

The defendant cites no authority that any such mere delay, if it be deemed negligent, constitutes such laches as will disqualify a court of equity to give relief. On the other hand, a reference to the cases on the subject of laches, which we have heretofore cited, will show that laches cannot be found to exist in this case without fully overruling them. No such short period as five months is even discussed in them as possibly constituting laches. They lay down the rule that there can be no laches unless with the delay there exists some evidence of prejudice to the defendant. Of course, there is no such evidence in the case at bar. All anyone can say that has happened is that the ultimate conclusion of this litigation has been postponed for about four months. If the defendant should prevail, this delay would be fully compensated for by legal interest.

After all, the defense of laches is an equitable defense and should never be sustained to permit the working of an inequity. No one reading the affidavits and exhibits in this case can doubt that a most outrageous fraud has been committed upon the complainants. To permit the defendant to get away with that fraud by denying the relief prayed for, or dismissing the bill of complaint on any of the grounds heretofore discussed, would be highly inequitable.

It is, therefore, respectfully submitted that the order appealed from should be in all things affirmed.

HENRY G. PELCH,
G. W. C. McCARTER,
Of Counsel with the Complainants

May Term, 1923.

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Order to Show Cause and Restraining Order.

ORDER TO SHOW CAUSE AND RESTRAINING ORDER.

Filed January 12, 1927.

In Chancery of New Jersey

Between

PERTH AMBOY GAS LIGHT COMPANY, a corporation,
Complainant,

and

ALEXANDER KILEK, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased, and EDWARD T. HANSON, one of the coroners of Middlesex County,
Defendants.

On Bill, &c.

Order to Show Cause and Restraining Order.

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This matter being opened to the Court by Collins & Corbin, solicitors for and of counsel with complainant, and the Court having read the bill of complaint in the above-entitled cause and the affidavits thereto annexed; 30

It is on this 12th day of January, A. D. one thousand nine hundred and twenty-seven, ORDERED that the defendants, Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased, and Edward T. Hanson, one of the coroners of Middlesex County, show cause before the Chancellor at the Chancery Chambers, in the City of Jersey City, at No. 1 Exchange Place, the 24th day of 40

Order to Show Cause and Restraining Order.

January, 1927, at the hour of ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why the said defendant, Alexander Kilek, individually and as administrator as aforesaid, should not be restrained and enjoined according to the prayer of said bill.

10 And it is FURTHER ORDERED that the said defendant, Alexander Kilek, individually and as administrator *ad prosequendum* as aforesaid, his attorneys, agents, servants and confederates, in the meantime and until the further order of this Court in the premises, desist and refrain from prosecuting or proceeding with the action at law begun by said defendant in the New Jersey Supreme Court, Middlesex County, against complainant.

20 And it is FURTHER ORDERED that a copy of the bill of complaint and affidavits and of this order (all of which may be certified by the solicitors of complainant) be served on said defendants within five days from the date hereof either personally or by leaving the same at their residences in the State of New Jersey, or in the case of said defendant Alexander Kilek, by serving the same upon Thomas Brown, his attorney in said action at law.

30 E. R. WALKER,
C.

Respectfully advised,

JAMES F. FIELDER,
V.-C.

We certify the foregoing to be a true copy of the original.

40 COLLINS & CORBIN,
Solicitors of Complainant.

Bill of Complaint and Supporting Affidavits.

BILL OF COMPLAINT AND SUPPORTING AFFIDAVITS.

Filed January 12, 1927.

IN CHANCERY OF NEW JERSEY.

To His Honor Edwin Robert Walker, 10
Chancellor of the State of New Jersey:

Perth Amboy Gas Light Company, complainant, a corporation of the State of New Jersey, having its principal office at Perth Amboy, in the County of Middlesex and the State of New Jerseys, respectfully shows:

1. On August 16, 1926, Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of his wife, Eva Kilek, deceased, began an action at law in the New Jersey Supreme Court against complainant to recover damages for the death of his said wife, alleging that complainant had negligently permitted and suffered illuminating gas to escape from its main in and around No. 1 Salem avenue, in the Borough of Carteret, County of Middlesex and State of New Jersey, where said Eva Kilek resided at the time of her death, and that as a result of such negligence said decedent, Eva Kilek, was poisoned and suffocated to death on February 15, 1926, in the Borough of Carteret aforesaid. 20 30

2. Complainant's investigation of the death of said Eva Kilek disclosed that there are no gas pipes or facilities for furnishing gas in said premises, #1 Salem avenue aforesaid, and an inspection of said premises on February 14, 1926, by one of complainant's workmen at eleven A. M. on that day disclosed that there was no gas leak in the cellar or other part of said build- 40

Bill of Complaint and Supporting Affidavits.

ing. Complainant's workmen also inspected the gas main in Salem avenue and found no evidence of any leak. The investigation also disclosed that the premises which are known as Nos. 1 and 3 Salem avenue, contain a cellar in which was a toilet used by the occupants and that the toilet and plumbing in the cellar were not properly trapped nor was there any ventilation into the outer air.

3. Said Eva Kilek died on February 15, 1926, or more than twelve hours after inspection of said premises by complainant's workmen. The certificate of death is signed by J. S. Hay, Coroner of Perth Amboy, N. J., and gives as the cause of death, "Suffocated by illuminating gas. Accident."

4. Complainant is informed by Dr. Otto Schultze, medical assistant to the District Attorney of New York County, who has performed thousands of autopsies, that the cause of death may be determined by an autopsy on the body of said Eva Kilek.

5. Complainant is informed by neighbors of said Eva Kilek that she was suffering from diarrhoea or dysentery on February 14th and 15th, 1926, and made frequent visits to the toilet in the cellar on February 14th. These neighbors have refused to make any affidavits for complainant.

6. No autopsy was performed on the body of said Eva Kilek at the time of her death and evidence as to the cause of her death can only be had by an exhumation and autopsy on her body, and complainant cannot fairly defend said action at law begun against it unless discovery

Bill of Complaint and Supporting Affidavits.

is made of the cause of death by exhumation and autopsy as aforesaid.

7. On December 31, 1926, Collins & Corbin, attorneys for complainant in said action at law, requested Thomas Brown, attorney for the plaintiff in said action, to permit an autopsy. On January 3, 1927, said Thomas Brown wrote the attorneys for complainant that said Alexander Kilek saw no need for an autopsy and did not care to have the body of his wife disturbed. A true copy of said letter is annexed hereto and made part hereof and marked Schedule "A."

8. On January 6, 1927, complainant made demand on Edward T. Hanson, one of the present coroners of the County of Middlesex, for an inquest and post mortem examination of the body of said Eva Kilek. A true copy of said demand together with the refusal of said coroner to accede to the same is annexed hereto and made part hereof and marked Schedule "B."

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased, and Edward T. Hanson, one of the coroners of the County of Middlesex, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That said Alexander Kilek, individually and as administrator as aforesaid, may be ordered to permit the exhumation of the body of said Eva Kilek and the performance of an autopsy thereon at the expense of the complainant; such autopsy to be performed by a physician or

Bill of Complaint and Supporting Affidavits.

pathologist selected by complainant in the presence of any physician or pathologist selected by said defendant, Alexander Kilek; and that said defendant Edward T. Hanson, coroner as aforesaid, be ordered to permit the exhumation and autopsy on said body as aforesaid.

10 3. That a writ of injunction or injunctive order may issue restraining the said defendant Alexander Kilek, his attorneys, agents and servants from prosecuting said action at law in the New Jersey Supreme Court against complainant until the performance of said autopsy.

4. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

20 COLLINS & CORBIN,
Solicitors for and of Counsel
with Complainant.

SCHEDULE "A"

THOMAS BROWN
Attorney and Counsellor at Law.
30 174 Smith St. Perth Amboy, N. J.

January 3rd, 1927.

Collins & Corbin, Esqs.,
1 Exchange Place,
Jersey City, N. J.

Re: Kilek v. P. A. Gas Light Co.

Dear Sirs:

40 Mr. Kilek sees no need for an autopsy and therefore does not care to have the body of his

Bill of Complaint and Supporting Affidavits.

wife disturbed. This will answer your letter of December 31st, 1926.

Truly yours,
THOMAS BROWN.

TB FF

10

SCHEDULE "B"

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

ALEXANDER KILEK, administrator *ad prosequendum* of the estate of Eva Kilek, deceased, and ALEXANDER KILEK, individually,

Plaintiff,

v.

PERTH AMBOY GAS LIGHT COMPANY, a corporation,

Defendant.

Action
at Law.

Demand.

20

To Edward T. Hanson, Coroner,
Middlesex County, N. J.

30

SIR:

WHEREAS, one Eva Kilek, did on or about February 15, 1926, depart this life and was at that time residing at No. 1 or 3 Salem street, Carterest, County of Middlesex, New Jersey, and has been since February 17, 1926, interred in Holy Virgin Cemetery, and it appearing that the demise of said Eva Kilek is alleged to have been caused by the negligence of the Perth Amboy

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Bill of Complaint and Supporting Affidavits.

Gas Light Company, in that said company did negligently maintain its gas service pipes in and about the vicinity of No. 1 or 3 Salem street, Carteret, Middlesex County, New Jersey, aforesaid, and

10 WHEREAS, an action at law was brought by Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased, in the New Jersey Supreme Court, Middlesex County, for damages for the alleged negligence of said Perth Amboy Gas Light Company, which said alleged negligence is supposed to have brought about the death of said Eva Kilek, and

WHEREAS, said action at law is now pending and still undetermined, and

20 WHEREAS, the said Perth Amboy Gas Light Company denies that said Eva Kilek died of illuminating gas or died through the alleged negligence of said Perth Amboy Gas Light Company.

