlow, Jacob W. Ludlow
Elizabeth D Brown wife of said defendant John H Brown
Edward M. R. Ludlow, Hannah M Ludlow, Mary
N. Ludlow, James Ireland, Robert Squires, C. Henry Brown
P. Henry Baker, William H Ireland, Leopold Mayer
Joseph T Brown, Mary Ennis, Amos Bigelow, William J Pope
Haley B. Bond and Daniel Tracy have or claim to have some
interest in the said mortgaged premises, or some part thereof
or purchase, mortgage or otherwise which interest if any has
occurred subsequent to the date of your Oration and
subject thereto.

In consideration whereof and for that your Oration is
remedies by the strict rule of ^{the} common law and believ-
able only in a Court of Equity, where matters of this sort
are properly cognizable: Do the end therefore that the
said Defendant may respecting full, true, direct and per-
fect answer make, without oath, answer or oath being hereby
sworn, according to the best of their respective knowledge
information and belief to all and singular the charges and
matters aforesaid as fully, and in every respect as if the same
were here again repeated and then thereunto particularly
interrogated, and that the said defendants may come to
a just and fair account touching the amount due to you
Oration upon the said Bond and Indenture of Mortgage
herein before mentioned, and set forth, and that they
or some of them may be secured to pay forthwith to your
Oration the amount which shall be found due to him
thereon and the interest thereon together with your Oration

9

reasonable cost and charge in this behalf sustained, and in default thereof that the said defendants herein named and each of them, and all persons claiming or to claim from or under them or either of them may be foreclosed and barred of and from all Equity of redemption and claim of, in and to the said mortgaged premises with the appurtenances, and that all and singular the said mortgaged premises may be sold with the appurtenances, by the order and decree and under the direction of your Honor and the money arising therefrom be applied towards satisfying to your Orator the full amount of the money so as aforesaid secured in and by the said Bond and Indenture of Mortgage, both principal and interest together with your Orators reasonable costs and charge, and that the said defendants and all persons claiming or to claim under them or either of them or who have come into possession of the said Mortgaged premises or any part or portion thereof do hereby and yield up possession thereof to your Orator or to whomever may become the purchaser or purchasers thereof at the said sale, or that your Orator may have such other and further relief in the premises as shall be agreeable to equity and good conscience.

May it please your Honor to grant to your Orator the Peoples writ of Subpoena issuing out of and under the seal of this Honorable Court to be directed to the said defendants John H. Brown, and Elizabeth D. Brown his wife, Mary Ludlum Jacob M. Ludlum,

James D. Ludlow, and Isabella B. his wife, Rowen
Ludlow and Harriet E. his wife, Edward M. Ludlow
Hannah M. Ludlow, Mary St. Ludlow, James Ireland
Robert Squires, C. Henry Bowman, P. Henry Baker
William St. Ireland, Leopold Mayer, Joseph T Brown
Mary Ennis, Amy Bigelow, William J Pope Harry
B. Hurd and Daniel Tracy, their and truly command-
ing them and each of them on a certain day, and under
a certain penalty to be therein inserted, that they person-
ally be and appear before your Honors in this Honorable
Court and then and there to answer all and singular the
premisses aforesaid and to stand to perform and abide
such rules, direction and decree therein as to your Honors
shall seem meet

And your Orator shall ever pray

Edw and S. Thome.

Compts, Solicitor

And on the Same day and Year aforesaid
the said Complainant by E. S. Thome his Solicitor
filed in the office of the Clerk aforesaid a Certain
affidavit of Non Residence in Words and figures
following to wit -

State of Illinois }
County of Cook }

Theodor P Case

Superior Court of Chicago

John A Brown Elizabeth D Brown
 Mary Luskam, James D Luskam, Isabella
 R Luskam, Reuben Luskam, Jacob W
 Luskam, Harriet Luskam, ^{Edwards} M P Luskam,
 Hannah W Luskam, Mary A Luskam, James
 Rowland, Robert Squires, C Henry Brerman
 William of Pope Harry, B Wood Leopold Prager
 Joseph T Brown, Mary Ennis Amory Peckham
 P Henry Baker, William A Rowland Daniel Tracy

In
 Chancery

E Edward S Johnson being duly sworn deposes and says
 that he is the Solicitor for the Complainant in the above
 entitled Cause and that he is informed & believes that
 John A Brown, and Elizabeth Brown Jacob W Luskam
 James D Luskam, James Rowland, Robert Squires, C
 Henry Brerman, P Henry Baker, William A Rowland
 Joseph T Brown, and Daniel Tracy, clerk of the
 defendants to the above entitled suit reside or have
 gone out of this State so that process cannot be
 served upon them

E. S. Johnson

Subscribed & Sworn to before me
 the 3rd day of November A D
 1862 Thomas B Carter Clerk

Order Jan'y 5th 23

And afterwards to wit on the Fifth day of
January in the Year of our Lord One Thousand Eight
Hundred and Fifty Three Said day being one
of the days of the January Term of Said Court the
following Among the proceedings was had in Said
Court and to wit of Record to wit

Therefore I Case

John H Brown and others ^{vs} Bill

This day Comes E. S.
Taylor Solicitor for John H Brown one of the defend-
ant in the above entitled Cause and in his motions
it is ordered that time for said defendant John H
Brown to plead answer or demurrer to the Bill of Com-
-plaint in said Cause be and is hereby extended twenty
days from this day

And afterwards to wit on the Twenty Third day
of January in the Year past aforesaid Said day being
one of the days of the January Term of Said Court
The following Among the proceedings was had in Said
Court and to wit of Record to wit

Theodor P Case

13

John H Brown et al

Bill

And now at this again
Said defendants by Taylor their Solicitor and
on his motion it is ordered that time for said
defendants to plead answer or demurr to the bill of
Complaint in said Cause is hereby further —
extended five days from this day

And afterwards to wit on the fourth day of
February in the year last aforesaid the Defendants
Daniel Tracy and Harry P Wood by And Both
& Peter their Solicitors filed herein their Certain
Answer in words and figures following to wit:

In Chancery.

To the Honorable Judges of the Superior Court
of Chicago in Chancery sitting.

The joint and several answers of Daniel Tracy and Harvey B. Hand two of the defendants to the bill of Complaint of Theodore P. Cook, the Complainant.

These defendants now and at all times hereafter severing and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's said bill of complaint contained for answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, these defendants answering say,

That they have been informed and verily believe it to be true that the defendant John H. Brown on a certain day to wit the 23^d day February A. D. 1859, make execute and deliver to the said complainant his said certain Indenture of mortgage as set forth in the complainant's said bill of complaint, wherein and whereby the said John H. Brown did then convey to the said complainant the several lots of land described in the said bill to secure to the said complainant the payment of the said sum of two thousand and five hundred dollars, and interest thereon accruing in manner as set forth in said bill of complaint and that the whole of said sum of money has become due and payable, but whether

the said sum of money and the interest thereon accrued or any part thereof still remains due and unpaid, these defendants further answering severally say that they nor either of them are informed further than is set forth in said bill of complaint.

These defendants also admit that they are interested in the lands mentioned and described in the complainant's said bill under and by virtue of a certain deed of trust dated the 12th day of August A.D. 1860 executed and delivered by the said by the said John R. Brown and Elizabeth H. his wife and James D. Dudlam + Isabella R. his wife to the said Henry B. Bonds to secure the payment to the said Daniel Tracy of the sum of fifteen hundred dollars at the expiration of five years from the day aforesaid together with interest thereon at ten per cent per annum, payable semi-annually which said sum of money with the interest thereon accrued is still due and unpaid.

