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Complaint.

(Filed March 30, 1929.)

In Chancery of New Jersey

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

The complainant, Joseph Weisberger, of the City of Newark, in the County of Essex and State of New Jersey, respectfully shows that:

1. On the 18th day of January, 1928, Jacob Gennet and J. G. Corporation, a New Jersey corporation, being indebted to Joseph Weisberger in the sum of Eleven Thousand Two Hundred Dollars, executed to him a bond of that date to secure that sum, payable on the 10th day of January, 1933, with interest at the rate of six per centum per annum, payable semi-annually from the 10th day of January, 1928.

2. To secure payment of the bond, said J. G. Corporation executed to said Joseph Weisberger a mortgage of even date with the bond; and thereby conveyed to him, in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the office of the Register of the County of Essex in Book L 63 of Mortgages, pages 408, etc.

3. The mortgaged premises are described as follows:

Situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

BEGINNING at a point on the westerly line of Hillside Avenue distant four hundred feet southerly from the corner formed by the intersection of the southerly line of Runyon Street and the westerly line of Hillside Avenue, as the same are laid down on the Block Maps of the City of Newark; thence running westerly parallel to the southerly line of Runyon Street one hundred feet; thence running southerly parallel to Hillside Avenue one hundred and ninety-one feet and thirty-five one-hundredths of a foot to the northerly line of the property of the New York Bay Railroad Company; thence running easterly along the same one hundred feet and twenty-one one-hundredths of a foot to the westerly line of Hillside Avenue; thence running northerly along the same one hundred and ninety-seven feet and eighty-two one-hundredths of a foot to the point or place of BEGINNING.

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, or if any tax, assessment, water rent or other governmental rate, charge, imposition or lien, or any or either of them, should remain unpaid for sixty days after the same should fall due, then the whole principal sum, with all unpaid interest, should, at the option of the mortgagee, his representatives or assigns, become immediately due.

5. On the 18th day of January, 1928, the J. G. Corporation conveyed said land, by deed of that date, to Jacob Gennet, in fee; which deed was, on May 23, 1928, recorded in the Register's office of

Essex County, in Book A 78 of Deeds, page 302.

Any interest which the said Jacob Gennet has in said land is subject to the lien of complainant's mortgage.

6. Said Jacob Gennet is married and his wife's name is Esther Gennet. Any claim or interest she may have, by way of inchoate right of dower, or otherwise, is subject to the lien of complainant's mortgage.

7. On January 10, 1929, one-half year's interest fell due on complainant's bond and mortgage, and remained unpaid for more than thirty days thereafter, and no part thereof has yet been paid.

The water rents due the City of Newark on the said mortgaged premises have not been paid since November 30, 1927, on which day they became a lien against the mortgaged premises, and the same remain unpaid and in arrears and are in arrears for more than sixty days.

Complainant has elected that the whole principal sum with all unpaid interest shall be now due upon complainant's bond and mortgage.

8. Said J. G. Corporation, Jacob Gennet and Esther Gennet, his wife, or one of them, have always been in possession of the mortgaged premises.

9. The whole principal sum, with interest thereon from July 10, 1928, is due upon complainant's bond and mortgage.

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

1. That J. G. Corporation, Jacob Gennet and Esther Gennet, his wife, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That an account may be taken of the amount due on complainant's mortgage.

3. That the defendants, or one of them, 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, they, and each of them, be debarred and foreclosed of all equity of redemption in said lands; or

4. That a decree may be made for the sale of the mortgaged premises to raise, and pay to complainant, the amount so found due on his mortgage, with interest and costs.

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

STEWART & HARTSHORNE,
Solicitors for and of Counsel
with Complainant.

Lis Pendens.

(Filed April 2nd, 1929.)

IN CHANCERY OF NEW JERSEY.

Between
JOSEPH WEISBERGER,
Complainant,

and

J. G. CORPORATION, JACOB GENNET and ESTHER GENNET, his wife,
Defendants.

On Bill to Foreclose.
Lis Pendens.

TAKE NOTICE, that a suit entitled as above set forth has been commenced and is pending in the Court of Chancery of the State of New Jersey. That the general object of the said suit is to foreclose a mortgage made by the said J. G. Corporation to Joseph Weisberger, which mortgage is recorded in Book L 63 of Mortgages, pages 408, etc.

That the lands and real estate to be affected by said suit are described as follows:

All that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

BEGINNING at a point on the westerly line of Hillside Avenue distant four hundred feet southerly from the corner formed by the intersection of the southerly line of Runyon Street and the westerly line of Hillside Avenue, as the same are laid down on the Block Maps of the City of New-

ark; thence running westerly parallel to the southerly line of Runyon Street one hundred feet; thence running southerly parallel to Hillside Avenue one hundred and ninety-one feet and thirty-five one-hundredths of a foot to the northerly line of the property of the New York Bay Railroad Company; thence running easterly along the same one hundred feet and twenty-one one-hundredths of a foot to the westerly line of Hillside Avenue; thence running northerly along the same one hundred and ninety-seven feet and eighty-two one-hundredths of a foot to the point or place of BEGINNING.

STEWART & HARTSHORNE,
Solicitors for and of Counsel with
Complainant.

Dated, April 2, 1929.

Answer.

(Filed April 15, 1929.)

IN CHANCERY OF NEW JERSEY.

Between

JOSEPH WEISBERGER,
Complainant,

and

J. G. CORPORATION, a corporation,
et als.,
Defendants.

On Bill to Foreclose.

Answer.

The defendant Jacob Gennet, residing in the City of Newark, County of Essex and State of New Jersey and J. G. Corporation, a New Jersey corporation, having its principal office in the City of Newark, aforesaid, answering the Bill of Complaint say:

1. They admit the allegations of paragraphs 1, 2, 3, 4, 5, 6, and 7 of the complaint, except as such admission is modified by the separate defenses hereinafter set forth, except also that they deny the allegation that the water rents due the City of Newark, on the mortgaged premises have not been paid since November 30, 1927.

First Separate Defense.

1. On or about January 18, 1928, the complainant arranged with the defendant Jacob Gennet, that all interest payments to become due on the

bond and mortgage referred to in paragraphs 1 and 2 of the complaint, should be made by check of Jacob Gennet and should be mailed to the office of complainant, at #69 Badger Avenue, Newark, N. J.

2. Complainant agreed to notify Jacob Gennet of any change of his address, and of any assignment of said bond and mortgage. He has not since given any such notice.

3. Pursuant to this agreement, Jacob Gennet mailed to complainant his check for the installment of interest, on said mortgage that became due on July 18th, 1928, prior to the expiration of the time for the payment of the same, and he mailed to complainant his check for installment of interest that fell due on January 10, 1929, prior to the expiration of the time for the payment of the same. In each instance he enclosed said check in an envelope addressed to the complainant at 69 Badger Avenue, Newark, N. J., having thereon the name and return address of Jacob Gennet, and having proper postage thereon. The envelopes containing said checks were never returned to Jacob Gennet.

4. On February 21, 1929, Jacob Gennet received a letter from Stewart & Hartshorne, solicitors for complainant, informing him that complainant had instructed said solicitors to foreclose said mortgage, by reason of the non-payment of installment of interest that became due on January 10, 1929. Upon receipt of said letter Jacob Gennet called on complainant and informed him of the mailing of said check, and when complain-

ant denied receiving said check Jacob Gennet tendered the amount of said interest to complainant in cash. The complainant refused to accept said cash. This tender was made before the commencement of this suit, and the defendant has ever since the time of said offer to pay and tender, and has at all times been ready to pay this sum, and is still ready to do so, and now brings the same into this court. The prosecution of this suit is contrary to law and against equity and good conscience.

Second Separate Defense.

1. These defendants deny that the principal sum secured by said mortgage is now due.

2. These defendants pray to be hence dismissed, with their reasonable costs and counsel fees in this behalf sustained.

NATHAN H. BERGER,
Solicitor for and of Counsel
with Defendants.

Decree Pro Confesso.

(Filed May 2, 1929.)

IN CHANCERY OF NEW JERSEY.

Between

JOSEPH WEISBERGER,
Complainant,

and

J. G. CORPORATION, a corporation,
et als.,
Defendants.

On Bill, &c. Decree Pro Confesso.

This cause being opened to the Court by Stewart & Hartshorne, of counsel with the complainant, and it appearing, that process of subpoena for the appearance of the defendants hath been duly issued, and service thereof has been acknowledged by Nathan H. Berger as attorney for the defendants, J. G. Corporation, Jacob Gennet and Esther Gennet, his wife, and that the said defendant Esther Gennet has not filed any answer to said bill within the time limited by law, and said order but has wholly failed and neglected so to do;

It is thereupon, on this 2nd day of May, in the year of our Lord one thousand nine hundred and twenty-nine, ordered, adjudged and decreed that the said bill be taken as confessed as against Esther Gennet, to the end that such decree be made against her as the Chancellor shall think equitable and just.

E. R. WALKER,
C.

A True Copy,
FERD GARRETSON
Clerk

Replication.

(Filed April 20, 1929.)

IN CHANCERY OF NEW JERSEY.

Between
JOSEPH WEISBERGER,
Complainant,

and

J. G. CORPORATION, a corporation, *et als.*,
Defendants.

On Bill to Foreclose.
Replication.

The complainant joins issue on the answer of the defendants, Jacob Gennet and the J. G. Corporation.

STEWART & HARTSHORNE,
Solicitors for and of Counsel with Complainant.

Order of Reference.

(Filed May 15, 1929.)

IN CHANCERY OF NEW JERSEY.

Between
JOSEPH WEISBERGER,
Complainant,
and
J. G. CORPORATION, *et als.*,
Defendants.

On Bill to Foreclose.
Order of Reference.

This matter being opened to the Court by Stewart & Hartshorne, solicitors for complainant, and no cause being shown to the contrary:

It is, on this 15th day of May, 1929, on motion of Stewart & Hartshorne, solicitors for complainant, ORDERED that the above entitled cause be referred to Hon. Alonzo Church, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor, and to report thereon to him, and to advise what order or decree should be made therein.

E. R. WALKER,
C.

I hereby consent to the entry of the foregoing order.

NATHAN H. BERGER,
Solicitor for defendants, J. G. Corporation and Jacob Gennet.