30 THEREFORE, Perth Amboy Gas Light Company, in accordance with statutes in such cases made and provided, and more particularly in accordance with Section 15, Comp. Stat. 1910, p. 1588, demands that you, Edward T. Hanson, Coroner of Middlesex County, forthwith order an inquest, post mortem examination of the body of said Eva Kilek, or an autopsy of said body, to determine the efficient cause of the demise of Eva Kilek, aforesaid.

Dated January 6, 1927.

Perth Amboy Gas Light Company,
by its attorneys,
COLLINS & CORBIN.

Bill of Complaint and Supporting Affidavits.

Refuse to accede to the above demand to exhume the body of said Eva Kilek for purpose of an inquest or an autopsy without the authority of a court order.

EDW. T. HANSON,
Coroner, County of Middlesex.

SCHEDULE "C"

STATE OF NEW JERSEY.

State Department of Health
Bureau of Vital Statistics

- 1. Place of Death
 - County Middlesex State New Jersey 20
 - Registered No. 2096 Township.....
 - or BoroughCity Carteret
 - No.St., Ward.
 - If death occurred in a hospital or institution, give its NAME instead of street and number.)
- 2. Full Name Eva Kilik
- 3. Residence, No. 1 Salem St. Ward.....
 - (Usual place of abode.) (If non-resident 30
 - give City, town and State.)
 - Length of residence in city or town where death occurred. yrs. mos. days. How long in U. S. if of foreign birth? yrs. mos. days.
 - Personal and Statistical Particulars
- 4. Sex Female
- 5. Color or race White
- 6. Single, Married, Widowed or Divorced
 - (write the word) Married. 40

Bill of Complaint and Supporting Affidavits.

- 7. If married, widowed or divorced
Husband of
(or) Wife of Ilia Kilik
(give full maiden name)
 - 8. Date of Birth.....
(month, day and year)
 - 10 9. Age Years Months Days
About 35
If LESS than 1 day.....hrs. or.....min.
 - 10. Occupation of Deceased.
(a) Trade, profession or particular kind
of work. Housewife.
(b) General nature of industry, business
or establishment in which employed (or
employer
 - (c) Name of employer.....
 - 20 11. Birthplace. (city or town)
(State or country) Poland.
- Parents—
- 12. Name of father Hrehory Yakubowicz
 - 13. Birthplace of Father
(city or town)
(State or country) Poland.
 - 14. Maiden Name of Mother Irene Kilik
 - 30 13 (a) Birthplace of Mother
(city or town)
(State or country) Poland
 - 15. Signature of Informant Ilia Kilik
(address) Carteret.
 - 16. Received Feb. 16, 1926 E. S. Wilgus
Local Register.
Medical Certificate of Death
 - 17. Date of Death.
(Month, day and year) Feb. 15, 1926.

Bill of Complaint and Supporting Affidavits.

- 18. I Hereby Certify That I viewed deceased
from.....19 , to, 19
that I last saw h alive on Feb. 15, 1926
and that death occurred on date stated
above, at....m.
The Cause of Death was as follows:
Suffocated by illuminating gas. Accident. 10
....(Duration) ...yrs. ...mos. ...ds. ...
Contributory
(secondary)
....(Duration) ...yrs. ...mos. ...ds. ...
- 19. Where was disease contracted, if not at
place of death?
Did an operation precede death.....
Date of
Was there an autopsy?.....
What test confirmed diagnosis?..... 20
(Signed) J. S. Hay, Coroner M. D.
(Address) Perth Amboy, N. J.
- 20. Place of Burial Cremation or Removal
Holy Virgin Cemetery
Date of Burial Feb. 17, 1926
- 21. Undertaker Michael Zylka
Address Perth Amboy, N. J.
New Jersey License Number 210

Bill of Complaint and Supporting Affidavits.

IN CHANCERY OF NEW JERSEY.

Between

10 PERTH AMBOY GAS LIGHT COM-
PANY, a corporation,
Complainant,

and

20 ALEXANDER KILEK, individu-
ally and as administrator
ad pros. of Eva Kilek, de-
ceased, and EDWARD T.
HANSON, one of the coro-
ners of Middlesex County,
Defendants.

On Bill, &c.
Affidavit.

STATE OF NEW JERSEY, } ss.
COUNTY OF HUDSON. }

EDWARD A. MARKLEY, of full age, being duly sworn according to law, on his oath deposes and says:

30 1. I am a member of the firm of Collins & Corbin, solicitors of complainant in the above-entitled cause. The facts, matters and things in said bill of complaint stated are true to the best of my knowledge, information and belief.

2. Particularly is it true that on August 16, 1926, said defendant Alexander Kilek began an action in the New Jersey Supreme Court against complainant to recover damages for the death of his wife as in said bill of complaint stated. Defendant has filed an answer in said action

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Bill of Complaint and Supporting Affidavits.

denying that the death of said defendant's in-
testate was caused by gas poisoning as alleged
in the complaint, and denying that complainant
was guilty of negligence as charged in the com-
plaint in said action at law.

3. Complainant caused an investigation to be
made of the premises No. 1 Salem avenue, in
Carteret, New Jersey, on February 14, 1926. 10
No evidence of any leaks of illuminating gas in
the premises or in the vicinity were observable
at that time and an investigator of complainant
was informed by neighbors in the vicinity that
said Eva Kilek was suffering from diarrhoea or
dysentery on February 14, 1926. She died on
February 15, 1926, as appears by certificate of
death, a true copy of which annexed hereto,
made part hereof and marked Schedule "C." 20

4. On December 31, 1926, I wrote to Thomas
Brown, attorney of the plaintiff in said action
at law, and on January 3, 1927, received from
him the letter, copy of which is annexed hereto,
made part hereof and marked Schedule "A."

EDWARD A. MARKLEY.

Sworn to and subscribed at Jersey
City, N. J., this 8th day of Janu- 30
ary, 1927, before me,

FRANK A. BOEHLER,
Attorney at Law of N. J.

40

Bill of Complaint and Supporting Affidavits.

IN CHANCERY OF NEW JERSEY.

Between

10 PERTH AMBOY GAS LIGHT COM-
 PANY, a corporation,
 Complainant,

 and

 ALEXANDER KILEK, individu-
 ally and as administrator
 ad pros. of Eva Kilek, de-
 ceased, and EDWARD T.
 HANSON, one of the coro-
 ners of Middlesex County,
 Defendants.

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On Bill, &c.
Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.

HOWARD F. McINTYRE, of full age, being duly sworn according to law, on his oath says:

30 I am an attorney at law of the State of New Jersey, employed by Collins & Corbin, solicitors of the complainant herein. I served the demand annexed to the bill of complaint herein and marked Schedule "B" on Edward T. Hanson, one of the coroners of Middlesex County, New Jersey, and thereupon said coroner dictated to me the refusal of the demand endorsed thereon, which I then wrote and he thereafter signed.

40 I have communicated with Dr. Otto Schultze, medical assistant to the District Attorney of New York County, who is recognized as a man of wide experience in autopsies, and who has performed thousands of them, and he informed

Bill of Complaint and Supporting Affidavits.

me that an exhumation and autopsy of said body will definitely determine the cause of death and whether or not it was from illuminating gas poisoning.

HOWARD F. McINTYRE.

Sworn to and subscribed at Jersey City, N. J., this 8th day of January, 1927, before me, 10

FRANK A. BOEHLER,
Attorney at Law of N. J.

We certify the foregoing to be a true copy of the original.

COLLINS & CORBIN,
Solicitors of Complainant. 20

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Answering Affidavits.

ANSWERING AFFIDAVITS.

Filed January 25, 1927.

IN CHANCERY OF NEW JERSEY.

10 *Between*

PERTH AMBOY GAS LIGHT COMPANY, a corporation,
Complainant,

and

20 ALEXANDER KILEK, individually and as administrator *ad pros.* of Eva Kilek, deceased, and EDWARD T. HANSON, one of the corners of Middlesex County,
Defendants.

On Bill, &c.
Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX. } *ss.*

JOSEPH WANTACH, M. D., of full age, being duly sworn on his oath, deposes and says:

30 I am a practicing physician in the Borough of Carteret and have practiced medicine for 22 years. I attended Eva Kilek at #1 Salem avenue, on February 14, 1926, and found her suffering from illuminating gas poisoning after applying the usual and orthodox tests to aid me in my diagnosis. I was recalled on February 15, 1926, and found Eva Kilek dead. My examination, according to the accepted medical theories, disclosed the woman had been overcome by illuminating gas.

40 I have treated several cases of illuminating

Answering Affidavits.

gas poisoning during my career. I have a knowledge of autopsies and have attended at least 50 autopsies. My experience convinces me that after practically a year's interment the exhumation of Eva Kilek's body and an autopsy performed thereon would elicit no further information concerning the death of the said Eva Kilek, and further that an autopsy at this time would be entirely valueless, and I am entirely satisfied that my diagnosis was the correct one and have no reason for believing the contrary.

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JOSEPH WANTACH, M. D.

Sworn and subscribed before me
this 22nd day of January, 1927.

