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New Jersey Court of Errors and Appeals

Between CAPITAL BUILDING AND LOAN ASSOCIATION OF NEWARK, a corp. of N. J., Complainant-Appellant, and JOHN PESCE, *et als.*, Defendants-Respondent.	On Appeal from the Court of Chancery.

Statement of Facts.

On March 9, 1928, the appellant was the holder of two bonds and mortgages, made by the Columbia Realty Co., a corporation, to it, both bearing date April 6, 1926, each to secure the payment of the sum of $9500. The mortgages covered adjoining premises on the West side of Tremont Street, in the Town of West Orange, Essex County, New Jersey, each of said lots was 35 feet front and rear, and 100 feet deep.

On March 9, 1928, the appellant commenced foreclosure proceedings on one of its said bonds and mortgages, the docket number and page of which in the Court below is 67-444. The foreclosure suit proceeded in the regular way and a final decree was duly entered and a *fieri facias* for the sale of the mortgaged premises was entered May 16, 1926 under which the Sheriff of Essex County, on July 24, 1928, sold the mortgaged premises to the Prudential Investment Co., a corporation, for the sum of $9550.00. The said sale was duly con-

firmed by the Court below and a deed was made by the Sheriff to the purchaser.

The appellant commenced foreclosure of its other bond and mortgage on March 12, 1928, the docket and page number of which, in the court below was 67-478. The suit proceeded in a regular way and a final decree was duly entered and a *fieri facias* for the sale of the mortgaged premises was entered May 16, 1928, under which the Sheriff of the County of Essex, on July 24, 1928, sold the mortgaged premises to the Prudential Investment Co., a corporation, for the sum of $9,675.00. The sale was duly confirmed, and a deed delivered to the purchaser by the Sheriff.

The defendants in the two suits were the same, except that there was an additional mortgagee in the second suit above-mentioned. They were John Pesce and Filomena Pesce, his wife, the owners, Home Aide Investments, Inc., mortgagee, Builders Aid, Inc., and Modern Home and Finance Co., judgment creditors, and in the latter suit, there was an additional defendant, Elsie R. Stone, who held a mortgage prior to that of the Home Aide Investments, Inc.

On or about Sept. 28, 1928, notice of motion was served that on Oct. 2, 1928, the Home Aide Investments, Inc., would apply to the Chancellor to direct the payment "of but one bill of costs in the above captioned suits." On October 2, 1928, the Chancellor made an order that "one bill of costs in the above captioned suits be paid, and that the bill of costs so paid, shall be in the amount allowed in the proceedings in docket 67, page 444, together with an additional cost of execution allowed in Chancery, in the cause docket 67, page 479, (should be 478), together with costs of this order.

This appeal is from that order.

Notice of Motion.

Filed October 2, 1928.

IN CHANCERY OF NEW JERSEY.

Docket 67-479.
Docket 67-444.

CAPITAL BUILDING AND LOAN ASSOCIATION OF NEWARK, a corporation of New Jersey, Complainant, and JOHN PESCE, *et al.*, Defendants.	On Bill, Etc. Notice of Motion.

To MICHAEL J. QUIGLEY, Solicitor and of Counsel for the Capital Building and Loan Association of Newark:

Take Notice that we shall appear before his Honor, the Chancellor, Edwin Robert Walker, at the Chancery Chambers, State House, Trenton, New Jersey, on the Second day of October, 1928, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, on a motion requesting the Chancellor to direct the payment of but one bill of costs in the above captioned suit, wherein the same complainant foreclosed two mortgages, each in like amount and each bearing the same date, and shall rely upon the cases of the Mutual Securities vs. Harris, 135 Atlantic, 337, and United Hebrew Charities vs. Levy, 5 New Jersey Advanced Reporter, 993.

MEYERS & LESSER,
Solicitors for Defendant,
Home Aid Investments, Inc.

Order.

Filed October 2, 1928.

IN CHANCERY OF NEW JERSEY.

Docket 67 page 479.
Docket 67 page 444.

Between CAPITAL BUILDING AND LOAN ASSOCIATION OF NEWARK, a corporation of New Jersey, and JOHN PESCE, *et al.*, Defendants.	On Bill, Etc. Order.

Upon opening this matter to the Court, by Samuel B. Lesser, Solicitor for the Defendant Home Aide Investments Inc., and it appearing from statements and sufficient cause being shown why one foreclosure bill should have been instituted in the above captioned cause instead of two separate bills

And it appearing, that two separate bills of costs having been paid wherein one bill of costs would have been paid in the event of one foreclosure bill;

It is Thereupon, on this Second day of October, A. D. Nineteen Hundred and Twenty eight, Ordered that one Bill of costs in the above captioned suits be paid and that the bill of costs so paid shall be in the amount allowed in the proceedings in docket 67 page 444, together with an additional cost of execution allowed in Chancery in the cause docket 67 page 479, together with costs of this order.