A true copy.
FERD GARRETSON,
Clerk.

Order of Designation.

(Filed June 3, 1929.)

IN CHANCERY OF NEW JERSEY.

Between
JOSEPH WEISBERGER,
Complainant,
and
J. G. CORPORATION, *et als.*,
Defendants.

On Bill to Foreclose. Order of Designation.

This matter being opened to the Court by Stewart & Hartshorne, solicitors of complainant,

It is, on this 29th day of May, 1929, ORDERED that the 26th day of June, 1929, at the hour of ten o'clock in the forenoon, in the Chancery Chambers in the City of Newark, be designated as the time and place for the hearing of the above entitled cause.

ALONZO CHURCH,
V. C.

I hereby consent to the entry of the above order.

NATHAN H. BERGER,
Solicitor of Defendants, J. G. Corporation and Jacob Gennet.

Notice of Hearing.

(Filed June 6, 1929.)

IN CHANCERY OF NEW JERSEY.

Between
JOSEPH WEISBERGER,
Complainant,
and
J. G. CORPORATION, *et als.*,
Defendants.

On Bill to Foreclose.
Notice of Hearing.

To NATHAN H. BERGER, Esq.,
Solicitor of Defendants, J. G. Corporation and Jacob Gennet.

Sir:

TAKE NOTICE of the hearing of this cause before the Honorable Alonzo Church, a Vice Chancellor of this Court, to whom the said cause has been referred, on the 26th day of June, 1929, at the hour of ten o'clock in the forenoon, in the Chancery Chambers in the City of Newark, the time and place designated by the order of the said Vice Chancellor on the 29th day of May, 1929.

STEWART & HARTSHORNE,
Solicitors of Complainant.

Testimony.

IN CHANCERY OF NEW JERSEY.

June 26, 1929.

Between
JOSEPH WEISBERGER,
Complainant,
and
J. G. CORPORATION, *et als.*,
Defendants.

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor Alonzo Church, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Messrs. Stewart & Hartshorne, for the complainant; Messrs. Nathan H. Berger and John P. Manning, for the defendants.

Mr. Stewart: I think this case will be very short. It is to foreclose a mortgage where the interest was not paid on the due date or within thirty days thereafter, the period of grace, and the complainant claims the full amount, according to the terms of the bond and mortgage.

I think it will be admitted that the bond and mortgage were executed.

Mr. Manning: It will, your Honor.

The Court: Wait a minute.

Mr. Stewart: And that that will be the testimony that will be given, that the interest was not received from the defendants.

Mr. Manning: We will admit that the interest was sent, but the complainant denies that he received it. We did send the interest.

Mr. Stewart: They claim they sent the interest by mail and my man says he did not get it.

The Court: Can you prove you put it in the mail?

Mr. Manning: Yes, we can, your Honor.

The Court: Very well. That is enough. The cases hold that if you have mailed it on a certain day, if you can prove that—(interrupted).

Mr. Manning: We can, your Honor.

Mr. Stewart: We have some testimony in rebuttal of that.

The Court: Very well, then; offer your proof.

Mr. Stewart: I will offer in evidence the bond and mortgage and the foreclosure search.

The Court: That is admitted, isn't it?

Mr. Manning: Yes, your Honor.

(Bond, mortgage and search referred to marked, respectively, Exhibits C-1, C-2 and C-3.)

The Court: You don't have to prove them.

Mr. Manning: Miss Chanin.

Mr. Stewart: This is their witness.

DEFENSE:

PEARL CHANIN, sworn for defendants.

Direct examination by Mr. Manning:

Q. Miss Chanin, what is your occupation? A. I am employed as bookkeeper for Mr. Gennet.

Q. The defendant in this case? A. Yes, sir.

Q. Have you Mr. Gennet's check book there? A. Yes, sir.

Q. Will you turn to the stub with reference to the check that was drawn to the order of Mr. Joseph Weisberger, the complainant in this case. A. (Witness does as requested.)

Q. In whose handwriting is that stub? A. That is in my handwriting.

Q. And how much is the amount? A. $336.

Q. Put it down, please. And what was the date? A. February 8.

Q. February 8, what year? A. 1929.

Q. 1929. Did you put the check in an envelope? A. Yes, sir.

Q. And was there any address on the envelope? A. Yes, sir.

Q. To whom was the envelope addressed? A. Mr. Joseph Weisberger.

Q. And at what address? A. 69 Badger Avenue, Newark, New Jersey.

Q. And was there any return address on your envelope? A. Yes, sir.

Q. And what address was there? A. That was, "Jacob Gennet, 251-255 Hillside Avenue, Newark, New Jersey."

Q. Was that his place of business? A. Yes, sir.

Q. Who deposited the envelope in the mail box? A. I did.

Q. At about what time in the day? A. Oh, it must have been about 6:15 in the evening.

The Court: On what day?

The Witness: It was on a Friday, February 8, 1929.

The Court: Is that the due date?

Q. Is that the date on which the interest was due? A. No, that is not the due date.

Q. Was it within thirty days of the due date? A. It was before the thirty days' grace was up. It was ten days before.

Q. And this stub is in your handwriting? A. Yes, sir.

Mr. Manning: We will offer this, your Honor please.

(Stub marked Exhibit D-1.)

Cross-examination by Mr. Stewart:

Q. Do you know whether the envelope ever came back or not? A. I have never received it.

Q. And do you open all the mail? A. Yes.

Mr. Stewart: All right. That is all.

The Court: That is all, Madame.

(Witness excused.)

(Witness resumes witness stand.)

Re-direct examination by Mr. Manning:

Q. One more question, if you will, please. Had you made a previous check for the interest? A. Yes.

Q. To Mr. Weisberger? A. Yes, sir.

Mr. Manning: That is all.

Re-cross-examination by Mr. Stewart:

Q. When was that check—have you got that check stub here? A. No, I haven't got it.

Q. Do you know whether that was mailed within the time or not? A. Yes, sir.

The Court: Oh, that doesn't make any difference, no; we are discussing this last check.

(Witness excused.)

JACOB GENNET, sworn for the defendants.

Direct examination by Mr. Manning:

Q. Mr. Gennet, you are one of the defendants in this case? A. Yes, sir.

Q. And do you recall signing a check for $336, on or about February 8, 1929 (handing witness book)? A. Yes, I do.

Q. And this is the stub of the check that you signed? A. Yes, sir.

Q. To whom was the check given after it was signed? A. I gave it to Miss Chanin, my bookkeeper.

Q. Did you ever receive the check back? A. No, I did not.

Q. Was it returned to you? When did you learn that the check was not received by Mr. Weisberger? A. After I received a letter in—I think it was on the 21st.

Q. Twenty-first of what? A. Of March.

Q. Of March. From whom? A. From Mr. Stewart.

Q. Are you sure it was March—or was it February? A. On the 21st of February.

Q. Twenty-first of February? A. Yes. I received a letter from Mr. Stewart, stating that Mr. Weisberger did not get my interest on the mortgage.

The Court: What did you then do?

The Witness: I went over to Mr. Weisberger—his business address, 69 Badger Avenue—and I told him that I mailed him the check, my girl mailed a check to him. And I say, "How is it that you didn't get it and we didn't get it back within two

weeks since I mailed the check?'' And he said, ''I didn't receive it.'' So I said, ''Mr. Weisberger, I will stop this check and I will give you a different one,'' and he said, ''You better wait. I will let you know.''

Q. What did you do with reference to stopping payment on the check? A. I waited a couple of days and then I went over to Mr. Berger and I explained to him that, and Mr. Berger told me to stop this check.

Q. Stop payment on this check? A. Stop payment on this check and cash a check for $336, and deliver it to Mr. Weisberger.

Q. And did you do that? A. I did that.

Q. What did Mr. Weisberger say when you tendered him the $336 in cash? A. He would not take it.

Q. Was there anyone with you at the time? A. Yes. Mr. Fox was with me.

Q. When did you make that payment—tender that payment—of $336? A. To Mr. Weisberger?

Q. Yes. A. That was in the afternoon.

Q. The afternoon of what day? A. That was on Thursday, I think.

The Court: No. What day of the month?

Q. What day of the month? A. In February.

Q. In February? A. Yes. I think it was the 26th; 25th or 26th.

Q. The 25th or 26th of February? A. Yes, sir.

The Court: 1928?

The Witness: 1929.

Q. Of this year? A. Yes.

Cross-examination by Mr. Stewart:

Q. Now, Mr. Gennet, when did you first go to see Mr. Weisberger after you got my letter of February 20? A. I went there on the same day.

Q. On the same day? A. Yes.

Q. Now, before you went to him, did you go to see Mr. Berger? A. No, I did not.

Q. You did not have any conversation with Mr. Berger after you got my letter? A. No. I went right to Mr. Weisberger.

Q. So that Mr. Berger did not know anything about your being in arrears for the interest; is that it? A. No; not until two or three days later.

Q. You are sure of that, are you? A. Positive.

Q. Did you have any talk with anybody in my office before you went to Mr. Weisberger? A. No, I did not.

Q. Didn't you talk to a young lady in my office? A. No, sir, I did not.

Q. And tell her that you received the letter and that it was Mr. Weisberger's duty to notify you that the interest was due? A. I was not even in your office.

Q. No. I say by telephone? A. No, I did not.

Q. And didn't she tell you that it was not his duty to do it, and so notify you? A. I didn't even talk to her.

Q. You never talked to her? A. No, I didn't talk to your office at all.

Q. Did you tell anybody else that you had this letter from our office and that you were in arrears for interest? A. The only one I told was Mr. Berger, after Mr. Weisberger—(interrupted).

Q. I mean, on the day you got the letter, February 21. A. Mr. Weisberger I told on that—(interrupted).

Q. All right. Other than Mr. Weisberger, did you tell anybody on February 21 or February 20? A. No.

——that you had gotten this letter? A. No, I did not.

Mr. Stewart: That is all.

The Court: That is all, sir.

Mr. Manning: The representative of the bank, please.

The Court: What do you want to prove by him?

Mr. Manning: That he stopped payment.

Mr. Stewart: I will admit that he stopped payment.

The Court: All right.

Mr. Stewart: Let us find out what date he did stop payment.

The Court: All right.

(Witness Gennet excused.)

