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N. J. Court of Errors and Appeals.

ADAH A. PUTNAM,

Appellant.

and

LYDIA A. CLARK and the Executors
of H. F. Clark,
Respondents.

Brief for Appellants.

The case shows :

- 1st. That in a previous suit in Chancery, Mrs. Putnam as complainant, and Mrs. Clark and the executors as defendants, contested the question : Was the assignment from Mrs. Putnam to Barret fraudulently altered ? Of which question Mrs. Putnam maintained the affirmative.
- 2d. That in that suit the Court adjudged that Mrs. Putnam failed to prove the affirmative of that issue, and on that ground decreed against her, dismissing her bill.
- 3d. That subsequently Mrs. Putnam brought an action in the Supreme Court against Mrs. Clark alone, in which she proposes to try the same issue as that presented in the former suit. That Mrs. Clark and the executors now apply to the

New Jersey State Library

Court of Chancery for an injunction against the prosecution of the suit at law, alleging that the question was tried in the first suit, and that the decree in that suit is a bar to the suit at law. To which bill Mrs. Putnam pleads that in the first suit the Court had no power to, and did not receive her own testimony. That by her testimony she can prove that the assignment was fraudulently altered, and that in the action at law the Court has power to, and will hear that testimony.

The order below overruled this plea. The appeal is from that order.

The statute (Revision 1874, page 378, section 3), provides "that no party shall be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness, *or either of the parties in a cause sue or are sued in a representative capacity,*" except under certain conditions which do not exist in this case. In the first suit in Chancery the executors of Clark, having been parties in a representative capacity, the Court had no power to hear, and did not hear Mrs. Putnam's testimony. In the suit at law, the executors not being parties, the Court can hear that testimony. Does this feature in the case prevent the decree from being a bar?

It is necessary to bear in mind that the facts stated in the plea must, for the decision of this appeal, be taken to be true. Therefore the Court must assume that Mrs. Putnam can prove by legal evidence, in the action at law, that the assignment was fraudulently entered, *i. e.*, that the property demanded is hers, unless she is estopped by the decree.

It is also necessary *in limine* to answer two objections from the other side.

First: the objection that the Court will not try a case on new evidence, where the evidence might have been procured by due diligence in the first suit. But the case at bar is distinguished from all cases to which

the objection applies, by this feature, viz. : the evidence of Mrs. Putnam was omitted in the first suit, not because of any neglect of hers to present it, but because of the want of power in the Court to receive it. This feature may or may not be sufficient to prevent the supposed estoppel. It certainly presents considerations entirely different from those suggested in the objection, and renders the latter irrelevant.

Second : the objection that Mrs. Putnam having had the choice of two remedies, *i. e.*, an action in detinue, or her suit in equity, and having *elected* to pursue the latter, is barred by that *election* from afterward suing in detinue or in any other form.

This objection assumes that the former decree is a bar solely on the ground of the *election* to pursue the suit in which it was given, independent of any other feature, or rather that the *election per se*, considered apart from the decree, has the force of an estoppel. The plea of a former judgment as an estoppel presupposes the existence, when the former action was brought, of the right to sue, either in that action or in the present action in which the plea is made. In every such case there must have been an election to pursue the former action, but if the party is estopped by the election, all inquiry as to whether the judgment contain the other elements necessary to make it a bar would be excluded. The only inquiry would then be : Has the plaintiff previously elected *any* other action against the defendant for the same claim. The question would not be : Has there been an opportunity for an *adequate* judgment ? but only : Has there been an opportunity for *any* judgment ?

In Countess of Plymouth v. Bladon, 2 Vern. 32, the complainant had brought two suits for an account—one at law, and one in equity, and being forced by the Court to elect, had dismissed the bill, “and not having met with such success at law as she expected,” filed another bill for the same accounting. These facts being set up by plea to the second suit, the Court overruled the plea, saying, “a dismission upon an election

is not peremptory." But in that case the former action had been between the same parties, for the same subject matter, in a Court having concurrent jurisdiction. Why did not the election bar? If it be said, because the judgment at law must have lacked some essential condition of an estoppel, the reply admits that the election itself does not bar; that the bar arises from some element in the former case other than the mere fact of election.

This case is approved in 1 Daniel, Ch. Pr. 817 (Ed. 1871) Story's Eq. Pr., sec. 742.

In *Hughes v. Nelson*, 2 Stew. 548, the complainant had sued at law, and having failed to prove the indorsement to himself of the note sued on, judgment went against him, and he then sued again in equity on the same note, alleging that the endorsement had been omitted by mistake. The Court held the first judgment to be no bar. Here the former action was by the same plaintiff against the same defendant for the same subject matter. Why was not the election of the former action a bar? If because the first Court had not jurisdiction to inquire into the alleged mistake, and supply the want caused by it, then the *election* by the complainant of the former action against the same defendant for the same claim was not a bar.

In *Blanchard v. Pasteur*, 2 Haywood (N. C.), 590, the plaintiff had sold goods to two partners, and took a bond signed by one partner with the firm name. Suit was brought on the bond against the partner who had not signed, the other being dead, and "judgment was upon the merits for the defendant." Afterwards the plaintiff brought suit in equity against the same defendant for the money for which the goods were sold. A plea of the judgment was overruled. Here was a second suit by the same plaintiff against the same defendant for the same debt, the only difference being in the mode of proof; in the one case the plaintiff resting on proof of the bond, in the other on proof of the sale. Why was not the *election* of the first action a bar? Because the first judgment lacked

an essential condition of an estoppel. It was not determinable on the same evidence—i. e., the issues in the two cases were different. So, in the case at bar, it is proposed to show that the decree lacks an essential condition of an estoppel; i. e., it was not obtained under the same rules of evidence as those which will determine the second judgment.

An election to pursue the suit in which the judgment is rendered is a necessary element in every judgment. If now the judgment is held to be no bar, the election to pursue the suit in which it was rendered can not be a bar. If the former judgment contain all the essential conditions to make it a bar, then there is an estoppel, not by virtue of the *election* to pursue the former action, but by virtue of the *judgment* in that action. It is absurd to say that an election to procure an inconclusive judgment is conclusive.

To sum up the answers to this objection, it may be said that the mere *election* to pursue a given action will not bar a second action against the same person for the same purpose, unless the *judgment or decree* in the first action has the characteristics necessary to make it an estoppel to the second suit.

But the decree against Mrs. Putnam in the first suit, has not the characteristics necessary to make it an estoppel to the action in detinue.

By the plea it appears that Mrs. Putnam has evidence (viz. her own testimony) sufficient to prove that the assignment to Barrett was fraudulently altered.

The Court had not power to examine that evidence in the first suit. The Court of law has power to examine it.

Point I.

When the Court, in the first suit, had not power to receive material evidence, which evidence, if admitted, might have led to a different result, and which evidence is admissible on the second suit, the judgment in the first suit is not a bar to the second.

The opinion of the Vice-Chancellor is based upon the general rule, that the judgment of a court of competent jurisdiction, rendered on the merits, between the same parties on the same issue, is a bar.

Duchess of Kingston's case, 2 Smith's Ld. cases.

But there are exceptions to this rule. Thus, where a rule of evidence in the second suit requires a weight of evidence greater than the evidence required in the first suit, the first judgment is no evidence in the second suit.

This was the rule of the Canon law.

1 Whart. Evidence, sec. 777.

In *Riker v. Hooper*, 35 Vt. 457, Riker had impounded Hooper's horse. Hooper sued in trover, and the issue was whether the proceedings to impound were illegal. On this issue judgment was given for Riker. Subsequently Riker sued Hooper on a penal statute to recover a certain sum per day for the time he had impounded the horse, in which action, to prove that the proceedings to impound were legal, he offered the former judgment in evidence. The defendant offered to prove that the proceedings to impound were illegal; the trial judge held that he was concluded by the first judgment. But the Supreme Court reversed the ruling, on the ground that the first suit being a civil suit the judgment might have rested on a mere preponder-

ance of evidence, and that, in the second suit, being a penal action, the weight of evidence required was greater, viz., proof beyond a reasonable doubt. The first judgment was held to be not even *prima facie* evidence.

Here the first judgment was by a court of competent jurisdiction, was rendered on the merits, between the same parties, on the same issue, but it was not conclusive, because the rule of evidence under which the first judgment was given so differed from the rule of evidence in the second action, that the evidence in the first action might have been insufficient, if produced in the second. The same issue was triable under different rules of evidence in the two cases.

In *Sopwith v. Sopwith*, 2 Swabey and Tr. the Court said (p. 169): "In a suit instituted by the husband for divorce on the ground of adultery, the wife may plead cruelty, desertion, or such wilful misconduct as has conduced to the adultery * * * but she cannot be heard as a witness in support of such allegation. In an independent suit by her for judicial separation on the ground of cruelty or desertion, or for dissolution of the marriage on the ground of adultery, coupled with cruelty or desertion, she may give evidence in support of her case; and inasmuch as the same issue in these two cases would be triable on different principles as to the admissibility of evidence, the doctrine of estoppel could not justly be applied."

In *Stoate v. Stoate*, 2 Sw. & Tr. 223, the wife had a decree of judicial separation, on a verdict which found that the husband had deserted her for two years and had treated her cruelly. The wife in this proceeding had testified in proof of the desertion and cruelty. Subsequently the husband petitioned for divorce on the ground of his wife's adultery. She in answer denied the adultery, and alleged adultery, desertion and cruelty by the husband, and pleaded the former verdict and decree. The husband took issue on the answer. In the trial to prove the desertion and cruelty

alleged in the answer the defendant offered the former decree in evidence.

The Court rejected it on the ground that it would be indirectly making use of evidence which was directly inadmissible in the present suit.

In *Bancroft v. Bancroft*, 3 Sw. & Tr. 597: The husband petitioned for a dissolution of the marriage on the ground of his wife's adultery. In a cross-suit by the wife for judicial separation on the ground of cruelty, the husband charged in answer the same adultery as in his petition, for divorce. The issues in the cross-suit were first tried before a jury, who found that the husband had been guilty of cruelty, and that the wife had not committed adultery. On this trial she was examined, and denied the adultery.

In the suit for divorce the defendant moved for leave to plead this verdict. The Court held that "the law by making the evidence of the parties admissible in one suit and not in the other, has virtually declared that in cases of this kind the issue as to the wife's adultery may be twice tried; the same issue being triable on different principles of evidence in the two suits; by one species of evidence in the one, and by another in the other."

The above cases are direct authority to show that a judgment, though rendered by a Court of competent jurisdiction, between the same parties, and directly on the point in issue is not conclusive if obtained by the *admission* of evidence which would be inadmissible in the second suit. Does it not follow that the first judgment would not be conclusive if obtained by the *exclusion* of evidence which would be *admissible* in the second suit? Of course the admission and exclusion must be due, not to the error, but to the greater power in the one case, and to the want of power in the other, on the part of the Court. In the case at bar, the evidence excluded in the first suit is lawful evidence in the second; in the cases cited, the evidence admitted in the first suits was unlawful evidence in the

second. But the *exclusion of lawful*, and the *admission of unlawful* evidence are equally fatal objections, and for the same reason, viz. : that the conclusion, i. e., judgment founded on either can not be presumed to be true. Therefore an authority for the proposition that a former judgment is not conclusive if founded on the *admission* of evidence *unlawful* in the second suit, is also authority for the proposition that a former judgment is not conclusive if founded on the *exclusion* of evidence *lawful* in the second suit.

See also *Rex. v. Boston*, 4 East. 572.

In *Norton vs. Wood*, 5 Paige, 249, one partner had sold to the other all his interest in the business. The latter sued Norton for a demand due to the firm at the time of the assignment. Norton claimed to have paid the money to the retiring partner before the assignment, and he called the retiring partner as a witness. But that partner being a nominal plaintiff, his testimony was excluded, the law at that time prohibiting parties to a suit from testifying. Judgment was entered against Norton on the claim.

He then filed his bill in equity, alleging the above facts and that the debt was paid. The Court said the defence was a good defence at law, and that had it been a bill for discovery the application would have been too late, but held that the inability of the Court of law to examine the testimony of Norton was sufficient to enable the Court of Chancery to re-examine the case.

In this case the former judgment was between the same parties on the same issue, viz. : was the claim paid? and was directly upon the point in issue. The reason that the first judgment was no bar to the second suit was that the judgment in the first suit was obtained by the exclusion of evidence which the Court in that suit had no power to receive, but which was admissible in the second suit.

In *Jordan vs. Loftin*, 13 Alabama, 547, the complainant had been a surety on the note of Hill given to Loftin. He became surety upon the condition that a third party should also sign as surety, which condition was known to Loftin, and which condition was, as Loftin also knew, not fulfilled. Subsequently Loftin sued Jordan and the principal at law. Judgment was entered, and the complainant filed a bill setting up the above facts, and charging that he was unable to prove his defence at law, because it was known only to the parties to the suit at law, and that none of them were competent witnesses, the law excluding the testimony of the parties. The Vice-Chancellor dismissed the bill, but on appeal the decree below was reversed, and the Court said: "It" (the bill) "is filed to enable the complainant to make a defence against the note on which the judgment is rendered, and which defence the complainant alleges he can only make by obtaining the testimony of the principal to the note, who sued jointly with him at law, and therefore the complainant could not obtain the benefit of his testimony upon the trial at law. * * * If the object of the bill had been to obtain a discovery from the plaintiff at law merely, he must then apply to equity before the rendition of the judgment, but the object of this bill is to obtain the benefit of the testimony of his co-defendant; and although the judgment is rendered, yet we think he may come into equity for that purpose, if he could not prove the same fact by any other witness. * * * We think, under the circumstances of this case, the rendition of the judgment at law ought not to preclude the complainant from filing his bill. And looking alone to the face of the bill, we think there is equity in it, for if the complainant were induced to sign a note on a promise made by Loftin, the payee, which promise has not been complied with, and if the complainant would not have signed the note as the surety of Hill, but on the faith of that promise, then he ought not be compelled to pay it."

In the above case the first judgment was between the same parties by a Court of competent jurisdiction directly upon the point at issue. The defence was a good legal defence, but the first judgment was not conclusive. Why? Because material evidence, viz., the testimony of a party to the cause, could not be received under the rules of evidence governing the Court in the first suit. It is no answer to say that in that case the complainant in equity was the defendant and not the plaintiff at law. The rule upon which the Vice-Chancellor's opinion is based works equally for the plaintiff against the defendant, and for the defendant against the plaintiff. If in the first suit the issue was the same, the parties the same, and the Court of competent jurisdiction, it matters not by which party the protection of the rule is invoked against the other. If the general rule just mentioned can be invoked in the case at bar, by the complainant, then it could have been invoked by the defendant in equity, in the case in Alabama.

Neither is it an answer to say that the case in Alabama was but an exercise of the ordinary power of the Court of Chancery to relieve against judgments. The Court of Chancery is bound by a judgment of a Court of Law between the same parties, on the same issue, if the court of law have jurisdiction of the question in issue. In the case in Alabama, there was no fraud, or mistake, or surprise, or newly discovered evidence as a ground for interference. The court of law had jurisdiction of the question in issue. The ground upon which the Court of Chancery re-tried the case was the ground upon which Mrs. Putnam asks the Court of Chancery in this case to permit her to retry the issue between her and Mrs. Clark.

See also *Miller v. McCan*, 7 Paige, 451.
Lewis v. Davis, 8 Daly, 185 (N. Y.)

The reasons upon which the main proposition rests are evident. Legal rights exist by force of the evidence which shows them, and of the law which defines them. The law is not the law of a particular court, but the

whole body of the jurisprudence of the State. Courts are merely agencies for investigating evidence, and declaring conclusions. The courts do not create rights; they merely discover and pronounce pre-existing rights. In the early stages of society a single court exercised all judicial powers of investigation, investigated all classes of contested rights. But in a highly organized society no one court is capable of transacting so great a volume of business. Hence, for convenience, cases of contested rights are classified, and certain classes assigned to the investigation of different tribunals. Often the power of a court to investigate evidence and to pronounce conclusions, *i. e.*, jurisdiction, is limited to the classes of cases thus assigned to that tribunal. Thus the classes of civil and criminal cases, the classes of law and equity cases and the like. Now, if the evidence exist, and the law exist by which I am entitled to a given right, I can not lose it because this or that court has not power to examine the evidence on which it is based, even though I have made the mistake of appealing to a tribunal of such limited power. If Mrs. Putnam had the right to the mortgage when she went into the Court of Chancery, by what act has she lost that right? We have seen that the mere fact of electing to submit her claim to the examination of a given tribunal is not negligence or laches which would bar a new prosecution. If that were the rule then, even though the first tribunal had no jurisdiction, the mere submission of her claim to it would be a negligence by which she would be barred.