JOHN C. STOCKEL,
Notary Public of New Jersey.

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IN CHANCERY OF NEW JERSEY.

Between

PERTH AMBOY GAS LIGHT COMPANY, a corporation,
Complainant,

and

ALEXANDER KILEK, individually and as admin. *ad pros.* of Eva Kilek, dec'd, *et als.*,
Defendants.

On Bill, etc. 30

Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX. } *ss.*

MICHAEL ZYLKA, of full age, being duly sworn, on his oath deposes and says he is a licensed

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Answering Affidavits.

undertaker and embalmer and has been such for twenty-two years. I was summoned on February 15th, 1926, to care for the body of Eva Kilek, who I was informed had died of illuminating gas poisoning. I performed the usual functions of an undertaker and embalmer and embalmed the woman according to the accepted methods of embalming, which necessitated the injection of approximately one gallon of embalming fluid and the withdrawal of all blood from the body; there was no evidence that I could see of this woman having been subject to any disease but the corpse had the appearance of being that of a normal and quite healthy woman. In my normal practice I have embalmed an average of about one hundred and fifty bodies a year.

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MICHAEL ZYLKA.

Sworn and subscribed to before me
this 22nd day of January, 1927.

ANDREW D. DESMOND,
Notary Public of N. J.

A true copy.

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THOMAS BARBER,
Clerk.

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Conclusions of Vice-Chancellor.

CONCLUSIONS OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

Between

PERTH AMBOY GAS LIGHT COM-
PANY,

Complainant,

and

ALEXANDER KILEK, individu-
ally and as administrator
ad prosequendum of Eva
Kilek, deceased, *et al.*,
Defendants.

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On Bill, &c.

*On Order to
Show Cause.*

Conclusions.

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Transcript of shorthand notes of testimony taken on final hearing in above-stated cause, January 24, 1927, at Chancery Chambers, Jersey City, before His Honor James F. Fielder, Vice-Chancellor.

Messrs. Collins & Corbin (Mr. Newton) for complainant.

Hon. Thomas Brown for defendants.

The Court (orally at close of argument).

30

The question presented is entirely new to me. So far as I know, it has not been before the courts of this State and counsel on both sides say they have been unable to find in the books any decision directly in point. In reaching a conclusion I must be guided by analogy to the practice in other cases and by what I consider to be the equity in this case.

In suits at law and in equity, provision is made whereby a party to a suit may be required

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Conclusions of Vice-Chancellor.

to produce or disclose to the opposing party before trial, evidence in his possession or under his control, when such evidence is necessary to the opposing party in the presentation of his side of the case. Under the practice in suits to recover damages for personal injuries, the plaintiff may be required to submit to a physical examination on the defendant's application and in this Court in a suit to annul a marriage on allegations of the defendant's impotence, an inspection of the defendant's person may be ordered. In homicide cases, it is my recollection of the law that a Supreme Court Justice may permit or order the exhumation of the body of the person killed, for the purpose of an autopsy which will disclose or aid in determining the cause of death. If an inspection of inanimate objects and the person of a party to a suit and of the deceased in a homicide case can be ordered and if disclosure of the contents of books, documents and other evidence in the possession or under the control of a party to a suit can be required, it seems to me that in the lawsuit here involved, where it is alleged that evidence material to and, in fact, vital to the issue can be discovered by an autopsy on, or the examination of the body of the person whose death the defendant therein is charged to have caused, it is only fair and equitable that the defendant in that suit should be given the opportunity to make such examination. The suit at law is brought by the husband individually and as administrator *ad prosequendum*, for damages consequent on the death of his wife and the exhumation of her body and an autopsy thereon, is to a large extent under his control. He refuses to consent thereto.

Conclusions of Vice-Chancellor.

Counsel for the husband has presented affidavits tending to show that it is now impossible to discover by an examination of the body, whether or not death was caused by asphyxiation from illuminating gas and he argues that an autopsy should not be ordered because it will prove of no value. Any application for discovery, examination or inspection before trial might be resisted on the plea that the party applying will find nothing if the order be made, but such a plea ought not to prevail if it appears that there is a probability that the evidence sought is in the possession or under the control of a party to a suit. The defendant in this suit at law says that it is advised by medical authority that if illuminating gas was the cause of death, evidence thereof can still be discovered by an examination of the body. Whether the plaintiff or defendant is correct on this point, it seems to me that an examination could disclose whether or not death resulted from some other cause. After all, if physicians making an examination of the body, appear and testify in the suit at law for either side, it is for the jury to decide as to the weight and value of their evidence.

This is a hearing upon the return of an order to show cause why the plaintiff at law and the coroner of the county should not permit the defendant in the suit to exhume the body and perform an autopsy and why the plaintiff therein should not be restrained from prosecuting his suit pending the autopsy. The general equity jurisdiction of this Court to compel discovery in aid of a suit at law is not questioned, but has this Court the power to say to the plaintiff and to the county authorities now, or at the final

Conclusions of Vice-Chancellor.

10 hearing: "We will order the body exhumed and you must not interfere with the exhumation or with an autopsy?" I doubt it, but I do believe that this Court has power to say to the plaintiff: "Unless you are willing that the defendant shall inspect the evidence which you have under your control, namely, the dead body and unless you will co-operate with the defendant to the extent of your ability, in procuring such inspection, this Court will restrain you from proceeding further with your action at law." I shall, therefore, make an order that unless the plaintiff at law consents to the exhumation of the body and to an autopsy to be performed by a physician to be selected by the defendant, in the presence of a physician to be selected by the plaintiff and also in the presence of the coroner of the county, in case the presence of the latter is desired or deemed necessary by the plaintiff at law, the plaintiff at law be restrained from further prosecuting his suit at law until this Court shall otherwise order. The order should provide that all expense connected with the exhumation and autopsy shall be borne by the defendant at law.

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Order to Refrain.

ORDER TO REFRAIN.

Filed February 1, 1927.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>PERTH AMBOY GAS LIGHT COMPANY, a corporation, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>ALEXANDER KILEK, individually and as administrator <i>ad prosequendum</i> of Eva Kilek, deceased, and EDWARD T. HANSON, one of the coroners of Middlesex County, <i>Defendants.</i></p>	<p style="font-size: 3em;">}</p>	<p><i>On Bill, &c.</i> <i>Order.</i></p>	<p>10</p> <p>20</p>
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This matter being opened to the court by Collins & Corbin, solicitors for and of counsel with the complainant, in the presence of Thomas Brown, solicitor for and of counsel with the defendant Alexander Kilek, individually and as administrator as aforesaid; and the Court having considered the bill of complaint and affidavits filed herein and the answering affidavits on the part of the said defendant Alexander Kilek and having heard and considered the arguments of counsel and being satisfied that the complainant is entitled to the relief hereinafter ordered:

It is on this 1st day of February, A. D. 1927, ORDERED that the said defendant Alexander Kilek, his attorney, agents and servants do desist and refrain from prosecuting an action at

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40

Order to Refrain.

10 law now pending in the New Jersey Supreme Court against the plaintiff, arising out of an action for damages caused by the death of Eva Kilek, the wife of the said Alexander Kilek, unless and until the said Alexander Kilek, individually and as administrator as aforesaid, does consent to the exhumation of the body of said Eva Kilek and the performance of an autopsy thereon at the expense of the complainant (unless this Court shall otherwise order), such autopsy to be performed by a physician or pathologist selected by complainant in the presence of any physician or pathologist selected by said defendant Alexander Kilek and also in the presence of the defendant Edward T. Hanson, one of the coroners of Middlesex County, if his attendance can be procured.

20 It is FURTHER ORDERED that this order shall not become effective and is made upon condition that the complainant pay the costs at law of the term at which the cause aforesaid between the parties herein now pending in the New Jersey Supreme Court was noticed, which costs have accrued up to the time of service of this order.

30 And it is FURTHER ORDERED that this order shall not restrain the defendant from noticing said cause for trial in the New Jersey Supreme Court from term to term until the further order of this Court.

E. R. WALKER,
C.

Respectfully advised,
JAMES F. FIELDER,
V.-C.

A true copy.
THOMAS BARBER,
Clerk.

40

Notice of Appeal.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between

PERTH AMBOY GAS LIGHT COMPANY, a corporation,
Complainant,

and

ALEXANDER KILEK, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased, and EDWARD T. HANSON, one of the coroners of Middlesex County,
Defendants.

10

On Bill, &c.

Notice of Appeal.

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Defendant Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased, hereby appeals from so much of the interlocutory decree made in the above-entitled cause on the 1st day of February 1927, as directs said defendant to desist and refrain from prosecuting an action at law now pending in the New Jersey Supreme Court, against the complainant, arising out of an action for damages caused by the death of Eva Kilek, the wife of the said Alexander Kilek, unless and until the said Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased aforesaid, does consent to exhumation of the body of said Eva Kilek and the performance of an autopsy thereon at the expense of the complainant, such autopsy to be

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Notice of Appeal.

performed by a physician or pathologist selected by complainant, to the Court of Errors and Appeals in the last resort in all causes.

Dated: March 1, 1927.

10 THOMAS BROWN,
Solicitor for and of Counsel with Defendant Alexander Kilek, individually and as administrator *ad pros.* of the estate of Eva Kilek, dec'd.

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

20 THOMAS BROWN,
Sol'r for and of Counsel with Defendant Alexander Kilek, individually and as admr. *ad prosequendum* of the estate of Eva Kilek, dec'd.