CHESTER SCHOTT, sworn for the defendants.

Direct examination by Mr. Manning:

Q. What is your occupation? A. Statement clerk in the Fidelity Union Trust Company, American Branch.

Q. Do you know Mr. Gennet? A. Yes, sir.

Q. Do you recall whether or not he called at your bank and stopped payment on a check in the sum of $336? A. Yes, he did, on the 26th of February.

Q. On the 26th of February? A. 1929.

Q. 1929? A. Yes, sir.

Mr. Manning: Take the witness.
The Court: Cross-examination?
Mr. Stewart: No questions.
Mr. Manning: That is all. Mr. Fox.

(Witness Schott excused.)

Frank Fox, sworn for defendant.

Direct examination by Mr. Manning:

Q. What is your occupation? A. Foreman of the factory.

Q. And by whom are you employed? A. Jacob Gennet.

Q. Were you with Mr. Gennet when he tendered to Mr. Weisberger the sum of $336? A. Yes, sir.

Q. On what date was that? A. I don't recollect exactly what date it is.

Q. Do you know what month it was? A. I do not.

Q. You don't know the date nor the month? A. (Witness nods no.)

Q. But you were present when he tendered him the money? A. Absolutely.

Q. Do you know that there was $336 that was tendered? A. Exactly.

Q. How do you know that? A. I saw Mr. Gennet count it out on the table.

Q. And you were present when the counting was done? A. Absolutely.

Mr. Manning: Take the witness.

Cross-examination by Mr. Stewart:

Q. What time of day was it? A. About 6 o'clock in the evening or 5:30, something like that.

Mr. Stewart: All right. That is all.

Mr. Manning: That is our case, your Honor please.

Mr. Stewart: Just one question.

Cross-examination by Mr. Stewart (Continued):

Q. You don't know what kind of money this was that he was offering, do you—tendering? A. What do you mean by "what kind of money"?

Q. Well, whether it was bank notes or—(interrupted). A. Bank notes.

Q. (Continuing)—Or legal tender notes or Federal Reserve bank notes or not? A. Ten dollar bills and twenty dollar bills.

Q. But you don't know what kind of currency it was? A. No.

Mr. Stewart: That is all.

The Court: Is that the case?

Mr. Manning: That is our case.

Mr. Stewart: Miss Blank.

COMPLAINANT'S CASE.

YETTA BLANK, sworn for complainant.

Direct examination by Mr. Stewart:

Q. Miss Blank, by whom are you employed? A. By Stewart & Hartshorne.

Q. Did you write a letter to the J. G. Corporation on February 20, 1929? A. I did.

Mr. Manning: We admit such a letter was written.

Q. And next day did anyone call you up on the wire regarding that letter?

Mr. Manning: I object to it, your Honor, please.

The Court: Why?

Mr. Manning: On the ground that she cannot identify any person calling her on the telephone.

Mr. Stewart: I suppose she can answer that question yes or no.

The Court: Yes. I will allow the question.

A. On the morning of February 21, 1929, our telephone operator called me to the 'phone and said that someone wanted to speak to Mr. Stewart. As Mr. Stewart was in court, I answered the 'phone and asked who it was. A man answered the 'phone, and he said he was Mr. Gennet.

Mr. Manning: Now, your Honor, please, I move to strike it out.

The Court: Yes, that is——(interrupted).

Mr. Manning: Unless she can identify the person.

Mr. Stewart: May it please the Court, I think that is perfectly admissible. Here is a——(interrupted).

The Court: This witness says she got a telephone from somebody that told her he was so-and-so.

Mr. Stewart: Yes, I appreciate that fully. Now, I also asked Mr. Gennet whether he had told anybody about the receipt of this letter.

The Court: Yes.

Mr. Stewart: Or whether he had communicated the fact to anybody that he was in arrears for interest. He said he had not. Therefore, nobody could have called up about this matter unless it had been the man who represented himself to be Mr. Gennet.

The Court: No. I cannot quite go that far. Do you object?

Mr. Manning: I do, your Honor.

The Court: I will sustain the objection.

Mr. Stewart: Your Honor will allow me an exception.

Q. You had never talked to Mr. Gennet before, had you? A. Never in my life.

Mr. Stewart: That is all.

The Court: Any cross-examination?

Mr. Manning: No cross.

CHARLES H. STEWART, sworn for complainant.

Direct examination by Mr. Hartshorne:

Q. On or about February 21 of this year, did you have a conversation with Mr. Berger, the solicitor for the defendants, in regard to the non-payment of interest? A. I did.

Q. Will you kindly tell the character of that transaction, I mean, how it occurred and exactly what was said by both parties? A. Mr. Berger called me up on the telephone and said that Mr. Gennet had been in to see him in regard to the letter which we had written the day before to the J. G. Corporation, not having paid its interest on

time. He said that Mr. Gennet had brought him the check and asked him to mail it to Mr. Weisberger and that he had misplaced it and had neglected to do it, and wanted to know whether I could do anything to straighten the matter out, and I told him I would take it up with Mr. Weisberger, the mortgagee in the matter.

Q. Did you— A. I——

Q. Was there any further conversation? A. That was all there was, at that time.

Q. Did you do so? A. I did.

Q. Did you take it up subsequently with Mr. Berger? A. I did.

Q. What did you do in that regard? A. I told him that Mr. Weisberger insisted on the payment of the full amount of the mortgage and interest.

Q. So far as you know, had the check been received by either your office or Mr. Weisberger, at the time that you talked with Mr. Weisberger? A. Well, of course, it had not been received by our office, but whether Mr. Weisberger received it or not I don't know, other than what Mr. Weisberger told me.

The Court: Well, of course, that is hearsay.

The Witness: Yes. I am not attempting to say what that was.

Q. There was nothing further in regard to that transaction? A. Nothing further. After that it was all negotiations between Mr. Berger and I, looking to an adjustment of this matter.

Mr. Hartshorne: You may cross-examine.

Mr. Manning: No cross-examination.

The Court: Is that the case? Have you finished?

Mr. Manning: Mr. Berger.

Mr. Stewart: Oh, there is one other thing. I don't know whether you will consent to it. I have two witnesses here who will testify they opened the mail in Weisberger's office and that no check was received. That will save time, if you will admit they will testify to it.

Mr. Manning: We will admit that, if your Honor please.

The Court: That will be all right. The question is, whether it was mailed. If it was, that, as I understand it, is legal tender.

Mr. Manning: That is the question.

Mr. Stewart: I do not understand that checks are legal tender, but of course that is a question we will argue after.

The Court: Well, I am going to—all right.

DEFENSE.

NATHAN H. BERGER, sworn for defendants.

Direct examination by Mr. Manning:

Q. Mr. Berger, you are a counselor at law of the State of New Jersey? A. I am.

Q. And you heard Mr. Stewart testify with reference to a conversation you had with him with regard to this interest? A. Yes.

Q. Will you please state your end of it? A. Well, now, the conversation—I think Judge Stewart is in error as to the date when it occurred. I think it was either the 22d or 23d; I don't believe it was the 22d. It must have been the day

after. What happened was this: Mr. Gennet's man—it was either Mr. Fox or one of his people —came down with a check for $336, and it was left with me to take care of this matter. I thought I could straighten this matter out with Judge Stewart. That check was mislaid in my office. The check was made out to the order of cash, for the purpose of either using that to pay the interest or cashing it and pay the interest, drawn on the Fidelity Union. I called Judge Stewart and I told him that such check was in my office but had been mislaid, and I would either get him another check or get the cash and pay it; I would like to straighten it up. The judge said he would take it up with his client, and then found he couldn't do anything with him, and in the meantime Mr. Gennet took care of it himself; that is, he drew another check, cashed that, and tendered the money.

Q. How soon after you received this check was that done? A. Well, I don't know. I was not present.

Cross-examination by Mr. Stewart:

Q. What check was it Mr. Gennet brought to you? A. It was either—I didn't meet Mr. Gennet personally, so it was either Mr. Gennet or somebody from his plant who brought me a check for $336, payable to cash, for the account of Joseph Weisberger.

Q. Mr. Berger, didn't you tell me that the reason this thing had gotten in the snarl that it was in was because Gennet had brought you a check long before the thirty days was up and that you had misplaced it and had forgotten about it, and you didn't know it had not been paid until Gennet came to you with a letter? A. No, sir. I think you are mistaken about that.

Q. Didn't you tell me that, no matter whether it is a fact or not? A. I don't think I did.

Q. Well, you won't say you did not? A. I am in doubt that I did. I don't think that I did.

Mr. Stewart: That is all.

Mr. Manning: That is the case, your Honor, please; so far as the defendant is concerned.

The Court: It seems to me that this whole case turns on the question of whether or not this young lady mailed this check on the day that she says she did. If she did, then that is a payment. Now, what do you say to that?

Mr. Stewart: I say, in the first place, that a check is not payment, it is not legal tender, and it is not payment.

The Court: Oh, no.

Mr. Stewart: And that they cannot pay interest on a mortgage that way. They have got to pay cash.

Mr. Manning: Your Honor, please; transactions every day in the week are made by checks, and not only that, the man had previously accepted a check from us for interest.

The Court: No. What is your motion?

Mr. Manning: The motion is the bill be dismissed.

The Court: I will grant it.

Decree.

(Filed June 28, 1929.)

IN CHANCERY OF NEW JERSEY.

Between
JOSEPH WEISBERGER,
Complainant,
and
J. G. CORPORATION, *et als.*,
Defendants.

On Bill, etc.
Decree.

This matter being opened to the Court by Charles H. Stewart and Richard Hartshorne, solicitors for and of counsel with the complainant, and Nathan H. Berger and John P. Manning, solicitors for and of counsel with the defendant, upon bill, answer, replication and proofs taken in open court, and the pleadings and proofs having been read and considered by the Court, and the arguments of counsel having been heard thereon, and the Court being of the opinion that complainant has not established his right to the relief prayed for in the bill of complaint filed herein:

IT IS THEREUPON, on this 28th day of June, 1929, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

ORDERED, ADJUDGED, AND DECREED, that the bill of complaint filed herein, be, and the same is hereby dismissed, with costs.

Respectfully advised,

E. R. WALKER,
C.

ALONZO CHURCH,
V. C.

Exhibit C-1.

