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BILL OF COMPLAINT.

Filed April 13, 1929.

In Chancery of New Jersey

To the Honorable Edwin Robert Walker, Chan- 10
cellor of the State of New Jersey.

The complainant, Charles H. Bohland, of the City of New York, County of New York, and State of New York, respectfully shows that:

1. On December 12, 1928, Jacob Horn and Bertha Horn, his wife, being indebted to the Parrow Holding Co., a corporation of the State of New Jersey, in the sum of thirty thousand (\$30,000.) dollars, executed to it a bond of that date to secure that sum, payable in installments of two hundred fifty (\$250.) dollars every three months until December 12, 1931, when the entire balance of said money would be paid, together with interest at the rate of six per cent. (6%) per annum, payable quarter-annually from the date of the bond. 20

2. To secure payment of said bond, the said Jacob Horn and Bertha Horn, his wife, executed to said Parrow Holding Co., a mortgage of even date with the bond; and thereby conveyed to Parrow Holding Co. in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the office of Register for the County of Essex, in Book C 66 of Mortgages, pages 413-415. 30
40

Bill of Complaint.

3. The mortgaged premises are described as follows:

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

10 BEGINNING in the westerly line of Halstead street at a point therein distant five hundred forty-four and fifty-four hundredths feet southerly from the corner formed by the intersection of the same with the southerly line of Halstead Place; and from thence running (1) along said line of Halstead street south thirty-six degrees six minutes west one hundred forty-seven feet; thence (2) north fifty-one degrees fifteen minutes west two hundred sixteen and ninety-eight
20 hundredths feet to a point midway between Halstead street and Evergreen Place; thence (3) north thirty-six degrees six minutes east one hundred forty-seven feet; thence (4) south fifty-one degrees fifteen minutes east two hundred sixteen and ninety-nine hundredths feet to said line of Halstead street and the place of BEGINNING.

Together with all the right, title and interest, if any, of the party of the first part, in and to
30 a strip of land twenty-two one-hundredths on the northeasterly side, lying between the northwesterly line of the premises above described and the fence as now located. This description being prepared in accordance with an actual survey made by Leonard O. Lindsay, surveyor, dated November 17, 1925.

4. The mortgage contained an agreement that should any default be made in the payment of any installment of principal, or of interest on
40

Bill of Complaint.

the prior mortgage, and should such installment of principal, or such interest remain unpaid and in arrears for the space of ten days, then the amount secured by this mortgage and the accompanying bond shall become due and payable at any time thereafter at the option of the owner or holder of this mortgage.

10

5. Complainant alleges the fact to be that payment has not been made in accordance with the terms of the prior mortgage on the premises herein described, in that there is a default in the payment of installments provided to be made in said prior mortgage for more than the space of ten days, and that therefore there is a default under the terms and conditions of complainant's mortgage.

6. On December 17, 1928, the Parrow Holding Co., a corporation of the State of New Jersey, assigned the mortgage more particularly described in paragraphs one and two, to the complainant, Charles H. Bohland, which said assignment of mortgage was recorded in the Register's office of Essex County on December 17, 1928, in Book 202 of Assignments of Mortgages for said County, on pages 513-514.

20

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

30

1. That Jacob Horn and Bertha Horn, his wife, who are the defendants to this suit, may answer this bill of complaint without oath, and each statement therein made.

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

3. That a decree may be made for the sale of the mortgaged premises to raise and pay to

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Answer.

the complainant the amount so found due on his mortgage, with interest and costs.

4. That a receiver may be appointed to collect the rents for the premises more particularly described in the bill of complaint.

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

ALFRED A., ALFRED A., JR., and
RICHARD V. STEIN,
Solicitors for and of Counsel
with Complainant.

20

ANSWER.

Filed May 3, 1929.

The defendants, Jacob Horn and Bertha Horn, his wife, jointly answering the bill of complaint in this cause, say that:

- 30 1. They deny the allegations contained in paragraph one, in which it is stated that on December 12, 1928, they were indebted to the Parrow Holding Co., in the sum of thirty thousand dollars (\$30,000), and expressly aver that they were never indebted to the Parrow Holding Co. for any sum of money whatsoever and did not borrow from Parrow Holding Co. any money whatsoever.

- 40 2. As to the allegations contained in paragraph two of the bill of complaint, as to the execution of a bond and as to the allegations contained in paragraph one as to the execution

Answer.

of a mortgage, the defendants admit that they executed such an instrument, but deny that they ever received any moneys from the Parrow Holding Co., nor did they have any transactions with Parrow Holding Co., such as recited in paragraphs one and two of the bill of complaint.

10

3. As to paragraph three of the bill of complaint, Jacob Horn admits that he is the owner of the premises described in said paragraph, and that he is married and his wife's name is Bertha Horn; and that she has a dower interest in said premises.

4. As to paragraph four of the bill of complaint, these defendants admit that they executed a mortgage as set forth in paragraph one of the bill of complaint, but deny that the funds thereon were ever paid to them by said Parrow Holding Co., although they admit that the said mortgage contains the clause averred in paragraph four of the bill of complaint.

20

5. As to paragraph five of the bill of complaint, they deny that there has been any default in the payments of any prior mortgage on the premises described in paragraph three, and they expressly aver that the prior mortgages on the premises described in paragraph three of the complaint are not in default because of the non-payment of principal installments, and have at no time been in default; and that the said prior mortgages, prior to complainant's mortgage, do not require any payments to be made on account of the principal sum of said prior mortgages, and the statement contained in paragraph five that there has been a default in payment

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Answer.

of principal installments on prior mortgages is not a fact.

10 6. The defendant, Jacob Horn, further states that prior to December 12, 1928, he came to the complainant, Charles H. Bohland, and his attorney, Casper B. Ughetta, and made an application for a loan of thirty thousand dollars (\$30,000), as a mortgage on the premises described in paragraph three of the bill of complaint in this cause. Charles H. Bohland agreed to lend the defendants the said sum of thirty thousand dollars (\$30,000).

20 7. Charles H. Bohland thereupon demanded that he be paid the sum of six thousand dollars (\$6,000), or twenty per cent. of said thirty thousand dollars (\$30,000), for making said loan to defendants. He endeavored to make a corrupt bargain to contravene the statute of the State of New Jersey; that is, the Act against Usury of the State of New Jersey, and demanded the sum of six thousand dollars (\$6,000) before he would make said loan.

30 8. After making said demand, he informed your defendants that he would not take a mortgage directly from your defendants, but insisted that the defendants give the mortgage to some corporation so that he could purchase it from the corporation, in order to contravene the statute against usury.

40 9. Your defendant, Jacob Horn, came to his attorneys, Zucker & Goldberg, and informed them of the demands of Charles H. Bohland and his attorney, Casper B. Ughetta, and thereupon your defendant's attorneys informed your defendant that they had a corporation by the name of Parrow Holding Co.

Answer.

10. Your defendant returned to Casper B. Ughetta with said information, and he drew a mortgage for thirty thousand dollars (\$30,000) from your defendants to Parrow Holding Co., and sent said mortgage to your defendant's attorneys for execution. Your defendant's attorneys had said mortgage executed and returned to Casper B. Ughetta, attorney for complainant, and the same was duly recorded as alleged in the bill of complaint. Your defendants received no moneys of any kind, nature or description from Parrow Holding Co., nor did your defendants ever solicit any loan from Parrow Holding Co., nor did Parrow Holding Co. have any funds with which to make said loan. 10

11. After said mortgage was recorded, Charles H. Bohland paid twenty-four thousand dollars (\$24,000) and received an assignment of the mortgage, and demanded that your defendants sign an estoppel certificate. Nevertheless, the entire scheme was an endeavor to evade the statute against usury, and Charles H. Bohland did not give to your defendants more than twenty-four thousand dollars (\$24,000). 20

12. Charles H. Bohland, complainant, demanded and exacted from the defendants as a consideration for the loan aforesaid, that your defendants pay him six thousand dollars (\$6,000) as and for a bonus or premium for the loan mentioned in the bill of complaint; and the defendants in further answering, jointly and severally, say that the complainant, in his exacting, demanding, receiving and retaining the sum of six thousand dollars (\$6,000) in his control aforesaid out of the thirty thousand dollars (\$30,000) which he agreed to pay to your 30
40

Answer.

defendants, took a higher rate of interest than was then or is now allowed by the law of this State, particularly referring to the act against usury; and further they submit and insist that the contract contained in the aforesaid bond and mortgage was and is usurious and corrupt
10 and contrary to the laws and statutes respecting usury and against taking or contracting to take or receive interest at a higher rate or more than the legal rate of interest allowed by law, either directly or indirectly; and insist and pray the same benefit and advantage of said laws and statutes and of each of them, as if they had jointly and severally, separately pleaded the same fully by their title and sections and exact phraseology, referring particularly to the laws of the State
20 of New Jersey in such case made and provided; and that the Parrow Holding Co. had no interest whatsoever in said transaction and all defendants received was twenty-four thousand dollars (\$24,000); and defendants pray that the mortgage hereinbefore mentioned and set forth in the bill of complaint be reformed to read twenty-four thousand dollars (\$24,000); and that defendants be credited with all interest payments made to complainant by reason of the aforesaid allegations, as by the statute of this State
30 in such case made and provided; and that said mortgage be continued for the full period as set forth in said mortgage, without any interest being paid on the same by reason of the statutes in such case made and provided.

ZUCKER & GOLDBERG,
Solicitors of Defendants.

REPLICATION

Filed June 29, 1929.

The complainant, replying to the answer filed by the defendants in the above-entitled cause, says that:

1. Complainant denies the allegations contained in paragraph one, and expressly avers that the defendants are estopped by an estoppel certificate that they were indebted to the Parrow Holding Company in the sum of thirty thousand dollars on December 12, 1928. 10

2. Complainant repeats the allegations contained in paragraph one of this reply.

3. Complainant has not sufficient knowledge, information or belief upon which to either affirm or deny paragraph four wherein the defendants allege that the funds were never paid to them by the said Parrow Holding Company, but says that the defendants are stopped by an estoppel certificate executed by them from denying the debt created by the execution of said bond and denying the mortgage given as security for the payment of said debt. 20

4. Complainant denies the allegations contained in paragraphs five, six, seven and eight. 30

5. Complainant has not sufficient knowledge, information or belief upon which to either affirm or deny paragraphs nine and ten, but leaves the defendants to their proof.

6. Complainant admits the allegations contained in paragraph eleven, except so much thereof as states that the estoppel certificate was demanded by complainant, and in regard to 40

Replication.

10 this, complainant expressly alleges the fact to be that the said estoppel certificate was tendered to the complainant by the defendants without any demand, compulsion or coercion on the part of the complainant. As to that part of said paragraph which alleges the scheme was an endeavor to evade the statute against usury, and that the complainant did not give to the defendants more than twenty-four thousand dollars, the complainant denies and expressly alleges the fact to be that he had no dealing with the defendants, but purchased the said mortgage by assignment from the Parrow Holding Company, as recited in the complaint.

20 7. Complainant denies the allegations contained in paragraph twelve.

MOTION TO STRIKE OUT.

Complainant reserves the right at the final hearing in the above-entitled matter, to strike out the answer filed herein by the defendants upon the ground that the answer does not properly plead the statute of usury.

30 ALFRED A., ALFRED A., JR., and
RICHARD V. STEIN,
Solicitors of Complainant.

*Offer of Documentary Evidence.***TESTIMONY.**

Testimony taken in the above-entitled cause at the Union County Court House, Elizabeth, New Jersey, on Thursday, the eleventh day of October, 1929, at 11:30 A. M.

Before Hon. Malcolm G. Buchanan, Vice-Chancellor. 10

Appearances:

Messrs. Alfred A., Alfred A., Jr., and Richard V. Stein, by Mr. Alfred A. Stein, for complainant.

Messrs. Zucker and Goldberg, by Mr. Edward R. McGlynn, for defendants.

Mr. Stein: I offer in evidence a mortgage which is set forth in the bill of complaint, and the bond and the assignment. 20

The Court: Are they all admitted?

Mr. McGlynn: Yes, sir.

Said mortgage made by Jacob Horn and wife to the Parrow Holding Company, to secure the sum of \$30,000, dated December 12, 1928; also the bond accompanying it; also an assignment of said mortgage by the said Parrow Holding Company to Charles H. Bohland, dated December 17, 1928, recorded in the Essex County Register's office in Book 202 of Assignments of Mortgages, on page 513 (said mortgage having been recorded in said Register's office in Book C 66 of Mortgages, page 413), are marked Exhibits C. 1, C. 2 and C. 3 respectively. 30

Mr. Stein: The mortgage provides that should any default be made in any of the installments on the prior mortgage—referring to a mortgage of \$315,000 held by the Eleventh Ward 40

Offer of Documentary Evidence.

Building and Loan Association of Newark—in the payment of any installment of principal, or of the interest on said prior mortgage, and should such installment of principal or such interest remain unpaid and in arrears for the space of ten days, or should any suit be com-
 10 menced to foreclose said prior mortgage, then the amount secured by this mortgage and the accompanying bond shall become due and payable.

I offer in evidence a certified copy of the mortgage made by Jacob Horn to the Eleventh Ward Building and Loan Association, in the sum of \$310,000, dated the twenty-first day of March, 1927, and another mortgage to the same asso-
 20 ciation by the same mortgagor, for \$25,000, dated the first day of March, 1928. The first mortgage is recorded in Book A 61 of Mortgages, page 155; the second mortgage is recorded in Book X 62 of Mortgages, page 541 of Mortgages for Essex County, which mortgages both provide, the first one—

The Court: They will speak for themselves. Is there any objection to these mortgages?

Mr. McGlynn: I want to straighten out in my mind the mortgage that is being foreclosed.
 30 It seems to be to secure the payment of \$315,000; and counsel speaks of one for \$310,000 and another for \$25,000. I don't know why the difference.

The Court: Well, the difference is in your favor.

Mr. Stein: That is evidently a mistake.

The Court: The mortgage speaks for itself.

Is it also admitted that these two mortgages cover the property comprised in the agreement
 40 the complainant sues on?

Offer of Documentary Evidence.

Mr. McGlynn: Yes, sir.

Said mortgages are marked Exhibits C. 4 and C. 5 respectively.

The Court: Have there been any payments on your mortgage?

Mr. McGlynn: Yes, sir.

The Court: You admit the receipt of how much? 10

Mr. Stein: We admit the receipt of, on account of principal, on March 12th, \$250, interest of \$450 to March 12, 1928 on \$30,000, amounting to \$450; also payment on account of principal on June 12, 1928, of \$250, and nothing on account of interest; and a further payment on September 12th of \$250, no interest.

We claim interest at six per cent. from June 12th on \$29,750 to September 12th, amounting to \$442.50, and then interest from September 12th on the balance of principal of the sum of \$29,250. In other words, there is interest on that balance due—we claim interest from March 12th to June 12th of \$446.25, and from June 12th to September 12th of \$442.50, and from September 12th to date of \$146.25 on the balance of the principal. 20

The Court: Those are 1929, then? 30

Mr. Stein: Yes, sir.

The Court: Is there any dispute as to the amount of money due?

Mr. McGlynn: No dispute of the recital of the figures which has just been given to the Court, or the figures with respect to the interest; no dispute with respect to the calculation.

Arthur T. Smethurst, direct.

ARTHUR T. SMETHURST, a witness produced on behalf of the complainant, being duly sworn testifies as follows:

Direct examination by Mr. Stein.

- 10 Q What is your position, Mr. Smethurst?
 A Secretary of the Eleventh Ward Building and Loan.
 Q Of Newark? A Of Newark.
 Q And as such secretary, you have charge of the books?

The Court: Is there any dispute about that?

- 20 Mr. Stein: Is there any dispute as to the fact of this?

Mr. McGlynn: With respect to these payments?

The Court: Yes.

Mr. McGlynn: Well, no; the secretary can tell you what has been paid; I don't know what the figures are. I understand some arrangement was made with the building and loan whereby the dues were charged.

- 30 Q As such secretary you have charge of the books of the Eleventh Ward Building and Loan Association? A I had.

Q Are you familiar with the account of Jacob Horn? A I am.

- 40 Q I show you a mortgage made to Jacob Horn in the sum of \$310,000, and another one for \$25,000, and ask you whether or not payments on account of those mortgages have been made, and what payments, speaking first of the mortgage for \$310,000? A There is a mortgage—two

Arthur T. Smethurst, direct.

mortgages, one of three hundred and ten thousand—

By the Court.

Q. The \$310,000.00 mortgage; were payments made on it? A There have been payments made on this mortgage, on the shares themselves—and profits that have been paid, on the \$310,000.00 mortgage. \$17,189.39— 10

Q Let me ask you first: your mortgage provides for monthly payments of \$3,100.00 on the the fourth Monday of each month? A It does.

Q Have those payments been made?

Mr. McGlynn: Objected to. 20

The Court: Objection overruled.

A They have not.

By the Court.

Q. Have any of them been paid? A Yes.

Q What and when? A Up to January 1st of 1929 the payments have been paid in full.

Q You mean \$3,100.00? A I mean \$3,100.00 a month. 30

Q Now, after that date you have mentioned, what payments did you receive on account of this mortgage? A After that date payments of \$2,175.00 a month have been made on the \$310,000.00 mortgage.

By the Court.

Q. Have they been made regularly? A They have been made regularly. 40

Arthur T. Smethurst, cross.

Q That is after January 1st? A Yes, sir.

10 Q Now, on the mortgage of \$25,000.00, dated the first day of March, 1928, that mortgage provides for the payment on the fourth Monday in each and every month, of \$250.00 each month. Has that payment of \$250.00 each month been made? A It has been made up to January 1st, 1929, and subsequent to January 1st, payments of \$187.50 a month have been made for nine months.

By the Court.

Q Regularly on the fourth Monday? A Yes, sir, on or before the fourth Monday.

20 Q Have those reduced payments on these two mortgages been made with the consent of the Building and Loan Association? A They have not.

Cross examination by Mr. McGlynn.