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Amended Notice of Appeal.

AMENDED NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>PERTH AMBOY GAS LIGHT COMPANY, a corporation, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>ALEXANDER KILEK, individually and as administrator <i>ad prosequendum</i> of the estate of Eva Kilek, deceased, and EDWARD T. HANSON, one of the coroners of Middlesex County, <i>Defendants.</i></p>	<p><i>On Bill, &c.</i></p> <p><i>Amended Notice of Appeal.</i></p>	<p>10</p> <p>20</p>
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This is an appeal from an interlocutory decree made by the Chancellor on the advice of Vice-Chancellor Fielder:

Defendant Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased, hereby appeals from so much of the interlocutory decree made in the above-entitled cause on the 1st day of February, 1927, as directs said defendant to desist and refrain from prosecuting an action at law now pending in the New Jersey Supreme Court, against the complainant, arising out of an action for damages caused by the death of Eva Kilek, the wife of the said Alexander Kilek, unless and until the said Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased aforesaid, does consent

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Amended Notice of Appeal.

to exhumation of the body of said Eva Kilek and the performance of an autopsy thereon at the expense of the complainant, such autopsy to be performed by a physician or pathologist selected by complainant, to the Court of Errors and Appeals in the last resort in all causes.

10 Dated, March 12, 1927.

THOMAS BROWN,
Solicitor for and of Counsel with De-
fendant Alexander Kilek, individually
and as administrator *ad prosequendum*
of the estate of Eva Kilek, dec'd.

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Petition and Grounds of Appeal.

PETITION OF APPEAL.

New Jersey Court of Errors and Appeals

Between

PERTH AMBOY GAS LIGHT COM-
PANY, a corporation,
Complainant-Appellee,

and

ALEXANDER KILEK, individu-
ally and as administrator
ad prosequendum of the
estate of Eva Kilek, dec'd,
and EDWARD T. HANSON,
one of the coroners of
Middlesex County,
Defendants-Appellants.

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*On Appeal
from Court
of Chancery.*

*Petition of
Appeal.*

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To the Honorable the Court of Errors and Ap-
peals in the last resort in all causes:

The petition of Alexander Kilek, individually
and as administrator *ad prosequendum* of the
estate of Eva Kilek, deceased, the appellant in
the above-entitled cause, respectfully shows that:

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1. Petitioner finds himself aggrieved by an
interlocutory decree made in the Court of Chan-
cery by His Honor Edwin Robert Walker, Chan-
cellor of the State of New Jersey, bearing date
the 1st day of February, 1927, in a certain cause
in said Court of Chancery, wherein the said
Perth Amboy Gas Light Company is complainant
and the said Alexander Kilek, individually and
as administrator *ad prosequendum* of the estate
of Eva Kilek, deceased, is defendant, in this re-

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Petition and Grounds of Appeal.

10 spect, to wit: that the said decree orders and directs the said defendant to desist and refrain from prosecuting an action at law now pending in the New Jersey Supreme Court against the complainant, arising out of an action for damages caused by the death of Eva Kilek, the wife of said Alexander Kilek, unless and until the said Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased aforesaid, does consent to the exhumation of the body of the said Eva Kilek and the performance of an autopsy thereon at the expense of the complainant, such autopsy to be performed by a physician or a pathologist selected by complainant.

20 2. The petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that:

1. The affidavits upon which the complainant relied were inadequate in that:

a. They set forth no facts in support of complainant's bill;

b. They are not made by the parties having knowledge of the facts alleged.

30 2. There were no facts before the Court to support the making of the decree in favor of the complainant.

3. The facts before the Court warranted a decree in favor of the defendants.

4. The complainant was guilty of laches in asking its remedy.

40 5. The relief sought by the complainant and granted by this decree is not necessary nor es-

Petition and Grounds of Appeal.

essential to the complainant's defense of the action at law.

6. The relief sought by the complainant is impossible of attainment because of the long delay and laches of the complainant.

7. The decree is contrary to the decisions of this Court. 10

Petitioner therefore prays that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden and that the petitioner may have such other relief in the premises as to this Court shall seem proper.

THOMAS BROWN,

Sol'r for and of Counsel with Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, dec'd. 20

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Answer to petition of appeal in common form. 40

Acknowledgment of Service.

**ACKNOWLEDGMENT OF SERVICE OF
PETITION OF APPEAL.**

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10 *Between*

PERTH AMBOY GAS LIGHT COM-
PANY, a corporation,
Complainant-Appellee,
and

ALEXANDER KILEK, individu-
ally and as administrator
ad prosequendum of the
estate of Eva Kilek, dec'd,
and EDWARD T. HANSON,
one of the coroners of
Middlesex County,
Defendants-Appellants.

*On Appeal
from Court
of Chancery.*

*Petition of
Appeal.*

*Acknowledg-
ment.*

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Collins & Corbin, attorneys for the complain-
ant-appellee in the above-entitled cause, hereby
acknowledge service of the petition of appeal
in said cause this 12th day of March, 1927.

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COLLINS & CORBIN.

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Notice of Argument.

NOTICE OF ARGUMENT.

COURT OF ERRORS AND APPEALS.

Between

PERTH AMBOY GAS LIGHT COM-
PANY, a corporation,
Complainant-Respondent,

and

ALEXANDER KILEK, individu-
ally and as administrator
ad prosequendum of Eva
Kilek, deceased, and ED-
WARD T. HANSON, one of
the coroners of Middlesex
County,
Defendants-Appellants.

*On Appeal.
Notice of
Argument.*

*Advised by
James F.
Fielder,
Vice-
Chancellor.*

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PLEASE TAKE NOTICE that the argument of the
issue joined in this cause will be moved before
said Court on the third Tuesday of May, A. D.
1927, at the State House, in the City of Trenton,
at 10:30 o'clock in the forenoon or as soon there-
after as the said Court can attend to the same.

Dated, March 18, 1927.

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Respectfully,

THOMAS BROWN,
Solicitor for Defendants-Appellants.

To Collins & Corbin, Esqs., solr's of complain-
ant-respondent, 1 Exchange Place, Jersey City,
N. J.

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New Jersey Court of Errors and Appeals

PERTH AMBOY GAS LIGHT COM-
PANY, a corporation,
Complainant-Respondent,

vs.

ALEXANDER KILEK, individually
and as administrator *ad pros-*
equendum of Eva Kilek, de-
ceased, and EDWARD T. HAN-
SON, one of the coroners of
Middlesex County,
Defendants-Appellants.

*On Appeal
from
Chancery.*

BRIEF.

This is an appeal taken from a certain interlocutory decree made by the Court of Chancery in the above-entitled cause on February 1, 1927, whereby the defendants-appellants were ordered to permit the exhumation of and the performance of an autopsy on the body of Eva Kilek, the deceased wife of the defendant-appellant Alexander Kilek, and further that the said Alexander Kilek refrain from prosecuting his suit at law until such autopsy be made.

Facts.

Eva Kilek was asphyxiated by illuminating gas on or about February 14, 1926. The diagnosis and pronouncement of death were made by a reputable physician. Her body was embalmed and interred in the usual manner and time. The complainant was promptly informed of her death and was further informed that the next of kin held it liable. No action was taken by the company.

A suit at law for the wrongful death was commenced August 16, 1926, as set forth in the affidavit presented by the complainant-respondent (p. 12, State of Case), issue was joined and the cause noticed for trial, but no demand or intimation of the desire for an autopsy was made. A demand was made for particulars of damage, which were furnished, but no autopsy was even suggested. The first expression of a desire for an autopsy was made by letter on December 31, 1927 (p. 13, State of Case) and formal demand was made January 6, 1927 (p. 14, State of Case). This request and demand was not made until it was evident that the trial of the case at law would be reached in the course of a day or two. The body after having been embalmed and having suffered the natural changes incident to eleven months' interment was claimed to be the best evidence. In support of this contention and as a basis for the interlocutory decree appealed from, complainant-respondent produced two affidavits. Each affidavit was made by one employed in the office of the attorneys for complainant-respondent and set forth no facts but merely what was told to the respective affiants by some other person or persons. No explanation is given for the failure to produce affidavits on the part of persons having actual knowledge of the facts. The defendant-appellant denied the allegations and presented answering affidavits made by the physician who treated the deceased woman, diagnosed her case and pronounced her dead, and by the undertaker and embalmer who prepared her body for burial. Their statement of facts secured by personal observation sharply refuted the assertions of the complainant-respondent.

ARGUMENT.

The argument based upon the grounds set forth in the petition of appeal logically divides itself into five points:

1. The affidavits in support of the bill are inadequate and incompetent.
2. The facts before the court warranted a decree against the complainant and in favor of the defendant.
3. The relief sought is neither necessary nor essential to the complainant's defense of the action at law.
4. The complainant was guilty of such laches as to warrant a decree against it.
5. In view of the citations in support of the foregoing points the decree was *contra* to the decisions of the courts of this state.

POINT I.

The Affidavits in Support of the Bill are Inadequate and Incompetent.

It is a well settled principle of equity that a bill for an injunction must be verified by positive proof and where the material facts are not within the knowledge of the complainant they should be verified by the oath of some person who has knowledge of the facts. In the case of *Youngblood v. Schamp*, 15 N. J. Eq. p. 42, on page 43, the Chancellor said:

"It is not necessary that the facts should be proved by the affidavit of the complainant. Where the material facts are not within his knowledge, they should be verified by the oath or affirmation of some person who has a knowledge of the facts."

