INDEX.

New Jersey
Court of Errors and Appeals

Bill of Complaint.

As amended by Order filed October 30, 1926.
(Original Bill Filed September 21, 1926.)

In Chancery of New Jersey.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainants, Otto Rau and Josephine Rau, his wife, of the Township of Caldwell, New Jersey, respectfully show that:

1. On January 1, 1874, Henry V. Doremus, being indebted to The Citizens Insurance Co. in the sum of $1,300.00, executed to it a bond of that date to secure that sum, payable on January 1, 1875, with interest at the rate of seven per centum per annum, payable half yearly from the date of the bonds.

2. To secure payment of the bond, said Henry V. Doremus, and Sarah C., his wife, executed to said The Citizens Insurance Co. a mortgage of even date with the bond; and thereby conveyed to it, in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the Register's Office of Essex County in Book W-6 of Mortgages, page 217.

3. On June 17, 1875, said Henry V. Doremus, being indebted to Warren Doremus in the sum of $1,000.00, executed to him a bond of that date to secure that sum, payable on June 17, 1876, with interest at the rate of seven per centum per annum, payable half yearly from the date of the bond.

4. To secure payment of the bond, said Henry V. Doremus and Sarah C. Doremus executed to said Warren Doremus a mortgage of even date with the bond; and thereby conveyed to him, in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was recorded in the Register's Office of Essex County in Book Y-6 of Mortgages, page 401.

5. The mortgaged premises are described as follows:

All that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the township of Caldwell in the County of Essex and State of New Jersey:

BEGINNING at the southeasterly corner of a lot of land now owned by William Bush and on the line of land now owned by Peter Bowman; from thence (1) northerly five degrees and fifteen minutes west fifty-eight chains to the Passaic River; from thence along the courses of the said river to the corner of a lot of Land formerly belonging to Henry H. Van Ness deceased; thence eight degrees and fifteen minutes east sixty nine chains and forty five links

to the line of lands of Peter Bowman; from thence along said Bowman's line north eighty four and a half degrees east six chains and thirty nine links to the place of BEGINNING. Containing eighty acres be the same more or less and being the same lands conveyed to Henry V. Doremus by William Bush and wife by Deed dated December 20th, 1873.

6. By written assignment dated August 22, 1878, The Citizens Insurance Co., together with Joseph Coult and James E. Howell, assigned the bond and mortgage first above referred to (W-6, 217) to Phebe L. Lamassena; which assignment was recorded in the Register's Office of Essex County, in Book 27 of Assignments of Mortgages, page 488.

7. By written assignment dated October 25, 1878, Phebe L. Lemassena assigned the said bond and mortgage (W-6, 217) to Warren Doremus; which assignment was recorded in the Register's Office of Essex County, in Book 29 of Assignments of Mortgages, page 124.

8. On October 29, 1913, said Warren Doremus died intestate, a resident of Fairfield, Essex County, N. J., leaving as his only heirs and next of kin Alice, his wife, and Henry S. Doremus, his son.

9. By written assignment dated October 1, 1914, said Alice Doremus and Henry S. Doremus, describing themselves as the only heirs-at-law of the said Warren Doremus, deceased, assigned the said bond and mortgage (W-6, 217) to the complainants; which assignment was recorded in the Register's

Office of Essex County, in Book 121 of Assignments of Mortgages, page 111.

By written assignment dated October 1, 1914, the said Alice Doremus, widow, and Henry S. Doremus assigned mortgage registered in Book Y-6 of Mortgages, page 401, together with the accompanying bond, to the said complainants, which assignment having been first acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in Book 121 of Assignments of Mortgages for Essex County, at page 112.

10. On or about July 3, 1912, Henry V. Doremus, being then the owner of the premises and in possession of the same, and Warren Doremus being then the owner of the mortgages, the said Henry V. Doremus delivered to the said Warren Doremus a document reading as follows:

"Montclair, July 3, 1912.

This is to certify that the wood and hay cut from the 'Lord North' lot in the 'Big Piece' by Warren Doremus for interest on mortgages and note held by him, and for taxes on said lot, was with my knowledge and consent, and that I am satisfied.

Henry V. Doremus."

11. When the said mortgages were assigned to the complainants the said arrangement was continued and is still in full force and effect.

12. Henry V. Doremus died about December, 1913, intestate, a resident of Montclair, Essex County, N. J., leaving the following heirs and next

of kin: Sarah, his wife, now deceased, and five children, viz., Job V. Doremus, Rachel L. Doremus, Kate Francis M. Doremus, Etta M. D. Sindle and Sarah M. Pray; and the title descended to his said heirs, any interest which the said heirs of Henry V. Doremus or their husbands may have in the property to be subject to the lien of complainants' mortgages.

13. Etta M. D. Sindle is married, and her husband's name is I. Lester Sindle. Any claim or interest he may have by way of right of curtesy or otherwise is subject to complainants' mortgages.

14. Sarah M. Pray is married, and her husband's name is Ernest W. Pray. Any claim or interest he may have by way of right of curtesy or otherwise is subject to complainants' mortgages.

15. The whole amount of principal is due upon complainants' bonds and mortgages.

Complainants are without adequate remedy in the courts of law, and therefore pray:

1. That Job V. Doremus, Rachel L. Doremus, Kate Francis M. Doremus, Etta M. D. Sindle and I. Lester Sindle, her husband, and Sarah M. Pray and Ernest W. Pray, her husband, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That an account may be taken of the amount due on complainants' mortgages.

3. That the defendants, or one of them, may be decreed to pay complainants the amount so found

due, with costs, by a short day, to be appointed by this court; and that in default of such payment, they, and each of them, be debarred and foreclosed of all equity of redemption in said lands; or

4. That a decree may be made for the sale of the mortgaged premises to raise, and to pay to complainants, the amount so found due on their mortgages, with costs.

5. 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.

PHILIP GOODELL,
Solicitor for and of
Counsel with Complainants.

Notice of Motion.

(Filed November 30, 1926.)

IN CHANCERY OF NEW JERSEY.

Between OTTO RAU and JOSEPHINE RAU, his wife, Complainants, and JOB V. DOREMUS, *et als.*, Defendants.	On Bill, &c. On Motion to Strike Out Notice.

TAKE NOTICE that I shall apply to the Chancellor of this State on Tuesday the Thirtieth day of November, 1926, at ten o'clock in the forenoon, or as soon thereafter as Counsel can be heard, at the Chancery Chambers in the City of Newark, to strike out those parts of the Bill of Complaint as amended, as are stated in the reasons delivered with this notice.

PAUL M. FISCHER,
Solicitor and of Counsel for the Defendants.

To:

PHILIP GOODELL, Esq.,
Solicitor and of Counsel for Complainants,
Hinck Building,
Montclair, N. J.

Due and legal service of the within Notice and a copy thereof is hereby acknowledged this Seventeenth day of November, 1926.

PHILIP GOODELL,
Solicitor and of Counsel for Complainants.

Reasons.

(Filed November 30, 1926.)

IN CHANCERY OF NEW JERSEY.

Between OTTO RAU and JOSEPHINE RAU, his wife, Complainants, and JOB V. DOREMUS, *et als.*, Defendants.	On Bill, &c. On Motion to Strike Out. Reasons.

On notice of motion for this purpose having been duly served upon Counsel for Complainants, the defendants jointly and severally move to strike out the Bill of Complaint and those parts herein referred to, for the following reasons:—

1. These defendants move to strike out the Bill of Complaint for the reason that it shows no ground for action or relief in this court, and that the presumption of the payment of said mortgages by said Henry Doremus, mortgagor and these defendants or either of them is conclusive, by reason of the lapse of time between the making of said mortgages, the non-payment of the same or any part thereof, and the filing of the Bill of Complaint, being a period of over 50 years, and no notice for payment or recognition of the same is alleged or shown for the collection of the mortgages from said mortgagor or these defendants, sufficient to satisfactorily account for or excuse said delay as a bar to said presumption of the payment of said mortgages. Said alleged agreement dated July 3, 1912, being only a recital in general of some act on the part of the mortgagor, but not specific in form or meaning as a promise for the payment, or as to the amount

paid or payable, either in taxes or in interest, or for what period of time the set-offs for wood and hay should apply, if at all, as an acknowledgment of payment of said mortgages for the purpose of attributing the same within said lapsed period. Also the sense of the agreement or its effect is dubious for the purposes set forth by the Complainant and insufficient as a bar to the defense of the defendants, viz.: that the presumption of the payment of said mortgages by the defendants is conclusive.

