NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN

ADAM MASIONIS,
Complainant-Respondent,

and

JENNIE ROMEL, *et al.*,
Defendants-Appellants.

ON APPEAL
ON BILL &c.

BRIEF OF COMPLAINANT-RESPONDENT.

A bill was filed in Chancery Court to foreclose a mortgage. Adam Masionis, Complainant.

Preliminary Statement.

Defendants appeal from the third order entered of rule to show cause, made by the Chancellor on advice of Vice-Chancellor Church dated November 9, 1926, denying motion to re-open.

Statement of Facts.

The bill of complaint was filed here in February, 1926, to foreclose a mortgage made by the defendants to the assignor of the complaint in the sum of two-thousand ($2,000) dollars, which mortgage was at the time of filing of the bill in default, the due date being then past due.

Pursuant to the order of reference in this case the matter was referred to Lionel P. Kristeller, one of the Masters of the Court of Chancery, to ascertain and report the amount due upon the Bond and Mortgage and at the hearing before the Master the defendants were both present and represented by their then solicitor of record, THEODORE J. HARRINGTON.

Testimony was taken before the Master and the defendants had paid Five Hundred Dollars ($500.00) on account of the principal. Upon this disputed question of fact the Master reported as follows:

> "The defendant is claimed to have made a payment of five hundred dollars on account of the principal of the said mortgage which said alleged payment was testified to by the defendant JENNIE ROMEL, and was sought to be corroborated by a written receipt marked Exhibit D-1 and offered in evidence. The alleged payment account of the principal was denied by Anton Czuzas, and his signature to Exhibit D-1 was likewise denied by him.
>
> I find that defendants have failed to sustain the burden of proof as to the payment of five hundred dollars on account of the principal of the said mortgage the burden of proving the payment being upon the defendants."

Exceptions were filed to the report on August 10, 1926, notice was served on the solicitor of the defendants fixing August 17, 1926, at Trenton, before the Chancellor, as the time and place for the argument on the exceptions filed by the defendants.

Complainant's solicitor appeared on that date before the Chancellor, but neither the defendants

nor their solicitor appeared. The exceptions were dismissed, a final decree was entered and the Fi. Fa. with the Sheriff of Union County and the sale was advertised to be held in the Union County Court House on October 6, 1926. During the time between the delivery of the Fi. Fa. to the Sheriff of Union County and the date fixed for the sale, the solicitor of the defendants on August 26, 1926 served upon complainant's solicitor a notice of application returnable before the Chancellor at Trenton on August 31, 1926, for an order to take additional testimony before the Master ~~and served upon the complainant's solicitor of~~ the ~~statement~~ denied the application to take additional testimony.

Chancellor

On September 27, 1926, about a month later, a solicitor by the name of William R. Wilson who was not the solicitor on record for the defendants, appeared before honorable Vice-Chancellor Church, at Newark and on additional affidavits of JENNIE ROMEL and CHARLES WALINSKI to which they added in affidavit of ADOLF ROMEL, applied for and obtained a rule to show cause why additional testimony should not be had before the Master on the question of the payment of the Five Hundred Dollars ($500.00) above referred to, which order was returnable October 13, 1926 and in that order to show cause the Sheriff was stayed from proceeding with the sale on October 6, 1926.

Complainant's solicitor called the attention of the honorable Vice-Chancellor Church to the similarity of the application made to him and the one already made by the Chancellor and called his attention to the order of the Chancellor denying the application. Whereupon Honorable Vice-Chancellor Church forthwith vacated the rule to show cause.

On the day fixed for the sale, October 6, 1926, William R. Wilson, again appeared before the Chancellor in the morning and obtained from the Chancellor an order again staying the sale of the Sheriff upon the final decree entered in this case, and that order directed the complainant to show cause at Newark, on October 19, 1926, why the final decree should not be set aside and for the purpose of permitting the defendants to interpose every defense with regard to the payment of the Five Hundred Dollars ($500.00) on account of the principal of the mortgage in question. In that same order the following paragraph is at the end thereof:

> "And it is further ordered that this matter be referred to the Honorable Alonzo Church to hear the same for the Chancellor and report thereon to him and advise what order or decree should be made therein".

