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BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

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

The complainant, South Camden Trust Company of Camden, N. J., a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office in the City and County of Camden and State of New Jersey, says that:

1. On the 15th day of July, 1927, Michael Stiefel, a single man, being indebted to the complainant in the sum of $70,000, executed to it a bond of that date, to secure that sum, payable on the 15th day of July, 1932, with interest at the rate of 6% per annum thereon, from the 8th day of January, 1927, payable half yearly from the date of the bond.

2. To secure payment of the bond, said Michael Stiefel executed to said South Camden Trust Company of Camden, N. J., a mortgage of even date with the bond; thereby conveying 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. Said mortgage was given to secure a portion of the purchase price of the deed of conveyance made by said South Camden Trust Company of Camden, N. J., on the said 15th day of July, 1927; which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon,

was recorded in the register's office of Camden County on July 22, 1927, in Book 313 of Mortgages, page 411.

3. The mortgaged premises are described as follows:

ALL that certain lot or tract of land situate in the City and County of Camden and State of New Jersey, bounded and described as follows:

BEGINNING at the intersection of the West line of Broadway with the Northeast line of Ferry Avenue, Northwest in said line of Ferry Avenue seventy-eight feet six inches, more or less, to the brick wall in line of premises #1754 Ferry Avenue; thence Northeast in line of said wall and at right angles to said line of Ferry Avenue sixty-seven feet to the West line of Broadway; thence South, along said West line of Broadway, ninety-eight feet one inch to the place of beginning.

BEING premises known as Flat Iron Hotel.

4. Both bond and mortgage contained an agreement that if any installment of interest should remain unpaid for thirty days after the same should fall due, then the whole principal sum, with all unpaid interest, should, at the option of the mortgagee, its successors or assigns, become immediately due.

5. Both bond and mortgage contained an agreement that the mortgagor, his heirs, executors, administrators or assigns, would pay the taxes assessed upon the premises hereinbefore described for the first half of every year on or before the 20th day of May therein, and for the second half of every year on or before the 20th day of November therein, and should produce receipts for taxes for each

half of every year on or before the first day of June and the first day of December respectively therein, and should also pay all other taxes, municipal assessments and charges in the nature thereof which might be laid or assessed upon the said premises immediately upon their assessment, and that if at any time default should be made in the payment of any tax or charge, as aforesaid, for the space of thirty days after the same should first become payable, or in such production of tax receipts as aforesaid, on or before the days aforesaid, then and in either such case the whole principal debt as aforesaid, should, at the option of the mortgagee, its successors or assigns, become due and payable immediately, and payment of principal debt and interest thereon, should be enforced and recovered at once.

6. The said Michael Stiefel failed and neglected to pay the taxes assessed by the City of Camden against said mortgaged premises for the year 1927, in accordance with the terms of said bond and mortgage, and also failed to produce the tax receipts, as provided for in said bond and mortgage, which said taxes amounted to the sum of $1,483.11, together with interest and costs, and which said sum is a lien on said premises.

7. The said Michael Stiefel has always been in possession of the mortgaged premises.

8. The whole amount of principal with interest thereon from January 8, 1928, together with the said sum of $1,483.11, with interest and costs, is due upon complainant's bond and mortgage.

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

1. That Michael Stiefel, who is the defendant 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 complainant's mortgage.

3. That the defendant may be decreed to pay complainant the amount so found due with interest and costs by a short day, to be appointed by this Court; and that in default of such payment, he 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 pay to complainant the amount so found due on said mortgage, with interest and costs.

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

STARR, SUMMERILL & LLOYD,
Solicitors for and of Counsel with Complainant.

ORDER OPENING DECREE.

(Filed June 28, 1928.)

IN CHANCERY OF NEW JERSEY.

Between
SOUTH CAMDEN TRUST COMPANY OF CAMDEN, N. J.,
Complainant,
and
MICHAEL STEIFEL,
Defendant.

On Bill to Foreclose.
Order Opening
Decree.

The defendant, Michael Steifel, having made application for leave to file an answer herein and the complainant consenting hereto:

It is, on this 27th day of June, 1928, ordered that the decree *pro confesso* heretofore entered against the defendant, Michael Steifel, be opened up, set aside and for nothing holden and that the said Michael Steifel have leave to file an answer to the bill of complaint.

E. R. WALKER,
C.

Respectfully advised.
WM. J. BACKES,
A. M.

[Endorsed]

We consent to the entry of the foregoing order.

Starr, Summerill & Lloyd,
Solicitors for Complainant.

On motion of
Joseph Beck Tyler,
Solicitor for Michael Steifel.

A true copy.
Thomas Barber,
Clerk.

ANSWER.

IN CHANCERY OF NEW JERSEY.

Between
South Camden Trust Company of Camden, N. J.,
Complainant,
and
Michael Steifel,
Defendant.

On Bill to Foreclose.
Answer.

The defendant, Michael Steifel, of the City and County of Philadelphia and State of Pennsylvania, answering the complaint in the above matter says:

1. The allegation of paragraph one is denied insofar as it alleges Michael Steifel to be a single man as he was on the 15th day of July, 1927, and ever since has been a married man. The remainder of said paragraph is admitted.

2. The allegation of paragraph two is admitted except that said conveyance by way of mortgage did not nor did it undertake to cover the dower interest of the wife of said Michael Steifel.

3. The allegations of paragraph three are admitted.

4. The allegation of paragraph four is admitted but this defendant says that no such default has taken place.

5. The allegation of paragraph five is admitted except that this defendant has no knowledge as to whether said default was to be for a space of thirty, sixty or ninety days and, further, that the complainant knew at the time said mortgage was created and at the time the settlement was made that the taxes for the year 1927 were unpaid and consented that settlement should be made and such taxes remain unpaid and, further, knew that at the time the defendant paid interest on said mortgage on February 7th, 1928, that taxes for 1927 were unpaid and accepted the interest payment with knowledge thereof and consented that such payment should be made without the taxes being paid and with knowledge that the taxes were unpaid accepted the interest payment and waived the default in payment of taxes. Further, the said complainant did not at that time or at any time since give the defendant notice

that it would insist upon a strict performance of the condition as to payment of taxes but filed the bill to foreclose without any notice of the reason therefore to this defendant. The complainant purposely and intentionally led this defendant to believe that it would not insist upon strict performance of the condition as to the payment of taxes that it might thereby bring about, for its own benefit, a technical default so as to foreclose for the full amount of said mortgage at this time.

6. The allegation of paragraph six that this defendant has not paid the taxes for 1927 is true and that he has not produced the tax receipts therefore is true but such failure was because of the facts and reasons heretofore alleged in answer to paragraph five hereof and this defendant immediately upon learning of the filing of this bill to foreclose offered, in writing, to the complainant to pay the taxes for 1927, the first half of taxes for the year 1928 and, further, to pay in advance the six months' interest due on July 8th, 1928, to reinstate said mortgage in good standing which offer the complainant refused to accept. Notwithstanding such default the failure to pay taxes was with the knowledge and consent of the complainant as hereinbefore set forth and for the reason that it wanted to bring about a technical default in the performance of the conditions of said bond and mortgage so as to enforce collection of the full amount thereof at once without waiting for the period therein provided for payment.

7. The allegation of paragraph seven is admitted.

8. The allegation of paragraph eight is denied and this defendant says that the said bond and mortgage is not due for the reasons aforesaid.

This defendant prays to be hence dismissed with his reasonable costs in this behalf sustained.

JOSEPH BECK TYLER,
Solicitor for Defendant.

NOTICE TO STRIKE OUT ANSWER.

IN CHANCERY OF NEW JERSEY. 10

Between SOUTH CAMDEN TRUST COMPANY OF CAMDEN, N. J., *Complainant,* and MICHAEL STEIFEL, *Defendant.*	On Bill, &c. Notice to Strike Out Answer.

20

Joseph Beck Tyler, Esq., Solicitor of Defendant:

Dear Sir:

Take notice that on the twenty-third day of July, 1928, at ten o'clock in the forenoon, at the Chancery Chambers, in the City of Camden, or as soon thereafter as counsel can be heard thereon, application will be made to strike out the following portions of the answer filed by the defendant in the above entitled cause, as set forth in paragraph 5 of said answer, to wit: 30

"That the complainant knew at the time said

mortgage was created and at the time the settlement was made that the taxes for the year 1927 were unpaid and consented that settlement should be made and such taxes remain unpaid and, further, knew that at the time the defendant paid interest on said mortgage on February 7th, 1928, that taxes for 1927 were unpaid and accepted the interest payment with knowledge thereof and consented that such payment should be made without the taxes being paid and with knowledge that the taxes were unpaid accepted the interest payment and waived the default in payment of taxes. Further, the said complainant did not at that time or at any time since give the defendant notice that it would insist upon a strict performance of the condition as to payment of taxes but filed the bill to foreclose without any notice of the reason therefore to this defendant. The complainant purposely and intentionally led this defendant to believe that it would not insist upon strick performance of the condition as to the payment of taxes that it might thereby bring about, for is own benefit, a technical default so as to foreclose for the full amount of said mortgage at this time.''

On the ground that said allegations herein set forth, which constitute a portion of paragraph 5 of the answer, are sham and untrue.

And further take notice that at the same time and place, application will be made to strike out the following portion of paragraph 6 of said answer, upon the ground that the same is sham and untrue:

> ''Notwithstanding such default the failure to pay taxes was with the knowledge and consent of the complainant as hereinbefore set forth and

for the reason that it wanted to bring about a technical default in the performance of the conditions of said bond and mortgage so as to enforce collection of the full amount thereof at once without waiting for the period therein provided for payment."

And further take notice that in support of the application to strike out the above mentioned portions of paragraphs 5 and 6 of the answer, there will be read the affidavits attached hereto and forming part hereof.