And again on the same page,

"Where the bill is filed by a corporation, the officer or other person who has the principal personal knowledge of the facts should swear to them."

In the case of *Holdrege v. Gwynne*, 18 N. J. Eq. p. 26, on page 32, the Chancellor again said:

"It is another established principle of this court in the matter of injunctions, that all the facts necessary to sustain the injunction must be verified by positive proof, or the injunction will be dissolved."

In the case of *Citizens Coach Co. v. Camden Horse R. R. Co.*, 29 N. J. Eq. p. 299, on pages 305 and 306, the Court of Errors and Appeals said:

"The answer was that of a corporation, and was under the corporate seal, and, therefore, was of no consequence on the motion referred to, except as it was explanatory of the meaning of the affidavits. Under such circumstances, it was the sworn statements that were to be regarded, and it was upon them that the result of the motion should have been made to depend."

The only affidavits presented by the complainant-respondent are those set forth on pages 12 and 14 of the State of Case. No material fact is set forth in either of these affidavits and what matter might have been relied upon as a basis for seeking the autopsy or injunction is set forth by the vaguest innuendo based upon admitted hearsay. In the affidavit of Edward A. Markley on page 13 of the State of Case, the affiant gives the result of an investigation which he himself did not make and also what was told an investigator by anonymous neighbors regarding the physical condition of Eva Kilek, whose death is the basis of this litigation. The affiant at no time says that he knows the matter set forth to be true nor does he explain the absence of any proof as to the facts set forth. The information regarding the physical condition of the said Eva Kilek, deceased,

"an investigator of complainant was informed by neighbors in the vicinity that

said Eva Kilek was suffering from diarrhea or dysentery on February 14, 1926."

can be called nothing but the merest rumor. It certainly cannot be set forth as evidence of anything. The statement that an investigation was caused to be made of the premises and that no evidence of any leaks of illuminating gas in the premises or in the vicinity were observable, is, on the face of it, hearsay and not proof.

The other affidavit by Howard F. McIntyre (p. 14, State of Case) is patently hearsay and evidence of nothing except that inquiry was made by the affiant regarding the determination of the cause of death. No explanation is given as to how the physician named in the affidavit reached his decision or what facts he had. The correspondence mentioned for some unexplained reason was not attached to the bill nor is it shown why the physician referred to did not himself under oath state the facts of his investigation and the result thereof.

It will be seen that these affidavits constitute the only attempt on the part of the complainant-respondent to justify the issuance of an injunction and this attempt is composed entirely of hearsay statements by persons admittedly not in possession of first-hand information regarding the facts. Affidavits such as those set forth are subject to the same rules of evidence as other testimony and as a consequence the affidavits referred to are valueless and not evidential. The Court of Errors and Appeals in the case of *Camden & Amboy R. R. Co. v. Stewart*, 21 N. J. Eq. p. 484, in considering affidavits attached to a bill for an injunction said on page 493:

"I am not aware that there is any relaxation of the rules of evidence with respect to affidavits annexed to injunction bills."

POINT II.

The Facts Before the Court Warranted a Decree
Against the Complainant and in Favor of
the Defendant.

In view of the incompetency and inadequate character of the affidavits presented by the complainant-respondent and in view of the positive and complete denial and refutation made by the affidavits presented by the defendant-appellant the injunction should have been denied. For preliminary injunctive relief it has always been required in answering that the proof of the complainant's bill be clear and convincing, that the principle of law involved be a settled one and that the material facts be undisputed.

In the case of *Van Hooten v. First Reformed Dutch Church*, 17 N. J. Eq., p. 126, the Chancellor said on page 133:

"I deem it due to the parties interested to add, that if I had arrived at a different conclusion in regard to these questions, and had been satisfied that the complainants had, by their bill, disclosed clear ground of equitable relief, the injunction must nevertheless, have been denied, inasmuch as the material charges of the bill are fully denied by the answer."

In the case of *Citizens Coach Co. v. Camden Horse R. R. Co.*, *supra*, on page 303, the Court of Errors and Appeals accepted as the established rule the following quotation:

"There is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, and which is more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity that never ought to be extended unless in cases of great injury, where the courts of law cannot afford an

adequate or commensurate remedy in damages."

and again on page 304 this court said:

"No rule of equity is better settled than the doctrine that a complainant is not in a position to ask for a preliminary injunction when the right on which he founds his claim is, as a matter of law, unsettled. In the case of *Stevens v. Paterson and Newark R. R. Co.*, 5 C. E., Gr. 126, this principle is expressed in these words, viz: "An injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law, about which there may be a doubt, which has not been settled by the courts of law of this state."

and on page 306:

"These sworn statements, as I have said, denied, as directly and emphatically as it was possible, every material allegation on which, in the bill, the prayer for an injunction rested.

The general rule, subject to but a few exceptions, is, that if the facts constituting the claim of the complainant for the immediate interposition of the court are controverted, under oath, by the defendant, the court will not interfere at the initial stage of the cause."

These principles of law have been accepted in this state down to the present time as being sound and correct.

In the case of *Lulevitch v. Robert*, 98 N. J. Eq., p. 373, on page 374 the Court of Errors and Appeals said:

"This we think, to have been error. The general rules of law governing the ordering of a preliminary injunction are too long and too well settled to require any restatement or elaboration at this time. They are reiterated, and the opinion of Chief Justice Beas-

ley, speaking for this court in *Citizens Coach Co. v. Camden Horse Railway Co.*, 29 N. J. Eq. 299, again approved in a deliverance of this court at the last term. 3 N. J. Adv. R. 475. In our view, the complainants in the case at bar should fail because their right seems to depend upon an unsettled question of law."

and in the case of *Ye Olde Staten Island Dyers & Cleaners v. Barrett & Co.*, 98 N. J. Eq., p. 702, the same court on page 703 said:

"Now, as we look upon the answer and defendant's affidavits, the material facts in the bill upon which the complainant's equity depends, are met by a full, explicit and circumstantial denial under oath. Such being the case, a preliminary injunction should not have been granted."

A reference to the answering affidavits set forth on pages 16 and 17 of the State of Case, will show that they are made by parties having personal knowledge of the facts set forth. The first affidavit (p. 16) is made by Dr. Joseph Wantoek, who says that he has been a practising physician for twenty-two years and treated Eva Kilek the deceased woman; that he applied the usual and orthodox tests in order to diagnose her case and found her to be suffering from illuminating gas poisoning; that he also pronounced her dead from this same cause. He states further that from his experience and knowledge of the case an autopsy would elicit no further information regarding the cause of death and that he is positive that his diagnosis was the correct one.

The affidavit of Michael Zylka (p. 17) shows that he is a licensed undertaker and embalmer and that he prepared the body for burial in accordance with the usual and accepted methods of his profession and in so doing withdrew the blood

from the body and injected a quantity of embalming fluid and that there was no evidence that this woman had been subject to any disease but the corpse had the appearance of being that of a normal and healthy woman.

A comparison of the affidavits on behalf of the complainant-respondent and the defendant-appellant shows that the former are not evidential nor acceptable as proof under the decisions above recited. They do not state that Eva Kilek died of any cause except gas poisoning as claimed by defendant-appellant; they simply attempt by innuendo to show from the statement of unnamed parties made to the affiants that there may have been another cause. The affidavits submitted by the defendant-appellant on the other hand made by the parties of their own personal knowledge state positively that the deceased woman, Eva Kilek, died of illuminating gas poisoning; that an autopsy would not reveal any other cause of death. In view of these facts it is respectfully submitted that a decree should have been advised against the complainant-respondent and in favor of the defendant-appellant.

POINT III.

The Relief Sought is Neither Necessary nor Essential to the Complainant's Defense of the Action at Law.

The complainant-respondent by its affidavit shows conclusively that it made no effort to secure the best and first-hand testimony regarding the death, instead an appeal was made to the Court of Chancery to invoke its injunctive power to compel the defendant-appellant to submit to the particular type of proof that the complainant-respondent happened to deem necessary. It is

simply stated that an autopsy was not made. It is not attempted to show that an autopsy was necessary. An investigation is alleged which apparently touched upon every phase of the case except the real and first-hand information concerning the woman's death. Complainant-respondent at no time mentions the fact that the woman was treated and examined by a reputable physician and that the same physician pronounced her dead and gave the cause of her death nor does it attack the reputation and competency of the attending physician. Nowhere in its case does it supply proof by persons actually in contact with the decedent which would tend to show any other cause of death than that alleged by the defendant-appellant.

Neither does the complainant-respondent take cognizance of the fact that the woman's body had been embalmed and that in the process of embalming all the blood was removed and embalming fluid injected into the body in place thereof (p. 18, State of Case). The cause of the woman's death was by being overcome by illuminating gas which is a volatile substance and consequently impossible to hold for any length of time and lastly the complainant-respondent fails to point out or stress the great length of time this body has laid interred and subject to natural changes and decomposition. Therefore under the very facts of the complainant's case and by reason of the obvious natural reasons which have been avoided by the complainant-respondent the autopsy demanded is shown to be unnecessary and even inadvisable.

POINT IV.

The Complainant was Guilty of such Laches as to Warrant a Decree Against It.

