No. 10

March T. 1896

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NEW JERSEY

Court of Errors and Appeals.

Between
THE PRINCETON SAVINGS BANK,
Appellant,
and
ALFRED W. MARTIN,
Respondent.

On Appeal from Final Decree.

POINTS BY W. M. LANNING FOR THE RESPONDENT.

I. Allegations of the Bill.

The bill of complaint in this cause sets forth that, on or about April 1st, 1867, Augustus L. Martin and the defendant, Alfred W. Martin, became indebted unto one Augustus S. Case in the sum of $1,800, and on that day executed their bond to Case for that sum, conditioned to pay the same, with interest, on or before April 1st, 1868; that they also gave to Case their mortgage of the same date to secure the bond, covering certain lands in Princeton township; that the mortgage was properly acknowledged and recorded; that on April 1st, 1868, Augustus L. Martin and wife quit-claimed their interest in the mortgaged premises to the defendant, Alfred W. Martin; that on March 24th, 1869, the defendant, Alfred W. Martin, conveyed the mortgaged premises to The Princeton Lumber and Improvement Company; that on March 25th, 1879, The Princeton Lumber and Improvement Company conveyed the premises to John

W. Fielder, Junior; that on September 27th, 1891, John W. Fielder, Junior, and wife conveyed the premises to Charles S. Bradfield; that on April 1st, 1869, Augustus S. Case assigned the bond and mortgage to William H. Vandeventer who, on February 12th, 1885, assigned the same to the complainant, The Princeton Savings Bank; and that on February 27th, 1892, the complainant filed a bill to foreclose the mortgage, obtained a decree of foreclosure, and had the mortgaged premises sold under a writ of execution in the foreclosure case to the complainant for $400, while the decree was for the sum of $2,020.50.

The bill further alleges that Augustus L. Martin died April 12th, 1881, and that the defendant, Alfred W. Martin, the surviving obligor named in the bond and mortgage, is liable to pay the amount of principal and interest due on the mortgage, which he refuses to pay.

The prayer of the bill is that the defendant, Alfred W. Martin, be decreed to be liable to pay to the complainant the principal and interest moneys due to it on its bond and mortgage, and that such liability may be enforced by the decree of this court, or by ordering the defendant, Alfred W. Martin, to pay to the complainant the principal and interest moneys due and to grow due on said bond and mortgage, together with the costs of suit. Alfred W. Martin is the only defendant to the bill.

II. Demurrer.

The defendant has demurred to the bill on four grounds: (1) That the bill shows no equity in favor of the complainant. (2) That, upon the face of the bill, it appears that the complainant has an adequate remedy at law. (3) Because the heirs and devisees and personal representatives of Augustus L. Martin are necessary parties. (4) Because the claim is barred by the statute of limitations.

III. The Vice Chancellor's Conclusions.

The learned Vice Chancellor concluded that the

statute of limitations furnishes a good defense, and consequently sustained the demurrer. He, however, overruled the demurrant's objection that the complainant's remedy was adequate at law and could not be maintained in equity. It is submitted that in the first of these conclusions he was right, and in the second, wrong.

IV. Argument.

1. I submit that the claim is barred by the statute of limitations.

It appears by the allegations of the bill that the defendant, Alfred W. Martin, conveyed the mortgaged premises to The Princeton Lumber and Improvement Company by deed dated March 24th, 1869, and that he has not owned the premises since that date. The bill in this case was filed May 17th, 1894, more than twenty-five years after the defendant had conveyed away the mortgaged premises. He is not liable unless he has made payment of principal or interest upon the bond within sixteen years. There is no allegation of such payment. Neither can there be any presumption of payment of interest by him on a mortgage upon property that he has not owned for over twenty-five years.

In *The Trustees of the Old Almshouse Farm of New Haven v. James B. Smith, 52 Conn., 434,* the facts were as follows: On September 1st, 1868, the defendant purchased two tracts of land of the plaintiff, giving in part payment therefor a promissory note for $2,850, secured by a purchase money mortgage. In November, 1868, the defendant paid the plaintiff $1,350 on the principal of the note, and obtained a quit claim deed from the plaintiff as to one of the tracts of land. The equity of redemption in the other tract was conveyed by the defendant on May 29th, 1872, the mortgaged premises coming, through several intermediary conveyances, to Lewis and Beecher Company in January, 1877. The defendant paid the interest on the note regularly to March 1st, 1872, he having made conveyance, as above stated, May 20th,

1872. After that date the interest was paid by the owners of the equity of redemption down to September, 1880, after which time no interest was paid. Suit was brought against the original mortgagor, and the question was whether the payments of interest on the note after March, 1872, by the several owners of the equity of redemption, operated as payments by the defendant so as, in effect, to create new premises or acknowledgments of the indebtedness by him. The court held that the payments of interest by the successive owners of the equity of redemption were on their own account, in order to keep alive the equity of redemption of which they had become the purchasers, and, being made on their own account and for their own benefit, they had no legal significance as regards the original mortgagor. It was held that they were not in any sense the agents of the original mortgagor in making such payments. In the reasoning of the court the following language is used: "The defendant was liable on the note. The grantees were liable to have their land taken for its payment. These liabilities are separate and distinct. Neither party could do any thing to increase the liability of the other. How could the grantees, by any act of theirs, acknowledge that the mortgage debt was a subsisting indebtedness so as to subject the defendant to a new liability upon it, when they themselves were not liable on the note? We think the grantees could do nothing by word or deed to remove the bar of the statute of limitations, so far as the defendant is concerned."