Said these defendants further answering say that as to the several remaining matters and things set forth and contained in the said bill, these defendants are not informed said by complainant's said bill and cannot say whether the same are true or not.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by said bill charged, without this, that there is any other matter cause or thing in the said Complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently an-

sworn, confessed, traversed and avowed or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

Hunt Booth & Potter.
Sols^{rs} for depts.

Daniel Tracy,
Harry B. Hunt.

And on the same day and year last aforesaid Daniel Tracy and Harry B. Hunt by Hunt Booth and Potter their Solicitors filed in this Cause this Certain Cross Bill in words and figures following to wit:—

In Chancery.

To the Honorable Judges of the Superior
Court of Chicago, in Chancery sitting.

The Cross-Bill of Daniel Tracy and Harvey B
Hurd in the cause pending in said Court wherein
Theodore P. Case is complainant and John H. Brown
Elizabeth D. Brown Mary Ludlam Jacob W. Ludlam
James W. Ludlam Isabella R. Ludlam Ruben Lud-
lam, Harriet G. Ludlam Edward W. P. Ludlam,
Kannah H. Ludlam Mary N. Ludlam James
Freeland ^{Robert} Squires C Henry Bowman P. Henry Bar-
ker, William H. Freeland, Leopold Mayer, Joseph
Z. Brown Mary Eussis Amory Bigelow William
J. Pope Harvey B. Hurd & Daniel Tracy are defen-
dants.

Humbly complaining sheweth unto
your honors your orators Daniel Tracy and Harvey
B. Hurd that on or about the third day of November
A.D. 1862. the said Theodore P. Case filed in this court
his bill setting forth among other things that on or about
the twenty third day of February A.D. 1859. the said John
H. Brown, Elizabeth D. Brown James W. Ludlam, & Isa-
bella R. Ludlam to secure a certain promissory note
for the sum of Two thousand & five hundred dollars,
& payable years after the date thereof with
interest at the rate of ten per cent per annum payable
semi annually made & executed to the said Theodore

Case a certain mortgage bearing date the day & year aforesaid conveying to him "Lots nineteen (19) Twenty (20) Twenty one (21) Twenty two (22) & twenty three (23) of W^m of Bankers, subdivisions of Block Forty three (43) of Carpenter's addition to Chicago, in Cook County Illinois with the proviso that the said conveyance should be void upon the payment of the said sum & interest as provided in said note and upon the further condition that in case of a failure to pay the said principal sum and interest the said Theodore P. Case or the legal holder of said mortgage might proceed & sell the said premises upon giving certain notice in said mortgage provided. And also setting forth that the said Brown & Dudlam had made default in the payment of certain instalments of interest on the said note, & that the said Case had elected to declare the whole sum of principal & interest due. And also setting forth that the other dependants above mentioned had or claimed some interest in the said premises & praying that the said mortgage be foreclosed & the premises be decreed to be sold to satisfy the claim of the said Theodore P. Case, & for other & further relief.

And your orator further show unto your honors that your orator have filed their answer therein admitting the facts in said bill alleged substantially and claiming the right herein after set forth.

And your orator further show unto your honors that the said John H. Barren & James H. Dudlam being

2

indebted to the said complainant Daniel Tracy in the sum of Fifteen Hundred dollars secured by two promissory notes viz; one for the sum of twelve hundred dollars & the other for the sum of Three Hundred dollars both bearing date the first day of August A.D. 1860 & payable to him five years from the date thereof with interest at the rate of ten per cent per annum, payable semi-annually they the said John H. Brown Elizabeth D. Brown, James W. Ludlam & Isabella W. Ludlam, made & executed to the said complainant Harvey B. Hunt, their deed bearing even date with the said notes conveying to the said Harvey B. Hunt the said lots & property in trust for the security of the said notes & the interest thereon which said deed was duly acknowledged by the said parties & recorded in the recorder's office in & for the county of Cook & state aforesaid on the fiveteenth day of August A.D. 1860 in Book 202 of deeds page 368

And your orators further show unto your Honors that the said notes & trust deed still remain unpaid & in full force & effect and the said notes are still the property of & held by your orator Daniel Tracy and that your orators have the right to redeem & pay off or have assigned to them the said mortgages & notes of the said Theodore P. Case, & have the same canceled or assigned to them.

And your orators further show unto your Honors that they have been informed and believe that the

said Theodore P. Case has since the making of the said note & mortgage to him received from the makers thereof divers sums of money on account of interest on said note & on account of principal but what sums & how much he has so received your orators have no knowledge & have no means of ascertaining except upon the oath & discovery of the said Theodore P. Case and they are unable to ascertain the amount due to the said Case upon such note & mortgage so as to render the same to him. although your orators have frequently & in a friendly manner applied to the said Case for an account of the money received by him as aforesaid & for a statement of the amount due to him on said note & mortgage & that he would take & receive redemption thereof from your orators.

But as it is the said Theodore P. Case confederating & fraudulently contriving to injure your orators & to deprive your orators of their said right in said premises & of their right of redemption therein sometimes pretend that he has caused the said premises to be sold upon the power of sale mentioned in said mortgage & that the same and all the right of your orators were sold to Lucius B. Otto & James Otis of the City of Chicago, on or about the 20th day of February A.D. 1863 but your orators charge the fact to be that some time in the month of November A.D. 1862 your orator Harvey B. Wood applied to the agents of the said Theodore P. Case in the City of Chicago & the solicitors of the said

3

Case in this suit for the purpose of redeeming said premises and inquired of the said solicitors & agents what would be done with said mortgage. How it would be foreclosed and the said solicitors & agents then informed said Board that they should proceed to foreclose the said mortgage by bill in Chancery in this Court and that your orators would have the right to bid in said property at the sale under the decree to be gotten in such suit or to redeem therefrom and afterwards about third day of November A.D. 1862 the said Case by their said solicitors filed his bill herein and served the said defendant Board with a summons in this suit as shown by the return of the sheriff upon the said summons and at about the same time filed affidavit of the non residence of said David Tracy & others & notice was duly published in the Chicago Daily Times notifying the said non resident defendants to be & appear to at the term of this court which cause is still pending and wholly undetermined. And your orators insist that if any such sale has been made it has been made since the commencement of said suit & in fraud of the rights of your orators. And your orators further insist that by the understanding between the solicitors of said Case & your orator Board & by the commencement & prosecution of said suit the said Case made his election to proceed thereby for the enforcement of his rights and that by such suit your orators and all other persons were notified of such election and of all the rights of your orators in

the premises + if the said ^{2²} + James Otis have purchased the said premises under such sale they so purchased the same while the said suit was pending; that they had actual or constructive notice of all the rights of your orator in the premises by virtue thereof and of the right of your orator to redeem from said mortgage and of the election of the said Case to proceed by said suit for the purpose aforesaid And your orator further charge that the said sale (if any were made) was made by collusion between the said Case + the said Lucius B. + James Otis + though the said premises were bid in by the said Lucius B. + James Otis professedly for their own use yet that in fact they acted in such purchase only as the agents and on behalf of + the purchase was made for the benefit of said Case. And your orator further charge that no proper notice was given of the time + place of such sale + that the same was not made by the person authorized by said mortgage to make the same and at the said sale the Solicitors of said Case + the said Otis's prevented competition by declaring that no bid would be received unless accompanied by the payment of a large sum of money as security for such bid or the giving of undoubted security while in fact the said Otis were allowed to bid in and the same premises were struck off to them without any such deposit or security and that great preference + favor was shown to them at such sale for the purpose of defrauding your orator as subsequent incumbrances and preventing the said premises from bringing ^{their} full

value. And in consequence of such misconduct, favor the said premises did not bring more than one third their value.

