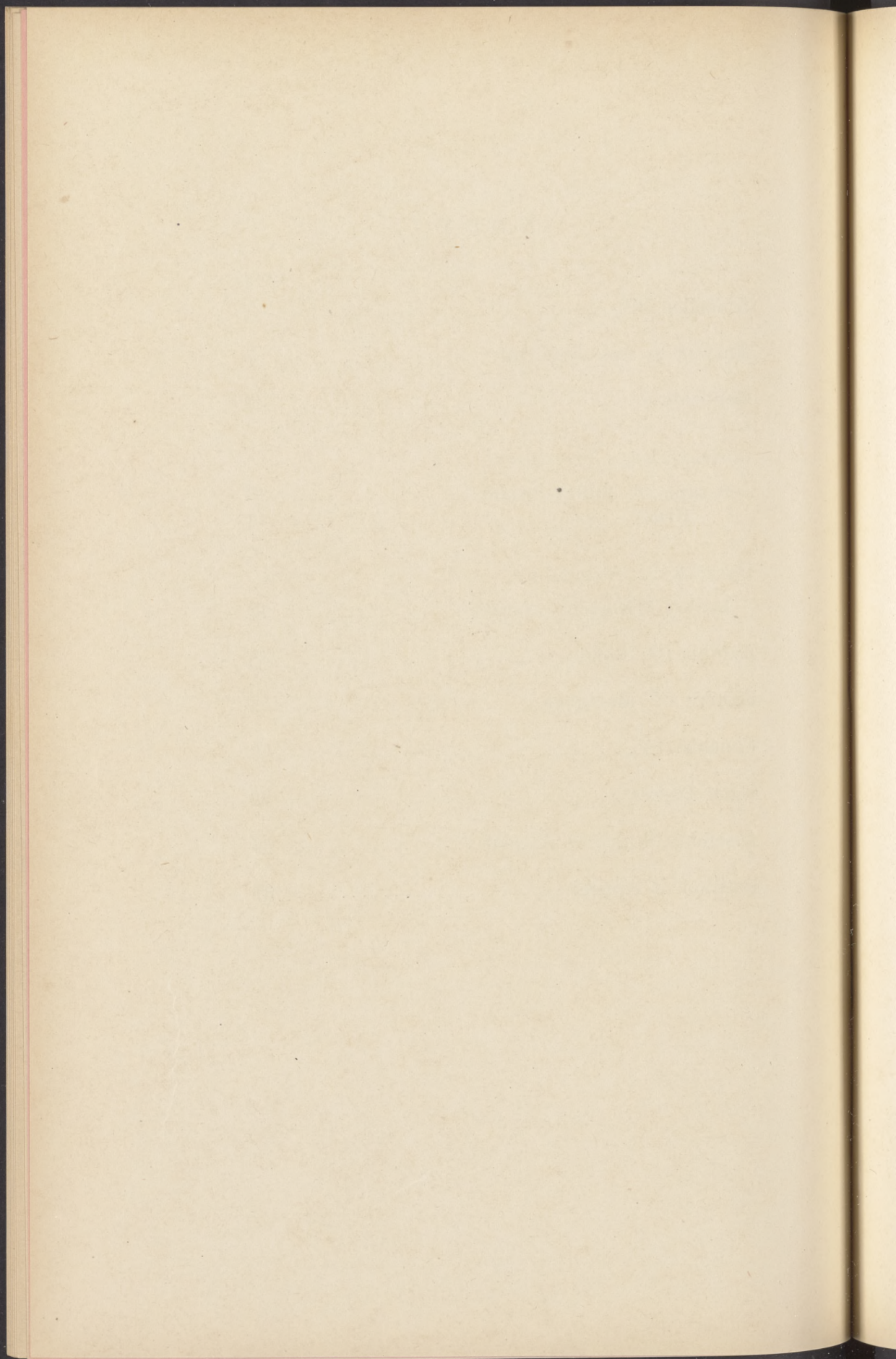


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AMENDED BILL.

(Filed June 7, 1930.)

IN CHANCERY OF NEW JERSEY.
75-670.