Complainant's solicitor appeared before Vice-Chancellor Church on October 19, 1926, and the matter was argued at length. The Vice-Chancellor then took the papers and filed a written opinion, which is printed in the New Jersey Advanced Reports, Vol. 4, #47, November 20, 1926, at page 1921. The Vice-Chancellor in this opinion said:

> "The defendants have had their day in court and they failed to convince the Master as to the authenticity of the so-called receipt.
>
> "The evidence, as I have said, does not convince me either. Any further evidence now produced after the proceedings have been practically completed in this case would I think be open to grave suspicion."

The sale has been from time to time adjourned because of the various applications made by the

defendants as above set forth and after filing a notice of appeal in this matter defendants' solicitor obtained a stay from Honorable Vice-Chancellor Buchanan, which stay was continued by the Chancellor until the hearing of the application before this court.

The Honorable Court's attention is directed to the petition, and affidavits filed by the defendants should convince this court that there is no merit to the defendants' application. The complainant's solicitor deemed it unnecessary to file answering affidavits to the same.

It was so apparent that the learned Vice-Chancellor, Alonzo Church, in his opinion (Page 27):

> "I have read the testimony taken and I agree with the Master. A paper purporting to be a receipt signed by Anton Cznzas was produced, which the defendant insists was signed by him. She called her husband to corroborate her, which he failed to do. Cznzas denies that the receipt is signed by him. Indeed, taking the testimony as a whole, there is a question as to whether this receipt was not manufactured after the foreclosure proceedings were begun. The additional affidavits filed are entirely too vague to be of any value".

In the following cases it was held:—

Williams v. *Lowe,* 79 N. J. Eq. 173.

Whether or not a final decree shall be opened is discretionary in the Court of Chancery and where an order refusing to a decree was neither an abuse of such discretion nor the result of mistake or of any imposition practiced on the Court, this court will not review such order for the mere purpose of substituting its discretion for that of the Court of Chancery.

Sanford v. *Wellborn,* 85 N. J. Eq. 577.

The opening of a decree of Chancery entered by default rests in the discretion of the Chancellor and a refusal to open such decree will not be reviewed by this Court where there is no abuse of such discretion shown, and is not result of mistake or imposition practiced on Court of Chancery.

Mullock vs. *Mullock,* 28 N. J. Eq. 15.

There is no universal and absolute rule which prohibits the court from allowing the introducing of newly discovered evidence of witnesses as to facts in issue in the cause after publication and knowledge of the former testimony and after hearing. But the allowance of it is not a matter of right in the party but of sound discretion in the court to be exercised sparingly and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause.

Townsend vs. *Smith,* 12 N. J. Eq. 350.

In case a defendant does not appear at the hearing before the Chancellor, the cause having been regularly noticed for argument, he cannot appeal from the decree they rendered in his absence.

Kirschbaum & Kirschbaum, 92 N. J. Eq. 7.

An application for a rehearing in Chancery is governed by the same principles applicable to motions for a new trial after verdict in cases at law. In order to justify a rehearing in an equity case for newly discovered evidence, the new matter must be of such character that if it had been heard on the trial it would probably have changed the

result and produced an opposite one; and it must be shown that the testimony sought to be introduced is newly discovered evidence, not accessible to the petitioner, but the exercise of due diligence, at the time of the hearing.

It is, therefore, respectfully submitted, that the decree of the Court of Chancery, as advised by his Honor, Alonzo Church, one of the Vice-Chancellors thereof, should be affirmed with costs.

Respectfully submitted,

Richard H. Cashion

RICHARD H. CASHION, Counsel with Complainant-Respondent and GEORGE MATULEWICH, Solicitor of Complainant-Respondent.

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NEW JERSEY COURT OF ERRORS AND APPEALS

Between

ADAM MASIONIS,
Complainant-Respondent,

and

JENNIE ROMEL, et al,
Defendant-Appellant.

On Appeal.
On Bill etc.

BRIEF OF DEFENDANTS

This is an appeal from an order dated November 9, 1926, made by the Chancellor on the advice of Vice Chancellor Church, discharging a rule to show cause made by the Chancellor on October 6, 1926.

The facts briefly are these; On March 1, 1924, the defendants made and executed a bond and mortgage to one Anton Czuzas of Elizabeth, New Jersey, to secure the payment of $2000. on lands in Elizabeth on or before March 1, 1925; said mortgage to draw interest from January 1, 1924, and which mortgage was extended to January 1, 1926.

In the early part of June 1925, the mortgagee Czuzas, demanded of the Romels that $500 be paid on account of the principal of the mortgage, which amount was paid to said Czuzas in his saloon in Elizabeth on June 27, 1925, together with $60 interest due on July following, in all $560, by Jennie Romel, one of the defendants, for which a receipt was given as set out in the State of the Case.