2. Referring particularly to paragraph #10. in the Bill of Complaint as amended, the defendants request that these be stricken from the Bill of Complaint as stating nothing which defendants need answer, nor by which equity can be done, for the fact of the insufficiency of said agreement, its purport and its lack of equitable force; that if proven, said agreement does not establish a bar to the defendants' claim of payment. To allow Complainant to plead said agreement in bar, would be against the equitable doctrine of laches, he having waited 12 years from the taking of his assignments on said mortgages, to the time of the filing of the Bill of Complaint, without any previous notification to these defendants or Henry Doremus, to pay said mortgages or of Complainants' agreement in the premises, Complainant all that time knowing that both the mortgagor and mortgagee and the assignees were of advanced age when the agreement is alleged to have been made, namely, July 3, 1912, and that both the mortgagor, Henry Doremus, and complainants' assignee Warren Doremus, respectively, had died two years previous to complainants' purchase of said mortgages; he the complainant even then depending on said agreement for the protection of the pe-

culiar position his security occupied. Also Complainant was not prompt, where it was his duty in the premises and the defendants have thereby been prejudiced in his delay of 12 years, all of which Complainant might have avoided; said Complainant being already chargeable with the knowledge of the previous delay of 37 years, by reason of which said mortgages were previously non-existent. The defendants being all this time in possession of said premises and being prejudiced in their rights of the conclusiveness of the payment of said mortgages by Complainant's laches, is without reasonable or equitable excuse to explain said delay at this late date, sufficient to seek the aid of this court by the use of said alleged agreement as a bar against the presumption of payment of the said mortgages by the defendants.

3. The defendants request that paragraph #11 be stricken out for the reasons stated in paragraphs #1. and #2. of these reasons, as above set forth in so far as the same are applicable to said agreement and its effect, and also for the further reason that neither Henry Doremus nor the defendants have been charged with any specific act or thing in participation of or in compliance with the said Complainant as to said alleged agreement to connect them with its operation, existence or continuance.

4. The defendants move that these motions be granted and such relief be given the defendants as may be equitable and just in the premises and whether they need answer said Bill of Complaint as amended, or any part thereof, and be dismissed with their costs and charges in this matter sustained.

PAUL M. FISCHER,
Solicitor and of Counsel for the Defendants.

Opinion.
(Filed January 3, 1927.)

IN CHANCERY OF NEW JERSEY.

Between OTTO RAU and JOSEPHINE RAU, his wife, Complainants, and JOB V. DOREMUS, *et als.*, Defendants.	On Bill, etc. Motion to Strike Out. Opinion.

PHILIP GOODELL for Complainants.

PAUL M. FISCHER for Defendants.

CHURCH, V. C.

This is a motion to strike out a bill of foreclosure. It appears that two mortgages were given on the property, one dated January 1, 1874, for $1300., the other dated June 17, 1875 for $1000. The mortgages were made by Henry V. Doremus and the first by mesne assignments came in 1878 into the hands of Warren Doremus. The second was made directly to Warren Doremus. Henry V. Doremus died in 1913, leaving five children, defendants in this suit. Warren Doremus died in 1913 and the mortgages were assigned in 1914 to the complainants.

The question therefore arises, are there any circumstances which would take the matter out of the rule laid down in Blue v. Everett, affirmed 56 N. J.

Equity, 455. This case holds that there is a twenty year limitation on the foreclosure of mortgages, provided no payment has been made on account of principal or interest.

Complainants plead a paper writing as follows: "Montclair, July 3, 1912. This is to certify that the wood and hay cut from the Lord North lot in the Big Piece by Warren Doremus for interest on mortgages and note held by him and for taxes on said lot was with my knowledge and consent, and that I am satisfied. Henry V. Doremus."

This, they allege, is evidence that the parties agreed that the wood and hay should be accredited to interest. There is nothing to show that Warren Doremus even consented to such an arrangement. The bonds accompanying the mortgages call for payment of interest at the rate of seven per cent, semi-annually, which, of course, means cash. There is no endorsement of receipt of interest or principal on the bonds or mortgages. This writing was made 37 years after the execution of the mortgages. How can it be definitely determined that Warren Doremus was satisfied at this so-called acknowledgment? Why did he wait 37 years and then accept a paper of this kind?

In the case of Cox v. Brown, 87 N. J. Equity, 462, at page 465, Vice Chancellor Leaming says: "The general rule is well settled in this state that he, who without adequate excuse delays asserting his rights until the proofs respecting the transaction 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."

Vice Chancellor Reed, in dealing with a similar situation in the case of Magee v. Bradley, 54 Equity, 326, at 330, said, "What occurred between them during this thirty years in relation to it (a mortgage) what arrangements were made in regard to its payment, what understanding was entered into in respect to its enforcement, surrender or payment can now never be known as the mouths of both * * * are closed by death."

In the case of Swinley v. Force, 78 N. J. Equity, 52, Vice Chancellor Stevenson says, inter alia, "A presumption of payment of a bond and mortgage on which no payments have been made for twenty years cannot be rebutted simply by proof in fact of non payment unless the delay for twenty years is satisfactorily accounted for or explained."

Considering again the facts in this case, we find that for 37 years nothing was done as to these mortgages. Then Henry V. Doremus signed the paper quoted above and delivered it to Warren Doremus. Warren did nothing with it, made no credit on the bonds and mortgages and died leaving it presumably among his papers. It was not assigned to complainants as part of the bonds and mortgages.

The meaning of the paper is vague. To what bonds and mortgages does it refer? Henry V. might have made other mortgages. It also refers to a note. There is nothing in the case to show that any note was given in connection with this transaction.

The mortgages were assigned in 1914, 12 years afterwards the bill was filed.

Opinion.

The lapse of time in the first instance between the execution of the mortgages and the signing of the paper, the vagueness of the paper itself and the fact that Warren Doremus himself never made any effort to enforce the mortgages are the reasons which lead me to the conclusion that the mortgages are now unenforceable under the doctrine laid down in Blue v. Everett, supra.

I will advise a decree accordingly.

Decree.

(Filed January 11, 1927.)

IN CHANCERY OF NEW JERSEY.

Between OTTO RAU and JOSEPHINE RAU, his wife, Complainants, and JOB V. DOREMUS, *et als.*, Defendants.	On Bill, etc. Decree.

This matter being opened to the Court by Paul M. Fischer, Esquire, of Counsel for the defendants Job V. Doremus, et als., and upon reading the pleadings and hearing the motions of the defendants to strike out the Bill of Complaint filed in this cause, having heretofore come on to be argued, and counsel for both sides having been heard thereupon, and the Chancellor being of the opinion that said motions to strike out and dismiss said Bill of Complaint are good and sufficient; IT IS ON THIS 11th day of January, 1927, ORDERED that the same do stand and be allowed and that said Bill of Complaint is hereby dismissed. And that the Complainants pay to the said defendants their costs of the said motions to be taxed and to pay a Counsel fee of ($100.) Dollars to Counsel for the Defendants.

And it is FURTHER ORDERED, ADJUDGED, AND DECREED, that the two mortgages recited in the Bill of Complaint and sought by the Complainants to be foreclosed, to wit; a mortgage made and executed by Henry V. Doremus and Sarah C. Doremus, his wife, during their lifetime, to the Citizens Insurance Co., in the sum of $1300., bearing date

Decree.

January 1, 1874, and recorded in the Essex County Register's Office in Book W. 6. of Mortgages, page 217; and a mortgage made and executed by Henry V. Doremus and Sarah C. Doremus, his wife, during their lifetime, to Warren Doremus, in the sum of $1000, bearing date June 17, 1875, and recorded in the Essex County Register's Office in Book Y 6 of mortgages, page 401; are conclusively presumed to have been fully paid and satisfied by the lapse of time, without sufficient excuse to explain the delay in payment of either principal or interest, for a period of over twenty years from the date of their respective execution and previous to the time of the filing of said Bill of Complaint; and it is FURTHER ORDERED that the said mortgages be cancelled of record, and be no longer a lien upon the said premises therein described against the said defendants or any person or persons claiming by, from or under them, and that the said Complainants and all persons claiming by, from or under them, be debarred and perpetually enjoined from collecting money upon said deeds of mortgages and from setting up the same against the premises therein described.

That a certified copy of this decree served upon and filed with the Register of the County of Essex and the payment to him of the usual cancellation fee, with the request to cancel the record of said mortgages in the Books aforementioned, shall be his authority for so cancelling said records.

Respectfully advised:

E. R. WALKER,
C.

ALONZO CHURCH,
V. C.

Notice of Appeal.
(Filed January 21, 1927.)

IN CHANCERY OF NEW JERSEY.