While it appears by the bill in the case before us that the defendant, Alfred W. Martin, owned the mortgaged premises in 1869, there is not even an averment that his grantees, The Princeton Lumber and Improvement Company, assumed to pay the mortgage. Had there been such an averment the relation in equity then existing between Martin and his grantees would have been that of surety to principal. See *Klapworth v. Dressler, 2 Beas., 62; Jarman v. Wiswall, 9 C. E Gr., 269.* And this liability of the original mortgagor, when his grantee assumes to pay the mortgage, is not founded on any con-

tract between the mortgagor and his grantee, but upon the equitable principle of subrogation. See *Pruden v. Williams, 11 C. E. Gr., 210; Crowell v. Currier, 12 C. E. Gr., 154.*

Had there been an averment in the bill that the defendant's grantee, the Princeton Lumber and Improvement Company, assumed and agreed to pay the mortgage in question, the defendant, Martin, would then in equity have been liable to the holder of the mortgage as surety. and possibly there might then have been urged upon the consideration of the court the question as to whether payments of interest upon the mortgage by the original mortgagor's grantee would not keep the mortgage alive as against the original mortgagor or surety himself. I deny that such would be the case. But, at this point, I only argue that, as there is no such averment in the bill, there is not only an utter absence of any contractual relations between the defendant, Martin, and his grantee, but also that there is an utter absence of any equitable relations existing between them whereby the mortgage may be kept alive as against Martin by the payment of interest upon the mortgage by Martin's grantee.

The bond and mortgage in question were executed, it should be remembered, not only by the defendant, Alfred W. Martin, but also by Augustus L. Martin. Augustus L. Martin is dead, and this bill is filed against Alfred W. Martin only. In *Atkins v. Tredgold, 2 Barnewall and Cresswell, 23,* where A. and B. made a joint and several promissory note and A. died, and ten years after his death B. paid interest on the note, it was held that the payment of interest by B. did not keep the note alive so that an action could be maintained against A.'s executors if the statute of limitations were set up in defense. And in *Slater v. Lawson, 1 Barnewall and Adolphus, 396,* it was held that payment of interest upon a note by the executors of one of the joint makers thereof would not take the debt out of the statute of limitations as against the survivor.

In *Disborough v. Bidleman's Heirs, Spen., 275,* our own Supreme Court has decided that payment made upon a

joint bond by one of the two joint obligors after the death of the other, will not revive the bond or keep it alive as against the representatives of the deceased joint obligor. This case was affirmed by the Court of Errors, in *1 Zab., 677.*

There is no averment in the bill that the defendant, Alfred W. Martin, has himself made any payment upon the bond and mortgage in question since he conveyed away the mortgaged premises in 1869; nor that his co-obligor, Augustus L. Martin, made any such payment between the date when he quit-claimed his interest to Alfred W. Martin on April 1st, 1868, and the time of his death, April 12th, 1881. Neither, indeed, is there any averment in the bill that any person whomsoever has ever made any payment of principal or interest on the bond and mortgage since they were executed on April 1st, 1867. There is not even an averment of any verbal acknowledgment of the debt by Alfred W Martin, Augustus L. Martin, or any of the subsequent owners of the mortgaged premises, at any time within sixteen years before the filing of the bill in this cause, or, indeed, at any time since April 1st, 1868, when the bond and mortgage matured.

Even if it were possible to conclude that the relation of surety to principal existed between the defendant, Alfred W. Martin, and his grantee (which we have above seen cannot be the case, for the reason that the grantee does not appear to have assumed the mortgage), yet payment of interest by the principal would not keep the bond and mortgage alive as against the surety. In New York State, where an accommodation maker of a promissory note is regarded as surety and is allowed to set up his contract of suretyship, it has been held that payment upon a joint and several promissory note made by the principal debtor does not keep the note alive as against the surety maker, unless such payment be made by the principal maker under the authority, and as the agent, of the surety maker. See *Littlefield v. Littlefield, 91 N. Y., 203–210.*

In *Lord v. Morris, 18 Cal., 489–492,* it was said: "The

mortgagor, after disposing of the premises by deed of sale, loses all control over them. His personal liability thereby becomes separate from the ownership of the land, and he can, by no subsequent act, create or revive charges against the premises. He is, as to the premises, thenceforth a mere stranger. * * * He cannot, at his pleasure, affect the interests of other parties."

It has likewise been held in *Harlock v. Ashberry, 19 C. Div., 539,* that payment by the mortgagor's tenant to the mortgagee does not keep the mortgage alive as against the mortgagor.

It is therefore submitted, that the bill of complaint is demurrable for the reason that it appears on the face of the bill that the alleged cause of action is barred by the statute of limitations. On this ground, therefore, the decree should be affirmed.

* * * * * * * * *

2. The Vice Chancellor should also have sustained the demurrer on the ground that the complainant had an adequate remedy at law for its alleged cause of action.

As already stated, the bond in question was executed by the respondent, Alfred W. Martin, and Augustus L. Martin to Augustus S. Case, on April 1st, 1867, for $1,800, payable, with interest, on April 1st, 1868. Augustus L. Martin died April 12th, 1881. Upon the death of Augustus L. Martin the joint obligation became severed, and thereafter the holder of the bond might at common law have brought action against the survivor, Alfred W. Martin, alone, at any time before the action became barred by the statute of limitations.

1 Chit. Pl., 43;

Jenkins v. De Groot, 1 Caines' Cases, 122;

Mott v. Petrie, 15 Wend., 317.

Or, under our statute, he might have brought his action at law against the representatives of Augustus L. Martin at any time before it became barred by the statute of limitations.

Revision 742, section 3;

Thompson v. Johnson, 11 Vr., 220.

There is no reason for bringing an action like the one now in hand into a court of equity. It is true that bills are frequently filed against the original mortgagor *and his grantees who have assumed to pay the mortgage* for the purpose of recovering the deficiency existing after the foreclosure and sale of the mortgaged premises, but, as we have above seen, such bills are founded *upon the equitable doctrine of subrogation.* In such cases there is no remedy at law. See *Pruen v. Williams, 11 C. E. Gr., 210; Crowell v. Currier, 12 C. E. Gr., 152.*

So a bill may be maintained in equity against one or more joint obligors and the representatives of a deceased obligor, for the reason that such action cannot be had at law.