It follows that the inability of one judicial agency to examine material evidence and its consequent decision, can not bar investigation by another judicial agent which has the power to examine that evidence.

All the exceptions to the general rule *nemo debet bis vexari pro una et eadem causa*, cited by the Vice-Chancellor, are based upon the principle that the evidence in the first cause could not have been, or naturally might not have been the same as the evidence in the

second suit. Thus where the first Court had not jurisdiction, as in the case of *Hughes v. Nelson* cited above, the statement "no jurisdiction," is only a convenient phrase to express the truth that the first Court had not the legal power to hear the evidence, proving that a mistake had caused the omission of the necessary endorsement, and to found its judgment upon that evidence; so where the parties in the first and second suit differ, why does this make an exception to the general rule cited by the Vice-Chancellor? Because the party in the second suit not having been a party in the first, he has had no opportunity to be heard. But why must he have an opportunity to be heard? Because, and only because he might have evidence which was not adduced in the former cause and which might lead to a different judgment.

1 *Greenleaf's Evidence*, 523.

Magauran vs. Paterson, 6 S. and R. 278.

So, when the issue in the two cases are different, though the suit is between the same parties, and for the same subject matter, the evidence in the first cause must be confined to the issue in that cause. If the judgment be outside of the issue, it is void.

Munday vs. Vail, 5 *Vroom*, 418.

If now the issue in the second cause is different, the evidence, which must be confined to that issue, may be different. But that is only another form of saying that in the first judgment evidence was omitted or excluded which in the second might be, conversely, excluded or admitted.

The fact that the plaintiff might have framed an issue in his first suit broad enough to cover the matter litigated in his second suit is never an objection to the second suit. That, at least, is the conclusion of the most and the best authorities.

1 *Wharton Evidence*, section 758, 784, 785, 788.

Cromwell vs. Sac, 94 U. S., 351.

And, as shown above, it is also an exception to the general rule, upon which the conclusion of the Vice-Chancellor is based, that the first judgment was obtained under rules of evidence different from the rules by which the second court is governed, and which difference might naturally lead to different judgments on the same issue.

A judgment in a foreign country between the same parties on the same issue, if the foreign court had jurisdiction of the parties, and of the subject matter, is conclusive.

1 Greenleaf's Evidence, 546 d.

1 Wharton Evidence. 802.

Suppose a judgment recovered in Turkey on the exclusion of evidence of Christians when such evidence would have proved a different case, would that judgment be a bar in an action between the same parties here?

Suppose a note given in New Jersey and sued on in a foreign State, which requires notes to be stamped before being offered in evidence, for want of such stamp the note is rejected and judgment is against the plaintiff, would the judgment be a bar to a suit in New Jersey?

Suppose I hold a bond and mortgage which has been paid. I foreclose, making the executors of a second mortgage parties. There is no evidence of payment except my testimony and that of the mortgagor which can not be received in the foreclosure suit because of the executors being parties. After decree for foreclosure I sue on the bond, and the defendant pleads payment. The decree of foreclosure was a direct adjudication that the amount for which it was given was due on the bond, could I set up that decree as an estoppel?

Point II.

That Mrs. Clark was a bona fide purchaser of the bond and mortgage, for value does not aid her case.

For this defence to be held, the person from whom the purchase was made must have had an equitable or legal title, or must have been carelessly armed with the evidence of title. A forgery can pass no rights, even to a bonafide purchaser.

Story's Equity, 1502 to 1505 and 1510.

1 Daniel on Negotiable Instruments, 634.

2 White & Tudor, L. C. E., 32, 45, 46, 61.

Ruckman vs. Decker, 8 C. E. Gr, 282.

It is submitted that the order should be reversed.

CHAS. H. HARTSHORNE,
of Counsel.

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COURT OF ERRORS AND APPEALS.

ADAH A. PUTNAM,	}	<i>On Petition for Review.</i>
Appellant,		
and		<i>Argument for Respondents.</i>
LYDIA A. CLARK & als.,		
Respts.		

1.—*This Court has no jurisdiction to grant any relief on the petition of Mrs. Putnam.*

Should this Court now make order granting petitioner leave to file a bill in Chancery, the Chancellor would not be bound to permit it. This Court can review the Chancellor's orders, but can not determine what they shall be in advance of application to the Chancellor.

The Chancellor cannot review the decree of this Court, because he has no jurisdiction to do so. The leave of this Court can not give the Chancellor jurisdiction. This Court is as much bound by the law as the Chancellor is, and can no more enlarge the powers of the Chancellor than he can enlarge his own powers.

This Court can not even review its own decrees. Appellate power is exercised over the proceedings of inferior courts—not on those of the Appellate Court (*Ex-parte Sibbold*, 12 Peters, 492; *Washington Bridge Co. vs. Stewart*, 3 How., 413).

If, then, this Court can not review its own decrees, how much less can it delegate to the Chancellor the power to do so. If the Chancellor has that power, he has it by law and not by the leave of this Court; if he has it not,

he can not be clothed with it by this Court's permission given petitioners.

In *N. J. Franklinite Co. v. Ames*, 1 Beas., 510, the Court said: "To advise the Court of Chancery to amend the proceedings, from facts disclosed originally in this Court by evidence taken here, would be alike unprecedented and illegal."

In *King v. Ruckman*, 7 C. E. Gr., 554, the Court said: "When judgment has been rendered after a hearing upon the merits, and has been entered on the minutes in accordance with the views of the Court, and the record has been regularly remitted, this Court has no further jurisdiction in the case."

In *Cox v. Breedlove*, 2 Yerger, 505, a petition for review was filed in the Appellate Court on new matter. It was declared that it necessarily called for the exercise of original jurisdiction. "The appeal being at an end the power of the Court ceased with it."

The whole subject is thoroughly canvassed by Judge Dillon in *McGregor v. Gardner*, 16 Iowa, 538, where a petition for review for newly discovered evidence was dismissed by the Appellate Court for want of jurisdiction.

In *Kimball vs. Feldman*, 28 Iowa, 497, an application was made (after affirmance) to the lower court, which refused to grant a review. On appeal Justice Wright said: "I was ready to hold in *McGregor vs. Gardner* that a bill of review would not lie after appeal, and this view I still entertain."

The same view was taken in the case of *Jewett vs. Dringer*, 4 Stew., 593, and in *Stafford vs. Bryan*, 2 Paige Ch., 47.

2.—*There is laches in making this application since the new evidence was discovered.*

Barnett's letter is dated June 3rd, in reply to Judge Barrett's. So complainant must have learned where Barrett was in May or before.

At law the applicant must not lose a term after discovery of the new matter.

This applicant has lost two terms and delayed nine months.

In *Brinkman vs. Brinkman* (not reported, decided 1880), Vice-Chancellor Van Fleet held that a delay of 7 months after discovery of the new evidence was fatal to the application to open the decree. See also *Warner vs. Warner*, 4 Stew., 551.

3.—*It does not appear that complainant has any new evidence.*

This fact should appear by legal proof. Barrett's letter is not sworn to. The application is based on hearsay.

In *Sheppard vs. Sheppard*, 5 Halst., 250, the Court said that "the new evidence ought to be laid before the Court in the shape of legal evidence, and not hearsay. Many men say things which they dare not confirm under oath. We ought to have more substantial ground for setting aside a verdict than a hearsay."

Approved, *Serviss vs. Cooper*, 4 Vroom, 68, 71. In the case of *Quick vs. Lilly*, 2 Gr. Ch., 257, new documentary evidence was discovered.

The motion for a new trial on the ground of newly discovered evidence must be supported by the affidavit of the witness expected to testify to the newly discovered facts.

Jenny Lind Co. vs. Bower, 11 Cal., 194.

Caldwell v. Dickson, 29 Mo., 227.

Arnold vs. Skaags, 35 Cal., 684.

Ritchey vs. West, 23 Ill., 385.

It has sometimes been said *at law* that the absence of an affidavit of the new witness may be explained and dispensed with.

McQueen vs. Stewart, 7 Ind., 535.

Cowan vs. Smith, 35 Ill., 416.

But this exception to the general rule does not extend to a petition for leave to file a bill of review.

"It is an error to suppose that because upon a motion for a new trial at law in some exceptional cases, the evidence of the witness relied on may be dispensed with upon good cause shown why it can not be obtained, that the like rule prevails upon applications for leave to file a bill of review." "The application must be based not upon what the complainant supposes can be proved, but upon what he satisfies the Court can be proved."

Long *vs.* Granberry, 2 Tenn. Ch., 92.

Thomas *vs.* Rawlings, 34 Beav., 50.

4.—*Barrett was not a competent witness at the time depositions were taken in this suit.*

He was a party, and Clark's executors were sued in a representative capacity. He is only competent now by reason of a change in the law of evidence. (Laws of 1880, p. 52.)

A review can not be granted because by change of law petitioner can now introduce important testimony which was excluded before.

Berry *vs.* Lisherness, 50 Me., 118.

The case of an incompetent witness having become competent is not newly discovered evidence to warrant a new trial on that ground.

Sawyer *vs.* Merrill, 10 Pick., 16.

State *vs.* Bean, 36 N. H., 122.

See also Linn *vs.* Neldon, 8 C. E. G., 169.

Grover *vs.* Wyckoff, 12 *id.*, 75.

It is true that if Barrett was not a proper party he might have been examined on behalf of a *co-defendant* by order of the Court.

Harrison *vs.* Johnson, 3 C. E. G., 420, 425.

But he was a proper defendant, and complainant, having made him a defendant, can not say that he is not, or complain of the loss of his testimony.

5.—*The new evidence, even if sworn to, does not warrant a review.*

When a new witness is discovered, whose testimony is shown to be unworthy of credit by facts proved in the former trial, a new trial will not be granted.

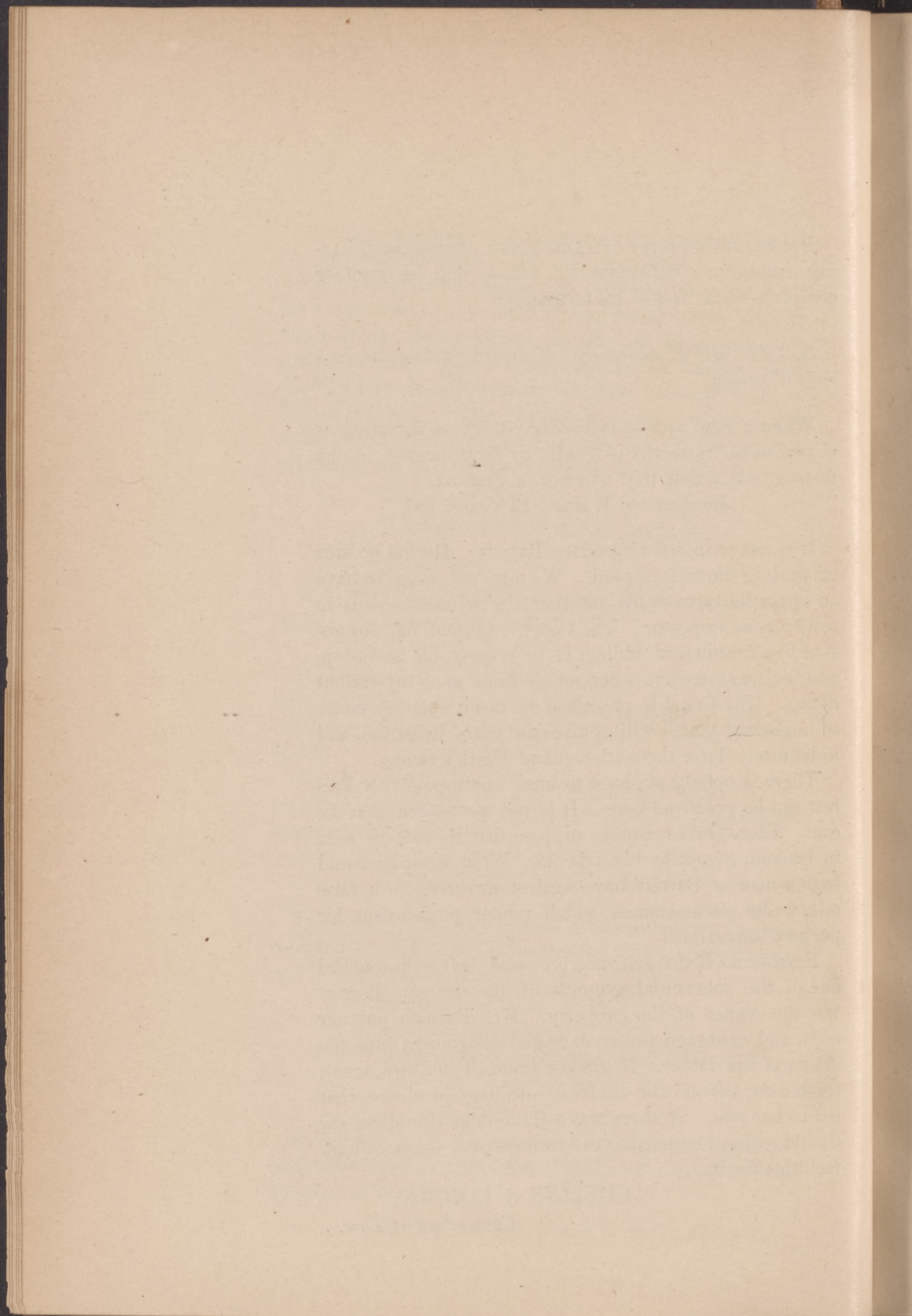
Jernigan *vs.* Wainer, 12 Texas, 189.

It is not proposed to produce Barrett. He has no idea of putting himself in peril. We are not even to have an opportunity to learn whether the witness who is to testify is an impostor. The Court is to send its commission to a criminal in hiding, is to respect his seclusion, and we are to receive a deposition from some mysterious depth. The Court is presumed to deem such evidence so important that it will revive six years' litigation, and indefinitely defer the settlement of Clark's estate.

There is not the slightest ground to suppose that Barrett can be produced here. It is not pretended that he can. There is no reason to suppose that he can be seen in Ireland, except by his friends. What scruples could such a man as Barrett have against swearing to a false tale, under circumstances which render punishment for perjury impossible?

Furthermore, the evidence proposed leaves untouched one of the substantial grounds of the decree. Barrett was the owner of the property. Mrs. Putnam put her bond and mortgage and an executed assignment into the hands of her debtor. It was the fraud of her own agent, trusted far beyond the limits of ordinary prudence, that led to her loss. If there was a fraudulent alteration, she should suffer, because her carelessness gave extraordinary facilities for it.

COLLINS & CORBIN,
Counselors at Law.



Seen

New Jersey Court of Errors and Appeals.

Between ADAH A. PUTNAM, <i>Appellant,</i>	}	<i>On Bill, &c.</i>
<i>and</i>		<i>Argument for</i>
LYDIA A. CLARK and Ex's of HOSEA F. CLARK, dec'd,		<i>Respondents.</i>
<i>Respondents,</i>		

The action ~~of~~^{at} law which is enjoined by this suit is an action of detinue against Lydia A. Clark alone, to obtain possession of a Bond and Mortgage which she holds for the sole use of Hosea F. Clark's executors.

The previous suit in Chancery was for the same purpose. In that suit, after a hearing on the merits, the bill was dismissed. Mrs. Putnam having been defeated in Equity, is seeking the same relief at law.

I.

The bill makes a proper case for an injunction.

The complainant's bill in this suit prays an injunction to restrain any suit at law to recover possession of said bond and mortgage. The propriety of filing this bill instead of pleading the former adjudication in the suit of

detinue, is not now the question before the Court. The present controversy is as to the validity of the plea. Still it may throw some light upon the case if we show the grounds on which the interference of the Court is claimed.

A.—The first ground is that complete justice cannot be done in the action at law for want of parties. Mrs. Clark has no individual interest in the Bond and Mortgage. It belongs to the Executors of Hosea F. Clark. She ought not to be harassed with their suit, or put to the expense of defending it. Should she be compelled to pay the value of this Bond and Mortgage in the suit at law, the Executors would not be bound by the verdict, and she might not be able to establish her claim in a suit against them for reimbursement. She ought not to be placed in such jeopardy in a matter which does not at all concern her. The action brought against her alone, without joining the real owners of the Bond and Mortgage, is an oppressive use of a legal remedy such as warrants the interference of equity.