THIS INDENTURE,

Made the eighteenth day of January, in the year of Our Lord One Thousand Nine Hundred and Twenty-eight,

BETWEEN

J. G. Corporation, a New Jersey corporation, having its principal place of business in the City of Newark, in the County of Essex and State of New Jersey, party of the first part, hereinafter known as the Mortgagor,

AND

Joseph Weisberger, of the City of Newark, in the County of Essex and State of New Jersey, party of the second part, hereinafter known as the Mortgagee,

WITNESSETH, that the said mortgagor, for and in consideration of the sum of ELEVEN THOUSAND TWO HUNDRED Dollars, lawful money of the United States of America, to it in hand well and truly paid by the mortgagee at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said mortgagor therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, enfeoffed, conveyed and confirmed, and by these present do give, grant, bargain, sell, alien, enfeoff, convey and confirm to the said mortgagee and to his heirs, executors, administrators, and assigns, ALL that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey,

BEGINNING at a point on the westerly line of Hillside Avenue distant four hundred feet south-

erly from the corner formed by the intersection of the southerly line of Runyon Street and the westerly line of Hillside Avenue, as the same are laid down on the Block Maps of the City of Newark; thence running westerly parallel to the southerly line of Runyon Street one hundred feet; thence running southerly parallel to Hillside Avenue one hundred and ninety one feet and thirty-five one hundredths of a foot to the northerly line of the property of the New York Bay Railroad Company; thence running easterly along the same one hundred feet and twenty-one one hundredths of a foot to the westerly line of Hillside Avenue; thence running northerly along the same one hundred and ninety-seven feet and eighty-two one hundredths of a foot to the point or place of BEGINNING.

Being the same premises conveyed to the party of the first part by Joseph Weisberger and wife by deed of even date herewith and about to be recorded.

The within mortgage is a purchase money mortgage and is given to secure a part of the purchase money mentioned as the consideration in the foregoing deed.

The within mortgage is second in priority to a mortgage in the nominal sum of $40,000.00 held by the Hill Building & Loan Association.

It is contemplated by the parties hereto that the party of first part will remodel the building now on said premises, that the mortgagee will not interfere in any way with said remodeling.

TOGETHER with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining. Also all the estate, right, title, interest, property, claim and demand whatsoever of

the mortgagor of, in and to the same, and of, in and to every part and parcel thereof.

To HAVE AND TO HOLD all and singular the above described tract or lot of land and premises with the appurtenances, unto the said mortgagee, his heirs, executors, administrators and assigns, to the only proper use, benefit and behoof of the said mortgagee, his heirs, executors, administrators and assigns forever. Provided, always, and it is agreed by and between the parties to these presents that if the said mortgagor, its successors and assigns do and shall well and truly pay, or cause to be paid, to the said mortgagee, the sum of ELEVEN THOUSAND TWO HUNDRED Dollars as follows: on the tenth day of January, Nineteen Hundred and Thirty-three, with lawful interest for the same from the tenth day of January, 1928, at the rate of six per cent, per annum, payable semi-annually according to the conditions of a certain bond, bearing even date herewith, in the penal sum of Nineteen Thousand Dollars, made by said J. G. Corporation, without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever, thence and from thenceforth these presents and said obligation shall cease and be void, anything herein and therein contained to the contrary in anywise notwithstanding.

The principal or any part thereof not less than Five Hundred Dollars, may be paid at any time before maturity, on any interest day herein reserved, upon thirty days' written notice to the holder of the Mortgage.

AND THE SAID MORTGAGOR, for itself, its successors and assigns, does covenant and grant to and with the said mortgagee, that it shall not nor will

claim or demand or be entitled to receive any credit or credits on the interest payable hereon, or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof.

AND THE MORTGAGOR, hereby warrants and defends the title to the said lands and premises.

The mortgagor shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire by insurers, through such broker or brokers selected and in an amount approved by the mortgagee, his heirs, executors, administrators and assigns, and assign the policy or policies and certificate or certificates thereof to the mortgagee, his heirs, executors, administrators and assigns, as collateral security for the payment of the principal and interest aforesaid; and it is agreed that if the mortgagor, its successors and assigns, shall neglect to pay all or any tax, assessment or other municipal or governmental rate, charge, imposition, or any installment or installments of monthly Building Loan dues and interest, or any sums payable under any lien superior hereto, or any premium for insurance, as aforesaid, on any day whereon the same shall become due and payable, after the period of default aforesaid, then it shall be lawful for the mortgagee, his heirs, executors, administrators and assigns, to pay such charges, and the sum or sums so paid shall be a lien on the said mortgaged premises added to the amount secured hereby with interest at six per cent, per annum, and in the event of such payment, at the option of the mortgagee, his heirs, executors, administrators or assigns, the principal

sum secured hereunder shall become due and payable, and agrees that if default be made in the payment of any installment of principal or of the said interest, or any part thereof, on any day whereon the same is made payable as hereinbefore expressed, and should the same remain unpaid and in arrears for the space of thirty days, or if default be made in the payment of any of said taxes, water rents or other municipal or governmental rate, charge, imposition or any money payable under the terms of any mortgage lien paramount hereto, on any day whereon the same shall become due and payable, and should the same remain unpaid and in arrears for the space of sixty days, or in the event that any building shall be demolished or removed from the mortgaged premises (or if the removal or demolition thereof is threatened) without the consent in writing of the mortgagee or holder of this mortgage, or in the event that the owner of the mortgaged premises shall fail, within ten days after written request therefor, to furnish a statement of the amount due and owing for principal and interest hereunder, or evidence of the payment of taxes, water rents, interest and principal of prior mortgages or any carrying charges, or in the event that default shall be made in any of the terms, covenants and conditions herein contained, or contained in any mortgage constituting a lien upon the mortgaged premises prior and superior to the lien hereof, or should any action be commenced to foreclose any such prior mortgage, ~~or should the owner of the mortgaged premises, fail, for a period of thirty days, to begin compliance with any requirements, recommendation or recommendations of any of the Departments or authority of the State of New Jersey, or the mu-~~

~~nicipality~~ ~~where~~ ~~such~~ ~~mortgaged~~ ~~premises~~ ~~are situate,~~ ~~such~~ ~~municipality~~ ~~or~~ ~~State~~ ~~Department or authority~~ ~~having~~ ~~jurisdiction~~ ~~over~~ ~~the~~ ~~mortgaged~~ ~~premises,~~ or in the event of the adjudication in bankruptcy or insolvency of the mortgagor or the owner of the mortgaged premises, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money, with all arrearages of interest thereon, and any other charges paid by the holder of this mortgage, shall, at the option of the mortgagee and assigns, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary hereof in anywise notwithstanding.

And agrees that the said mortgagee, his heirs, executors, administrator or assigns shall and may, from time to time, and at all times after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said mortgagor, its successors or assigns, or of any other person or persons whatsoever.

And agrees that if default shall be made, as aforesaid, the mortgagee, his heirs, executors, administrators and assigns, shall have the right forthwith, after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues and profits thereof, and to apply the

same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are, in the event of any such default, hereby assigned to the mortgagee, and the mortgagee shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of right, as security for the amounts due the mortgagee, without consideration of the value of the mortgaged premises or solvency of any person or persons liable for the payment of such amounts.

In Witness Whereof The Mortgagor has caused these presents to be signed by its proper officers and its corporate seal affixed, the day and year first above written.

J. G. Corporation
By Jacob Gennet
President.

Signed, sealed and Delivered
in the presence of

Attest:
Frances Pietrucka
Assistant Secretary

(J. G. Corporation Seal)

Exhibit C-1.

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

BE IT REMEMBERED that on this Eighteenth day of January, in the year of our Lord, One Thousand Nine Hundred and Twenty-eight, before me, the subscriber, a Notary Public of New Jersey, personally appeared, Frances Pietrucka who, being by me duly sworn on his oath, says that he is the Ass't Secretary of the J. G. Corporation, the grantor named in the within instrument; that Jacob Gennet is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed her name thereto as witness.

FRANCES PIETRUCKA

Sworn and subscribed before me, at
Newark, N. J. the date aforesaid

HERMAN J. HARRIS
Notary Public
of New Jersey.

Exhibit C-1.

(BACKING)

Compared by 61 & 24.

MORTGAGE.

J. G. Corporation,
a New Jersey Corporation,
to
Joseph Weisberger,

Dated January 18th, 1928.

Received in the Register's Office of the County of Essex, N. J. on the 19th day of January, A. D. 1928, at 1:01 o'clock in the afternoon and Recorded in Book L 63 of Mortgages for said County, on page 408-410

HOWARD S. DODD
Register

JACOB L. NEWMAN,
810 Broad Street,
Newark, N. J.

RECEIVED
REGISTERS OFFICE
January 19th, 1928
1:01 PM
ESSEX COUNTY
NEWARK, N. J.

Exhibit C-2.

KNOW ALL MEN BY THESE PRESENTS:

That Jacob Gennet, of Newark, Essex County, New Jersey; and J. G. Corporation, a New Jersey Corporation, having its principal place of business in the City of Newark in the County of Essex and State of New Jersey are held and firmly bound unto Joseph Weisberger, of the City of Newark in the County of Essex and State of New Jersey, in the penal sum of TWENTY TWO THOUSAND FOUR HUNDRED ($22,400.00) DOLLARS lawful money of the United States of America, to be paid to the said Joseph Weisberger, his heirs, executors, administrators or assigns, for which payment well and truly to be made it binds itself, its heirs, successors or assigns firmly by these presents. Sealed with the Obligors seal and dated the eighteenth day of January, One Thousand, Nine Hundred and Twenty-eight.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the above bounden Jacob Gennet, and J. G. Corporation, its successors, heirs, executors, or assigns, shall well and truly pay, or cause to be paid unto the above named Joseph Weisberger, his heirs, executors, administrators or assigns, the just and full sum of ELEVEN THOUSAND TWO HUNDRED ($11,200.00) DOLLARS on the Tenth day of January, which will be in the year One Thousand, Nine Hundred and Thirty-three, and the interest thereon, to be computed from January 10, 1928, at and after the rate of six per cent, per annum, and to be paid semi-annually, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

The mortgage securing the within bond is second in priority to a mortgage in the nominal sum

of $40,000.00 held by the Hill Building & Loan Association.