E. R. WALKER,
Chancellor.

Notice of Appeal.

Filed November 5, 1928.

IN CHANCERY OF NEW JERSEY.

Docket 67 page 479.
Docket 67 page 444.

Between CAPITAL BUILDING AND LOAN ASSOCIATION OF NEWARK, a corporation of New Jersey, Complainant, and JOHN PESCE, *et al.*, Defendants.	On Bill, Etc. Notice of Appeal.

The complainant, Capital Building and Loan Association of Newark, a corporation of New Jersey, hereby appeals from the order made in the above entitled causes, on October 2, 1928, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, November 1, 1928.

M. J. QUIGLEY,
Solicitor for and of Counsel with Complainant, Capital Building and Loan Association of Newark.

I conceive there is a good cause for appeal in the above entitled causes.

M. J. QUIGLEY,
Of Counsel with Complainant, Capital Building and Loan Association of Newark.

Petition and Grounds of Appeal.

Filed November 22, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between CAPITAL BUILDING AND LOAN ASSOCIATION OF NEWARK, a corporation of New Jersey, Complainant-Appellant, and JOHN PESCE, *et als.*, Defendants-Respondent.	On Appeal from the Court of Chancery. Petition and Grounds of Appeal.

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Capital Building and Loan Association of Newark, the appellant in the above-stated causes, respectfully show that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the second day of October, 1928, in certain causes in said Court of Chancery, wherein your petitioner was complainant, and John Pesce and others were defendants, in this respect, to wit: that the said final decree or order adjudges that one bill of costs in the two above captioned suits be paid and that the bill of costs so paid should be in the amount allowed in the proceedings in docket 67 page 444, together with additional costs of execution allowed in Chancery in the cause docket 67 page 479, together with the costs of this order.

And your petitioner hereby appeals from the

whole of the decree of the Chancellor which decrees as aforesaid, upon the grounds that the same is erroneous, for that:

1. The appellant had the absolute right to file two bills of complaint to foreclose two mortgages which it held on two different pieces of property owned by the defendant, John Pesce and others.

2. The appellant was entitled to its taxed bills of costs in each foreclosure suit.

3. The court had no power to make the order or decree appealed from.

4. The court had no power to make the order or decree appealed from after final decree, sale, confirmation and satisfaction of appellant's mortgages and payment of its two taxed bills of costs.

5. The defendant, Home Aide Co., Inc., has no right, equity or interest justifying the granting of the order or decree appealed from.

6. The order or decree appealed from does not consolidate the two foreclosure suits instituted by the appellant.

7. No order or decree can be made that one bill of costs be paid in the two suits when two bills of costs have already been paid under prior decrees of the court below in said suits.

8. No causes were pending when the order or decree appealed from was made by the court below.

9. The respondent, Home Aide Investments, Inc., was guilty of laches in not making its application sooner.

10. The Home Aide Investments, Inc., took no step to protect its interest at foreclosure, but permitted the Prudential Investments, Inc., a stranger to the transaction to buy at Sheriff's sale, and then sometime thereafter, proceeded in the cause appealed from.

11. And after the complainant in the two foreclosure suits had made new loans to the Prudential Investments, Inc., and had placed new mortgages on the respective premises.

Your petitioner therefore prays that the said decree of the Chancellor be wholly reversed, set aside, and for nothing holden. And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

M. J. QUIGLEY,
Solicitor for and of Counsel
with Complainant-Appellant.

Acknowledgment of Service of Petition and Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between CAPITAL BUILDING AND LOAN ASSOCIATION OF NEWARK, a corporation of New Jersey, Complainant-Appellant, and JOHN PESCE, *et als.*, Defendants-Respondent.	On Appeal from the Court of Chancery. Acknowledgment of Service of Petition and Grounds of Appeal.

We hereby acknowledge service of a copy of the petition and grounds of appeal in the above stated cause, this twenty-third day of November, 1928.

MEYERS & LESSER,
SAMUEL B. LESSER,
Solicitors of defendant-respondent,
Home Aide Investments, Inc.

New Jersey Court of Errors and Appeals

Between CAPITAL BUILDING AND LOAN ASSOCIATION OF NEWARK, a Corp., of N. J., Complainant-Appellant, and JOHN PESCE, *et. als.*, Defendants-Respondent.	On Appeal from the Court of Chancery.

BRIEF OF APPELLANTS.

On March 9, 1928, the appellant was the holder of two bonds and mortgages, made by the Columbia Realty Co., a corporation, to it, both bearing the same date, each to secure the payment of the sum of $9500.00. The mortgages covered adjoining premises in the Town of West Orange, Essex County, New Jersey.