Hedden v. Van Ness, 1 Penn., 84;
Sigler v. Interest, 2 Penn., 724;
Fisher v. Allen, 7 Vr., 203.

But the bill now before the court is not against Alfred W. Martin, one of the original joint obligors, and the representatives of the other joint obligor, nor is it against Alfred W. Martin and his grantees for the purpose of enforcing a remedy on the principle of subrogation. It is a bill against Alfred W. Martin *alone.* Alfred W. Martin can only properly be sued in equity for the deficiency set forth in the bill of complaint either where the representatives of his deceased co-obligor are made his co-defendants, or where, for the purpose of enforcing the principle of subrogation, his grantees are made his co-defendants. There is no equitable principle involved in the proceeding before us. It is a pure law case. No precedent for such a proceeding in equity can be found. If such a proceeding can be maintained, so may a bill against the survivor of two joint makers of a promissory note.

It is submitted that the decree of the Court of Chancery dismissing the bill of complaint should be affirmed with costs.

W. M. LANNING,
Of Counsel with Respondent.

"Princeton Press" Printing Establishment.

New Jersey Court of Errors and Appeals.

Between
THE PRINCETON SAVINGS BANK,
Appellant,
AND
ALFRED W. MARTIN,
Respondent.

On Appeal from a Decree in Chancery.

BRIEF FOR APPELLANT.

The bill was filed in this cause to recover the deficiency due upon a bond executed by the defendant Alfred W. Martin and his brother Augustus W. Martin in 1867, to one Augustus S. Case; to secure which they executed and delivered to Case a mortgage upon a tract of land owned by them.

In 1868 Augustus L. Martin conveyed his interest in the mortgaged premises to the defendant Alfred W. Martin, who in 1869 conveyed said premises to the Princeton Lumber and Improvement Company. In these two con-

veyances no mention was made of the mortgage in question; the premises were not conveyed subject to the mortgage, nor was its payment assumed by either grantee.

In 1879 the Lumber and Improvement Company conveyed the mortgaged premises to J. W. Fielder, Jr., who in 1891, with his wife, conveyed them to Chas. S. Bradfield. These two conveyances were made subject to the mortgage, but its payment was not assumed in either deed.

The bond and mortgage were assigned by Case to one Van Deventer who in 1888 assigned them to the complainant in this case.

A bill was filed in Chancery in 1892 to foreclose said mortgage under which a decree was obtained and the premises were sold by the Sheriff in June, 1893.

The premises having greatly depreciated in value, the complainant in said suit was compelled to bid them in for four hundred dollars, leaving a deficiency due of nearly two thousand dollars, and to recover that deficiency, this action was brought.

The premises covered by the mortgage which secured the bond in question, were conveyed four times between the execution of the mortgage and its foreclosure, and no one of these four grantees assumed or agreed to pay the mortgage debt.

> "Such assignee of the mortgagor does not become "personally liable for the mortgage debt, in the "absence of express agreement upon the subject, "even though the deed under which he claims con- "veys the estate 'subject to an outstanding mort- "'gage.'"
>
> 2 Washburn on Real Property, page 113.

The difference between conveying land subject to a mortgage and with a covenant whereby the grantee assumes and agrees to pay the mortgage, is marked. In the former case, as stated by Pomeroy in his Equity Jurisprudence, Vol. 3, Par. 1205, "Where a mortgagor conveys by a deed, which states simply that the conveyance is 'subject' to a certain specified mortgage, or words to that effect, the grantee takes the land burdened with the lien. As between himself and the grantor-mortgagor, the land is the primary fund out of which the mortgage debt should be paid; he can not claim that the mortgagor should pay off the mortgage and thus exonerate the land. He does not, however, become personally liable for the mortgage debt. But the mortgagor remains personally liable for any deficiency arising upon a foreclosure sale of the land."

Buisse vs. Paige, 1 Abb. App. Dec. 138.
Belmont vs. Cowan, 22 N. Y., 438.
Cleveland vs. Southard, 25 Wis. 479.
Johnston vs. Monell, 13 Iowa, 300.

Two of these conveyances were made subject to the mortgage, — but

"When the premises are conveyed *subject to the mort-*
"*gage debt*, the grantee incurs no personal re-
"sponsibility."

Klapworth vs. Dressler, 2 Beasley. 62
Hoy vs. Bramhall, 4 C. E. Green, 563

This defendant, thereupon, who was one of the original obligors on the bond (now the sole surviving one) never lost his character as an original debtor, nor did he become a

surety merely for the payment of the mortgage debt by any one, or all of his subsequent grantees.

Had any one of these grantees covenanted to pay off the mortgage debt, the grantee would be regarded in equity as *the principal debtor*, and the grantor only as surety.

Hoy vs. Bramhall, 4 C. E. Green, 563.
Stiger vs. Malone, 9 C. E. Green, 426.

But in this case the defendant, the original obligor, clearly remains the principal debtor.

The defendant moreover is liable because of the conveyances in which the mortgaged premises were conveyed subject to the mortgage debt; for

> "accepting the title subject to the mortgage is sufficient acknowledgement to take the case out of the statute. As between the mortgagor and his grantee, the latter is liable for the whole mortgage debt; but as between the mortgagee (or his assigns) and the mortgagor, all the premises remain liable, "*because the acknowledgement of the grantee also binds his grantor, the mortgagor.*"

Moore vs. Clark, 13 Stewart, 152; and the cases therein cited.

In that case it was decided by Vice Chancellor Bird that when a subsequent grantee took title before the expiration of the twenty years, accepting a deed in which it was expressly stated that it was conveyed subject to this mortgage, that was such an acknowledgement as took the case out of the statute.

