JOHN B. WILHELM, ADMINISTRATOR OF JOHN WILHELM vs. STEPHEN L. LEE ET AL. — JULY TERM, 1849.

[REMEDIES AT LAW AND IN EQUITY UPON MORTGAGES.]

IT is a well settled rule, that a mortgagee may sue, at the same time, in law, upon his bond or covenant, and in equity, upon his mortgage; the case of a mortgagee forming an exception to the general rule, that a party shall not be permitted to sue at law and in equity at the same time for the same debt.

In this case, one mortgagee had recovered judgments at law for his debt, upon one of which judgments, an appeal had been taken, and was still pending in the Court of Appeals, the other remained unsatisfied in the County Court, the other mortgagee had simply instituted a suit at law, but had recovered no judgment. HELD—

That each of these cases come within the rule, which permits a morgtagee to sue at law upon the bond or covenant, and in equity, upon his mortgage.

The bill in this case, was filed on the 10th of January, 1849, by the complainant, for the foreclosure of a mortgage, and sale of the mortgaged premises, of which his intestate was the assignee in part. The defendant, the mortgagor, after claiming in his answer, various credits on account of the mortgage debt, resisted the decree, upon the ground, that the complainant had already recovered a judgment at law upon the bond, to secure the payment of which, the mortgage was given, and insists that such reconveyance, was an election by complainant, to proceed at law to recover all that was due him by the defendant, and that he cannot now file his bill in equity, for the recovery of the same debt.

An agreement of the parties, was filed on the 18th of July, 1849, by which it was agreed, that the credits claimed by the defendant should be allowed, and the question submitted for the decision of the Chancellor, which are stated in the following opinion delivered on the 14th of August, 1849.

THE CHANCELLOR:

The agreement submitting this case, presents two questions. The first is, whether a mortgagee, who has recovered judgments at law for his debt, upon one of which an appeal has been taken, and is now pending in the Court of Appeals, the other remaining unsatisfied in the County Court, can maintain a bill in equity for a foreclosure, and sale of the mortgaged premises. And, secondly, whether a mortgagee who has simply instituted a suit at law, but recovered no judgment, is entitled in this court to such a decree.