OTTO RAU and JOSEPHINE RAU, Complainants, vs. JOB V. DOREMUS, *et als.*, Defendants.	On Bill, etc. Notice of Appeal.

The complainants, Otto Rau, and Josephine Rau, hereby appeal from the final decree made by the Chancellor on the advice of Vice Chancellor Alonzo Church, in the above entitled cause on January 11, 1927, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: January 20, 1927.

PHILIP GOODELL,
Solicitor for and of Counsel
with Complainants.

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

PHILIP GOODELL,
Of Counsel with Complainants.

Affidavit of Service of Notice of Appeal.

(Filed January 21, 1927.)

IN CHANCERY OF NEW JERSEY.

Between OTTO RAU and JOSEPHINE RAU, Complainants, and JOB V. DOREMUS, *et als.*, Defendants.	Affidavit of Service of Notice of Appeal.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

ELIZABETH GLASBY, being duly sworn upon her oath deposes and says that she is an Attorney at Law of the State of New Jersey, and is in the employ of Philip Goodell, Solicitor of the Complainants in the above entitled cause.

That on January 20th, 1927, at the hour of 11:45 o'clock in the forenoon, she served upon Paul M. Fischer, personally, Solicitor of the Defendants in the above entitled cause, a true copy of the annexed Notice of Appeal, at his office located at number 630 Bloomfield Avenue, Montclair, New Jersey, and informed him of its contents.

ELIZABETH GLASBY.

Sworn and subscribed to before me }
this 20th day of January, 1927. }

MARGARET MURRAY,
Notary Public for New Jersey.

Petition of Appeal.

(Filed February 17, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

OTTO RAU and JOSEPHINE RAU, Complainant-Appellants, vs. JOB V. DOREMUS, *et als.*, Defendant-Appellees.	On Appeal from the Court of Chancery. Petition of Appeal.

TO THE HONORABLE THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Otto Rau and Josephine Rau, the appellants in the above entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a decree, final in form, advised by Honorable Alonzo Church, one of the Vice Chancellors, and made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date January 11th, 1927, in a certain cause in said Court of Chancery wherein the said Otto Rau and Josephine Rau were complainants and the said Job V. Doremus et al. were defendants, in this respect, to wit, that the said decree adjudges that the bill of complaint in the cause should be dismissed, whereas, as the appellants believe, the said bill of complaint shows a good cause of action; and

FURTHER because the said decree adjudges that the two certain mortgages owned and sought to be

foreclosed by the appellants and in said decree recited are conclusively presumed to have been fully paid and satisfied by the lapse of time without sufficient excuse to explain the delay in payment of either principal or interest for a period of over twenty years from the date of the respective execution and previous to the time of filing of said bill of complaint, whereas the only matter before the Court of Chancery was the question as to whether the bill filed by the appellants, as complainants in that Court, should or should not be stricken out; and

FURTHER because the said decree orders that the said mortgages be cancelled of record, and that they are no longer a lien on the premises therein described, and that the complainants, and all persons claiming by, from or under them, be debarred and perpetually enjoined from collecting money upon the said deeds of mortgages and from setting up the same against the premises therein described, whereas the only question before the Court of Chancery was the question of whether or not the bill of complaint should be dismissed for failure to show a good cause of action; and

FURTHER because the said decree provided that a certified copy of itself should be authority to the Register of Essex County, in which County the mortgaged lands are situate, to cancel the same of record, whereas the only question before the Court of Chancery was whether or not the bill of complaint filed by the appellants disclosed a cause of action.

And the petitioners appeal from the said decree of the Chancellor which decrees as aforesaid, upon the

ground that the same is erroneous in that (1) the bill of complaint did show a good cause of action and should not have been dismissed; (2) the Court erred in making a final decree on the merits of the case, not only because the bill of complaint showed a good cause of action, but because the cause, in the absence of pleadings by the defendants, had not reached a point where a final decree should have been made; (3) because the Court erred in granting affirmative relief, to wit, enjoining the complainants, and those holding under them, as hereinbefore recited, from proceeding under the mortgage, there being no proof or testimony, by affidavit or otherwise, before the Court, nor any pleadings except the bill of complaint and notice to strike out; and (4) because the Court erred in granting affirmative relief, to wit, ordering the Register of Essex County to cancel the said mortgage of record without pleadings by the defendants seeking such relief.

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

PHILIP GOODELL,
Solicitor for and of Counsel
with Appellants.

Affidavit of Service of Petition of Appeal.

(Filed February 23, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

OTTO RAU and JOSEPHINE RAU, Complainant-Appellants, vs. JOB V. DOREMUS, *et als.*, Defendant-Appellees.	On Appeal from the Court of Chancery. Proof of Service of Petition of Appeal.

STATE OF NEW JERSEY, COUNTY OF ESSEX, } ss.:

ELIZABETH GLASBY, of full age, being duly sworn upon her oath deposes and says that she is an Attorney at Law of the State of New Jersey, and employed by Philip Goodell, solicitor for the complainants-appellants in the above entitled cause, and that on the 19th day of February, 1927, she served a true copy of the petition of appeal, filed in this cause, upon Paul M. Fischer, solicitor for the defendants-appellees.

ELIZABETH GLASBY.

Sworn and subscribed to before me this 19th day of February, 1927.

MARGARET MURRAY,
Notary Public for New Jersey.

Answer to Petition of Appeal.

(Filed March 19, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

OTTO RAU and JOSEPHINE RAU, Complainant-Appellants, vs. JOB V. DOREMUS, *et als.*, Defendant-Appellees.	On Appeal from the Court of Chancery. Answer to Petition of Appeal.

The answer of the above-named Defendant-Appellees to the petition of appeal from the Court of Chancery, of the above named Complainant-Appellants.

These Defendant-Appellees, not acknowledging all or any of the matters which in said petition of appeal are contained, to be true, for answer thereto, nevertheless say and admit, that a decree was, on the Eleventh day of January, 1927, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof these Defendant-Appellees pray to refer thereto when the same shall be produced. And these Defendant-Appellees are advised and believe, that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these Defendant-Appellees.

PAUL M. FISCHER,
Solicitor and of Counsel
for Defendant-Appellees.

Service of the within notice and a copy thereof acknowledged this 18 day of March, 1927.

PHILIP GOODELL,
Solicitor and of Counsel
for Complainant-Appellants.

13

New Jersey
Court of Errors and Appeals

Between OTTO RAU and JOSEPHINE RAU, Complainant-Appellants, and JOB V. DOREMUS, *et al.*, Defendant-Appellees.	On Appeal from the Court of Chancery.

POINTS FOR COMPLAINANT-APPELLANTS.

In September, 1926, the complainants, being the owners of two mortgages on the same property aggregating $2300.00, one made in 1874 and one made in 1875, filed their bill to foreclose the mortgages. The mortgages were old, and the complainants alleged an agreement dated July 3rd, 1912, satisfactory to the owner of the equity of redemption, as follows:

"Montclair, July 3, 1912.

This is to certify that the wood and hay cut from the 'Lord North' lot in the 'Big Piece' by Warren Doremus for interest on mortgages and note held by him, and for taxes on said lot, was with my knowledge and consent, and that I am satisfied.

HENRY V. DOREMUS."

They then allege, in lieu of stating a date to which interest had been paid, that the same arrangement by which the use of the fruct of the land was taken

in lieu of interest was in full force and effect. The only defendants were the heirs at law of the original mortgagor, and their spouses. Their counsel moved to strike out the bill on the grounds that there was no cause of action shown, and that there was laches on the part of the complainants on account of the age of the mortgages and there could be no foreclosure. The matter was heard on motion before Vice Chancellor Church, who advised a decree, which was duly entered January 11th, 1927 (see page 15 of the Case) decreeing: (1) that the mortgages were "conclusively presumed to have been fully paid and satisfied by the lapse of time, without sufficient excuse to explain the delay in payment of either principal or interest, for a period of over twenty years from the date of their respective execution and previous to the time of the filing of the bill of complaint"; (2) that the mortgages be cancelled of record; (3) "that the complainants—be debarred and perpetually enjoined from collecting money upon said deeds of mortgages and from setting up the same against the premises therein described"; and (4) "that a certified copy of this decree served upon and filed with the Register of the County of Essex—shall be his authority for so cancelling said records."

From this decree the complainants have appealed, on four grounds, set up in the petition of appeal (page 19 of the Case). These four reasons group themselves naturally into two classes: (a) That the bill did show a right in the complainants, and that the Vice Chancellor erred in striking out the bill. Whether he was right or wrong in this goes to the actual merits of the case. (b) That the Vice Chancellor, even if he were right in striking out the bill, erred in making a final decree in a case not at issue and which has not been referred to him, and in granting affirmative relief,

enjoining the complainants from ever proceeding with their mortgages, and taking their mortgages out of their control, and having them cancelled, thus destroying the very subject matter.