And further take notice that application will also be made to strike out paragraphs 5 and 6 of said answer on the ground that the defenses stated in said paragraphs with reference to the right of the complainant to foreclose the mortgage set forth in the complainant's bill are frivolous and not sufficient to withhold the granting of relief for the foreclosure of said mortgage, as set forth in the complainant's bill.

Your obedient servants,

STARR, SUMMERILL & LLOYD,
Solicitors of Complainant.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

Between SOUTH CAMDEN TRUST COMPANY OF CAMDEN, N. J., *Complainant,* and MICHAEL STEIFEL, *Defendant.*	}	On Bill, &c. Affidavit.

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

RALPH W. E. DONGES, being duly sworn according to law, on his oath deposes and says:

I am the president of the South Camden Trust Company of Camden, N. J., complainant, and its duly authorized agent in this behalf. As such president, I have a general knowledge of the matters and things hereinafter set forth.

The bill filed in the above cause is for the purpose of foreclosing the mortgage given by the defendant to the complainant, dated July 15, 1927, to secure the sum of $70,000, represented by a bond of the same date, given by the said Steifel, payable on the 15th of July, 1932, with interest at the rate of six per cent per annum, from the 8th day of Jan-

uary, 1927, payable half-yearly from the date of the bond. The said bond and mortgage were given pursuant to a final decree made in the Court of Chancery and dated June 7, 1927, in a cause wherein the above named complainant was complainant and the defendant above named was defendant, a copy of which decree is hereto attached and forms part hereof.

Inasmuch as the said defendant was obliged, by the terms of said decree, to accept title to the said lands and premises and executed the said bond and mortgage as of the 8th day of January, 1927, the bond and mortgage provided that the interest from the 8th day of January, 1927, was to be assumed by the defendant.

The first six months' taxes for 1927 were payable on the 1st day of June of that year, prior to the time of the execution and delivery of said bond and mortgage, and it was understood and agreed between the complainant and the said Steifel that the latter should take title to the said lands and premises subject to the taxes for the first six months of 1927, then due. I, as the president and general representative of the complainant, was present at the settlement and know that this agreement was made between the complainant and the duly authorized representative of the defendant.

The second six months of the taxes for 1927 fell due on the 1st day of December, 1927, and the same were not paid by said Steifel, or did he pay any part thereof. The entire amount of taxes assessed for the year 1927 amount to $1483.11.

I have read the answer of the defendant, Michael Steifel, filed in the above entitled cause, and particularly the 5th paragraph thereof. It is not true, as stated in the said paragraph of the answer that at the time settlement was made, the taxes for the

year 1927 were unpaid, and that the complainant consented that settlement should be made and such taxes remain unpaid. It is true, however, that the taxes, which fell due on the 1st of June, 1927, and which were payable at the time settlement was made for said mortgaged premises, were not paid, and that it was understood that said Steifel should take subject to these taxes, in view of the fact that he was obliged to accept settlement as of the 8th of January, 1927. Neither is it true, as stated in said paragraph of said answer that when the defendant paid interest on the said bond and mortgage on February 7, 1928, that the complainant knew that the taxes for 1927 were unpaid. Neither is it true that the complainant accepted the said interest payment, with knowledge thereof. Neither is it true that the complainant consented that such interest payment should be made without the taxes being paid. Neither is it true that the complainant, with knowledge that the taxes were unpaid, accepted the interest payment and waived the default in the payment of the taxes. Neither is it true, as stated in said paragraph that the complainant purposely and intentionally led the defendant to believe that it would not insist upon strict performance of the conditions as to the payment of taxes that it might thereby bring about, for its own benefit, a technical default so as to foreclose for the full amount of the said mortgage at the time the bill in this cause was filed.

At the time the interest payment was made on February 7, 1928, I, as the representative of the said complainant, had no communications whatever with the said Steifel, or anybody representing him, with respect to the non-payment of the taxes for 1927. The said interest was paid in the ordinary course of business to the complainant, without any mention being made of the non-payment of the taxes for

1927, which fell due on the 1st of December of that year, and it is my belief that no other person connected with the complainant as an officer or employe, had any communication whatever with the said Steifel, or his representative, with respect to the non-payment of taxes when the interest was paid.

The following is a copy of the clause in the mortgage respecting the default in case of non-payment of taxes:

> "Provided, always, nevertheless, that if the said parties of the first part, their heirs, executors, administrators or assigns, do and shall well and truly pay, or cause to be paid unto the said party of the second part, its successors or assigns, the aforesaid debt or principal sum of Seventy Thousand Dollars on the day and time heerinbefore mentioned and appointed for the payment thereof, together with interest for the same, in like money, and for all taxes and charges, and production of tax receipts, in way and manner hereinbefore specified therefor, without any fraud or further delay and without any deduction, defalcation or abatement to be made for or in respect of any taxes, charges, or assessments whatsoever; that then and from thence forth, as well this present indenture, and the estate hereby granted, as the said obligation above recited, shall cease, determine and become absolutely null and void to all intents and purposes, anything hereinbefore contained to the contrary thereof in any wise notwithstanding."

It is not true, as stated in paragraph 6 of the answer of said Steifel that his default and failure to pay taxes for 1927 was with the knowledge and consent of the complainant.

RALPH W. E. DONGES.

Sworn and subscribed to before me this 11th day of July, 1928.

HERBERT RICHARDSON,
M. C. C. of N. J.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

Between
SOUTH CAMDEN TRUST COMPANY OF CAMDEN, N. J.,
Complainant,
and
MICHAEL STEIFEL,
Defendant.

On Bill, &c.
Affidavit.

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

CLARENCE N. HAVEN, being duly sworn according to law, on his oath deposes and says:

I am the treasurer of the South Camden Trust Company of Camden, N. J., complainant, and its duly authorized agent in this behalf, and I have personal knowledge of the matters and things hereinafter set forth.

The bill filed in the above cause is for the purpose of foreclosing the mortgage given by the defendant

to the complainant, dated July 15, 1927, to secure the sum of $70,000, represented by a bond of the same date given by the said Steifel, payable on the 15th of July, 1932, with interest at the rate of six per cent per annum, from the 8th day of January, 1927, payable half-yearly from the date of the bond. The said bond and mortgage were given pursuant to a final decree made in the Court of Chancery and dated June 7, 1927, in a cause wherein the above named complainant was complainant and the defendant above named was defendant, a copy of which decree is hereto attached and forms part hereof.

Inasmuch as the said defendant was obliged, by the terms of said decree, to accept title to the said lands and premises and executed the said bond and mortgage as of the 8th day of January, 1927, the bond and mortgage provided that the interest from the 8th day of January, 1927, was to be assumed by the defendant.

The first six months' taxes for 1927 were payable on the 1st day of June of that year, prior to the time of the execution and delivery of said bond and mortgage, and it was understood and agreed between the complainant and the said Steifel that the latter should take title to the said lands and premises subject to the taxes for the first six months of 1927, then due. I was present at the settlement and know that this agreement was made between the complainant and the duly authorized representative of the defendant.

The second six months of the taxes for 1927 fell due on the 1st day of December, 1927, and the same were not paid by said Steifel, or did he pay any part thereof. The entire amount of taxes assessed for the year 1927 amount to $1483.11.

I have read the answer of the defendant, Michael Steifel, filed in the above entitled cause, and par-

ticularly the 5th paragraph thereof. It is not true, as stated in the said paragraph of the answer that at the time settlement was made, the taxes for the year 1927 were unpaid, and that the complainant consented that settlement should be made and such taxes remain unpaid. It is true, however, that the taxes, which fell due on the 1st of June, 1927, and which were payable at the time settlement was made for said mortgaged premises, were not paid, and that it was understood that said Steifel should take subject to these taxes, in view of the fact that he was obliged to accept settlement as of the 8th of January, 1927. Neither is it true, as stated in said paragraph of said answer that when the defendant paid interest on the said bond and mortgage on February 7, 1928, that the complainant knew that the taxes for 1927 were unpaid. Neither is it true that the complainant accepted the said interest payment, with knowledge thereof. Neither is it true that the complainant consented that such interest payment should be made without the taxes being paid. Neither is it true that the complainant, with knowledge that the taxes were unpaid, accepted the interest payment and waived the default in the payment of the taxes. Neither is it true, as stated in said paragraph that the complainant purposely and intentionally led the defendant to believe that it would not insist upon strict performance of the conditions as to the payment of taxes that it might thereby bring about, for its own benefit, a technical default so as to foreclose for the full amount of the said mortgage at the time the bill in this cause was filed.

At the time the interest payment was made on February 7, 1928, I, as the representative of the said complainant, had no communications whatever with the said Steifel, or anybody representing him, with

respect to the non-payment of the taxes for 1927. The said interest was paid in the ordinary course of business to the complainant, without any mention being made of the non-payment of the taxes for 1927, which fell due on the 1st of December of that year, and it is my belief that no other person connected with the complainant as an officer or employe, had any communication whatever with the said Steifel, or his representative, with respect to the non-payment of taxes when the interest was paid.

The following is a copy of the clause in the mortgage respecting the default in case of non-payment of taxes:

> "PROVIDED, ALWAYS, nevertheless, that if the said parties of the first part, their heirs, executors, administrators or assigns, do and shall well and truly pay, or cause to be paid unto the said party of the second part, its successors or assigns, the aforesaid debt or principal sum of Seventy Thousand Dollars on the day and time hereinbefore mentioned and appointed for the payment thereof, together with interest for the same, in like money, and for all taxes and charges, and production of tax receipts, in way and manner hereinbefore specified therefor, without any fraud or further delay and without any deduction, defalcation or abatement to be made for or in respect of any taxes, charges, or assessments whatsoever; that then and from thenceforth, as well this present indenture, and the estate hereby granted, as the said obligation above recited, shall cease, determine and become absolutely null and void to all intents and purposes, anything hereinbefore contained to the contrary thereof in any wise notwithstanding."