And it is hereby expressly agreed that should any default be made in the performance of any of the terms, covenants and conditions contained in the Mortgage accompanying this Bond (the said terms, covenants and conditions, and all matters and things contained in said Mortgage being hereby made a part hereof as though particularly incorporated herein), or should any of the events or contingencies occur by reason of which the time for the payment of the said Mortgage matures as set forth therein, or should any default be made in the payment of the said interest or any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the Mortgage accompanying this Bond, and become due and payable, and should the said interest, remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of sixty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money, or so much thereof as may then remain unpaid, with all arrearage of interest thereon, shall, at the option of the said obligee, or the legal representatives of the said obligee, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired,

anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

The principal secured by this Bond, or any part thereof not less than Five Hundred Dollars may be paid at any time before maturity, on any interest day herein reserved, upon thirty days' written notice to the holder of the Mortgage accompanying this Bond.

AND IT IS FURTHER EXPRESSLY AGREED that the said obligor shall not be entitled to and will not claim any credit on the interest payable on the Mortgage securing this Bond for taxes which may be levied upon the mortgaged premises, or for any part of said taxes.

J. G. CORPORATION
by JACOB GENNET,
President.

Signed, Sealed and Delivered
in the presence of

(J. G.)
(Corporation)
(Seal)

Attest:
FRANCES PIETRUCKA
Assistant Secretary.

Witness:
SAUL J. ZUCKER.

JACOB GENNET ((L. S.)

Exhibit C-2.

The obligor, as further collateral security for the mortgage debt hereby secured, hereby assigns to the obligee, all its right, title and interest in and to the two hundred shares of stock held by the Hill Building and Loan Association, and upon the acquisition of the said premises by virtue of a foreclosure, the holder of the Mortgage accompanying this Bond, or the purchaser at foreclosure sale, shall be fully entitled to all the equity in said shares, and to have them transferred on the books of said Association in the name of the holder of said Mortgage, or purchaser, at the foreclosure sale.

This assignment is, however, made subject to the lien of the said Association on said shares, by virtue of its being the holder of a Mortgage embracing the premises described in the Mortgage accompanying this Bond.

J. G. Corporation
By Jacob Gennet
President.

Signed, Sealed and Delivered
in the presence of

(J. G.)
(Corporation)
(Seal)

Attest:
Frances Pietrucka
Assistant Secretary.

Exhibit C-2.

($5.75 Revenue stamps affixed)

(Backing)

Bond

Jacob Gennet, and
J. G. Corporation, a
New Jersey corporation,
to
Joseph Weisberger,

Dated: January 18, 1928.

Amount..... $9500.
Date.....January 2, 1928.
Due.....January 2, 1933.

Interest payable Semi-annually.

Jacob L. Newman
810 Broad Street
Newark, N. J.

Notice of Appeal.

(Filed September 17, 1929.)

IN CHANCERY OF NEW JERSEY.

Between

JOSEPH WEISBERGER,
Complainant,

and

J. G. CORPORATION, JACOB GENNET and ESTHER GENNET, his wife,
Defendants.

On Bill, &c.
Notice of Appeal.

The complainant hereby appeals from the final decree made in the above entitled cause on the 28th day of June, 1929, by the Chancellor, on the advice of Vice Chancellor Alonzo Church, dismissing the bill of complaint filed therein, with costs, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

STEWART & HARTSHORNE,
Solicitors for and of Counsel
with Complainant.

Dated, September 12, 1929.

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

CHARLES H. STEWART,
Of Counsel with Complainant.

(ENDORSED.)

Service of the within Notice of Appeal is hereby acknowledged this 13th day of September, 1929.

NATHAN H. BERGER,
Solicitor of Defendants.

Petition of Appeal.

(Filed September 26, 1929.)

(Refiled October 14, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH WEISBERGER, Complainant-Appellant, *vs.* J. G. CORPORATION, JACOB GENNET and ESTHER GENNET, his wife, Defendants-Appellees.	On Appeal from the Court of Chancery. Petition of Appeal.

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

The petition of Joseph Weisberger, the appellant in the above entitled cause, respectfully shows that:

Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 28th day of June, 1929, in a certain cause in said Court of Chancery, wherein the said Joseph Weisberger was complainant, and the said J. G. Corporation, Jacob Gennet and Esther Gennet, his wife, were defendants, in this respect, to wit: that the said decree adjudges that the bill of complaint filed in said cause be and the same thereby was dismissed with costs.

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

1. The Court held that the mailing of a check to the complainant, at his place of business, 69 Badger Avenue, Newark, constituted payment of interest, notwithstanding the check was not delivered to or received by the complainant.

2. The Court held that the defendant had, by the mailing of the check as aforesaid, complied with the terms of the mortgage and bond, calling for the payment of interest within thirty days after the same fell due.

3. The Court held that payment of interest by check was equivalent to payment in legal tender.

4. The Court held that if the check was mailed, that constituted legal tender.

5. The Court determined, as a matter of fact, that Jacob Gennet had caused one Pearl Chanin to draw a check to the order of the complainant for the interest due on the 10th day of January, 1929, and had signed the same, and had caused the said Pearl Chanin to deposit the same in a mail box on the 8th day of February, 1929, when the uncontradicted evidence showed that the check in payment of the interest had been delivered to Nathan Berger, the solicitor of the said Jacob Gennet, and that Mr. Berger had misplaced the same and had neglected to mail it to the complainant.

6. The Court held that, as a matter of law, it was not necessary that the interest be paid in cash.

7. The Court overruled the offer of the complainant to prove, by a witness, Yetta Blank, that on the morning of February 21, 1929, some one representing himself to be Mr. Gennet had talked to her over the telephone about the non-payment

of the interest, and to detail the conversation had, on the ground that it was hearsay, and on the ground that witness could not identify the speaker as Mr. Gennet.

8. The decree is contrary to the weight of evidence.

9. The said decree dismisses complainant's bill.

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

STEWART & HARTSHORNE,
Solicitors for and of Counsel
with Appellant.

(ENDORSED.)

Service of a copy of within Petition of Appeal acknowledged this 30th day of September, 1929.

NATHAN H. BERGER,
Solicitor for Defendants.

Answer to Petition of Appeal.

(Filed January 8, 1930.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH WEISBERGER, Complainant-Appellant, *vs.* J. G. CORPORATION, JACOB GENNET and ESTHER GENNET, his wife, Defendants-Appellees.	On Appeal from the Court of Chancery. Answer to Petition of Appeal.

The answer of the above-named defendants-appellees to the petition of appeal of the above-named complainant-appellant.

These defendants-appellees, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless, say, admit and declare that a decree was on the 28th day of June, 1929 last past made and entered in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, in the cause for that purpose mentioned in said petition, as is therein stated; but as to the substance and form thereof these defendants-appellees pray to refer thereto when the same shall be produced. And these defendants-appellees are advised and believe that the said decree is agreeable to equity and they pray that the same may be affirmed, with costs to be adjudged to these defendants-appellees.

NATHAN H. BERGER,
Solicitor for and of Counsel with
Defendants-Appellees.

Service of a copy of the within Answer to Petition of Appeal is hereby acknowledged as of time, January 6, 1930.

STEWART & HARTSHORNE,
Solicitors for Complainant-Appellant.

New Jersey Court of Errors and Appeals

JOSEPH WEISBERGER, Complainant-Appellant, *vs.* J. G. CORPORATION, JACOB GENNET and ESTHER GENNET, his wife, Defendants-Appellees.	On Appeal from the Court of Chancery.

BRIEF OF APPELLANT.

Facts.

This action is one brought to foreclose a mortgage.

The mortgage (Exhibit C-1, p. 32, State of Case) was dated January 18, 1928, and was given by the J. G. Corporation to complainant, to secure the payment of $11,200, a part of the purchase price of the premises therein described, on its sale by the complainant and wife to the defendant J. G. Corporation. It was second to a mortgage in the sum of $40,000, held by a building and loan association.

The principal sum was due January 10, 1932, and carried interest at six per cent. per annum, payable semi-annually, from the 10th day of January, 1928.

It contained a provision that if the mortgagor, its successors and assigns, neglected, for sixty days after the due date of any tax, assessment or other municipal rate, charge or imposition, to pay the

same, or if the mortgagor, its successors and assigns, should neglect or fail to pay the interest on the mortgage on the day whereon the same was due, and permit the same to remain unpaid for the space of thirty days thereafter, then, at the option of the mortgagee, the whole principal sum should be due and payable, with all arrears of interest thereon.

The bond (Exhibit C-2, page 41, State of Case) which this mortgage secured contained similar conditions and covenants.

The bill of complaint recites the bond and mortgage and their terms, in general language, and contains an allegation (par. 4, p. 2, State of Case) setting up the clause of the mortgage in reference to the right of the complainant to elect that the whole principal should be due in case of default in the payment of interest for thirty days after its due date, or in case of default in the payment of taxes, etc., for sixty days after their due date. The bill further recites the conveyance, by the J. G. Corporation to Jacob Gennet, of the fee in the premises covered by the mortgage.

It further recites (par. 7, p. 3, State of Case) that on January 10, 1929, one-half year's interest fell due and remained unpaid for more than thirty days thereafter, and that at the time of the filing of the bill it was still unpaid, and that the complainant had elected that the principal should be due for the failure to pay the interest on its due date or within thirty days thereafter; and contains the usual prayers.

The defenses set up are that about January 18, 1928, complainant arranged with defendant Jacob Gennet that interest payments should be made by the check of Jacob Gennet and should be mailed to the complainant at his office, 69 Badger Avenue, Newark, New Jersey; that pursuant to said agreement, Jacob Gennet mailed his check for the in-

stallment of interest due July 18 (*sic*), 1928, and also mailed his check for the installment of interest that became due January 10, 1929, prior in each case, to the expiration of the thirty day grace period; that in each instance the check was put in an envelope addressed to the complainant at 69 Badger Avenue, Newark, New Jersey, and that the envelopes were not returned to the sender, although they had his name and address thereon; that on the 21st day of February, 1929, defendant Jacob Gennet received a letter from complainant's solicitors, stating that they would foreclose the mortgage for non-payment of interest, and that Jacob Gennet, on receipt of said letter, went at once to complainant and told him of the mailing of the check, that complainant denied receiving it, and defendant thereupon tendered, in cash, the interest due on January 10, 1929, which complainant refused.