30 Q Mr. Secretary, are you familiar with the application by the Building and Loan Association of the moneys which are paid by the mortgagors monthly? A I am.

Q On the mortgage of \$310,000.00, where the monthly payments are \$3,100.00, what proportion, if any, of that \$3,100.00 was applied to the dues which are required to be paid on account of the shares issued to the mortgagor?

Mr. Stein: Objected to.

The Court: I hear no ground of objection; the objection is overruled.

40 A One-half.

Arthur T. Smethurst, cross.

Q Half of it? A Yes, sir.

Q Did your association at any time have a single mortgage for \$315,000.00 on this property in East Orange, to your recollection? A No.

Q On these two mortgages which you have mentioned, one for 310 and the other for 25, I believe, was the full amount of \$335,000.00 advanced on those mortgages? A It was. 10

Q So that at the present time your association has mortgages aggregating \$335,000.00—310 and 25? A That is not so, because there has been a certain reduction made in one of those mortgages.

Q Apart from the monthly payments? A Apart from the monthly payments.

Q When was that payment made? A It was not made in a payment. Part of the dues paid in on the shares was applied in reduction of the loan. 20

Q Which was that? A The \$310,000.00 loan.

Q How much of the dues which had been paid by the mortgagor were applied towards the payment of principal? A Twenty thousand.

By the Court.

Q When? A I can't give you the exact date. 30

Q Haven't you your book with you? A I haven't my book with me.

Q Should not the application of that \$20,000.00 towards the reduction of the principal have some effect upon the question of the monthly payments? A It would.

Q That's true? A Yes, sir.

Q Can you tell us when he paid 3,350 and when he began to pay 3,150? A I can't give you the exact date. 40

Arthur T. Smethurst, cross.

Q About when? A Around the first of the year.

Q January 1, 1929? A Yes, sir.

Q You state that the matter of the smaller payments by the mortgagor had not been consented to by the Building and Loan Association?

10 A I do.

Q Have they in any way objected to the smaller payments, if you know? A We have received the smaller payments.

Q Do you happen to know whether or not that was by arrangement with any of the officers of the Association?

Mr. Stein: Objected to.

By the Court.

20 Q Do you know? A I do not.

Q You don't know? A No.

Q Now, outside of the \$20,000.00 which you say was applied to the reduction of the principal, has any other sum paid by this mortgagor on account of the dues represented by the shares of stock in the Association in his name, been applied to the reduction of the principal? A No.

30 Q Is the Association now charging interest on— The Association is now charging interest on what sum to the mortgagor? A Including both mortgages?

Q Yes. A \$315,000.00.

Q On \$315,000.00? A Yes, sir.

Q What does the Association do with the money, so far as the application of payment is concerned, which is paid by him now on account of dues? A It is carried in shares.

40 Q When if at any time, is that applied towards reduction of the principal? A Either

Jacob Horn, direct.

by the request of the mortgagor or at such time as the value of the shares is sufficient to wipe out the mortgage.

Q These shares are assigned as collateral security in addition to the mortgage on the property? A They are.

Q What is the name of the president of the association? A Benjamin F. Hurd. 10

Q What office does Mr. Budd hold? A Executive vice-president.

Re-direct examination by Mr. Stein.

Q So that on January 1, 1929 there was due on the two mortgages of the building and loan, \$315,000.00? A \$315,000.00.

COMPLAINANT RESTS. 20

JACOB HORN, a witness produced on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. McGlynn.

Q You are the owner of this property under foreclosure? A Yes, sir. 30

Q How did you come to meet Mr. Charles H. Bohland?

Mr. Stein: Objected to. There is no evidence that he did meet him.

Q Did you ever meet him? A Yes, sir.

Q When? A At 147-148 Halstead street, East Orange. 40

Jacob Horn, direct.

Q That is the property under foreclosure?

A Yes, sir.

Q When, the first time? A That was in the fall of last year.

Q The fall of '28? A Yes.

By the Court.

10

Q What time in the fall? A It must have been around September; it's around that time; I can't remember the exact time.

Q Did Mr. Bohland tell you how he came to be at your property? A Yes, sir.

Q What did he tell you? A He come around about the second mortgage; he come around to look over the property.

Q Did he tell you how he came to be there?

20 A Yes, sir.

Q How? A Mr. Isenberg sent him over.

Q Had you previously spoken to Mr. Isenberg about the second mortgage on this property? A Yes, sir; we were talking.

Q What did you say to Mr. Bohland? A He was looking around the property and he says, "Well, the property is all right," and he says he is willing to give me a \$30,000.00 mortgage.

30 Q For how long? A For three years, at twenty per cent.

Q 20%. A Yes.

Q Twenty per cent. what? A Bonus.

Q Go on? A And he wanted \$1,000.00 every three months.

Q On the principal? A On the principal and interest.

Q What did you say? A I told him I can't do it that way.

40 Q Give us the conversation? A I told him I can't afford to pay so much. I was willing,

Jacob Horn, direct.

see, to pay him? I told him I will give him \$5,000.00 bonus and pay him \$750.00 a month.

Q \$750.00 a month? A I mean every three months; \$750.00 with interest. And he went away.

Q He went away? A He went away, yes, for about two or three months, then I was in Mr. Isenberg's office again. 10

Q The same Mr. Isenberg? A The same Mr. Isenberg. I was talking to him again.

Q Speak more slowly and distinctly. A About a month or two I was down at Isenberg's. I needed money. Mr. Isenberg says to me, "Why don't you go over to New York to his son-in-law, you'll get it."

Q Whose son-in-law? A Mr. Bohland's. 20

Q Is that the first you heard of Mr. Ughetta?
A Yes.

Q Did you go? A I went over to his place. It's on his office, I think.

Q Somewhere in New York? A Yes, sir.

Q What was his business? A A lawyer.

Q What relation was he to Mr. Bohland? A His son-in-law.

Q What did you say to Mr. Ughetta? A Mr. Ughetta told me he has got a check left by Mr. Bohland there, and if I could go on his conditions there he had— 30

Q You say he said he had a check? A Mr. Bohland left him a check in his possession.

Mr. Stein: I object to any conversation between Ughetta and this witness in the absence of Bohland.

The Court: You may move to strike it out if it is not connected up. 40

Jacob Horn, direct.

Q Did he tell you where Mr. Bohland was?

A Yes, sir; away to Europe.

Q Did he tell you how much he had? A He had \$25,000.00 left with him in his possession.

Q What did you say? A We made arrangements that I should pay \$250.00 every
10 three months with interest.

Q \$250.00 on the principal? A Yes, and \$6,000.00 bonus; that is, with the lawyer's expenses and everything.

Q Everything was to be included? A Yes, sir.

Q When you first talked to Mr. Bohland—

By the Court.

Q When was this that you had this conversation with him? A This was, I think,
20 in November, if I'm not mistaken, or December, or something like that. I was twice there. In the first it was the first time, and then the second time.

Q You made two calls? A Two calls, yes, either the latter part of September—

Q November, you mean? A November or December; something like that.

Q When you first talked to Mr. Bohland out
30 in East Orange on the property, had Mr. Bohland said anything to you about how he wanted you to carry out this transaction if it was consummated, whether he would take a direct mortgage or—

Mr. Stein: Objected to.

A No.

Q When you were in Mr. Ughetta's office what
40 did you say? Give us the conversation?

Jacob Horn, direct.

Mr. Stein: Objected to.

The Court: If it is not connected up it can't hurt you.

A Mr. Ughetta said he can't according to the law, he can't get a mortgage direct from me, but it should be made out a mortgage to the company and from the company, should give to him, and we agreed that and I told him "All right, I will go over to Newark to my lawyer Mr. Zucker andt he will straighten this thing out." I went over and I told Mr. Zucker— 10

By the Court.

Q You say Mr. Ughetta told you he would have to have a mortgage made to the company? A Yes, sir. 20

Q What company? A To a company.

Q You saw your lawyer? A Yes, sir, and he said "All right."

Q Who had charge of the transaction for you? A Them two.

Q Mr. Zucker and Mr. Ughetta? A Yes, sir.

Q Do you recall when the transaction was closed? A It was closed in December. 30

Q Do you recall the time it was closed, the occasion of it's being closed and do you remember your being there and getting some checks? A Sure, I was there and got some checks.

Q When was that? A I can't tell you the date.

Q Where was it closed? A In Zucker's office.

Q In Newark? A In Newark. 40

Jacob Horn, direct.

Q Who was there? A Mr. Ughetta, Mr. Zucker and I.

Q Mr. Bohland wasn't there? A No.

Q Had you and your wife already executed a mortgage or did you execute it then and there?

A We executed it right there.

10 Q Were you given any money that day? A Yes, I got money that day.

Q How much? A I got fifteen thousand some odd dollars. I can't tell you exact. I got a check from lawyer Zucker.

Q Had anything been deducted from the proceeds, from the mortgage, by way of charges—

20 Mr. Stein: Objected to. We know nothing about that. It wouldn't be binding on us.

The Court: He may answer.

Q Do you recall what was deducted? A The tax and the bonus.

Q From the proceeds of the mortgage loan?

A Yes.

30 Q I show you a statement. Will that help your recollection on the question of the amounts of the checks? A \$15,142.20.

Q What? A \$15,142.20.

Mr. Stein: That is objected to. The testimony now with reference to checks that were given does not refer to any checks given by Mr. Ughetta or Mr. Bohland, but to checks by Mr. Zucker. How they could possibly have any bearing on our case I don't know.

40 The Court: Your objection is noted.

Jacob Horn, direct.

Q You got a check for \$15,142.20? A Yes, sir.

Q What else was deducted? A \$6,000.00 bonus and \$822.80 that was taxes.

Q Tax on this particular property? A Yes, and it was paid to lawyer Zucker and Goldberg \$35.00 and the balance I got. 10

Q Did you see Mr. Ughetta give a check or checks to Mr. Zucker at the time this transaction was closed? A Yes, sir.

Q How much was the check he gave Mr. Zucker? A I sign a check—

Q No; the check he gave? A A check for \$2,400.00; I think that's what it was.

By the Court.

Q Speak louder. What was it? A 20
\$2,400.00.

Q Did you have any business transaction at all with this Parrow Holding Company? A Never.

Q And is that the company that was picked out to make this mortgage you described before? A Yes.

Q Do you recall how you came to go to Mr. Ughetta's office? A Yes. 30

The Court: He has testified to that.

Q With respect to the Eleventh Ward Building and Loan Association that holds two mortgages on your property, up until what time did you pay the full amount on monthly advances provided for in those mortgages? A Up to January 1, 1928.

Q And did you discuss with any of the officers— A No, 1929. 40

Jacob Horn, direct.

Q Did you discuss with any of the officers of that association any difference in the amounts you were to pay per month thereafter?

10 Mr. Stein: Objected to. The discussion between the officers and the witness as to how the payments might be made could not bind the building and loan association as the mortgagee. It would have to be done through the Board of Directors.

The Court: He may answer.

Q Whom did you discuss it with? A The president.

Q What was his name? A Mr. Hurd and Mr. Budd.

20 Q What did you say to them and they to you?
A They told me they were going to take it up at their meeting and they will let me know to the next pay day. I came around the next day and they told me they granted it to me.

Q Granted you what? A I should pay full interest and half of the stock.

Q You were to pay full interest, but only half payments on the stock? A Yes.

30 Q And that payment you kept up ever since?
A Right.

Q Did they discuss with you the question of reducing the principal of the mortgage from \$335,000.00 to \$315,000.00?

40 Mr. Stein: I would like to make a further objection, that this testimony is improper, since the officers of the building and loan association could not, by any act of theirs, affect the covenants in our mortgage. They would not have any right to reduce the payments to our detriment.

Jacob Horn, cross.

A (No answer.)

Cross examination by Mr. Stein.

Q Just when was it that you met Mr. Bohland? A It was early in the fall.

Q Well, when? A I can't tell you exactly; 10
it's over a year.

Q September. A I can't tell you.

Q October? A I can't tell you.

Q November? A I can't tell you. It was around the fall. It was either September, October or August; it was around that time.

By the Court.

Q Around what time? A Around them two or three months. I can't tell you what 20
month.

Q Certainly you can tell me more closely than that. A I can't remember exactly; I know it was in the afternoon.

Q As closely as you can? A Either in August or either in September.

Q Then it was not October or November?
A I don't think so.

Q Well, you would know? A No, no, 30
it wasn't around that time, because it must have been around that time, either in August or September.

Q It was either in August or September?
A Yes, sir.

Q Who was at your building in Newark with Mr. Bohland? A Mr. Ughetta.

Q At that first meeting? A Yes, but I never talked to him, but the superintendent was there, too; he went around. 40

Jacob Horn, cross.

The Court: Don't talk so fast, and talk louder. Talk loudly enough and distinctly enough so that I can hear you and understand; and don't volunteer anything.

10 Q What superintendent? A My superintendent.

Q Who were all the persons with you or Mr. Bohland when you met in August or September at your building in Newark? A I can't understand that.

Q Can you tell some of the people there besides you and Mr. Bohland? A Mr. Ughetta.

Q Anybody else? A No.

By the Court.

20 Q You just said your superintendent was there? A He's there all the time.

Q Was he in the party? A No.

Q Was Mr. Isenberg with Mr. Boland? A No.

By the Court.

Q Just the three of you, then? A Yes.

Q Is that right? A Yes.

30 Q So that the only persons at the building were you, Mr. Bohland and Mr. Ughetta? A That's right.

Q When you talked about this mortgage loan? A Right.

Q Now, why did Mr. Bohland appear at your building? A He come around to look over the building.

Q Why? A For giving me a mortgage.

40 Q Why? A He come around to look over the building for giving me a mortgage.

Jacob Horn, cross.

Q Yes. Now, was there any talk about it before this day in August between you and Bohland? How did he come to be there? A No, it was a talk between Mr. Isenberg and Mr. Bohland but when he come to the building, that's the time I was talking to him.

Q Had you talked to Mr. Isenberg? A Yes, 10
sir. I was talking to Mr. Bohland.

Q Had you asked Mr. Isenberg to get you a mortgage from someone? A Yes, sir.

Q And as a result of that talk Bohland appeared at your property? A Yes, sir.

Q He appeared at your building? A Yes, sir.

Q What time of the day was that? A That was, I think, in the morning, before noon.

20

By the Court.

Q You said a moment ago that it was in the afternoon? A It was in the morning.

Q You said it was in the afternoon. Why did you say that? A No, it was in the morning.

Q Why did you say that? A Little by little maybe I got to realize how the thing happened. It is a thing that is very—

30

Q Whereabouts at your building did this conversation take place, inside or outside on the street? A Inside.

Q Whereabouts inside? A In the basement.

Q In the janitor's office? A No.

Q Whereabouts? A In the basement.

Q Whereabouts in the basement, near the boiler or where? A No, in the back of the boiler the laundry is.

Q Back of the boiler? A Yes.

40

Jacob Horn, cross.

Q How long did you talk about this thing?

A About ten minutes.

Q Ten minutes? A Yes.

Q You couldn't agree? A No, we couldn't agree.

10 Q And that was the end of the matter? A Yes.

Q You wanted to pay \$5,000.00 bonus? A Yes, sir.

Q And he wanted six? A Yes.

Q Was that the end of it then? A Yes, he wanted four thousand—

Q But the deal was off, was it? A Yes, sir.

Q That ended that? A Yes.

20 Q Now, after that did you ever see Mr. Bohland again? A I saw Mr. Bohland—

Q I mean between the time that you— A No, I didn't see him.

Q Wait a minute; you don't know what I was going to ask you. I mean between the time you saw him in August or September until the time you got your money; did you ever see him again? A No.

30 Q Now, isn't it a fact that the first time you ever saw Mr. Bohland after that was sometime in January when he came in to see you about his money? A In January?

Q About the building loan payments? A Yes, sir.

Q About when was that in January, was it after the fifteenth or towards the end of January? A I don't think he saw me in January; that must have been in February, not in January.

40 Q He came to see you to protest against your payments to the Building Loan being less than they should be? A Yes.

Jacob Horn, cross.

By the Court.

Q And that is the first time you saw him since the time you saw him in August? A Right.

Q That is correct? A Yes.

Q Now, then, if I understand you correctly, you went over to Mr. Ughetta's office? A Yes, right. 10

Q That is the gentleman here (indicating)? A Yes, sir.

Q When was that—you went over twice—the first time? A Yes, it was in November.

Q Well, everything was off between you and Mr. Bohland?

The Court: He has so testified. 20

Q Why, then, did you go to Ughetta? A Mr. Isenberg told me that if I will go over to Ughetta I will straighten it out, because Mr. Bohland is away to Europe, and he left with him things to straighten out there.

Q Mr. Isenberg is the man that built your building, or he did some work in it? A Yes, sir.

Q In this building that is the subject of this mortgage, is that right? A What? 30

Q Mr. Isenberg did some work on this building? A Yes.

Q Which is covered by this mortgage? A By what mortgage? Yes.

Q Now, you owed some money after the building was finished, didn't you? A Yes.

Q Did you owe it to Isenberg? A Yes; I owe him now plenty, too.

Q I don't care about that. Did you go alone to Mr. Ughetta's office? A Alone. 40

Jacob Horn, cross.

Q In November? A Yes.

Q I understand you to say that Mr. Ughetta told you that there was a check in his possession from Mr. Bohland? A Yes, sir.

Q For \$25,000.00? A Yes.

Q Sure about that? A Positively.

10 Q Sure about the \$25,000.00? A Positively.

Q A check? A Yes, sir.

Q Did you see it? A No; how can I see it? He told me he has got the money and he will give it to me right away. He said I should make it before he comes back.

Q Now, were any papers made out that day by you and Mr. Ughetta—any papers at all? A When, the first time or the second time?

20 Q November, the first time you went to Mr. Ughetta's? A Nothing at all.

Q Nothing at all? A No, only figures.

Q What figures? A Figured out to see how much the building brings in and how much the expenses are and how much I could afford to take off.

Q And how much you paid in the building loan? A Yes, yes, yes, yes.

Q Now, the loan wasn't made that day. Is that right? A No, sir.