Story's Equity Jurisprudence, Sec. 885.

Id., Sec. 901.

Proceedings at law may be enjoined when the bringing in of new parties (which can be ordered in equity and cannot be at law) is necessary in order to do complete justice.

Radcliffe v. Varner, 56 Ga. 222.

It will be observed that the appellant's plea does not at all meet the equity of the bill in this respect. If the bill is well founded on this ground, the plea must be over-ruled, irrespective of the question of the former adjudication.

B.—The second ground on which we place the bill is

that taken by the Vice-Chancellor, in his opinion, namely, that after a decree in chancery on the merits a suit at law for the same relief, is vexatious and a contempt of court, and will be enjoined as such. The authorities in support of this proposition, are numerous. Eden, on Injunctions, 57, 58 and 59.

Story's Equity Jur., Sec. 889.

Joyce on Injunctions, 1,040.

2 L. Cases in Equity, 1,320.

In *Mocher v. Reed*, 1 Ball & Beattie, 319, the Chancellor said:—"Where a decree has been pronounced, and the party obtains the relief he prayed, it is a contempt of court to proceed at law, and on that ground I grant the Injunction." In *McNamara v. Arthur*, 2 B. & B., 349, a bill for specific performance was dismissed on the report of the Master that plaintiff could not make title. Then plaintiff brought suit at law on the agreement. Enjoined because, "It appears to be an attempt to induce the jury to act contrary to the Master."

In *Selby v. Selby*, Dickens 678, a party had suffered Decree pro confesso, which debarred his right to an estate. He was enjoined from an action of ejectment until the Decree should be reversed.

In *Grand Junction Canal v. Dimes*, 17 Sim. 38, defendant was restrained by the Chancellor from obstructing boats. Afterwards he brought trespass against the Company. Injunction granted because "Dimes was re opening the question and thereby violating the spirit of the Decree." In *Frank vs. Basnett*, 2 Myl. & K. 619, the Court enjoined a suit at law saying, "Where a proceeding is before this Court, and the Court has full power to do justice, a party ought not to resort to any other tribunal." An injunction of like nature was granted in *Phelps vs. Prothero*, 7 De G. M. & G., 722, and the Court said: "It is well settled that a defendant cannot be allowed without leave of the Court to proceed at law on the subject matter whilst proceedings in this Court are pending. This rule I think is as much ap-

plicable after decree as it is pending suit, and not less applicable to a plaintiff than to a defendant."

See also *Wilson v. Wetherherd*, 2 Meriv., 406.

Bell v. O'Reilly, 2 Sch. & Lef., 430.

Paxton v. Douglass, 8 Vesey, 520, cited and followed by Chan. Kent in *Thompson v. Brown*, 4 J. Ch., 619.

Mosely v. Bassett, 1 Vesey & Beames, 383, cited and followed by Chan. Kent in *Rogers v. Vosburgh*, 4 Johns. Ch., 84.

Wedderburn v. Wedderburn, 2 Beav., 209.

Hope v. Carneigie, 1 L. R. Ch'y App., 320.

Turner v. Turner, 19 L. J. (N. S. Ch.), 352, cited in *Joyce on Injunc.*, 1263.

II.

The matter litigated in the action at law is res adjudicata.

There is no question that the relief sought and the issue raised in the action of detinue are identical with the relief sought and issue raised in the former Chancery suit. Neither can there be a doubt that the Chancellor had jurisdiction to award the relief prayed in the former suit, namely, the delivery to complainants in that suit of the Bond and Mortgage.

Duke of Somerset v. Cookson, 1 L. Cases in Equity, 1110 [821].

Jackson v. Butler, 2 Atk., 306.

Neither will it be disputed that the Chancellor's Decree in the former suit was made upon hearing upon the merits. All dismissals after hearing are presumed to be on the merits unless the decree expressly provides that they shall be without prejudice.

Durant vs. Essex Company, 7 Wallace, 107.

Asbury v. Lafarge, 2 N. Y. 113.

Thus in *Bigelow v. Windsor*, 1 Gray, 299, a bill by a creditor to set aside a sale of goods as fraudulent was dismissed. Held that the creditor could not afterwards maintain trover for the goods.

Under these circumstances the question raised by the action of detinue must be held *res adjudicata*.

A.—*Nemo debet bis vexari pro una et eadem causa*
Broom's Maxims, p. 327, 329.

Chancellor Kent says that the rule rest on the "unfitness, vexation and indecorum of permitting a party to go on successively by way of experiment from one concurrent tribunal to another."

Simpson v. Hart, 1 Johns.Ch., 91.

"Where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit and might have been presented in that trial, the matter must be considered as being passed *in rem adjudicatam*, and the former judgment is conclusive on the parties."

Amora vs. West, 7 Wallace, 102.

See also *Beloit vs. Morgan*, 7 *Id.*, 622.

Henderson vs. Henderson, 3 Hare, 115.

Ricardo vs. Garcias, 12 Clark & Fin., 400.

"A judgment estops not only as to every ground of recovery or defense actually presented, but also as to every ground which might have been presented."

Cromwell vs. County of Sac., 4 Otto, 353.

"We must look beyond the judgment first, to the cause of action, next to the defense, and regard every question as finally adjudged against the unsuccessful party which would have been conclusive for him if decided in his favor."

2 Smith's Leading Cases, 771.

Hopkins v. Lee. 6. Wharton 113.

quoted in Wells' *Res adjudicata*. 336

Wells' *Res adjudicata*
pp. 253. 296. 3

Suppose Mrs. Putnam had succeeded in her chancery suit, and had recovered the Bond and Mortgage, would Mrs. Clark have been permitted to bring detinue and try the question over again before a jury? If Mrs. Clark would be barred by the decree, how much more is Mrs. Putnam, who selected the equitable tribunal?

B.—The respondent by her plea does not dispute that the question in the action of detinue is the same question which was decided by the Chancellor, that the Chancellor had jurisdiction and that his Decree was upon the merits. Her plea is that in the Chancery suit the law excluded her from being a witness, because the Executors of Hosea F. Clark were admitted as defendants to that suit, that she was prejudiced by that exclusion, and could probably have sworn her own case through, and that therefore she can try the cause over again in a form of action where she can be a witness for herself.

The proposition is, that if a plaintiff brings a suit in a Court where he is excluded by law from testifying, he may, if beaten, always try again in another Court where he can testify. The Court is asked to say, that the rule of law which excluded the respondent from testifying in her own behalf is unjust, that the mode of ascertaining the truth prescribed by law was defective, and that a judgment reached where a witness has been excluded, can not be considered conclusively correct.

No authority is cited for this assumption, and none can be found. On the contrary, the Court will presume that the judgment reached by the application of legal rules of evidence is more reliable than any which can be reached by the violation or evasion of those rules.

Such a principle as the appellant contends for, would open every decree denying divorce, the Legislature having at the last session qualified the parties as witnesses. It would on the passage of the act enabling parties to testify, have given every beaten plaintiff a new trial. As for defendants, the new principle is not adapted to their use.

It is hardly possible to cite decisions against such a

ie (9th Ed) 328 [358]

claim, for it was never seriously made before. But in the case of *Memphis v. Dean*, 8 Wallace, 61, it was held that "a question pending in one Court could not be raised in another, by adding a new party, and raising a new question as to him along with the old one as to the former party." If not by adding a party, then surely not by omitting one.

C.—The defendant, before the Vice-Chancellor, cited cases of new trials at Equity after judgment at law. These may all be met by the suggestion that they were based on equitable grounds.

The only pertinent authority cited by defendant below was that of *Stoate vs. Stoate*, 2 Swabey & Tristram, 223. That was a petition of a husband against his wife for divorce for adultery. In a previous suit the wife had obtained a decree for separation for cruelty on her own evidence. In reply to the adultery suit the wife pleaded the decree and offered the record on the trial as proof of cruelty. The Court rejected it because the wife's testimony was not competent in the adultery suit, and to admit the record would be "indirectly using evidence which was directly inadmissible in the present suit."

It will be observed that the issues and the relief sought in the two suits differed. The former judgment was offered not as a bar but as evidence upon one of several issues. This evidence was rejected on the express ground that to admit it would indirectly admit incompetent evidence. This reason has no application to the present case. It must also be observed that the rules of evidence are the same in the action of detinue, as in the action in chancery. In the case of *Stoate v. Stoate*, the rules of evidence differed, and the evidence overruled was offered in violation of the policy of the law. That case therefore, does not cover this, and whether it is sound or not is immaterial.

D.—Thus far we have discussed the plea on the theory that the testimony of Mrs. Putnam was rejected, but it

was not. The testimony of a wife in divorce is rejected (or was) on grounds of public policy, whether objected to or not. But the testimony of Mrs. Putnam was competent unless objected to by the defendants, who were sued in a representative capacity. The plea does not allege that she ever offered herself as a witness. So far as appears she might have used her own testimony. Had she offered herself and been rejected on objection taken, it would be on the theory of the law that the truth could be better ascertained without her testimony than with it; but in fact she was never produced as a witness. If she had been allowed to testify she would be deprived of the only argument she has. It can not be assumed that she would have been excluded if she had been called.

E.—The estate of Hosea F. Clark, dec'd, is entitled to peace. The suit in Chancery was commenced in the Spring of 1876. The settlement of that estate was delayed for years to await the result. The suit was close, and was keenly and expensively litigated. The Chancellor's decree was affirmed by this Court, and the respondents have justly relied and acted upon it. It is contrary to every principle of fairness, public policy and law to permit the matter to be again controverted.

COLLINS & CORBIN,

Counsel for Respondents.

New Jersey Court of Errors & Appeals

ADAH A. PUTNAM,
Appellant,
and

LYDIA A. CLARK ET AL.,
Respondents.

BRIEF FOR APPELLANT.

The doctrine of review of final decrees by the courts which pronounce them, is based upon the recognized fallibility of human tribunals. I think the doctrine may be stated in plain terms, thus: Whenever a Court of Equity is shown evidence making it highly probable that its judgment was erroneous, that it has adjudged to one the property, which by law belongs to another, and that reasonable diligence could not have produced the evidence sooner, in such case the Court will re-examine the evidence, including the new evidence, and reverse or affirm its decree as the justice of the case requires, unless such action would injure new rights grown out of the first decree. The case of *Quick vs. Lilly*, 2 Gr. Ch. 255, states the doctrine even more favorably for us.

It will appear then that the innocence of the defendants, and the hardship to them of a reversal of the decree, are all beside the question if those same considerations existed at the time of the first decree, and were no defence to it.

The questions are, was Mrs. Putnam's property taken from her by forgery? Was the complainant unable, by reasonable diligence, to procure sooner the proof of that forgery? Have any new rights

arisen since the decree which would be injured by reviewing it? True, the defendants purchased innocently, for value ; true they will suffer a great hardship if the decree is against them ; but these things were also true at the time the decree was first pronounced, yet had the forgery been then proved, these considerations would have been impertinent. If they would have been no answer to the forgery then, they can be no answer now. Had the forgery been proved in 1878 the decree would have been just had it gone for Mrs. Putnam ; but we offer now evidence, which, if true, proves the forgery, and which we could not sooner obtain. How has justice, in 1878, become, in the same state of affairs, injustice in 1882? It is also no answer to say that Mrs. Putnam complains of the act of her own attorney. An innocent purchaser can not maintain title through a robbery, though it were made by my servant, or through a forgery though it were committed by my agent.

A strong point in favor of this application is that the Court has never had an opportunity fully to investigate all the facts in the case. If all the circumstances had been fully before the Court, and after examination the Court had been convinced that the assignment was not forged, but little reliance would be felt upon this discovery of new evidence. But the fact is that the evidence of forgery was strong enough to create grave suspicion, and it only fell short of proof. No evidence appeared to explain away those suspicions, the whole case left the impression that there was much behind, which the evidence could not reach. Now good fortune has thrown open to us absolute proof of what before, everything indicated, but failed to prove.

In order to understand the bearings of the new evidence, I beg to recall in brief the evidence adduced before. The complainant's bill charged the assignment to have been forged and prayed that it might be canceled. In proof appeared first the suspicious note on the record. There can be no doubt

that there was an alteration. Who would write the note beneath the name of the witness? Not the recording clerk, unless he copied it from the assignment. But who would have written it on the assignment? The evidence shows the papers to have been always in the possession of Barrett and his assignees. Would they have noted or permitted the notation of such an alteration, which was not made? Assuming the alteration to have been in fact made, it then will follow from probabilities so strong as to amount to proof that the name erased was the name of Ramsey. Some name must have been there. What name? No other is suggested than those of Ramsey and Barrett. If not Barrett's whose was it but Ramsey's? The erasure corresponds with this hypothesis. The middle letter, the last name and the place of residence are written over the erasure, and just so much of Ramsey's assignment must have been erased. The real question was not whether there was an alteration, but when that alteration was made; and whether with the assignee's consent. The evidence in the case stands thus: A mortgagee about to sell to Wm. M. Ramsey, at the time of the contemplated sale executes an assignment which, there is very strong reason to believe, was made to him, leaving it with her agent for delivery on payment of the money. Ramsey refuses to complete the bargain, and five years later it is discovered that the agent is an habitual embezzler, that after the assignment has lain 5 years in his hands, he has sold the mortgage to another fraudulently, without his principal's knowledge, and for his own use; that the mortgage turns up in the hands of the present holder, the assignment gone, and the record showing that the name of the assignee has been erased, and that of the agent substituted, and finally one of the assignors swears positively that though he does not remember the fact of signing the paper, he never assigned or intended to assign the mortgage to his agent for any purposes whatever.

Against this case of the complainant the defendant offers no evidence on the question of forgery. And the Court decrees—what? Not affirmatively that the instrument was not forged, but negatively that “no fraudulent alteration was *proved*.” It was the Scotch verdict, “Not proven.” The circumstances were of the most suspicious character, but did not reach the degree which the Court thought necessary to overturn the record.

Now the complainant offers in evidence the confession, under circumstances showing it credible, of the man who committed the forgery, and asks for a review. I say credible, for what motive has Barrett to voluntarily testify falsely. His interest lies in concealment or denial, not in confession, and above all not in pretending to confess himself guilty of a crime which he did not commit. He had only to refuse to answer and he was safe, but what motive can he have to commit perjury, and falsely charge himself with forgery? The evidence too comes through the best of hands, directly from Barrett through a Justice of the Supreme Court of New York.

This new evidence is material, it is not cumulative, it will show, if it is found to be true, that the Court by its mistaken decree has adjudged to the defendants the property of the complainant, and finally the case is still in *statu quo*, there has been no change in the rights of these or any other parties since the decree was made.

The Chancellor does not deny any of these facts, he bases his decision on three grounds, viz :

1. That it would be transgressing the bounds of reasonable litigation, to open this suit.
2. That the complainant has been guilty of laches in applying for the benefit of the new evidence.
3. That she has been guilty of laches in obtaining that evidence.

I.

Answer to the objections made in the Opinion of the Chancellor.

1. Let us examine the first of these grounds. Should the complainant be refused relief because it would "subject the defendants to what would be practically the fourth litigation over this matter which four years ago was decided in their favor in the forum chosen by the complainants, and on the case as made and submitted by her for decision, and thence went on her motion with like result to the tribunal of last resort?"

This objection is put as an independent and sufficient ground for denying relief. The attitude the Court assumes is this: "It may be true that the Court was mistaken, that it handed over your property to the defendants, not knowing the truth; that the new evidence will prove this mistake, that you could not with reasonable diligence have shown this sooner. All this may be true, but there has been too much litigation, you have fought too long and too pertinaciously. You should not have attempted to try your case a second time. Reversing the principle illustrated by a great teacher in olden times, 'because of your importunities you shall not be heard.'"

Wherein has there been excessive litigation? The first suit and the prosecution of the first appeal were not unreasonable. Every application for a review pre-supposes a former litigation. The only other litigation was the suit at law and the suit to enjoin it.

These were but one litigation, for the suit at law never went to issue; before plea was filed the injunction was interposed and the case was transferred to equity, where it was determined. It is not pretended that there were circumstances of wilful vexation. The suits were prosecuted in good faith. In the second case no evidence was taken; it was begun,

decided, appealed and the appeal decided within a year. It was not an expensive litigation. What is there then in this litigation to disentitle the complainant to her petition for review? Is it a rule that whenever the complainant begins a second suit for the same object, she must forfeit any subsequent claim she may acquire to review the first decree? When she began her suit at law she knew nothing of this new evidence. She knew nothing of it till after the injunction case had been argued.