Replication was filed.

The cause was referred to Vice-Chancellor Church and came on for hearing.

The bond and mortgage were offered in evidence, and their execution and delivery admitted by the defendants, and complainant rested.

The defense then offered as a witness Miss Chanin, who is a bookkeeper of the defendant, Jacob Gennet, who testified (page 17, State of Case) that she had before her the check book of Mr. Gennet and produced a check stub dated February 8, 1929, showing a check drawn to the order of Joseph Weisberger for $336; that the stub is in her handwriting; that she put the check in an envelope, addressed to Weisberger at 69 Badger Avenue, Newark, New Jersey; that the envelope had a return address thereon: "Jacob Gennet, 251-255 Hillside Avenue, Newark, New Jersey," his place of business; that she deposited the envelope in a mail box about 6:15 P. M., February 8,

1929. She was asked: "Was it within thirty days of the due date? A. It was before the thirty days' grace was up. It was ten days before." She further testified that she opened all the mail of Gennet's and that the envelope and check never came back.

Mr. Gennet, the defendant, (page 19, State of Case) testified that he recalled signing a check for $336 about February 8, 1929, which he gave to Miss Chanin, and that he never received the check back. That he first learned complainant had not received the check when he got a letter from complainant's solicitors on February 21, 1929; that he then went over to see Mr. Weisberger at 69 Badger Avenue, Newark, and told him "I mailed him the check, my girl mailed a check to him. 'How is it you didn't get it and we didn't get it back within two weeks since I mailed the check?' (page 20, State of Case). And he said 'I didn't receive it.' I said, 'Mr. Weisberger, I will stop this check and I will give you a different one.' He said, 'You better wait. I will let you know.' "

He further testified that he waited a couple of days, then went to Mr. Berger, his solicitor, and explained the situation to him and Berger told him to stop payment on the check and cash a check for $336 and deliver it to Mr. Weisberger, which he testifies he did, and that Weisberger would not take the money; that Mr. Fox went with him when he made the tender, and that it was made February 25 or 26, 1929.

In rebuttal, Mr. Stewart, one of the solicitors of the complainant, was sworn and testified (page 26, State of Case) that on or about February 21, 1929 he had a 'phone conversation with Mr. Berger, the solicitor of the defendants, in regard to the non-payment of interest by Gennet; that Berger had called him up and said Gennet had been in to see

him in regard to the letter complainant's solicitors had written the day before, in reference to the non-payment of the interest, that Gennet had brought him a check and asked him to mail it to Weisberger, that he had misplaced it and had neglected to do it, and wanted to know if Stewart could do anything to straighten the matter out, and that Stewart had said he would take the matter up with Weisberger. That he did take it up with Weisberger and subsequently took it up with Berger and told him Weisberger insisted on payment in full.

It was admitted that complainant had two witnesses in Court who, if called, would testify that they opened all Weisberger's mail and that the check was never received.

Mr. Berger, being called in behalf of the defendants, (page 28, State of Case), detailed his connection with the matter, which did not agree with that which Mr. Stewart had testified to; but on cross-examination, his attention being called to the testimony of Mr. Stewart and being asked if it was not correct (page 29, State of Case), said:

> "No, sir. I think you are mistaken about that.
>
> Q. Didn't you tell me that, no matter whether it is a fact or not? A. I don't think I did.
>
> Q. Well, you won't say you did not? A. I am in doubt that I did. I don't think I did."

The testimony on behalf of the defendants nowhere shows that, as claimed in their answer, Gennet had arranged with the complainant that all interest payments to become due on the bond and mortgage should be paid by check of Jacob Gennet and should be mailed to the office of the complainant at 69 Badger Avenue, Newark, New

Jersey. There was not a single witness of the defendants who was examined on that point.

At the close of the case, the Court said:

> "It seems to me that this whole case turns on the question of whether or not this young lady mailed this check on the day that she says she did. If she did, then that is a payment. Now, what do you say to that?
>
> Mr. Stewart: I say, in the first place, that a check is not payment, it is not legal tender, and it is not payment.
>
> The Court: Oh, no.
>
> Mr. Stewart: And that they cannot pay interest on a mortgage that way. They have got to pay cash.
>
> The Court (to Mr. Manning): What is your motion?
>
> Mr. Manning: The motion is the bill be dismissed.
>
> The Court: I will grant it."

LAW.

The giving of a check is not payment and does not cancel a debt.

In the case of *Freeholders of Middlesex* v. *Thomas & Martin,* 20 N. J. Eq. 39-41, an action to foreclose a mortgage, Chancellor Zabriskie says:

> "And a check or promissory note, either of the debtor or a third person, received for a debt, is not payment, if not itself paid, except in cases where it is positively agreed to be received in payment."

See also

Anderson vs. *Gill,* 79 Md. 312-318;
Carroll vs. *Sweet,* 128 N. Y. 19-21;
Thomas vs. *Supervisors,* 115 N. Y. 47.

"The proposition is quite elementary that the acceptance of the promissory note of a debtor, for a precedent debt, will not operate as a discharge or satisfaction of the debt, unless it is agreed that such shall be its effect."

Wildrick vs. *Swain,* 34 N. J. Eq. 167;
Swain vs. *Frazier,* 35 N. J. Eq. 326-331;
American Brick Co. vs. *Drinkhouse,* 59 N. J. Law 462-464;
Born vs. *First National Bank,* 7 L. R. A. 442, and footnote, 21 R. C. L., Section 34, page 37;
Central Union Trust Co. vs. *Willat Film Corp.,* 99 Eq. 748-754;
Kuhl vs. *Mayor, etc. Jersey City,* 23 N. J. Eq. 84.

"A party to whom a debt is owing has a right to demand payment of his claim in money, for, in the absence of an express agreement, payment can only be made in money. (Hancock *vs.* Yaden, 6 L. R. A. 576) * * *. It is and long has been settled law that an ordinary check does not constitute payment. This doctrine is so well settled that it is unnecessary to refer to the authorities * * *. From whatever point of view it is examined, it appears clear that there is no release of the drawer of the check unless there is either an express or implied agreement to that effect."

Born vs. *First National Bank,* 7 L. R. A. 442;
Tiederman on Commercial Paper, Section 456.

"The delivery of a check to, or acceptance by, the creditor of his debtor's check, although for convenience often treated as the passage of money, is not payment, although the check is certified before delivery, in the absence of

any agreement or consent to receive it as payment, or any laches or want of diligence on the part of the creditor, or the negotiation of the check by him."

48 C. J. 617, 703, Sec. 218.

We, therefore, respectfully submit that the attempt by the defendant, Jacob Gennet, to pay the interest by check, since the same was not received by the complainant and no evidence was offered to show that any agreement had been made, or custom existed, that payment might thus be made, was a nullity, and the complainant was entitled to elect that the full principal should be due according to the terms of the mortgage.

MAILING CHECK DOES NOT CONSTITUTE PAYMENT.

"Payment is not effectuated by sending the amount due to the creditor by mail or other public carrier, until the remittance gets into the hands of the creditor, unless he expressly or by implication directs or consents that payment be so made or such a mode of payment is according to the usual course of dealings between the parties from which the creditor's assent can be inferred * * *. A mere general direction by a creditor to his debtor to remit money to him does not ordinarily constitute a direction or consent that remittance be made by mail *at the creditor's risk* * * * and a direction that a particular remittance be made by mail does not of itself authorize the debtor to make other remittances in such manner, nor does the fact that in a previous instance remittance has been made by mail without objection on the part of the creditor."

48 C. J. 594, Section 9.

"The general rule of law is that the duty lies on the debtor to pay his debt to his creditor personally or to his authorized agent.

> The burden of proof to show payment of a debt is not sustained, therefore, by proof that a letter containing the requisite amount, directed to the creditor, was duly deposited in the post-office. The debtor must go further. He must show that the creditor authorized this mode of remittance, either by express assent or direction or a usage and course of dealing from which such assent or direction may be fairly inferred. If this can be shown, then the transmission is at the risk of the creditor; otherwise it lies upon the debtor. (Citing cases.)''

Guerney vs. *Howe,* 75 Mass. 404;
Buell vs. *Chapin,* 99 Mass. 594;
Burr vs. *Sickles,* 17 Ark. 428-432, bottom;
Morton vs. *Morris,* 31 Ga. 378-381;
Crane vs. *Pratt,* 78 Mass. 348;
Williams vs. *Carpenter,* 36 Ala. 9;
21 R. C. L., page 35, Sec. 30.

The case of *Burr* vs. *Sickles, supra,* supports the proposition that because once before remittance had been made by mail and not objected to does not authorize the debtor to assume that he may again remit by mail and at the creditor's risk. The Court says:

> ''For it is fair that the appellee should have presumed, inasmuch as the appellants, without instruction and consequently at their own risk, selected the post to make their first remittance, that in case they should choose to pursue that same course, they would expect to do so, as they had done at first, on their own risk.''

The burden of proving payment remains throughout the case upon the party who asserts it.

Model Mill Co., et als. vs. *Webb, et als.,*
80 S. E. 232.

We, therefore, respectfully submit that the defense has not borne the burden which the law lays upon them. Further, that sending a check or money through the mail, unless expressly authorized, does not constitute payment, and that no such authorization was proven in this case. And lastly, that a check is not payment unless specially authorized or assented to, which was not proven in this case; and, therefore, the decree of the Court of Chancery should be reversed and the case remitted to the Court of Chancery for the ascertainment of the amount due on the mortgage, and the entry of a decree of foreclosure.

Respectfully submitted,

STEWART & HARTSHORNE,
Solicitors for and of Counsel
with Complainant-Appellant.

New Jersey Court of Errors and Appeals

JOSEPH WEISBERGER, Complainant-Appellant, vs. J. G. CORPORATION, JACOB GENNET and ESTHER GENNET, his wife, Defendants-Appellees.	On Appeal from the Court of Chancery.

BRIEF OF APPELLEES.

Facts.

