

ciency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose. What constitutes the setting down of a demurrer for argument is not expressly defined by the equity rules. According to the equity practice in England, a demurrer is set down for argument by an ex parte order, issued on petition of the plaintiff, and served upon the defendant's solicitor two days before the hearing. 1 Daniell, Ch. Pl. & Prac. (5th Ed.) pp. 595, 596. Under the provisions of rule 5 of the equity rules, a motion to set down a demurrer for argument is grantable of course by the clerk. Its provisions are:

"All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills pro confesso; for filing exceptions, and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown."

And by the preceding rule (4) the entry in the order book of any motion grantable of course by the clerk is made sufficient notice to the parties and their solicitors. An observance of these rules of procedure will secure to the plaintiff the option conferred upon the plaintiff by rule 38 of the equity rules, and to the defendant the right of dismissal under the circumstances prescribed by the same rule. An order will be entered striking the demurrer from the law calendar.

FARMERS' LOAN & TRUST CO. v. GRAPE CREEK COAL CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 26, 1895.)

No. 204.

MORTGAGES—FORECLOSURE FOR DEFAULT AS TO INTEREST—DEFICIENCY JUDGMENT BEFORE MATURITY OF PRINCIPAL.

On foreclosure of a mortgage for nonpayment of interest, although the proceeds of sale of the property as an entirety are insufficient to pay the whole debt, no judgment for the deficiency can be rendered if the principal is not due and there is no provision in the mortgage, or the bonds secured thereby, that the principal shall become due on default in payment of interest.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This was a suit by the Farmers' Loan & Trust Company against the Grape Creek Coal Company, Grape Creek Coal & Coke Company, Mason M. Wright, and John B. Brown, to foreclose a mortgage. A decree was rendered for complainant under which the mortgaged property was sold as an entirety, but afterwards, upon defendants' appeal, the decree was reversed in certain particulars, and the cause was remanded to the circuit court. 63 Fed. 891. The circuit court entered a decree, September 12, 1894, in conformity with the opinion of the circuit court of appeals, adjudging \$379,648.56 to be due. From this decree complainant appealed.

J. S. Runnells, William Burry and H. B. Turner, for appellant.
C. A. Remy and J. B. Mann, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge. In conformity with our decision when this cause was previously before us (18 U. S. App. —, 63 Fed. 891), the court below, on September 12, 1894, vacated so much of the original decree as adjudged that the principal of the bonds was due, and so much of its decree of March 2, 1893, confirming the sale of the mortgaged premises, as adjudged the balance of the debt, after application of the proceeds of sale, to be due, and rendered judgment to the complainant therefor, and thereupon in all other respects confirmed the original decree, and ratified and confirmed the sale of the mortgaged premises under the original decree before its reversal by this court. The appellant, complainant below, assigns for error that the court erred in not according to it a money judgment for the debt secured by the mortgage remaining unpaid after application of the proceeds of the sale. The refusal to award such a judgment was clearly right. If under the provisions of the trust deed the trustee could, under any circumstances, be entitled to a judgment for the amount of the bonds secured by the trust deed, and if its functions did not cease upon distribution of the proceeds of the sale of the mortgaged premises among the various bondholders,—questions which we do not decide,—it still remains true that the principal of the bonds does not mature until the year 1916, that there is no provision in the bonds or the trust deed securing them that the principal should become due upon default in the payment of interest, and that a sale of the property mortgaged to secure the payment of the bonds could not have the effect of maturing the principal. A judgment for deficiency, before maturity of the principal, would be wholly unwarranted. *Danforth v. Coleman*, 23 Wis. 528.

Affirmed.

DANIELS et al. v. LAZARUS et al.

(Circuit Court, S. D. New York. December 31, 1894.)

1. PROCESS—FEDERAL AND STATE COURTS—PROPERTY IN CUSTODIA LEGIS.

L. brought an action against the W. Co. in a state court, and caused an attachment to be levied upon certain personal property, alleged to belong to the W. Co. The cause was removed to the federal court, and the sheriff, under an order of that court, turned over the attached property to the United States marshal. D., the assignee of the W. Co. for the benefit of creditors, interposed a claim to the attached property, and, upon failure of the sureties upon an indemnity bond, given by L., to justify, the federal court made an order, in accordance with the practice under the state Code, directing the marshal to turn over the attached property to D. This order was entered at 1:15 p. m., and was immediately served upon the marshal. On the same day, after the entry and service of such order, but before actual delivery of the property by the marshal to D., a coroner, under process of the state court, in an action by one I. against L., D., the marshal, and the sheriff, replevied the property. *Held* that,