The complainant-respondent was so tardy in making a demand for an autopsy that it is respectfully submitted their demand should not have been considered by the Court of Chancery. It must be borne in mind at the outset that this is a unique situation. The complainant-respondent demands the exhumation and autopsy of the body of a woman who died February 14, 1926. Although cognizant of the woman's death and that it was held liable therefor, no demand was made until after eleven months. It is hardly necessary to point out that a body consigned to the earth is subject to changes and alterations which are impossible of calculation and since the complainant-respondent knowingly delayed, it is guilty of laches.

In the case of *Stout v. Seabrook's Executors*, 30 N. J. Eq., p. 187, the court held on page 190:

"More than one hundred years ago Lord Camden said: 'A court of equity will always refuse its aid to a stale demand, when the party has slept upon its rights, or acquiesced for a great length of time. Nothing will call forth the activity of a court of equity but conscience, good faith and reasonable diligence.'"

In the case of *Crawford v. Lees*, 84 N. J. Eq., p. 324, on pages 340 and 341, Vice-Chancellor Leaming held:

"Laches may be equitably attributed to delay in the ascertainment of one's rights, when the duty and opportunity of ascertainment exist to the same extent as for delay in the assertion of such rights after their ascertainment."

In the case of *Soper v. Cisco*, 85 N. J. Eq., p. 165, at page 174, Justice Trenchard stating the opinion of the Court of Errors and Appeals said:

“The general rule is well settled that he who, without adequate excuse, delays asserting his rights until the proofs respecting the transaction, out of which he claims his rights arose, are so indeterminate and obscure that it is impossible for the court to see whether what is asserted to be justice to him is not injustice to his adversary, has no right to relief.”

and in the case of *Bridgewater v. Ocean City Ass'n.*, 85 N. J. Eq., p. 379, Aff. 88 N. J. Eq., p. 351, Vice-Chancellor Backes said:

“Equity demands diligence whenever its remedy is sought in cases of this kind, and where the right to enforce building restrictions is of a purely equitable nature, a court of equity will not enforce them by mandatory injunction, unless prompt application is made by the person entitled to enforce the restrictions.”

If diligence is required in the asserting of such rights as restricted covenants and rights in land, it is respectfully submitted that even greater diligence was required under the peculiar circumstances of this case, where the subject matter is subject to deterioration and change and the facts of the case bring it squarely under the rule set forth by the Court of Errors and Appeals in the case of *Massie v. Asbestos Brake Co.*, 95 N. J. Eq. p. 298, where on page 311, the Court said with regard to laches:

“There must be delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances and which has been prejudicial to the defendant.”

POINT V.

In View of the Citations in Support of the Foregoing Points the Decree was contra to the Decisions of the Courts of this State.

The question as to the exhumation and performance of an autopsy on a corpse has not been dealt with fully by the courts of this state. However, there are numerous cases in which the question has been considered and the decisions are sufficiently clear to establish the fact that an autopsy is not considered by our courts in the same light as ordinary evidence and that while the Court of Chancery has the power to order both exhumation and autopsy it exercises that power with the greatest care and circumspection. In dealing with the relative rights of the next of kin and of the public to the possession and care of dead bodies, the decisions in this state are all in accord and are to the effect that while there is no property right in the dead body itself, a duty is imposed upon the surviving spouse or next of kin to bury the dead person and with that duty goes the right to protect it from desecration or needless removal or disturbance, and further that in cases of necessity and for good cause shown, the Court of Chancery may, in its discretion, order the removal or exhumation of a corpse. The Court of Chancery, while it has exercised this power in our state, has dealt with cases only between relatives of the decedent, and in all its decisions seems to view the removal of a corpse already buried with disfavor.

In the case of *Peters v. Peters*, 43 N. J. Eq., p. 140, which was an action by the wife of a decedent to recover the body of her husband after it had been buried by the husband's father, with her consent. The court assumed jurisdic-

tion and refused to permit the removal of the corpse, stating that the wife having once consented to this interment, could not now demand its removal, and the attitude of the court is expressed in the following words:

“And the father, being one so near of kin, having thus committed his son to a last resting place, as was then clearly understood, every consideration demands that he should be protected in the peaceful enjoyment of the right which he now asserts. I think all of the authorities go this far.”

In the case of *Smith v. Shepherd*, 64 N. J. Eq., p. 401, where a widow who had buried her husband's body in a burial plot belonging to his sister, with the consent of all, attempted to remove the body because certain of his children could not also be buried there and the court followed *Peters v. Peters*, *supra*. The court here held that the remains should not be disturbed and that once a body was buried, there was no right to have it taken up and moved.

The case of *Toppin v. Moriarty*, 59 N. J. E. 115.

The question of the property right in a dead body is dealt with rather fully and the court is in accord with the great weight of authority that there is no property right in a dead body. In this case they permitted the removal of the body because the request of the decedent, with the consent of her husband, had been that she be buried with her parents and when the parents changed their burial plot, the court held that the husband could not permit them to go to great expense in providing a new place and then refuse to consent to the removal of the body when he had first acquiesced to the wishes of the decedent.

The case of *de Festetics v. de Festetics*, 79 N. J. E. 488.

The court followed the three cases *supra* in the following language:

“We get little light on the subject from the cases in our own state, which seem to settle three propositions—first, that there is no property right in a dead body; second, that after the body shall have been buried it is in the custody of the law; third, that the removal of a body once buried is subject to the jurisdiction of this court. *Peters v. Peters*, 43 N. J. Eq. (16 Stew.) 140; *Smith v. Shepherd*, 64 N. J. Eq. (19 Dick.) 401; *Toppin v. Moriarty*, 59 N. J. Eq. (14 Dick.) 115.”

In all these cases before mentioned, the question was one as to the relative rights of next of kin to the possession of the body after burial and as to the jurisdiction of the Court over such body, and in the reading of the cases it will be seen that the Court assumes jurisdiction, but is exceedingly careful and apparently loath to disturb the remains which have once been buried. Authorities, generally in other states and in the United States courts, are of the same tenor. In 17 *C. J.*, page 1139, section 17-3, the law is stated as follows:

“3. RIGHTS AS TO DISTURBANCE OR DISINTERMENT—a. IN GENERAL. Except in cases of necessity or for laudable purposes the policy of the law is that the sanctity of the grave should be maintained, and that a body once suitably buried should remain undisturbed.”

and further on page 1140 in dealing with the question of disinterment by order of court, it is stated:

“The right to have a dead body remain unmolested is not an absolute one; it must yield where it conflicts with the public good

or where the demands of justice require such subordination. A court will not, however, order a body to be disinterred **unless there is a strong showing that it is necessary and the interests of justice require it.**"

The case of *Painter v. U. S. Fidelity and Guaranty Company*, 91 A. T. L. 158 (a Maryland case), the question of the right of an insurance company to the inspection of a dead body, when the privilege of said inspection is one of the conditions of the policy, is taken up and the Court of Appeals of Maryland held (p. 160):

"The right is not a property right in the general meaning of property right, but is extended for the purpose of determining who shall have the custody of the body in preparing it for burial. And courts of equity will protect those having this right from unreasonable disturbance. But courts have never hesitated to have a body exhumed where the application under the **particular circumstances appeared reasonable and was for the purpose of eliciting the truth in the promotion of justice.**"

Under a note in Volume 39 American and English Annotated Cases, page 156, on page 157, the authorities are cited as follows:

"Although the reported case appears to be one of first impression in holding that a demand for an autopsy should be made on a reasonable and proper occasion, its reasoning is upheld by those cases which have determined that the **right to make an examination of the body of the insured is not a continuing right, but one which must be exercised within a reasonable time.** *Wehle v. U. S. Mutual Acc. Assoc.*, 153 N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598, affirming 11 Misc. 36, 31 N. Y. S. 865; *Ewing v. Commercial Travelers' Mut. Acc. Assoc.*, 55 App. Div. 241, 66 N. Y. S. 1056, affirmed 170 N. Y. 590, 63 N. E. 1116; *Root v. London Guarantee, etc. Co.*, 92 App. Div. 578, 15 N. Y.

Ann. Cas. 100, 86 N. Y. S. 1055, affirmed 180 N. Y. 527, 72 N. E. 1150. See also *American Employers' Liability Ins. Co. v. Barr*, 68 Fed. 873, 32 U. S. App. 444, 16 C. C. A. 51. For if the right to 'examine the person' of the insured with respect to 'any cause of death' is extended for a reasonable time after death **and so long as the body is unburied or not finally disposed of, the utmost limit of the privilege stipulated for is reached.** *Ewing v. Commercial Travelers' Mut. Acc. Assoc.*, *supra*. Hence under a policy giving the insurer a right to make an examination of the person of the insured with respect to any alleged injury or cause of death, an application for an examination is properly refused when it is made nearly a month after interment and it is shown that the organs of the deceased were removed at an autopsy immediately after death and were not replaced. *Ewing v. Commercial Travelers' Mut. Acc. Assoc.*, *supra*. And a request for permission to exercise this right has been held to have been **unreasonably delayed where it was made three days after death, on the day after the burial, and the insurer knew of the death on the day that it occurred.** *Root v. London Guarantee, etc. Co.*, *supra*."