30 Q You went away? A Yes, yes, yes.

Q When did you go back the second time to Mr. Ughetta's? A The second time I went back I think it was in December; I think it was the beginning of December.

Q What? A I think it was the beginning of December, see?

Q Alone? A Alone.

By the Court.

40 Q How long after the first time? A About two or three weeks.

Jacob Horn, cross.

Q And how long before the day you got the check was it? A That's about eight or ten days or two weeks; something like that.

Q Now, when you went back the second time, in December, was the arrangement completed that day for the loan? A Yes. Just a minute. I called him up twice on the telephone. We made the arrangements on the telephone, but the arrangements were made— 10

Q December, which was your second visit, your second trip, did you complete then with Mr. Ughetta, all your arrangements for the loan? A No—

Q What did you talk about in Mr. Ughetta's office? A I am going to explain.

Q Answer the question? A I want to explain. 20

The Court: Answer the question.

Q What did you talk about, you and Mr. Ughetta, in December, the second time? A It wasn't in December; it couldn't be in December.

Q Well, when was it? A No, no, no; that was in November; in November; I was twice there; now I remember, and I guess I think it was around the twenty-fifth or the twenty-sixth, see? or the twenty-fourth; something like that, we made the arrangements about this paper the way it should be worked out. 30

Q Whom do you mean by "we"? A The two of us.

Q Who? A Mr. Ughetta and I.

Q Nobody else? A No.

Q What arrangements did you make then? A That the mortgage should be drawn through a company. 40

Jacob Horn, cross.

Q Who picked the company? You said somebody picked the company. A I didn't.

By the Court.

Q You say Ughetta and you made an arrangement? A Yes.

10 Q Just a minute. You said you and Ughetta made an arrangement— A Yes.

Q Don't interrupt me. That the mortgage should be made through a company. Was it— A Yes.

Q Wait. Was it arranged on that day through what company it was to be made? A No.

20 Q What else did you arrange on that day besides the making of the mortgage to a company? A It was arranged that I will go over to my lawyer to make the arrangement to see about the company, what he wanted, see? A Mr. Ughetta said he understood—

Q Who is your lawyer? A Mr. Zucker. Mr. Ughetta wanted that the mortgage should come through a company, not direct to him, so I went over to my lawyer and told him about it, and he said "All right."

30 Q You hadn't yet arranged how much this mortgage was to be for? A Yes.

Q Tell us about that? A The arrangement was made \$30,000.00, I get a second mortgage for three years, \$6,000.00 I have to pay bonus and lawyer fee.

Q Go on? A And my payments should be \$250.00 every three months with interest.

Q All right. Then was that all that was arranged? A Yes, sir.

40 Q You knew what you had to do? A Yes.

Jacob Horn, cross.

Q Where did you go, to Zucker? A Yes.

Q And Goldberg? A Yes.

Q Whom did you talk with? A Zucker.

Q The mortgage had to be made to a company. What company did you make the mortgage to? A To what's-the-name?

Q Parrow Holding Company? A Parrow Holding Company. 10

Q Who picked that company for you? A Mr. Zucker.

Q Who was the president of that company, do you know? A I don't know.

Q On the day that— Do you know Clara G. Zucker? A Yes, sir.

Q Who is she? A She is working in Mr. Zucker's office.

Q His sister? A Yes, sir. 20

Q Do you know Maurice Zucker? A Right here.

Q That is your lawyer? A Yes, sir.

Q When you made the mortgage for \$30,000.00 your wife signed it with you? A Right.

Q Did you sign it that day in Mr Zucker's office? A Yes, sir.

Q In November? A That was signed in December, but the mortgage was drawn before, and it was signed by Mrs. Horn and after I signed it. 30

Q When did you sign the mortgage? A In lawyer Zucker's office.

Q In December? A In December.

Q Now, after this time— A There was two mortgages. I signed one mortgage and that was sent to Mr. Ughetta and he wasn't satisfied with that mortgage; then he sent it back and I had to sign another one. 40

Jacob Horn, cross.

Q Now, after November did you see Mr. Ughetta again? A In December I saw Mr. Ughetta.

Q Where? A In Zucker's office.

Q In Zucker's office? A Yes.

10 Q Now, was that the day on which the mortgage was signed to the Parrow Holding Company, in December— A No, no, no.

Q The mortgage had already been signed? A Yes, sir.

Q It was signed before you saw Mr. Ughetta in Mr. Zucker's office? A Right.

Q Now, that's right, isn't it? A Right.

20 Q The day Mr. Ughetta came into Mr. Zucker's office, was that the day on which Mr. Ughetta brought a check. A I think Mr. Ughetta was twice there in the office. The check, when he brought it in, I think that was the 12th of December or the 13th, see? because the mortgage was made out a day before or two days before, see?

Q That is the day on which you made the mortgage, December 12th, isn't it, to the Parrow Holding Company? A Yes.

Q That's right. A Yes, it was transacted the same day, everything.

30 Q Everything? A That is, Parrow Holding Company to Bohland—

Q What about you and your money? A Also the same day.

Q Did you get your money on the twelfth? A Either the twelfth or the thirteenth. I can't remember exactly the date when the settlement was. I'll recognize the signature on the check, don't worry.

40 Q You remember the fact of signing the mortgage to the Parrow Holding Company, don't

Jacob Horn, cross.

you? that is, the fact that you did sign the mortgage? A Yes.

Q Now, having that in mind—the day makes no difference—the fact that you signed the mortgage; bear that in mind, will you? A Yes.

Q How long after that was it that you got any money? A I got the money the same day when we settled everything. 10

By the Court.

Q Was that the day you signed the mortgage? A I signed some papers; I can't tell you exactly it was the mortgage or not. I know I signed some mortgage, some affidavit or something, but I can't tell you exactly if I signed a mortgage or not.

Q You said a moment ago that you did remember signing the mortgage? A Yes. 20

Q Now, did you get the money on the same day you signed the mortgage? A Yes.

Q You are positive of that? A Yes, sir.

Q And your wife was there? A After, my wife signed before.

Q Signed the mortgage before? A Yes.

Q Is that what you mean? A Yes, sir.

Q You and your wife were not present together in Mr. Zucker's office? A My wife was in Zucker's office, but she— 30

Q Was she there? A Yes.

Q On the day you got your money? A No.

Q You didn't sign it until the day you got your money? A Yes.

Q Is that right? A Yes, sir.

Q You didn't sign it until the day you got your money? A Right. 40

Jacob Horn, cross.

Q You are a large property owner in Newark? A Yes, sir.

Q Buildings separate or apartment houses?

A Yes.

Q And some mortgages? A Yes, sir.

10 Q A number of apartment houses? A Yes, sir.

Q You know all about this mortgage business?

A Yes, plenty.

Q Whose check did you get for your money?

A I got a check from lawyer Zucker.

Q Was it his check? A His check.

Q You got no check from Mr. Ughetta? A No.

20 Q Do you remember that before you got your check from Mr. Zucker that Mr. Ughetta gave a check to Mr. Zucker? A Yes, sir.

Q That was all the same day? A The same day.

Q Did you see the check that Mr. Ughetta gave to Mr. Zucker? Did you see that check that day? A I signed—

By the Court.

Q Did you see? A Yes, I did; two checks I see.

30

Q Two checks, did you say? A Yes.

Q How much for? A One was for 500.

Q Yes? A And another was for 24,000.

Q 24,000? A Yes, sir.

Q I show you a check dated December 17, 1928 for the sum of \$24,000.00, drawn to the Parrow Holding Company? A Yes.

Q Signed Charles H. Bohland? A Yes, sir.

40 Q Is that one of the checks you saw that day? A Yes, sir.

Jacob Horn, cross.

Q Do you notice the fact that it is dated December 17th? A Yes, sir.

Q Five days after December 12th? A Yes, sir.

The Court: Let the record show that the witness, in examining the check to see whether it was a check drawn on that day, looked at the back at the endorsement and not on the front. 10

Q Do you notice that that check has an endorsement, "Pay to the order of Zucker and Goldberg, Trustee, Parrow Holding Company, Maurice Zucker, secretary"? A Yes, I see that.

Mr. Stein: I ask to have that check marked. 20

Said check is marked Exhibit C. 6 for identification.

Q You said a little while ago that Mr. Ughetta had a check in his office from Mr. Bohland for \$25,000.00. Did you see that check? A No.

Q You say that Mr. Ughetta told you that he had a check for \$25,000.00? A Yes, sir. 30

Q When you signed the mortgage to the Parrow Holding Company, do you remember that date? A Yes; I don't remember the exact date. I remember I signed the mortgage to the Parrow Holding Company.

Q Did you also at that same time when you signed the mortgage to the Parrow Holding Company, sign any other paper? A I don't remember. 40

Jacob Horn, re-direct.

Q Do you remember the time when you got your money from Mr. Zucker? A Yes, sir.

Q Before you got the money were you asked to sign another paper? A No.

Q Are you sure? A Yes, sir.

10 Q Was anything said before you got your check for this mortgage, about signing a paper to the effect that you have no defenses against the mortgage? A I don't remember.

Q Well, I show you a paper which is dated the same day that the check is dated, December 17, 1928? A Yes.

Q Which purports to bear your signature. Is that your signature? A Right.

Q And is that (indicating) your wife's signature? A Right.

20 Q Is the signature under the word "witness" that of your lawyer, Maurice Zucker? A Yes.

Q Do you remember signing that paper now? A Right; that's my signature.

Q Do you remember when you signed it? A No; that's my wife's signature and my signature.

Q You don't remember signing that on the day you got your money? A No, I don't remember, because it was this way—

30 Q Never mind.

Mr. Stein: I ask to have that marked.

Said paper, being an estoppel certificate, is marked Exhibit C. 7 for identification.

Re-direct examination by Mr. McGlynn.

40 Q You said in your earlier examination, if you remember your recital, that on the occasion you got your money you thought you signed

Jacob Horn, re-cross.

some affidavits. Do you remember that? A Right.

Q Did you also, at Mr. Ughetta's request, on that occasion, endorse or put your name on another check? A Right.

Q Do you remember the amount of that check? A \$500.00. 10

Q Was that Zucker's check or Ughetta's check, do you recall? A That was Ughetta's check.

Re-cross examination by Mr. Stein.

Q Ughetta's check to whose order? A It was a check of \$500.00 Ughetta gave it to me I should sign it.

Q To whom was the check payable? A I don't know. I signed the check; I don't remember; either it was made out to me or it was made out to Ughetta. 20

Q You are a business man? A Yes, sir.

Q If the check was endorsed by you, you wouldn't endorse it without any reason for it, would you? A Right.

Q Can you remember why you endorsed that check for \$500.00? A Yes, sir.

Q Why? A That was a fee for Mr. Ughetta. 30

Q But were you paying it? A Well, certainly, it went off—

Q Is that right, you paid him \$500.00? A I didn't.

Q Who did? A Mr. Bohland paid it. I received—

By the Court.

Q This was a check made by Ughetta to you? A No. 40

Henry R. Isenberg, direct.

Q Endorsed by you? A It was made by Mr. Bohland to Ughetta.

Q You said it was made by Ughetta to somebody else, as I understood you. Is that right? A It must have been my name there; I signed it.

10 Q You tell me something you remember. What was it? A A check for \$500.00.

Q Made by whom? A By Mr. Bohland.

Q How do you know? A It must have been, because if it was made to me I must have signed it.

20 HENRY R. ISENBERG, a witness produced on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. McGlynn.

Q Mr. Isenberg, you are engaged in what line of business? A Tile, marble.

Q Do you know Mr. Jacob Horn? A I do.

30 Q Do you recall sometime in the fall of last year, either late in the summer early fall, Mr. Horn coming to you with reference to a second mortgage on this Halsted street property in East Orange?

Mr. Stein: That is objected to as leading.

The Court: Objection overruled.

A Yes, I do.

40 Q Did you at any time get in touch with Mr. Bohland with reference to the second mortgage on that particular property? A I did.

Henry R. Isenberg, direct.

Q How did you get in touch with him, do you recall? A Mr. Horn came to me and wanted to get a loan of \$30,000.00 he thought he needed. I said, "I think I might know somebody who might get it." I got in touch with Mr. Bohland and told him Mr. Horn was interested in a \$30,000.00 mortgage, and asked him if he would be interested. He said he would and he would go up to see the property. I understand he was up to see the property. 10

Q Did you see him after that? A After that I first saw Mr. Horn; I first saw him—

Mr. Stein: Objected to.

The Court: Answer the question.

Q After you had got in touch with Bohland, did you see Bohland thereafter? A Yes, I saw him after that. 20

Q Did he tell you whether he had been to the property? A I guess he was at the property—

Mr. Stein: I object to that guess; the question is whether he told him.

A Yes, he was; he told me he was.

Q Do you recall what next you had to do with reference to this transaction? A I had nothing more to do, only he wanted to get the mortgage and he wanted \$6,000.00 bonus. I said, "That's too much money; he can't pay that." He said, "I can't let it out for anything less than that. 30

Q Thereafter did you get in touch with either of them about this particular mortgage? A I got in touch with Horn and I told Horn "I would rather you not bother with that mortgage; it's too much money." And then— 40

Henry R. Isenberg, direct.

Q I want to know whether you subsequently got in touch with Horn and directed him to go anywhere else about this mortgage? A No.

Q Did you ever tell him to go to New York any particular place? A No. I told him about Mr. Ughetta.

10 Q Tell me what happened? A During the summer Mr. Bohland and Mr. Ughetta was at me constantly about trying to get Mr. Horn to accept this mortgage. I told Mr. Ughetta, "I wouldn't have Horn take that mortgage; you are charging too much money.

Q How did Ughetta come to get in touch with it? A He is Mr. Bohland's son-in-law.

Q Was he ever with him on any of the occasions that you discussed this mortgage? A Yes, down at the shore in the Allenhurst—

20 Q They were both together? A Yes.

Q What happened? A Mr. Ughetta got in touch with me and I told him it was too much money, and Mr. Horn came to me and said, "See what you can do for me; I need this money." I said, "I'll call up Mr. Ughetta, because Mr. Bohland is in Europe," and Mr. Horn sat at the counter while I called him up.

Q What did you tell Mr. Horn to do? A I told him to go to New York to see Mr. Ughetta.

30 Q That is all you had to do with this transaction? A We did discuss some terms over the 'phone.

Q You discussed it with Ughetta? A Yes, sir.

Q Did he tell you whether he was in a position to consummate a loan for you? A He said Mr. Bohland left a check with him for \$30,000.00 to take care of this loan. He said, "I would like to make a few dollars." I said, "Jake Horn can't

40

Henry R. Isenberg, cross.

make it." He said, "We'll arrange for \$750." I said, "He can't pay that," I said, "the best he can pay is \$250. every three months.

Q I can't hear you? A I said the best he can pay was \$250. every three months. I said, "He has intended to get a split mortgage and when he gets that he is willing to pay more money." 10

Q What did Ughetta say? A He said, "Have him come over; we'll discuss it."

Q And as a result of that? A I told Mr. Horn to go over and see Mr. Ughetta.

Q Then you dropped out? A I had nothing to do with it.

Cross-examination by Mr. Stein.

Q Do you know what time of the year in 1928 Mr. Bohland went to Europe? A Probably it was in October. 20

Q Do you know? A I don't know; I didn't see him off.

Q But you do know he went to Europe? A Yes, sir.

Q Do you, perchance, know when he returned? A I don't know, either.

Q Mr. Isenberg, did you ever make an arrangement with Horn and Bohland to meet? A I asked Mr. Bohland to go to the building to see Mr. Horn. 30

Q You never saw Mr. Horn? A Oh, yes, I saw Mr. Horn.

Q What I meant was whether you ever arranged for Bohland and Horn to meet about this mortgage? A I don't remember that.

Q You mean you don't remember whether you made such an arrangement or whether such a thing took place? A I told Mr. Bohland to go see Mr. Horn on the building. 40

Henry R. Isenberg, re-direct.

By the Court.

Q When was it? A That was in the summer time; I don't know what time; it was early; I think Mr. Horn was at that time putting the roughing on the building.

10 Q Do you remember, Mr. Isenberg, Mr. Bohland coming to you after you told him about this loan, to look at the building? Do you remember his coming back to you and telling you he was over there but that he couldn't see Mr. Horn, that Mr. Horn was sick? A I don't remember that now; it is so long ago.

Q You don't remember it? A No, it's so long back.

20 Q And that you then went to the telephone and called up Mr. Horn's wife? Do you remember that? A No, I don't remember that.

Re-direct examination by Mr. McGlynn.

Q Had you ever had any—or did you on any previous occasion arrange for any second mortgage loan out in Essex County where Mr. Bohland took the mortgage previous to this one? A Yes, I got interested in one on High street.

30 Q I am not particularly interested in knowing the name. Did you ever submit an application for Mr. Bohland? A Yes.

Q How did you know he was in the—

Mr. Stein: Objected to.

The Court: How is it material?

Mr. McGlynn: I had not finished my question. I understood Mr. Stein raised the question Mr. Ughetta had no right to act for Mr. Bohland.

40

Maurice J. Zucker, direct.

The Court: Proceed.

Q You say you do recall some other transaction? A Yes, sir.

Q Involving a mortgage? A Yes.

Q How did you know Mr. Bohland was willing to take the mortgages? A I understood he was interested in putting money out on second mortgage, and I would recommend anyone to Mr. Bohland. 10

Q Did you talk to Mr. Bohland about the situation? A Yes, sir.

Q Give any other transaction that Mr. Ughetta appeared in the situation? A What?

Q Was there any other transaction that Mr. Ughetta appeared in the situation? A Not that I know of. 20

Q Where did you meet Ughetta first? A I met him through the family.

MAURICE J. ZUCKER, a witness produced on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. McGlynn. 30

Q You are a member of the bar of the State of New Jersey, are you not? A I am.

Q And have been for how long? A Ten years.

Q How did you get in touch with Mr. Ughetta? A I was given Mr. Ughetta's card by Mr. Horn and asked to call Mr. Ughetta up on the telephone, and I did. 40

Maurice J. Zucker, direct.