The appellant presents first to the Court his argument based on the making of this final decree and granting of affirmative relief, following this with his argument on the merits of the case.

The Vice Chancellor exceeded his power in making a final decree in this case.

Vice Chancellors in New Jersey are statutory officers (see subheading XIV. of the Chancery Act). The statute states that the Chancellor may refer to them any cause or matter which may at any time be pending in the Court of Chancery, and that he also may, by general rule, provide for a reference to a vice chancellor of causes, matters or proceedings pending or future. In pursuance of this statute the Chancellor has promulgated, and there is in effect, rule No. 130 of the Court, by which rule there are automatically referred to any vice chancellor certain matters, viz:

1. Applications for habeas corpus.

2. Applications for writs of *ne exeat.*

3. Applications in relation to insolvent corporations, etc., and appointment of receivers.

4. Applications on summary proceedings under the statute for the production, custody or examination of the books of corporations and the investigation of the election of the directors of corporations.

4a. Applications to punish for contempt.

5. Applications in any cause or proceedings for orders or decrees, *excepting decrees pro confesso and final decrees,* and excepting orders of reference.

It is submitted that this rule limits the powers of vice chancellors where they are not acting under an order of reference, and while the application for a motion to strike out the bill was properly made and heard by the Vice Chancellor, his authority stopped with ordering the bill to be dismissed. He had no power to make a final decree, no power to grant an injunction against the complainants, and no power to order the register to cancel the mortgages.

There was nothing before the Court but the bill of complaint and the motion to strike out, and nothing in them to justify the granting of affirmative relief.

Except for the fourth paragraph of the respondent's reasons for making his motion (page 8 of the Case) for such relief as may be equitable, there was no hint, until the decree was presented, that any such relief would be claimed.

Mr. Kocher, in his Chancery Practice, at page 433, says "The relief accorded by the decree must conform to the case made out by the pleadings, as well as to the proofs. And the court cannot act upon a distinct ground of relief made by the proofs, if it be not set up in the bill. Hence matters not set up in the pleadings as a defense, but introduced only in argument, cannot be made the basis of a decree." He cites a number of cases illustrative of this fact, but it seems necessary only to cite one.

Van Houten vs. Stevenson, 69 N. J. Eq. 626. In this case a motion was made to dismiss a bill on

the ground that there was another suit involving the same subject matter pending. Vice Chancellor Stevens pointed out that there was nothing before the court on which such a motion could be considered. It is true that he did, apparently to save the parties time, discuss the merits of the matter, but the point actually decided by him was that the necessary averments were not before the court. So in our case, no claims were made by the respondents' counsel in any way for affirmative relief, and it is respectfully contended that it should not have been granted.

The request for equitable relief in the reasons for the motion it is believed is negligible. The relief must be sought in the pleadings. There is no pleading in the case but the bill,

It is therefore submitted, for the above reasons, that the whole of the final decree, except the first paragraph, was improper and that the orders therein contained must be reversed or expunged from the decree, leaving the complainants in a position, if they see fit, and if the remainder of the decree is not reversed, to proceed with a new foreclosure, if they conceive that their first bill was improperly drawn and did not set before the Court all the existing facts and circumstances.

The bill showed a cause of action and should not have been dismissed.

We now come to the actual merits of the case, and let us look a little further into the facts. The two mortgages, one for $1300.00 dated in 1874 and payable January 1st, 1875, and the other for $100.00 dated in 1875 and payable in 1876, were assigned and became the property of the complainants October 1st, 1914. The bill next alleges the

delivery of a document, signed by the mortgagor, dated July 3rd, 1912, reading:

"Montclair, July 3, 1912.

This is to certify that the wood and hay cut from the 'Lord North' lot in the 'Big Piece' by Warren Doremus, for interest on mortgages and note held by him, and for taxes on said lot, was with my knowledge and consent, and that I am satisfied.

HENRY V. DOREMUS."

(see paragraph 10 of the bill). The complainants allege, in paragraph 11, that the said arrangement was continued at the time of the assignments to them and is still in full force and effect, and the bill seeks a decree for the amount of the principal only. In other words, it appears that instead of paying his interest in cash, Warren Doremus and Henry V. Doremus made an arrangement whereby Warren should cut the wood and hay on the "Lord North" lot in the "Big Piece" and should pay the taxes, in lieu of interest on the mortgages, and in 1912 Henry V. Doremus recognized this agreement in writing.

It is contended that the delivery of this document is a sufficient reinstatement of the mortgages, so that anything that happened before that date became immaterial, and that the allegation that it is still in full force and effect takes the place of the usual allegation in a foreclosure bill showing the date to which interest is paid.

The rule of law in New Jersey is plain and has often been decided and used by the courts. If there has been no payment on account of the principal or interest on a mortgage within twenty years, full payment is presumed, unless there is adequate excuse explaining the delay. *Blue* vs. *Everett,* 55 N. J. Eq. 329, affirmed by the Court of Errors and Appeals in 56 N. J. Eq. 455, may be said to be a leading case. The complainant does not allege interest to have been paid, nor does he allege that interest was not paid, but sets up, it is claimed, the exact facts. Even assuming interest had not been paid, in paragraph 10 of the bill of complaint, by alleging the delivery of the document of July 3rd, 1912, the complainant makes an explanation sufficient to explain the delay in bringing suit.

Justice Dixon, for the Court of Errors and Appeals, on the appeal of the *Blue* vs. *Everett* case, collected the reported cases at that time, 1897, where the Court of Chancery had sustained a bill for the collection of a debt by foreclosure of a mortgage after twenty years. He cites *Moore* vs. *Clark,* 40 N. J. Eq. 152, and *Miller* vs. *Teeter,* 53 N. J. Eq. 262. In *Moore* vs. *Clark* the acknowledgment on the part of the defendant, the owner of the equity of redemption, was simply that when he took title to the land, within twenty years of the foreclosure, he accepted a deed subject to the mortgage. Vice Chancellor Bird said, "I conclude that that was such an acknowledgment as will take the case out of the statute." In *Miller* vs. *Teeter* the acknowledgment which was relied on to take the case out of the statute of limitations was the fact that the defendant acknowledged the debt to a third person by getting him to write to the holder of the mortgage concerning the arrangements to pay it off.

It would seem that the acknowledgment on July 3rd, 1912, by Henry V. Doremus was much stronger than the acknowledgment which was satisfactory to the courts in both these cases cited.

From the opinion of the Vice Councellor (page 11 of the Case) we learn that he dismissed the bill on the ground that the lapse of thirty-seven years between the date of the mortgages and the written acknowledgment was fatal. He finds fault with

the arrangement shown by the document of July 3rd, 1912, for several reasons: First, because there was nothing to show that Warren Doremus consented to such an arrangement. It is contended that he is mistaken. Warren Doremus had the document. The document itself shows that he cut the hay and wood and paid the taxes in lieu of receiving interest, and that he did it with the knowledge and consent of the owner of the land, the mortgagor. The Vice Chancellor points out that interest at seven per cent means cash, implying that the payment must be in cash, and cash only. It is again contended that he is mistaken. Certainly any arrangement between debtor and creditor whereby merchandise was accepted in lieu of cash as interest is payment of interest.

He again asks why Warren Doremus waited thirty-seven years and then accepted a paper of that kind. We do not know that he did wait, but even if he waited it is immaterial why he saw fit to do it. The two men undoubtedly understood one another, and Henry V. Doremus was satisfied in 1912 to acknowledge in writing that the mortgages were alive, and that interest was paid to that date by the method described in the document, and the bill alleges, and the fact is, that the arrangement was continued ever since.

The Vice Chancellor cites *Sox* vs. *Brown,* 87 N. J. Eq. 462, and *Magee* vs. *Bradley,* 54 N. J. Eq. 326, for his law precedents in basing a decision on this lapse of thirty-seven years in which he assumes nothing was paid (line 20, page 13 of the Case). It is contended that what occurred during the thirty-seven years between the mortgagor and the mortgagee is quite immaterial, as in 1912 the mortgagor, the party now charged with the debt, through his heirs, was, to quote his own language, "satisfied." No evidence is lost by the death of the parties, as no

evidence is necessary as to what took place during that long period from 1875 to 1912.

Again the Vice Chancellor finds that the paper quoted above was not assigned to complainants as part of the bonds and mortgages. It did not have to be assigned. It had no property value and could not be the subject of assignment. It is evidence of certain facts. The complainants on the hearing were bound to make proof of it, but the complainants have been given no hearing.