It is not true, as stated in paragraph 6 of the answer of said Steifel that his default and failure to pay taxes for 1927 was with the knowledge and consent of the complainant.

CLARENCE M. HAVEN.

Sworn and subscribed to before me this 10th of July, 1928.

EDNA M. GULDIN,
Notary Public of N. J.

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DECREE FOR SPECIFIC PERFORMANCE.

IN CHANCERY OF NEW JERSEY.

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20 63/65
Between
SOUTH CAMDEN TRUST COMPANY OF CAMDEN, N. J.,
Complainant,
and
MICHAEL STEIFEL,
Defendant.

On Bill, &c.
Decree for Specific Performance.

30

This cause coming on to be heard *ex parte,* in the presence of Starr, Summerill & Lloyd, solicitors of the complainant, the bill of complaint having been taken as confessed against the defendant, Michael Stiefel, and the complainant, pursuant to an order

entered herein, dated the 1st day of June, 1927, having taken proofs in accordance with the practice of this Court, from which it appears to the satisfaction of the Court that the complainant was, on the 7th day of October, 1925, the owner in fee simple of all that certain lot, tract or parcel of land situate in the City of Camden, County of Camden, in the State of New Jersey, bounded and described as follows:

BEGINNING at the intersection of the West Line of Broadway, with the Northeast line of Ferry Avenue, Northwest in said line of Ferry Avenue seventy-eight feet, six inches more or less to the brick wall in line of premises No. 1754 Ferry Avenue; thence Northeast in line of said wall and at right angles to said line of Ferry Avenue sixty-seven feet more or less to the West line of Broadway; thence South, along said West line of Broadway, ninety-eight feet one inch more or less to the place of beginning.

And that the said complainant and the defendant entered into an agreement in writing on said 7th day of October, 1925, wherein and whereby the complainant agreed to convey the said lands and premises on or before the 8th day of October, 1926, unless the parties thereto agreed in writing to an earlier date, with the provision that the complainant might, on or before said date, obtain an extension of three months for settlement with said defendant, and the said defendant agreed to buy and pay for said lands and premises the sum of one hundred thousand dollars ($100,000) by a first payment of ten thousand dollars ($10,000) on the day of the execution of said agreement, and a second payment of five thousand dollars ($5,000) on or before December 8, 1925, and the payment of the further sum of fifteen thousand

dollars ($15,000) in cash at the time of settlement, and the execution by the defendant of a purchase money bond and mortgage of seventy thousand dollars ($70,000) as provided by the terms of said agreement.

And it further appearing to the satisfaction of the Court that the time for the conveyance of said lands and premises by the complainant to the defendant, and settlement therefor under the terms of said agreement, by the said defendant, was extended, as provided in said agreement to the 8th day of January, 1927.

And it further appearing to the satisfaction of the Court that the defendant did not perform said agreement for sale on the 8th day of January, 1927, and has refused and failed to perform said agreement, at any other time, and the complainant has always been and still is ready and willing to comply with the terms of said agreement on its part.

And the Court being of the opinion that the said complainant is entitled to the specific performance of said agreement as prayed for by it, in its bill of complaint filed herein.

It is, on this 7th day of June, 1927, ordered, adjudged and decreed that the agreement aforesaid be in all things specifically performed by the said defendant, as of the 8th day of January, 1927, on the 15th day of July, 1927, at the hour of ten o'clock in the forenoon, standard time, at the office of Charles V. D. Joline, Esquire, a Master in Chancery of New Jersey, in the Temple Building, Camden, New Jersey, under the supervision of said Master, and that the defendant, at that time and place, pay to the said complainant the sum of fifteen thousand dollars ($15,000) together with the costs of this suit, as hereinafter allowed, and interest on said sum of fifteen thousand dollars ($15,000) at the rate of six

per cent per annum, from the 8th day of January, 1927, and at the same time and place, the defendant make, execute and acknowledge, in due form of law, and deliver to the said complainant, his bond in the penal sum of one hundred forty thousand dollars ($140,000) conditioned for the payment of seventy thousand dollars ($70,000) within five years from the 15th day of July, 1927, with interest at the rate of six per cent per annum from the 8th day of January, 1927, payable semi-annually, containing the usual terms and conditions, and at the same time and place, the defendant make, execute and acknowledge, in due form of law, and deliver to the said complainant, a purchase money first mortgage on said lands and premises, securing the payment of said bond and all moneys due and payable thereunder, with the usual default tax and insurance clauses, and deliver to the complainant an insurance policy for twenty thousand dollars ($20,000) to be required by the terms of the mortgage, covering the building erected on said lands and premises, with the usual mortgagee clause attached, upon the delivery at the same time and place by the said complainant to the defendant of a special warranty deed, duly executed and acknowledged by the complainant, conveying to the said defendant the said lands and premises in fee, free and clear of all encumbrances, including municipal liens and assessments, except such as are shown on the title policy of Land Title Guaranty Company, No. 457, and also excepting the encroachments recited in the agreement aforesaid, and also excepting municipal improvements in the course of construction and not assessed, obvious easements, usual restriction running with the land and also subject to the restrictions that the said lands and premises shall not be used for banking purposes.

And it is further ordered, adjudged and decreed that if, at the time and place hereinbefore mentioned, the said defendant shall fail or neglect to pay said sum of fifteen thousand dollars ($15,000) together with taxed costs and interest, as hereinbefore mentioned, and deliver the bond and mortgage hereinbefore described, duly executed and acknowledged, upon the tender of said deed, the aforesaid sums of fifteen thousand dollars ($15,000) together with the taxed costs and interest as hereinbefore mentioned, and of seventy thousand dollars ($70,000) together with interest from January 8, 1927, shall be and become, and are hereby impressed as a lien upon said lands and premises in favor of the complainant to the end that said lands and premises may be sold pursuant to law, to raise the said amounts, together with costs and interest, and that in case a deficiency should arise upon such sale, the said defendant may be ordered by this Court to pay such deficiency.

It is further ordered that the said defendant pay to the complainant the costs of this suit to be taxed, including a counsel fee of two hundred and fifty dollars, which is hereby allowed to the complainant.

And it is further ordered that true but uncertified copies of this decree and of said taxed costs be served upon the solicitor of the defendant within ten days from the date hereof.

E. R. Walker,
C.

Respectfully advised,
Bayard Stockton.

AFFIDAVIT OF E. GASTON SELTZER.

IN CHANCERY OF NEW JERSEY.

Between

SOUTH CAMDEN TRUST COMPANY OF CAMDEN, N. J.,
Complainant,
and
MICHAEL STEIFEL,
Defendant.

On Bill to Foreclose. Affidavit of E. Gaston Seltzer.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.*

E. GASTON SELTZER, of full age, being duly sworn, according to law, upon his oath deposes and says:

I am an attorney at law of the State of Pennsylvania and represented the defendant, Michael Steifel, at the settlement with the complainant for the property described in the bill of complaint in the above entitled cause.

I have read the affidavit of Ralph W. E. Donges, president, and Clarence N. Haven, the treasurer of the complainant company.

The defendant, Michael Steifel, was not present at the settlement and all matters in connection with said settlement were handled by deponent.

The facts are that the decree for specific perform-

ance was signed on June 7th, 1927, and the bond and mortgage were executed on July 15th, 1927, and settlement made on that day.

The statement in the affidavit of Judge Donges that the allegation of the answer of said defendant that the taxes for 1927 were unpaid and that complainant consented to settlement without the payment of such taxes is untrue, is itself untrue. The facts are that the taxes for 1927 were unpaid at that time and the complainant consented to settlement without their being paid. The allegation that there was an express agreement that the defendant should pay said taxes at once is untrue. No such agreement was made. In fact, it was expressly understood and agreed that the complainant would make settlement without the taxes then due being paid.

At said settlement six months' interest from January 8th, to July 8th, 1927, was paid and production of tax receipts was not required.

The bond and mortgage provides as one of its terms that the defendant shall pay taxes when due and produce the tax receipts to the complainant on June first and December first of each year. This was not done and the complainant had full knowledge that it was not done and assented to the payment of interest without the tax receipts being produced.

The first knowledge that the defendant had that the complainant would insist upon strict performance of this covenant of the bond and mortgage was the filing of the bill of complaint and the election of the complainant to collect the full amount of the bond and mortgage. No demand was made upon the defendant for the production of tax receipts nor that the complainant would insist upon the strict performance of its bond and mortgage.

If this defendant had known that the complain-

ant insisted upon strict performance of this bond and mortgage the taxes would have been paid at once and receipts produced. In fact, as soon as the bill of complaint was filed this defendant offered to pay the taxes for 1927, the first half of 1928 and six months' interest which was not then due in order to satisfy the complainant. This the complainant declined and insisted upon a collection of the full amount of said bond and mortgage.

It is true that the complainant accepted the interest payments in July, 1927, and in February, 1928, with knowledge that the tax receipts were not produced therewith and no demand for such receipts was made upon this defendant or upon anyone on his behalf and if such demand had been made at the time either of these payments of interest were made the taxes would have been paid and receipts produced at once.

It is also true that at the time the interest was paid in July, 1927, which was paid as a part of the settlement the complainant accepted settlement without the taxes being paid. In fact, as above stated it was expressly understood and agreed that the complainant would make settlement without the taxes then due being paid.

This defendant is willing and has offered to pay all taxes in arrears and all interest and the costs of foreclosure and has offered to make such payment to the complainant so that this deponent is satisfied that the purpose of the complainant was to bring about a technical default in order to foreclose the full amount of the mortgage at this time and this would not have happened if the complainant had not led this defendant to believe that it was willing and did accept interest payments without requiring the taxes to be paid.