In the course of his learned opinion the Vice Chancellor used the following language: —

> "But if the grantee of the mortgagor, who took "subject to the mortgage, did not take a grant for "all the land, then it seems to me that, as between "the mortgagor and his grantee, the grantee would "be liable for the whole mortgage debt, and the part "of the land mentioned in his deed would also be "liable; *but not so as between the mortgagee or his "assigns and the mortgagor*, as to the balance of the "land covered by the mortgage; as to such balance "the lien of the mortgage remained perfect, not-"withstanding the sale and conveyance of a part, "and still is perfect unless the statute applies. Does "the statutory bar apply? I think not; for the "reason that the acknowledgement which binds the "grantee, as I have concluded above, ought certainly "to operate with equal force against the grantor."

The defendant had his election: he could have demanded that a new bond and mortgage be given when he conveyed away his interest in the mortgaged premises, but he slept upon his rights. The original obligation could not be lost; it was never assumed by any of the subsequent grantees, but it was acknowledged and kept alive by all of them, the last two conveyances (one as late as 1891) having been made subject to its lien. So long as the obligation was kept alive there must of necessity have been a remedy for any default in its payment. That remedy could not be enforced against any of the subsequent grantees, none of whom assumed the payment of the obligation, but is clearly enforceable against

this defendant, the surviving original obligor, who has never lost his character as the original debtor, and against him only has this complainant its remedy.

Our New Jersey Statute of Limitations provides that "an action for the payment of money only, must be commenced within sixteen years after cause of action shall have accrued on such bond, and not after; but if *any payment* shall have been made on the bond within or after the sixteen years, then an action within sixteen years after such payment shall be good."

As was held by Chief Justice Hornblower in Van Dike vs. Van Dike's Administrators.

3 J. S. Green, 289.

And we contend that under that statute, keeping alive the bond by subsequent holders of the property, where the original bond was allowed to remain in force, also keeps alive the obligation as to the original obligor, even though he has long since disposed of his interest in the property covered by the mortgage given to secure the bond.

Vice Chancellor Bird in his opinion sustaining the demurrer in this case below, admits that

> "under the law as it has been declared in this State
> "(Van Dike vs. Van Dike's administrators, cited
> "above) any acknowledgement of the liability upon
> "such an instrument, either before the statute begins
> "to run or afterwards, by one or two or more joint
> "obligors, will not only bind the one making the
> "acknowledgement but also all others, so as to pre-
> "vent the operation of the statute,"

and then says that this principle seems to have been settled adversely in New York, citing Van Keuren vs. Parmelee.

A leading case in England has long been *Whitcomb vs. Whiting*, and the principle there established has been followed in several of the States in this country, notably New Jersey.

In that case Lord Mansfield gave his opinion in the following language: —

> "Payment by one is payment by all; the one acting "virtually as agent for the rest; and in the same "manner, an admission by one is an admission by "all, and the law raises a promise to pay when the "debt is admitted to be due."

We insist that the only possible interpretation of our New Jersey Statute of Limitations, as it applies to the circumstances of this case, is the one steadfastly maintained by Chief Justice Hornblower, and which was most happily expressed by him in the language of the following opinion:

> "The statute provides that if any payment is "made upon it, *either within* or *after* the period of "sixteen years, an action may be instituted, and "successfully prosecuted at any time, within sixteen "years after such payment. It is then the *payment* "on the bond, that avoids the statute; not an im- "plied or presumptive promise, raised up by con- "struction of law, upon such payment; but the mere "naked, simple fact, that a payment has been made, "on the bond, within sixteen years before the action "was commenced. The question, then is, what will "constitute a payment within the meaning of the "statute? I answer, it must be an actual, bona fide

"payment, made by some person, legally or morally, "bound to pay at the time of doing so. I say, "'morally,' because, by the terms of the statute, a "payment made *within* or *after* the period of sixteen "years, from the time the bond became due, equally "bars the operation of the statute. If, therefore, "twenty or thirty years have elapsed since the cause "of action accrued, so that the obligor is not legally "bound to pay, but in the exercise of a good con- "science, under a sense of moral obligation, he makes "a payment, it will, in my opinion, be such a pay- "ment as the statute contemplates, and as will avoid "its operation; *not only as against the person making "the payment, but as against all persons, who were bound "by the terms or legal effect of the original contract.* "If it was an actual, bona fide payment, made on "the bond, we have no right to say that because it "was not made by the defendants, they shall not be "affected by it. This would be to add a new clause "to the statute, and make it read that sixteen years "should be a bar 'unless *the party sued upon it*, had "'made a payment within sixteen years before the "'action was commenced.' This we have no right "to do."

Disborough vs. Bidleman, Spencer, 275, 284.

P. A. V. VAN DOREN,
G. D. W. VROOM,
For the Appellant.

"Princeton Press" Printing Establishment.

In Chancery of New Jersey.

Between
The PRINCETON SAVINGS BANK,
Complainant,
AND
ALFRED W. MARTIN,
Defendant.

On Bill, etc.
Bill for Relief.

To the Honorable Alexander T. McGill, Chancellor of the State of New Jersey:—

Humbly complaining, showeth unto your Honor your Orator, The Princeton Savings Bank, a corporation duly organized under the laws of the State of New Jersey, of the Borough of Princeton in the County of Mercer, and State of New Jersey; that on or about the first day of April, in the year one thousand eight hundred and sixty-seven, Augustus L. Martin and Alfred W. Martin, of the Township of Princeton, in the County of Mercer, and State of New Jersey, became and were justly indebted unto Augustus S. Case, of the same place, in the sum of eighteen hundred dollars, and being so indebted the said Augustus L. Martin and Alfred W. Martin in order to secure the payment of the said sum of money, with interest, did make and execute,

under their hands and seals, and deliver unto the said Augustus S. Case a certain bond or obligation, bearing date the same day and year last aforesaid, in the penal sum of three thousand six hundred dollars, lawful money of the United States, with a condition thereunder written, that if the said Augustus L. Martin and Alfred W. Martin, their heirs, executors or administrators should well and truly pay, or cause to be paid, unto the said Augustus S. Case, or to his executors, administrators or assigns, the just and full sum of eighteen hundred dollars lawful money aforesaid, with lawful interest on the same, on or before the first day of April, eighteen hundred and sixty-eight, without any fraud or other delay, then the said obligation should be void, otherwise to remain in full force and virtue; as in and by the said bond or obligation and the condition thereof, reference being thereunto had, will more fully and at large appear.