The Federal cases deal almost entirely with the claims of insurance companies based upon agreements in their policies permitting examination. In the case of *American Employers' Liability Insurance Company v. Barr*, 68 Fed. 873 on page 877, it was held:

"Some three or four weeks after the deceased had been embalmed and buried, an application was made by the defendant company, to the widow of the deceased, for leave to exhume and examine the remains of her deceased husband, and such permission was by her denied. Under these circumstances the Circuit Court instructed the jury, in substance, that the demand for an autopsy

was not made within a reasonable time. We are of the opinion that, if the defendant company intended to rest its defense to this action on the ground that it was denied the right to examine the body of the deceased, it should at least have shown that it sought permission from the plaintiff to make such an examination when it was within his power to comply with the request. There is no evidence in the present record tending to show that the plaintiff refused to allow the body of his deceased uncle to be examined on any occasion, either prior to or subsequent to its interment, or that it was within his power to allow the body of the deceased to be exhumed and examined when such a request was preferred. For this reason, if for no other, we think that the exception to the charge last above mentioned is without merit."

In the case of *Mutual Life Insurance Company, New York, v. Griesa*, 156 Fed. 398, the Court permitted the exhumation of the body for an examination, but it in no way departed from the principles hitherto set down, for the facts in this case were almost conclusive of fraud on the insurance company, and the insurance company applied promptly for an autopsy. The Court held that in the furtherance of justice, it would itself appoint a chemist to determine the cause of the death of the decedent.

Conclusion.

From the foregoing citations of the law, as viewed by various courts, it will be seen that while the court of equity has jurisdiction over the bodies of deceased persons, it exercises that jurisdiction with great care and circumspection, and in fact even where the petitioning parties have some direct claim or agreement, they must show a very good and justifiable reason for the

exhumation of the dead body and they must further show that they have acted within a reasonable time. In the present case, it certainly cannot be claimed by the complainant that it has acted within a reasonable time. Almost a year after the death of the defendant's wife and upon the very eve of the trial of the action at law, they suddenly demand that an autopsy be made and claim they cannot adequately defend any action unless the same is made. They ignore the fact that a licensed physician was in attendance upon the woman. They place their reliance upon an affidavit of counsel that he has heard a rumor that this woman suffered from diarrhoea or dysentery about the time of her death.

^{This} ~~His~~ rumor is unsupported. Counsel simply says in his affidavit that some people told him of this fact. Then, too, the only other affidavit supporting this bill is one again made by counsel to the effect that someone else, who claims to be an authority, told him that an autopsy would definitely determine the cause of death. The fact, before mentioned, that a regular licensed physician was in attendance is ignored. The fact that the complainant knew for almost a year that this woman had died as a result of illuminating gas poisoning and made no request for an autopsy was also disregarded. The fact that a most informal request was made just before trial of the issue at law, and that immediately a restraining order was obtained, is also disregarded by the complainant. No reason is assigned for the unprecedented delay; no proof is given of any question as to the cause of death; no doubt is raised as to the capability of the attending physician who diagnosed the case.

The Court is asked upon the flimsiest of affidavits and representations to grant an order

directing exhumation and autopsy, despite the fact that all the authorities are to the effect that very good cause must be shown and that the complainant must act with good speed.

It is respectfully urged that the decree or order in this case be set aside and the restraint dissolved.

Respectfully submitted,

THOMAS BROWN,
Attorney for and of Counsel with
Defendant-Appellant Alexander Kilek.

New Jersey Court of Errors and Appeals

Between

PERTH AMBOY GAS LIGHT COM-
PANY, a corporation,
Complainant-Respondent,

and

ALEXANDER KILEK, individu-
ally and as administrator
ad prosequendum of Eva
Kilek, deceased, and ED-
WARD T. HANSON, one of
the coroners of Middlesex
County,
Defendants-Appellants.

*On Appeal
from
Chancery.*

BRIEF FOR COMPLAINANT-RESPONDENT.

1.

Statement of the Case.

This appeal is from an interlocutory order of the Chancellor made on advice of Vice-Chancellor Fielder staying an action at law brought by appellant against respondent in the Middlesex Circuit of the Supreme Court to recover damages for the death of Eva Kilek, wife of appellant Alexander Kilek, unless appellant consents to the exhumation of the body of Eva Kilek and the performance of an autopsy thereon for the purpose of discovering the cause of her death, at the expense of respondent.

The complainant in said action at law alleged that the death of said Eva Kilek was caused by the inhalation by her of illuminating gas which respondent negligently allowed to escape from its

main or mains in or near the premises No. 1 Salem avenue, Carteret, New Jersey, in which said Eva Kilek and her husband, Alexander Kilek, resided.

Respondent filed an answer in the lawsuit denying that the death of said Eva Kilek was due to the cause alleged in the complaint.

It became necessary for respondent to ascertain the cause of death of said Eva Kilek and the only method of determining such cause with accuracy was by an autopsy on her body, there having been no such autopsy at the time of her death.

Respondent, thereupon, requested appellants to permit such autopsy and they refused to do so.

A bill was then filed by respondent in the Court of Chancery, supported by affidavits, praying for discovery of the cause of the death of said Eva Kilek by the exhumation of her body and an autopsy thereon and the staying of the action at law pending such discovery. An order to show cause why such stay should not be granted was duly made and after hearing thereon the order now under appeal was made.

Appellants attack this order on the grounds that the affidavits in support of the bill were insufficient; that the relief sought by respondent was not necessary or essential to its defense of the action at law; that the relief sought would not aid respondent in its defense of said action and that the order is contrary to law.

BRIEF OF THE ARGUMENT.

I.

The question on the order to show cause was not whether the exhumation of and an autopsy upon the body of Eva Kilek would show that her death was caused by the inhalation of illuminating gas, but whether the action at law should be stayed pending determination by the Chancellor of respondent's right to a discovery in that respect after final hearing.

In the matter of preliminary stay, therefore, it was necessary for respondent to satisfy the Chancellor by affidavits only that the discovery prayed by the bill is pertinent to a defense of the action at law and that respondent might be prejudiced in its defense of that action if appellant Kilek was allowed to proceed thereon pending final hearing on the bill.

The Chancellor could stay the action at law until final hearing on the bill, if the affidavits produced by respondent showed that the discovery sought by the bill is pertinent to respondent's defense of the action at law and that respondent may be prejudiced if appellant was permitted to proceed in such action pending final hearing.

One of the affidavits produced by respondent showed that in his action at law, appellant Kilek averred that the death of Eva Kilek was caused by her inhalation of illuminating gas, and that respondent denied such averment. The pertinency of discovery of the cause of her death to respondent's defense of the action is plainly shown by this affidavit. It is not denied in any of the affidavits produced by appellants and must be regarded as an admitted fact.

The discovery sought by the bill being pertinent to respondent's defense of the action at law,

the next question for the Chancellor was whether respondent may be prejudiced if appellants were permitted to proceed in such action pending final hearing on the bill.

On that question, it was necessary for the Chancellor to be satisfied only that an autopsy upon the body of Eva Kilek *may* and not that it *will* show the cause of her death. The affidavits produced by respondent in this respect show that it has been reliably informed that such autopsy would disclose the cause of death. This is denied by the affidavits in behalf of appellants. There is a conflict in this regard which can be settled only by the discovery respondent desires, and it is manifest that respondent will be prejudiced if appellants are permitted to proceed in this action at law without such discovery.

II.

Complainant has no adequate remedy at law.

Section 19 of the Evidence Act (P. L. 1900, pp. 362, 367), provides that before the trial of an action brought to recover damages for injury to the person, the court may direct an examination of the person injured, by a competent physician or surgeon; but that statute clearly applies to a living person and not to an autopsy on a corpse.

Section 142 of the Practice Act provides for the inspection of books, papers or documents in the possession or under the control of either party.

We have been unable, after careful research, to find any provision in the Practice Acts of 1903 or 1912 or elsewhere in the New Jersey statutes which would authorize a court of law to grant the relief sought by the bill.

III.

The order appealed from is within the power of a Court of Equity under its general jurisdiction to compel discovery in aid of the prosecution or defense of an action at law.

Courts of equity will always compel discovery in aid of prosecuting or defending suits at law; and in order to make such discovery of use on the trial at law, will restrain that suit from proceeding until the discovery is had. The jurisdiction is not taken away by the fact that courts of law have been clothed with powers to compel discovery in such cases by the oath of the complainant. Chancellor Zabriskie so held in *Shotwell v. Smith*, 20 N. J. Eq. 79, where he enjoined suits at law brought by the defendants upon notes and bonds which were alleged to have been obtained by fraud and without consideration, and ordered a discovery of the circumstances under which they were executed.

This case was followed by Vice-Chancellor Emery in *Miller v. U. S. Casualty Co.*, 61 N. J. Eq. 110, where complainant sought discovery as to certain contracts necessary to enable him to prosecute a suit at law. The Vice-Chancellor said:

“In the *first* place, it is settled in this state that the statutes conferring jurisdiction for discovery upon the law courts have not had the effect of divesting the courts of equity of their ancient and original jurisdiction for discovery. *Howell v. Ashmore*, 1 Stock. 82 (Chancellor Williamson, 1852); *Shotwell v. Smith*, 5 C. E. Gr. 79, 81 (Chancellor Zabriskie, 1869), approved and followed in *Sweeney v. Williams*, 9 Stew. Eq. 627, 629 (Errors and Appeals, 1883).”

Shotwell v. Smith was approved by the Court of Errors and Appeals in *Sweeney v. Williams*, 36 N. J. Eq. 627, where Magie, J., said:

“When by statute, a right to administer relief previously administered only by courts of equity is extended to courts of law, the jurisdiction of the courts of equity is undisturbed unless prohibitory or restrictive words are used in the statute; thenceforth the jurisdictions are concurrent.”