Q Did Mr. Horn tell you what transaction he wanted you to call Mr. Ughetta about? A He did.

Q He did explain it to you then? A He did.

10 Q As a result of your telephone conversation with Ughetta what did you actually do with reference to the consummation of this arrangement?

A I took one of our mortgage and bond forms and drew up a mortgage from Jacob Horn and Bertha Horn, his wife, to a corporation known as Parrow Holding Company, had Jacob Horn and his wife execute that mortgage and bond, took the acknowledgement, if I remember correctly, and mailed it to Mr. Ughetta for his approval, with a letter from the office.

20 Q What happened thereafter? A Mr. Ughetta returned that mortgage and with it sent me one that he drew up from Bertha Horn and Jacob Horn to the Parrow Holding Company, and asked that I have that executed instead of the one I had sent to him.

Q And that mortgage is the mortgage that is offered in evidence in this case? A This is the mortgage.

30 Q That is the one that Ughetta sent back to you? A It is.

Q Do you recall whether the bond which was used was the one that he drew or the one that you drew? A The one that he drew.

The Court: Let the record show that he testified not from his recollection, but from and inspection of the bond.

40 Q Who was this Parrow Holding Company? It is a corporation we use in the office as a mat-

Maurice J. Zucker, direct.

ter of convenience, composed of myself, my partner and my sister.

Q After this bond and mortgage was sent to you by Mr. Ughetta, what was the next thing that he asked you to do? A He asked me to have it executed and recorded, and to let him know when it was recorded.

10

Q Did you do that? A I did, and wrote to him a letter and told him the mortgage had been recorded.

Q What was the next step? A The next step was, he asked me to make an arrangement to have Mr. Jacob Horn in the office, and he would come down with a check and have an assignment drawn from the Parrow Holding Company to his client.

Q What is the name of his client? A Charles H. Bohland.

20

Q Did he appear at the time you set for—
A I don't know. Mr. Bohland, I don't know who he is.

Q Ughetta I mean. A Yes, he appeared at my office.

Q Was the assignment executed that day? A It was.

The Court: Let the record show that the witness testifies in answer to that question by an inspection of the assignment.

30

Q Were there any other documents executed that day? A Yes, there was.

Mr. McGlynn: May I have the estoppel certificate?

The Court: Why not ask the question first before showing him these papers?

40

Maurice J. Zucker, direct.

Q Do you recall what other instruments were executed that day? A An estoppel certificate from Jacob Horn and his wife to the Parrow Holding Company.

Q Who drew that, do you recall? A My office.

10 Q I show you a paper which is marked C. 7 for identification and ask you if that is the document which you just referred to? A It is.

Q Is that to the Parrow Holding Company? A No, it is not to the Parrow Holding Company.

Q Who is it to? A It is to Charles H. Bohland from Jacob Horn.

By the Court.

20 Q That is not the one you testified to? A Yes.

Q You said the one that was executed was one to the Parrow Holding Company. A Well, I wish to correct that testimony; there was no estoppel certificate executed to the Parrow Holding Company at all.

30 Q Now, who was present at this closing that you are talking about? A Mr. Horn, Mr. Bohland and myself.

By the Court.

Q You intimated or said a little while ago that you never saw Mr. Bohland. A Mr. Horn, Mr. Ughetta and myself I mean.

40 Q In what shape was the money brought in the closing? A A check was given to me by Mr. Ughetta, made payable to the Parrow Holding Company.

Maurice J. Zucker, direct.

Q Do you recall what the amount of that check was? A I believe it was \$24,000.00.

Q What did you do with that check? A I endorsed it Parrow Holding Company and then put it into the trustee account of Zucker and Goldberg.

Q What did you do with the proceeds? A I disbursed it under an arrangement I had with Mr. Ughetta, that I was to pay the taxes. I am not sure that I didn't give Mr. Ughetta the check for the taxes and he himself paid them, a check for a fee of \$35.00, representing Mr. and Mrs. Horn, and gave the balance to Mr. Horn. 10

Q I show you a paper and ask you if that is a copy of the statement made at the time of the closing of the transaction showing receipts and disbursements of money you have just testified about? A It is. 20

Q What was the amount of taxes disbursed on that day? A \$8,822.80.

Q And a fee of \$35.00 to your office? A Yes, sir.

Q How much was the check you gave to Ughetta? A \$15,142.20.

Q Do you recall any other check at that closing except the one of \$24,000.00 that you say was given to you? A I do. 30

Q What is your recollection of that other check? A Mr. Bohland—

Q Who? A Mr. Ughetta wanted to make \$500.00 on the transaction. He said at that time that he couldn't get a dime out of Mr. Bohland, and he either had one of Mr. Bohland's checks or he drew his own check to Jacob Horn and asked Jacob Horn to endorse his name on the back of it, and he took that check with him. 40

Maurice J. Zucker, direct.

Q Is that all that transpired at that time? A He wanted the estoppel certificate signed by Mrs. Horn and I had to go up to Mrs. Horn's home and get her to sign it, and after that was signed, that was after lunch, we passed the money.

10 Q Is that the only interest the Parrow Holding Company had in this entire transaction, that you have testified to? A That is all.

Q Did anybody outside of yourself ever discuss any of the arrangements concerning the making of this mortgage and the closing of this transaction with Mr. Ughetta? A None.

20 Q When you first talked to Ughetta over the telephone, do you recall whether he told you at that time whether he and Mr. Horn had completed all arrangements, or was there anything left open to be arranged for or agreed to? A I didn't know what the arrangements were; I called up to find out.

Q What was his answer? A He told me over the telephone just what he wanted done.

Q Don't repeat what he told you about the bond and mortgage, but what else did he tell you, anything about the terms of the transaction? A Well, no—

30 Q How could you draw the bond and mortgage if he didn't tell you anything about it? A Over the telephone he gave me all the information that I had to have to do what was done in that transaction.

The Court: Strike it out.

By the Court.

40 Q What did he tell you over the telephone? A He told me he wanted to avoid any question of usury, and he said his client

Maurice J. Zucker, cross.

didn't want to take the mortgage direct from Mr. Horn, if he got a corporation in good standing that Mr. Horn and his wife can make a mortgage to so that an assignment of that mortgage could be taken. I told him I had and told him the name of it and told him I knew it was in good standing. He said "Well, draw the mortgage from Jacob Horn and his wife to this corporation and afterwards send it to me and I will look it over." And I did it. 10

Cross-examination by Mr. Stein.

Q I believe you are the counsel who prepared the answer in this case? A I am.

Q Were the statements and recitations in the answer which you filed predicated upon your own knowledge of the facts in this case, with reference to this usurious mortgage, Mr. Zucker? A My own knowledge. Knowledge I obtained from Mr. Isenberg and knowledge which I obtained from my client. 20

Q You were present when the money was paid over? A I was.

Q Do you know that Charles Bohland did not pay it over? A I do. 30

Q The eleventh paragraph of your answer states that after the mortgage was recorded Charles H. Bohland paid \$24,000.00 and received an assignment of mortgage and demanded that your defendant sign an estoppel certificate? A I still say the same thing.

Q That Bohland did that? A Through his agent.

Q I ask you whether Bohland did that in person? A Bohland did not do that in person. 40

Maurice J. Zucker, cross.

Q Did you mean by the answer, in the words I have just stated to you, to convey the impression that you were pleading agency? A I can't put any interpretation on my pleadings. They are there, and I am in no position to put my interpretation on them at all. I don't want to be
10 asked to interpret the pleadings unless I can read the entire answer.

Q Paragraph eleven says that after the mortgage was recorded Charles H. Bohland paid \$24,000.00 and received an assignment of the mortgage and demanded that the defendant sign an estoppel certificate. A Yes.

Q Did he do that? A Not personally, no.

Q As a matter of fact, as I understand you, you never saw Bohland during any of these transactions, and wouldn't know him now if you saw him? A I wouldn't know him except to take a
20 guess as to who he was.

Q What was it you say that Mr. Ughetta told you about this estoppel certificate, why he wanted it? A Mr. Bohland—Mr. Ughetta?

Q Yes. He wanted an estoppel certificate from Horn so that if Horn raised any defense at any time on this mortgage he could use this estoppel certificate to stop it.
30

Q Did he say anything about his client? A He did.

Q Wait a minute. Did he say anything about his client insisting upon having good title to anything he bought? A I don't think he did. I don't think that question—

Q Did he say it? A No, he didn't.

Q He did not? A No.

Q You positively say he didn't say that? A I am sure he didn't.
40

Maurice J. Zucker, cross.

Q You say the estoppel certificate was simply given so that it might be presented on a day like this in court? A Yes, sir.

Q Did you expect your client to be bound by it? A That's up to my client to answer. I don't know.

Q I am asking you when you prepared it— 10
A I don't know. You'll have to ask my client, I don't know.

By the Court.

Q You answer it. It is directed to you. You answer it. A I expected my client, if he wished to be bound by his agreement, if he was legally bound by that.

Q And if he could slip off from in under it, you were willing to help him? A Absolutely. 20

Q You were willing to help him? A I was.

Q You spoke in your testimony of a conversation with Ughetta, Mr. Bohland's lawyer, asking you whether you had in your office a corporation in good standing? A Yes, sir.

Q You told him yes? A I did.

Q You told him you had? A Yes, sir.

Q Was that true? A It was.

Q What sort of a corporation is that? A It is the Parrow Holding Company, a real estate corporation. 30

Q Does it buy and sell real estate? A It does.

Q Is there any capital? A A thousand dollars.

Q Has it made any money since its existence? A It has, and lost it all.

Q At the time it took this mortgage had it any money which could buy a mortgage? A No it didn't. 40

Maurice J. Zucker, re-direct.

Q Was that known to Mr. Ughetta? A It was.

Q He knew it? A Yes sir.

Q Did you make it known to him, Ughetta?

A I did.

Q What did you say about it? A I told
10 him what kind of a corporation it was.

Q What did you say to him about it, if it was in good standing, what did you tell him, what did you tell him it was? A I told him it was in fact, in good standing, that we used it in the office to buy and sell real estate and take up a mortgage and that it owned real estate at the time.

Q What did you suppose was meant by Mr. Ughetta when he asked you whether you had a
20 corporation in good standing? A A corporation whose charter had not been forfeited by the State of New Jersey.

Q That was your understanding? A That was my understanding.

Q You understood it that way? A I did.

Q Did you impart your understanding to him so he might not be misled? A I did not.

Q You didn't tell him about that? A I knew he was a lawyer.

Q You didn't tell him about your understand-
30 ing— A No sir.

Q Of what is a corporation in good standing? A No sir.

Q Not a word? A No.

Re-direct examination by Mr. McGlynn.

Q Did you receive this letter on February 1st, 1929 from Mr. Ughetta? (showing witness a paper) A I did.

40

Maurice J. Zucker, re-cross.

Mr. McGlynn: I offer it in evidence on the question of the last sentence in the letter. The letter reads, "I have been informed by the Register's office that the mortgage executed by Jacob Horn to the Parrow Holding Co. was mailed to your office on January 8th, 1929. You will recall that this mortgage was assigned to my client, Mr. Charles H. Bohland. 10

I would appreciate it therefore if you would forward this mortgage to my office as soon as possible.

Yours very truly,
Casper B. Ughetta."

Said letter dated February 21, 1929, addressed to Zucker and Goldberg, attention Mr. M. J. Zucker is marked Exhibit D. 1. 20

The Court: Do you admit that this is a letter from Mr. Ughetta?

Mr. Stein: Yes sir.

Re-cross examination by Mr. Stein.

Q I want you to identify these two letters (showing witness papers). A These are both written by me, although they don't bear my signature. 30

Mr. Stein: I offer them in evidence. Said letters to Mr. Charles H. Bohland from Zucker and Goldberg by Morris J. Zucker one dated September 9, 1929 and the other dated June 11, 1929 are marked exhibits "C. 8 and C. 9 respectively.

The Court: Are they admitted as letters written by Mr. Zucker to Bohland? 40

Casper B. Ughetta, direct.

Mr. McGlynn: Yes sir, they are.

Mr. Stein: I now offer this letter of Jacob Horn. Said letter without date to Mr. Charles H. Boland signed Jacob Horn is marked Exhibit C. 10.

10 Mr. Stein: I would like you to agree that that letter was written March 12, 1929, enclosing the first payment or installment of principal and also interest.

Mr. McGlynn: That is admitted.

20 CASPER B. UGHETTA, a witness produced on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. McGlynn:

Q You are the member of the bar of the State of New York? A Yes.

Q What relation are you to Charles H. Bohland? A I am his son-in-law.

30 Q Whom did you represent in the transaction concerning this mortgage in East Orange? A I represented Mr. Bohland.

Q He was in Europe at the time of the closing? A Yes sir.

40 Q Prior to his leaving what had he done with reference to putting you in a position to consummate this transaction? A He left several blank checks with me with instructions if there was any possibility of placing mortgages or buying mortgages that were valid and legal I should do so; that is buy them at a discount.

Casper B. Ughetta, cross.

Q And there would be sufficient balance to consummate a transaction involving \$24,000.00?

A Yes, sir.

Q The account that they were drawn upon had sufficient balance there to consummate a \$24,000.00 transaction that's what I mean? A I know what you mean. Yes.

10

Q And the details then of these proposed transactions had not been arranged by Mr. Bohland before he left? A No, sir.

Q The arrangements with respect to them was left to you by him? A The legal arrangements were left to me.

Q What about the other arrangements, the payments? A Well, I had an arrangement that we charge a bonus of six per cent to buy a mortgage or to place a mortgage, a second mortgage.

20

Q For how long? A For a year.

Q What was your understanding from your client with reference to the mortgage? A About eighteen per cent.

Q Did he leave some discretion with you in reference to the transaction? A Yes, sir, some transactions.

Q And the amortization payments would be? A Yes.

30

Cross-examination by Mr. Stein.

Q The time of this transaction that we are discussing here in court, where was your father-in-law at that time? A He was in Europe.

Q When did he leave for Europe? A When he left.

Q When did he leave? A I don't recall the exact date, but I know it was in the latter part of September.

40

Casper B. Ughetta, cross.

Q And when did he return? A He returned on Christmas Eve, December 24th.

Q Who was with him? A His brother.

Q Did you see him off? A Yes.

Q His brother went with him? A Yes.

Q Any one else? A No one else.

10 Q Was his son there? A No.

Q Did you go to meet him on his return home?

A Yes, sir.

Q Do you know when he went and when he returned? A Yes, certainly.

Q Were any instructions given to you by Mr. Bohland with reference to this particular mortgage? A No, sir.

20 Q Did you and your father-in-law meet Mr. Horn at the building covered by this mortgage in August, in East Orange? A No, sir.

Q Were you ever out at the building there with your father-in-law? A Yes, I was there.

Q When? A I was there in the latter part of June, I think, 1928.

Q 1928? A Yes.

Q With whom? A I was there with Mr. Bohland.

Q 1928? A Yes, sir.

Q Was Mr. Horn there then? A No.

30 Q Did you ever meet with Mr. Horn and your father-in-law there or anywhere else? A No, sir.

Q No where? A No, sir, the first time I met Mr. Horn was when he came to my office.

Q And that was when? A That was in November, 1928.

Q Now at that time your father-in-law was in Europe? A Yes, sir.

40 Q Did you communicate with your father-in-law in Europe, or receive any instructions from

Casper B. Ughetta, cross.

him pending the negotiations for this loan, directing you what to do? A No, sir.

Mr. Mc Glynn: That is objected to as not material.

The Court: It has been answered.

10

Q You conducted this whole transaction yourself? A Yes, sir.

Q Did I understand you to say you had certain instructions from your father-in-law as to what you were to do with reference to, I think you said, title to mortgages? A I was to have the title searched and see if the title was valid and see that he received a valid second mortgage on the premises wherever we placed the mortgage.

20

Q What was the object of your asking for, if you did ask for, this estoppel certificate? A My object in asking for that was to protect Mr. Bohland to see that I was buying a good valid second mortgage to which there would be no defense.

Q You insisted upon that certificate before you paid over any moneys? A Yes, I asked that they execute an estoppel certificate.

Q Was Mr. Horn present when you made this insistent to Mr. Zucker? A Yes, Mr. Horn signed this paper at the closing.

30

Q Did Mr. Bohland in any way you know of have any knowledge—and you would know if he had had—of the transaction as it was between the consummation and closing until his return? A That is the first knowledge when we gave him the bond and mortgage and the assignment together with the estoppel certificate on his return.

40

Casper B. Ughetta, re-direct—re-cross.

Re-direct examination by Mr. McGlynn.

Q How many other transactions did you close with these blank checks? A That was the only transaction I closed. Pardon me, I closed one other.

10 Q And in that one he knew nothing of the terms and conditions until he came back and got the papers? A In that one I think—

Mr. Stein: That is objected to.

The Court: I don't think it is material.

Mr. McGlynn: I will withdraw the question.

Re-cross examination by Mr. Stein.

20

Q Mr. Horn was there when you delivered this check to Mr. Zucker? A Yes, sir.

Q And he was in the same room with you when the thing was closed? A Yes, sir.

Q You knew then that he, Mr. Horn, was only getting \$24,000.00? A I didn't know that because all I did was to give the check to Mr. Zucker. I gave him a check for \$25,000.00, and what ever arrangement with Mr. Horn I knew nothing of.

30

Q They were consummated right in front of you? A No.

Q Didn't you receive a check for the taxes and didn't you know that the taxes were being paid? A Yes, I knew the taxes were being paid.

Q Didn't you see these papers drawn up by Mr. Zucker and a reduction made for taxes, here is \$356.00, and a check given to Horn for \$15,142.20? A No, I never saw that paper.

40

Q Never saw it? A No.

Casper B. Ughetta, re-cross.

Q You knew those figures, though? A No, I didn't know those figures.

Q You didn't? A No.

Q Did you leave Zucker's office and go up and pay the taxes? A Yes.

Q With Mr. Horn? A Yes, sir.