As a matter of fact, the property covered by said

mortgage was purchased for $100,000.00 and about $30,000.00 besides interest, costs, etc., had been paid to the complainant and the market value of the property at this time is not as much as the mortgage so that deponent is satisfied the purpose of the complainant is to endeavor to reach other property of this defendant.

To foreclose the mortgage under the circumstances would mean to sacrifice the property covered by the mortgage and other assets of the defendant.

E. Gaston Seltzer.

Sworn to and subscribed before me this 19th day of July, A. D. 1928.

Anna Rosenthal,
Notary Public.

Commission expires 3/28/31.

AFFIDAVIT OF MICHAEL STEIFEL.

IN CHANCERY OF NEW JERSEY.

Between SOUTH CAMDEN TRUST COMPANY OF CAMDEN, N. J., *Complainant,* and MICHAEL STEIFEL, *Defendant.*	On Bill to Foreclose. Affidavit of Michael Steifel.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.*

MICHAEL STEIFEL, of full age, being duly sworn, according to law, upon his oath deposes and says:

I am the defendant in the above entitled cause.

I had no knowledge that the complainant insisted upon a strict performance of the covenant of the bond and mortgage as to the payment of taxes at the time the foreclosure bill was filed. The complainant had not notified me nor anyone on my behalf that it had changed its agreement made at the time of settlement that the taxes could remain unpaid.

Settlement for the property was made with me in July, 1927, at which time all the taxes for 1927 were unpaid and the first half thereof was due June 1st,

1927. This settlement was made by the complainant with full knowledge that these taxes were unpaid and payment thereof was not required nor was there any agreement by me or to my knowledge on my behalf that I would pay these taxes to satisfy the terms of the bond and mortgage. The matter was never mentioned to me.

When the interest was paid in February, 1928, it was accepted by the complainant and the requirement of the bond and mortgage that tax receipts should be produced was not insisted upon and I assumed that the understanding made at the time of settlement was satisfactory.

If the complainant had requested a performance of the terms of its bond and mortgage as to production of tax receipts I would have paid all taxes at once and, in fact, after I learned that a bill to foreclose had been filed, through my attorney, I offered at once to pay all the taxes, including the first half of 1928, and the six months' interest due in July, 1928, which was not then due, at once and produce the tax receipts in accordance with the bond and mortgage. This offer the complainant declined.

I am ready and willing to pay said taxes, interest and costs of foreclosure proceedings.

I am satisfied that it is the purpose of the complainant to bring about a technical default of the said bond and mortgage for the purpose of foreclosing the same at once and for the purpose of reaching other assets of myself. The property will not bring the amount of the bond and mortgage at the present time although it has a future value and this defendant is ready and willing, in all respects, to carry out the terms of the bond and mortgage and keep up the payment of the taxes and interest and to make settlement in accordance with the terms of the bond and mortgage. This would have been done

had the complainant not agreed that the taxes could remain unpaid and by its action had not led me to believe that it would not insist upon a strict performance in the payment of taxes and the production of receipts therefor.

MICHAEL STEIFEL.

Sworn to and subscribed before me this 19th day of July, A. D. 1928.

ANNA ROSENTHAL,
Notary Public.

Commission expires 3/28/31.

ORDER STRIKING OUT PART OF ANSWER AS SHAM.

IN CHANCERY OF NEW JERSEY.

Between SOUTH CAMDEN TRUST COMPANY OF CAMDEN, N. J., *Complainant,* and MICHAEL STEIFEL, *Defendant.*	On Bill, &c. Order Striking Out Part of Answer as Sham.

Due notice of this application having been given, and the same coming on to be heard in the presence

of Starr, Summerill & Lloyd, solicitors of the complainant, and Joseph Beck Tyler, solicitor of the defendant, and upon reading the affidavits filed on behalf of the complainant and the answering affidavit filed on behalf of the defendant, it appearing that the various portions of the answer objected to are sham and should be stricken out.

It is, thereupon, on this 26th day of July, 1928, on motion of Starr, Summerill & Lloyd, solicitors of the complainant, ordered that the following portion of paragraph 5 of the answer filed by the defendant, Michael Steifel, to wit:

> "That the complainant knew at the time said mortgage was created and at the time the settlement was made that the taxes for the year 1927 were unpaid and consented that settlement should be made and such taxes remain unpaid and, further, knew that at the time the defendant paid interest on said mortgage on February 7th, 1928, that taxes for 1927 were unpaid and accepted the interest payment with knowledge thereof and consented that such payment should be made without the taxes being paid and with knowledge that the taxes were unpaid accepted the interest payment and waived the default in payment of taxes. Further, the said complainant did not at that time or at any time since give the defendant notice that it would insist upon a strict performance of the condition as to payment of taxes but filed the bill to foreclose without any notice of the reason therefor to this defendant. The complainant purposely and intentionally led this defendant to believe that it would not insist upon strict performance of the condition as to the payment of taxes that it might thereby bring about, for its own bene-

fit, a technical default so as to foreclose for the full amount of said mortgage at this time."

And the following portion of paragraph 6 of said answer, to wit:

"Notwithstanding such default the failure to pay taxes was with the knowledge and consent of the complainant as hereinbefore set forth and for the reason that it wanted to bring about a technical default in the performance of the conditions of said bond and mortgage so as to enforce collection of the full amount thereof at once without waiting for the period therein provided for payment."

be stricken out as frivolous.

And it is further ordered that leave be granted to the defendant to file an amended answer within ten days from the date of service of a copy hereof.

Respectfully advised,

E. B. LEAMING,

V. C.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between
SOUTH CAMDEN TRUST COMPANY OF CAMDEN, NEW JERSEY,
Complainant,
and
MICHAEL STEIFEL,
Defendant.

On Bill, &c.

JOSEPH J. SUMMERILL, ESQ., for complainant.
JOSEPH BECK TYLER, ESQ., for defendant.

LEAMING, V. C.:

I am satisfied that these paragraphs moved against must be stricken out. I understand it to be well settled that the payment of interest installments without the production of tax receipts is not operative as a waiver by the mortgagee of any default that may exist by the non-payment of taxes; such transactions would operate to waive the production of the tax receipts but do not waive the payment of taxes. The peculiar situation is that the settlement was made in July, as of January, and

at the time the settlement was actually made the first half of the taxes of 1927 were due and unpaid. A deduction of the amount of taxes that had accrued in January was presumptively made in settlement since the burden of taxes would be on the mortgagee up to that time and the burden thereafter would fall on the mortgagor, and it is probably true that since there was a default in June and a settlement was actually made in July there could be no forfeiture under the tax clause in the mortgage for the non-payment of July, but I am unable to see how that situation or that circumstance in relation to the settlement in any way operated to waive the provision inserted in the mortgage requiring the payment of taxes in December when they fell due, or thereafter, promptly and in accordance with the requirement of the tax clause in the mortgage. The affidavits filed by the defendant do not disclose, and I do not understand it is claimed, that there was any specific waiver touching the payment of taxes in December. Any waiver touching the non-payment of taxes in 1927, if it existed, must have arisen through the transactions which are disclosed by the affidavits, and I do not find anything in those transactions which operated as a waiver. The first paragraph that is moved against states that the mortgagee waived default in the payment of taxes, but the evidence does not support that claim, and it seems clear there was no waiver except as it is to be inferred from the circumstances of the case, nor is there anything to indicate that the mortgagee in any way attempted to deceive or mislead the mortgagor. My judgment is that the paragraphs moved against must be stricken out.

If the defendant can frame an answer that will show a specific waiver of the nature that is claimed in the answer he will be privileged to file an

amended answer for that purpose, but if that cannot be specifically disclosed there is no necessity of filing such an answer.

Mr. Summerill: Will you limit the defendant's time in filing that amended answer?

The Court: An amended answer, if filed, must be filed within 10 days.

Heard and determined July 23, 1928.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between
SOUTH CAMDEN TRUST COMPANY,
Complainant-Appellee,
and
MICHAEL STEIFEL,
Defendant-Appellant.

On Bill to Foreclose.
Notice of Appeal.

The defendant, Michael Steifel, hereby appeals from the order made by the Chancellor and advised by Vice-Chancellor Leaming in the above entitled cause dated the twenty-sixth day of July, 1928, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes and I conceive that there is good cause for appeal.

JOSEPH BECK TYLER,
Solicitor for and of Counsel with Defendant, Michael Steifel.

Dated, August 1st, 1928.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
SOUTH CAMDEN TRUST COMPANY,
Complainant-Appellee,
and
MICHAEL STEIFEL,
Defendant-Appellant.

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 Michael Steifel, the appellant in the above entitled cause, respectfully shows that:

1. Your petitioner finds himself aggrieved by an order striking out part of answer of the defendant as sham made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 26th day of July, 1928, in a certain cause in said Court of Chancery wherein the said South Camden Trust Company was complainant and the said Michael Steifel was defendant in this respect, to wit, that said order adjudges that the portion of paragraph five of said answer and the portion of paragraph six of said answer ordered stricken out are frivilous.

2. And your petitioner appeals from the order of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous in that the allegation of the complainant having made settlement with the defendant without the first half of the taxes for 1927 being paid and having waived the terms of the bond and mortgage that such taxes should be paid the said waiver was operative as to the taxes which became due and payable on December 1st, 1927, unless notice of the strict performance of the terms of the bond and mortgage as to the payment of taxes was given the defendant.

3. Further, that the acceptance of interest in February, 1928, without the requirement that tax receipts be produced operated as a waiver of the terms of the bond and mortgage requiring the production of tax receipts unless notice was given to the defendant that the complainant would insist upon strict performance thereof.