And your Orator further shows, that the said Augustus L. Martin and Alfred W. Martin, in order to secure the payment of the said sum of money above mentioned, together with the interest which should acrue or become due thereon, executed and delivered unto the said Augustus S. Case, a certain indenture of mortgage, bearing date the same day and year last aforesaid, made by said Augustus L. Martin and Annie E., his wife, and Alfred W. Martin of the first part, and said Augustus S. Case of the second part, in and by which said indenture of mortgage the said party of the first part did grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said Augustus S. Case, said party of the second part, and to his heirs and assigns, all the following described tract or parcel of land and premises, situate, lying and being in the Township of Princeton, in the County of Mercer, and state of New Jersey, known and used as the Princeton Basin Lumber and Coal Yard, now occupied by Alfred W. Martin:

Beginning at the corner where the south-east line of the public road leading from the Canal Bridge to the Iron Bridge over Stony Brook, joins the land of the Delaware and Raritan Canal Company; thence along the east side of said road towards the Iron Bridge, to the middle of the channel of said Stony Brook over which and where the Iron Bridge is built; thence down the middle of the channel of said Stony Brook in a north-easterly direction to a corner in the line of land formerly belonging to Joseph Stout, in a channel of a branch of said Stony Brook, which said branch was the original or former channel of said Brook; thence along the said branch channel on the line of said Stout's land, to the line of land of the said Delaware and Raritan Canal Company; thence along the line of the land of said Canal Company to the place of beginning. Being bounded on the easterly side by the Delaware and Raritan Canal Company's land; on the westerly side by Stony Brook; on the southerly side by the public road leading from the Canal across the Iron or Long Bridge to Princeton; on the northerly side by the land of the late Joseph Stout, and embracing land now covered by water and used as the Canal Basin, within the boundaries of said lot of land hereinbefore described; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion or reversions, remainder or remainders, rents, issues and profits thereof; and also, all the estate, right, title, interest, use, property, possession, claim and demand whatsoever, as well in law as in equity, of the parties of the first part to the said Indenture of Mortgage, and every part and parcel thereof, with the appurtenances; to have and to hold the therein above granted and described premises, with the appurtenances, unto the said Augustus S. Case, the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof forever: Provided, always, and the said Indenture of Mortgage was

therein declared to be upon this express condition, that if the said Augustus L. Martin and Alfred W. Martin, parties of the first part to the said Indenture of Mortgage, their heirs, executors or administrators should well and truly pay, or cause to be paid, unto the said Augustus S. Case, or to his certain attorneys or attorney, executors, administrators or assigns, the said sum of money mentioned in the condition of the aforesaid Bond or Obligation, with the interest thereof, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, then the said Indenture of Mortgage, and the estate thereby granted, should cease, determine, and from thenceforth be null and void.

And your Orator further shows that after the execution of the said Indenture of Mortgage, the same was in due form of law acknowledged by the said Augustus L. Martin and Annie E. Martin, his wife, and Alfred W. Martin before Hezekiah Mount, a commissioner to take acknowledgments and proof of deeds in and for said County and State, on the first day of April, eighteen hundred and sixty-seven, and duly recorded in the Office of the Clerk in and for the said County of Mercer, in Book R. of mortgages, page 568, etc., on the fifth day of April, in the year one thousand eight hundred and sixty-seven; as by the certificate of the Clerk of the said County, endorsed on the said Indenture of Mortgage, more fully appears, and to which your Orator, for greater certainty, begs leave to refer, if it be necessary so to do.

And your Orator further shows that afterwards, on or about the first day of April, eighteen hundred and sixty-eight, the said Augustus L. Martin and Annie E., his wife, did execute a deed of conveyance, under their hands and seals, whereby they did, in consideration of the sum of three thousand five hundred dollars, sell and convey and quitclaim their interest in the said mortgaged premises to the said Alfred W. Martin, his heirs and assigns, as in and

by a certified copy of said deed now in the possession of your Orator, ready to be produced and proven, as this court shall direct, reference being thereunto had will more fully appear.

And your Orator further shows that afterwards, on or about the twenty-fourth day of March, eighteen hundred and sixty nine, the said Alfred W. Martin did execute a deed of conveyance, under his hand and seal, whereby he did, in consideration of the sum of fifty-five hundred dollars, sell and convey the said mortgaged premises to the Princeton Lumber and Improvement Company, their successors and assigns, as in and by a certified copy of said deed now in the possession of your Orator, ready to be produced and proved, as this Court shall direct, reference being thereunto had, will more fully appear.

And your Orator further shows that afterwards, on or about the twenty-fifth day of March, eighteen hundred and seventy-nine, the said Princeton Lumber and Improvement Company did execute a deed of conveyance under their corporate seal, whereby they did, in consideration of the sum of five thousand dollars, sell and convey the said mortgaged premises to one John W. Fielder, Junior, his heirs and assigns, as in and by a certified copy of said deed now in the possession of your Orator, ready to be produced and proved, as this Court shall direct, reference being thereunto had, will more fully appear.

And your Orator further shows that afterwards, on or about the twenty-seventh day of September, eighteen hundred and ninety-one, the said John W. Fielder, Junior, and Phebe C., his wife, did execute a deed of conveyance under their hands and seals, whereby they did, in consideration of the sum of one dollar, sell and convey the said mortgaged premises to one Charles S. Bradfield, his heirs and assigns; as in and by a certified copy of said deed, now in the possession of your Orator, ready to be produced and proved, as this Court shall direct, reference being thereunto had, will more fully appear.