Consider for a moment the circumstances.

Notwithstanding circumstances of evidence strongly in her favor the complainant loses her property by a decree which merely finds her case "not proven," and this in a state of the case which excludes her testimony. She is advised that she may re-try the case in another form and use her own evidence. She attempts to do so, and the court without re-examining the evidence refuses to re-try the case on the ground that the first decree is final. Is this unreasonable or vexatious ligation? The court itself was not satisfied that the forgery did *not* take place. Is it strange that she should not be satisfied?—that she should attempt any step, which she was advised would be lawful, to give the court a fuller view of the evidence?

2. The Chancellor also says that there has been laches in applying for the benefit of the new evidence since its discovery.

The appeal in the first case was decided in December, 1880. In the same month, immediately after that decision, the suit at law was begun; before issue was joined the injunction was served. The argument in the injunction case took place in the latter part of May, 1881, and Barrett's letter, dated June 3d, was not received till that case was in the hands of the Vice Chancellor. The Chancellor is mistaken in saying that the suit at law was begun after discovering the new evidence. Now, had the Vice Chancellor decided that case favorably to Mrs. Putnam, the new evidence could have been used in the suit at law.

Upon discovering it, was she bound to withdraw her case from the Vice Chancellor's hands, discontinue it, and apply for leave to review, under penalty of forfeiting that privilege? The Vice Chancellor's decision was rendered in October, and at the following November term it was affirmed on appeal. And the Court of Chancery having decided that it could not entertain a petition for review when a case had gone to the Appellate Court, the petition for leave to review was presented at the next term of the Court of Appeals, in March, 1882. It was impossible for the complainant to have presented her petition earlier unless she had abandoned the suit which, when she made the discovery, had already gone into the hands of the Court.

3. Finally the Chancellor thought there had been laches in obtaining the new evidence.

Now the diligence required in these cases is not diligence which leaves no stone unturned. There is no case in which one who has searched in vain can not say, "I might have done one thing more." The diligence required is only reasonable diligence.

Would reasonable diligence have required more than the complainant did? She first learned of her loss when Barrett fled to Europe in April, 1876. Her bill was filed in May following, and a decree was rendered two years later—May, 1878. Was there any want of diligence up to the time of pronouncing the decree? Barrett went away to conceal himself from pursuit for crime and did conceal himself. Until long after the argument before the Chancellor, until about the time of rendering the decree Judge Barrett had no communication with his uncle and did not know where he was.

It appears that the complainant had no reason to suppose any one, except Butler and Grant had any communication with Barrett. She applied to both these for information about him, and both denied that they knew where he was. It appears by Mrs. Putnam's affidavit that both these men lived in New York.

They could not have been compelled to disclose their knowledge if they had any. Under these circumstances would any counsel have advised further pursuit of information? Of whom was she to inquire? Judge Barrett did not know. The Chancellor intimates that through him she might have discovered the evidence sooner: but what ground for the assumption? Barrett had other near and personal friends; would reasonable diligence require that she should make application to each and every of these to find if some one of them might induce the criminal to confess? She did apply to two and they denied information. They were the only two likely to know anything of about him. It was notorious that he was concealing himself. Why should she suppose, after the rebuff from Butler, that any friend to whom he trusted knowledge of his hiding place would betray it to her? But suppose she had reason to believe she might find him by further inquiry, to what purpose was she to continue her search? His crimes were then fresh, public indignation was highest, he had but just escaped, he was studiously concealing himself, he had gone in order to elude just such investigations as Mrs. Putnam wished to make. Had she found him she could not have compelled him to testify. She could only have requested him to do so. To do what? To confess a crime—the forgery of this assignment—of which there could be no adequate evidence save his own confession, to come out from his hiding place to make that confession openly, at the time when general indignation was highest, and he had fled the country to escape its consequences. Would the most careful counsel, the most diligent client have pursued further inquiry for an opportunity to ask for Barrett's confession under such circumstances.

It is not to be inferred, from his confessing now, that he might have confessed then. Circumstances are entirely changed. Six years have elapsed since his flight, the heat of indignation is burned away. He

himself is in poverty, alone, an old man, who has had time for the work of remorse. His letter shows on its face that the motives to write it are of a kind which were not likely to have had the least influence upon him when he went away. When he fled to escape pursuit he certainly would not have been "ready and anxious to do anything on earth to benefit Mrs. Putnam, regardless of every tribulation and sorrow to himself." He would not then have been willing and desirous "regardless of every consequence to make atonement" by stating the facts. Judge Barrett had no such influence with him then as he has now, when the fugitive is dependent for his support upon his nephew's affection and charity.

If there was no failure in diligence in the first suit surely there has been no failure since. This case and evidence is not of a kind to have required the complainant to be on the constant watch and inquiry for new evidence. When the evidence is taken and the case decided, it is expected that the parties will submit and let the matter rest, not that they will then begin or even continue a search for more evidence. It would be an argument against the complainant were it shown that she began to search for new evidence after the decree against her. In nearly all cases of newly discovered evidence, surely in all proper cases of that kind, the discovery comes by circumstances of chance or good fortune. Very few or none are the result of deliberate search. It is presumed that search was exhausted before decree. The only occasion to charge negligence in such case is where the party neglects to follow the hint or chance which fortune put in his way. Now Mrs. Putnam has not been guilty of such negligence. She first learned, in May, 1881, that she could communicate with Barrett, and she obtained his consent to testify in the month after that. The application for the benefit of the evidence was made to this Court, the only Court to which it could be made, at its second term after the discovery, and, at the first term after the final decision in the

injunction case. She could have done no more except to have omitted the appeal in that case.

But surely the complainant is not to be told "Though in justice you may have been entitled to the bond and mortgage, though lack of evidence to prove your case may not be due to any fault of yours, though you were guilty of no laches up to the time of discovering the new evidence, though there has been no change in the status of the case, yet because you appealed the injunction case, you have lost your claim for relief. You might have had it in November, in March you can not have it."

II.

A bill of review is proper when the new evidence is (1) material, (2) not cumulative, (3) shows the decree to be wrong, and that injustice has been done by it, and (4) when the evidence could not by reasonable diligence have been procured before the former decree was made.

Story's Eq. Pl. sec. 412, 413, 414.

Connolly v. Connolly, 32 Gratt. 657.

1. There can be no question that the new evidence was material.

2. It is not cumulative. Cumulative evidence is additional evidence *of the same kind*, on the same point. Thus, on a trial for crime A is convicted, the evidence on both sides being circumstantial. Now he cannot get a new trial upon discovering new evidence of those same, or of similar circumstances, not necessarily and plainly conclusive of the case. Such would be additional evidence of the *same kind* on the same issue. It would be cumulative. But if he afterwards produce a witness, whom he could not by reasonable diligence have produced at the trial, who was present at the act, and who is ready to testify that not A, but another committed it, a new trial would be granted, of course. Here the additional evidence

is on the same issue, but it is not of the same kind.

The former was circumstantial, the latter direct evidence.

Guyot v. Butts, 4 Wend. 580.

Platt v. Munroe, 34 Barb. 291.

Mulock v. Mulock, 1 Stew. 21.

Watts v. Howard, 7 Metc. 478-480.

The new evidence is not only material and non-cumulative: it shows error in fact in the decree, and that injustice has been done.

The evidence here makes a much stronger case than is necessary for a bill of review. In *Quick v. Lilly*, 2 Gr. Ch. 255-258, it was allowed when the new evidence made it doubtful only whether the decree was right; and that was stated to be the rule upon which a bill for review would be allowed.

The credibility of the evidence can not be inquired into now upon this application. *Quick v. Lilly*, p. 258-9.

III.

It is no objection that the new evidence is that of a party to the suit (Barrett.)

Barrett could have been examined as a witness (had he been found) in the original suit, notwithstanding there were parties suing in a representative capacity.

The statute excluding the evidence of a party when others are sued as executors does not apply when he is not interested in the cause—when he is only a nominal party.

Harrison, Admtix v. Johnson, 3 C. E. Gr. 420-425, Reversed,

but not as to this point in 4 id. 488.

A party may be examined as a witness notwithstanding the statute in any case in which he would have been competent before the statute admitting parties as witness.

Lanning v. Lanning, 2 C. E. Gr. 234.

"A plaintiff (in equity) might obtain an order as of course to examine a defendant as a witness upon affidavit that he was a material witness, and was not interested upon the side of the applicant." * * *
 "And it may be obtained *ex parte* as well *after*, as before decree."

1 Greenleaf Evid. sec. 361.

1 Daniel Ch. Pr. p. 855 note, (Edition 1871.)

Barrett will testify against his interest, and in such case he is not interested in the legal sense of the word.

1 Greenleaf Evid. sec. 410.

Barrett has no interest in the cause. Whichever way the decree goes he is liable for his embezzlement. The bill does not seek relief against him. No decree could be made against him on the issue framed.

In *Harrison, Admtix vs. Johnson, supra*, the position of the defendant Johnson was exactly that of Barrett in this case, yet he was held to be an unnecessary party, uninterested and therefore competent as a witness.

When the suit was begun the executors of Clark were not parties, and therefore Barrett was competent as a witness. The executors were made parties afterwards on their own petition.

Barrett was a competent witness in the original suit, because a decree *pro-confesso* had been taken against him, and in such case even before the statute making parties competent witnesses, the party could be called by either side as a witness.

1 Greenleaf Evid., sec. 357.

So when the plaintiff had, by mistake, unnecessarily made his witness a defendant, he was permitted at law to strike his name from the record even after issue joined. *ib.* sec. 359.

IV.

A forgery can pass no rights, even to a bona fide purchaser. The defence of a bona fide purchase, can be used only when the purchase was made from one having either (1) An equitable title; (2) A legal title; or (3) Was carelessly armed, by the owner, with the evidence of title.

Ruckman v. Decker, 8 C. E. Gr. 282.

Story Equity, 1502 to 1505 and 1510.

2 White & Tudor's L. C. E. 32, 45, 46, 61.

1 Daniel on Negotiable Instruments, 634.

It is submitted that the prayer of the petition should be granted.

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COURT OF ERRORS AND APPEALS.

ADAH A. PUTNAM,
Appellant,

and

LYDIA A. CLARK & *als.*,
Respts.

*On Petition for
Review.*

*Argument for
Respondents.*

1.—*This Court has no jurisdiction to grant any relief on the petition of Mrs. Putnam.*

Should this Court now make order granting petitioner leave to file a bill in Chancery, the Chancellor would not be bound to permit it. This Court can review the Chancellor's orders, but can not determine what they shall be in advance of application to the Chancellor.

The Chancellor cannot review the decree of this Court, because he has no jurisdiction to do so. The leave of this Court can not give the Chancellor jurisdiction. This Court is as much bound by the law as the Chancellor is, and can no more enlarge the powers of the Chancellor than he can enlarge his own powers.

This Court can not even review its own decrees. Appellate power is exercised over the proceedings of inferior courts—not on those of the Appellate Court (*Ex-parte* Sibbold, 12 Peters, 492; *Washington Bridge Co. vs. Stewart*, 3 How., 413).

If, then, this Court can not review its own decrees, how much less can it delegate to the Chancellor the power to do so. If the Chancellor has that power, he has it by law and not by the leave of this Court; if he has it not,

he can not be clothed with it by this Court's permission given petitioners.

In *N. J. Franklinite Co. v. Ames*, 1 Beas., 510, the Court said: "To advise the Court of Chancery to amend the proceedings, from facts disclosed originally in this Court by evidence taken here, would be alike unprecedented and illegal."

In *King v. Ruckman*, 7 C. E. Gr., 554, the Court said: "When judgment has been rendered after a hearing upon the merits, and has been entered on the minutes in accordance with the views of the Court, and the record has been regularly remitted, this Court has no further jurisdiction in the case."

In *Cox v. Breedlove*, 2 Yerger, 505, a petition for review was filed in the Appellate Court on new matter. It was declared that it necessarily called for the exercise of original jurisdiction. "The appeal being at an end the power of the Court ceased with it."

The whole subject is thoroughly canvassed by Judge Dillon in *McGregor v. Gardner*, 16 Iowa, 538, where a petition for review for newly discovered evidence was dismissed by the Appellate Court for want of jurisdiction.

In *Kimball vs. Feldman*, 28 Iowa, 497, an application was made (after affirmance) to the lower court, which refused to grant a review. On appeal Justice Wright said: "I was ready to hold in *McGregor vs. Gardner* that a bill of review would not lie after appeal, and this view I still entertain."

The same view was taken in the case of *Jewett vs. Dringer*, 4 Stew., 593, and in *Stafford vs. Bryan*, 2 Paige Ch., 47.

2.—*There is laches in making this application since the new evidence was discovered.*

Barrett's letter is dated June 3rd, in reply to Judge Barrett's. So complainant must have learned where Barrett was in May or before.

At law the applicant must not lose a term after discovery of the new matter.

This applicant has lost two terms and delayed nine months.

In *Brinkman vs. Brinkman* (not reported, decided 1880), Vice-Chancellor Van Fleet held that a delay of 7 months after discovery of the new evidence was fatal to the application to open the decree. See also *Warner vs. Warner*, 4 Stew., 551.

3.—*It does not appear that complainant has any new evidence.*

This fact should appear by legal proof. Barrett's letter is not sworn to. The application is based on hearsay.

In *Sheppard vs. Sheppard*, 5 Halst., 250, the Court said that "the new evidence ought to be laid before the Court in the shape of legal evidence, and not hearsay. Many men say things which they dare not confirm under oath. We ought to have more substantial ground for setting aside a verdict than a hearsay."

Approved, *Serviss vs. Cooper*, 4 Vroom, 68, 71. In the case of *Quick vs. Lilly*, 2 Gr. Ch., 257, new documentary evidence was discovered.

The motion for a new trial on the ground of newly discovered evidence must be supported by the affidavit of the witness expected to testify to the newly discovered facts.

Jenny Lind Co. vs. Bower, 11 Cal., 194.

Caldwell v. Dickson, 29 Mo., 227.

Arnold vs. Skaags, 35 Cal., 684.

Ritchey vs. West, 23 Ill., 385.

It has sometimes been said *at law* that the absence of an affidavit of the new witness may be explained and dispensed with.

McQueen vs. Stewart, 7 Ind., 535.

Cowan vs. Smith, 35 Ill., 416.

But this exception to the general rule does not extend to a petition for leave to file a bill of review.

"It is an error to suppose that because upon a motion for a new trial at law in some exceptional cases, the evidence of the witness relied on may be dispensed with upon good cause shown why it can not be obtained, that the like rule prevails upon applications for leave to file a bill of review." "The application must be based not upon what the complainant supposes can be proved, but upon what he satisfies the Court can be proved."

Long *vs.* Granberry, 2 Tenn. Ch., 92.

Thomas *vs.* Rawlings, 34 Beav., 50.

4.—*Barrett was not a competent witness at the time depositions were taken in this suit.*

He was a party, and Clark's executors were sued in a representative capacity. He is only competent now by reason of a change in the law of evidence. (Laws of 1880, p. 52.)

A review can not be granted because by change of law petitioner can now introduce important testimony which was excluded before.

Berry *vs.* Lisherness, 50 Me., 118.

The case of an incompetent witness having become competent is not newly discovered evidence to warrant a new trial on that ground.

Sawyer *vs.* Merrill, 10 Pick., 16.

State *vs.* Bean, 36 N. H., 122.

See also Linn *vs.* Neldon, 8 C. E. G., 169.

Grover *vs.* Wyckoff, 12 *id.*, 75.

-It is true that if Barrett was not a proper party he might have been examined on behalf of a *co-defendant* by order of the Court.

Harrison *vs.* Johnson, 3 C. E. G., 420, 425.

But he was a proper defendant, and complainant, having made him a defendant, can not say that he is not, or complain of the loss of his testimony.

5.—*The new evidence, even if sworn to, does not warrant a review.*

When a new witness is discovered, whose testimony is shown to be unworthy of credit by facts proved in the former trial, a new trial will not be granted.