4. Further, that the requirement of the bond and mortgage that taxes be paid and receipts produced having once been waived could not afterwards be asserted without notice to the defendant.

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

JOSEPH BECK TYLER,
Solicitor for and of Counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between SOUTH CAMDEN TRUST COMPANY, *Complainant-Appellee,* and MICHAEL STEIFEL, *Defendant-Appellant.*	On Appeal from the Court of Chancery. Answer to Petition of Appeal.

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

This appellee, not acknowledging all or any of the matters which, in said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that an order was, on the 26th day of July last past, made and entered in the Court of Chancery in the cause for that purpose mentioned in said petition, as is therein stated, but as to the substance and form thereof, this appellee prays to refer thereto when the same shall be produced.

And this appellee is advised and believes that said order is agreeable to equity and that it prays that the same may be affirmed with costs to be adjudged to this appellee.

STARR, SUMMERILL & LLOYD,
Solicitors of Complainant-Appellee.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
SOUTH CAMDEN TRUST COMPANY,
Complainant-Appellee,
and
MICHAEL STEIFEL,
Defendant-Appellant.

BRIEF FOR COMPLAINANT-APPELLEE.

FACTS.

On October 7, 1925, complainant and defendant entered into an agreement wherein and whereby the complainant agreed to convey the lands and premises covered by the mortgage being foreclosed in this case. By the terms of said agreement, complainant was to convey the said premises on or before the 8th day of October, 1926. The consideration for said conveyance was the sum of $100,000; $10,000 payable on the date of the execution of said agreement, a second payment of $5,000 was due on or before December 8, 1925, and the payment of the further sum of $15,000 was due in cash at the time of settlement. The balance of the purchase price was to be taken care of by the defendant executing to complainant a purchase money mortgage of $70,000 at the time of final settlement.

Said agreement contained a provision that the time of settlement might be extended three months. The time of settlement was extended, as provided in said agreement, to the 8th day of January, 1927.

The defendant did not perform said agreement for sale on the 8th day of January, 1927, whereupon complainant commenced a suit for specific performance in the Court of Chancery of this State and on June 7, 1927, obtained an order from the Court of Chancery decreeing that the agreement aforesaid be specifically performed by the defendant as of the 8th day of January, 1927, on the 15th day of July, 1927, before a specified Master, and at that time and place the defendant was directed to pay complainant the sum of $15,000, being the balance of cash due the complainant, interest on the same, from January 8th, 1927, the complainant's costs of suit, and that the defendant execute and deliver to the complainant a bond and mortgage in the amount of $70,000 payable within five years from the said 15th day of July, 1927, with interest at the rate of 6% per annum from the 8th day of January, 1927. The said order and decree further provided, among other things that the said purchase money bond and mortgage should contain the usual default, tax and insurance clause. (C. pp. 21, 22 and 23.)

On the said 15th day of July, 1927, the parties hereto consummated a settlement in accordance with the terms of the contract and the decree aforesaid.

On the said 15th day of July, 1927, settlement was made in accordance with the terms of the said decree. At the time of settlement the taxes for the first half of the year due on June 1st were not paid. At the time of settlement it was agreed between complainant and defendant that the latter should hold title to the said lands and premises subject to the

taxes for the first six months of 1927 then due. The second six months taxes for 1927 fell due on the first day of December, 1927, and the same have not been paid. (C. p. 13.)

On or about the 9th day of March, 1928, complainant commenced proceedings to foreclose the said bond and mortgage on account of the defendant's default in paying the taxes for the year 1927, said taxes amounting to the sum of $1,483.11. After advertising for the defendant as a non-resident, on or about the 27th day of June, 1928, the defendant filed his answer therein. After notice of motion to strike out, contain paragraphs of this answer were stricken out by order of the Court of Chancery on July 26, 1928. From this order of the Court of Chancery, the defendant has taken this appeal.

ARGUMENT.

By affidavit of Honorable Ralph W. E. Donges, president of the complainant, it appears that at the time of settlement, the taxes for the first half of 1927 were not paid and that complainant consented that settlement should be made and such taxes remain unpaid and that it was understood that the defendant should take title subject to these taxes, in view of the fact that they were to make settlement as of the 8th day of January, 1927. Moreover, when the defendant paid interest on said bond and mortgage on February 7, 1928, the complainant did not know that the 1927 taxes were unpaid, did not consent that such interest payment should be made without the taxes being paid and did not waive the default in the payment of taxes. Further, it is not

true that the complainant purposely and intentionally led the defendant to believe that it would not insist upon a strict performance of the conditions as to the payment of taxes in order to bring about a technical default. (C. pp. 13 and 14.)

The affidavit of Clarance N. Haven, treasurer of the complainant is to the same effect. (C. pp. 16, 17, 18, 19 and 20.)

The affidavit of E. Gaston Seltzer, the attorney for the defendant at the settlement, merely states that at the time of settlement, it was expressly understood and agreed that the complainant would make settlement without the taxes then due being paid. Further that complainant accepted the payment of interest without the production of tax receipts, that the purpose of the complainant was to bring about a technical default in order to foreclose the mortgage. The defendant was not present in person at the settlement. (C. pp. 25, 26, 27 and 28.)

The affidavit of the defendant, Steifel, is not material with reference as to what occurred at the settlement, in view of the fact that he was not present.

The first part of defendant's brief addresses itself as to the consent at the time of settlement that taxes should remain unpaid.

The affidavit of Seltzer, mentioned above, merely states that the complainant consented to the settlement on July 15, 1927, without the payment of taxes. There was no agreement that the taxes could remain unpaid.

As Vice-Chancellor Leaming stated in his opinion, we are unable to see how that situation or that circumstance in relation to settlement can be construed as an agreement that the defendant would not have to pay the taxes due on December 1st, or is a waiver

of the payment thereof. So, therefore, irrespective of everything else in the case, defendant has no justification whatever for not paying the taxes due December 1st, and, therefore, any defense he endeavors to make on the December 1st taxes is without merit.

Furthermore, we contend that complainant's consent to make settlement, without the defendant paying taxes, did not operate as to give defendant a permanent right for years and years to refuse to pay the taxes then due. It is perfectly obvious and manifest, both from the affidavits of the complainants and from Seltzer's affidavit that the only thing that was done at the settlement was to make the settlement without requiring the defendant to pay the taxes at that time. The defendant was forced to make settlement by a decree for specific performance and from the facts in all affidavits it can readily be inferred that he did not have enough money at the time of settlement to pay complainant the $15,000 cash balance due, with interest thereon from the previous January 8th, and also to pay the taxes.

Considering the affidavit of Seltzer, in its strongest light, still there does not appear to be any agreement either in writing or verbal that complainant would waive the non-payment of these taxes forever.

Generally, we have no fault to find with the law cited by the defendant in his brief, that is, if there is an agreement either written or verbal, that specifically excuses the defendant from the payment of taxes, that the complainant cannot foreclose his mortgage until after he has given notice to the defendant that the complainant would insist upon strict compliance with the terms thereof. We do not feel, however, and we emphatically contend, that consent to make settlement without payment of

taxes cannot be construed as a contract excusing the defendant from the payment of the taxes due July 15, 1927, for all time, and certainly not for the taxes due the following December 1st, for the latter taxes were never mentioned in any way, shape or form at the time of settlement.

There is no doubt that a mortgage can be foreclosed for non-payment of taxes.

> "A stipulation for the prompt payment of taxes cannot be regarded as differing essentially from a like stipulation touching the prompt payment of interest." Nor is the same a forfeiture clause.
>
> *Bergman v. Fortescue*, 74 N. J. E. 266, at page 269.
>
> "Where the maker of a bond and mortgage fails to pay the taxes assessed against the land covered by the mortgage at the time when the terms of the mortgage provide they should be paid, such default caused the whole amount of the principal to become due, in accordance with the provisions of the mortgage and the right to foreclose accrued to the holder of the mortgage by reason of the default."
>
> *Weiner v. Cullens*, 97 N. J. E. 523.

Moreover defendant's answer does not plead a specific waiver nor does his affidavits show one.

In reference to the acceptance of interest waiving a default for the non-payment of taxes, the affidavit of Steifel does not help us a bit as the same does not state any facts, except that the production of the tax receipts was not insisted upon. On this point, the affidavit of Seltzer merely states that the complainant had full knowledge that the taxes had not been paid and assented to the payment of in-

terest without the tax receipts being produced. This meager statement of knowledge is not sufficient to show that the officers of the complainant had the knowledge aforesaid.

Knowledge is either a thing that you know or you do not know, and Seltezer does not give any facts which would show or tend to show that the officers of the company had the knowledge in question. Both Judge Donges and the treasurer of the complainant stated in their affidavits that they had no knowledge whatever that the taxes in question remained unpaid. However, the Court of Chancery of this State has decided that a complainant might accept interest on a mortgage and still declare a default for non-payment of taxes and water rents. *Bainbridge v. Warburton,* 98 N. J. E. page 81.

Where a mortgagor is in default in his taxes and an interest payment becomes due and the mortgagee knows the taxes are unpaid, we respectfully contend that this Court will not, from the acceptance of the interest, bar him from his remedies for the non-payment of taxes. The mortgagee is already in jeopardy because the taxes have not been paid. Will this Court compel him to place himself in further jeopardy by refusing the payment of interest? It is only fair and just to the mortgagee that he can accept the payment of interest and protect himself to his extent at least, and still retain his remedy for the tax default.

In the Bergman case mentioned above and also in the case of the *Union Trust Company v. New Jersey Water & Light Company,* 93 N. J. E. 562, the mortgagee accepted payment of interest when the taxes were in default. These cases held that the mortgagee was not barred from his remedy for the default in taxes.

Our opponent states that in the Bergman case, Vice-Chancellor Leaming indicated that if the mortgagee had known of the default, that the acceptance of interest would have been a waiver of default. We have read the case carefully and can find no such indication. This point was not mentioned by the Vice-Chancellor in his opinion.