And your orators further state that they were wholly ignorant of the intention of the said Case or his solicitors or agents to sell the said premises under & by virtue of the power of sale in said mortgage or that any notice therefor was published or that such sale would take place till the day of the filing of this bill, that they had watched the progress of said suit relying upon the said information given to said Ward by said solicitors & the pendency of this suit fully expecting & intending to avail themselves of the right they would have in such proceedings & to redeem or buy in said premises. And your orators now are and always have been ready to redeem from the said mortgage of the said Case, & to pay him such amount as may be due him upon said mortgage & note and to have the same assigned to them or otherwise as shall be according to equity in the premises.

To the end therefore that the said Theodore P. Case & James Otis may upon their several and respective corporal oaths full, true direct & perfect answer make to all & singular the matters herein before stated & charged and that the said Theodore P. Case may discover & a full account render of the amount received by him on said note of interest & principal and that the said James Otis be made joint defendants with the said Case & the Codefendants of your orators in this suit and that summons issue against said & James Otis for the

purpose aforesaid and that they be decreed to release & convey to your orators or to the said mortgager the said premises & that said supposed sale to them be set aside & declared to be fraudulent & void and that your orators be let in to redeem said premises upon the payment of the amount due to said Theodore F. Case upon said note & mortgage & that the said Case be decreed to assign said mortgage to your orators as their security for such redemption money.

And may it please your Honor to grant unto your orators such other & further relief as to equity & good conscience shall seem meet & proper & your orator will ever pray &c

Harvey B. Ward.

Daniel Tracy.

By Ward.

Ward Borth & Potter
Sols for Compt.

And afterwards to wit on the Twenty Third day of February in the Year last aforesaid James Otis defendant in said Cross Bill, by Bailey Gony & Williams his Solicitors filed him his Oath and Answer to said Cross Bill in words and figures following to wit:—

In the Superior Court
of Chicago in Chancery

The answer of James Otis
Defendant to the Cross bill of Daniel Tracy & Harvey
B. Hound two of the defendants to the Bill of Complaint
of Theodore P. Case, Complainant,

This defendant having and reserving all manner
of benefit & advantage of Execution to the said Cross
Bill for answer thereto saith -

That he admits that the said Theodore P. Case did
file in this Court at the time in that behalf in said Cross
Bill mentioned, his bill to foreclose the said Mortgage
to the said Case as in said Cross Bill mentioned, except
that said Mortgage was executed by the said John H. Brown
only and not by Elizabeth D. Brown, James D. Ludlum
& Isabella R. Ludlum also, & that said Mortgage was
given to secure the payment of a Bond with interest
Coupons instead of a note, as in said Cross Bill is al-
leged -

And this defendant further says that though it is
true that the said Defendants Tracy & Hound, had
at the time of filing in this Court their said Cross Bill
also filed their answers to the said Bill of Complaint of
the said Case, yet they did not file their said answers
until the same day on which they filed said Cross Bill
to wit, the 12th day of February A.D. 1863,

And this Defendant further says that he has no

knowledge, information, remembrance or belief, as to the said indebtedness of the said John W. Brown and James W. Ludlum to the said Tracy as in his Cross Bill mentioned or as to the said promissory notes and Trust deed given to secure the same as in said Cross Bill alleged, and therefore leaves the said Tracy & Hurd to make such proof thereof of material as they may be able to produce,

And this Defendant further says that he admits that the said Case had before the filing of said Cross Bill received from the said John W. Brown divers sums of money on account of interest upon said mortgage, but denies that he had received from said Brown any money on account of the principal thereof, and also denies that the said Tracy & Hurd had no knowledge or means of knowledge except upon the oath or discovery of the said Case as to what sums & how much said Case had so received, and also denies that the said Tracy & Hurd were unable to ascertain the amount due to the said Case, and that they or either of them ever applied personally or by any other means or note to the said Case for an account of the money received by him, or for a statement of the amount due to him, or that he would take or receive redemption of said mortgage from the said Tracy & Hurd or either of them or any other person, But on the contrary this defendant swears, that in truth & in fact the said John W. Brown had paid to the said

Case the interest which had accrued upon said Mortgage up to the 23^d day of February A.D. 1861 and no more and had never paid any sum on account of the principal of said mortgage, and that the said Case had never until the sale to this Defendant hereinafter mentioned received from any source on account of said mortgage any money except the said interest up to the 23^d day of February A.D. 1861 and that whole balance of said interest & the whole of the principal of said mortgage was due & unpaid to said Case & that at any and all times he & his solicitor were ready & willing to inform any person of the amount that was due upon said mortgage & to receive the same from any person that would pay the same and assign & transfer said mortgage to any person who would pay such amount.

And this Defendant further says that the said Mortgage from the said Brown to the said Case was given on the 23^d day of February A.D. 1859 to secure the payment of the sum of Twenty five Hundred Dollars on the 23^d day of February A.D. 1863 with interest thereon at the rate of two per centum per annum payable semi-annually on the 23^d day of February & August in each year & contains a provision in substance that if default should be made in the payment of any of said interest for thirty days after the same become due, then at the option of the said Case the whole of said sum of Twenty five Hundred Dollars with all interest that had accrued thereon should become due & payable & might be collectable

at any time after such default of the said Mortgage also contained a provision that in case of any default on the part of the said Brown (among other things) to pay said interest then the said Case in person or by Attorney might (among other things) after giving 30 days notice of the time & place of such sale by advertising ~~and~~ in a daily newspaper published in the English language in the City of Chicago, sell the premises in said mortgage described at public Auction, as by the said Mortgage when produced & to which this Defendant prays leave to refer as part of this his answer will more fully & at large appear,

And this Defendant further saith that the said Case by his duly constituted Attorney, Edward S. Shum, did (commencing on the 27th day of December A. D. 1862) in accordance with the provisions of said mortgage (having elected to declare the whole of the principal & interest of said sum secured by said Mortgage due & payable for default in the payments of said interest as in said Mortgage provided) duly advertise for upwards of thirty days the said premises in said Mortgage described for sale under the power of sale in said Mortgage contained in the "The Chicago Morning Post" a daily newspaper then & thereunto published in the English language in said City of Chicago, which said advertisement thus and is in the words & figures following, to wit:

5

Whereas, John H. Brown, did on the twenty third day of February, in the year of our Lord one thousand eight hundred and fifty nine, make, execute and deliver to me Theodore P. Case his certain mortgage deed of the premises hereinafter described, bearing date the day and year aforesaid to secure the payment of his certain bond or obligation of even date with said deed in the penal sum of five thousand dollars conditioned in effect for the payment to me of the sum of twenty five hundred dollars, on the twenty third day of February in the year of our Lord one thousand eight hundred and sixty three with interest for the same to be computed from the day of the date thereof at the rate of ten per centum per annum which said interest was to be paid half yearly to wit: on the twenty third day of each of the months of February and August in each and every year until the said principal sum should be fully paid, and which said interest payments until the said principal sum should become due were specified in and further secured by eight coupons given therewith, with a proviso under said bond written, whereby it was expressly agreed and fully understood that if default be made in the payment of any of the interest on the principal sum above mentioned, payable half yearly as aforesaid and any portion of the same should remain due and unpaid for the space of thirty days after the same should become due and payable, then and in that case the principal sum above mentioned, together with all arrearages of interest ^{thereon} should at my option

thereupon become due and payable, which said mortgage is recorded in the Records office of Cook County Illinois in book 44 of mortgages, page 461,