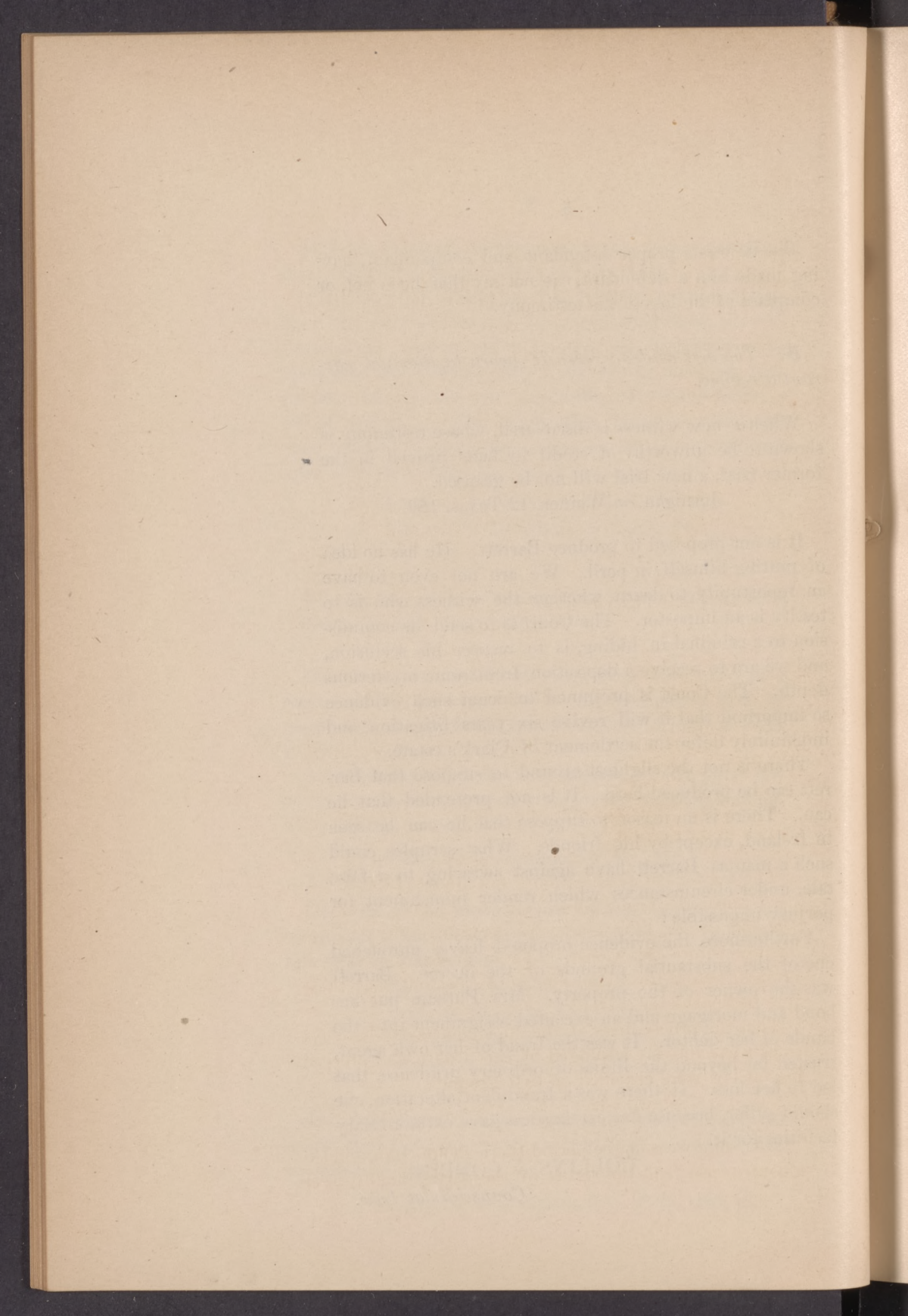
Jernigan vs. Wainer, 12 Texas, 189.

It is not proposed to produce Barrett. He has no idea of putting himself in peril. We are not even to have an opportunity to learn whether the witness who is to testify is an impostor. The Court is to send its commission to a criminal in hiding, is to respect his seclusion, and we are to receive a deposition from some mysterious depth. The Court is presumed to deem such evidence so important that it will revive six years' litigation, and indefinitely defer the settlement of Clark's estate.

There is not the slightest ground to suppose that Barrett can be produced here. It is not pretended that he can. There is no reason to suppose that he can be seen in Ireland, except by his friends. What scruples could such a man as Barrett have against swearing to a false tale, under circumstances which render punishment for perjury impossible?

Furthermore, the evidence proposed leaves untouched one of the substantial grounds of the decree. Barrett was the owner of the property. Mrs. Putnam put her bond and mortgage and an executed assignment into the hands of her debtor. It was the fraud of her own agent, trusted far beyond the limits of ordinary prudence, that led to her loss. If there was a fraudulent alteration, she should suffer, because her carelessness gave extraordinary facilities for it.

COLLINS & CORBIN,
Counselors at Law.



New Jersey Court of Errors and Appeals

IN THE LAST RESORT IN ALL CAUSES.

Between

ADAH A. PUTNAM,

Appellant,

and

LYDIA A. CLARK & al.,

Respondents.

*On appeal from
order of Chan-
cellor denying
leave to file a
bill of review.*

ARGUMENT FOR RESPONDENT.

Leave to file a bill of review was rightly denied by the Chancellor, because :

1.—THE RESPONDENTS ARE BEING UNREASONABLY VEXED BY LITIGATION.

The matter before this Court has given rise to six reported decisions (see 2 Stew., 412; 6 *id.*, 338; 7 *id.*, 51, 532, 539; 8 *id.*, 145) besides the decision of the Chancellor now before this Court. These proceedings were all brought before the Chancellor on notice, and may therefore be considered.

That the proceedings of the appellant have been vexatious was expressly adjudged by this Court, and proceedings at law were enjoined on that ground.

7 Stew., 532.

“ At some reasonable period there should be an end to a controversy, and the rights of the parties finally ascer-

tained. When a cause had been fully argued and deliberately decided in a court of the last resort, neither party should be permitted to disturb it. It would be too harassing to individuals, and introduce an uncertainty in the administration of the law, which would be more intolerable than any erroneous decision that might occasionally intervene. In the language of Chancellor Kent in *Gelston v. Codwise*, 1 J. Ch., 189, 'such a precedent as the one sought for would tend to fix a character of dangerous instability on the administration of justice.'"

White, *J.*, in *Cox v. Breedlove*, 10 Tenn., 499, 510.

Although this Court has not followed *Cox v. Breedlove* in denying the right to file a bill of review for newly discovered evidence, after an affirmance on appeal, yet the reasoning of that case addresses itself to the discretion of this Court.

2.—THE APPELLANT DID NOT GIVE SUFFICIENT NOTICE OF HER APPLICATION.

No notice was given to the defendants, Redfield and the Relief Fire Insurance Co. They are strictly necessary parties. The title assailed came through them. On every sale of securities, as well as of chattels, there is an implied warranty of title.

Merriam v. Wolcott, 3 Allen, 258.

Gurney v. Womersley, 4 E. & B., 133.

Should the appellant succeed in recovering her mortgage, Mrs. Clark would have an action against her assignors. She is therefore entitled to require that they should be notified, in order that they may be bound by the decree of the Court. Should this Court decree the assignment in question to be a forgery, Mrs. Clark must not be left in such a position that she must try the question over again in a suit against Redfield and the Company.

"The petition or notice of motion must be served on the other parties to the cause."

2 Daniells' Ch., 1578.

2 Hoffman's Ch., 11.

"Such petition is addressed to the sound discretion of the Court, and for the proper exercise of that discretion, it is essential that the parties interested should have an opportunity afforded of bringing forward what they may *respectively* be advised to be material."

Gaston, *J.*, in *Love v. Blewit*, 1 Dev. & Bat. Eq., 108.

Story's Eq. Pl., Sec. 420.

Howard v. McKenzie, 54 Tex., 171, 190.

Affidavits are admitted on both sides.

Elliott v. Balcom, 11 Gray, 286.

Dexter v. Arnold, 5 Mason, 303.

In *Richardson v. Lloyd*, 99 Mass., 475, a writing was discovered after trial; and the fact being proved before the Judge who heard the cause, he granted a review without hearing witnesses against the motion. This action was reversed because both sides were not heard.

There is no authority for opening a decree five years old, without notice to all parties materially interested. They are entitled to be heard, and accordingly must be notified.

3.—THE APPLICATION IS BARRED BY LACHES SINCE THE NEW EVIDENCE WAS DISCOVERED.

On the appellant's own showing, Barrett's letter was received in June, 1881. No application was made until the March Term, 1882, of this Court. Meanwhile appellant was experimenting with a suit at law, holding back the letter in order to "mend her hold" if beaten in that proceeding. If this application had been made as soon

as the letter was received, the appellant would then have been seeking the same relief in two suits, one at equity and the other at law. The Chancellor would then have required her to elect on which tribunal she would rely, and she would have been bound by her election.

Wedderburn *vs.* Wedderburn, 2 Beav., 208.

See also cases cited in our former brief, 7 Stew., 537 (b).

She did make her election by going on with the other suit. She cannot be now in any better position than if she had not delayed her application.

A supplemental bill for newly discovered evidence ought to be filed as soon as practicable after the matter is discovered.

Ord *v.* Noel, 6 Mad., 127.

Pendleton *v.* Fay, 3 Paige, 205.

Story's Eq. Pl., Sec., 338a and Sec. 423.

"*Laches* or negligence destroys the title to relief."

Crocker *v.* Houghton, 61 Me., 346.

See Barnes *v.* Dewey, 58 Ind., 418; Cartwright *v.* Holmes, 69 Ind., 577, 589.

In Brinkman *v.* Brinkman (not reported, decided 1880) Vice-Chancellor Van Fleet said that the application should be made before the lapse of a term, after discovery of the new evidence; and he held that a delay of seven months was fatal.

In Embury *v.* Klemm, 3 Stew., 517, nine months' delay to apply to open a decree was held to bar the application.

A recent illustration of the effect of laches upon a petition for rehearing will be found in Ellis *v.* Sisson, 96 Ill., 105, 122. That was merely for review of questions of law, but the Court said that the petitioner "lay by and presented his case for decision without raising the present question. Now, for the first time, after final decisions he presents this question upon a petition for rehearing," and the Court refused the rehearing because it

would have a tendency "to encourage delay and prolong litigation."

4.—NO DILIGENCE TO OBTAIN THE EVIDENCE OF BARRETT BEFORE HEARING IS SHOWN.

The appellant learned in some way, she does not tell how, that she could reach Barrett through Butler and Grant, and she asked where he was. It does not appear, however, that she made this inquiry before the hearing, or that she made the slightest effort at any time to procure his testimony. She does not claim that she desired it or sought it before the hearing. It was worth as much then as now, and on her theory of the case she knew of it. It is tolerably plain that she did not then seek it, because she supposed that she would succeed without it.

"No implication in favor of a bill of review can be indulged; the applicant must not leave chasms to be supplied by intendment."

"Bills of review which seek to open a cause again for testimony after the parties have by the opinion and decree found the weaker parts of their case, must be received with great caution *ut finis sit litium*."

Bowles *vs.* South, Hardin, 451.

Suppose appellant had known before the hearing what she knew after it, that her proof was insufficient, would she not before closing her case have made an effort to obtain the testimony of Barrett? That is the course she did take as soon as the decree of the Court of Appeals showed her that she needed more evidence, and her first application brought a promise of the evidence. No doubt his deposition might have been obtained before hearing on the same terms as now. He proposes now to testify on commission in such manner that he will not be exposed to punishment. Any criminal would do as much to accommodate a friend who was sending him money. (What such testimony is worth is another consideration.)

Had appellant made an effort before the hearing to

procure this testimony and failed, she might now meet this charge of *laches*. As it is, if this application should succeed, counsel may well remit effort to procure testimony of questionable character before hearing, in the hope that it may be more useful to repair damages after hearing.

In *Provost v. Gratz*, 1 Peter's C. C., 3:9, Justice Washington said he was satisfied justice would be promoted by granting a review, but the means of ascertaining the existence of the new evidence had been in the possession of the parties all along, and the failure to discover it arose from inattention or misjudgment, and he denied leave.

In *Young v. Keighey*, 16 Vesey, 351, Lord Eldon said that the new documents were very material, but plaintiff ought to have used more diligence to find them in time. In *Jenkins v. Eldridge*, 3 Story, 314, Judge Story says: "It matters not that the party did not understand the importance of it."

See also *Livingston v. Hubbs*, 3 Johns. Ch., 126; *Perkins v. Partridge*, 3 Stew., 559.

The case of *Connolly v. Connolly*, 32 Gratt., 657, differs greatly from this. In that case the fact of forgery and the witness to prove it were both newly discovered. There was no suspicion of *laches* either before or after discovery, and the witness was at hand to testify and bear the penalty of his confessed crime.

5.—IT DOES NOT APPEAR THAT THERE IS ANY NEW EVIDENCE.

The whole case is that in June, 1881, a letter was received from Barrett expressing a willingness to testify on commission.

This is not proof; it is hearsay. In *Sheppard v. Sheppard*, 5 Halst., 250, the Court said that the new evidence "ought to be laid before the Court in the shape of

legal evidence and not hearsay. Many men say things which they dare not confirm under oath. We ought to have more substantial ground for setting aside a verdict than a hearsay."

Approved *Serviss v. Cooper*, 4 Vroom, 68, 71.

The decisions to this effect are very numerous. In *Templeton v. The State*, 5 Tex., App. 418, the Court states eight requisites for a new trial, for new evidence, one being "that the witness will testify to it."

The precise question came up in New York Court of Appeals under the combined Law and Equity Practice. A petition sufficient in other respects was held "defective in not containing an affidavit of the witnesses, who, it was claimed, would give the additional evidence relied on, stating that they were ready to swear to the facts claimed to be newly discovered."

Adams v. Bush, 2 Abb. Prac. N. S., 104, 111.

In *Arnold v. Skaags*, 35 Cal., 684, an application on the same ground was dismissed for the same defect. *Sanderson, J.*, said: "In asking for a new trial on the ground of newly discovered evidence, it is not sufficient for the moving party to state in his affidavit what, as he has learned, certain parties know about the matter, and how, as he believes, they will testify. He must produce the affidavits of the newly discovered witnesses as to what they know and as to what they will testify. The affidavit of the party himself is but hearsay testimony, and cannot be received, unless for good cause shown the affidavits of the newly discovered witnesses cannot be obtained in time, or in such further time as may have been granted for that purpose. The affidavits of E. and K. were not obtained, nor was any cause shown why they were not. Applications for new trials upon the ground of newly discovered evidence must be looked upon with suspicion and disfavor, because the temptation to make a favorable showing after having sustained a defeat is great. A party who relies upon that ground must make a strong case, both in respect to diligence on his part in preparing for the trial, and as to the truth and materiality

of the newly discovered evidence, and that, too, by the best evidence which can be obtained. If he fail in either respect his motion must be denied."

See *Caldwell v. Dickson*, 29 Mo., 227.

Ritchey v. West, 23 Ill., 385.

Taylor v. Boardman, 25 Mich., 529.

Nichols v. Nichols, 8 W. Va., 174.

In the present case no excuse is offered for the non-production of Barrett's affidavit. Even had such excuse been presented it would not have sufficed in Chancery. In *Long v. Granberry*, 2 Tenn. Ch. 85, 92, Chan. Cooper said: "It is an error to suppose that because upon a motion for a new trial at law, in some exceptional cases, the evidence of the witness relied on may be dispensed with upon good cause shown why it cannot be obtained, that the like rule prevails upon applications for leave to file a bill of review. The bill of review is more like a bill filed for the purpose of having a new trial after the judgment at law. In both cases the application must be based, not upon what the complainant supposes can be proved, but upon what he satisfies the Court can be proved. Since application can never be based upon possibilities, but must be grounded on certainties; otherwise there would never be an end to litigation. *Thomas v. Rawlings*, 34 Beav., 50."

The case of *Quick v. Lilly* 2 Gr. Ch., 257, is cited as warranting leave to file a bill of review on the affidavit of a party alone. But in that case the new evidence was a *document* which had been missing, the existence of which was proved by the party's affidavit; such proof was not hearsay.

6.—THE TESTIMONY PROPOSED DOES NOT WARRANT A REVIEW EVEN IF SWORN, BECAUSE THE RESPONDENTS ARE SUED IN A REPRESENTATIVE CAPACITY.

Barrett was a necessary party to the suit which sought to annul as fraudulently altered an assignment to him.