Moreover, the answer of the defendant merely states that the complainant consented to the payment of interest with the knowledge that the taxes were unpaid and by accepting the interest payment, waived the default. There is no allegation in the answer that the default was occasioned by the acts, declarations or conduct of the complainant.

Furthermore, defendant by his answer states that complainant did not give notice that complainant would insist upon the strict performance of the conditions as to payment of taxes. This is not argued in the defendant's brief and, therefore, we consider that the same has been waived. However, the law of this State is that the debtor shall seek the creditor and there is no duty upon the mortgagee to give the mortgagor notice of interest or tax payments.

Moreover, the Court in the case of *Weiner v. Cullens,* mentioned above says:

> "A contention that the foreclosure proceedings were prompted by improper motives on the part of the complainant and that, therefore, the defendants were entitled to equitable relief, cannot prevail where it appears that the complainant was seeking to enforce a legal right."

Furthermore, there are no facts before this Court upon which defendant can base an argument that the complainant is acting in an improper way. Complainant is merely acting for its own security and

the security of its stockholders. Moreover our Courts have held in the case of *Arkenburgh v. Lakeside Residential Association,* 56 N. J. E. 106, and the Bergman case aforesaid, that the defendant has offered to pay the taxes, is unavailing at this time.

Furthermore, it has been decided in the case of *Union Trust Company v. New Jersey Water & Light Company, a corporation,* 93 N. J. E. 562, at 566, that the mere acceptance of interest by the mortgagee, after default complained of and with full knowledge thereof, does not constitute a waiver of the default. Citing *Arkenburgh v. Lakeside Assn.,* 56 N. J. E. 102 to 109; *Industrial Land Development Company v. Post,* 55 N. J. E. 559 and *Bergman v. Fortescue, supra.*

We therefore respectfully contend that the order of the Court of Chancery appealed from be affirmed.

STARR, SUMMERILL & LLOYD,
Solicitors for Appellee.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

SOUTH CAMDEN TRUST COMPANY,

Complainant-Appellee,

and

MICHAEL STEIFEL,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT.

The complainant filed a bill to foreclose a mortgage in the sum of $70,000.00, dated July 15th, 1927, payable at the expiration of five years from the date thereof, by reason of non-payment of taxes. The tax default clause provided that the mortgagor should pay taxes for the first half of each year on or before the twentieth day of May of each year and would pay taxes for the second half of each year on or before the twentieth day of November of each year and produce tax receipts to the mortgagee by the first of the succeeding month, to wit: on the first of June and the first of December, respectively, and upon default for a period of thirty days after the same should first become payable or in the production of tax receipts the principal debt should become due and payable at once.

The default alleged in the bill of complaint is failure to pay taxes for the year 1927 amounting to the sum of $1,483.11 and production of tax receipts as provided in the bond and mortgage, and by reason of such failure complainant elected that the full amount of said mortgage should become due and payable at once.

The defendant filed an answer, paragraph five, of which (S. of C., page 7) is as follows:

> "That the complainant knew at the time said mortgage was created and at the time the settlement was made that the taxes for the year 1927 were unpaid and consented that settlement should be made and such taxes remain unpaid and, further, knew that at the time the defendant paid interest on said mortgage on February 7th, 1928, that the taxes for 1927 were unpaid and accepted the interest payment with knowledge thereof and consented that such payment should be made without the taxes being paid and with knowledge that the taxes were unpaid accepted the interest payment and waived the default in the payment of taxes, further, that the said complainant did not at that time nor at any time since give the defendant notice that it would insist upon a strict performance of the condition as to payment of taxes, but filed a bill to foreclose without any notice of the reason therefore to this defendant."

Paragraph six of the answer (S. of C., page 8) says:

> "And this defendant immediately upon learning of the filing of the bill to foreclose offered, in writing, to the complainant to pay the taxes for 1927, the first half of taxes for the year

1928 (which were not yet due) and, further to pay in advance the six months' interest due on July 8th, 1928, to reinstate said mortgage in good standing, which offer the complainant refused to accept."

The complainant moved to strike out paragraphs five and six of the answer for the reason that said paragraphs were sham and untrue and an order was entered striking out paragraphs five and six of the defendant's answer.

The affidavits in support of said answer were made by the defendant and by E. Gaston Seltzer, Esq., who represented the defendant at the settlement with the complainant at the time the property was purchased. The affidavit of Mr. Seltzer (S. of C., page 26) says:

> "In fact, it was expressly understood and agreed that the complainant would make settlement without the taxes then due being paid. At said settlement six months' interest from January 8th, 1928, to July 8th, 1927, and production of tax receipts was not required.
>
> The bond and mortgage provided, as one of its terms, that the defendant (mortgagor) shall pay taxes when due and produce the tax receipts to the complainant on June first and December first of each year. This was not done and the complainant had full knowledge that it was not done and assented to the payment of interest without the tax receipts being produced."

The affidavit of Mr. Seltzer further states that according to the terms of said mortgage the first half of 1927 taxes should have been paid by May

20th, and tax receipts produced by June 1st, 1927. As a matter of fact, the settlement was not made until July 15th, 1927, and it was expressly agreed that the payment of taxes then due was not required.

The affidavit further sets forth that interest due January 8th, 1928, was paid without the payment of taxes which, according to the terms of the mortgage, should be paid by November 20th, and tax receipt produced by December 1st, 1927, with full knowledge of the complainant that such taxes were not paid and receipts were not produced.

The affidavit then sets out an offer to pay the taxes then in arrears, the first half of 1928 taxes and six months' interest due July 8, 1928, both of which were not then due, which offer was declined by the complainant.

ARGUMENT.

The Vice-Chancellor in his conclusions (S. of C., page 35) says:

> "That since there was a default in June and settlement was actually made in July, there could be no forfeiture under the tax clause in the mortgage for the non-payment of July (meaning June), but I am unable to see how that circumstance in relation to the settlement in any way operated to waive the provision inserted in the mortgage requiring the payment of taxes in December when they fell due or thereafter promptly in accordance with the requirement of the tax clause in the mortgage. The affidavits filed by the defendant do not disclose and I do not understand it is claimed that

there was any specific waiver touching the payment of taxes in December.''

This statement of the Vice-Chancellor presents the issue on this appeal. The Vice-Chancellor finds that there was a waiver as to taxes due June 1st, 1927, but concludes, as a matter of law, that this would not operate as a waiver of the taxes due December 1st, 1927. In other words, that the provision in the mortgage for default in taxes is separable for each tax payment. The contention of the appellant is that the tax clause must be taken as a whole and once being waived, cannot be afterwards asserted without notice to the mortgagor. That it is the tax clause in the mortgage which is waived and not the payment of any one installment.

CITATIONS.

The general rule is that the waiver applies to the tax clause of the mortgage and the following authorities are in point:

Jones on mortgages, paragraph 1179, volume 2, page 201, says:

> ''When the mortgage provides that upon any default in the payment of interest the principal sum shall immediately, or after the continuance of the default for a specified time, become due, time is made the essence of the contract, and a court of equity will not relieve the mortgagor from a default, unless he can show some good excuse for it such as mistake or accident or fraud.
>
> Terry v. Eureka College, 70 Ill. 236; Heath v. Hall, 60 Ill. 334; Baldwin v. VanVorst, 2 Stock

(N. J.) 577; DeGrost v. McCotter, 19 N. J. Eq. 531; Albert v. Grosvenor Investment Co., 8 Best & S. 664; L. R. 32 B 123; Per Lush, J.

'The word "default" imports something wrongful,—the omission to do something which, as between the parties, ought to have been done by one of them. Therefore the omission of the plaintiff to pay on the day specified, being with the concurrence of the defendants, was not a default.'

The time of payment may be extended by a parol agreement so that there will be no default within the meaning of the deed, because this is made with the concurrence of the creditor. Although such an agreement be not binding for want of consideration, and therefore is subject to revocation at any moment, it is a sufficient excuse for a default. The creditor cannot treat it as a default working forfeiture, without first demanding payment of the installment.

Where it was provided that in case the interest should remain due and unpaid for ten days, the principal should become due, and the owner of the equity paid the interest after that time and took a receipt as of the day when it fell due, it was held to be a waiver of the forfeiture, so that the mortgagee could not proceed to foreclose. Sire v. Wightman, 25 N. J. Eq. 102. Neither will the court enforce a forfeiture of the time credit if the failure to pay the interest within the time specified was occasioned by the acts or declarations of the holder of the mortgage; (Wilson v. Bird, 28 N. J. Eq. 352; as where by agreement of the parties the payment of interest had been regularly made at

the place of business of the mortgagor, and the payment on which the forfeiture of credit was claimed occurred because the mortgagee had not called for the interest, and the mortgagor did not know where to find him. (DeGroot v. McCotter, 19 N. J. Eq. 531. The order in this case was that upon payment to the complainant within ten days, of the amount then due, all proceedings upon the mortgage be stayed, until default be made according to the condition of the mortgage without reference to default in the payment of interest moneys previously due; or where the owner of the equity tendered the amount due which the mortgagee refused to receive. (Ewart v. Irwan, I Phila. 78.)''

Further in paragraph 1189, page 210, it is said:

"A mortgagee may be estopped from foreclosing his mortgage by an agreement with the mortgagor upon which the latter has acted, that the mortgage should never be enforced against him; and even without any positive agreement if the mortgagee, by giving the mortgagor to understand that he should be released of the burden of the mortgage, intentionally leads the mortgagor to act in such a manner that he will be seriously prejudiced by the mortgagee's not carrying out the understanding. (Faxton v. Faxton, 28 Mich. 159.) In this case the mortgagee having persuaded a son of the mortgagor, after the death of the latter, to remain upon the farm, and support his father's family, upon a promise that the mortgage should not be enforced against the family, was not allowed, after the son had cultivated the farm and supported the family for several years to foreclose

the mortgage. See Fausel v. Schabel, 22 N. J. Eq. 126, for circumstances and agreement not amounting to an agreement to extend."