On March 9, 1928, the appellant commenced foreclosure proceedings on one of its said bonds and mortgages, the docket number and page of which in the Court below is 67-444. A *fieri facias* for the sale of the mortgaged premises was entered May 16, 1926, under which the Sheriff of Essex County, on July 24, 1928, sold the mortgaged premises to the Prudential Investment Co., a corporation. The said sale was duly confirmed and a deed was made by the Sheriff to the purchaser.

The appellant commenced foreclosure of its other bond and mortgage on March 12, 1928, the docket and page number of which, in the court below was 67-478. A writ of *fieri facias* for the sale of

the mortgaged premises was entered May 16, 1928, under which the Sheriff of the County of Essex, on July 24, 1928, sold the mortgaged premises to the Prudential Investment Co., a corporation. The sale was duly confirmed, and a deed delivered to the purchaser by the Sheriff.

The defendants in the two suits were the same, except that there was an additional mortgagee in the second suit above mentioned, which was a mortgage prior to the respondent's mortgage.

On or about Sept. 28, 1928, notice of motion was served that on Oct. 2, 1928, the Home Aid Investments Inc., the second mortgagee in the first suit and the third mortgagee in the second suit, would apply to the Chancellor to direct the payment "of but one bill of costs in the above captioned suits." On October 2, 1928, the Chancellor made an order that "one bill of costs in the above captioned suits be paid, and that the bill of costs so paid, shall be in the amount allowed in the proceedings in docket 67, page 444, together with an additional cost of execution allowed in Chancery, in the cause docket 67, page 479, (should be 478), together with costs of this order.

This appeal is from that order.

The objections in the petition of appeal will be briefed under three points, viz.:

1. The Chancellor cannot consolidate foreclosure suits where the mortgages cover different properties.

2. Defendants are guilty of laches.

3. The order is void because it does not consolidate the actions, and it is indefinite.

POINT I.

The Chancellor cannot consolidate foreclosure suits where the mortgages cover different properties.

"If mortgages do not cover precisely the same land, a consolidation for actions for foreclosure is not proper."

> Jones on Mortgages, Vol. 2 (6th Ed.), sec. 1459.

* * * But this (consolidation) cannot be done where the liens affect different properties, or when one mortgage includes land not covered by the other."

> 42 C. J. 132, Section 1716.
> Kipp vs. Delamater, 58 Howard Practice Reports, 183 (N. Y. Sup. Ct.)
> Bech vs. Ruggles, 6 Abbot's New Cases, 69 (N. Y. Sup. Ct.)
> Wooster vs. Case, 12 N. Y. S. 769, (N. Y. Sup. Ct.)

The reasons given for this rule are stated in Kipp v. Delamater, supra, as follows: 1. The authorities are against it: 2. The proceedings are in rem against different pieces of property: 3. Rights of individual defendants differ, and one defendant should not bear that which belongs to another. The motion was to consolidate three foreclosure actions. The first mortgage covered lands, 50 acres affected by the other two mortgages. The second mortgage covered 150 acres embracing the land affected by the first mortgage. The third

mortgage covered 100 acres, being part of the land affected by the other two mortgages, and excluding a portion sold. The motion was denied.

In Beck v. Ruggles, *supra,* a motion was made by the defendant to consolidate six actions to foreclose six mortgages, and covering separate adjoining lots in the City of New York. The parties in each action were the same. The motion was denied.

In Wooster v. Case, *supra,* the two mortgages did not cover precisely the same piece of land and the order of the court below consolidating the two actions was reversed.

The order appealed from is based on two cases decided by the Chancellor, viz: Mutual Securities Corp. vs. Gilbert T. Harris Corp., 100 N. J. E. 365, and United Hebrew Charities v. Levy, 137 At. 817, (not yet officially reported.) He held that two foreclosure suits of two different mortgages on different properties could be consolidated by a court of equity, even though the parties were different and there were various encumbrances on the different parcels. I differ with his holding, so far as concerns mortgages on different parcels of land.

The cases cited by the court below expressly hold that where complainant owns two or more mortgages on the same tract of land, they may or must be foreclosed in one suit. This is undoubtedly good law. The court does not, however, cite any authority for the proposition that where complainant holds two different mortgages on two different properties, that he can be compelled to foreclose them in one suit, except the case of Demarest vs. Berry, 16 N. J. E. 481. I do not think that case so holds. In that case, A held a mortgage on tracts B and C, and a separate mortgage on tract B. A bill was filed to foreclose the second mortgage and when it was subsequently discovered that

the first mortgage covered only one parcel, another suit was commenced to foreclose the mortgage covering both tracts. The court held that proceedings in the first suit should be stayed, and the second suit alone proceed to decree. It does not hold that if A has commenced foreclosure on one mortgage on tract B, and on another mortgage on tract C, that the two actions must be consolidated.