And, whereas, default has been made in the payment of the interest on said principal sum due on the twenty third day of August in the year of our Lord one thousand eight hundred and sixty two and the sum has remained due and unpaid for the space of thirty days after it became due and payable,

And, whereas, I have elected to declare the principal sum above mentioned, together with all arrears of interest thereon due and payable,

And, whereas, there is now due on said bond the said principal sum of twenty five hundred dollars and interest thereon from the twenty third day of February, in the year of our Lord one thousand eight hundred and sixty two, at the rate of ten per centum per annum,

And, whereas, I have entered into and upon all and singular the said premises,

Now therefore public notice is hereby given that I shall, under and by virtue of the powers by said mortgage conferred and in pursuance of the purposes therein expressed, on Thursday, the Fifth Day of February, in the year of our Lord one thousand eight hundred and sixty three, at ten o'clock in the forenoon

of said day at the North door of the Court house in the City of Chicago, in the County of Cook and State of Illinois sell at Public Auction, to the highest and best bidder for cash, all those certain lots, pieces or parcels of land situate lying and being in the City of Chicago, and County of Cook and State of Illinois and known and described as being lots number nineteen (19) twenty (20), twenty one (21) twenty two (22) and twenty three (23) all in William J. Bankers sub division of block number forty three (43) in Carpenters addition to Chicago, said premises taken together constituting a parallelogram of ground having a frontage of one hundred and twenty five (125) feet on Washington Street and extending back with a uniform width a distance of one hundred (100) feet to a fourteen (14) foot alley in the rear of said premises, being the premises conveyed by said mortgage deed, and all benefit and equity of redemption of the said John H. Brown, his heirs and assigns therein,

Theodore P. Chase, Mortgagee,
Chicago, Dec. 27, 1862.

And this Defendant further swears that he having seen said advertisement in the said newspaper before the day of sale therein mentioned, attended at the time & place in said advertisement mentioned and that & that at the said sale which was then & there made in all respects in accordance with the said advertisement did bid for each of the said lots in the said mortgage

32

I advertisement described, the sum of seven hundred & fifty dollars, except one of them for which he bid the sum of seven hundred forty seven ^{50/100} dollars which being the highest & best bid for said lots respectively, the same being sold separately, all of said lots were then & there struck off and sold by the said Case by his said Attorney to this defendant & thereupon immediately thereafter the said lots were by the said Case, by his said Attorney, conveyed to this defendant & this defendant at the time of said conveyance paid to the said Case by his ^{said} Attorney the sum of thirty seven hundred and forty seven ^{50/100} dollars in full of the purchase money of said lots, all of which conveyance & payment of purchase money was done on the same day with the said sale, that is to say on the 5th day of

February A.D. 1863

And this Defendant further says that he has no knowledge, information remembrance or belief as to any interviews or conversations between the said Board & the Agents or Solicitors of the said Case & leaves the said Gray & Board to make such proof thereof, if material, as they may be able to produce, but insists that this Defendant is not to be affected or prejudiced by such interviews or conversations whatever may have been their character or tenor.

And this Defendant admits that the said Bill so filed by the said Case against the said Person & others to foreclose said Mortgage was pending in this

9

Court at the time of said sale to this Defendant but this Defendant says that the said Tracy & Board had not nor had either of them appeared in said suit, nor had any of the defendants to said suit in any way put in any defence thereto, although the time limited by the statutes of this state & the practice of this Court had then long elapsed and expired, and that in fact the said Case was then entitled to have the said Bill taken as confessed against all of the defendants thereto, but this Defendant denies (subject to the opinion of the Court upon the question) that by the filing of said Bill or in any other way, the said Case had elected to proceed to foreclose said Mortgage only by the said suit in Chancery and insists that he was still entitled to use & pursue all his other remedies given him by law, a contract, for the collection of the money due to him upon account of the debt secured by said Mortgage.

And this Defendant denies that there was on the part of the said Case any conspiring and fraudulently contriving to injure the said Tracy & Board or either of them, or to deprive them or either of them of any right they or either of them had in said premises, or of any right of redemption thereto, or that he in any way falsely pretends to have sold said premises to this Defendant or to Lucius B. Otis & this Defendant.

And this Defendant further denies that sale was made by collusion between the said Case & Lucius

B. Otis & this defendant or between any of them & denies that the said Lucius B. Otis or this defendant acted in such purchase as agents of the said Case & denies that said purchase was made in any way for the benefit of said Case further than that thereby he obtained payment of his debt secured by said Mortgage.

And this defendant further says that due and proper notice according to the provisions of said mortgage was given of said sale, & that the same was made by the said Edward S. Isham the duly constituted attorney of the said Case.

And this defendant denies that competition was prevented at such sale by declaring that no bid would be received unless accompanied by the payment of a large sum of money as security for such bid, or the giving of undoubted security, but avers that the only condition imposed was that the purchaser after his bid was accepted, should pay the money, or make a deposit to insure the sale, and that such conditions were reasonable and proper & in accordance with the tenor & effect of said mortgage and usual to prevent sham bidders & that this defendant complied therewith by offering such deposit & then by paying immediately the whole amount of the said purchase money, and denies that any preference or favor was shown to this defendant or the said Lucius B. Otis at such sale for any purpose, but

ans that the said Lucius B. Otis & this defendant
were at the time of such sale, entire strangers to the
said Case & his said Attorney & that this defendant
bought at said sale entirely without consultation
agreement or understanding with the said Case or
his said Attorney or any one on their or either of their
behalf—

And this defendant further says that there was
in fact a brisk competition at such sale among
bidders on each of said lots & that they were sold for
a full fair price for the property at a forced sale &
as much as could reasonably have been expected by
any person.

And this defendant further saith that he
has no knowledge information remembrance or
belief as to whether the said Tracy & Hurd did or
did not know of the intention of said Case to sell
said premises or that said sale would take place
or whether they were watching the proceedings of said
suit, or what were their expectations or intentions &
therefore leaves them to make such proof thereof, if
material, as they may be able to produce, but insists
that he is not to be affected or prejudiced thereby, and
this defendant denies that the said Tracy & Hurd
have been always or at any time before the filing of
said Cross Bill ready to redeem from the said mort-
gage to the said case, & to pay him the sum due thereon,

And this defendant further answering says

that on the day of said sale to wit the 8th day of February A.D. 1868 at the North door of the Court house in the City of Chicago in the County of Cook and state of Illinois, the said Theodore P. Case by his said duly constituted Attorney being in possession of the said Mortgage from the said John W. Brown to the said Theodore P. Case together with the bond thereby secured to be paid, was or pretended to be lawfully authorized to sell the said premises described in said mortgage under the provisions thereof, for the purposes therein expressed absolutely, free from all right or equity of redemption of any and every person to all or any part of said premises.

And this defendant believing that the said Case by his said Attorney was so lawfully authorized did bid at such sale, upon each of said lots separately as they were respectively offered for sale the sum of seven hundred & fifty dollars except one of them on which he bid seven hundred & forty seven $\frac{50}{100}$ dollars.