10

Between
SERAPH F. LILLIG,
 Complainant,
 and
JOSEPH MCGARRITY, *et*
 als.,
 Defendants.

} On Bill to Foreclose.
 Amended Bill.

20

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

The complainant, Seraph F. Lillig, of the City of Atlantic City, County of Atlantic and State of New Jersey, respectfully shows:

1. On April 21, 1921, Elizabeth W. Wood and Charles H. Wood, her husband, being indebted to Seraph F. Lillig in the sum of \$36,500.00, executed to him a bond of that date to secure that sum, payable at the expiration of five years, with interest at the rate of six per centum per annum, payable half-yearly from the date of the bond. 30

2. To secure the payment of the bond, said Elizabeth W. Wood and Charles H. Wood, her husband,

executed to said Seraph F. Lillig a mortgage of even date with the bond; and thereby conveyed to him, in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the County Clerk's Office of Atlantic County in 10 Book 210 of Mortgages, pages 349, &c.

3. The mortgaged premises are described as follows:

20 ALL that lot, tract or parcel of land and premises, situate, lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows: BEGINNING at a point in the West line of New York Avenue at the distance of four hundred and fifty-eight feet South from the Southerly line of Pacific Avenue, and extending thence (1) Westwardly and parallel with Pacific Avenue, one hundred and fifty-five feet; thence (2) Southwardly parallel with New York Avenue along other land of said Cornelius Dubois and of Westminister Avenue, sixty-seven feet; thence (3) Eastwardly and parallel with Pacific Avenue one hundred and fifty-five feet to the Westerly line of New York Avenue; thence (4) 30 Northwardly along said Westerly line of New York Avenue, sixty-seven feet to the place of beginning.

Being the same premises conveyed to the present grantor by deed from Seraph F. Lillig, et ux., bearing even date herewith and intended to be forthwith recorded.

This mortgage being given to secure the payment of part of the purchase price therein mentioned.

4. Both bond and mortgage contained an agreement that if any installment of interest should remain unpaid for 30 days after the same should fall due, then the whole principal sum, with all unpaid interest, should, at the option of the mortgagee, his representative or assigns, become immediately due. 10

5. The mortgage also contained an agreement that the mortgagors, their heirs and assigns, would keep the buildings on the mortgaged premises insured against loss or damage by fire in a sum not less than \$15,000.00, and would assign the policy of insurance to the mortgagee, his representatives or assigns; and in default of so doing that the mortgagee, his representatives or assigns, should be entitled to effect such insurance, and the premiums paid for the same by the mortgagee, or his assigns, with interest at six percentum per annum, should be a lien on said land added to the amount of the mortgage debt and secured by the mortgage. 20

6. On October 14, 1924, Elizabeth W. Wood and Charles H. Wood, her husband, conveyed said land, by deed of that date, to Ella Wood (single woman), in fee; which deed was on October 18, 1924, recorded in the county clerk's office at Mays Landing, Atlantic County, New Jersey, in Book 755 of Deeds, page 130. 30

7. On October 15, 1924, Ella Wood (single woman), conveyed said land, by deed of that date, to Charles H. Wood, in fee; which deed was, on

October 18, 1924, recorded in the county clerk's office at Mays Landing, Atlantic County, New Jersey, in Book 755 of Deeds, pages 131, &c.

Any interest which the said Charles H. Wood has in said land, is subsequent and subject to the lien of complainant's mortgage.

8. On June 23, 1926, Charles H. Wood and Elizabeth W. Wood, his wife, conveyed said land, by deed
10 of that date, to Joseph McGarrity, in fee; which deed was on August 5, 1926; recorded in the county clerk's office aforesaid in Book 832 of Deeds, page 274.

Any interest which the said Joseph McGarrity has in said land is subsequent and subject to the lien of complainant's mortgage.

9. Said Joseph McGarrity is married and his wife's name is Kathryn McGarrity.

20 Any interest which the said Kathryn McGarrity may have in the said land, by way of inchoate right of dower or otherwise, is subsequent and subject to the lien of complainant's mortgage.

