7th December, 1899, upon default of appearance, and for leave to appear and defend.

C. Evans-Lewis, for defendant.

T. D. Delamere, K.C., for plaintiffs.

THE MASTER.—The facts of the case are not in dispute. The action was to recover the amount due on a mortgage made by defendant on 4th March, 1889. Subsequently defendant sold the mortgaged premises to one Hall, who on 4th May, 1892, conveyed the same to W. B. McMurrich as a trustee for the Rathbun Company. By deed of 4th February, 1898, McMurrich conveyed to the plaintiffs, the mortgagees. One of the plaintiffs made affidavit that this deed was never registered, but only held as an escrow, to be used for the purpose of making title in case of exercising the power of sale. . . .

At the time of the service of the writ of summons, in November, 1899, defendant thought he had no defence, and allowed judgment to go by default. He has since become aware of the existence of the unregistered instrument executed by McMurrich, and has been advised that the effect of that instrument was to release him from all liability under the mortgage as effectually as if it had been discharged by plaintiffs. His counsel stated at the argument that it would be impossible to give security for the judgment, if that were made a term of being allowed in now to defend. . . .

There are, in my opinion, three fatal objections to the motion.

First, it is clear under McVicar v. McLaughlin, 16 P. R. 450, that no relief could be given unless defendant were able to pay into Court a substantial part, if not the whole, of the amount due on the judgment.

Second, that under the previous case, and the authorities cited therein, the delay has been too great. To the same effect is . . . McLean v. Smith, 10 P. R. 145.

Third, the proposed defence was stated to be based on certain statements in the opinions of the Judges in Scarlett v. Nattress, 23 A. R. 297. . . . The facts in that case distinguish it from the present case. There was no undertaking by McMurrich to assume the mortgage in question. . . . Bourne v. O'Donohoe, 17 P. R. at p. 524, referred to.

Motion dismissed with costs.