And your Orator further shows that afterwards, on or about the first day of April, eighteen hundred and sixty-nine, the said Augustus S. Case assigned said Indenture of Mortgage, together with the bond secured thereby, to one William B. Vandeventer, which said assigment was duly acknowledged before Charles O. Hudnut, a commissioner of deeds for New Jersey, on the fourth day of May, eighteen hundred and sixty-nine, and was duly recorded in the Mercer County Clerk's Office, in Book D. of assignments of mortgages, on page 567, on the sixth day of May, eighteen hundred and sixty-nine, as in and by said assignment, now in the possession of your Orator, ready to be produced and proved, as this Court shall direct, reference being thereunto had, will more fully appear.

And your Orator further shows that afterwards, on or about the twelfth day of February, eighteen hundred and eighty five, the said William B. Vandeventer assigned said Indenture of Mortgage, together with the bond secured thereby, unto the Princeton Savings Bank, your Orator, which said assignment was duly acknowledged before John F. Hageman, Junior, one of the Masters of this Court, on the twelfth day of February, eighteen hundred and eighty-five, and was duly recorded in the Mercer County Clerk's Office, in Book Q. of assignments of mortgages, on page 500, on the seventh day of May, eighteen hundred and ninety-one, as in and by said assignment, now in the possession of your Orator, ready to be produced and proved, as this Court shall direct, reference being thereunto had, will more fully appear.

And your Orator further shows, that on or about the twenty-fifth day of February, eighteen hundred and ninty-two, your Orator filed its bill of complaint in this honorable Court for the foreclosure and sale of said premises under its said mortgage, setting out its said mortgage and the bond which the same was given to secure, but the said Alfred W. Martin was not made a party to said Bill of Complaint of your Orator.

And your Orator further shows, that such proceedings were had on its said bill of complaint, that afterwards, on or about the twenty-seventh day of April, eighteen hundred and ninety-three, a decree of foreclosure was made by your Honor in this Court, by which it was ordered and decreed that your Orator was entitled to have the sum of two thousand and twenty dollars and fifty cents, together with lawful interest thereon from the said twenty seventh day of April, eighteen hundred and ninety-three, being the amount then found to be due on its said mortgage, together with the further sum of one hundred and forty-five dollars and nine cents of costs, with lawful interest thereon from the twenty-seventh day of April, eighteen hundred and ninety-three, to be paid and satisfied out of the proceeds of the sale of the mortgaged premises; and that the said mortgaged premises should be sold to pay and satisfy the said several amounts, and that a writ of fieri facias should for that purpose issue out of this honorable Court to the Sheriff of the County of Mercer, commanding him to make sale of said premises to pay and satisfy the said several sums accordingly.

And your Orator further shows, that afterwards, on or about the sixteenth day of May, eighteen hundred and ninety-three, a writ of execution on said decree was duly issued out of this honorable Court, directed and delivered to the Sheriff of the County of Mercer, commanding him to make sale according to law of said mortgaged premises, to pay and satisfy the said several sums of money in accordance with the terms of said decree.

And your Orator further shows, that the said Sheriff of the County of Mercer duly advertised the said mortgaged premises, by virtue of the said writ of execution, for sale at the Court House in the City of Trenton, on Wednesday, the twenty-first day of June, eighteen hundred and ninety-three, at two o'clock in the afternoon of that day, on which day the Sheriff struck off and sold the said mortgaged

premises to the said Princeton Savings Bank, your Orator, it being the highest bidder for the same, for the sum of four hundred dollars; and that the said Sheriff has made and executed a deed of conveyance of said land and premises to the said Princeton Savings Bank, under and by virtue of said sale, for the said consideration of four hundred dollars, which said deed has been delivered to and accepted by the said Princeton Savings Bank and duly recorded in the office of the Clerk of said County of Mercer, in Book 190 of Deeds, on page 208, etc.

And your Orator further shows, that it appears by the official statement of said Sheriff, filed in this Court, that he sold said premises to said Princeton Savings Bank for said sum of four hundred dollars, and that he retained the sum of forty-two dollars and forty cents for his executive fees; and that the Solicitor of your Orator retained the taxed costs of your Orator, in said cause, together with interest thereon, amounting to the sum of one hundred and forty-five dollars and nine cents, leaving the sum of two hundred and twelve dollars and fifty-one cents to be credited upon, and deducted from the sum decreed to be due to your Orator in said foreclosure suit.

And your Orator further shows, that after the execution of your Orator's said bond and mortgage, to wit, on or about the twelfth day of April, eighteen hundred and eighty-one, the said Augustus L. Martin departed this life.

And your Orator further alleges, and expressly charges, that by virtue of your Orator's said bond and mortgage, and also the several deeds of assignment above set forth, to wit: the assignment from the said Augustus S. Case to the said William B. Vandeventer; and the assignment from the said William B. Vandeventer to the said Princeton Savings Bank, your Orator, the said Alfred W. Martin, the surviving obligor named in your Orator's said bond, is liable in equity to pay the amount of principal and interest due on your Orator's said mortgage; and that your Orator has applied

to the said Alfred W. Martin, and requested him to pay to your Orator the amount of the principal and interest so due as aforesaid to your Orator on its said bond and mortgage, and that he has wholly refused so to do.

Whereupon your Orator prays the aid of this honorable Court in the premises. To the end, therefore that the said Alfred W. Martin may be decreed and declared to be liable to pay to your Orator the principal and interest moneys so due to it on its said bond and mortgage, by reason of said bond and mortgage, and that such liability may be enforced by the decree of this Court by ordering and decreeing the said Alfred W. Martin to pay unto your Orator the principal and interest moneys due and to grow due unto your Orator on its said bond and mortgage, together with its costs of suit, and that your Orator may have such other and further relief in the premises, as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your Orator the State's Writ of Subpœna, issuing out of, and under the seal of this honorable Court, to be directed to the said Alfred W. Martin, commanding him by a certain day, and under a certain penalty therein to be expressed, to be and appear before your Honor in this honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by, and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

And your Orator, as in duty bound, will ever pray, etc.