Q Using the check of Zucker and Goldberg?
A I didn't go in with Mr. Horn when he paid the taxes. I stayed in the car.

Q You knew what was being done? A I knew he was paying the taxes; I was interested in that.

Q And you never saw a copy of this paper?
A No.

By the Court.

Q How did you know what was being done? A When he was paying the taxes?

Q Yes. A When he came out he had the receipt.

Q You knew he was going in there with the check for that purpose? A Yes. I didn't see the check.

Q You knew he had it? A Yes.

Q And you knew it was a Zucker and Goldberg check? A I didn't know whose check it was.

Q How do you know he had a check? A Only that he had a check to pay the taxes.

Q How did you know he had a check? You say you knew he had a check to pay the taxes. A I suppose I did know he had the check.

Q You were seeing to it that your father-in-law got a valid mortgage, weren't you?
A Yes.

Casper B. Ughetta, re-direct.

Q You knew the taxes were not paid? A Yes, sir.

Q You knew it was a part of the thing you had to look after, to see that the taxes were paid? A Yes.

10 Q You knew this money he was using to pay the taxes came out of this fund of \$24,000.00? A Yes, but I didn't see the check, your Honor; I didn't see it at all.

Q You knew the taxes had to be paid out of this money you gave? A What?

Q You knew that the taxes had to be paid out of this money that you gave to him? A Yes, I knew that.

Re-direct examination by Mr. McGlynn.

20 Q Did you discuss with Mr. Zucker, over the telephone or any other way, the manner in which this transaction was closed, telling him it would be necessary to have a mortgage made to a corporation— A No, sir. I talked to Mr. Zucker over the 'phone, but I didn't suggest that the mortgage be placed with a corporation.

30 Q Did he submit and offer a mortgage from Horn to the Parrow Holding Company? A I think he did.

Q Did you destroy that and draw one of your own? A Yes. I don't think I destroyed it.

Q You didn't use it? A No.

Q He submitted such a bond and mortgage? A Yes, I think he did.

Q You drew the bond and mortgage eventually used? A Yes.

40 Q Had you ever discussed with any officer of the Parrow Holding Company the question of this mortgage? A No, sir.

Charles H. Bohland, direct.

Q What was this \$500.00 check? A I don't remember that transaction. I heard Mr. Horn testify to that, but I don't remember it.

Q Was there any other check at that time except the \$24,000.00 check? A That was the only check I had.

Q Didn't you have some other blank checks of your father-in-law's? A No, sir, not at that time. If I had them I had them in the safe deposit box in New York.

10

DEFENDANTS REST.

Mr. Stein: I move to strike out all testimony offered of conversations between Zucker and Horn with Mr. Ughetta, as not being binding on the complainant. The testimony was offered for the purpose, I take it, to prove an agency for the purpose of making a usurious agreement, and I move to strike the testimony out on the ground of the failure to make such proof.

20

The Court: The motion will be denied.

CHARLES H. BOHLAND, the above named complaintant, being duly sworn in his own behalf, testifies as follows:

30

Direct examination by Mr. Stein.

Q Mr. Bohland, Mr. Horn testified that sometime in the month of August or September, he is not sure which, he met you at East Orange in the premises described in the bill of complaint, and discussed with you a mortgage loan. Did

40

Charles H. Bohland, direct.

you meet Mr. Horn at that place at that time? A I did not.

Q Mr. Bohland, did you ever meet Mr. Horn there or anywhere else prior to the placing of this mortgage, to discuss with him a mortgage loan? Do you understand my question Mr. Bohland? A I never did.

Q When was the first time that you met Mr. Horn? A I met him the first time in Mr. Isenberg's office after I came back from Europe.

Q Now, when was that? A That was after the twenty-fourth day of December.

Q 19—? A 1929.

Q Or '28? A '28, right.

Q And that was the only time you met Mr. Horn anywhere? A The first time I met him.

Q That was after this mortgage had been placed? A Yes, sir.

Q Had you heard from anyone that Horn wanted a mortgage? A Yes, sir.

Q From whom? A From Mr. Isenberg.

Q When was that? A That was around in June.

Q 1920—? A 1928.

Q And did you know what property the loan was desired for? A Mr. Isenberg gave me the description of the property, the number of the place.

Q Did you go to see the property? A I went to see the property.

Q When? A In June.

Q 1928? A Yes, sir.

Q I call your attention to Exhibit C. 6, a check for the sum of \$24,000.00, signed by you?

A Yes, sir.

Charles H. Bohland, cross.

Q And I ask you whether that is a check that you left with your son-in-law before you went to Europe? A Yes, sir.

Q Was it filled out when you left it? A I don't think it was; I am sure it wasn't; a blank check.

Q Did you leave any other check besides this in blank with him. A I think I left two or three. 10

Q Why? A Because I told him that if anything came along in regards to mortgages that he should try to take them and see to it that I will get the real title. He is a young man. I said, "Whatever you do be careful that I get the real title.

Q Now, Mr. Bohland, at the time you left these blank checks with your son-in-law, did you give him any instructions about this particular mortgage? A Not about this particular mortgage. 20

Cross-examination by Mr. McGlynn.

Q He knew that you had looked at this property in East Orange before you went to Europe? A I think he did.

Q Why didn't you take the loan when you first looked at the property? A What? 30

Q Why wasn't the loan closed before you went to Europe? A I don't know, I'm sure.

Q Your understanding was from Mr. Isenberg that Jacob Horn wanted to borrow some money on his property on Halstead street, East Orange. Is that right? A What?

Q You understood from Mr. Isenberg that Jacob Horn wanted to borrow some money on property on Halstead street? A Yes. 40

Charles H. Bohland, cross.

Q And after you inspected the property you were satisfied with the value of the property, so far as the loan was concerned? A Yes, sir.

Q Did you discuss with anybody the question of terms of the proposed mortgage that you were to make on this particular property? A No.

10 Q Before you went to Europe? A No, not with Horn.

Q With anybody? A I think I spoke to Isenberg.

Q What did you say? What did you tell Isenberg your terms were? A I told Isenberg I wanted \$6,000.00

Q \$6,000.00 what? A I wanted \$6,000.00.

By the Court.

20 Q Bonus? A Less than the mortgage.

Q Bonus? A I will buy the mortgage for \$6,000.00 less.

By the Court.

Q You knew there wasn't any mortgage there? A Yes.

30 Q You knew it was to be a second mortgage? A Yes, and at the time I didn't know whether this property—

Q Isenberg told you Horn wanted to raise money on a second mortgage, didn't he? A Yes.

Q And you told Isenberg that you would let them have \$24,000.00, didn't you? A Yes.

Q And the mortgage was made for \$30,000.00? A Yes.

40 Q In other words, if you had a \$30,000.00 mortgage you wanted \$6,000.00 bonus? A

Charles H. Bohland, cross.

Well, you can call it what you want to call it, but I didn't know whether this house was in Horn's name or whether it was the realty company or what. What it was for I didn't know. I just looked at the property.

Q And these blank checks were left with your son-in-law, these blank checks you left with him were left with him with the purpose on your part, if he wanted to, to close this East Orange transaction, if he could make the necessary arrangements? A Well, I give him several what he could close. 10

Q You didn't limit him; he could do as he pleased if he got you good mortgages. That was the idea, wasn't it, Mr. Bohland? A That was the idea. 20

BOTH SIDES REST.

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CONCLUSIONS.

Filed December 12, 1929.

ON FINAL READINGBUCHANAN, *V.-C.*

10 Complainant sues to foreclose a mortgage of \$30,000, dated December 12th, 1928, payable \$250 every three months and becoming completely due in three years. The quarterly payments of \$250 each have all been made when due, but complainant contends that the entire principal has become due, under an acceleration clause in the mortgage, because of alleged default by defendants in payments on account of a prior mortgage.

20 Defendants deny any default and deny any right by complainant to acceleration of maturity; they also set up usury in defence, alleging that a bonus of \$6,000 was exacted by the mortgagee, out of the \$30,000.

The acceleration clause in the mortgage is conditioned on "default—in the payment of any installment of principal or interest" on a prior "mortgage given to secure the payment of \$315,000 and interest, held by the Eleventh Ward Building and Loan Association."

30 In fact there was no such mortgage. There was a first mortgage of \$310,000 and a second mortgage of \$25,000, both held by the Building and Loan Association on which there was—by reason of some arrangement between the mortgagors and the Association a principal sum due of \$315,000 at the time of the execution of complainant's mortgage. Under the terms of the first mortgage, the mortgagor was bound to pay \$3,100 each month, and under the second, \$250

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Conclusions of Vice-Chancellor.

each month, to be applied, first to the payment of any fines due from Horn to the Association, then to the payment of interest on the said loan and the balance to be applied to dues on the shares of stock of the Association owned by Horn and assigned as collateral for the mortgage loan.

Under the terms of these mortgages Horn was required to pay, therefore, \$3,350 a month. In fact, by agreement with the Association, he was only paying \$3,150 a month. Later, by agreement with the president of the Association, the monthly payments were further reduced; and it is this latter reduction upon which complainant seeks to base a default. 10

It will be noted that the acceleration clause specifies default in the payment of principal or interest "on said prior mortgage," not "according to the terms of said prior mortgage." It may well be doubted that complainant would have the right to seize upon a reduction of payment which was satisfactory to the Building and Loan Association, as a "default" which would give him the right to accelerate his principal. 20

But I think complainant's case must fall for another reason. The right of acceleration is a penalty: the clause which awards it is to be strictly construed, and the complainant seeking to exact the penalty in a court of equity, must show that he is strictly entitled to it under the terms of the agreement. The terms of the agreement make the penalty due for default in a \$315,000 mortgage. In fact there was no such mortgage, and complainant has therefore failed to prove his right to the penalty. 30

Moreover, complainant's bill must also fail, because defendant, has proved the allegation as to the bonus. The evidence is entirely satisfying 40

Conclusions of Vice-Chancellor.

that complainant's son-in-law, who acted for complainant in making the loan, was fully authorized and expected by complainant to obtain a bond and mortgage for \$30,000 but to pay to the mortgagor only \$24,000, and that is exactly what was done.

- 10 Complainant seeks to protect himself behind the fact that the bond and mortgage were made to a corporation—Parrow Holding Company—and by the latter assigned to him; also that defendants executed an “estoppel certificate,” acknowledging the \$30,000 was due on the bond and mortgage.

- 20 The evidence is entirely convincing however that the Parrow Holding Company was a mere nominal party; that the mortgage was thus made and assigned, and the estoppel certificate executed, all as a part of what was in actual fact a loan by complainant to defendant, and that these forms were adopted simply to give complainant the appearance of a purchaser for value without notice.

- 30 The bill will be dismissed with costs. Defendant asks decree adjudicating the actual amount due on the bond and mortgage. There is no counter claim however on which such a decree could be rested.

ORDER OF DISMISSAL.

Filed December 12, 1929.

This cause coming on to be heard before the Chancellor upon bill, answer, replication and proofs, in the presence of Alfred A., Alfred A., Jr. and Richard V. Stein, Esqs., solicitors of complainant and Edward R. McGlynn, Esq. and Zucker & Goldberg, Esqs., solicitors for and of counsel with defendants and pleadings and proof having been read and the arguments of counsel heard and considered, and the Chancellor being of the opinion that the complainant's bill should be dismissed because the facts do not disclose that the complainant had a right to accelerate the payment of the principal of his mortgage and also because the defense of usury pleaded by the defendants was proven; it is thereupon on this 17th day of December 1929, by His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey,

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ORDERED, ADJUDGED AND DECREED that the bill of complaint in the above entitled matter be and the same is hereby dismissed with costs; and it is further

ORDERED, ADJUDGED AND DECREED that there shall be included in the taxed bill of costs the sum of five hundred dollars as counsel fee to the solicitors of the defendants.

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E. R. WALKER,

C.

Respectfully advised,

MALCOLM BUCHANAN

V.-C.

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Order of Dismissal.

(SEAL) I, FERD GARRETSON, Clerk of the
 Court of Chancery of the State of New
 Jersey, the same being a Court of
 Record, do hereby certify that the
 foregoing is a true copy of the Order
 of Dismissal in the cause wherein

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Charles H. Boland is petitioned, and
 Jacob Horn, et als, are defendants,
 now on the files of my office.

In TESTIMONY WHEREOF, I have hereto set my
 hand and affixed the seal of said Court, at Tren-
 ton, this twenty-eighth day of January, A. D.,
 nineteen hundred and thirty.

FERD GARRETSON,
 Clerk.

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NOTICE OF APPEAL.

Filed March 11, 1930.

To: Zucker & Goldberg, solicitors for defendants.

The complainant, Charles H. Bohland, hereby
appeals from the whole and every part of the 10
decree or order herein made on the 17th day of
December, 1929, by his Honor Edwin Robert
Walker, Chancellor of the State of New Jersey
on the advice of the Hon. Malcolm G. Buchanan,
Vice Chancellor, to the New Jersey Court of
Errors and Appeals in the last resort in all
causes.

Dated March 10, 1930.

ALFRED A., ALFRED A., JR., 20
and RICHARD V. STEIN,
Solicitors of Complainant.

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

ALFRED A. STEIN,
Of Counsel.

Service duly acknowledged by solicitor of de-
fendants, March 10, 1930. 30

PETITION OF APPEAL.

Filed March 11, 1930.

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

10 The humble petition of Charles H. Bohland, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an order or decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of the Hon. Malcolm G. Buchanan, Vice Chancellor, bearing date the 17th day of December, 1929, in a cause wherein Charles H. Bohland was complainant and Jacob Horn, et al., were defendants, in this respect, to wit: that the said order or decree dismisses the bill of complaint and awards costs to defendants and directs that there should be included in the taxed bill of costs a counsel fee of \$500. And your petitioner humbly appeals from such portion of the said order which decrees as aforesaid, upon the ground that the same is erroneous for that the said Court should have granted a decree in favor of complainant of foreclosure of the mortgage referred to in the bill of complaint or the amount due upon said mortgage and should have awarded costs and counsel fee to complainant instead of defendant for the reason that it appeared in the proofs before the Chancellor that there had been a default in the payment of complainant's mortgage because there had been a default in the payment of an installment of principal and interest on a prior mortgage given to secure the payment of \$315,000 and interest held by the Eleventh Ward Building & Loan Association, which default,

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Petition of Appeal.

under the terms and conditions of complainant's mortgage, entitled complainant to accelerate payment of the principal and that complainant had accelerated the payment of the principal and was entitled to a decree of foreclosure for the principal and interest, and the Court erred in holding that, within the contemplation of the default clause of complainant's mortgage, there was no such mortgage as that referred to in such default clause, and erred in holding that there was no default under such mortgage, and erred in construing the default clause of complainant's mortgage as if the right of acceleration is a penalty whereas, in fact, it is not, and for the reason that the Court erred in holding that the allegations of defendants' answer as to a bonus were sustained for the reason that there were no proofs before the Court sufficient to permit the Court to so hold and for the further reason that, the Court having found that there was no default in complainant's mortgage, it was beyond the jurisdiction of the Court to adjudicate that there was usury in complainant's mortgage, and for the further reason that the allegations as to the usury set up in the answer were not made out by the proofs, and the Court further erred in not granting a decree for the foreclosure of complainant's mortgage for the reason that even if the allegations with respect to usury were found to be true complainant was entitled to a decree for foreclosure.

Your petitioner therefore prays that the said order or decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner

Petition of Appeal.

may have such relief in the premises as to this honorable court shall seem meet.

ALFRED A., ALFRED A., JR.,
and RICHARD V. STEIN,
Solicitors for and of Counsel
with Appellant.

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MERRITT LANE,
of Counsel.

Service duly acknowledged by solicitors of defendant March 10, 1930.

Formal answer to petition of appeal filed, April 24, 1930, by Stein, McGlynn & Hannoeh, of counsel with respondent.

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Exhibit C. 1.

Exhibit C. 1 is a mortgage made by Jacob Horn and Bertha Horn, his wife, to the Parrow Holding Co., dated December 12, 1928, recorded in the office of the Register of the County of Essex on the 13th day of December, 1928, in Book C 66 of Mortgages for said County, pages 413-415, covering the lands and premises described in the bill of complaint. The mortgage is signed by Jacob Horn and Bertha Horn, his wife, witnessed by M. J. Zucker and the acknowledgment taken by Maurice J. Zucker, Master in Chancery of New Jersey. 10

The mortgage provides:

“WHEREAS, the said JACOB HORN and BERTHA HORN are justly indebted to the said party of the second part in the sum of THIRTY THOUSAND Dollars (\$30,000.00) lawful money of the United States of America, secured to be paid by their certain bond or obligation, bearing even date with these presents, in the penal sum of SIXTY THOUSAND (\$60,000.00) Dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of THIRTY THOUSAND (\$30,000.00) Dollars, lawful money as aforesaid, to the said party of the second part, its successors or assigns, at the time and in the manner hereinafter expressed and interest thereon, to be computed from the 12th day of December one thousand and nine hundred and twenty-eight at and after the rate of six (6) per cent. per annum, and to be paid on 12th day of March, 1929 and quarter-annually thereafter; said principal sum to be paid as follows: Two hundred fifty (\$250.) dollars on March 12, 1929; Two hundred fifty (\$250.) dollars on June 20 30 40

Exhibit C. 1.

10 12, 1929; Two hundred fifty (\$250.) dollars on September 12, 1929; Two hundred fifty (\$250.) dollars on March 12, 1930; Two hundred fifty (\$250.) dollars on June 12, 1930; Two hundred fifty (\$250.) dollars on September 12, 1930; Two hundred fifty (\$250.) dollars on December 12, 1930 Two hundred fifty (\$250.) dollars on March 12, 1931; Two hundred fifty (\$250.) on June 12, 1931; Two hundred fifty (\$250.) dollars on September 12, 1931; and Twenty seven thousand two hundred fifty (\$27,250.00) dollars on December 12, 1931.