And that this defendant being the highest & best bidder at said sale, the said lots were severally struck off & sold to this defendant at the said prices, whereupon the said Case by his said duly constituted Attorney by his certain deed of bargain & sale dated the same day & year last aforesaid in consideration of said sum of Thirty seven hundred & forty seven $\frac{50}{100}$ Dollars paid to him by this

Defendant granted, bargained & sold the said premises to this defendant his heirs & assigns forever, as by the said deed reference being thereunto had will more fully and at large appear, and this defendant doth aver that the said sum of Thirty seven Hundred & forty seven 50/100 Dollars, the consideration money in said deed mentioned was actually paid by this defendant to the said Case, by his said Attorney at the time the said deed bears date,

And this defendant doth also aver that at & before the respective times of the execution of the said Deed by the said Case by his said Attorney & the delivery thereof to this defendant & of the payment of the said purchase money by this defendant, he this defendant had no notice whatsoever in fact either express or implied, actual or constructive (except such as the law will imply, if any, from the bare fact that the said Bill of the said Case was pending in this Court,) of the pendency of the said Bill of the said Case in this Court, nor had he at & before the said respective times any notice whatsoever of the said supposed Equities now claimed by the said Tracy & Housh or either of them or of any other Equities or rights whatsoever that in any wise might or could affect the said premises or any part thereof or the validity of the said sale under said mortgage. And this defendant insists that the said Tracy & Housh by neglecting to appear in said suit

38

and assert their rights if any they had, are pre-
cluded from having any benefit thereby against
this defendant. And this defendant insists
that he is a bona fide purchaser of the said prop-
erty for a good and valuable consideration
& without any notice of any rights or Equities to
the same on the part of the said Tracy & Ward
or either of them & that he ought not to be affected
thereby if any such exist. & prays that he may
have the same benefit & advantage of this defence
as if the same were set up by way of plea.

And this defendant denies all & all manner of
unlawful combination & confederacy whereunto
he is by the said Cross Bill charged, without this
that there is any other matter, Cause, or thing in
the said Cross Bill contained, material or
necessary for this defendant to make answer
unto & not herein & hereby well & sufficiently
answered, confessed & avoided traversed or de-
nied, is true to the knowledge or belief of this
defendant.

All which matters & things this defendant
is ready & willing to aver maintain & prove
as this Honorable Court shall direct & hum-
bly prays to be hence discharged with his rea-
sonable costs & Charges in this behalf most uny-
fully sustained.

Baily, Gay, & Williams }
Deft Soli, 3

James Otis

15
State of Illinois }
County of Cook } 3d.

James Otis being
duly sworn says that he is the defendant
named in the foregoing answer, that he
has read the said answer read & knows the
contents thereof, and that the same so far as
the matters & things therein stated relate to his
own acts & deeds is true, & as to all the other
matters & things therein stated he believes the
same to be true,

Shewn & subscribed before } James Otis
me this 23^d day of February }
A. D. 1863. }
Thomas B. Carter Clerk

And on the same day and year aforesaid the
said Thos. B. Carter by E. S. Thomas his Solicitor
filed herein his Oath and Denial to the Cross Bill
in words and figures following to wit:

Superior Court of Chicago
In Chancery

The demurrer of Theodore Place one of the defendants therein, to the Cross bill of Harvey B. Bond and Daniel Tracy filed in the cause pending in the said Court wherein the said Theodore Place is Complainant and John H. Brown, and the said Bond and the said Tracy and others are defendants.

This defendant, by protestation, not confessing all or any of the matters and things in the said Cross bill contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said Cross bill, and for causes of demurrers sheweth;—

1. That the bill on the face of it is a cross bill and as such ought to be confined to the matters in controversy in the original bill, wherein this defendant is complainant and these complainants, with others are defendants.
2. That the bill on the face of it is a cross bill, and as such ought to be confined to matters in dispute to the said original bill.
3. That the bill on the face of it is a cross bill, and as such ought not to introduce new parties having no connection with the matters in controversy in the said original bill.

Wherefore and for divers other good causes of demurrer appearing in the said bill this defendant doth demur. He doth not pray the judgment of this Honorable Court whether he shall be compelled to make any further and other answers to the said cross bill and humbly prays

to be hence dismissed with his reasonable costs and charges in
this behalf sustained -

E. S. Mann

Solr for T. P. Case

And afterwards on the ninth day of March in
the Year aforesaid Harry B Hurd and Daniel
Tracy Complainants in the Cross Bill filed hereunder
this Certain Replication in words and figures following
to wit

In the Superior Court of Chicago
March Term A D 1863

Thurston P Case

as
John H Brown et al

In Chancery

The Replication of Daniel Tracy
& Harry B Hurd to the Answer of James Otto to the
Cross Bill of Said Tracy & Hurd against Said Otto
Thurston P Case and other

These Repliants for repli-
cation to said Answer say that this said Cross Bill
is true Certain & Sufficient and that said Answer
except so far as it admits the allegations in said
bill contained is untrue uncertain and insufficient and
that these repliants are ready to aver maintain & prove
as the honorable Court shall direct when for they pray as
in and by this bill they have already prayed &c

Hurd & Barth Solrs for
Tracy & Hurd

And afterwards to wit on the Sixteenth day of
March in the Year last aforesaid Said day being
one of the days of the March Term of Said Court the
following among other proceedings was had in Said
Court and entered of record to wit

Murdin P Case

Original Bill
John H Brown Elizabeth D Brown his wife
Jacob W Suddam Mary Suddam
James D Suddam and Isabella A Suddam
Reuben Suddam and Harriet E Suddam
Edward M Suddam Harriet W Suddam
Mary A Suddam, James Howland, Robert
Squires, Henry Brown, P Henry Boker,
William H Howland, Sophia Mayne, Joseph
T Brown, Mary Emms Amory Bigelow
William J Pope, Harry B Wood and Daniel Tracy

And
Daniel Tracy and Harry B Wood

Murdin P Case et al

Cross Bill

And now at this
day Comes the Said Complainant in the Original
Bill Murdin P Case by Edward Shaw his Solicitor
and the Said Daniel Tracy and Harry B Wood
defendants to the original bill and the Complainants in
the Cross bill filed in above entitled Cause by Harry

43

B Ward his Solicitor also Come, and the Cause
Coming on now to be heard, upon the Demurrer filed
by said Complainants Thorton P Care to the Cross
Bill of said Daniel Tracy, and Harry B Ward and
Council being heard thereon and the Court being fully
advised it is Concluded by the Court that the demur-
rer be sustained and that the said Cross Bill be
dismissed at Costs of the said defendant to Daniel
Tracy & Harry B Ward, and that said Complainants
recover of them his Costs in that behalf expended and
thereof have execution

And afterwards to wit on the Seventeenth day of
March in the Year last aforesaid said day being
one of the days of the March Term of said Court
the following Among other proceedings was had in
said Court and entered of Record to wit: -

Thorton P Care
John H Brown^{vs} Original Bill
Elizabeth D Brown
his wife and others

And now at this day Comes
said Complainant by Edward S Whann his Solicitor
and on his Motion it is ordered that the original
bill, of Complaint in said Cause be and is hereby dis-
missed at Costs of said Complainant, Therefore

it is Commanded that Said defendants do have & recover of & from Said Complainant three Cents in the behalf aforesaid & have execution therefor.