Further in paragraph 1191, page 211, it is said:

"If the time of payment of such a mortgage be extended by parol agreement, though this may be insufficient to change the legal effect and operation of the writing under seal, it will be a sufficient waiver of the default contemplated in the mortgage, and neither a court of equity nor a court of law will enforce a forfeiture of credit which has occurred under such agreement. (Albert v. Grosvenor Investment Company, L. D. 3 QB 127), Mr. Chief Justice Cockburn said: 'This is the case of a mortgage whereby the mortgagor transfers the property in certain goods to the mortgagees, but subject to the mortgagor's right of redemption; and there are certain clauses in the deed, the result of which is, that the mortgagees cannot seize and sell the goods unless the mortgagor makes default in paying the installments of two pounds, which he is bound to do on each successive Monday till the loan is repaid. Now, the facts are, that the plaintiff's wife went to Bayne (who must be taken to have had full authority to bind the defendants by what he did, for, on the evidence, I see not the slightest reason to believe anyone else ever interfered in the management of the business of the company) and told him that her husband had difficulty in meeting the installment due on the 28th of August, and Bayne extended the time for payment of that and the next installment to the 11th of September. Now the bill of sale provides that

if the mortgagor shall make "default" in payment of the sum of 62 pounds 10s, or any part thereof the whole amount shall be then immediately due and payable; and it shall be lawful for the mortgagees to take possession of the goods, and to sell and dispose of them. Now "default" must be taken to mean a non-payment by the party bound to pay, without the consent of the parties having the right to waive the payment. And I see nothing which goes to show that if, by the consent of the person who is to receive payment the time for payment is extended, the omission to pay within the time specified must be a "default" within the meaning of the word in the bill of sale; and it would be monstrous to hold that it was a default; for the mortgagee might always lead the mortgagor into a snare by consenting that the time for payment might be extended, and then coming down upon him by insisting that there had been a default. And even if money were offered by the mortgagor the next day, and it were accepted by the mortgagee, the result would be the same. "Default" must mean a default where something is not done by the mere act of omission of the one party, and not an omission with the concurrence of the other party. And in the present case, the voluntary extension of the time by Bayne alters the character of the act of the plaintiff, which would otherwise have been a default.' "

The principle for which the above citation is given at length is that the mortgagee has concurred in the default and the failure to pay taxes was with the permission of the mortgagee. That the mortgagee

has waived the default clause as to payment of taxes and it cannot be re-established without notice to the mortgagor and that a Court of Equity will not enforce a forfeiture of credit which has occurred under such an agreement.

The above case of *Albert v. Grosvenor,* L. R. 3 QB 127, holds that where the mortgagor made a default in paying installments of two pounds on each successive Monday and time was extended for the payment of one or two installments, that thereafter omitted to pay within the time specified, "it would be monstrous to hold that it was a default for the mortgagee might always lead the mortgagor into a snare by consenting that the time for payment might be extended and then coming down upon him by insisting that there had been a default."

The case further holds that default means where something is not done by the mere act of omission of one party and not an omission with the concurrence of the other party.

Jones on Corporate Bonds and Mortgages, Third Edition, paragraph 383, at page 423, says:

> "A default may be waived so that no right of action will arise by reason of non-payment upon the day stipulated. If the waiver be by parol and without consideration, it may be revoked; and then after a demand of payment, the payment waived will become due. Albert v. Grosvenor Investment Company, L. R. 3 QB 123; Union Trust Co. v. St. Louis, etc., R. Co., 5 Dill (U. S.) I."

Walker, et ux, v. McMurchie et al., Supreme Court of Washington, 112 Pac. 500-501, Morris, J., said:

> "And when a party to a contract waives a

default in its terms as to payment, he cannot again establish his right to proceed strictly thereunder, until he has given due notice of his intention to the other party. 29 Am. & Eng. Ency. 685; Cole v. Hines, 81 Md. 476; 32 Atl. 196; 32 L. R. A. 455; Watson v. White, 152 Ill. 364; 38 N. E. 902. Such is the announced rule in this court. Douglas v. Hanbury, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. Rep. 1096."

Stevenson v. Joy, Supreme Court of California, 128 Pac. 751-753, Henshaw, J., said:

"The true rule is firmly established and recognized by all the authorities. Where time is made of the essence of the contract or the payment of rent or other payments of money, and this covenant has been waived by the acceptance of the rent or other moneys after they are due, and with knowledge of the facts, such conduct will be regarded as creating, 'such a temporary suspension of the right of forfeiture as could only be restored by giving a definite, specific notice of an intention to enforce it.' Such is the language of Monson v. Bragdon, 159 Ill. 66, 42 N. E. 383, quoted with approval by this court after an extensive review of the authorities in Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126."

Taylor et al. v. Gollet, Court of Appeals of N. Y., 101 N. E. 867-868, Cuddeback, J., said:

"This court has held that where an executory contract fixes the time within which it is to be performed, and performance within that time is waived by the parties to the agreement, neither party can thereafter rescind the contract on

account of such delay without notice to the other requiring performance within a reasonable time, to be specified in the notice, or the contract will be abrogated. By the waiver, time, as an essential element of the contract, has been removed therefrom, but it can be restored by a reasonable notice demanding performance and stating that the contract will be rescinded if the notice is not complied with. Lawson v. Hogan, 93 N. Y. 39; Schmidt v. Reed, 132 N. Y. 108, 30 N. E. 373."

Morton v. Griggs, Cooper & Co., Supreme Court of Minnesota, 203 N. W. 218-219, Taylor, C., held:

"Assuming that the oral agreement was not valid or binding, yet it operated as a waiver of the delay, and defendant could not thereafter terminate the contract for plaintiff's failure to complete it before 1922 without giving him notice of its intention to do so and allowing him a reasonable time in which to perform after such notice. Quinn v. Olson, 4 Min. 422, 26 N. W. 230; Mo v. Bethrer, 68 Minn. 179, 70 N. W. 1076; Scheerschmidt v. Smith, 74 Minn. 224, 77 N. W. 34; Tengue v. Patch, 93 Minn. 437, 101 N. W. 792; Lynch v. Higgins, 154 Minn. 151, 191 N. W. 422; Trainer v. Lammers (Minn.), 201 N. W. 540."

Preferred Underwriters, Inc., et al., v. New York N. Y. & H. R. Co., et al., Supreme Judicial Court of Mass., Suffolk, 137 N. E. 590-591, Pierce, J., held:

"At law time is always the essence of a contract; in equity it is not, except in cases where there is an express agreement that it shall be so treated, or there is a clear and necessary im-

plication from the circumstances that such was the intent of the parties to the agreement, or where there was a notice to the party in default to perform within a reasonable time. Mansfield v. Wiles, 221 Mass. 75, 82, 108 N. E. 901; King v. Connors, 222 Mass., 261, 110 N. E. 289; Morgan v. Forbes, 236 Mass. 480, 128 N. E. 792; Parkin v. Thorhold, 16 Beav. 59; 1 Ames. Cases in Equity Jurisdiction, 327, and cases cited in notes.

It is to be observed that the right of either party to give a notice which shall bind the other to a performance of the contract at a specified time is not a right to change the construction or add terms to that contract, but is a right which can be exercised with effect in equity upon the relation of parties only when the notice follows a default in performance on the day named in the contract, by the party upon whom notice is served. Fry on Specific Performance, 1092; Mansfield v. Wiles, Supra; Fuller v. Hovey, 2 Allen 324, 79, Am. Dec. 782; Asia v. Hiser, 38 Fla. 71, 20 South 796; Taylor v. Brown, 2 Beav. 180; King v. Wilson, 6 Beav. 124; Green v. Sevin, 13 Ch. D. 589-599; Rousech v. Schindler, 7 Ferr L. R. 92."

Riddle Co. v. Taubel, Supreme Court of Pennsylvania. 120 A. 776-777, Kephart, J., held:

> "Where time for the performance of a contract is extended from time to time, with no intention manifested to hold to literal performance, a party cannot rescind without a demand for strict compliance within a reasonable time. Pennsylvania cases cited."

Boone v. Templeman, et al., Supreme Court of California, 110 Pac. 947-950, Shaw, J., held:

> "We think from these facts a court might infer a waiver of the conditions regarding forfeiture and time, and they supported the general allegation of the complaint that Templeman had waived those conditions. The authorities with practical unanimity so hold. In Monson v. Bragdon, 159 Ill. 66, 42 N. E. 385, the court upon similar facts says: 'While not necessarily an absolute permanent waiver, yet in a court of equity there was at least such a temporary suspension of the right (of forfeiture) as could only be restored by his giving a definite and specific notice of an intention to that effect.' Similar rulings were made in Steele v. Branch, 40 Cal. 13; Hudson v. Duke, 21 Ga. 403; Kansas L. Co. v. Horrigan, 36 Kan. 387, 13 Pac. 564; Pier v. Lee, 14 S. D. 600, 86 N. W. 642; Timmins v. Russell, 13 N. D. 487, 99 N. W. 48; Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686; Gaughen v. Kerr, 99 Iowa, 214, 68 N. W. 694; Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207; Keator v. Ferguson, 20 S. D. 473; 107 N. W. 678, 129 Am. St. Rep. 947; Peck v. Brighton Co., 69 Ill. 200."