The Vice Chancellor, in line 30 on page 13 of the Case, asks to what bonds and mortgages the paper of July 3rd, 1912, refers. It is true that there is no direct allegation that the bonds and mortgages referred to in the paper of July 3rd, 1912, are the ones sought to be foreclosed. Perhaps this allegation should have been made, but it is contended that since the language of the document of July 3rd, 1912, is general in terms and would apply to all mortgages of Henry V. Doremus held by Warren Doremus, and since the paragraph alleges that when the agreement was made Henry V. Doremus owned the premises and Warren Doremus owned the mortgages in suit, the mortgages referred to in the document of July 3rd, 1912, must include the mortgages in suit. If the Vice Chancellor felt that the direct allegation should have been made and the bill was fatally defective by the lack of it, he had the option of dismissing the bill or of giving the complainants an opportunity to amend on payment of costs. Under the principles of equity it is contended that he should have limited his relief to a dismissal without prejudice or a dismissal unless the complainants amended. If this Court feels that the allegation showing that the paper of July 3rd, 1912, referred to the mortgages sought to be foreclosed is lacking, it is urged that they modify the Vice Chancellor's decree, either dismissing the bill

without prejudice or dismissing the bill unless the complainants amend.

In the last paragraph of his opinion (page 14 of the Case) the Vice Chancellor sums up and he gives an additional reason for dismissing the bill, that Warren Doremus never made any effort to collect the mortgages, but he fails to show what obligation there was on the mortgagee, whose mortgage was in good standing, to foreclose or make other effort to collect the mortgages until he was ready.

Defendant respondent, in his argument for dismissal of the bill, seems to make two points. First, that the complainants were in laches, and second, that no interest or installment on the principal having been paid within twenty years created a presumption of payment of the mortgage. It was this latter point on which Vice Chancellor Church based his opinion, but we have already attempted to point out that his conclusions that nothing had been paid from 1875 to 1912 were not properly taken, considering the allegations of the bill as true.

Up to the full limit of twenty years no delay or laches in foreclosing a mortgage will defeat it.

The foregoing words are taken from Vice Chancellor Emery's careful opinion in *Blue* vs. *Everett,* 55 N. J. Eq. 329 (unanimously affirmed by the Court of Errors and Appeals 56 N. J. Eq. 455), and the question is taken from the top of page 344, *Barned* vs. *Barned,* 21 N. J. Eq. 245, being cited. To all intents and purposes there is a twenty year limitation on the foreclosure of mortgages, and it is hard to set up any facts where that can be shortened. In this particular case, no reasons are brought forward why it should be shortened. The situation of the parties has not changed. Henry V.

Doremus died and left five heirs, all of whom are *sui juris,* and who, it is presumed, knew about their property and were satisfied with the situation. No allegation is made of any effort on their part to pay up the mortgage, or to pay their own taxes, or to recognize in any way that they owned the property or had any interest in it. Warren Doremus and his assignees, the complainants, on the other hand, have been going peacefully along carrying out their end of the bargain, using the land and paying the taxes on it, and now they are seeking to give the owners of the equity of redemption the opportuity to redeem if they think it worth while. So much for laches.

A payment of interest on a mortgage or written admission that the mortgaged debt exists within twenty years is a sufficient recognition of the debt to overcome any presumption that the mortgage has been paid, even though it is much older than twenty years.

It is of course admitted for the purpose of this argument, by the respondents that the document of July 3rd, 1912, set forth in the bill, was made, and, as alleged in paragraph 11 of the bill, that the arrangement is continued and is still in force and effect. This document is a recognition by the then owner of the equity of redemption of a number of things—(1) that the wood and hay cut was for interest on the mortgage and for taxes on the lot, (2) that the mortgages existed as debts, (3) that Henry V. Doremus knew of the cutting of wood and hay for interest and consented thereto, and (4) that he was satisfied. It is not argued that this document is a new promise to pay a debt already outlawed, although it could be argued that it recognizes the existence of the debt and the promise to

pay it is implied, but it is argued and insisted that it is to all intents and purposes a receipt for interest in 1912, well within twenty years—in fact, within fourteen years of the starting of the suit. We need go no further. Vice Chancellor Emery in *Blue* vs. *Everett* cited above makes an interesting and careful analysis of the subject. It makes no difference that the facts in that case were such that they found no interest had been paid within twenty years. He points out on page 337:

> "that our decisions at law as well as in equity, establish the rule that unless the delay for twenty years is satisfactorily accounted for or explained, the presumption of payment of a bond and mortgage or other pecuniary debt is conclusive and cannot be rebutted simply by proof in fact of non-payment without accounting for the delay."

There seems to be no question in his mind, however, that if interest had been paid within the twenty years, the presumption would have been overcome, and he finds as a fact that the interest which the complainants allege paying on August 9, 1875, within twenty years of the date of filing the bill, was not in fact paid, and it was this fact and the failure to show any sufficient circumstances explaining the delay (which it is interesting to note might have been shown had they existed, and if shown, would have lengthened the period of time beyond twenty years), that led him to make the decree dismissing the bill. It is needless for me to repeat the cases cited in this opinion, because I think it is not disputed by my adversary or myself as to what the law is in this case. The question that arises is whether the complainants' document is sufficient to show the payment of interest, and it is insisted that it is sufficient.

Even if the Court feels that interest was not paid, —and, of course, no money was passed—it is contended that the arrangement between the parties whereby the mortgagee took the wood and grass was expressly in lieu of interest, and fully explains why no interest was paid.

The circumstances are such that the presumption of non-payment is overcome.

It is clear from the *Blue* vs. *Everett* case cited above that the presumption is overcome if the facts justify it. *Murphy* vs. *Coates,* 33 N. J. Eq. 424, there cited is a case where the original mortgagor wrote on the mortgages and on the bonds an acknowledgment that no part of the principal or interest had been paid over a period of twenty-three or twenty-four years. The acknowledgment was held sufficient to overcome the presumption arising from lapse of time, and decree for payment based solely on this acknowledgment was held effective.

Again in *Blue* vs. *Everett,* at page 341, Vice Chancellor Emery says:

> "Acknowledgments of this character, even if not accompanied by express promise to pay, were always considered in courts of law as sufficient to raise a new promise, which would revive a debt on simple contract barred by the statute of limitations. The equitable abligation to pay the debt was a sufficient consideration for the new promise of which the acknowledgment was sufficient evidence. Parker vs. Butterworth, 46 N. J. Law 244 (Depue, J., at p. 247). Upon the same principle, an acknowledgment of the validity of a mortgage debt, after the expiration of twenty years, would equitably have the effect of imposing on the debtor the obligation to pay it, preventing him from claiming that at the time of the acknowl-

> edgment he was discharged from the debt by reason of the presumption of payment. An acknowledgment sufficient to overcome the positive bar of a statute is certainly sufficient to overcome a mere rule of evidence, the general purpose of which is the same as that of the statute."

This is the law as set forth by Vice Chancellor Emery, and I do not find that it is changed. I believe that the acknowledgment of the arrangement in lieu of interest in the document of July 3, 1912, is equivalent to the payment of interest, and that the payment of interest up as late as 1912 controls this case, but I further believe that the words in the document of July 3, 1912, "Mortgages and note held by him," is sufficient acknowledgment of the indebtedness to come within the rule as stated by Vice Chancellor Emery.

Swinley vs. *Force,* 78 N. J. Eq. 52, cited by the defendants' solicitor is an interesting case, and is based on *Blue* vs. *Everett* and the law cited therein, but I do not see that it changes the law or helps us particularly in applying the law in the case at bar.

The following cases are commented on here to distinguish them from the case at bar:

Cox vs. *Brown,* 87 N. J. Eq. 462, is cited by Vice Chancellor Church in his opinion in confirmation of his point that the lack of action on the mortgages in suit for thirty-seven years constituted a presumption of payment which was unexplained, quoting Vice Chancellor Leaming:

> "The general rule is well settled in this state that he, who without adequate excuse delays asserting his rights until the proofs respecting the transaction 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."

It is, of course, contended that the allegation of the document of July 3rd, 1912, and the allegation in the bill that it is still in full force and effect fully explained the delay. That case was a partnership matter and did not refer to the foreclosure of mortgages. Of course, no exception is taken to the law, but it is alleged that it does not apply to our facts.