P. A. V. VAN DOREN,

Solicitor for and of Counsel with the Complainant.

STATE OF NEW JERSEY, } ss.
COUNTY of MERCER. }

Crowell Marsh, of full age, being duly sworn, according to law, on his oath saith:—that he is now, and for several year last past has been, the President of the Princeton Savings Bank, the corporation named as complainant in the above Bill of complaint; and that by means of said office he has acquired and possesses, as he verily believes, greater and more particular knowledge of the matters stated in said Bill, than any other Officeer or member of said Corporation, inasmuch as said matters relate particularly to the sphere of duties of deponent as such President; that he has read the above Bill, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters that are therein stated to be on the information and belief of the complainant, and that as to these matters, he has been so informed, and believes it to be true.

CROWELL MARSH.

Sworn and subscribed this May }
16th, A. D. 1894, before me. }

P. A. V. VAN DOREN,
M. C. C. of N. J.

In Chancery of New Jersey.

Between
THE PRINCETON SAVINGS BANK,
Complainant,
AND
ALFRED W. MARTIN,
Detendant.
} On Bill, etc.
Demurrer.

The Demurrer of Alfred W. Martin, the Defendant, to the Bill of Complaint of the Princeton Savings Bank, Complainant.

This Defendant by protestation, not confessing all or any of the matters and things in the Complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer shows:

First—That the Complainant has not in and by its bill of complaint made or stated such a case as entitles it in a Court of equity to any relief against him as to the matters contained in said bill or any of such matters.

Second—That the Complainant upon the matters stated and contained in its bill has a full and adequate remedy in the courts of law.

Third—That the heirs and devisees and personal representatives of Augustus L. Martin in the Complainant's bill of complaint mentioned ought to be made parties thereto.

Fourth—That the supposed cause of action or suit in the Complainant's bill of complaint mentioned and set forth did not accrue at any time within sixteen years before the

filing of the bill in this suit; therefore, and for divers other good causes of demurrer appearing in the said bill, this Defendant doth demur thereto and humbly prays the judgment of this honorable Court whether he shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

W. M. LANNING,
Solicitor for and of Counsel with Defendant.

10 STATE OF NEW JERSEY, }
COUNTY OF MERCER. } *ss.*

Alfred W. Martin, of full age, being duly sworn, according to law, says that the foregoing demurrer is not interposed for delay, but in good faith for the causes therein seth forth.

ALFRED W. MARTIN,

Sworn to and subscribed before me, this 26th day of June, A. D. 1894.

20 C. S. ROBINSON,
Justice of the Peace.

I hereby certify that I have perused the Complainant's Bill in the above stated cause and that the above demurrer is well founded in point of law.

W. M. LANNING,
Of Counsel with Complainant.

Between

THE PRINCETON SAVINGS BANK,
Complainant,
AND
ALFRED W. MARTIN,
Defendant.

Opinion.

According to the unquestioned practice in this State a mortgagee may proceed in equity against the maker of the bond secured by such mortgage for deficiency, notwithstanding he may have a complete remedy at law.

After sixteen years the statute of limitations bars the remedy upon the bond if there be no payments or acknowledgments of liability within that time, notwithstanding the lien of the mortgage given to secure such bond remains unaffected for twenty years.

On demurrer to bill for deficiency.

Mr. W. M. Lanning, for demurrant.

Mr. P. A. V. Van Doren and Mr. G. D. W. Vroom, contra.

On the first day of April, 1867, Augustus L. Martin and Alfred W. Martin made their joint and several bond for the sum of $1,800.00 payable in one year and delivered the same to Augustus S. Case. To secure this bond they executed and delivered to Case a mortgage upon a tract of land owned by them as tenants in common. On April first, 1868, A. L. M. sold and conveyed his interest in the mortgaged premises to his brother A. W. M. Subsequently there were several cenveyances of the fee, the last one being to one Charles S. Bradfield.

Case assigned the bond and mortgage to one Van Deventer, who assigned them to the Complainant, The Princeton Savings Bank, on the 12th day of February, 1885.

On the 25th day of February, 1892, the Complainant filed a bill to foreclose the mortgage, without making A. W. M., this Defendant, a party, and such proceedings were had that a sale was effected by virtue thereof.

The bill filed in this case is for the deficiency remaining after that sale. This bill shows that the amount of the decree was $2,020.50, besides $145.09 of costs. The premises sold for $400, the purchaser being the present complainant. After the payment of Sheriff's fees and the costs there remained $212.51 to be credited upon the decree.

The demurrant insists that the Complainant has a complete and adequate remedy at law. While that may be, the practice of proceeding by bill in equity for deficiency arising upon the sale of mortgaged premises has been so long recognized by courts of equity, and, so far as I know, never questioned in this State, that I do not feel at liberty in this case to say that the Complainant has mistaken its forum. There is no single fact in this case to deprive the Complainant of this method or to relieve the defendant from answering in this court. As between the Complainant and the defendant, if any one be, he of all others is liable. It no where appears that the grantees or any of them assumed the payment of the money secured by this mortgage, consequently the only person liable if any one be on the bond in question, is the Defendant. (Pruden *vs.* Williams, 11 C. E. Gr. 210, and cases cited.)