Fant v. Thomas, et al., Supreme Court of Appeals of Virginia, 108 S. E. 847-850, Saunders, J., held:

> "Where a party to a contract waives a default in its terms, he cannot establish his right to proceed strictly thereunder until he has given due notice of his intentions to the other party. Elliott on Contracts, par. 2050.
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> In the case of Belloc v. Davis, 38 Cal. 242, it

was held that a provision in a note that, on default of interest, the whole principal should become due, did not cause the Statute of Limitations to run from that date, but at the expiration of the credit fixed by the note. While the court held in this case that the provision that, on default in payment of interest, the whole amount of principal and interest should become due and payable, was in the nature of a penalty, it further held that, by accepting interest made after the default, the creditor waived all benefit from the default, and thereafter the rights and obligations of both parties continued, without regard to the forfeiture. This case was approved and affirmed in the later case of Mason v. Luce, 116 Cal. 232, 48 Pac. 72.

It is a fair conclusion that when, in the Nickels case, supra, this court cited Pomeroy as authority for the proposition that a provision in a contract providing that, in a specified event, the time for the payment of a certain sum shall be accelerated, does not create a penalty or forfeiture against which a court of equity will relieve it approved the companion proposition asserted by Pomeroy in the same section that the provision 'for accelerating the time of payment of the whole debt in this manner may, of course, be waived by the creditor.' "

S. W. Bridge & Co., Inc., v. Barry, et al., Court of Appeals of N. Y., 142 N. E. 664-665, Andrews, J., held:

> "Where there is a general unrestricted waiver as to the time fixed for the performance of a contract, that condition ceases to be of the

> essence of the agreement If one thereafter seeks to enforce the contract, delay is no defense, although in some cases it may be a basis for a counter-claim. Nor may one rescind because of such delay in the absence of demand and notice.''

Moter v. Hershey, Supreme Court of S. D., 205 N. W. 239-242, Sherwood, J., held:

> "It is settled law in this state that where one waives a provision in his favor in a contract, where time is the essence of the contract, and if thereafter he seeks to enforce the contract, he is required to notify the party in default 'of the fact and give him a reasonable time in which to comply with the terms of the contract.' Keater v. Ferguson, 20 S. D. 473, 107 N. W. 678, 129 Am. St. Rep. 947; Speer v. Phillips, 24 S. D. 257, 123 N. W. 722. We therefore hold that this action was prematurely brought.''

Wilt v. Hammond, et al., 165 S. W. 362-364, Springfield Court of Appeals (Missouri), Sturges, J., held

> "There is no doubt that parties to a contract may waive, for the time being, a strict compliance with some of its terms without binding themselves to a continuance of such waiver, and, while not allowed to take advantage of the non-compliance already waived, or, perhaps, to return to a strict enforcement without notice, yet such parties may, on reasonable notice at least, either with or without valid reasons therefor, demand a strict compliance with the terms of the contract in the future.''

Loury, et al., v. Rosengrant, 71 S. 439-441, Supreme Court of Alabama, Thomas, J., held:

> "After the buyer has waived the time limit and insisted on delivery under the contract, he cannot put the seller in default without first giving notice of his desire to receive the purchased property with the offer of reasonable time for making the delivery after notice. Farmers C. O. T. Co. v. Ward & Son, 170 Ala. 491, 54 South 513; J. M. Ackley & Co. v. Hunter-Beun & Co., 166 Ala. 295, 51 South 964; Elliott v. Howinson, 146 Ala. 568, 40 South 1018; McFadden & Bro. v. Henderson, et al., 128 Ala. 221, 29 South 640; Stephenson v. Allison, et al., 123 Ala. 439, 26 South 290, ——
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> Even where time is expressly declared to be of the essence of the contract, it may be waived by the conduct of the party for whose benefit the stipulation is made; as, for instance, where he recognizes the contract as still in force after the time for performance has passed. 9 Cyc, 608; Paddock v. Stout, 121 Ill. 571, 13 N. E. 182; Pinckney v. Dambmann, 72 Md. 173, 19 Atl. 450; Brown v. Guarantee Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; Phillips Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341; Amoskeag Mfg. Co. v. United States, 17 Wall 592, 21 L. Ed. 715; 8 Rose's Notes, U. S. Supreme Court, p. 746 ——
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> (Quoting from Thorne v. French, 24 N. Y. S. 694): 'Where time is waived a party is not put in default until he has demanded performance and thus restored time as an element of the contract. Lawson v. Hogan, 93 N. Y. 39; Wallman v. Society, 45 N. Y. 485; Leaird v. Smith, 44 N. Y. 618; Owen v. Evans, 134 N. Y. 514, 31 N. E.

999; Dillon v. Masterson, 42 N. Y. Super. Ct. 176.

Jacobs, et al., v. Swift, Court of Appeals of Kansas, Northern Department, C. D. 56 P. 1127-1129, it was held:

> "We are of the opinion that if these facts did show a default, under the conditions of the mortgage, that, by receiving these payments of interest, and treating the mortgage as a subsisting one, he has waived such forfeiture. Martin v. Melville, 11 N. J. Eq. 222; 2 Jones Mortg. 1186; Bell v. Romaine, 30 N. J. Eq. 24; 20 Am. & Eng. Enc. Law 557."

Rathburne, et al., v. Forsyth, et al., Supreme Court, Appellate Division, 3rd Department, 156 N. Y. Sup. 888-890, Kellogg, P. J., held:

> "We have recently held that where there was a right to rescind a contract, the acceptance of a part performance after the right accrued was a waiver. Sturges & Burn Mfg. Co. v. American Separator Co., 144 App. Div. 872, 129 N. Y. Sup. 210. By accepting the interest in September, 1914, the plaintiff set the time running and time ceased to be of the essence of the contract so far as relates to the right to declare the whole amount due until a notice of a contrary intention was given. French v. Row, 77 Hun 380, 28 N. Y. Sup. 849, considers a somewhat similar case. We quote from page 385 of 77 Hun, from page 852 of 28 N. Y. Sup.
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> Again where by the terms of a contract for the sale of land, the purchase money is to be paid in installments with annual interest and the vendor reserves to himself the right to for-

feit the contract if the vendee makes default in any of the payments, and after default the vendor continues to receive parts of the purchase money, it has been uniformly held in this state that such a vendor, by receiving payments after default, has so far waived the forfeiture that he could not insist upon it, without giving the purchaser notice to pay the arrears, or he would exercise the right of forfeiture, and that a vendor who has waived a forfeiture for non-payment by receiving partial payments from the vendee after the time of payment prescribed in the contract, cannot suddenly stop short, and insist on a forfeiture for the non-payment of the arrears, without previous notice of his intention to do so if the arrears are not paid.

In the sale of a piano upon conditional sale the same holding was made. Cunningham v. Hedge, 12 App. Div. 212, 42 N. Y. Sup. 549.

It was therefore impossible, under the circumstances of this case, to declare the whole amount of the mortgage due, even though the plaintiffs did not agree that the payment of March, 1914, need not be made. But the circumstances show clearly that it was the understanding of the parties that the payment due March 1, 1914, was waived.

The judgment should therefore be reversed, upon the law and facts, and judgment directed for defendants with costs."

From the above cases it clearly appears that the waiver applies not to a particular installment payment but to the clause of the mortgage itself, and it cannot be re-established without notice to the mortgagee.

The issue is therefore a narrow one and it only remains to examine the decisions affecting this rule in this jurisdiction.

Weiner v. Cullens, 95 N. J. Eq. 523, is not in point as it was stated that no legal or equitable defense was made and in that case there was no suggestion of a waiver of any of the terms of the mortgage.

Bergman v. Fortesque, 69 Atl. 474 (not cited in state reports), is distinguished by the facts that the acceptance of interest was without knowledge of the mortgagee of the default in taxes. In that case Vice-Chancellor Leaming clearly indicates that had the mortgagee known of the default that the acceptance of interest would have been a waiver of default.

In *Fausel v. Shaubel,* 22 Equity 126, it was held that no proof of such agreement (agreement to extend time for payment of interest) was made or offered.

In *Martin v. Millville,* 11 Equity 222, the Chancellor said:

> "That there are other facts which show that the neglect was a sheer mistake or misapprehension of the defendants and that the complainant by his conduct has waived the forfeiture and in the Syllabus that 'Where it is a mistake on the part of the obligee that would happen to prudent men and also where there has been a waiver of the default on the part of the obligor, the court will relieve.' "

In that case a decree was made giving the obligee a limited time in which to make good the default.

In *DeGrott v. McCotter,* 19 Eq. 331, the defendant was misled by complainant and time was given to reinstate the mortgage before it was declared in default.

In *Newark Trunk Company v. Clark,* 94 Eq. 79,

no excuse was given for the non-payment of taxes except that the defendant was pinched for money. In that case there was no actual waiver.

In none of the above cases in this jurisdiction was there an express waiver as in the present case.

I have cited the authorities from other jurisdictions at considerable length to show the general rule is that the default clause being expressly waived (and the Vice-Chancellor in this case has found that it was expressly waived), it cannot be reasserted without notice.

Here the mortgage is for $70,000.00 which, as a matter of fact, is more than the property is worth in the present market and it cannot be refinanced. It is a purchase money mortgage and $30,000.00 in cash had been paid. The mortgage is not due until 1932. It is very probable that by 1932 the property could be sold without a loss, but to force a sale at this time means to sacrifice the entire investment. The assertion of the forfeiture without notice is an endeavor to reach other property of the mortgagor on the bond. As far as the property covered by this mortgage is concerned, the interests of the mortgagee are best conserved by acceptance of the offer to pay interest and taxes and to carry the property until such time as market conditions warrant a sale.

It is respectfully submitted that this case differs from the other cases decided in this jurisdiction in that there was an express waiver of the default clause and the taxes were not paid by consent of the mortgagee and it is urged that the defendant should have had notice of the intention to insist upon the forfeiture clause and a chance to make good.

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