10. On July 27, 1926, said Joseph McGarrity mortgaged the lands hereinabove described to Elizabeth W. Wood to secure the payment of \$23,000.00, which mortgage was on August 5, 1926, recorded in the clerk's office aforesaid in Book 412 of Mortgages, page 315, &c.

30 Any interest which the said Elizabeth W. Wood may have in said lands is subsequent and subject to the lien of complainant's mortgage.

11. Said Joseph McGarrity failed to keep the buildings on said land insured against loss or damage by fire in any sum, and on July 27, 1929, com-

plainant caused the same to be insured in the sum of \$36,500.00, for one year, and on July 29, 1929, paid the sum of \$1,178.95 for insurance premium thereon, which sum, with interest at the rate of six per centum per annum, is a lien on said premises added to the amount of the mortgage debt and secured by complainant's mortgage, and is prior to the lien of the mortgage of Elizabeth W. Wood.

12. On October 21, 1929, one-half year's interest 10
fell due on complainant's bond and mortgage, and remained unpaid for more than thirty days thereafter, and no part thereof has yet been paid. Complainant has elected that the whole principal sum, with all unpaid interest, shall be now due.

13. Said Elizabeth W. Wood, Ella Wood, Charles H. Wood and Joseph McGarrity, or one or several of them, have always been in possession of the mortgaged premises. 20

14. The whole amount of principal, or \$36,500.00, with interest thereon from April 21, 1929, besides insurance premiums amounting to \$1,178.95, with interest thereon from July 29, 1929, is due upon complainant's bond and mortgage.

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

1. That Joseph McGarrity, Kathryn McGarrity, 30
his wife, Elizabeth W. Wood and Charles H. Wood, her husband, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

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

3. That the defendants, or one of them, may be decreed to pay the complainant the amount so found due, with interest and costs, by a short day, to be appointed by this Court, and that in default of such payment they, and each of them, be debarred and foreclosed of all equity of redemption in said lands; or

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

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

WILLIAM I. GARRISON,
*Solicitor for and of Counsel
with Complainant.*

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30

ANSWER TO AMENDED BILL.

(Filed June 24, 1930.)

IN CHANCERY OF NEW JERSEY.
75-670.

10

Between

SERAPH F. LILLIG,

Complainant,

and

JOSEPH MCGARRITY, *et*

als.,

Defendants.

} On Bill to Foreclose.
Answer to Amended
Bill.

20

Defendants, Joseph McGarrity and Kathryn McGarrity, his wife, answering the amended bill of complaint, say that:

1. Paragraphs one to ten, inclusive, and paragraph thirteen are admitted.

2. As to the allegations contained in paragraph eleven, defendants have no knowledge or information sufficient to form a belief, and leave complainant to his proof. 30

3. Paragraph twelve is denied.

4. Paragraph fourteen is denied.

SPECIAL DEFENSE.

These defendants, by way of special defense, say that:

1. These defendants are the present owners of the premises described in paragraph three of the complaint.

10

2. On April 21st, 1929, there became due and payable to the complainant, the holder of the bond and mortgage covering said premises and described in said complaint, from these defendants the principal sum of \$36,500, together with interest at the rate of six per cent per annum payable semi-annually.

20

3. On May 4th, 1929, said complainant and these defendants entered into an agreement that the time of payment of the sum mentioned in said mortgage be extended, whereby the said principal sum of said bond and mortgage should be payable on April 31st, 1932, for the extension and in consideration whereof the defendants agreed to pay to the said complainant the sum of \$1,095 over and above the principal sum due on said mortgage and interest at six per cent per annum as stipulated in said mortgage, which sum of \$1,095 the said defendants then and there paid to the said complainant on said date.

30

4. Said agreement is tainted by usury and is therefore void under an Act of our Legislature entitled, "An Act Against Usury," New Jersey Compiled Statutes, page 5704, for the reason that the said complainant received as consideration for extending the time of payment of the principal amount

of said bond and mortgage a sum greater than \$6.00 for the forbearance of \$100.00 for a year.