State of Illinois }
County of Cook } ss

I Thomas J Carter Clerk
of the Superior Court of Chicago within and for
the County and State aforesaid. do hereby Certify
that the foregoing is a full true and Complete
transcript of the Bill, Cross Bill and the Answers
thereto. the Demurrals and Replications (being all the
papers on file in my office) together with all orders
and the Decree entered of record in said Court
in a certain Cause between Theodore J. Case was
Complainant and John A. Brown Elizabeth D
Brown his wife and others were defendants

In testimony whereof I have hereunto
set my hand and affixed the Seal
of said Court at Chicago in the County
and State aforesaid this Eighteenth
day of April A D 1863

Thomas J Carter
Clerk



Supreme Court
State of Illinois

Assignment of Errors

- 1st The Court erred in sustaining the demurrer.
- 2nd The Court erred in dismissing the cross bill.
- 3rd The Court erred in not granting the relief prayed in the cross bill.

Hull & Booth
for appellants.

Harry B. Hunt et al

vs
Theodore P. Case } defendant in law

And now come the said defendant in Error of Edw^d S. Lehman his Solicitor and say that there is no error in the said Record or in the judgment rendered thereon -

E. S. Lehman -

April 28. 1883.

Sols for T. P. Case

58 229

H. B. Hund
Stat. 11.50

J. P. Carver

Record

Filed Apr. 29, 1863

Deland
Clk.

Fees \$11.50 paid

J. B. Carver Clk.

Hund 27.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1863. }

HARVEY B. HURD & DANIEL TRACY,
IMPLEADED WITH OTHERS,

Appellants,

} IN CHANCERY.

vs.

THEODORE P. CASE, APPELLEE.

POINTS FOR APPELLANTS.

STATEMENT OF CASE.—The appellee, Case, on the 3d November, 1862, filed in the Superior Court of Chicago, his bill to foreclose a mortgage upon certain lots in Chicago, given by John H. Brown to him for \$2,500, dated February 23, 1859, and payable 23d February, 1863, with 10 per interest, payable semi-annually. The bill states that, default had been made in the payment of the last three instalments of interest, and that the bond had been forfeited. The bill then shows, that Daniel Tracy and Harvey B. Hurd, and various other persons, are interested in the premises, and prays a foreclosure, sale, &c.

Publication was made to non-resident defendants, according to statute, and Hurd was served with process, and the suit was proceeding at the time

of filing the cross-bill, hereafter mentioned. On the 12th of February, 1862, Tracy and Hurd filed their answer to the original bill, admitting all the allegations of the bill, except as to the amount claimed to be due Case, and filed a cross-bill to redeem from Case's mortgage, setting forth that Case held the mortgage mentioned in the original bill, and that subsequent to the giving of that mortgage, John H. Brown and James D. Ludlam had, on the 1st day of Sept., 1860, given a trust deed to Hurd, to secure Tracy in the sum of \$1,500, payable five years from its date, which still remains unpaid; and that Tracy had often applied to Case to redeem the premises from his (Case's) mortgage, but that Case would not receive his redemption money, or give any account of how much he had received on account of interest on his mortgage; but that, for the *purpose of defrauding* Tracy and Hurd, and depriving them of their right of redemption, sometimes *pretends* that he has caused the premises to be sold, on a power of sale contained in the mortgage, and that they were sold to Lucius B. Otis and James Otis, February 5, 1863. Then charges that, in November, 1862, Hurd applied to the agents and solicitors of Case to redeem the premises, and inquired of them what would be done with the mortgage, and how it would be foreclosed; and was informed by them that it would be foreclosed by bill in chancery, in the Superior Court, when said Hurd and Tracy would have a right to bid in the property at the sale, under decree, or to redeem therefrom; that afterwards, November 3d, 1862, said Case, by his said solicitors, filed his bill herein, and served Hurd with summons—at same time filed affidavit of non-residence of said Tracy and others, and published notice in the Chicago Times, to said non-residents, to appear; that the sale, if any, *has been made since the commencement of this suit, while it has been pending, and in fraud of the rights of said appellants*; that, by the understanding between the solicitors of Case, and Hurd, and *by the commencement and prosecution of said suit, Case made his election to proceed in that way to collect his claim*, and thereby notified all parties, interested, of his election. That said Lucius B. Otis and James Otis purchased, *if at all, while the said suit was pending, and with notice, actual or constructive, of all the rights of the appellants, and of the election of said Case to proceed by suit*; that said sale was made by collusion between said Case and said Lucius B. and James Otis, and that *the premises were, in fact, bid in by them for Case, as his agents*; that no proper notice of the time and place of sale was given; that the sale was not made by the

proper person, and that unfair means were resorted to by the solicitors of Case to prevent competition, and that partiality and favor were shown to said Otises at the sale, (setting out the particular acts of favor) by reason of all which, the premises did not bring more than one-third their value. That said Hurd and Tracy were wholly ignorant of the intention of Case to sell under the power, or that any notice had been published, or that the sale would take place till the day of the filing of this bill ; that they had watched the progress of said suit, relying on the information given to Hurd by the solicitors of Case, expecting to avail themselves of their right to redeem the premises ; that they have always been, and now are, ready to redeem, and pay Case the amount due him on his mortgage. Then prays that Case may discover and render account ; that James Otis may be made joint defendant with said Case ; that they be decreed to release and convey to said Hurd and Tracy, or to the mortgagee, the said premises, or that the said sale be set aside as fraudulent and void, and that your orators be let in to redeem the premises upon payment of the amount due to Case, and that Case be decreed to assign the mortgage to Tracy in security for the redemption money.

To this cross-bill, Case demurred on 23d February, 1863, on the ground that, the matters contained in the cross-bill were not proper subjects of a cross-bill. The court sustained this demurrer, and dismissed the cross-bill and allowed Case to dismiss the original bill.

The questions, raised by the record, are as follows :

1. May a defendant, who is a subsequent incumbrancer, redeem from the mortgage sought to be foreclosed against him, and if so, may he file a cross-bill for that purpose ?

2. Can the complainant, by assigning, encumbering, or disposing, of his interest in the mortgage, or property encumbered, cut off such right of redemption ; or, by changing the parties in interest, cut off the right to file a cross-bill ?

I .

We do not think the defendant in error will contend that, up to the time he claims he sold the property under the power of sale in the mortgage, the subsequent incumbrancers might not have filed their cross-bill to redeem from the mortgagor. We think that right so clear, that we deem it unnecessary to offer any argument upon that point.

II .

The difficulty which the defendant seems to think stands in the way of the cross-bill, arises under that part of the cross-bill which sets up that Case "*sometimes pretends*" that he sold the premises in question to the Otises, under a power of sale in the mortgage, pending the original bill, which sale was made for the purpose of defrauding Hurd and Tracy, and preventing the redemption of the premises by them, and prays that if any such sale was made, it be set aside. He seems to think he had succeeded in putting a stumbling block in our way that chancery has no power to remove. If the setting aside of the sale to the Otises was the only purpose of the cross-bill, the argument of the defendant might have some pertinency; but that is only an incident to the main purpose. We care nothing for the sale to the Otises, except that it stands in our way to redeem. We say we have a right to redeem from this mortgage at any time before a decree of foreclosure against us, and have the security assigned to us. The mortgagee is seeking a decree of foreclosure against us, and refuses to allow us to redeem. If we do not interfere, he will have a decree to that effect. How, then, can we secure our right but by a cross-bill, or how can we do it better. The effect of our cross-bill is to prevent a decree of foreclosure, and obtain one that the complainant take his money, and that he assign his securities to us.