20 AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest or installment of principal or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest or installment remain unpaid and in arrear for the space of fifteen (15) days or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of sixty (60) days then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of THIRTY THOUSAND (\$30,000.00) DOLLARS with all arrearage of interest thereon, shall, at the option of the said

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Exhibit C. 1.

party of the second part or its legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding; as by said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear." 10

It further provides:

"This mortgage is subject and subordinate to a mortgage given to secure the payment of THREE HUNDRED FIFTEEN (\$315,000.00) THOUSAND Dollars and interest, recorded in the office of the Register of the County of Essex, in Book A 61 of mortgages, page 155, held by the Eleventh Ward Building & Loan Association, now a prior lien on said premises. 20

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of any installment of principal, or of the interest on said prior mortgage, and should such installment of principal, or such interest remain unpaid and in arrears for the space of ten days, or should any suit be commenced to foreclose said prior mortgage, then the amount secured by this mortgage and the accompanying bond shall become and be due and payable at any time thereafter at the option of the owner or holder of this mortgage. 30

AND IT IS HEREBY FURTHER EXPRESSLY AGREED, that should any default be made in the payment of any installment of principal, 40

Exhibits C. 2—C. 3.

10 or of the interest on said prior mortgage, the holder of this mortgage may pay such installment of principal, or such interest and the amount so paid, with legal interest thereon from the time of such payment, may be added to the indebtedness secured by this mortgage and the accompanying bond, and shall be deemed to be secured by this mortgage and said bond, and may be collected thereunder.”

20 **Exhibit C. 2** is a bond accompanying the mortgage Exhibit C. 1 and contains the same provisions with respect to payment. The bond is signed by Jacob Horn and Bertha Horn and is witnessed by Maurice J. Zucker.

30 **Exhibit C. 3** is an assignment of mortgage made by the Parrow Holding Co. to Charles H. Bohland, in consideration of one dollar and other good and valuable consideration, assigning the bond and mortgage Exhibit C. 1 and covenanting that there is due on the bond and mortgage the sum of \$30,000, with interest, at six per cent. from December 12, 1928, payable quarter annually, from March 12, 1929. The assignment is dated December 17, 1928, and is recorded in the office of the Register of the County of Essex, on the 17th day of December, 1928, in book 202 of Assignments of Mortgages, pages 513-514, and it is signed as follows: “Parrow Holding Co., by Clara G. Zucker, vice president, attest: Maurice J. Zucker, secretary,” and seal attached. It is proven by Maurice J. Zucker, as secretary of the company, before William Fogel,
40 an attorney at law of New Jersey.

Exhibit C. 4.

Exhibit C. 4 is a mortgage made Jacob Horn and Bertha Horn, his wife, to the Eleventh Ward Building and Loan Association of Newark, N. J., dated March 21, 1927, and provides as follows:

“WHEREAS, the said Jacob Horn is justly indebted to the said party of the second part, in the sum of Three Hundred Ten Thousand dollars, lawful money of the United States of America, secured to be paid by his certain bond or obligation, bearing even date with these presents, in the penal sum of Six Hundred Twenty Thousand dollars, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of Three Hundred Ten Thousand dollars, lawful money as aforesaid, together with interest thereon and any fines which should thereafter accrue as provided for by the Constitution of said Association, which has been duly assented to by the said party of the first part and made a part thereof, to wit, by the payment of one dollar on each of said one hundred dollars of said loan, that is to say, by the payment of Thirty-one Hundred dollars on the Fourth Monday of each and every month thereafter, or such other time as should thereafter be appointed for that purpose, which said monthly payments of Thirty-one Hundred dollars said Jacob Horn thereby agreed should be applied, first to the payment of any fines due from said Jacob Horn to said Association; then to the payment of interest on said loan, to be computed from the date thereof, at the rate of six per centum per annum and the balance to be applied to dues on Thirty-one Hundred

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Exhibit C. 4.

shares of the stock of said Association owned by said Jacob Horn standing in his name on the books of said Association, and assigned to it as collateral security for the payment thereof, and on which this loan is based, until the said shares should attain the par value of one hundred dollars each; and conditioned for the further payment of such other fees, premiums, charges and moneys as required by the Constitution, By-Laws, Rules, Resolutions or Regulations of said Association, and all of which was thereby and hereby is duly assented to. AND IT IS THEREBY EXPRESSLY AGREED, that should any default be made in the payment of said monthly payments of Thirty-one Hundred dollars above mentioned, or any, or either of them, or of any other moneys therein agreed to be paid, or of any part thereof on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage and become due and payable; and should any of such monthly payments, or any part thereof, or any other moneys or said tax, assessment, water-rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of two months, then and from thenceforth, that is to say, after the lapse or expiration of said period, the aforesaid principal sum of Three Hundred Ten Thousand Dollars or the balance thereof remaining unpaid with all arrearage of in-

Exhibit C. 5.

terest and fines thereon, and other moneys should at the option of the said Association or its legal representatives become and be due and payable immediately thereafter, although the period first above limited for the payment thereof might not then have expired, anything thereinbefore contained to the contrary thereof in anywise notwithstanding; as by the said bond or obligation and the condition thereof, reference being thereunto had, may more fully appear." 10

The mortgage covers the lands and premises mentioned in the bill of complaint.

It was recorded in the office of the Register of Essex County on April 9, 1927, in Book A-61 of Mortgages, pages 155-47. 20

Exhibit C. 5 is a mortgage made by Jacob Horn and Bertha Horn, his wife, to the Eleventh Ward Building and Loan Association of Newark, N. J., dated March 1, 1928, and provides as follows:

"WHEREAS, the said Jacob Horn is justly indebted to the said party of the second part, in the sum of Twenty-five Thousand Dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation, bearing even date with these presents, in the penal sum of Fifty Thousand Dollars, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of Twenty-five Thousand Dollars, lawful money as aforesaid, together with interest thereon and any fines, which should thereafter accrue as provided for by the Constitution of said Association, which has been duly assented 30 40

Exhibit C. 5.

to by the said party of the first part and made a part hereof, to wit, by the payment of one dollar on each of said one hundred dollars of said loan, that is to say, by the payment of Two Hundred Fifty Dollars, on the Fourth Monday of each and every month thereafter, or such other time as should thereafter be appointed for that purpose, which said monthly payments of Two Hundred Fifty dollars said Jacob Horn thereby agreed should be applied, first to the payment of any fines due from said Jacob Horn to said Association; then to the payment of interest on said loan, to be computed from the date thereof, at the rate of six per centum per annum and the balance to be applied to dues on Two Hundred Fifty shares of the stock of said Association owned by said Jacob Horn standing in his name on the books of said Association, and assigned to it as collateral security for the payment thereof, and on which this loan is based, until the said shares should attain the par value of one hundred dollars each; and conditioned for the further payment of such other fees, premiums, charges, and moneys as required by the Constitution, By-Laws, Rules, Resolutions or Regulations of said Association, and all of which was thereby and hereby is duly assented to. AND IT IS THEREBY EXPRESSLY AGREED, that should any default be made in the payment of said monthly payments of Two Hundred Fifty dollars above mentioned, or any, or either of them, or of any other moneys therein agreed to be paid, or of any part thereof on any day whereon the same is

Exhibit C. 5.

made payable, as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable; and should any of such monthly payments, or any part thereof, or any other moneys, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of two months, then and from thenceforth, that is to say, after the lapse or expiration of said period, the aforesaid principal sum of Twenty-five Thousand Dollars or the balance thereof remaining unpaid with all arrearage of interest and fines thereon, and other moneys should at the option of the said Association or its legal representatives become and be due and payable immediately thereafter, although the period first above limited for the payment thereof might not then have expired, anything thereinbefore contained to the contrary thereof in anywise notwithstanding; as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear."

It covers the lands and premises referred to in the bill of complaint and was recorded in the office of the Register of Essex County, on the 12th day of March, 1928, in Book X-62 of Mortgages, pages 541-543.

Exhibit C. 6.

Exhibit C. 6 is a check as follows:

(On side of check.)

147-149 Halstead St.
East Orange.

10 No..... New York December 17th, 1928

THE NATIONAL CITY BANK OF
NEW YORK 1-8
Fifth Avenue Branch

Fifth Avenue at Twenty-Eighth Street
New York, N. Y.

PAY TO THE ORDER OF

Parrow Holding Co... ..\$24,000.00/100

Twenty four thousand & 00/100.....DOLLARS

Chas. H. Bohland

20 Endorsements:

Pay to the order of Zucker & Goldberg,
Trustees

Parrow Holding Co.

Maurice J. Zucker

Secretary

30

40

Exhibit C. 6.

Pay to the order of
FIDELITY UNION TRUST CO.

Newark, N. J.

Zucker & Goldberg, Trustees

Or any Bank, Banker or Trust Company
or order

Prior endorsements guaranteed 10
Dec. 17, 1928

FIDELITY UNION TRUST CO.

55-9 Newark 55-9

New Jersey

Roy P. Duke, Treasurer

(NIGHT) RECEIVED PAYMENT

Through New York Clearing House

Prior endorsements guaranteed 20
Dec. 17 1928

CHASE NATIONAL BANK

New York

No. 74

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Exhibit C. 7.

Exhibit C. 7 is an Estoppel Certificate reading as follows:

ESTOPPEL CERTIFICATE

10 The undersigned, owning the premises at #147-149 Halstead Street, East Orange, New Jersey, covered by mortgage for thirty thousand dollars (30,000) and interest, dated December 12, 1928, and recorded December 13, 1928, in the office of the Register of the County of Essex in Book Daily No. 65 of mortgages, which mortgage is about to be assigned by Parrow Holding Co., a corporation of New Jersey, the holder, to Charles H. Bohland, hereby certifies in consideration of one dollar paid and to enable said assignment to be made and accepted, that said mortgage, so
20 to be assigned, is a valid lien on said premises for the full amount of principal and interest due thereon, namely, thirty thousand dollars (\$30,000) with interest at *sic* percent per annum from December 12, 1928, and that there are no defenses or offsets to said mortgage, or to the bond which it secures.

The undersigned further certifies that all the other provisions of said bond and mortgage are unmodified and in force.

30 Dated the 17th day of December, 1928.

Jacob Horn (L. S.)

Bertha Horn (L. S.)

WITNESS:

M. J. Zucker

Duly acknowledged by Jacob Horn on the 17th day of December, 1928, before Maurice J. Swetland, a Master in Chancery of New Jersey, certificate of acknowledgment attached.
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Exhibit C. 8.

Exhibit C. 8 is a letter as follows:

ZUCKER & GOLDBERG
Counsellors at Law
Chamber of Commerce Building
24 Branford Place

Newark, New Jersey 10
Sept. 9, 1929.

X-684

Mr. Charles H. Bohland,
322 West 72nd Street,
New York City.

Dear Sir:

Enclosed please find check of Jacob Horn, No. 4734 in the sum of \$250.00 on account of principal on the mortgage which you hold in the sum of \$30,000, on premises 147 Halstead Street, East Orange, New Jersey. 20

Kindly acknowledge receipt of this check.

Yours very truly,

ZUCKER & GOLDBERG,

By Maurice J. Zucker

MJZ.C

Enc.

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Exhibit C. 9.

Exhibit C. 9 is a letter as follows:

ZUCKER & GOLDBERG
Counsellors at Law
Chamber of Commerce Building
24 Branford Place

10

Newark, New Jersey

1417

June 11, 1929.

In re: Horn ads Bohland
Mr. Charles H. Bohland,
322 West 72nd Street,
New York City.

Dear Sir:

Enclosed herewith is check No. 4630 in the
sum of \$250, made to your order, in payment of
20 instalment of principal on \$30,000 mortgage, the
said instalment being due on June 12, 1929.

Yours very truly,

Zucker & Goldberg
By M. J. Zucker

/LR

REGISTERED MAIL
RETURN RECEIPT REQUESTED

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Exhibit C. 10.

Exhibit C. 10 is a letter as follows:

32 Harrison Place,
Irvington, New Jersey.

Mr. Charles H. Bohland,
322 West 72nd Street,
New York City.

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Dear Sir:

Enclosed please find my check in the sum of Seven Hundred Dollars (\$700.00) representing \$250.00 on account of principal and \$450.00 interest for three months on the mortgage, which you hold on premises 147 Halstead Street, East Orange, New Jersey, in the sum of \$30,000.

Kindly acknowledge receipt of this check.

Yours very truly,

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Jacob Horn

JH.CGZ
Enc.

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Exhibit D. 1.

Exhibit D. 1 is a letter as follows:

Law Offices of
Casper B. Ughetta
15 West 44th Street
New York

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February 21st, 1929

Zucker & Goldberg Esqs.,
24 Branford Place,
Newark, N. J.

Attention Mr. M. J. Zucker.

Dear Sirs: Re: Horn—Parrow X-684

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I have been informed by the Register's Office that the mortgage executed by Jacob Horn to the Parrow Holding Co., was mailed to your office on January 8th, 1929. You will recall that this mortgage was assigned to my client Mr. Charles H. Bohland.

I would appreciate it therefore if you would forward this mortgage to my office as soon as possible.

Yours very truly,

Casper B. Ughetta

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CBU/MG

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New Jersey Court of Errors and Appeals

Between

CHARLES H. BOHLAND,
Complainant-Appellant,

and

JACOB HORN, *et als.*,
Defendants-Respondents.

On Bill, &c.
On Appeal
from Court of
Chancery.

REPLY BRIEF OF APPELLANT.

(Italics, etc., ours, except where otherwise noted.)

I.

Although the matter of usury has nothing to do with the issue before this Court, respondents suggest at several points in their brief that there was usury, apparently with the idea of a plea *ad hominem*. In closing their brief they suggest that "in construing the default clause in complainant's mortgage, serious and material consideration must be given to the fact that complainant, only four months before the filing of the bill to foreclose, had charged the defendants \$6,000.00 for a \$30,000.00 mortgage * * *." What this has to do with the construction of written instruments, respondents do not disclose.

II.

Under their Point II respondents contend that there was absolutely no proof of any default in the mortgages held by the 11th Ward Building and Loan Association as provided for in the default clause in complainant's mortgage.

They base this conclusion upon (a) the default clause in complainant's mortgage provides that "should any default be made in the payment of any installment of principal, or of the interest on said prior mortgage" and (b) the provision of the Building and Loan Mortgage is that \$3,150 should be paid each month and applied first to the payment of any fines, then to the payment of interest on said loans and then to the payment of dues. Apparently they argue that a payment on account of dues is not a payment on account of principal but if it is not a payment on account of principal, what is it a payment on account of?

The Building and Loan scheme contemplates that, by the increase in the value of shares, the mortgage will be paid off, the increase in the value of shares is due in part to the payment of dues.

The result is that *all* money paid to the Building and Loan Association each month other than that used to pay fines and interest *is a payment on account of principal.*

The Building and Loan mortgages require that *certain* sums should be paid each month. Every dollar which is not applied to the payment of fines and interest is applied to the payment of principal and the Building and Loan mortgages require that the difference between the amount actually used for fines and interest and the amount which the mortgages require to be paid should be applied to principal.

And failure to pay the amount called for by the mortgages any month is a failure to pay amounts which, under the terms of the mortgages, are to be applied to principal.

I do not understand the statement in respondents' brief, p. 11 that "the borrower cannot, unless by special arrangement, compel the Association to apply such payments to the reduction of the principal of his loan." In every case in which

there has been a foreclosure of a building and loan mortgage the value of the shares at the time of the foreclosure has been offset against the amount of the principal of the mortgage, and I know of no case in which it has been suggested that the mortgagor could not claim that right.

III.

Respondents refuse to argue that the Building and Loan Association is bound by any consent to the smaller payments.

Respectfully submitted,

ALFRED A. STEIN,
MERRITT LANE,
Of Counsel for Appellant.

Received of the Treasurer of the
Board of Education the sum of
Twenty Dollars for the year
ending June 30, 1887.

Witness my hand and seal
this 1st day of July, 1887.

John J. [Name]

Superintendent of Schools

City of New York

New Jersey Court of Errors and Appeals

Between

CHARLES H. BOHLAND,
Complainant-Appellant,

and

JACOB HORN, *et al.*,
Defendants-Respondents.

On Bill, etc.

On Appeal
from Court
of Chancery.

This is an appeal from a final decree in the Court of Chancery advised by Vice-Chancellor Buchanan dismissing the bill of complaint.

The bill was filed to foreclose a mortgage dated December 12th, 1928, made by the defendant, Jacob Horn and his wife to secure a bond in the sum of \$30,000.00 payable in installments of \$250.00 every three months until December 12th, 1930, with interest at six per cent. The complainant sought to justify the filing of the foreclosure bill before the due date of the mortgage just mentioned by the following allegation, quoting from the bill of complaint (State of Case, pp. 2 and 3):

“4. The mortgage contained an agreement that should any default be made in the payment of any installment of principal, or of interest on the prior mortgage, and should such installment of principal, or such interest remain unpaid and in arrears for the space of ten days, then the amount secured by this mortgage and the accompanying bond shall become due and payable at any time thereafter at the option of the owner or holder of this mortgage.

5. Complainant alleges the fact to be that payment has not been made in accordance with the terms of the prior mortgage on the premises herein described, in that there is

a default in the payment of installments provided to be made in said prior mortgage for more than the space of ten days, and that therefore there is a default under the terms and conditions of complainant's mortgage."

The actual provision in the mortgage of the complainant, which it was asserted gave complainant the right to foreclose, is as follows (See State of Case, Exh. C-1, pp. 79-82, at pp. 81 and 82):

"This mortgage is subject and subordinate to a mortgage given to secure the payment of Three hundred fifteen (\$315,000.00) thousand dollars and interest, recorded in the office of the Register of the County of Essex, in Book A 61 of mortgages, page 155, held by the Eleventh Ward Building & Loan Association, now a prior lien on said premises.

And it is hereby expressly agreed, that should any default be made in the payment of any installment of principal, or of the interest on said prior mortgage, and should such installment of principal, or such interest remain unpaid and in arrears for the space of ten days, or should any suit be commenced to foreclose said prior mortgage, then the amount secured by this mortgage and the accompanying bond shall become and be due and payable at any time thereafter at the option of the owner or holder of this mortgage.