This suit was brought to foreclose a mortgage dated January 18, 1928 (Ex. C-1, State of Case, p. 32). The mortgage provides for the payment of interest semi-annually at six per cent per annum, from January 10, 1928, and provides, that if default be made in the payment of any installment of interest for thirty days, that the principal sum, with arrears of interest thereon, shall *at the option of the mortgagee,* become due immediately thereafter, (State of Case, p. 37, fol. 12-20).

At the hearing there was uncontradicted testimony that on February 8, 1929, within said period of thirty days, the defendants enclosed in an envelope a check for $336.00, payable to defendant

for the installment of interest in question; that this envelope was addressed to complainant, at his place of business, with the return address of defendant Jacob Gennet thereon, and was deposited in a mail box, that the envelope containing this check was never returned to the defendants. The defendants had made a previous check for interest to the complainant, (State of Case, pp. 17, 18). This was all corroborated by the testimony of defendant Jacob Gennet, who further testified that on February 21, 1929 he received a letter from Mr. Stewart, counsel for the complainant, stating that complainant did not get the interest on the mortgage, that he, Jacob Gennet, called on complainant and informed him of the mailing of the check, offering to stop payment on it, and to give him another check; that the complainant said, *"You better wait, I will let you know."* (State of Case, page 19, fols. 30-40; page 20, fols. 1-9). Jacob Gennet further testified that on February 25th, or 26th, 1929, he stopped payment on the check, and cashed another check for the amount of said interest, and tendered it to complainant, who refused to take it; (State of Case, page 20, fols. 10-13).

Chester Schott corroborated Jacob Gennet as to his stopping payment on the check for $336.00. (State of Case, page 22).

Frank Fox corroborated Jacob Gennet as to the tender of the cash to complainant (S. of C. page 23). The complainant offered no testimony to contradict this proof, except that he denied receiving the check.

The complainant filed a bill on March 30, 1929, foreclosing said mortgage, because of the failure

of the defendants to pay said installment of interest. The bill recites that the complainant has elected that the whole principal sum, with all unpaid interest, shall be now due upon complainant's bond and mortgage. (State of Case, page 3, fols. 15-35). There was no evidence that the complainant had exercised the option contained in the bond and mortgage, to declare the amount of principal and interest due by reason of said default prior to filing the bill.

A Decree of Dismissal was entered in this case, (State of Case, page 31). The complainant appeals from this Decree.

LAW.

POINT I.

Where a penalty or a forfeiture has been incurred by reason of mistake or accident, equity will grant relief.

The failure of the defendants to pay their interest was due entirely to accident or mistake, and not at all to their negligence.

When a mortgagor, without neglect or fraud, is prevented by accident from paying an installment, at the time specified in mortgage, equity will afford relief.

Bostwick vs. *Stiles,* 35 Conn. 195.
Copper vs. *Dyer,* 59 Vt. 447.

The jurisdiction of equity to relieve against the consequence of a mistake of fact has existed from an early period, and is thoroughly established. Indeed it is said that a Court of equity should be liberal giving relief from mistakes of fact, when no one shall be in a worse position by reason thereof. The jurisdiction exists notwithstanding a remedy may be had at law, and is as broad as in cases of fraud.

21 *Corpus Juris,* 86.
Graham vs. *Berryman,* 19 N. J. Eq. 29.
Smith vs. *Allen,* 1 N. J. Eq. 43.
Broderick vs. *Smith,* 26 Barb. (N. Y.) 539.

In the case of *Theodore Martin* vs. *Andrew Melleville,* 11 N. J. Eq. 222, which involved the foreclosure of a bond and mortgage for failure to pay interest within a period of thirty days after it became due, similar to the default claimed in the instant case, the Court held that, in as much as the defendants failed to pay their interest in time through mistake on their part as to the time the interest fell due, such a mistake was sufficient of itself to justify the Court in relieving the defendants. The Court relieved the defendants from the forfeiture. In that case, as in the case at bar, the defendants made a tender of the interest when they discovered their mistake, and the complainant refused to accept the same.

The Chancellor, in his opinion, in this case, differentiates between that case and the case of *Baldwin* vs. *Van Vorst,* 10 N. J. Eq. 577, in which case the court points out there was no excuse for the default, and for aught that appeared in that case the defendant was guilty of gross negligence, and obstinacy in not paying his interest money, according to the condition of the bond. The defendants were not guilty of any negligence which resulted in the non-payment of the installment of interest. The mortgage in question is dated January 18, 1928, and only one installment of interest fell due prior to the installment of interest in question, which was paid by check, as appears by the testimony of Pearl Chanin, as follows:

> Q. One more question, if you will, please. Had you made a previous check for the interest?
>
> A. Yes.
>
> Q. To Mr. Weisberger?
>
> A. Yes, sir.
>
> Q. When was that check—have you got that check stub here?

A. No, I haven't got it.

Q. Do you know whether that was mailed within time or not?

A. Yes, sir. (State of Case, page 18, fols. 25-35).

The complainant accepted payment of the first installment of interest by check sent to him through the mail, and led the defendants to believe that this was an acceptable way of paying the interest. If, under these circumstances, through some unexplained cause, the complainant did not receive the check for the installment of interest in question, the defendants should be relieved from the forfeiture, as was done in the case of *Martin* vs. *Melleville*, supra.

POINT II.

The Court was justified in finding as a fact that the complainant did receive the check for interest, mailed to him by the defendants.

In the case of *Kruger* vs. *Brown*, 79 N. J. Law, 418, 75 Atl. Rep. 171, it was held that where a contract may, by its terms be terminated upon notice by the mailing of a letter, with postage prepaid, containing such notice, there is a presumption of fact that it reached the party entitled thereto. If there be evidence that the person to whom it was addressed did not receive it, which, if credited, would overthrow the presumption, a question for a jury to determine is presented. *Citing* as authority the case of *Rosenthal* vs. *Walker*, 111 U. S. 185.

In the case of *New York Central Railroad Co.* vs. *Petrozzo*, 92 N. J. Law, p. 425, it was held that

where there is evidence showing, without contradiction, the sending of a written notice by mail, in the usual manner, the legal presumption that such notice was received stood unchallenged, and it was properly removed from the consideration of the jury.

In the case of *Melvin* vs. *Purdy,* 17 N. J. Law, 162, it was held that the mailing of a letter was prima facie evidence of the receipt of it.

In the case of *Goodman* vs. *Saperstein,* 81 A. R. 695, (Md.) it was held that proof mailing of a letter raises the presumption of the receipt of the letter by the addressee.

In 22 *Corpus Juris,* p. 96, this principle is laid down as follows: when a letter or other mail matter is properly addressed, and mailed, with postage prepaid, there is a rebuttable presumption of fact that it was received by the addressee, as soon as it could have been transmitted to him in ordinary course of the mail. Under favorable conditions, presumption of the receipt of mail matter is a strong one, and may be given the same prima facie force as a presumption of law.

On page 102 of the same volume of Corpus Juris, it is stated that evidence of non-receipt of mail matter, even though it consists of the addressee's positive denial of receipt, does not nullify the presumption, but leaves the question for the determination of the jury under the circumstances.

The trial court decided the facts in this case, sitting as a jury, and having before him the positive testimony of a witness who mailed the letter containing the check to the complainant, and the statement that the complainant did not receive it,

the trial court in deciding as a fact that the complainant did receive this letter.

If the complainant did receive the letter, containing the check for the interest, and he failed to make use of it, and failed to notify the defendants that the check was not acceptable in payment of his interest, he was guilty of such conduct as was calculated to mislead the defendants, and the learned Vice-Chancellor was justified in relieving the defendants from the forfeiture in this case.

In the case of *De Groot* vs. *McCotter*, 19 N. J. Eq. 531, our Court of Errors and Appeals of this State, in an action involving the foreclosure of a mortgage, because of the default in the payment of interest for a period of thirty days, after it fell due, *Held* that equity will not enforce a forfeiture of the credit, if the omission to pay interest, within the time specified, had been occasioned by the act or declarations of the complainant.

The Court in finding for defendant holds, that since the default in paying interest was the result of an honest mistake and misapprehension, to which the defendant was led by acts or declarations by the complainant, the Court of Equity will not hold the failure to pay, a forfeiture of the credit.

POINT III.

The mailing of a check constitutes payment, if the creditor, by implication, consents that payment be so made, or such mode of payment is in accordance with the usual course of dealings between the parties, from which the creditor's assent can be inferred, 48 C. J. 594.

As has been pointed out before, the testimony in this case was that the previous interest payment was made by mailing a check, and it is reasonable to say that the defendants were justified in following the same procedure in paying the next installment of interest, the one now in question.

POINT IV.

If the Court of Chancery erred in making the decree of dismissal, this Court should remit the case to the Court of Chancery for re-hearing and not merely for ascertainment of the amount due on the mortgage, and the entry of a decree of foreclosure.

Through inadvertence defendants failed to adduce proof in support of the allegation contained in their answer to the effect that on January 18, 1928 complainant arranged with the defendant Jacob Gennet that all interest payments to become due on said bond and mortgage should be made by the check of Jacob Gennet, and should be mailed to the office of the complainant, at No. 69 Badger Avenue, Newark, N. J. and that pursuant to said

agreement Jacob Gennet mailed his check for the installment of interest due July 18, 1928, and also mailed his check for the installment of interest which became due January 10, 1929, in each case prior to the expiration of the thirty days grace period, and that in each instance the check was put in an envelope addressed to the complainant at 69 Badger Avenue, Newark, N. J., and that the envelopes were not returned to the sender, although they had his name and address thereon, (State of Case, page 7, fols. 38-40; page 8, fols. 1-30). Counsel for the complainant points out this allegation on page 2 and 3 of his brief, and also points out the failure of the defendants to establish this allegation on pages 5 and 6 of his brief. The defendants should have an opportunity to adduce this testimony, at a re-hearing of this case, if it should be found that the Court of Chancery erred in making the decree of dismissal.

It is, however, respectfully urged that the decree of dismissal should be affirmed.

NATHAN H. BERGER,
Solicitor for and of Counsel with
Defendants-Appellees.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOSEPH WEISBERGER, *Complainant-Appellant,* *vs.* J. G. CORPORATION, JACOB GENNET and ESTHER GENNET, his wife, *Defendants-Appellees.*	*On Appeal from the Court of Chancery.*

REPLY BRIEF OF APPELLANT.