When the case was decided he was not a competent witness. He is only competent now by reason of a change in the law of evidence. (Laws of 1880, p. 52.) A review cannot be granted because a change in the law petitioner can now introduce evidence which was excluded before.

Berry *v.* Lisherness, 50 Me., 118.

Linn *v.* Neldon, 8 C. E. G., 169.

Grover *v.* Wyckoff, 12 *id.*, 75.

It is argued for the appellant that even before the statute the Chancellor could have permitted Barrett to testify for complainant. If that is true, the appellant is presenting not a competent witness, but one who might, by the Chancellor's leave, become a witness. How can it be assumed that the Chancellor would have granted such leave?

But his admissibility is questionable. The authority for it is 1 Greenleaf's Evidence, sec. 361. An examination of cases throws doubt upon the accuracy of the law there stated.

True, a defendant might be examined for a co-defendant, by leave of the Court, which was granted when he was not interested. But the reason was that otherwise the complainant might close the mouth of every adverse witness by making him a party.

Neville *v.* Demeritt, 1 Green, Ch., 333.

Harrison *v.* Johnson, 3 C. E. G., 420, 425.

But if complainant desired the examination of a party, the remedy was to apply to strike out the name of such party from the suit, which the Court would grant only where the party was unnecessary. Such relief was granted in this case, to permit complainant to have the benefit of her husband's testimony.

See De Wolf *v.* Johnson, 10 Wheat., 367, 384.

Eckford *v.* DeKay, 3 Paige, 565.

It is laid down in 1 Hoffmann's Chancery Practice, 485, that a party on his own affidavit may have a rule of

course to examine another party, but such examination will be an equitable release to the witness. "If the defendant so examined is primarily liable to the plaintiff, it will prevent his obtaining a decree against the other defendants liable in a secondary degree." Now, in the case before the Court, Barrett was a necessary party defendant, and primarily liable beyond a doubt on the complainant's showing. Will this Court open the decree to permit the calling of a witness who could not have been called before decree without destroying the complainant's case? If so, a relief would be granted which would be useless to appellant and which she would not seek for, except to obtain the advantage of the new rule of evidence established by the Act of 1880. It is superfluous to argue that a review can not be granted because of a change in the laws of evidence; and yet it is that change alone, which is the foundation and motive of this application.

7.—A WITNESS DISCREDITED BY THE FACTS IN THE CASE, CANNOT BE USED TO PROCURE A REVIEW.

Jernigan v. Wainer, 12 Texas, 189.

8.—NEW DOCUMENTARY EVIDENCE IS ESSENTIAL TO A BILL OF REVIEW, WHERE THE NEW EVIDENCE RESPECTS A POINT FORMERLY LITIGATED.

Oral evidence suffices if it is not cumulative, as in *Connolly v. Connolly*, 32 Grat, 657, where a will was established by a judgment which was reviewed on proof of forgery, which was not charged on the first trial. But in this case the new evidence relates to the precise issue contested already, and therefore must be documentary to avail.

Respass v. McClenahan, Hardin, 342.

Head v. Head, 3 A. K. Marsh, 121.

Vaughan v. Hann, 6 B. Mon., 340.

Wood v. Mann, 2 Sumner, 316, 335.

Jenkins v. Eldredge, 3 Story, 312.

Randolph v. Randolph, 1 Hen. & Munf., 189.

Whether this principle, which unquestionably is law in Kentucky, and which has been received with respect elsewhere, is adopted as binding or not, it is at least entitled to consideration in guiding the discretion of the Court. We call special attention to the reasoning of the Court in *Respass v. McClenahan*.

The order of the Chancellor should be affirmed.

COLLINS & CORBIN,
Of Counsel with Respondents.

11

the following is a list of the names of the persons who have been elected to the office of the President of the United States since the year 1789.

1789 George Washington
1793 John Adams
1797 John Adams
1801 James Madison
1805 James Madison
1809 James Madison
1817 James Madison
1821 James Madison
1825 James Madison
1829 James Madison
1833 James Madison
1837 James Madison
1841 James Madison
1845 James Madison
1849 James Madison
1853 James Madison
1857 James Madison
1861 James Madison
1865 James Madison
1869 James Madison
1873 James Madison
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1973 James Madison
1977 James Madison
1981 James Madison
1985 James Madison
1989 James Madison
1993 James Madison
1997 James Madison
2001 James Madison
2005 James Madison
2009 James Madison
2013 James Madison
2017 James Madison
2021 James Madison

J. J. GRIFFITHS, Law Printer, 38 Montgomery St., Jersey City.

New Jersey Court of Errors & Appeals

Between

ADAH A. PUTNAM,
Appellant,

and

LYDIA A. CLARK ET AL.,
Respondents.

IN CHANCERY OF NEW JERSEY.

ADAH A. PUTNAM,
Complainant,

and

LYDIA A. CLARK, individually, and
WILLIAM A. LEWIS and LYDIA A.
CLARK, Executors of H. F. Clark,
deceased, and others,
Defendants.

Petition for leave
to file a bill of
review.

*To the Honorable THEODORE RUNYON, Chancellor of the
State of New Jersey :*

The petition of Adah A. Putnam respectfully shows:

1. That on May 29th, 1876, she and husband, Fernando C. Putnam, filed their bill of complaint in this court against Lydia Ann Clark, William C. Barrett, Amasa A. Redfield and the Relief Fire Insurance

Company, alleging that a certain assignment, purporting to have been executed by your petitioner and her husband, and purporting to assign a bond and mortgage belonging to your petitioner, had been fraudulently altered by said Barrett without the consent of your petitioner, by erasing the name of William C. Ramsey, who was the assignee in said assignment, and by substituting the name of said Barrett. The said bill also alleged that your petitioner had never delivered the said assignment but after executing it had left it in the hands of said Barrett, who was her attorney, to be delivered to said Ramsey upon the payment by said Ramsey of the amount due on said bond and mortgage; that Ramsey never paid the amount or any part thereof, and never assented to taking said assignment, and that subsequently when your petitioner and Barrett understood that no assignment would be made to Ramsey or to any other person, said Barrett made the said fraudulent alteration in said assignment, and after that he assigned said bond and mortgage to the Relief Fire Insurance Company, which assigned the same to Amasa A. Redfield, who assigned to said Lydia A. Clark. The said mortgage was made by John M. Mackey and his wife to your petitioner on land in Jersey City to secure the payment of \$12,000 and interest, and was dated June 21st, 1869; the alleged assignment to Barrett was dated and acknowledged on April 21, 1871, and was recorded in Hudson County, New Jersey, March 12, 1875; the alleged assignment to said insurance company was dated March 9th, 1875, and was recorded March 12, 1875; the alleged assignment to Redfield was dated October 5th, 1875, and was recorded March 24th, 1876; the alleged assignment to Lydia A. Clark was dated February 29th, 1876, and was recorded March 24th, 1876.

The said bill prayed that said paper purporting to be an assignment to said Barrett and the record thereof be decreed to be fraudulent and void, and that said Lydia A. Clark be decreed to deliver said bond and mortgage to your petitioner.

2. That William A. Lewis and Lydia A. Clark being the executor and executrix of the will of Hosea F. Clark, deceased, who had at the time of his death been the owner of the premises on which the mortgage was made, petitioned this Court after the filing of said bill to be admitted as parties defendants, and they were so admitted by order of this Court, and the name of your petitioner's husband as a complainant was stricken out of the case. Said executor and executrix and said Amasa A. Redfield and said Lydia Ann Clark filed answers to said bill, no answers being filed or appearance being entered by the other defendants. The answers denied any knowledge or notice of said fraudulent alteration, and alleged that the respective defendants had taken their assignments respectively in good faith and for valuable consideration. The answers of said Lydia and of the said executor and executrix further showing that the assignment to her had been made by the request of her husband, said Hosea, when he purchased said land, to protect his title, she not having paid any consideration therefor.

Replications having been filed to said answers, the cause being at issue, evidence was taken upon both sides, the proofs closed, and the cause brought to a hearing. Whereupon this Court, on the 27th day of May, 1878, made a decree as follows :

This cause coming on to be heard in the presence of Peter Bentley, Esquire, of counsel with the complainant, of Collins & Corbin, of counsel with the defendant Lydia A. Clark, and with the defendants William A. Lewis and Lydia A. Clark, executors, &c., of Hosea F. Clark, deceased, and Hamilton Wallis, Esquire, of counsel with the defendant Amasa A. Redfield, and the bill, answers, replications, cross-bill, answers, proofs and exhibits being read and the arguments of the respective counsel having been heard, and the Chancellor having taken time to consider the same, and it appearing to the satisfaction of the Chancellor that the assignment set forth in the said bill made by the complainant and her husband,

was executed by them and delivered to the said William C. Barrett, and that he was then in possession of their said bond and mortgage, and that the complainant permitted said William C. Barrett to retain possession of said assignment, and of the said bond and mortgage, and that the said bond and mortgage were assigned to the said defendant Lydia A. Clark in trust for her husband, Hosea F. Clark, since deceased, and are now held by the defendants William A. Lewis and Lydia A. Clark as executors of the last will and testament of said Hosea F. Clark, deceased; and it also appearing to the satisfaction of the Chancellor that said Hosea F. Clark purchased said bond and mortgage in good faith, for valuable consideration, and without notice of any fraud on the part of the defendant William C. Barrett, and the Chancellor being of opinion that no fraudulent alteration of the said assignment to William C. Barrett has been proved; and it appearing to the Chancellor that the complainant was not and is not entitled to the relief sought and prayed for by her in her bill of complaint; It is on this twenty-seventh day of May, in the year of our Lord eighteen hundred and seventy-eight, ordered, adjudged and decreed that the complainant's said bill be, and the same is hereby dismissed with costs.

THEODORE RUNYON,

Chancellor.

3. Your petitioner appealed from said decree to the Court of Errors and Appeals of New Jersey, and said Court at the term of November, 1880, by its decree affirmed the said decree of this Court, and the record has been remitted to this Court, and said decree of affirmance made the decree of this Court.

And your petitioner further shows, that since the pronouncing of said decree, to wit, in the month of May or June last, she discovered new matter of consequence, particularly as follows: Said William C. Barrett has written a letter, a copy of which is annexed hereto, and is marked "Schedule A," confess-

ing that he did fraudulently alter said assignment; that he did so after the execution thereof, without the consent or knowledge of your petitioner, for the purpose of converting it to his own use, and stating that he will testify to these facts if requested to do so.

5. It was not possible to obtain the testimony of said Barrett sooner, for the following reasons: Your petitioner had no knowledge or suspicion that the said assignment was altered, or that any assignment other than that to Ramsey had been executed until said Barrett absconded and fled to Europe, which was in April, 1876, or about that time. When he absconded, he had embezzled the property of other persons besides your petitioner, to a large amount, and he fled to escape punishment for his crimes. Your petitioner did not know, and has never known until recently his whereabouts. He lived in concealment from the time of his flight until now. Your petitioner requested one Nevin W. Butler and Lewis Grant, who were the only persons whom your petitioner had any reason to suppose to be in communication with him, to state where he was, and they denied knowledge of his whereabouts, though your petitioner believes that said Butler was directly or indirectly in communication with him. Your petitioner heard rumors at different times that he, Barrett, was in Belgium and in Ireland but was unable to trace those rumors to any trustworthy source. She addressed one letter to the wife of said Barrett, who (she believed) was living with him, and gave it to said Grant to forward to her, but she never received any reply thereto. Until the time of pronouncing the said decree of said Court in 1878 it would have been useless to attempt to communicate with Barrett relative to her case. He was, until then, fearing detection and punishment for his crimes in embezzling the property of his clients, and studiously attempting to conceal himself, and he was, as your petitioner believes, entirely indifferent to her said

loss, and to her efforts to recover her bond and mortgage. Your petitioner until May or June last, never communicated with said William directly or indirectly.

6. Your petitioner got the said letter from Barrett in the following manner: George C. Barrett, a resident of New York City, is a nephew of said William C. Barrett, and is a friend of your petitioner. For a long time after the flight of William C. Barrett, his nephew had no correspondence or communication directly or indirectly with him, but about two or three years after his flight, said William C. Barrett having then lost his wife and been in exile, aged, alone, and friendless, his condition appealing to the sympathies of his nephew, a friendly correspondence was opened between them, in the course of which said William C. Barrett expressed repentance and remorse for his misdeeds. Your petitioner did not know until May or June last of the correspondence just mentioned. In one of those months your petitioner's husband called upon said George to consult with him about the possibility of obtaining from said William his evidence in a suit then pending at law between your petitioner and Lydia Ann Clark, for the recovery of the said bond and mortgage. The said George wrote to William C. Barrett explaining your petitioners loss, the ensuing litigation, stated the reasons for believing that the assignment had been altered by said William, and requesting him to state whether he had so fraudulently altered it in the particular aforesaid, and to consent to testify to the facts in the case whatever they might be. The said letter from said George to said William contained no intimation or offer directly or indirectly, of any consideration whatsoever for compliance with the said request, nor any promise or intimation to shelter the said William, or to aid in sheltering him in any way, directly or indirectly from the consequences of his crimes, but was solely an appeal to the conscience and sense of justice of William C.

Barrett. No copy was kept of the said letter. In answer to said letter came the letter which is hereto appended. The present address of William C. Barrett is, as your petitioner is informed, in care of Francis D. Marslen, Beverston, Rathmines Road, Dublin, Ireland. Your petitioner does not know whether he resides in Dublin or where he resides, but she is informed that letters reach him when addressed as above.

7. In order to show the importance of this new evidence, and that it is not cumulative, your petitioner refers to the evidence in the former case, as follows: On the issue of fraudulent alteration, in that case, no evidence was offered by the defendants. They relied solely upon the record of the alleged assignment to Barrett, together with evidence of their having purchased bona fide without notice, and for valuable consideration. They offered evidence that the original assignment of mortgage could not be found. On the part of the petitioner it was in evidence that about April, 1871, the date of the alleged assignment, your petitioner was negotiating through William C. Barrett for the assignment of said mortgage to William M. Ramsey of Montreal. That your petitioner and her husband then expected to execute an assignment to said Ramsey, and they believed that they had done so. The negotiations for the sale to Ramsey were broken off at about that time, and the bond and mortgage and assignment were left in Barrett's hands.

Your petitioner could not testify in her former case because the executors of said Clark were parties thereto, but her husband was sworn and testified to the above facts though he could not recollect the fact of executing the said assignment. He denied positively that he had executed any assignment or had ever consented to any assignment, or ever thought of making any assignment to said Barrett. Barrett absconded in April, 1876, and at the time of absconding had embezzled a large amount of property of other

persons. The alleged assignment to him lay in his hands unused from its date in April, 1871, until March, 1875, when he converted it to his own use, as above shown. That at about the time or soon after he so converted it he was closely pressed for money and his crimes were threatening to come to light, and in fact did come to light within a year after that time. That upon the record of said assignment *underneath* the name of the subscribing witness was the following note, "The words C. Barrett, of the City of New York, written over an erasure before execution." That the subscribing witness was called, and though he did not remember the execution of this paper, stated that it was contrary to his universal practice to sign his name above the notation of an erasure, and that he did not believe that the said notation was written by him.

8. Your petitioner submits that the new matter above offered to be proven by your petitioner is not cumulative. That it would be decisive evidence upon which this Court would be justified in pronouncing a decree in her favor, and she avers that by the testimony as adduced she will prove that said assignment is as stated, and that she could not with reasonable diligence or with any diligence have obtained the evidence so as to make use thereof in the said former cause previous to the time of pronouncing the said decree.

Your petitioner therefore prays that she may be at liberty to file a bill for review in this Court for the purpose of having the said decree reviewed, reversed and set aside, and that your petitioner may have such other relief as this Court shall think she is entitled to. And your petitioner will ever pray, &c.

ADAH ANN PUTNAM.

NEW YORK STATE AND COUNTY, ss.

Geo. C. Barrett, being duly sworn, on his oath, says that the statements contained in the sixth paragraph of the foregoing petition of Adah A. Putnam, so far as they relate to the acts of deponent and of Wm. C. Barrett are true. And also that deponent did not know the residence of said Wm. C. Barrett prior to the time of beginning said correspondence.

GEO. C. BARRETT.

Sworn and subscribed January 18, 1882, before me, a Notary Public in the State of New York and for the State of New York. The word "not" being first interlined in said affidavit.

JAMES L. MCNIERNY,
Notary Public, New York Co.

STATE OF NEW JERSEY, }
HUDSON COUNTY. } ss.