5. Under the terms of the bond and mortgage mentioned in the bill of complaint there became due and payable on October 21st, 1929, one-half year's interest amounting to \$1,095, but the defendants are entitled to a credit for having paid the sum by virtue of their payment of \$1,095 for said extension on said mortgage, which sum they are entitled to have applied to said installment of interest and by reason thereof no default occurred on October 21st, 1929, because nothing was due on said date. 10

Wherefore, these defendants pray to be hence dismissed with their reasonable costs and charges and to have such relief as they may be entitled to under said Act of Legislature entitled, "An Act Against Usury."

CASSMAN & GOTTLIEB, 20
Solicitors for Defendants,
Joseph McGarrity and
Kathryn McGarrity.

REPLICATION.

(Filed March 12, 1930.)

IN CHANCERY OF NEW JERSEY.
75-670.

10

Between SERAPH F. LILLIG, <i>Complainant,</i> and JOSEPH MCGARRITY, <i>et</i> <i>als.,</i> <i>Defendants.</i>	}	On Bill to Foreclose. Replication.
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Complainant, Seraph F. Lillig, replying to the special defenses set forth in the answer of Joseph McGarrity and Kathryn McGarrity, his wife, filed herein, says that:

1. Paragraph one of the special defenses is admitted.
- 30 2. Paragraph two of the special defenses is admitted.
3. That part of paragraph three of the special defenses is admitted wherein it is stated that on May 4, 1929, said complainant and these defendants entered into an agreement that the time of payment

Replication

11

of the sum mentioned in said mortgage be extended, whereby the said principal sum of said bond and mortgage should be payable on April 21, 1932. All of the other allegations in said paragraph are denied.

4. Paragraph four is denied.

WM. I. GARRISON,
Solicitor of the Complainant.

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Mr. Siddell: I wish to introduce into evidence bond of Elizabeth W. Wood, et al., to Seraph F. Lillig, dated the twenty-first day of April, 1921.

(Bond admitted and marked Exhibit C1.)

Mortgage, Elizabeth W. Wood, et vir., to Seraph F. Lillig, dated twenty-first day of April, 1921, in the amount of \$36,500.

10

(Mortgage admitted and marked Exhibit C2.)

Foreclosure search #9120 of the Chelsea Title and Guaranty Company which shows charges in the amount of \$48.46.

(Search admitted and marked Exhibit C3.)

SERAPH F. LILLIG, SWORN.

20

Direct examination.

By Mr. Siddell:

Q. Are you the complainant in this case, Mr. Lillig?

A. Yes.

Q. Who is the owner of the bond and mortgage at the present time?

30

A. I am.

Q. Is there anything due for principal and interest on this bond and mortgage?

A. Yes.

Q. What amount of the principal is due at the present time?

A. You asking interest?

Q. I am asking you the amount of the mortgage which is due at the present time?

A. \$36,500.

Q. Is there any interest due on this mortgage?

A. Over a year.

Q. From what date is interest due on this mortgage?

A. April 22, 1929.

10 Q. There is interest due on this mortgage from April 22, 1929, to date?

A. To date.

The Court: I call attention that the date of the mortgage is the twenty-first.

Mr. Siddell: Then that will be the twenty-first.

20 Q. Has any part of the principal sum been paid to you?

A. No.

Q. Was any interest paid from April 21, 1929?

A. No.

Cross-examination:

By Mr. Cassman:

30 Q. Mr. Lillig, prior to the due date of the original mortgage did you have some conversation with Mr. McGarrity regarding the extension?

A. Yes.

Q. What was that conversation?

A. When Mr. McGarrity purchased this property I gave him a mortgage of three years, one year prior to this mortgage falling due, he and I had a

conversation about a renewal and in that conversation it was something like this, I spoke to him about I would renew it and also that when I borrowed money that I know what I had to do to pay for it and he was willing there and then to pay me three per cent known as service charges between him and I for renewing the mortgage for another three years. That was one year before the mortgage was due.