And it is hereby further expressly agreed, that should any default be made in the payment of any installment of principal, or of the interest on said prior mortgage, the holder of this mortgage may pay such installment of principal, or such interest and the amount so paid, with legal interest thereon from the time of such payment, may be added to the indebtedness secured by this mortgage and the accompanying bond, and shall be deemed to be secured by this mortgage and said bond, and may be collected thereunder."

The proof offered by the complainant at the final hearing to sustain the allegations of the bill which it was asserted permitted the complainant to accelerate the due date of his mortgage, will be found in State of Case pages 14 to 19 and is given by Arthur T. Smethurst, who was secretary of the Eleventh Ward Building & Loan Association, the holder of the mortgages which were prior liens on the property of the defendants.

From this testimony and from the Exhibits in the case, C-4 and 5, State of Case pages 83-87, it appears that the Eleventh Ward Building & Loan Association was the holder of two mortgages, one in the sum of \$310,000.00 dated March 21st, 1927, recorded in the Essex County Register's office in Book A 61 of Mortgages for said County pages 155-157; and the other in the sum of \$25,000.00 dated March 1st, 1928, recorded in the Essex County Register's office in Book X 62 of Mortgages for said County pages 541-543. Both of these mortgages contained the following pertinent clauses with regard to the payments to be made by the owner to the Building & Loan Association, the default of which was relied upon by the complainant, as herein set forth. The clauses read as follows:

“WHEREAS, the said Jacob Horn is justly indebted to the said party of the second part, in the sum of Three Hundred Ten Thousand dollars, lawful money of the United States of America, secured to be paid by his certain bond or obligation, bearing even date with these presents, in the penal sum of Six Hundred Twenty Thousand dollars, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of Three Hundred Ten Thousand dollars, lawful money as aforesaid, together with interest thereon and any fines which should thereafter accrue as provided for by the Constitution of said Association, which has been duly assented to by

the said party of the first part and made a part thereof, to wit, by the payment of one dollar on each of said one hundred dollars of said loan, that is to say, by the payment of Thirty-one Hundred dollars on the Fourth Monday of each and every month thereafter, or such other time as should thereafter be appointed for that purpose, which said monthly payments of Thirty-one Hundred dollars said Jacob Horn thereby agreed should be applied, first to the payment of any fines due from said Jacob Horn to said Association; then to the payment of interest on said loan, to be computed from the date thereof, at the rate of six per centum per annum and the balance to be applied to dues on Thirty-one Hundred shares of the stock of said Association owned by said Jacob Horn standing in his name on the books of said Association, and assigned to it as collateral security for the payment thereof, and on which this loan is based, until the said shares should attain the par value of one hundred dollars each; and conditioned for the further payment of such other fees, premiums, charges and moneys as required by the Constitution, By-Laws, Rules, Resolutions or Regulations of said Association, and all of which was thereby and hereby is duly assented to."

The defense set forth in the answer filed by the defendants, which was asserted at the final hearing, was a denial (see State of Case, p. 5):

" * * * that there has been any default in the payments of any prior mortgage on the premises described in paragraph three, and they expressly aver that the prior mortgages on the premises described in paragraph three of the complaint are not in default because of the non-payment of principal installments, and have at no time been in default; and that the said prior mortgages, prior to complainant's mortgage, do not re-

quire any payments to be made on account of the principal sum of said prior mortgages, and the statement contained in paragraph five that there has been a default in payment of principal installments on prior mortgages is not a fact.”

The defendants also in their answer and at the final hearing pleaded usury and proved it. The Court will note that appellant states on page 16 of his brief, that the Vice-Chancellor found usury and that the appellant does not propose to argue there was no usury. The usury charge was a charge of \$6,000.00 for the loan of \$30,000.00 for a period of three years, or 20%, not taking into consideration the fact that the complainant was to receive \$250.00 every three months on account of the principal sum of \$30,000.00 during the three year term. The learned Vice-Chancellor who heard the case, in his conclusions (State of Case pages 70-72) justifies the decree of dismissal advised by him on several grounds; first, in the following language:

“It will be noted that the acceleration clause specifies default in the payment of principal or interest ‘on said prior mortgage,’ not ‘according to the terms of said prior mortgage.’ It may well be doubted that complainant would have the right to seize upon a reduction of payment which was satisfactory to the Building and Loan Association, as a ‘default’ which would give him the right to accelerate his principal.”

He then went on to state as follows:

“But I think complainant’s case must fall for another reason. The right of acceleration is a penalty: the clause which awards it is to be strictly construed, and the complainant seeking to exact the penalty in a court of equity, must show that he is strictly entitled to it under the terms of the agreement. The

terms of the agreement make the penalty due for default in a \$315,000.00 mortgage. In fact there was no such mortgage, and complainant has therefore failed to prove his right to the penalty.”

He then proceeded to give an additional reason:

“Moreover, complainant’s bill must also fail, because defendant has proved the allegation as to the bonus. The evidence is entirely satisfying that complainant’s son-in-law, who acted for complainant in making the loan, was fully authorized and expected by complainant to obtain a bond and mortgage for \$30,000 but to pay to the mortgagor only \$24,000, and that is exactly what was done.”

Appellant’s argument, in seeking to set aside the decree of dismissal is apparently based upon the following arguments:

1. That a construction of the default clause in complainant’s mortgage would make it effective, notwithstanding that there was no prior mortgage amounting to \$315,000.00 in view of the fact that there were two prior mortgages upon which there was due \$315,000.00.
2. That there was sufficient proof of default in the terms of complainant’s mortgage, because both mortgages held by the Eleventh Ward Building & Loan Association, which were prior liens to complainant, were in default.

In connection with this last argument, considerable stress is laid upon the testimony in the record with regard to the consent of the Building & Loan Association to the payments which were being made by defendant, in accordance with the terms of its two mortgages.

ARGUMENT.

I.

Respondents' contention with reference to a construction of the default clause in complainant's mortgage as to whether or not it was effective.

In the statement of facts at the commencement of this brief, respondents have set forth in full the default clause contained in complainant's mortgage. Whether the learned Vice-Chancellor who heard the case below was correct or not in stating that a default clause which gives to a mortgagee the right of acceleration is a penalty or not, seems to respondents to be of minor importance. It is their contention that whether such a default clause is or is not a penalty, it must be strictly construed when it is of such material importance that it can accelerate the due date of a mortgage from December 12th, 1931, to April 13th, 1929 (the date when complainant's bill was filed).

The proofs in this case indicated that complainant's son-in-law, who is a lawyer, drew the bond and mortgage held by complainant, which contained the default clause now under consideration. (See State of Case, p. 48, lines 1-39.) Consequently, under ordinary rules of construction, the terms of this mortgage should be strictly construed as against the party who drew the instrument, and that, in this case, would be complainant.

The Court will observe that the default clause in question distinctly states that complainant's mortgage is subject and subordinate to a mortgage given to secure the payment of \$315,000.00

recorded in Book A 61 of mortgages, page 155 and then proceeds to say:

“And it is hereby expressly agreed, that should any default be made in the payment of any installment of principal, or of the interest on said prior mortgage.”

The Court's attention is also directed to the allegation of the bill of complaint which has also been referred to herein, referring to any default in the payment of any installment of principal or of interest on the prior mortgage. Admittedly, the facts in the case indicate that there were two prior mortgages, neither one of which were in the sum of \$315,000.00 but which was the sum due on both mortgages, although there was a mortgage prior to complainant's, recorded in the same book and page as is mentioned in the default clause.

It is therefore respectfully contended that a reasonable and fair construction of the default clause under consideration amply sustains the Vice-Chancellor's conclusions.

II.

Respondents contend there was absolutely no proof of any default in the two mortgages held by the Eleventh Ward Building & Loan Association, as provided for in the default clause in complainant's mortgage.

Earlier in this brief the default clause in complainant's mortgage has been set forth in full and the Court's attention is especially directed to the following portion of it which respondents contend should be dispositive of this appeal:

“And it is hereby expressly agreed, that should any default be made in the payment of any installment of principal, or of the interest on said prior mortgage, and should such

*installment of principal, or such interest remain unpaid and in arrears for the space of ten days * * * .”*

It will be apparent from a reading of that portion of the default clause in complainant's mortgage just quoted that the portion of it on which complainant must have relied was that portion which refers to a default in the payment of any installment of principal, because as will be apparent from a reading of the clauses of the mortgages held by the Eleventh Ward Building & Loan Association, also set forth in full in an earlier portion of this brief, the Building & Loan Association, by virtue of its mortgage, constitution and by-laws, applies the money paid to it by the owner of the property on which the Association holds mortgages, in the following manner :

First, to the payment of any fines;

Then to the payment of interest on said loans;

And the balance to be applied to dues.

Assuming, without admitting, that the default clause in complainant's mortgage is applicable to two prior mortgages on which there was due \$315,000.00, and taking the facts as they appear in the record of this case, the owner Horn had been paying to the Eleventh Ward Building & Loan Association, from January 1st, 1929, \$2,175.00 a month on the \$310,000.00 mortgage and \$187.50 a month on the \$25,000.00 mortgage. There is no proof of any fines imposed by the Eleventh Ward Building & Loan Association on Horn and therefore the Court below had a perfect right to assume that under the clauses of the building and loan mortgage just referred to, the Building & Loan Association had applied each month on account of the interest due it on its respective mortgages, the sum of \$3,100.00 per month on the \$310,000.00

mortgage and \$125.00 a month on its \$25,000.00 mortgage and that it had applied the difference between the aggregate amount of these interest payments and the amount of money paid by the owner to dues on the 3,100 shares and 125 shares of stock of the Association owned by Horn and which had been assigned to the Building & Loan Association as collateral security for the payment of its respective loans.

Certainly, under such a situation of facts as has been just indicated, the only default on which complainant could possibly base his right to accelerate the payment of the principal of his mortgage would be that portion of the default clause in his mortgage which refers to the non-payment of any installment of principal, and there is nothing in the record of this case which even attempts to prove a default in the payment of any installment of principal. Respondents contend that anyone who has any knowledge of the theory of building and loan association mortgages knows that there is no provision contained in building and loan association mortgages for the payment of any installment of principal. Every person who borrows money from a building and loan association and secures the payment thereof by a bond and mortgage, must be a shareholder of the association and his shares of stock are assigned to the association as collateral security for the payment of the loan, in addition to the bond and mortgage on the real estate, and the Building and Loan Association cannot be compelled to apply any of the payments made to it on account of the dues on its stock to the reduction of principal. That is one of the ways that building and loan associations make profit for its stockholders who do not borrow money from it, because it is enabled under this theory to continue to charge interest on the full amount of its loan, notwithstanding the fact that a borrower who has secured repayment of his loan

by a Building and Loan Association mortgage, has paid into the Association's treasury, a substantial sum of money which eventually, when his shares mature, will be used for the purpose of paying off the principal of his mortgage, but until the shares of stock have attained the maturity value, the borrower cannot, unless by special arrangement, compel the Association to apply such payments to the reduction of the principal of his loan.

This was the contention urged by respondents in the Court below and for that reason they do not deem it important to argue on the point of whether or not the Building and Loan Association had consented to the smaller payments, because as has been asserted, there is nothing in the record of the case below which proves as a fact that there was any default in the payment of any installment of principal on either or both of the mortgages of the Eleventh Ward Building & Loan Association.

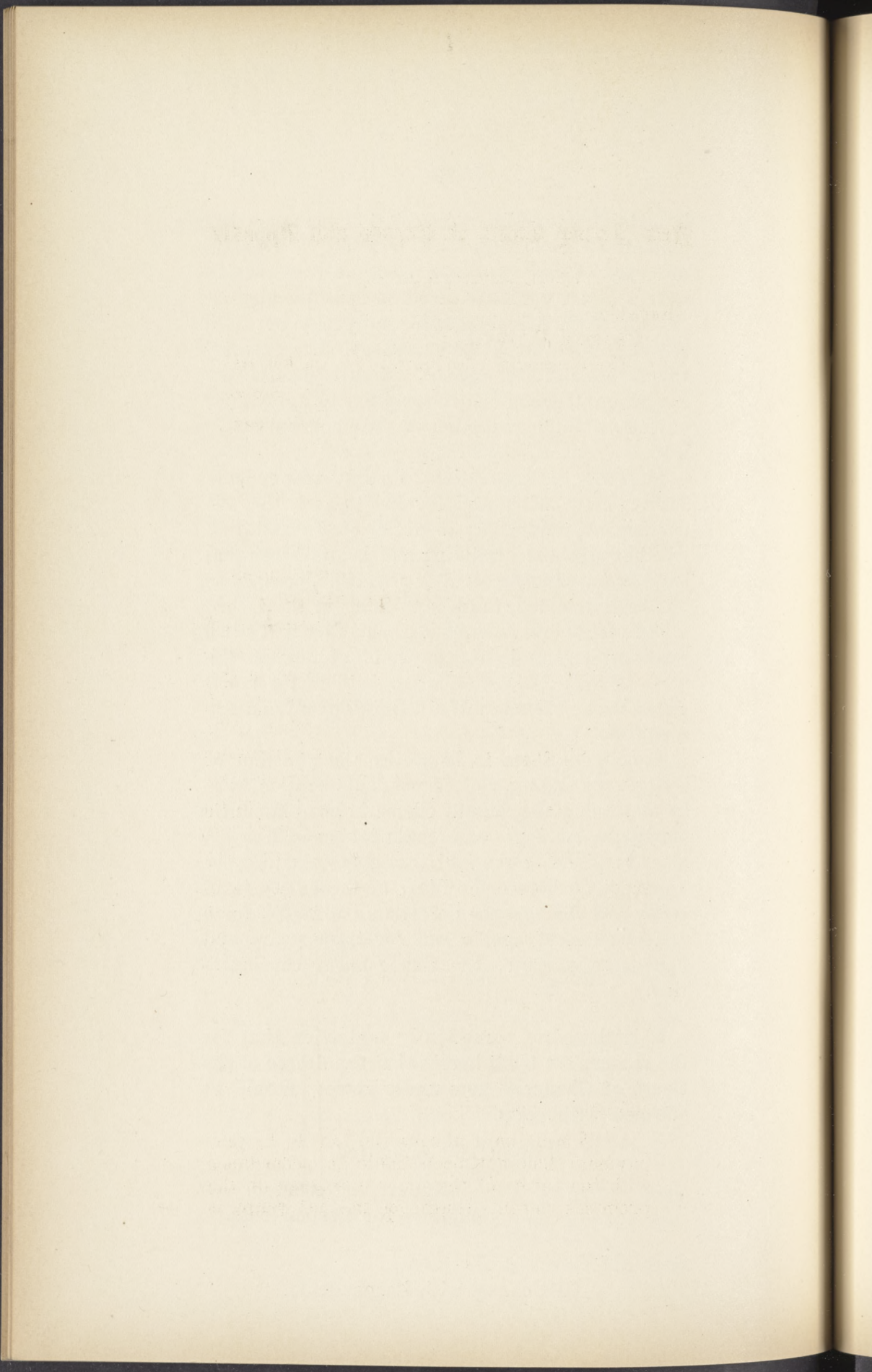
Appellants seem to brush by the question of usury very lightly, but respondents contend that in construing the default clause in complainant's mortgage, serious and material consideration must be given to the fact that complainant, only four months before the filing of the bill to foreclose, had charged the defendants \$6,000.00 for a \$30,000.00 mortgage to run for three years and had actually drawn the clause under consideration.

It is therefore respectfully contended that for the reasons set forth herein that the decree of the Court of Chancery now under review should be affirmed with costs.

Respectfully submitted,

ZUCKER & GOLDBERG,
Solicitors for Respondents.

STEIN, MCGLYNN & HANNOCH,
Of Counsel with Respondents.



New Jersey Court of Errors and Appeals

Between

CHARLES H. BOHLAND,
Complainant-Appellant,
and

JACOB HORN, *et als.*,
Defendants-Respondents.

On Bill, Etc.

On Appeal
from Court of
Chancery.

Sat Below:
Buchanan, V. C.

BRIEF FOR APPELLANT.

Statement of the Case.

This was a foreclosure suit. The mortgage, dated December 12, 1928, was made by defendants, Jacob Horn and Bertha Horn, to Parrow Holding Company, to secure a bond in the sum of \$30,000, payable in installments, \$250 every three months until December 12, 1931, with interest at six per cent. On December 17, 1928, the mortgage was assigned to complainant (pp. 1, 3, Exhibits C-1, C-2, C-3, pp. 79 to 82). The default alleged was rested upon the following provision of the mortgage:

“This mortgage is subject and subordinate to a mortgage given to secure the payment of THREE HUNDRED FIFTEEN (\$315,000.00) THOUSAND Dollars and interest, recorded in the office of the Register of the County of Essex, in Book A 61 of mortgages, page 155 held by the Eleventh Ward Building & Loan Association, now a prior lien on said premises.

And it is hereby expressly agreed, that should any default be made in the payment of any installment of principal, or of the inter-

est on said prior mortgage, and should such interest remain unpaid and in arrears for the space of ten days, or should any suit be commenced to foreclose said prior mortgage, then the amount secured by this mortgage and the accompanying bond shall become and be due and payable at any time thereafter at the option of the owner or holder of this mortgage."

There was no single mortgage of \$315,000 at any time held by the Eleventh Ward Building and Loan Association but there were, at the time of the making of complainant's mortgage, two mortgages held by the Association upon which, at the time of making of complainant's mortgage there was due \$315,000. One of these mortgages was dated March 21, 1927 and secured a bond for \$310,000 and was payable "by the payment of \$3100. on the fourth Monday of each and every month thereafter; or such other time as should thereafter be appointed for that purpose." (p. 83) and which mortgage was recorded in Book A-61 of mortgages page 155. (Exhibit C-4 at p. 85), the book and page mentioned in the clause heretofore quoted from complainant's mortgage. The other was dated March 1, 1928 and secured a bond for \$25,000 and was payable "\$250 on the fourth Monday of each and every month thereafter, or such other time as should thereafter be appointed for that purpose" (p. 85).