A bill to foreclose was filed in the cause on Febru-

ary 13, 1926, by the complainant to whom the mortgage was assigned, in which the complainant set out that the sum of $2000 was due and owing. An answer was filed by Mr. Harrington then Solicitor of defendants at that time, setting up the payment of $560 and later on an order of reference was made to settle the amount due and the then Solicitor of the defendants appeared before the Master and presented the side of the defendants, and introduced the receipt set forth in the answer, which was disallowed by the Master.

After the filing of the Master's report, exceptions were taken by the then defendants' Solicitor, Mr. Harrington, to the same. Later on the complainant's Solicitor, Mr. Harrington, gave notice to have the exceptions heard and disposed of, and the then Solicitor of defendants failed to appear, and an order was made dismissing the exceptions and confirming the report. A final decree was made, dated August 17, 1926, and on August 31, 1926 a fieri facias was issued out of the Court of Chancery directed to the Sheriff of Union County, directing the sale of the property and the property was advertised for sale for October 6, 1926.

That on or about September 27, 1926, the defendants applied to William R. Wilson an officer of this Court and a petition was filed, setting out the facts of the case, and a Rule to show Cause was made by his Honor the Chancellor to undo the error of the Master dated October 6th, 1926, and returnable October 19, 1926 to be heard by Vice Chancellor Church at Chancery Chambers, in Newark, New Jersey on November 9, 1926, on petition and affidavits. No answering affidavits were filed by the complainants.

The rule to show cause dated of October 6th, 1926, granted by his Honor the Chancellor, was in the nature of an application to open the final decree

and enter a proper defense to said action, but the said rule was discharged November 9, 1926 by Vice Chancellor Church.

Attached to the petition filed in the Court of Chancery, are the affidavits as to the payment in the saloon of Czuzas on the 27th day of June 1925 and the affidavits of others, which evidence if then known and introduced would have materially changed the result.

It was after effort that the above evidence was found. The defendants now feel that the decree should be opened for the purpose of admitting this evidence. A reading of the petition and affidavits should convince this Court, that there is merit in the application.

The charge is made in the papers filed on behalf of the defendants that Czuzas, the mortgagee, sold the mortgage after the payment of $500 on the principal to the complainant for $1600 and that later he was compelled to hand over $200 more to the complainant. Why did Czuzas do this, if the amount of $2000 was due at the time of the assign ment to the complainant? Another matter which should appeal to this Court is this, that while a petition and affidavits have been introduced and filed, alleging these facts, the complainant doesn't deny it, as no Counter affidavits were filed by the complainant denying the statements made in the affidavits filed by the defendants.

It is felt on the part of the defendants that there is so much merit in their application at this time, that they should have an opportunity to present their side of the case. It is evident from an examination of the affidavits filed, that a great injustice has been done, to the defendants, and there should be some remedy afforded them.

In the law Courts a remedy has been provided,

for mistakes of the character set out in the pleadings filed in this case.

THE LAW

The Court will always correct an Attorney's mistake where party suffers injury.

An act of the legislature was passed in 1895 at page 712 to the following effect:—

> "That where any action or suit at law has heretofore been commenced, or shall hereafter be commenced, in any court of law of this State; under or by virtue of any statute or at common law, and said action or suit has been or shall hereafter be dismissed, abated, nonsuited or a judgment shall have been or shall be entered against the defendant or defendants, therein, by reason of the failure of the attorney or attorneys in such action or suit to file any pleading within the time limited by law, or by reason of the filing by such attorney or attorneys of an insufficient or improper pleading, it shall be the duty of said court or of any judge thereof to revise and reinstate said action or suit or to open said judgment and permit a proper and sufficient pleading to be filed upon such terms as may seem to said Court or judge to be equitable and just, if in the opinion of said court or judge, the failure to file said pleading, or the filing of said insufficient or improper pleading, was due to the neglect, fault, error or mistake of said attorney or attorneys, and injury or wrong has or may result to the defendant or defendants, by reason of such neglect, fault, error or mistake, provided however, that no action or suit which has been

> or shall be dismissed, abated, non-suited, or in which a judgment shall have been or shall be entered against the defendant or defendants therein, for the reasons above stated, shall be revised, reinstated, or opened, unless application for that purpose be made within one year from the date of such dismissal, abatement, nonsuit or judgment."