We desire to point out that the argument made in the brief of the defendants-respondents does not meet the issues raised in the cause.

In support of the first point of the respondents' brief, viz.: "Where a penalty or a forfeiture has been incurred by reason of mistake or accident, equity will grant relief," respondents rely on alleged accident or mistake, and claim that they were in nowise negligent.

It should first be pointed out that the relief which equity gives for "mistake" is a mistake of fact and not one of law, and the mistake which the respondents made was purely a mistake of law, viz., that they thought they were legally justified in mailing the check for interest, at the risk of the mortgagee, and that a check was good payment.

As we pointed out in our original brief, the law is against them on both points.

The case of *Bostwick* v. *Stiles,* 35 Conn. 195, cited by the respondents, was a case where the Court relieved the defendant from the enforcement of the penalty for not paying the interest

on a mortgage within a fixed time, because, through no fault of the defendant, he had been unable to do so and the mortgagor had made every attempt to fulfill his obligation within the time limit.

The case of *Kopper* v. *Dyer,* 59 Vt. 447, was one which arose, also, out of accident and not mistake.

In further support of this proposition, respondents cite the case of *Graham* v. *Berryman,* 19 N. J. Eq. 29. This case does not support respondents, but is against them. The question in the case was whether a mortgage could be reformed to set forth the actual consideration when a greater one had been inserted by mistake, and the Court said, at page 35:

> "Courts of equity will relieve against mistake, and will correct and reform deeds and instruments of the most solemn character to grant such relief. *But when relief is sought from deeds or other writings, the mistake must be clearly proved.*
>
> "Again: The mistake must be as to a fact, not only not known to the party, but one which he could not, by reasonable diligence, have ascertained. Where a party ought, in the exercise of ordinary prudence, to have made an inquiry, and neglects to ascertain the facts upon which his contract is based, in cases where it is not necessary to repose confidence in the other party, or where it is as much his duty as that of the party with whom he deals to know the facts, courts of equity will not relieve against his own negligence."

And, in this case, the Court did not relieve the defendants from the effect of their alleged mistake.

This case, however, was reversed in 21 N. J. Eq. 370, and relief granted both on the ground

of fraud and mistake; but the mistake was one of fact and not one of law.

Likewise, the case of *Smith* v. *Allen,* 1 N. J. Eq. 43, which was for the reformation of the condition of a bond to the sheriff, involved a mistake of fact, not of law.

The case of *Broderick* v. *Smith,* 26 Barb. (N. Y.) 539, was a case where the defendant did not pay his interest within the days of grace; but there was an agreement that the mortgagee should, within ninety days of the date of the mortgage, cancel a judgment lien on the premises. He did not cancel it until six months after the date of the mortgage and did not give notice of the cancellation to the mortgagor. The mortgagor failed to pay his interest, believing the judgment lien still unpaid. Later on, the mortgagor found out the lien was cancelled, and tendered the interest, which the mortgagee refused and brought suit to foreclose. The Court held, by a two-to-one vote, that the default should not be enforced.

The case of *Martin* v. *Melleville,* 11 N. J. Eq. 222, was one also involving a mistake of fact as to when interest fell due; and, while the Court said the mistake was based on facts sufficient to cause the Court to intervene, the Court further said that the complainant, by his conduct, had waived the forfeiture. And this Court, in *Voorhees* v. *Murphy,* 26 N. J. Eq. 434, points out that Martin *v.* Melleville was decided on the ground of waiver.

In opposition to the contention of the respondents, we cite the cases of *Voorhees* v. *Murphy,* 26 N. J. Eq. 434, and *Serrell* v. *Rothstein,* 49 N. J. Eq. 385. These were both suits to foreclose mortgages, where the mortgages contained days of grace.

In the case of *Voorhees* v. *Murphy,* defendant alleged mistake, in that he thought the days of grace were thirty instead of ten; and, in the case of *Serrell* v. *Rothstein,* that the days of grace were one month instead of thirty days.

In the Voorhees case, the Court says:

> "Such carelessness will not be regarded in equity as a mistake."

In *Serrell* v. *Rothstein,* the default was only one day after the expiration of the thirty days of grace.

Yet, in both cases, the Court held complainant entitled to foreclose.

The case of *Baldwin* v. *Van Vorst,* 10 N. J. Eq. 577, cited by respondents, was one where relief was denied the defendant against the forfeiture; and the Court quotes with approval, in that case, the statements of the Chancellor in the English Courts as follows:

> "I think the remarks of the Chancellor, in Benedict *v.* Lynch (1 J. C. R. 376), very applicable in a case like this. The notion that seems too much to prevail (and of which the facts in the present case furnished an example), that a party may be utterly regardless of his stipulated payments, and that a court of Chancery will almost at any time relieve him from the penalty of his gross negligence, is very injurious, to good morals, to a lively sense of obligation, to the sanctity of contracts, and to the character of this court. It would be against all my impressions of the principles of equity to help those who show no equitable title to relief.
>
> "As a general rule, courts of equity will not regard time in the performance of a contract. But the parties may make time the essence of the contract, so that the court will not interfere to aid the party who is in default, unless he can offer some good excuse,

as mistake or accident, for such default. Benedict *v.* Lynch (1 J. C. R. 370), and cases there referred to; or where the character of the contract is such that by the payment of money, or otherwise, it has been partly fulfilled, and the default is made under such circumstances as to render it unconscionable to insist upon the forefeiture. * * *

"But I cannot in this case see any ground for equitable relief. The agreement itself is a reasonable one. Time is the essence of the contract, and there was no hardship in making it so. The agreement is altogether executory, and no act has been done by either party, to change the position of the parties, so as to make it oppressive in the complainant to call for the fulfillment of the agreement."

On page 6 of respondents' brief, respondents point out that the complainant had accepted payment of the first installment of interest by check sent to him through the mail, and led the defendants to believe that this was an acceptable way of paying interest.

That the mailing of a check, in payment of a debt for interest, on one occasion does not of itself authorize the debtor to make other remittances in such manner, is supported by the citations on pages 8 and 9 of the original brief of the appellant.

The case of *Martin* v. *Melleville,* 11 N. J. Eq. 222, does not support this proposition of the respondents.

Point II of respondents' brief: "The Court was justified in finding as a fact that the complainant did receive the check for interest, mailed to him by the defendants."

The Court did not find as a fact that the complainant received the check for interest. All

the Court found was that if Gennet's clerk mailed the check on the day that she says she did, that amounted to payment (p. 30, State of Case, l. 14).

The cases quoted under this point merely hold that testimony showing that a paper was enclosed in an envelope properly addressed, with postage prepaid thereon, and deposited in the post office or mail box, raised a presumption of fact that it reached the party entitled thereto, but that it is a rebuttable presumption, and, if any evidence is introduced which, if credited, would overthrow the presumption, a question for the jury is presented.

In the case before the Court, there is the testimony of Miss Chanin (page 17, State of Case) that on February 8, 1929 she deposited, in a mail box, the envelope, properly addressed and containing the check for interest. Gennet himself was not interrogated on this point; but, in his recital of what he said to Weisberger after he got the letter from Weisberger's solicitors, demanding principal and interest, he inferentially supports Miss Chanin's testimony. Against this, however, is the admission of the defendants (bottom of p. 15 and top of p. 16, State of Case):

> "Mr. Stewart: And that that will be the testimony that will be given, that the interest was not received from the defendants.
>
> "Mr. Manning: We will admit that the interest was sent, but the complainant denies that he received it."

And page 28:

> "Mr. Stewart: Oh, there is one other thing. I don't know whether you will consent to it. I have two witnesses here who will testify they opened the mail in Weisberger's office and that no check was received.

> That will save time, if you will admit they will testify to it.
>
> "Mr. Manning: We will admit that, if your Honor please.
>
> "The Court: That will be all right. The question is, whether it was mailed. If it was, that, as I understand it, is legal tender."

So that the presumption is rebutted, and the Court did not pass on the issue thus raised, but passed solely on the question, as before stated, that mailing constituted tender, and that a check constituted payment, whether received or not by the person to whom it was mailed.

Respondents cite, in support of their proposition, 22 C. J. 96; but in the same paragraph as that quoted in respondents' brief is the following, at page 98 of 22 C. J.:

> "On the other hand that the presumption is not a strong one was indicated in an early case, where it was said that the presumption is 'contradicted daily by the immense dead letter collections never received by correspondents.' * * * And in a later case it was held that the mailing of a letter, duly stamped and properly addressed, *does not raise a presumption* of either law or fact, *but it is a relevant circumstance* from which, *if not rebutted,* the inference is fairly deducible that the letter was received in due course. * * * Certainly the presumption, that a person, to whom a letter has been addressed and mailed, received it, is not conclusive."

The case of *Rosenthal* v. *Walker,* 111 U. S. 185, holds:

> "The presumption so arising is not a conclusive presumption of law, but a mere inference of fact founded on the probability that the officers of the government will do their duty in the usual course of business, and, when it is opposed by evidence that the letters never were received, must be weighed with all the other circumstances."

On page 8 of the respondents' brief, last paragraph, respondents say:

> "The court in finding for defendant holds, that since the default in paying interest was the result of an honest mistake and misapprehension, to which the defendant was led by acts or declarations by the complainant, the Court of Equity will not hold the failure to pay, a forfeiture of the credit."

There is no such finding by the Court, and there is no evidence upon which the Court could have decided that the default in paying interest was the result of an honest mistake and misapprehension, to which the defendant was led by acts or declarations by the complainant.

The last point raised by the respondents is that, "if the Court of Chancery erred in making the decree of dismissal, this Court should remit the case to the Court of Chancery for re-hearing and not merely for ascertainment of the amount due on the mortgage, and the entry of a decree of foreclosure."

The answer to this point is that the defendants had their day in court and had every opportunity to put in evidence to sustain the defenses which they set up in their answer.

Respondents say:

> "Through inadvertence defendants failed to adduce proof in support of the allegation contained in their answer."

It appeals to us that the answer to this is, that when they prepared their answer they probably knew what proof they had and that they made their answer much broader than their proof; and in any event, they should not now be allowed to supply this proof, after having heard the testimony of the witnesses and after the failure to

make out their defense has been pointed out in these briefs.

All of which is respectfully submitted.

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