Each mortgage contained a provision that if default was made in the payment of installments and interest for a period of two months, the Building and Loan Association should have the opinion of declaring the entire principal due (pp. 84, 86).

The bill alleged (paragraph 4) the provision in the mortgage of complainant to the effect that if there should be a default upon a prior mortgage,

the amount secured by complainant's mortgage should, at the option of the holder, become due (p. 2) and the answer (p. 5, paragraph 4) admits that such a clause was contained in the mortgage.

The bill, paragraph 5 (p. 3) alleged a default under the terms of the prior mortgage, and the answer, paragraph 5 (p. 5) *denied any default* and (p. 5)—“and they expressly aver that *the prior mortgages on the premises described in paragraph three of the complaint are not in default* because of the non-payment of principal installments; and have at no time been in default; and that the said prior mortgages, prior to complainant's mortgage, do not require any payments to be made on account of the principal sum of said prior mortgages, and the statement contained in paragraph five that there has been a default in payment of principal installments on prior mortgages is not a fact.”

The answer does *not* allege that the clause in complainant's mortgage referring to a prior mortgage of \$315,000 is at all uncertain or that there is *any* doubt as to the identity of the prior mortgage mentioned. It rests upon denial of the allegation that there had been a default in payments on the prior mortgages held by the Building and Loan Association upon which there was due at the time of the making of complainant's mortgage, \$315,000.

The answer attempted to set up usury (p. 6).

The Court in its conclusions, p. 70, held that the exercise of the right of acceleration *creates a penalty* and that the clause which awarded the right was to be strictly construed and that complainant had failed to prove his right *to the penalty* because there was no such mortgage as a \$315,000 mortgage held by the Building and Loan Association, and the Court further held: “Com-

plainant's bill must also fail, because defendant, has proved the allegation as to the bonus" (p. 71).

The Court also *doubted* whether complainant could take advantage of the fact that defendants were paying a lesser amount than required by the Building and Loan mortgages, the lesser amount being paid, as the Court said, "by agreement with the president of the Association", but it does not decide that point (p. 71).

The result was a decree dismissing the bill (p. 73) from which this appeal was taken. (Notice of appeal, p. 75; petition of appeal, p. 76.)

Assuming the usury to have been proven, the result would not be a dismissal of complainant's bill if there had been default by defendants in the payments of the Building and Loan mortgages and if the clause in complainant's mortgage refers to those mortgages or one of them. There would be only a reduction of the amount due on complainant's mortgage.

The Vice Chancellor considered the case as if the default claimed was in payments of interest upon complainant's mortgage in which event, if usury were proven, there would be no default for there would be no interest due.

The decree, therefore, is wrong unless either (1) the default clause relied upon in complainant's mortgage has no application because there was no single \$315,000 prior mortgage, or (2) there was no default upon the prior mortgage referred to in complainant's mortgage.

ARGUMENT.

I.

The default clause in complainant's mortgage is effective notwithstanding that the Building and Loan Association did not hold a single mortgage securing \$315,000.

The default clause in complainant's mortgage (p. 81) refers to a mortgage given to secure the payment of \$315,000 "recorded in the office of the Register of the County of Essex, in Book A 61 of mortgages, page 155, held by the Eleventh Ward Building and Loan Association, now a prior lien on said premises."

There *was* a mortgage held by the Building and Loan Association, dated March 21, 1927, to secure the payment of \$310,000 *recorded in Book A 61 of mortgages for Essex County, pp. 155-47* (Ex. C-4, pp. 83, 85).

The other mortgage held by the Building and Loan Association was dated March 1, 1928, and was to secure the payment of a bond in the sum of \$25,000 and was recorded in Book X 62 of mortgages, pp. 541, 543.

Upon both of these mortgages there was due \$315,000 at the time complainant's mortgage was given (pp. 18, 19).

There was default as to the payments on *each* of these mortgages (pp. 15, 16). If, therefore, the clause in complainant's mortgage has reference *either* to the two mortgages held by the Building and Loan Association because it mentions the principal sum of \$315,000, which, in fact, was the amount due, or to either one of those mortgages, the decree is wrong upon this branch of the case.

The Vice-Chancellor called the right of accelera-

tion a "penalty" and held that because there was no "\$315,000 mortgage" the clause was wholly ineffective overlooking, we submit, that the mortgage is not only referred to as a \$315,000 mortgage (p. 81) *but* as one "recorded in the office of the Register of Essex County in Book A61 of mortgages, p. 155, held by the Eleventh Ward Building and Loan Association, now a prior lien upon said premises" (p. 81). There *was* a mortgage held by the Eleventh Ward Building and Loan Association then a lien upon the premises recorded in the book and on the page mentioned in complainant's mortgage. It happened to be to secure the payment of \$310,000 and not \$315,000.

Even if the exercise of the right of acceleration creates a penalty so that the strictest kind of construction must be indulged in, the court is not required, we submit, to go to the extreme of creating a result which leaves the clause meaningless.

But, it has been settled in this State that the exercise of the right under such a clause as is involved here does *not* create a penalty or a forfeiture. This court, in *Weiner v. Cullens*, 128 Atl. 176, 97 N. J. E. 523, after approving the language of Vice-Chancellor Leaming in *Bergman v. Fortescue*, 74 N. J. E. 266, at p. 269, to the effect that a stipulation for the prompt payment of taxes cannot be regarded as differing essentially from a like stipulation touching the prompt payment of interest, said:

"The basic principle appears to be, as illustrated by the cases in this court, that it is competent for the parties to a contract to agree that the time fixed therein for the prompt payment of sums due or to grow due affecting the property mortgaged shall be the essence of the contract, and to further agree that a failure to perform, at the time or times fixed therein, shall render the principal to become immediately due and payable.

Thus it becomes at once apparent that it is of no material significance whether the default is made in the prompt payment of interest due on the mortgage or in the payment of taxes or assessments levied upon the property mortgaged, if the time or times for their prompt payment is or are made the essence of the contract. *Nor can it be properly said that such a stipulation is in the nature of a forfeiture, since it is quite obvious that all the defendants are required to pay to the plaintiff is the amount justly due and owing from them to her; the time for payment of the same having been shortened by several years, seemingly, through the defendants' neglect and fault."*

And of course there is no material difference between a default in the prompt payment of taxes and default in the prompt payment of interest on a prior mortgage.

See also *Union Trust Co. of New Jersey v. New Jersey Water Co.*, 94 N. J. E. 446 in which this Court sustained the right of a mortgagee to call the principal of a mortgage *five years* after knowledge of the default although, during that period of time, interest had been regularly paid and accepted.

See also *Freund v. Weisman*, 5 N. J. Advance Reports, p. 1029, in which this court reiterated what it had said in *Union Trust Company of New Jersey v. New Jersey Water Co.*, 94 N. J. E. 446.

The Vice-Chancellor erred, we submit, in treating the stipulation as providing for a forfeiture or penalty and in applying the rule of strict construction.

The language should be *reasonably* construed, as that of any other contract.

In *Ackens v. Winston*, 22 N. J. E. 444, there were clauses involved providing for default and

the conditions as to payment were not expressed with explicitness and certainty.

The Vice-Chancellor construed these conditions and said (p. 447):

“The stipulation that, in default of payment of interest within sixty days after the same becoming due, the whole principal shall be payable, cannot be enforced in this suit. This is so, *not because the stipulation works a forfeiture which equity does not favor*, but because the immediate payment of the whole principal is declared in the mortgage to be dependent on conditions, and these conditions are not expressed with such explicitness and certainty as to entitle the complainant now to the aid of this court in enforcing them. *The true meaning being now settled, the conditions may be operative as to the future, but not as to the past.*”

There can be no doubt in this case as to what the parties intended by their stipulation.

In the answer the point was not made that the clause was wholly ineffective because there was no single mortgage held by the Eleventh Ward Building and Loan Association securing the sum of \$315,000.

II.

There was default on both of the mortgages held by the Eleventh Ward Building and Loan Association.

The mortgage to secure a bond in the sum of \$310,000, dated March 21, 1927, held by the Eleventh Ward Building and Loan Association, recorded in Book A 61 of mortgages, p. 155, which is undoubtedly referred to in the clause in complainant's mortgage providing for acceleration of payment, for the book and page numbers are

therein given, provided for the payment of \$3,100 on the fourth Monday of each and every month after its date. These payments were made up to January 1, 1929, and after that payments were made of \$2,175 a month (p. 15).

The Secretary of the Building and Loan Association, Smethurst, testified (pp. 16, 18) that these smaller payments *had not been consented to by the Building and Loan Association*. The mortgagor, Horn, said, over objection (p. 26) that he had had a talk with a Mr. Hurd, who is the President of the Association (p. 19) and a Mr. Budd, who is the Executive Vice-President, about the reduction in the amount of the payments and "They told me they were going to take it up at their meeting and they will let me know to the next pay day. I came around the next day and they told me they granted it to me" (p. 26).

There was no other evidence of any supposed agreed reduction in the amount which the mortgagor was to pay on this mortgage. The Vice-Chancellor says in his conclusions (p. 71) that—

"Under the terms of these mortgages (both mortgages) Horn was required to pay, therefor, \$3,350 a month. In fact, by agreement with the Association, he was only paying \$3,150 a month. Later, by agreement with the president of the Association, the monthly payments were further reduced; and it is this latter reduction upon which complainant seeks to base a default."

There was *no* evidence of any consent by the Building and Loan Association to the reduction of the payments on the mortgage of \$310,000, to \$2,175 a month.

The Secretary of the Association testified (pp. 15, 16, and again, p. 18) that the Building and Loan Association had *not* consented. The only testimony of any talk of any arrangement with any

of the officers of the Association is that of the mortgagor, Horn (p. 26), and that testimony indicates that he knew that neither the president nor the vice-president had any authority to make any such agreement. He puts them in the position of stating to him that they would take it up at the meeting and would let him know and then of telling him that the request had been granted. There is nothing to indicate that the Board of Directors ever acted. It is beyond the power of any officer of the Building and Loan Association to make any such agreement changing the terms of bonds and mortgages and the testimony of the mortgagor as to his conversations with these officers was improperly admitted (p. 26).

“The officers and agents of a building and loan association have only the powers which are granted by statute and the charter and by-laws of the association and which are incidental thereto * * *. The duties of the president or in his absence the vice president and the duties of the treasurer, do not differ from corresponding officers in other corporations.”

Thompson on Corporations, 3d Ed., Vol. 2, sec. 1545.

This Court, in affirming the decree in the *First Italian Building and Loan Association v. Di Niscla*, 78 N. J. E. 299, on the opinion of Vice Chancellor Stevens, which is reported in 79 N. J. E. 46, held that the secretary of a building and loan association “had no implied authority to vary the terms of the contract.” That case involved a foreclosure of a mortgage. It was claimed that there was no default because the Building and Loan Association had retained moneys which should have been applied to the payment of the dues said to be in default, and that the secretary of the association had, in fact,

credited the payments on the pass book. Vice-Chancellor Stevens, before using the language heretofore quoted said:

“In the second place, the monthly payments, according to the by-laws, (as here, according to the contract) were to be made at the monthly meetings. It is not pretended that the entries were made or the book written up at these meetings. Thirdly, as the contract appearing from the minutes of July, 1907, was to advance money for the purpose of completing the building, it was incumbent on the defendants to show that such contract was changed by the mutual agreement of the respective parties.”

In *People's Building Association v. Wroth*, 43 N. J. L. 70 it was claimed that sureties on the bond of the treasurer of a building and loan association were released because of a custom which had grown up of the treasurer receipting for dues not paid to him in cash but vouched for by one of the other officers of the Association, and the Supreme Court said:

“The monthly dues and fines payable by the members to the association were, by the constitution and by-laws, to be paid to the treasurer in cash. It was a breach of the duty appertaining to the office of the treasurer of the association for him to accept the promise or voucher of any member or officer of the association, in place of cash. It appears from the evidence that it was customary for some members of the association to pay their dues to the secretary or president, with the request that he would pay to the treasurer, to save the necessity of attendance at the monthly times of payment; and in some cases, when these members were not prepared to pay, the officer assumed the payment for them; the payments were sometimes withheld, and the bare promise given by the officer who

acted for these members was received by the treasurer as cash, and was so entered on the books. It also appears that at these monthly meetings for the payment of dues and fines, the executive officers of the association were present, and had knowledge of, if they did not expressly assent to, these irregular methods of accounting for dues and fines to the treasurer, and that report was made to them by the treasurer. It is claimed that this conduct of the officers of the association discharges the sureties from liability for all these sums which were not actually paid to the treasurer, but vouched for by others with the knowledge of such officers. But the executive officers or directors of this corporation had no authority to set aside the constitution and by-laws of the association, or change the duties of the treasurer as therein prescribed, nor can they by their unauthorized acts relieve the sureties from their responsibility to the corporation, representing all the members or stockholders, for a breach of the laws of the association."

It further said (p. 76) :

"If, therefore, the executive officers of the association were present, and, by their silence, or by their participation, acquiesced in the irregular accounting for dues and fines by any arrangement between the treasurer and individual members, their acts were unofficial, outside of their duties, and do not affect the corporation. If, in the performance of their duties as a committee to audit the accounts of the treasurer, at the monthly meetings they passed them as correct, their laches or failure to comply with the laws of the association will not discharge the treasurer and his sureties from his failure to perform his duties. He is the agent of the company to receive cash, and not promises for cash, and no other officer of the corporation can enlarge this agency, or discharge his sureties for a breach of duty in this matter."

And this Court has said that a corporation will not be bound by an act of an officer which is not expressly authorized or usual in his office unless the corporation has held him out or allows him to appear as having authority, and the act is within the scope of his apparent authority.

Beach v. Palisade Realty and Amusement Co., 86 N. J. L. 238.

The general authority of the president of a business corporation does not authorize him to assign corporate contracts, or money not yet earned under such contracts.

Budke v. Schalkenbach, 84 N. J. E. 467;
Cogan v. Conover Manufacturing Co., 69 N. J. E. 358.

An endorsement on a mortgage bond, by the president of a corporation which had purchased mortgaged lands, that in consideration of an extension of time of payment the rate of interest would be 7 per cent. when by the terms of the bond it was 6, was not binding on the corporation.

Depew v. Colton, 68 N. J. E. 954, 59 N. J. E. 126.

Where a contract between a brewing corporation and a saloon keeper required the latter to sell no other beer than that made by the corporation the president thereof had no authority to modify the contract so as to permit sales of other beers.

Mausert v. Christian Feigenspan, 68 N. J. E. 671.

Without express authority, the president of a corporation has no power to surrender a lease and accept a new one.

Lister Agricultural Chemical Works v. Selby, 68 N. J. E. 271.

In the case at bar, there was no express authority shown to the president or any other officer to change the terms of the contracts evidenced by the mortgages and such an authority is not implied. Indeed, there was no evidence offered as to the duties of the president and vice-president. In a building and loan association, the secretary is usually the mouthpiece and agent of the association, and often, in point of fact, he is the manager of the entire affairs of the association.

Thompson on Corporations, 3d Edition,
Vol. 2, sec. 1545.

The president of a building and loan association, unlike the president of most corporations, has usually but little to do with the management of the affairs of the association. The secretary is usually the only paid officer, with the possible exception of the treasurer.

There was no evidence in the case at bar of any holding out by the association that the president and vice-president were authorized either to change the contract with respect to the payment of dues or make representations with respect thereto.

The mortgagors were members of the association and were bound to know the limitations upon the powers of the president and vice-president and any other officer.

There is nothing more important to a building and loan association than the prompt payment of principal and interest at the time stated in the contracts. If, in this important matter, the mortgagors desired a change, it was their duty to see to it that the directors of the association, who alone had power to make the change, acted.

On the mortgage held by the Building and Loan Association, dated March 1, 1928, to secure the

bond in the sum of \$25,000, and which provided for payments of \$250 a month (Exhibit C-5, p. 95), the mortgagor, after January 1, 1929, paid but \$187.50 and these reduced amounts were not consented to by the Building and Loan Association (pp. 15, 16, 18).

The Vice-Chancellor suggested (p. 71) that there might be some difference between the construction of the phrase used in complainant's mortgage (p. 81) and that "should any default be made in the payment of any installment of principal or of the interest on said prior mortgage" and a clause which would read that "should any default be made in the payment of any installment of interest or of the interest according to the terms of said prior mortgage".

We submit that, although the words are different, the meaning is precisely the same. The purpose of this provision was twofold: 1—so that the mortgagee would be in a position to protect himself in the event of a default which might lead to foreclosure of the mortgage held by the Building and Loan Association, and 2—to make certain that the payments should be made so that complainant's security would be continuously enhancing in value.

If the mortgagor can be permitted by agreement with the Building and Loan Association to change the terms of the mortgage, this second object cannot be accomplished.

But no agreement binding upon the Building and Loan Association to reduce the monthly payments of these mortgages was shown and, under the cases in this Court heretofore referred to,—*Union Trust Co. of New Jersey v. New Jersey Water Co.*, 94 N. J. Eq. 446; *Weiner v. Cullens*, 128 Atl. 176, 97 N. J. Eq. 523, the Building and Loan Association, notwithstanding its accep-

tance of the smaller payments is, and always has been, since the reduced payments were made, in a position to foreclose.

It is respectfully submitted that the Vice-Chancellor erred and that there was such a default as accelerated the time of payment of whatever there was due upon complainant's mortgage.

III.

The matter of usury.

The Vice-Chancellor found usury and we do not propose to argue that there was not.

The Vice-Chancellor seemed to feel, however, that, having found usury, complainant, even if there had been default, was not entitled to foreclose.

That does not follow. The effect of the usury is only to reduce the amount for which the decree may go. It does not affect the default nor the right to foreclose for, as we have previously stated, the acceleration is not because of default in the payment of interest on complainant's mortgage but default in the payment of installments on a prior mortgage.

Conclusion.

It is respectfully submitted that the decree should be reversed and the record be remitted to the Court of Chancery with directions to enter a decree of foreclosure for the amount actually due upon complainant's mortgage.

Respectfully submitted,

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