Adah A. Putnam being duly sworn on her oath, says that she is the petitioner named in the foregoing petition. That the allegations therein contained, so far as they relate to her own acts and beliefs are true, and so far as they relate to the acts of others she believes them to be true. Deponent further says, that said Lewis Grant and Nevin W. Butler, named in said petition, have not from the time of Barrett's flight to the present time resided in or been engaged in business in the State of New Jersey. Deponent further states that in the former case referred to in said petition, there was no direct evidence of the said alteration other than that stated in said petition. Deponent further states that George C. Barrett, named in said petition, is a Justice of the Supreme Court of the State of New York.

ADAH ANN PUTNAM.

Sworn and subscribed before me, January 18th, 1882.

H. W. WINFIELD,
Master in Chancery,
New Jersey.

SCHEDULE A.

JUNE 3d, 1881.

MY DEAR GEORGE:

I lose not a moment in replying to your letter of 10th ult., which only reached me this morning. Thanks for your kind reception of O'Connor & Griffen. I could not avoid the introduction, for OC's family are most kind and attentive to me. I foresaw and stated to them the difficulty you suggest, but while Griffen is a mere laborer, O'Connor has had experience in a draper's shop, is well educated and very intelligent, and all the instincts of a gentleman,

Every word you have written about Mr. and Mrs. Putnam brings sorrow to my heart, and adds additional misery to my condition, but I am not only willing, but desirous regardless of every consequence to make every atonement by stating the facts to the very best of my remembrance. I forget the a'mt of the mortgage, but think it was \$1000 (ten thousand). Adah desired to dispose of it. Ramsey agreed to buy it, and drew the assignment to William M. Ramsey who subsequently either could not or would not take it. The assignment was duly acknowledged before Nettleton, without any notation of erasure. The bond and mortgage remained with me for some time and my affairs being desperate I erased "M. Ramsey," and wrote over the erasure "C. Barrett" & wrote in the place your name "C. Barrett written over an erasure before execution." The act was mine done without the consent or knowledge of Mrs. Putnam, after the erasure and notation. I drew an assignment of the B and mortgage, as I think, to the Relief Fire Ins. Co. but I must be in error, as you say it is to H. F. Clark, and if to her it was as collateral security for \$2500, but the recorded evidences will explain all this. The erasure of M. Ramsey, and the writing of C. Barrett, together with the notation of the erasure, done by me after execution & acknowledgment by Mrs. Putnam, is I apprehend the desired evidence.

My mind was so distracted at the time I cannot remember to whom I assigned the B. & mortgage. If to Mrs. Clark, it was done through Mr. Butler, and my impression is that a large amt. of my indebtedness to her is paid off by other security held by Butler for her. He is as honest a man as lives, & will give every word of truth.

I can say no more. I am ready to do anything on earth to benefit Mr. & Mrs. Putnam. I am ready & anxious to do it, regardless of every tribulation & sorrow to myself. In case of a commission could Charles F. Marslen named as Comr.?

I am grieved to hear of Julia's illness. Dear loved child. I will never see her on earth.

My heart was fixed on seeing you this Summer—unless you come this summer it is very doubtful if I live to see you.

I am sorry to hear of Gertys illness, but why not accompany her. Where will she arrive. I cannot rest until I see your little girl, & she should see Alice's children. Alice will return from China next April. I had a long loving letter from her yesterday. The climate does not agree with her. You are so good to me I hate to say a word about money. Your last remittance to me was 1st March which reached me 12th that month you sent it one month before promised. Two Months expired on the 1st inst. and if you can send me \$75 by return mail it will be a great convenience to me.

I was obliged to buy some clothing out of my May interest, and with other outlays I am now down to £2-7 which will pinch me awfully if I get no remittance until middle of July. My dear Boy do forgive me, my sight is so bad I am barely fit to write and only for the nature of the letter I would get an amanuensis.

My love to all—Write soon.

YOUR UNCLE, WM.

My love to Butler & Redfield.

IN CHANCERY OF NEW JERSEY.

Between

ADAH A. PUTNAM,

Compl't,

and

LYDIA A. CLARK ET AL.,

Defdts.

On Bill, &c.
Order.

The plaintiff having presented to this Court a petition for leave to file a bill of review in the above entitled cause, and notice thereof having been given to the defendants, and the said petition coming on to be heard in the presence of Charles H. Hartshorne of counsel with the complainant petitioner, and of Charles L. Corbin of counsel with the defendants, and it appearing to the Chancellor that leave to file such bill of review ought not to be granted,

It is on this third day of October, A. D. eighteen hundred and eighty-two, by His Honor Theodore Runyon, Chancellor of the State of New Jersey, ordered, adjudged and decreed that the said leave to file such bill of review be and the same hereby is denied, and that the said petition be, and the same is hereby dismissed with costs.

THEODORE RUNYON, C.

The petition of appeal appeals from the whole of the said order.

BENTLEY & HARTSHORNE,
Solicitors of Appellant.

COLLINS & CORBIN,
Solicitors of Respondents.

MAY T., 1882.

ADAH A. PUTNAM, }
 v.
 LYDIA A. CLARK, and als. }

Bill for relief. Motion for leave to file a bill of review. On petition and affidavits.

Mr. C. H. HARTSHORNE and Mr. C. PARKER for the motion.

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Mr. C. L. CORBIN, *contra*.

The Chancellor.—The complainant asks leave to file a bill of review, not on the ground of the recent discovery of material evidence but of the recent discovery of the whereabouts of the witness, William C. Barrett, by whom an important fact can be proved.

The fact to be proved is not a new discovery; nor is it a recent discovery that the witness can prove it. When the bill was filed both facts were known to the complainant. Her bill was filed May 31st, 1876, to set aside as fraudulent an assignment of a bond and mortgage, and to compel the defendants, the executors of Hosea Clark, deceased, to deliver up those instruments to the complainants. The complainants case was that she had executed the assignment; that when she executed it it was by its terms an assignment to William Ramsey, of Montreal; that after she executed it she left it in the hands of William C. Barrett, of the City of New York, her attorney, to be delivered to Ramsey, who, Barrett informed her, would purchase the bond and mortgage; that it was never delivered to Ramsey, but Barrett altered it by erasing part of Ramsey's name and substituting his own, and then delivered it to the Relief Fire Insurance Company, by which the bond and mortgage were assigned to Amasa A. Redfield, by whom they were assigned to the defendant, Lydia A. Clark. It appeared in the cause that Mrs. Clark held them merely in trust for her husband, who obtained them for valuable consideration, and caused them to be assigned to her in trust for himself. At the time of filing the

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bill he was dead and his executors were made parties to the suit on their own application. On the hearing the bill was dismissed by decree of May 27th, 1878, and the action of this court in that respect was afterwards, December 10th, 1880, affirmed on appeal. *Putnam v. Clark*, 2 Stew. 412; S. C. on appeal, 6 Stew. 338. On the fourteenth of December, 1880, the complainant instituted an action of detinue against Mrs. Clark for the recovery of the bond and mortgage, but
10 on the application of the defendants in this suit on bill filed by them against her, she was enjoined from prosecuting that action on the ground that the matter which she sought to litigate in the court of law had already been adjudicated upon here. The action of this court on that subject was affirmed on appeal. *Putnam v. Clark*, 7 Stew. 532. The suits at law and here were for the same object, but the complainant claimed that she had the right to re-try the matter in the court of law because by reason of the fact that
20 the executors were defendants, she was prevented from giving her own testimony in the suit here, whereas in the suit at law, which was against Mrs. Clark individually, she would not be debarred from testifying in her own behalf. This claim proved unavailing. She now asks leave to file a bill of review because she says she now knows, as she avers she did not until May or June, 1881, where Barrett is. She alleges in her petition that she was unable up to that time to ascertain his whereabouts because he con-
30 cealed himself. She of course is chargeable with knowledge when she filed her bill in this suit in 1876 of the importance of his testimony, and if she supposed she could succeed without it, and therefore did not try to get it, but went on without it, that is no excuse. She stands before the court as a complainant who having brought suit, has voluntarily gone to hearing without the testimony of a witness of whose existence she knew, but whose testimony she did not deem material or perhaps underestimated, and of
40 whose testimony she was not deprived by the de-

fendants. In the bill she charged that Barrett made the alteration in the assignment after it was executed. On the subject of diligence she says in her petition that until the decree of this court was pronounced in 1878 it would have been useless to attempt to communicate with him relative to her case, for until then he was in concealment through fear of punishment for his crimes in embezzling the property of his clients. She says she requested two persons whom she names and who she says were the only persons that she 10 supposed were in communication with him to state where he was, but they denied that they any knowledge of his whereabouts, though she believes that one of them was in fact in communication with him. She says she heard rumors at different times that he was in Belgium and Ireland, but was unable to trace them to any trustworthy source, and that she at one time addressed a letter to his wife and gave it to one of the persons above referred to to send to her, but that she never received any reply to it. It appears 20 from the the petition that it was not until May or June of 1881 that she applied to Barrett's nephew, who lived in New York, and was a friend of hers, for information (which she obtained from him) as to the whereabouts of his uncle, though she says he had corresponded with Barrett from a period of about two or three years after the latter's flight, which took place in April, 1876; that is from about April, 1878, or April, 1879. When the correspondence began does not more particularly appear. Whether she might 30 not have discovered Barrett's whereabouts from his nephew or by his aid had she applied to him at an earlier day does not appear. It was not until some months after the final decree of this court had been affirmed by the court of *dernier ressort* that any application was made to the nephew (although, as before stated, he was a friend of her's) to discover Barrett's whereabouts. He says, indeed, in his affidavit, that he did not know until the correspondence took place where Barrett was, but it does not appear that 40

he ever previously tried to ascertain nor but that he knew where she could get information on the subject. Nor does there appear to have been any indication in the progress of the suit of any effort to get the testimony. The complainant knew of Barrett's whereabouts in or about May or June, 1881, but made no application to file a bill of review until the spring of 1882, when the application was made to the Court of Errors and Appeals. In the meantime in December, 1881, instead of such application to this court, she began a suit at law to recover the bond and mortgage. I am constrained to conclude that apart from other considerations, she has been guilty of laches in the matter, both as to obtaining the testimony and as to the application for the benefit of it, to such a degree as to disentitle her to relief in the premises, if she had otherwise been entitled to any. But apart from these considerations, if it were conceded that she has used due diligence to obtain the testimony and in making the application, the prayer of the petition ought not to be granted. The whole matter rests in the sound discretion of the court, which is to be exercised so as to effectuate the ends of justice. "The granting of a bill of review," says Judge Story, "for new discovered evidence is not a matter of right, but rests in the sound discretion of the court. It may, therefore, be refused, although the facts, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause inadvisable." Story's Eq. Pl. § 417. This suit was brought six years ago against those who hold the bond and mortgage for valuable consideration, and without notice of the alleged fraud. It went to decree here four years ago and was taken by appeal to the court of last resort, where it was decided (as in this court) adversely to the complainant, in December, 1880. The attempt of the complainant to re-try the cause at law was successfully resisted by the defendants on the ground that the

subject was *res adjudicata*; that the trial which had been had here was conclusive of the matter between the parties, and therefore the defendants ought not to be harassed with another litigation. That consideration applies with equal force to the present application. The case is one to which the principle of the maxim which declares the policy of restraining litigation within reasonable limits, is eminently applicable. It would be as unjust as it would be 10 impolitic to grant the prayer of this petition and subject the defendants to what would be practically the fourth litigation over this matter, which four years ago was decided in their favor in the forum chosen by the complainant, and on the case as made and submitted by her for decision, and thence went on her motion with like result to the tribunal of last resort. The injustice and impolicy of granting such an application under such circumstances are manifest. The petition will be dismissed with costs.



Class Tabu No 58

DAVISON & Co., Law Printers, 27 Montgomery st., Jersey City.

In Chancery of New Jersey.

Between

LYDIA A. CLARK and others,
Compl'ts,

and

ADAH A. PUTNAM,
Def't.

Bill for Injunction.

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To the Honorable THEODORE RUNYON, Chancellor of the
State of New Jersey :

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Humbly complaining showeth unto your Honor,
your orators, Lydia A. Clark, and Lydia A. Clark, ex-
ecutrix, and William A. Lewis, executor of the last
will of Hosea F. Clark, deceased.

1st. On or about the thirty-first day of May,
A. D. eighteen hundred and seventy-six, Adah A. Put-
nam and Fernando Putnam, her husband, filed a bill
in this court against Lydia A. Clark, The Relief Fire
Insurance Company, William C. Barrett and Amasa
A. Redfield, and therein set forth that about the first 30
day of April, eighteen hundred and seventy-one, the
said Adah A. Putnam was the owner of a bond
and mortgage dated June 21st, 1869, made by Jane M.
Mackay and John M. Mackay, her husband, to said
Adah A. Putnam, for twelve thousand dollars, recorded
in book 62 of mortgages, on page 719, Hudson County
Clerk's office; that on or about the first day of
April, A. D. eighteen hundred and seventy-one, Fer-
nando C. Putnam at his wife's request called upon
William C. Barrett, a counselor at law of the Supreme 40

Court of New York, and asked whether he could get the money on said mortgage; that said Barret stated that he had a client by the name of William Ramsey who would be glad to take it; that soon after the said Adah A. Putnam and her husband, to wit: on the twenty-first day of April, A. D. eighteen hundred and seventy-one, went to the office of said Barrett and were informed by him that he had prepared an assignment of said mortgage by them to said Ramsey, and
 10 asked them to execute the same before a commissioner of deeds, which they did, and left said assignment and said bond and mortgage in possession of said Barrett to procure the money thereon and deliver the same to said Ramsey, which was to be done within a few days; that a few days after the said Barrett stated that Ramsey had not the money just then, and that he had not been able to procure the money for said Adah A. Putnam.

20 2d. It was in and by said bill further alleged that said Barrett had, since the bond and mortgage were made, collected the interest which became due, and paid the same to said Adah A. Putnam, and continued so to do until about April 1st, 1876; that said Adah A. Putnam then learned that said Barrett had absconded; that they inquired for said bond and mortgage, and found on the records of Hudson County an assignment of a bond and mortgage by Adah A. Putnam and husband to William C. Barrett, dated and acknowledged
 30 ed April 21st, 1871, but that said record shows that under the name of the subscribing witness there had been written upon the paper which had been presented to the register of deeds in said county to be recorded the words "the words C. Barrett of the City of New York written on an erasure before execution."

3d. And it was further in and by said bill alleged that the complainants in said bill, to wit: Adah A. Putnam and Fernando C. Putnam, her husband, never
 40 did execute such assignment as said record shows, nor

any assignment of any bond and mortgage to William C. Barrett, on the twenty-first day of April, A. D. eighteen hundred and seventy-one, or at any other time and they charged that said Barrett at some time after the execution of the said assignment to said Ramsey did fraudulently and without any authority erase the name of said Ramsey, except the said Ramsey's first name, and write in the said Barrett's name and place of residence, and did write the notation thereof under the name of the witness, and that the subscribing witness 10 did not write said notation, nor was it written when it was executed.

4th. And in said bill it is further alleged that said Barrett, on the nineteenth day of March, eighteen hundred and seventy-five, assigned said bond and mortgage to The Relief Fire Insurance Company, and that the said company, on the fifth day of October, eighteen hundred and seventy-five, assigned said mortgage to Amasa A. Redfield, and on the twenty-ninth 20 day of April, eighteen hundred and seventy-six the said Redfield assigned said bond and mortgage to Lydia Ann Clark, and that said bond and mortgage were at the time of filing the said bill in the possession of the said Lydia Ann Clark, or under her control.

5th. It was in and by said bill prayed that the defendants might answer under oath, that said assignment by the complainants in said bill to William C. Barrett, and the record thereof might be decreed to be 30 fraudulent and void, and that said Lydia Ann Clark might be decreed to deliver said bond and mortgage to the said Adah A. Putnam, and that said complainants might have such other and further relief as the nature of said case might require.