Enabling acts allowing consolidation give the party bringing the suit the privilege to consolidate and do not as a rule compel him to do so. Courts have the inherent power to consolidate acts but this power should only be exercised to prevent scandalous abuse and to protect defendants against gross oppression. The Chancellor points out in the case of Burnham v. Dalling, 16 N. J. E. 310, cited by the court below, the reluctance and even refusal of the English Equity courts to consolidate actions. He says on page 312, "the same reason exists for consolidation of suits in equity as at law, though from the nature of the proceeding, more caution may be required in the exercise of the power by this court." It will be noted that in the case last cited a written consent to the order of consolidation was filed in the cause. In the case of Conover vs. Conover, 1 N. J. E., 403, at page 412, cited by the court below, the Chancellor recommended consolidation; he did not order it. There is no abuse or hardship on defendants by separate actions on separate mortgages on different properties.

In the case of United Hebrew Charities v. Levy, *supra,* the court below, in the last paragraph, refers to the complications that might ensue if a man took one mortgage on three different tracts of land. That is true, but the man taking the mortgage should have realized that such a condition might arise. If this man, however, had taken the precaution to take three separate mortgages on

three separate tracts, why should he be made to suffer the difficulties of the man who took only one mortgage, by consolidation.

The inconvenience and dangers of consolidating foreclosures of separate mortgages on separate tracts is illustrated very strongly by the facts in the case of Wooster v. Case, *supra.* In that case the mortgage of 1874 so called seemed to cover a strip of land five feet on the east side of the lot, not covered by the mortgage of 1875 so called; and the mortgage of 1875 seemed to cover a strip of five feet wide on the West side of the lot not covered by the mortgage of 1874. I assume that both covered the center of the lot. In case consolidation were compelled, a decree could be drawn selling the lot in three parcels and the order of sale determined; but the mortgagee would have great difficulty in determining how much to bid on each parcel. I question whether that burden could or should be imposed upon him. Whereas on a sale separately, he would only have to bid the amount due on his mortgage with interest and costs. It would be difficult, if not impossible, to apportion the taxed costs among the three parcels. If the costs were not apportioned, one lot would bear the burden of the others. The mortgagor has rights which should be respected as well as the mortgagee.

The right of a mortgagee to foreclose a mortgage held by him in a court of equity is an absolute right. South Jersey Title & Finance Co. v. Ireland, 138 At. 898, (not yet officially reported). While this case and those therein cited do not hold that a mortgagee holding two different mortgages on two different tracts has the absolute right to bring separate foreclosuring proceeding, that is my contention. One holding ten promissory notes may bring ten separate law suits. Consolidation is per-

missible but not compulsory. We claim this is equally true on foreclosure of different mortgages on different properties. A foreclosure suit is an action in rem. Brown v. John P. Smythe & Co., 98 N. J. E. 206.

POINT II.

The defendants are guilty of laches.

The Chancellor said in the case of Mutual Securities Corp. v. Gilbert T. Harris Corp., *supra,* (last paragraph), that two bills had been filed and each cause had progressed to final decree. "These decrees having been made and filed, they will not now be disturbed, but the suits will be consolidated at this point, and one execution shall issue for the sale of the mortgaged premises," etc. That the defendant would be saved the cost of double advertising. If defendant had come in earlier and moved for consolidation, he would have obtained it very much as a matter of course, and thus have saved costs which the complainant had incurred in the prosecution of the two suits. He then says that the ruling is not to be regarded as a precedent for all cases.

In our case the order was made after the executions had been satisfied, the deeds given for the properties, and new mortgages placed on them.

(OVER)

POINT III.

The order is void, because it does not consolidate the actions, and it is indefinite.

I have treated the order as one of consolidation, but it really does not consolidate the actions. The order reads that "one bill of costs in the above captioned suits be paid", and directing how the amount of costs should be made up. Two taxed bill of costs had already been taxed, raised by the Sheriff, and paid.

The order does not state that the complainant shall refund any money that it had received as taxed costs, nor to whom the difference should be paid. The respondent, the second mortgagee on one tract, and the third on another, naturally assumed the money should be paid to it. Why should it belong to him rather than the second mortgagee on the other tract or the mortgagor? It would seem as though a bill of interpleader would have to be filed to ascertain the amount to be paid and to whom it should be paid. Certainly no contempt proceedings could be founded on such an order.

I submit that the order should be reversed for the reasons stated.

Respectfully submitted,

MICHAEL J. QUIGLEY,
Solicitor for Complainant-Appellant.