The statutes of 1845, chap. 21, sec. 24, 25 and 28, provide, that "any defendant may, after filing his answer, exhibit, and file his cross-bill," and that "no complainant shall be allowed to dismiss his bill, after a cross-bill has been filed, without the consent of the defendant."

Now the cross-bill in this case shows that Tracy, a subsequent incumbrancer, made frequent applications for a statement of the amount due to Case, and to be allowed to redeem; both of which were refused, and his agent was told that the mortgage would be foreclosed by a suit in

chancery. He commences his suit, brings the parties into court, and, while he is litigating with them, and their attention is fixed upon the proceedings there pending, he pretends he has made a sale by quietly advertising and selling the property under a power of sale which he has previously informed the parties, both in terms and by the institution of the suit, he would not pursue. Now the pendency of this suit was notice to all the world of the rights of the defendants to redeem, and to make any other proper defence, either by cross-bill or otherwise, and also of the election of the mortgagee to pursue that remedy for his debt; and the mortgagor is not at liberty to resort to such an inconsistent remedy at the same time. Otherwise the design of the statute prohibiting the complainant from dismissing his bill after a cross-bill is filed, might, at any time, be defeated, as the complainant might as well after, as before the filing of the cross-bill, sell under the power, and thus take from the adjudication of court the subject matter in dispute.

In *Longworth vs. Butler*, 3, 9, 32, this court say that "*upon the slightest proof of unfair conduct, a court of equity will set the sale aside.*" Is there no unfairness in notifying the defendant that his rights are to be settled by a court of chancery, and when he has come into court, that the complainant should leave him there, pursuing his defence, and resort to a remedy to which he is not made a party, and of which he may have no actual notice? May not the defendant be fatally misled, and the plaintiff gain an unfair advantage over him?

If there is an opportunity for frauds even, in such a course, we think the court should not allow it. But the cross-bill goes further, and shows actual fraud in this sale, and that the property was really sold and bid in for Case, for the purpose of preventing our redemption. Can there be any doubt, under the circumstances, that we have a right to redeem, and to file our cross-bill for that purpose, and to remove the difficulties such pretended sale may have put in our way, and have the securities assigned to us?

The cross-bill seeks discovery, of Case, of the amount received by him of the mortgagor; and as a bill of discovery, it is good, and should not have been dismissed.

HURD & BOOTH,

Attorneys for Plaintiffs.

229

Ward + others Case

Appellants Points

Filed May 25, 1865

J. L. Ward

Supreme Court of Illinois

April Term 1853

Daniel Tracy, v.
Harvey B. Hunt
v.
Theodore P. Case

It is hereby agreed that
the above entitled cause may be sub-
mitted to the court upon written argu-
ments to be filed therein

Harold D. Booth

Att'y for Pffs.

C. G. Wilson

Att'y for Case

58 229-

Stephen -

Filed Apr. 29.
1860. J. Nelson
Clk.

5475

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1863. }

HARVEY B. HURD & DANIEL TRACY,

IMPLEADED WITH OTHERS,

Appellants,

} IN CHANCERY.

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To this cross-bill, Case demurred on 23d February, 1863, on the ground that, the matters contained in the cross-bill were not proper subjects of a cross-bill. The court sustained this demurrer, and dismissed the cross-bill and allowed Case to dismiss the original bill.

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chancery. He commences his suit, brings the parties into court, and, while he is litigating with them, and their attention is fixed upon the proceedings there pending, he pretends he has made a sale by quietly advertising and selling the property under a power of sale which he has previously informed the parties, both in terms and by the institution of the suit, he would not pursue. Now the pendency of this suit was notice to all the world of the rights of the defendants to redeem, and to make any other proper defence, either by cross-bill or otherwise, and also of the election of the mortgagee to pursue that remedy for his debt; and the mortgagor is not at liberty to resort to such an inconsistent remedy at the same time. Otherwise the design of the statute prohibiting the complainant from dismissing his bill after a cross-bill is filed, might, at any time, be defeated, as the complainant might as well after, as before the filing of the cross-bill, sell under the power, and thus take from the adjudication of court the subject matter in dispute.

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If there is an opportunity for frauds even, in such a course, we think the court should not allow it. But the cross-bill goes further, and shows actual fraud in this sale, and that the property was really sold and bid in for Case, for the purpose of preventing our redemption. Can there be any doubt, under the circumstances, that we have a right to redeem, and to file our cross-bill for that purpose, and to remove the difficulties such pretended sale may have put in our way, and have the securities assigned to us?

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HURD & BOOTH,
Attorneys for Plaintiffs.

58 - 229

Mount + other as base

Appellants Points

Filed May 25, 1863

L. L. Carter
C.M.R.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1863. }

HARVEY B. HURD & DANIEL TRACY,

IMPLEADED WITH OTHERS,

Appellants.

In Chancery.

VS.

THEODORE P. CASE. APPELLEE.

ABSTRACT OF RECORD.

R. p. 1 **Bill** filed Nov. 3d, 1862, to foreclose a mortgage.

2 The bill sets forth that John H. Brown, one of the parties impleaded
with the appellants was indebted to Case, to the amount of \$2,500, secured
by bond, dated Feb. 23, 1859, payable Feb. 23, 1863, with interest pay-
able semi-annually, at 10 per cent—payments to be made in the city of
3 New York. That in default of payment of any of the interest fallen
due for 30 days, the whole of the principal shall become due at the elec-
4 tion of Case. That on the said 23d February, 1862, Brown executed a
mortgage of that date to Case, of certain city lots in Chicago, described in
7 the bill, to secure payment of said bond. That default was made in pay-
ment of interest which accrued and fell due Aug. 23, 1861, Feb. 23, 1862,
and Aug. 23, 1862, and that the said bond had thereby become forfeited in

8 law. The bill then shows that various persons have interests in the mort-
gaged property, and among the rest the appellants, Hurd and Tracy,
9 waives the oath of defendants in answer, and prays foreclosure by sale
of the mortgaged premises and application of the money in the usual form.

11 On the same day the bill was filed an affidavit of the non-residence of
several of the parties defendant, and among the rest, Tracy was also
filed.

14 The answer of Hurd and Tracy admits the existence of the mortgage
15 and indebtedness, and that the same has become due; also, that the said
Hurd and Tracy are interested in the lands under a deed of trust, dated
Aug. 1, 1860, given by said Brown and wife, and James D. Ludlam and
wife to said Hurd, to secure payment to said Tracy, of the sum of \$1,500,
five years from date, with interest at 10 per cent., payable semi-annu-
ally, which sum, with the interest accrued, is unpaid.