6th. Your oratrix Lydia A. Clark, the defendant in said suit, answered the said bill, and alleged that she had no knowledge as to the transaction between said complainants and said William C. Barrett; admitted 40

there was a record of the said assignment as in said bill set forth; alleged that she had no knowledge of any fraud in any of the assignments of said bond and mortgage; that the premises described in said bill were sold at auction on the fourth day of January, eighteen hundred and seventy-six, and bought by Hosea F. Clark, formerly the husband of your oratrix, for the sum of ten thousand and seventy-five dollars, which was paid by said Hosea F. Clark to Luther Redfield, then appearing of record to be the owner thereof; that it was represented at the time of the said sale that the mortgage now claimed by said Adah A. Putnam had been paid and the same was tendered for cancellation; that for the protection of the title on account of certain defects or possible defects having no relation to said mortgage, it was requested by said Hosea F. Clark or his solicitors, that said bond and mortgage should be assigned by Amasa A. Redfield, and the same was accordingly assigned to Lydia Ann Clark; and the said Lydia Ann Clark by her said answer disclaimed all individual interest in said bond and mortgage and declared that she held the same in trust for Hosea F. Clark and his representatives. And it was further in said answer set forth that Hosea F. Clark died on the thirteenth day of April, A. D. eighteen hundred and seventy-six, leaving a will whereby he appointed Lydia Ann Clark and William A. Lewis his executors, which will had been duly proved.

The defendant Amasa A. Redfield also answered the said bill, denying any fraud in the making of said assignment.

7. The executors of Hosea F. Clark, deceased, petitioned to be admitted as defendants in said suit, and were by order of the Court so admitted and filed their answer, wherein they alleged that Hosea F. Clark had purchased the said bond and mortgage and the lands whereon the said mortgage was a lien for valuable consideration without notice of any fraud in the assignments of said bond and mortgage or in any of them.

The complainants' bill was amended by striking out the name of Fernando C. Putnam as complainant.

8th. Depositions were taken in said cause on the part of the complainant and on the part of all the answering defendants, and the cause was regularly set down for a hearing before the Chancellor, and counsel were heard for the complainant and for the answering defendants, and on the twenty-seventh day of May, eighteen hundred and seventy-eight, a final decree was 10 made in said cause in the following terms :

This cause coming on to be heard in the presence of Peter Bentley, Esquire, of counsel with the complainant, of Collins and Corbin, of counsel with the defendant Lydia A. Clark, and with the defendants William A. Lewis and Lydia A. Clark, executors, &c., of Hosea F. Clark, deceased, and Hamilton Wallis, Esquire, of counsel with the defendant Amasa A. Redfield, and the bill, answers, replications, cross-bill, answers, proofs and exhibits being read and the arguments of 20 the respective counsel having been heard, and the Chancellor having taken time to consider the same, and it appearing to the satisfaction of the Chancellor that the assignment set forth in the said bill made by the complainant and her husband, was executed by them and delivered to the said William C. Barrett, and that he was then in possession of their said bond and mortgage, and that the complainant permitted said William C. Barrett to retain possession of said assignment, and of the said bond and mortgage, and that the said bond 30 and mortgage were assigned to the defendant Lydia A. Clark in trust for her husband, Hosea F. Clark, since deceased, and are now held by the defendants William A. Lewis and Lydia A. Clark as executors of the last will and testament of said Hosea F. Clark, deceased ; and it also appearing to the satisfaction of the Chancellor that said Hosea F. Clark purchased said bond and mortgage in good faith for valuable consideration, and without notice of any fraud on the part of the defendant William C. Barrett, 40

and the Chancellor being of opinion that no fraudulent alteration of the said assignment to William C. Barrett has been proved ; and it appearing to the Chancellor that the complainant was not and is not entitled to the relief sought and prayed for by her in her bill of complaint ; It is on this twenty-seventh day of May, in the year of our Lord eighteen hundred and seventy-eight, ordered, adjudged and decreed that the complainant's said bill be, and the same is hereby dismissed with 10 costs.

THEODORE RUNYON,
Chancellor.

9th. The complainant appealed from the decree of the Chancellor to the Court of Errors and Appeals, and the said appeal was argued before said Court, and on the tenth day of December, A. D. eighteen hundred and eighty, the said Court entered a decree of affirmance and remittance.

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10th. Your orators say that the said cause and the relief sought by said bill, and the parties and the decree, were all within the jurisdiction of this Court ; that said decree was rendered upon the merits of the claim of the said Adah A. Putnam to the possession and ownership of the said bond and mortgage, and that said decree is an estoppel to the said Adah A. Putnam, in any further litigation for the same matters.

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11th. On the fourteenth day of December, A. D. eighteen hundred and eighty, and after the making of said final decree and said decree of affirmance, the said Adah A. Putnam commenced an action of detinue in the New Jersey Supreme Court, for the possession of same bond and mortgage which she had previously demanded in and by her said suit in Chancery, as above set forth.

The said suit was commenced by the issuing of sum-
40 mons, which was served upon said Lydia A. Clark.

The said Lydia A. Clark is the sole defendant to the said suit at law. The declaration has been filed in said suit, but no further proceedings have been taken therein, no plea having been filed by the said Lydia A. Clark.

12th, Your orators charge that said suit at law is a contempt of this Court; that it is unjust to said Lydia A. Clark, and oppressive, being brought against her individually, and not against the executors of the said Hosea F. Clark, deceased, who are the true owners of said bond and mortgage, and the real parties in interest; that it conclusively appears by the decree and proceedings above set forth, that Adah A. Putnam and her husband executed an assignment of the bond and mortgage to William C. Barrett, and that Hosea F. Clark was a purchaser of said bond, and mortgage for valuable consideration, without notice of any fraud on the part of William C. Barrett. And your orators say that said Adah A. Putnam is estopped from questioning the title of Hosea F. Clark or of your orators to the said bond and mortgage.

Your orators pray that the said Adah A. Putnam may answer under oath all and singular the premises, and that she may be perpetually enjoined from proceeding at law against your orators or any or either of them, for possession of said bond and mortgage, or for damages on account of the refusal of your orators to surrender the same to her.

And that your orators may have such further and other relief as may be agreeable to equity, may it please your Honor, the premises considered, to grant unto your orators not only the writ of injunction to be addressed to the said Adah A. Putnam, commanding her to refrain from further proceedings in said suit at law, or from any other proceedings at law, until she shall have answered the bill in this cause, and until the further order of the Court to the contrary; but also the writ of subpoena to be addressed to the said Adah A. Putnam, commanding her personally to be

and appear in this Court, and to stand to, abide, and perform such order and decree in this cause as to your Honor shall seem meet.

And your orators will ever pray, &c.

COLLINS & CORBIN,
Solicitors and of Counsel with Complainant.

STATE OF NEW JERSEY, ss.

10 Charles L. Corbin, being duly sworn on his oath says, that he is one of the solicitors for the complainants in above stated bill; that he was also one of their solicitors in the suit in Chancery in said bill stated, and that he is one of their attorneys in said suit at law in above bill mentioned, and deponent says that all the matters and things in the foregoing bill stated, with reference to the proceedings taken in said suits in equity and at law are true: deponent further says
20 that he was counsel for Hosea F. Clark in the above bill mentioned, and as such made a search for him, and reported upon the title obtained by him to the premises described in the mortgage in above bill mentioned, and that deponent was present at the passing of title to said Hosea F. Clark, and knows that said Hosea F. Clark was a purchaser for valuable consideration of said premises.

CHARLES L. CORBIN.

Sworn to, etc.

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PLEA.

The plea of the defendant to the bill of complaint of the complainants:

This defendant by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true in such manner and form as the same are thereby and therein set forth
40 and alleged for plea to the whole of the said bill, says:

1. That in the suit in this Court brought by her, as set forth in the bill of complaint in this cause, she produced and offered in evidence all the evidence which, during the pendency of the said suit it was possible for her to obtain, to prove the allegations contained in her bill of complaint, and that there was no evidence admissible in said suit to prove the allegations of her said bill, and possible for her to obtain other than that so produced in said cause.

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2. That when she filed her said bill in her said suit mentioned, in the bill of complaint in this cause, she was ready and willing, and she then intended to be, a witness in her own behalf, and to testify in her said suit the facts hereinafter stated in paragraph four.

3. That she was prevented from being a witness and from testifying any facts in her said suit by this only, viz. by the said executrix and executor of Hosea F. Clark being made parties defendant upon their own petition 20 to her said suit as mentioned in the bill of complaint in this cause. The order making the said executors parties defendant in her said suit was made and filed prior to the taking of any evidence in her said suit.

4. That this defendant knows and will prove by her own oath in her action of detinue mentioned in the bill of complaint in this cause the following facts, viz.: that she never at any time assigned or transferred the bond and mortgage mentioned in the bill of 20 complaint, and sued for in her said action of detinue, either conditionally or absolutely, to William C. Barrett mentioned in said bill of complaint, and that she never at any time signed or delivered any written assignment or transfer, either conditional or absolute, to said William C. Barrett, of the said bond and mortgage. That at or about the date of the alleged assignment by her and her husband to William C. Barrett mentioned in complainant's bill, she intended to sign and acknowledge, and she believes she did sign and 40

acknowledge before an officer authorized to take acknowledgement of deeds of conveyance, a written assignment of her said bond and mortgage to William M. Ramsey, which said assignment she left in the hands of said Barrett to be delivered to the assignee, said William M. Ramsey, only upon certain conditions, which conditions have never been fulfilled. That the name of William C. Barrett was not contained in the written assignment aforesaid when she signed and acknowledged it as aforesaid. That she never executed any written assignment containing the name of William C. Barrett as assignee of her said bond and mortgage. That she has not at any time, either before or after the signing and acknowledging of the said assignment to Ramsey, authorized the name of William C. Ramsey to be written in the said assignment. That she never signed and acknowledged before an officer authorized to take the acknowledgment of deeds for this or any other state, any written assignment whatever of her said bond and mortgage other than the aforesaid assignment to Ramsey, and that she is still the absolute legal and equitable owner of said bond and mortgage. That her husband, Fernando C. Putnam, who was also alleged to be a party to the supposed assignment to Barrett mentioned in said bill, and who was a party to the undelivered assignment aforesaid to Ramsey, was produced by this defendant in her said suit in this Court as a witness, and was examined as to all facts within his knowledge and memory touching the said assignment to Ramsey, and the said supposed assignment to said Barrett, but that he had forgotten many of the facts touching said assignment to Ramsey, and his testimony did not satisfy this Court of the truth of the facts which this defendant has above stated herself able to prove as aforesaid. This defendant also says that there was no other witness and no other evidence possible to be obtained during the pendency of her said former suit by whom or by which she could prove the facts by her alleged, in this paragraph of her plea.

All which matters and things this defendant doth aver to be true, and she pleads the same in bar to the said complainants' bill, and prays the judgment of this Honorable Court whether she should be compelled to make any other or further answer to the said bill, and to be hence dismissed with her costs and charges in that behalf most wrongfully sustained.

BENTLEY & HARTSHORNE,
Solicitors for Defendants.

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ORDER.

This cause coming on to be heard by consent of the parties, in the presence of Collins & Corbin, of counsel with the complainants, and Bentley & Hartshorne, of counsel with the defendant, and the Court having heard the arguments of counsel for the respective parties on the plea filed in above stated cause, and a re-hearing having taken place, it is on this 21st day of October, A. D. 1881, on motion of Collins & Corbin, of counsel with the complainants, ordered that said plea be overruled, with costs, and that defendant answer the complainants' bill within forty days, and that if she fail so to do, that complainants' bill will be taken as confessed against her.

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OPINION.

THE VICE-CHANCELLOR.

The question to be decided is raised by a plea to the bill of complaint. The argument was in effect a demurrer to the plea; the discussion turning solely on the question, whether the facts stated in the plea if true, were a sufficient ground for dissolving the injunc- 40

tion, to which, taking the bill of complaint by itself, it was not denied that the complainants were entitled.

The bill was filed to restrain the prosecution of an action of detinue in the Supreme Court of this State, brought by Adah A. Putnam against Lydia A. Clark, for the possession of a bond and mortgage dated June 21st, 1869, for \$12,000, made to the said Adah by Jane and John M. Mackay, and which are alleged by means of several subsequent assignments to have become the property of Lydia A. Clark. The claim of Mrs. Putnam to the possession of the same bond and mortgage has been recently litigated in this Court, and adjudged against her. The action of detinue begun since the litigation here was finally decided, is sought to be restrained by the defendants in the former suit on the ground that the asserted claim is *res adjudicata*. The defendants in that suit invoke the principle of the maxim *nemo debet bis vexari pro una et eadem causa*. This principle seems to me to be clearly applicable to the present controversy, and I must therefore advise that the injunction be retained.

The bond and mortgage were on or about the first of April, 1871, delivered by Mrs. Putnam to William C. Barrett, a counsellor at law in New York, with a deed of assignment therefor, duly executed and acknowledged, which deed of assignment was subsequently found by Mrs. Putnam to have been recorded with the name of William C. Barrett as grantee therein instead of the name of William Ramsey, to whom she says it was in fact originally drawn, to whom it was meant by her to go and from whom she was to receive through Barrett, her attorney, the full consideration therefor. Barrett having afterwards absconded while she supposed the papers so assigned were still in his hands undelivered, she became apprised of the assignment being on record, and of the subsequent transfer through several intermediate purchasers of the bond and mortgage, to Lydia A. Clark, one of the complainants in this suit, and one of the defendants in the former one. Mrs. Putnam alleges that Barrett fraudu-

lently erased the name of Ramsey from the assignment, and inserted his own; that he deceived her by falsehoods, and that notwithstanding the payment of full value without notice on the part of Mrs. Clark, she never parted with her title to the securities, and ought now to recover them from Mrs. Clark, to whose possession they have come.

The bill of complaint exhibited by Mrs. Clark sets out the proceedings in the former litigation in this Court, for the recovery of the securities, and shows that the action of detinue is for the same securities on the same asserted title, and between the same parties. 10
It was not disputed on the argument that taking the bill by itself, the injunction which is prayed for, should issue, but the contention very ingeniously and urgently made by the counsel of Mrs. Putnam was, that the facts set out in the plea exempted her case from the operation of the principle of the maxim quoted above. The plea in substance avers that in the former suit, she did not testify as a witness, not being legally competent; that if she had been admissible 20
and sworn, she could and would have proved by her testimony that the name of Barrett in said deed of assignment was fraudulently inserted, and that she never in fact or in law transferred to any one the title to the securities in dispute; that the bill which she filed in the former suit, was by herself and her husband against Mrs. Clark alone; that before any evidence was taken therein, the executors of Hosea F. Clark, deceased, (of whom Mrs. Clark was one), were on their own application made parties defendant; that by such addition of parties, she, Mrs. Putnam, was excluded as a witness, and was consequently unable to establish by proofs her right to the possession of the securities, as she will be able to establish it by her own oath if permitted to proceed with her action at law. 30

The inquiry is, does this circumstance entitle her after a full hearing in this Court, with an adverse result, to open the controversy anew in another tribunal, —the property sought to be recovered—the grounds of 40

her claim to it—and the parties from whom recovery is sought being the same? I am unable to answer this inquiry otherwise than in the negative. The case undoubtedly involves a great hardship for Mrs. Putnam as it stands, but an opposite result would involve a great hardship for Mrs. Clark. There is no suggestion that in the former suit in this Court (which was carried also to the Court of Appeals, and there adjudged as below), there was any ingredient of surprise or unfairness, or that there has since been discovered any evidence then unknown.

The doctrine of *res adjudicata* rests on strong reasons of public policy and also of private right. If after decree in equity a party shall proceed at law for the same matter, equity will restrain him by injunction. Such suit at law is treated as contempt of Court for it is gross oppression to vex another with a double suit for the same cause of action.

2 Leading cases in Equity, 1319 [635]. Story Eq. Jurisp. 889. Joyce on Injunction, 1040. Simpson vs. Hart, 1 Johns. Ch. 91. 24 Howard, 344.

NEW JERSEY COURT OF ERRORS & APPEALS.

ADAH A. PUTNAM,
Appellant.
and
LYDIA A. CLARK and others,
Respondents.

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

The humble petition of Adah A. Putnam, the appellant in the above stated cause, respectfully shows that your petitioner finds herself aggrieved by an order made in the Court of Chancery by the Chancellor of New Jersey, dated October 21st, 1881, in a cause wherein Lydia A. Clark and the executors of the last will of Hosea F. Clark, deceased, were complainants and your petitioner was defendant in this respect, to wit: that said order overrules the plea of your petitioner which was filed in said cause.

And your petitioner humbly appeals from said order on the ground that the same is erroneous, for that the said plea ought to have been allowed.

Your petitioner therefore prays that the said order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And ³⁰ that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

BENTLEY & HARTSHORNE,
Sol'rs of ADAM A. PUTNAM.

CHAS. H. HARTSHORNE,
of Counsel.

The usual answer was filed.