Also found in General Statutes, p. 2596 section 364.

The above act, amended acts of 1893 and 1894.

The defendants are asking the benefit of that act in the case before this Court. The one year set out in the act will not expire until August, 1927.

The first case under the above statute was a suit at law, *Lenz vs. Rowe,* 37 *Vroom,* 131, decided in February 1901, where the Court held as follows:—

> "When from neglect, fault, error or mistake, the attorney of a defendant has failed to file a plea, and by reason thereof judgment by default has been entered against his client and injury or wrong has resulted to him therefrom, the judgment will be opened."

By analogy the same rule should apply in a court of equity, and the above act of the Legislature should be as effective in equity as in law.

In case of mistake equity will afford relief.

Smith vs. Allen, 1 *N. J. Equity* (*Saxton*) 43.

So also in *Hendrickson v. Ivins,* 1 *N. J. Eq.* pg. 568, it was held as follows:—

> "Court of Equity now go on the broad principle, that where a mistake is manifest, they

will in the exercise if their ordinary jurisdiction correct it and hold the party accordingly to his original intention."

See cases cited.

II

The Court will always grant relief where it appears that injustice has been done.

In the case of *Jessup vs. Cook*, 6. *N. J. Law*, p. 434, the Court said:—

> "Newly discovered evidence must be important and such as to induce belief that injustice has been done."

See also *Mechanics Fire Ins. Co. vs. Nichols*, 16 *N. J. L. Law* 410.

Hayes vs. U. S. Photo Co. 65 *N. J. Eq.* 5.

So also in *Hoban vs. Sanford etc.* 60 *N. J. Law*, 426, the court announced the principle of law as follows:—

> "On a rule to show cause why a new verdict should not be set aside, and a new trial had, on the ground of newly discovered evidence must be of such a character, that it would probably change the result."

So also if a party applies for a new trial on the ground of newly discovered evidence, it ought to respect a new point, a matter which *has come to light since the trial, in which the party has never been heard,* such as a discovery of release or receipt for part payment, or some new ground of evidence.

Den. vs. Wintermute, 13 *N. J. Law* at pg. 182.

III

Application will be granted where testimony is material and goes to the merit of the case.

Where on an application for a new trial on the ground of newly discovered evidence,

> "It satisfactorily appears, that testimony has in fact been discovered since the former trial, which by the use of reasonable diligence could not then have been obtained, and that such testimony is material to the issue, goes to merit of the case, and is not cumulative, the application will be granted."
>
> *Dundee Mfg. Co. vs. Van Riper,* 33 *N. J. Law* 152.
> *Young vs. McPherson.* 3 *N. J. Law,* 895.

If newly discovered evidence is of a kind and character different from that adduced at the trial, it will not be liable to the objection that it is cumulative.

The rule admits of exception, when the newly discovered evidence, although cumulative, will render plain and certain what was before doubtful.

> *Mulock vs. Mulock,* 28 *N. J. Equity* 15.

The court may in its sound discretion, grant a new trial whereby reason of mistake or surprise at the trial, it can see that justice has not been done by the verdict.

> *Hutchinson vs. Coleman,* 10 *N. J. Law* 74.
> *Moore vs. Railroad Co.* 24 *N. J. Law* 268, 277.
> *Searles vs. Elizabeth etc.* 70 *N. J. Law* 388, 393.

See also case of *Hannon vs. Maxwell,* 31 *N. J. Equity* at page 331, where the Court held:—

> "That the bill must show that proper diligence was used in the preparation for the first trial, and that the exercise of such diligence failed to discover the testimony, or that, from the charater of the testimony, or the manner of its subsequent discovery, no proper degree of care would have brought it to light, in time for the original trial."

In *Hayes and Otto Executors etc., vs. U. S. Phonograph Company* 65 *N. J. Equity* 5, it was held:—

> "That the party must show not only the relevancy or materiality of such evidence, but also show that proper diligence had been used in the preparation for such trial, or that no diligence would have discovered such evidence."

The whole tenor of the decisions indicate that where injustice has been done, or full justice not done, relief will be granted so that the evidence desired may be introduced.

On the pleadings before this Court and the law governing the same, the defendants should be granted the relief prayed for.

Respectfully

WILLIAM R. WILSON,

Solicitor for and of Counsel with
Defendants-Appellants.

See also case of *Hankin* vs. *Maxwell*, 31 *N. J. Equity* at page 231, where the Court held:—

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