17, 18 The cross bill of Hurd and Tracy, refers to the bill and their answer
19 thereto; and then sets forth that said John H. Brown and James D.
Ludlam were indebted to said Tracy, on promissory notes, dated Aug.
1, 1860, in the sum of \$1,500, payable five years from date, with interest
at 10 per cent. payable semi-annually; that said Brown and Ludlam,
and their wives, gave their deed of trust of the same date with said
notes, conveying the lots described in the bill to said Hurd in trust to
secure payment of said notes, which said deed was recorded Aug. 14,
20 1860, and that the notes are unpaid. That Case has received money on
account of principal and interest on his claim—how much they are unable
to say; that they have applied to him for an account, and that he would
permit them to redeem; that said Case fraudulently contriving to injure
said Hurd and Tracy, and deprive them of the right of redemption,
sometimes pretends that he has caused the said premises to be sold on a
power of sale in said mortgage, and that they were sold to Lucius B.
Otis, and James Otis, Feb. 20, 1863. Then charges that in November,
1862, Hurd applied to the agents and solicitors of Case to redeem the
premises, and inquired of them what would be done with the mortgage,
and how it would be purchased, and was informed by them that it would

21 be foreclosed by bill in chancery in this court, when said Hurd and Tracy would have a right to bid in the property at the sale under decree or to redeem therefrom; that afterwards, Nov. 3d, 1862, said Case, by his said solicitors, filed his bill herein, and served Hurd with summons at same time filed affidavit of nonresidence of said Tracy and others, and published notice in the Chicago Times to said non-residents to appear; that the sale, if any, has been made since the commencement of this suit, while it has been pending and in fraud of the rights of said appellants; that by the understanding between the solicitors of Case and Hurd, and by the commencement and prosecution of said suit, Case made his election to proceed in that way to collect his claim, and there-

22 by notified other parties interested of his election; that said Lucius B. and James Otis have purchased, if at all, while said suit was pending, and with notice, actual or constructive, of all the rights of the appellants and of the election of said Case to proceed by suit; that said sale was made by collusion between said Case and said Lucius B. and James Otis, and that the premises were in fact bid in by them for Case, as his agents; that no proper notice of the time and place of sale was given; that the sale was not made by the proper person, and that unfair means were resorted to by the solicitors of Case to prevent competition, and that partiality and favor were shown to said Otises at the sale, by reason of all which the premises did not bring more than one-third their value.

23 That said Hurd and Tracy were wholly ignorant of the intention of Case to sell under the power, or that any notice had been published, or that the sale would take place till the day of the filing of this bill; that that they had watched the progress of said suit relying on the information given to Hurd by the solicitors of Case expecting to avail themselves of their right to redeem the premises; that they have always been, and now are, ready to redeem, and pay Case the amount due him on his mortgage.

24 Then prays that Case may discover and render account; that James Otis may be made joint defendant with said Case; that they be decreed to release and convey to said Hurd and Tracy, or to the mortgagee, the said premises, and that the said sale be set aside as fraudulent and void, and that your orators be let in to redeem the premises upon payment of

the amount due to Case ; and that Case be decreed to assign the mortgage to your orators in security for the redemption money.

25 The answer of James Otis to the cross bill, filed 23d Feb., 1863, admits the filing of the bill by Case to foreclose the mortgage mentioned in the cross bill, only the mortgage was executed by said John H. Brown, alone, and not by his wife, nor by said James D. Ludlam and wife ; and that the mortgage was given to secure a bond, with interest coupons, instead of a note.

26 Denies knowledge of the indebtedness of said Brown and Ludlam to said Tracy, alleged in the cross bill ; admits that Case had received moneys on account of interest, from Brown, before filing of said cross bill ; but denies that he had received any of the principal sum, and denies that said Hurd and Tracy had no knowledge or means of knowledge, except on the oath or discovery of Case, as to the amount received by him, or the amount still due him, or that either said Hurd or Tracy had knowledge on these points, or that he would receive the redemption of
27 said mortgage ; assents that Brown had paid to Case the interest accrued on said mortgage up to 23d Feb., 1861, and no more ; that Case had never received anything else from any source on said mortgage ; that the whole balance of interest accrued, and the whole of the principal was due, and that Case and his solicitors were ready and willing to receive it from any person, and to assign the mortgage.

28 The answer then sets forth the mortgage described in the original bill ; also sets forth a power, contained in said mortgage, to sell at public auction, after 30 days' notice, by advertisement in a daily newspaper published in Chicago, in the English language ; that Case, having elected to declare the whole principal debt due, for default in payment of the interest, did advertise the premises for sale for 30 days and upwards, commencing the 27th of December, 1862, in the Chicago Morning Post,
29 published in the English language in Chicago, setting forth the advertisement in full. That said defendant, Otis, attended the sale, which was
31 made in all respects in accordance with said advertisement, and bid off
32 the lots therein described, for \$750 each, except one, for which he bid

\$747.50; that his were the highest and best bids, and that the said lots were struck off and sold to him, and that he paid to the said Case, \$3,747.50, on the same day of the sale, to wit: the 5th of Feb., 1863.

33 That he knows nothing of the alleged interviews between Hurd and Tracy and the solicitors of said Case; admits that the bill of foreclosure was pending at the time of the sale, but that neither Tracy nor Hurd had entered appearance, though the time therefor had expired, and that Case was then entitled to have the bill taken as confessed; and denies that Case had, by filing said bill, elected to proceed to foreclose only by said suit in chancery, but that he might still pursue all his other remedies at law.

34 Denies all confederating and fraud, to injure Hurd or Tracy, and deprive them of their right to redeem; or that there was any collusion between said Case and Lucius B. Otis and this defendant, or that they acted in said purchase as the agents of said Case, or in any way for his benefit, further than that he obtained payment of his debt by the sale.

Avers that the notice was given of the sale according to the terms of the mortgage, and that sale was made by Edward S. Isham, duly constituted attorney of said Case.

35 Denies that competition was prevented at said sale by declaring that no bid would be received unless accompanied by the payment of a large sum of money, or giving undoubted security; and avers that the only condition imposed was that the purchaser should pay the money or make a deposit to insure the sale, and that no favor was shown to said Otis in this respect; and that he, at the time of the sale, was an entire stranger to said Case and his attorneys; and that he bought without consultation or understanding with said Case, or his attorney, or any one in their behalf.

36 Avers that there was a brisk competition at the sale, and that the property sold for a fair price.

That on the said 5th day of February, 1863, at the north door of the

37 court house, in Chicago, Illinois, said Case, by his attorney, being in possession of said mortgage, was or pretended to be lawfully authorized to sell the premises absolutely, and free from all equity of redemption ; that defendant, believing that said Case, by his attorney, was so lawfully authorized, bid at such sale upon each of the lots separately, as offered for sale, \$750, except one, for which he bid \$747.50 ; that, being the best bidder, the said lots were severally struck off and sold to him at said
38 prices ; that said Case, by his said attorney, on the day and year aforesaid, conveyed the said lots to defendant, by deed of the same date, for the consideration of \$3,747.50, which sum the defendant then actually paid. That at the time of the execution and delivery of said deed, defendant had no notice, actual or constructive, of the pendency of said bill, except such as the law will imply (if any) from the fact that the bill was then pending, and no notice of any of the equities now claimed by said Hurd and Tracy. That he is a *bona fide* purchaser, and claims the benefits of such purchases. Answer on oath.

40 **Demurrer** of T. P. Case to the cross bill, filed Feb. 23, 1863 :

1st. That the bill, on the face of it, is a cross bill, and as such ought to be confined to the matters in controversy in the original bill.

2d. That it ought to be confined to matters in defense to the said original bill.

3d. That it ought not to introduce new parties, having no connection with the matters in controversy in the original bill.

41 Replication of Hurd and Tracy to the answer of Otis to the cross bill filed March 9, 1863.

43 March 16, 1863. The Court, on hearing, sustain the demurrer, and decree that the cross bill be dismissed.

March 17, 1863. T. P. Case dismissed his original bill.

ASSIGNMENT OF ERRORS.

58 229

Hard et al

vs

Case

Abstract

Reported in full

Filed Apr. 23-1863

J. G. Land

Clark