Wallace vs. *Coward,* 79 N. J. Eq. 243, is another opinion by Vice Chancellor Emery applying the principles of *Blue* vs. *Everett.* In this case the bill was thrown out because there was no allegation of any payment of interest or principal within twenty years of the filing of the bill, and no explanation or excuse for complainant's delay. The demurrer was allowed and complainant was given leave to amend the bill. In the case before us the bill alleges (paragraph 11) that the arrangement to take wood and grass and to pay the taxes in lieu of interest was and is still in full force and effect. In the case at bar we have not only the effect of the document of July 3, 1912, less than twenty years ago, but the allegation that interest had been paid to date by the complainants taking the grass and wood.

Olden vs. *Hubbard,* 34 N. J. Eq. 85. Complainants do not quarrel with the law in *Olden* vs. *Hubbard,* but insist that it does apply in the case at bar, nor in *Stimis* vs. *Stimis,* 54 N. J. Eq. 17, nor in *Magee* vs. *Bradley,* 54 N. J. Eq. 229, all of which are cited by the respondents.

Lutjen vs. *Lutjen,* 64 N. J. Eq. 773, does not interest us, because the other cases are explicit that in a foreclosure there will be no laches, provided the delay is not over twenty years, and the same is true, as to the effect on this case, of *Dunham* vs. *Adams,* 82 N. J. Eq. 265.

To sum up, it is respectfully urged that the document of July 3, 1912, satisfactorily and fully shows that the bonds and mortgages were in full force and

effect at that time, and that since twenty years have not elapsed since that time the complainants are entitled to have the bill stand, and that therefore

The decree dismissing the complaint should be reversed.

Respectfully submitted,

PHILIP GOODELL,
Solicitor for and of Counsel with
Complainant-Appellants.

Baker Printing Co., Law Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

Between
OTTO RAU AND JOSEPHINE RAU,
Complainant-Appellants.
and
JOB V. DOREMUS, *et al*,
Defendant-Appellees.

On Appeal from the Court of Chancery.

POINTS FOR DEFENDANT-APPELLEES

The Bill of Complaint as originally filed was without merit.

The defendants gave notice of motion to strike out the bill and for dismissal. Thereafter the complainants obtained consent of defendants to amend the bill and the memorandum of agreement recited by the complainants, dated July 3, 1912, was added with other paragraphs to plead the same in bar of the presumption of payment of the mortgages sought to be foreclosed. Motions to strike out portions of the amended bill and to dismiss the same were duly filed (see page 7, State of Case, and Reasons, page 8).

There were four motions directed to the Bill in behalf of the Defendants' contentions for striking out and dismissal.

The first motion goes to the initial lapse of time being over twenty years to wit, fifty years without principal or interest having been paid and also that the agreement set up is not sufficient to satisfactorily account for or excuse said delay as a bar to

the presumption of payment, being dubious in form and in sense, etc. For this part of the reasons, Blue *vs.* Everett and Swinley *vs.* Force, cited post, were used in support of defendants' contention. Whereas the second motion (paragraph 2, page 9, of Reasons in the State of Case) was urged on the grounds that should the first motion fail because of the agreement having been made within twenty years of the filing of the bill, that then it should be sustained because of the insufficiency of the agreement and because of a further delay of twelve years after it came into being without notice or payment under the equitable doctrine of laches without reasonable excuse to explain said delay at the late date of filing the bill.

Paragraph 3 disputes the right of Complainants to set up any specific charge that defendants were connected with the continuation of said agreement under the past tense of the agreement. The fourth motion is for relief and dismissal with costs.

Both counsel appeared to argue said motion in the Lower Court and submitted briefs on order of the Vice-Chancellor.

The motions have been referred to particularly, because Solicitor for Appellants seems to confine himself to the motion in the first paragraph of the Reasons and his entire thought is to forget the question of laches and insufficiency of his agreement as to form, or the delay in action for twelve years after its existence, which is asserted in the second paragraph of Reasons.

Complainants also dwell on the statement, that said "arrangement was continued and is still in full force and effect" referring to the taxes and hay in lieu of interest. That statement is improper in the bill and the third motion should succeed in

striking it from the bill. Nothing is stated that connects it with the equitable bar contemplated as against these defendants. By appearance of Counsel and filing briefs no mistake or surprise occurred.

The merits of the motions and reasons have been fully gone into and are set forth below.

Under them, these defendant respondents assert that the opinion and the decree signed by the Vice-Chancellor are well founded and should be affirmed. It appears to the defendants that the complainants' appeal is directed most pointedly to the jurisdiction and power of the Vice-Chancellor and the Chancellor to make an affirmative decree on a prayer for general relief, on a motion to strike out, in lieu of answer or cross bill.

Therefore defendants-respondents reply, first to the points in Appellants' brief on that issue and insist that there is no merit in his points, nor have the rules or references made in support of that theory been properly applied or even consistently interpreted to cover such an issue. Instead therefore, of marking time with the distinct paragraphs of Appellants' discussion, the defendants' solicitor reports his deductions and the results of his research in the following manner in justification of the right of the Vice-Chancellor or Chancellor to make the decree as entered in this cause.

In all the cases reported in our state or in the rules and under the issues raised in decisions in law and in equity, I find nothing by which it can be inferred that it is against the right of the Vice-Chancellor or the Chancellor to make such a decree as was entered in this particular case on such an issue.

If it is a fundamental issue not yet controverted as to the power and regularity of the Court of Equity to execute such a decree, then we must con-

sider the issue, as one within the power of the court under irregular form, but necessary to cope with the ever enlarging rights of its discretion.

The purpose to be accomplished by decree in equity, is to finally settle and determine rights of all persons interested in the subject matter, Beall *vs.* New York and New Jersey Water Co., 87 N. J. Eq. 390.

I have failed to find any decisions in the reports of this state which are directly in point and none against the manner or form of the entry of this decree.

In the many cases read, however, where there was a variance of jurisdiction or form, the underlying principle and theory to justify the variance from strict practice was to the effect that decrees and judgments and relief were granted wherever equity could be done consistent with the merits, rather than the errors or jurisdiction of the case in order to come to a final determination of the matter, where the technical fault would not bring a different result, but only prolong litigation.

Not daring to cite the cases which bear out the principle, because they are not directly in point, I feel justified to quote these principles (which are founded on citations gathered) in Corpus Juris, Vol. 21, pages 660-662, Section 845. Under the topic "Relief in General." While certain equitable remedies are called for with sufficient frequency to create definite rules for framing the decrees in such cases, and equitable relief may be affected or circumscribed by the nature of the subject matter of the suit, and while in the remedial exercise of its power a court of equity proceeds with a discretion which is controlled by legal principles, as distinguished from arbitrary or capricious power, its power to grant relief is not circumscribed by any

fast or technical rule, and the court has a broad discretion in framing its decrees in order to adapt the relief to the circumstances of particular cases. It will adjust the relief in such a way as to afford fair protection to the rights of all parties, and may grant any relief within the issues made by the pleadings. The primary object of a decree in equity is to reach the ends of justice. Equity procedure is usually elastic enough to accomplish this result, and the court shapes its decrees accordingly. The court should go only so far as is just and equitable, and is never justified in rendering an inequitable decree. The power is conferred and the duty is imposed upon a court of equity, which has acquired jurisdiction, to consider and determine all the rights and claims of the parties relating to the subject matter, and to enter a decree that will finally determine them, to the end that a multiplicity of suits may be avoided and litigation may cease. The decree should be framed to this end. The final decree should dispose of all the issues, including those raised by a cross bill, and should grant to defendant whatever relief may be necessary to render that granted to plaintiff equitable and just.

I beg leave to refer to decisions of our sister states to bear out the favor of this view as in the case Bauer *vs.* Hill, 267 Pa., page 559, 110 Atl., 346, On appeal from order discharging rule to open a confessed judgment where the case depends on legal questions, and deductions from undisputed facts, the court will review the case on the merits, rather than determine whether the Chancellor has properly exercised his discretion.

Also On appeal from chancellor's order refusing to open consent judgment, the case will be reviewed on its merits by appellate court rather than merely to ascertain whether chancellor properly

exercised discretion. State Camp of Penn. of Patriotic Order, Sons of America *vs.* Kelley, 267 Pa., page 49, 110 Atl., page 339.

A decree will not be reversed for technical errors, when justice has been done and enforcement of technical rules on another trial will not result in a different decree. Cooley *vs.* Houston, 247 Pa. 590, 93 Atl., 624.

Finally, the following case within our state: "Where an order refusing to open decree was not abuse of discretion, it will not be reviewed by Court of Errors and Appeals." "This Court will not review such order for the mere purpose of substituting its discretion for that of the Court of Chancery." Williams *vs.* Lowe, 79 N. J. Eq., 173.