The jurisdiction of a court of equity to compel discovery in aid of the prosecution or defense of an action at law is exhaustively and learnedly discussed in *Reynolds v. Burgess*, 71 N. H. 322, 51 Atl. 1075, where an inspection of machinery was ordered. We commend to the court a careful reading of this instructive opinion. The court quoted Story as follows:

“Story, after speaking of the defect of the administration of justice in courts of common law, arising from their want of power to ‘compel the production of deeds, books, writings and other things’ material to the issues on trial, says that the defect is remediable in courts of equity which will compel the production of such books, deeds, writings and other things. 2 Story, Equity Jur., Sections 1484, 1485.”

We have found one case directly in point. It is *Mutual Life Insurance Co. v. Griesa*, 156 Fed. 398. Bill in equity was filed to cancel a policy of life insurance for \$100,000, payable to the estate of one Perkins who had died. When he died there were other policies in force aggregating \$540,000. About the time he took out the policy in suit, insured was in correspondence with a chemist as to the uses and effects of poisons. The day of his death he purchased morphine poisons and that evening fell from the roof of his house and when reached was un-

conscious, and died a few hours thereafter without regaining consciousness. The bill of complaint was filed after the death of the insured. The insurance company made application for an order to exhume the body of the insured. The executors of the insured protested on the ground that U. S. Comp. Stat. 190 at p. 583 provided only for the production of papers and writings. The court said:

“Whether he suicided is not now a question for decision; but on such a showing, if the body cannot be exhumed, it is because the court cannot and should not compel the disclosure of the real truth. If such disclosure cannot be made, it is because of the right of one party to disclose the truth if believed advantageous and to conceal it if believed harmful, and that ought not to be a rule for the guidance of courts. And the only objection aside from that as to the power of the court is one of sentiment, as if sentiment should control in the administration of justice.”

The court also said:

“The recent scholarly and timely work on Evidence by Wigmore (sections 2220 *et seq.*) is to the point that sentiment and modesty, real or affected, must not stand in the way of the court in compelling parties to disclose the exact truth, and to not allow one party to the litigation to make known the facts, or suppress them, as the interest of such party may suggest. And along the same lines is the Preliminary Treatise on Evidence by Prof. Thayer (1898) of Harvard, and Two Centuries Growth of American Law (1701-1901) by the Faculty of the Yale Law School, under the title of ‘Evidence.’ And see the following authorities as to the power of a court of chancery as to evidence: *Reynolds v. Burgess*, 71 N. H. 322, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535, for the inspection of machinery; *Hensey v. Land-*

gon (C. C.) 80 Fed. 178, for the inspection of a mine; 1 Pomeroy, Equity, sections 191, 225. 2 Story Equity, Sections 689, 690. Can any one doubt but that all sentiment would dissipate, and all objection would vanish, if it were necessary for the estate to make the showing in order to recover the large sum of money involved? And why should it be optional with one party to say what part of the truth shall be made known, and what part kept from the court?

The order will be that the marshal of this district will exhume the body. The court will appoint a pathologist to examine the body to the end that the evidence may be had as to whether the fall killed the insured. A chemist will be appointed to determine whether he died by morphine poison. The results of their efforts ought to materially aid the court in arriving at the truth. And such an order is made because this court is of the opinion that it cannot be made in the action at law, but holding that it is within the general powers of a court of equity, and that such an order is in the furtherance of justice."

On appeal to the Circuit Court of Appeals for the Eighth Circuit, that court reversed the decision below on the ground that, "It is the settled law of this Circuit and of the Supreme Court that after the death of an insured a suit in equity will not lie for the surrender and cancellation of the policy upon the ground that it was obtained by fraud, for the reason that the company has a plain, speedy and adequate remedy by interposing the fraud as a defense to an action at law upon the policy," citing *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 5 Law 1.

Professor Wigmore in his work on evidence, Volume V, p. 435, says with respect to this case:

"*Mutual Life Ins. Co. v. Griesa*, C. C. Kansas 156 Fed. 398 (bill in equity to cancel a policy of life insurance; the deceased was killed by falling from the roof of his house; the issue was whether he had taken morphine, just previously, with intent to suicide thereby, and had deliberately thrown himself from the roof to conceal the suicide; the insurer applied for an order to exhume the body of the deceased; granted, in a scholarly and sensible opinion by Smith McPherson, J.; the order directed the appointment of a pathologist to examine for the effect of the fall, and a chemist to examine for morphine; the opinion repudiates a privilege protecting from such disclosure).

1909, *Griesa v. Mutual Life Ins. Co.*, 8th C. C. A., 169 Fed. 509 (same case on appeal) point not decided."

IV.

The order below simply maintained the status quo until the final hearing. It will be observed that the Vice-Chancellor expressly refused to compel the defendant Kilek or the coroner to exhume the body and not interfere with the exhumation or autopsy (p. 22), but confined himself to restraining the defendant from prosecuting the action at law unless he consented to the exhumation and autopsy at the expense of the complainant and in the presence of a physician selected by complainant and by defendant. The effect of this order is simply to maintain the status quo until the final hearing, and we submit there was ample justification for this order in the bill and affidavits. It was undisputed that Eva Kilek died by illuminating gas poisoning and it was likewise undisputed that there were

no gas pipes or facilities for furnishing gas in the premises she lived in. It was likewise undisputed that she did not die until twelve hours after the premises were inspected by complainant's workmen. The certificate of death annexed to the bill likewise showed (p. 11) that there was no autopsy and no test to confirm the diagnosis of death, but merely the bare statement that the cause of death was, "Suffocated by illuminating gas. Accident (p. 11, l. 10)."

We submit that there was a sufficient showing to warrant the court of chancery in restraining the action at law until the further order of the court, that is, until final hearing. If upon final hearing the complainant cannot establish by Dr. Schultze that an autopsy will disclose the cause of death, then his case will fail. But, we submit that a mere statement by a doctor who made no autopsy on the body that an autopsy would be entirely valueless, supplemented only by the statement of the undertaker that the corpse had the appearance of a normal and healthy woman, is not sufficient reason for denying an injunction designed to preserve the status quo until final hearing. The general rule is that a preliminary injunction will not issue where the material facts in complainant's bill and affidavits on which the complainant's right depends, are met by a full, explicit and circumstantial denial under oath. But, defendants' affidavits lack those essential qualities and injunction to preserve the status quo until final hearing was proper. *Sherman v. Stern*, 93 N. J. Eq. 626 (Errors and Appeals) and cases cited at page 629.

V.

Laches.

Appellant contends that the relief sought by complainant is impossible of attainment because of the long delay and laches of the complainant. If that be so, then the laches are not prejudicial to the defendants, but to the complainant. Mere lapse of time is not sufficient to bar a suit by laches, but the person asserting it must show that he has been prejudiced. *Vliet v. Cowenhoven*, 83 N. J. Eq. 234, and cases cited at p. 238.

VI.

Appellant asserts that the discovery sought is not necessary nor essential to complainant's defense of the action at law. Complainant, in its defense to the action at law, will have to overcome the testimony of the physician who attended Eva Kilek and also the coroner who made the certificate of death and who no doubt viewed the body and also the undertaker who embalmed it. No autopsy was performed on the body although the death was declared to be by accident. The body itself, or rather, the result of the examination of the body by autopsy, will furnish the vital and controlling evidence in the case. It may well be that the result of the autopsy may absolutely demolish the defense, but inasmuch as the defendant is in a position to afford an autopsy, his refusal to consent to it, can fairly be said to be due to a fear that an autopsy may demolish his case at law. He is seeking to recover a large sum of money from this complainant. If it were essential to his case that the autopsy be performed, we have no doubt that one would have been made without regard to sentiment. If the present defendant be permitted to proceed with

his action at law and suppress evidence which it is within his power to produce or at least permit inspection of by his adversary, then he has the present complainant at an advantage, which is neither equitable nor just and which deprives the present complainant of that equality before the law which is the right of all suitors.

VII.

The cases in this State, cited in Point V of appellants' brief, concern disputes between next of kin as to the possession of bodies after burial, and are not very helpful in the present inquiry. They do settle, however, that after burial the body is in the custody of the law and its removal is subject to the jurisdiction of the Court of Chancery. *de Festetics v. de Festetics*, 79 N. J. Eq. 488, where the earlier cases are cited. Nor are the cases cited in Point V involving the right of an insurance company to an inspection or autopsy of the body under a condition of the policy, pertinent. In the present case there was no contractual right in the respondent. The death occurred February 15, 1926, and the action at law was not begun until August 16, 1926 (p. 12). Appellant argues that because a licensed physician diagnosed the cause of death as suffocation by illuminating gas, the question of the cause of death is settled; but it is common knowledge that post mortem autopsies controvert ante mortem diagnoses. Of course, we recognize that the sanctity of the grave should not be lightly violated to satisfy the whims of relatives. In this case, however, the respondent is not seeking to gratify a whim, but to protect itself from being mulcted in heavy damages on an allegation of negligence which may be proved or dis-

proved by evidence in the control of its adversary.

The order appealed from should be affirmed with costs.

COLLINS & CORBIN,

Of Counsel with Complainant-Respondent.

EDWARD A. MARKLEY,

DAVID A. NEWTON,

Of Counsel.

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