But another objection by way of demurrer is assigned, i. e., that the debt is barred by the statute of limitations. It appears that the debt was evidenced by the bond of Augustus and Alfred Martin. It bore date April 1st, 1867, and was payable in one year. April 1st, 1868, Augustus conveyed his interest to Alfred, and on March 24th, 1869, Alfred conveyed his interest in the premises. There is nothing whatever to show that either of these obligors in any manner recognized or acknowledged his liability after the dates last given. The only proof of the validity of the

mortgage itself as a lien is the foreclosure which is stated in the bill to have gone to a decree and a sale. The claim that because the amount found to be due as expressed in the decree was greatly below the amount that would have been due at that time if there had been no payments, raises the clear presumption that there must have been payments, cannot in any sense avail the Complainant in this proceeding. The rule that allegations must be taken most strongly against the pleader, cannot be overcome by such an alleged presumption. Besides, in order that such presumption should prevail in this case as against this Defendant, the Court would be obliged to presume that the alleged payments were made while he had some interest in the property, since it is fair to presume that as the mortgage continued to be a lien upon the premises, the obligor would not make payments upon his bond after he had parted with his title to the premises, given as security for such bond.

I think if payments were made by any of the subsequent grantees, by which the lien of the mortgage was preserved as against the land, such payments would not bind the obligors on the bond. It is not shown that such grantees and obligors were under the slightest liability to each other. It is true that under the law as it has been declared in this State (Van Dyke vs. Van Dyke, 3 Gr. L. 289) any acknowledgment of the liability upon such an instrument, either before the statute begins to run or afterwards, by one or two or more joint obligors, will not only bind the one making the acknowledgment but also all others, so as to prevent the operation of the statute, which principle, however, seems to have been settled adversely in New York. (Van Kuren vs. Parmelee, 2 New York.)

But, as already intimated, there is no such binding relation between the grantees named in the bill of complaint and the makers of the bond in question, as will put in operation any such principle. This view seems to have controlled the court in the case of The Trustees of Old Alms House vs. Smith, 52 Conn. 434.

Nor does the fact that the lien of the mortgage has been established by decree remove the bar of the statute as to the remedy for the debt. It seems that where statutes do not prevail to the contrary it is held that the remedy for the debt may be barred, while the lien of the mortgage continues to subsist.

Jones on Mortgages, Secs. 1203, 1204;
Waltermire vs. Westover, 14 N. Y. 16;
Heyer vs. Pruyn, 7 Paige 465;
Jackson v. Sackett, 7 Wendell 94;
Ball vs. Wyeth, 8 Allen 275;
2d. Wood on Limitations of Actions, 545.

From these authorities it would seem to follow that if these obligors had been made parties to the bill to foreclose, and a decree for deficiency, if any, had been prayed for against them, it could not have been granted without proof that one of them at least had knowledged their obligation within 16 years prior to the time of filing the bill, notwithstanding the Complainant's lien upon the premises by virtue of its mortgage was still binding.

In brief of counsel for the Complainant it is urged that the questions raised in this case should be presented by plea, not by demurrer. I think that if the Defendant has mistaken his mode of relief the other side could only take advantage of it by notice of motion to strike out his demurrer. Submitting to a hearing as introduced by the adverse party ought to bind his antagonist.

I think the demurrer should be sustained with costs.

JOHN T. BIRD,
V. C.

A true copy.
ALLAN MCDERMOTT.

In Chancery of New Jersey.

Between
THE PRINCETON SAVINGS BANK,
Complainant,
AND
ALFRED W. MARTIN,
Defendant.

On Bill, etc.,
Final Decree.

This cause coming on to be heard upon bill of complaint and demurrer thereto in the presence of Messrs. P. A. V. Van Doren and G. D. W. Vroom, of counsel with the complainant, and Mr. William M. Lanning, of counsel with the defendant, and the pleadings having heen read and the arguments of the respective counsel having been heard and considered, and the Court being of the opinion that the bill of complaint is defective, for want of equity therein, and that the complainant is not entitled to the relief prayed for: It is thereupon on this fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-five, on motion of William M. Lanning, of counsel with the defendant, ordered, adjudged and decreed, and the Chancellor doth hereby order, adjudge and decree that the said bill of complaint be and the same is hereby dismissed, with costs to the defendant to be taxed.

Respectfully advised.

ALEX. T. McGILL,
C.

JOHN T. BIRD,
V. C.

A true copy,
ALLAN MCDERMOTT.
Clerk.

In Chancery of New Jersey.

Between
THE PRINCETON SAVINGS BANK,
Complainant,
AND
ALFRED W. MARTIN,
Defendant,

On Bill, etc.

Notice of Appeal.

The Complainant hereby appeals from so much of the decree made in this Court, in the above stated cause, sustaining the demurrer filed therein, as declares that the debt sought to be recovered is barred by the Statute of Limitations, which said decree was made and dated on the fifteenth day of October, eighteen handred and ninety-five, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated October 18, 1895.

P. A. V. VAN DOREN,
Solicitor and of Counsel with Appellant.

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

G. D. W. VROOM,
Of Counsel with Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
THE PRINCETON SAVINGS BANK,
Appellant,
AND
ALFRED W. MARTIN,
Respondent.
} Petition of Appeal.

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

The humble petition of the Princeton Savings Bank, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by a decree made in the Court of Chancery by his Honor, Alexander T. McGill, Chancellor of the State of New Jersey, bearing date the fifteenth day of October, in the year of our Lord, one thousand eight hundred and ninety-five, wherein the said the Princeton Savings Bank was complainant, and the said Alfred W. Martin was defendant, in this respect, to wit:—

That the said decree sustains the demurrer filed in said cause, adjudging that the debt sought to be recovered is barred by the Statute of Limitations. And your petitioner humbly appeals from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that the said decree should have adjudged and decreed that the said debt sought to be recovered was not barred by the Statute of Limitations.

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

P. A. V. VAN DOREN,
Solicitor for Appellant.
G. D. W. VROOM,
Of Counsel with Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between THE PRINCETON SAVINGS BANK, *Appellant,* AND ALFRED W. MARTIN, *Respondent.*	On Appeal. Answer.

The answer of the above named respondent to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that a decree was, on the fifteenth day of October 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 this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed with costs to be adjudged to this respondent.

W. M. LANNING.
Solicitor of Respondent.