Solicitor for Appellants suggests that if the issue were presented on answer or cross bill, the court would undoubtedly have the jurisdiction and power to make a decree such as has been rendered, therefore nothing would be gained by proceeding to proof (inasmuch as his case is admitted as pleaded) and the practice demands that a motion to strike out is the only proper course. Blue *vs.* Everett, 56 N. J. Eq., 455; Swinely *vs.* Force, 78 N. J. Eq., 52.

Solicitor for Appellants stresses the technical issue that no affirmative relief was prayed for by way of Answer or Cross Bill.

He admits the fact that ("such relief be given the defendants as may be equitable and just in the premises"), is set up in the Reasons on Motions to strike out filed by the defendants. (See page 10, paragraph 4, state of case.) Defendant respondents contend that this manner of praying for relief in the reasons is by analogy in the same nature as if made in an answer or cross bill; also that it is the only way in which equity could be done, consistent

with the practice of pleading. This is so because the opportunity to file an answer or a cross bill is barred under the rule which gives the motion to strike out the first place in the procedure; and rightly so, as we see perhaps for the first time in this case, to speedily come to the merits of a cause for immediate relief. Whereas, a final hearing or further proof would not make it possible for a complaining party to obtain any other result, yet no rights are lost and no injury is done.

"He who seeks equity must do equity."

Referring to the complaint of the solicitor for appellants, that his remedy to proceed further with his foreclosure of these ancient mortgages is lost, I ask, has he not placed himself in the hands of equity; has he not already amended his bill to the utmost of his only saving point, viz.: the memorandum which he says bars the presumption of payment; has he not had his day in court; a court where he seeks the wide latitude of equitable relief and has he been denied any proof (admission of the facts) pleaded in his bill or the value of his memorandum of agreement, as proof in bar of the defense. The defendant respondents have done equity in answering the bill by appearance and by submitting themselves under the rules of this court to its judgment in the only way available for that purpose.

In the motions to strike out under a prayer for general relief, affirmative relief can be safely granted to Defendant Respondents on a successful motion to dismiss the bill, when the facts on the face of the bill are undisputed and would preclude any other relief than that favorable to the Defendants, if within the discretion of the Court, equity can be done for both parties; provided all the parties Complainant and Defendant, in

anywise interested in the issues presented by the bill, are within the jurisdiction of the Court, have pleaded and are at issue.

The Court of Chancery is a high court of general jurisdiction over the subject-matters which fall within its cognizance. Like the common-law courts of general jurisdiction, its final judgments, namely its decrees do not, to be valid, have to show upon their face that all jurisdictional requirements have been complied with, as is the case with inferior tribunals of circumscribed and limited jurisdiction. Bull *vs.* International Power Co., 85 N. J. Eq., 209.

The Court of Chancery will make a precedent to fit a case, novel in incident, which comes within some head of equity jurisprudence.

Palmer *vs.* Palmer, 84 N. J. Eq., 550.

In the following case a decree went beyond the requests of the bill of complainant.

Where the bill alleged the insolvency of a corporation and prayed the appointment of a receiver, or decree adjudging the corporation to be insolvent, appointing a receiver, and enjoining the exercise of its franchise, is a final decree. Karst *vs.* Black Diamond Range Co., 82 N. J. Eq., 231.

The following case is at variance with equity jurisdiction. Where an information by the attorney-general in behalf of the state is filed in connection with a bill by a city to declare void a grant by the riparian commissioners and for other relief, separate decrees on the information and bill may be rendered. Attorney General etal v Central R. Co of N.J. etal

68 N. J. Eq., 198, affirmed 70 N. J. Eq., 797.

The defendant respondents desire that the decree as filed stand confirmed, but if that part of the decree which orders the mortgages cancelled is found improper, that then the order relating to the

dismissal of the bill of complaint and for the payment of counsel fee and taxed costs stand, and the decree be reformed to that extent only, and in favor of said defendants.

The Defendant-Appellees as to the merits of the issue claim that the agreement set up in bar is dubious, indeterminate and unexplained, and the presumption of payment of said mortgages is conclusive.

Following is the agreement:

> "Montclair, N. J., July 3, 1912.
>
> This is to certify that the wood and hay cut from the 'Lord North' Lot in the 'Big Piece' by Warren Doremus for interest on mortgages and note held by him, and for taxes on said lot, was with my knowledge and consent, and that I am satisfied.
>
> Henry V. Doremus."

The defendants charge that this agreement is too late in the making and of no effectual purport to bring the case within the decisions in this court and therefore presents the issue of the First Motion. (See reasons set forth for the first motion page 8, par. 1, State of Case.)

In substance this motion is directed at the lapse of time, to wit, thirty-seven years, before any attempt was made to collect; that in fact the complainant does not allege interest was collected for those years or any part thereof and even now does not claim interest in the mortgages in his bill as amended; that therefore the statute of limitations, as applied in this court by analogy (see Swinley *vs.* Force, Post), in such cases applies to this suit, and the presumption of payment is conclusive. This is so because the agreement mentioned, is dubious and unexplained and uncertain, as is said in the case of

Cox *vs.* Brown, 87 N. J. Eq., page 462—"the agreement is indeterminate and obscure and impossible for the court to see whether what is asserted to be justice to the complainant is not injustice to his adversary and so he has no right to relief," affirmed in 45 N. J. Eq., page 265.

While the memorandum set up in the bill as amended is an attempt to assert an agreement to pay the interest on the mortgages it also refers to a note, and immediately raises other issues and surely is confusion, yet it does not even state in its very sense that the obligation is assumed nor can it be interpreted as an agreement, to pay, or in payment of, the original obligation or particularly these obligations; for in fact the mortgagor made many other mortgages and notes during the same years, to none of which this agreement will permit of a specific reference or accounting of the amount he has assumed, or if he does assume it—it reads—"and I am satisfied"—does that mean he pays on account of these obligations or that he is pleased with or releases the mortgagee from his obligations to account for money due the mortgagor, or for the unauthorized trespass and trover and conversion of the mortgagee on the mortgagor's land, which last thought, in truth is more like the reason for its coming into being at all, than that the mortgagor would after thirty-seven years of freedom from this uncertain obligation foolishly renew it and still be out of pocket for an unaccountable amount of revenue, which he must have failed to receive from the mortgagee on his own admission. Can equity then be done if this doubt and conflict of fact be raised?

The instrument comes within the term "dubious" and 'insufficient" as is the carefully laid down test in cases to renew a debt barred by the lapse of time. Neither is there any explanation of the effect of the

agreement or to what period such delay is excused. The agreement was made on July 3, 1912 and the amended bill of complaint in this cause was filed October 30, 1926, another lapse of 14 years, without any credit toward payment, or further explanation of the delay in collecting either principal or interest. It does not even claim interest for that period. It does not appear at all inequitable to say that during the first 20 years of the existence of the mortgages that payment thereof was conclusively presumed and the question was at an end.

This agreement being indefinite it is also insufficient as an explanation of the delay, in order to bar the presumption of payment; it is also ineffective by the further delay in that there was a lapse of 14 years time after it came into being, before the defendants were called upon to make payment, and that only by the filing of the bill in this cause, see Swinley *vs.* Force, 78 N. J. Eq., pages 52, where six years further delay was fatal on the like question and in support of this motion.

The agreement was two years old when the complainant says he took the assignment of the mortgages (see the assignments set up in the bill of complaint, October 1, 1914), but the agreement is not even assigned to him and further was not obtained from the original parties holding the mortgages, but from third parties who had no paper title, and who had not collected anything on the mortgages or given notice to the defendants, nor had the complainant any available proof behind this agreement that it was still in force or assignable without notice, the bill is silent as to these facts and of what avail would such allegations be to out-explain the circumstances open to question on the agreement itself? Therefore also, the agreement cannot bar these defendants or the original rights of said mortgagor

in the presumption of payment being conclusive at this late date.

This thought is in line with cases which judge such facts inexcusable laches, and make the loss fall on the party who first could have made such an agreement an issue of proof, instead of one of doubt. The points and facts of this argument are well sustained by the following dicta:

Where on the face of the Bill of Complaint the right of action is barred by the statute of limitations, demurrer will lie. Wallace *vs.* Coward, 79 N. J. Eq., page 243; Olden *vs.* Hubbard, 34 N. J. Eq. page 85. Also, the presumption of payment arising from a lapse of 20 years, will be sustained in the absence of allegations stated sufficiently to release the bill from the operation of the statute, by demand, payment of either principal or interest or entry by the mortgagee. Stimis *vs.* Stimis, 54 N. J. Eq., page 17, decided in 1895, and so in the leading and recent case which defines and enlarges on these features. I refer to the case of Swinley *vs.* Force, 78 N. J. Eq., page 52, where V. C. Stevenson quotes V. C. Emery in the case of (Blue *vs.* Everett, 55 N. J. Eq., 329):

"Our decisions at law as well as at Equity, establish the rule, that unless the delay for twenty years is satisfactorily accounted for or explained, the presumption of payment of a Bond and Mortgage or other pecuniary debt is conclusive and cannot be rebutted simply by proof in fact of non-payment without accounting for the delay." Then V.-C. Stevenson says further, "It must be observed that the legal and equitable principle formulated by V.-C. Emery, as a result of our decisions, recognizes the function of this presumption of payment from lapse of time to give repose in analogy with the established function of the statute of limitations."

This view is also supported by Vice-Chancellor Reed, in the case of Magee *vs.* Bradley, 54 N. J. Eq., page 329, "That the principle in question is both a rule of evidence and a rule of public policy." Speaking further in making his conculsions, he says, in part—"admitting every allegation to be true as it must be read in the light of the rules which govern the interpretation of a bill of complaint upon demurrer, my conclusion is, that the facts set forth do not sufficiently account for the long delay and do not exhibit an unequivocal acknowledgment of the debt according to one formulation of the rule to be applied, and do not rebut the resumption of payment according to the other formulation of that rule. In either case, it must be held that the presumption of payment stands." Again as to the adverse possession theory: V.-C. Stevenson in the case of Swinley *vs.* Force, supra, says: "In the thousands of instances in New Jersey where overdue mortgages are held as permanent investments, it is safe to say that the mortgagors and the mortgagees are alike unconscious of any element of hostility in the possession of the mortgagor. Dropping all theory and all fiction, the plain fact is, that the mortgagor is in possession upon the distinct understanding and agreement that he shall remain in possession with the consent of the mortgagee until the loan is called."

The defendants respectfully request that the Bill of Complaint be dismissed for the facts set up in the above argument on the first motion in the reasons to strike out.

Second Motion Argued

As to the Second Motion, the argument is directed on the same principle as in the previous motion, with the special point that if the agreement set up as a bar, were sufficient originally, it fails at this late date, by reason of the second period of unexplained delay for 14 more years under the doctrine of laches.

(See Reasons for this motion, page 9, par. 2, State of Case.)

This motion should be granted in being fully supported by the case of Swinley *vs.* Force, supra, 78 N. J. Eq., 52, where V.-C. Stevenson says at paragraph 6. "Assuming, however, that the view is tenable in this case, that it does not appear from the allegations of the bill, that the presumption of payment stands established, it would seem that the complainant might be barred of equitable relief under the doctrine of laches. The defendant knew when he took an assignment of this mortgage in 1902 that his security occupied a very peculiar position, such as to call for prompt action on his part against all parties against whom he proposed to enforce it, no interest had been paid for twenty-two years,"—"there seems to be force in the argument that the complainant, when accepting a mortgage under these circumstances, was bound to be prompt in enforcing all the rights he thereby undertook to acquire against these two owners who were ignorant of these alleged rights. Complainant made no effort to enforce his mortgage against these owners for over six years, while during that period one of them died and one of the executors of—died." Citing the case of Lutjen *vs.* Lutjen, 64 N. J. Eq., page 773, continues, "The efficacy of the defense based on laches does not depend upon proof that the lapse of time has resulted in the actual loss

of testimony through death or otherwise; it is generally sufficient" that "the court cannot feel confident of its ability to ascertain the truth now as well as it could when the subject for investigation was recent."

"In this case, however, it seems clear from the allegations of the bill that most important testimony has been lost, while the complainant has been holding his mortgage in concealment and taking no steps to enforce it."—"will the equitable doctrine of estoppel and laches allow complainant to slumber on his rights and wait fourteen years until the owners of the mortgaged premises and their witnesses are dead, and then have his equitable remedy of foreclosure against their estates, by proving facts and circumstances concerning which the deceased owners and their witnesses might have testified, if the foreclosure suit had been brought while they were alive."

See also Dunham *vs.* Adams, 82 N. J. Eq., 265—(1913) citing nine other cases to support this view. "It is sufficient to say that the delay in instituting the suit on one claim for upwards of sixteen years after it became due, which period exceeds the time allowed by statute by eight years, constituted such inexcusable laches that equity should not aid the plaintiff."

He who without adequate excuse delays asserting his rights until definite proof thereof is not obtainable, waives his right to relief. Soper *vs.* Cisco, 85 N. J. Eq., 165.

So in the case at bar, the mortgagee, Warren Doremus, and the mortgagor, Henry Doremus, were dead two years when the complainants, on October 1, 1914, took the assignment of the mortgages in the Bill of Complaint in this cause set forth. The agreement set up in bar was never recorded, neither

has it an assignment or endorsement written thereon; in fact its existence or transfer is vaguely connected with the mortgages as well as the holders right thereto. Is this equitable or constructive notice to the defendants? The instrument itself is merely a small piece of ruled note paper, written in long hand, by a person not a party to the mortgages and subscribed to only by the mortgagee, Henry Doremus, in a very illegible shaky hand, done presumably when this aged person was weak in mind and body and near his death, when it would be most easy to procure his signature to any instrument for the sake of peace and contentment. In fact the text sounds more in release than in contract; no witness or other formality appears to have been available or of value to this most casual document, which one day might be needed to commit the heirs of this aged obligor to the payment of money. The defendants, until shortly before the Bill was filed never heard a breath of this important affair and found no evidence of the debt of these mortgages among the papers of decedent, naturally enough, yet they have lived in the same premises where the ancestor died, to wit, Montclair, N. J., until the present writing and within easy access of the complainant.

Under what circumstances, then, was this agreement procured which all of a sudden becomes a vital part of the complainant's case, although obtained with such simple and indifferent informality fourteen years ago to secure a secret protection for money that one day would be a surprise to some one! Can it be called evidence in equity; where is the privilege of cross examination; how can the defendants recognize any of its value at this late date? The instrument itself raises only doubt and no witnesses can be called to deny its purport or

prove its worthlessness as a genuine promise of the payment of these mortgages or any part thereof. The best evidence is the instrument itself. Does that make a clear reference to the payment of money or even a sum specific, so as to leave no doubt of the amount claimed or the balance due after the credits mentioned as "Wood and Hay" have been analyzed? Is "Wood and Hay" a definite determinable credit? Is the "note" mentioned as one of the obligations, still to be brought into the issue, or was it thereby paid or already barred? Or, which of the three instruments is divisable one from the other? If these premises are not sufficient to confuse the issue, then what number of other conundrums shall be advanced to analyze this promise to the point of a contract to pay money. Is there a promise in the contract sufficient to meet the test of equity so that it may not err in its conclusions?

Surely all these issues exist on the face of the agreement, and if equity cannot be done, he who suffered such a condition to arise (the complainants in this case) cannot have relief in this court or any other court on such a remedy.

Considering the facts presented on the face of the Bill of Complaint, he not only understood the weakness of this instrument but purchased the mortgages depending upon it, and then conceals it for twelve years, and gives no notice to the defendants that he has such an instrument, or the mortgages; he bought the mortgages October 1, 1914, and filed his Bill of Complaint without further explanation or notice October 30, 1926. There is no other explanation in the bill for this delay than the memorandum set up as a bar, nor could he allege any excuse or explanation to satisfy the rule by proof of what he may have done, to consider it alive of his own initiative on the

strength of the agreement, unless such excuse would be connected with notice before hand of the fact of a promise that was good and notice to the defendants that the promise was alive.

The promise or credit for "Wood and Hay" is not a continuing promise, and does not go to a future promise or a payment in lieu of interest, but in fact is only a past consideration for the making of a then present, indefinite statement of fact. Therefore it cannot, in anywise, be construed or considered a promise to pay these mortgages nor a license to assume that entry on the land for the like purpose existed and as a result, that the defendants, thereby had notice and the mortgagee or his assignee, has possession as a bar to the claim of the defendants as owners.

The Defendants respectfully request that the paragraphs referred to in this second motion be stricken out and the bill dismissed by reason of the rules and facts above submitted in support of said motion.

Third motion as per reasons (see page 10, State of Case).

This motion prevails with the consideration of the two previous motions as the same is so connected with the facts presented that it stands or falls with the decision on the above motion.

Fourth motion is for relief and costs upon dismissal of the Bill of Complaint on the above motions.

The decree rendered and in the form granted should be affirmed.

Respectfully submitted,

PAUL M. FISCHER,

Solicitor for and of Counsel
with ~~Complainant-Appellants.~~
Defendants appellees