Q. When you met on May fourth in Mr. Jeffer's office was that actually paid? 10

A. That was paid in one check in conjunction with the interest due for that time.

Q. And the amount of that was \$1095, I suppose?

A. Yes.

Q. I show you a letter of April twenty-ninth, this is a letter from Mr. McGarrity addressed to Mr. Lillig in which Mr. McGarrity recites the agreement that he is to pay a bonus of three per cent for three years' extension.

20

(Letter admitted by consent and marked Exhibit D1.)

A. If there is no objection, the word "bonus" in this matter applies otherwise, was never used —

Q. There is no question.

By Mr. Siddell:

Q. Did you pay any other charges in connection with this mortgage? 30

A. Yes, sir.

Q. What charges did you pay?

A. I paid \$1178 or more fire insurance.

Q. It was at least \$1178?

A. I would say at least—no \$1178 or \$1180 something in that neighborhood.

Mr. Cassman: Is that included in the bill?

Mr. Siddell: I think there is a provision in the bill that the mortgagee may pay the premium on fire insurance.

The Court: What is there in the bill?

10 Mr. Cassman: Don't seem to be any allegation in either the bill or the replication about it.

The Court: Don't seem to be.

Mr. Siddell: I wish to make a motion to make such an amendment.

20 Mr. Cassman: I think, if the Court pleases, that is untimely. We couldn't meet that situation at this hearing.

The Court: I will permit the amendment and give you an opportunity for a continuance to such time as may be necessary for you to controvert that allegation if you desire.

30 Mr. Cassman: If the Court please, that is all there is to the case with the exception of our opportunity to meet the allegation of fire insurance.

The Court: Submit the bills to Mr. Cassman and I will give you an opportunity on the seventeenth, a motion day, to close the matter.

Mr. Cassman: At this time I want to prove the amount due on the second mortgage.

JOSEPH MCGARRITY, SWORN.

Direct examination.

By Mr. Cassman:

Q. I show you mortgage dated July 27, 1926, Joseph McGarrity to Elizabeth W. Wood in the original sum of \$23,000 recorded in book 412 page 10 315 and ask you if this is the mortgage which you signed?

A. Yes, that is my signature.

Q. Is this the bond that you signed?

A. That is my signature.

Q. What is the amount due on this mortgage?

A. \$20,000.

Q. With interest from?

A. January twenty-seventh to May fourth of 1929.

Q. Interest from January 27, 1929? 20

A. 1929.

(Bond and mortgage admitted and marked Exhibits D2 and 3.)

(Adjourned to June 17, 1930.)

Atlantic City, N. J., June 17, 1930.

Trial of the cause continued.

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Received bill for fire insurance, together with check offered, received in evidence and marked Exhibits C3 and 4.

EXHIBIT C1.

BOND

20

KNOW ALL MEN BY THESE PRESENTS That we, ELIZABETH W. WOOD and CHARLES H. WOOD, of Bryn Mawr, Pennsylvania, (hereinafter called the Obligors) are held and firmly bound unto SERAPH F. LILLIG, of the City of Atlantic City, County of Atlantic and State of New Jersey, (hereinafter called the obligee) in the sum of SEVENTY THREE THOUSAND DOLLARS lawful money of the United States of America, to be paid to the said Obligee, his certain Attorney, Executors, Administrators or Assigns; to which payment, well and truly to be made, we do hereby bind and oblige ourselves, our Heirs, Executors and Administrators and every of them, jointly and severally firmly by these Presents. Sealed with our Seals Dated the twenty-first day of April, in the year of our Lord one thousand nine hundred and twenty-one (1921).

30

THE CONDITION OF THIS OBLIGATION IS SUCH, That if the above bounden Obligors, their Heirs, Executors, Administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above name Obligee, his certain Attorney, Executors, Administrators or Assigns, the just sum of THIRTY SIX THOUSAND FIVE HUNDRED DOLLARS like lawful money as aforesaid, payable at the expiration of five years from the date hereof, together with interest thereon at and after the rate of six per centum per annum, payable semi-annually in like lawful money as aforesaid, without any fraud or further delay; and shall pay all taxes, assessments and charges in nature thereof, that may be laid or levied upon the lands and premises described in the accompanying indenture of mortgage, immediately upon their assessment and conditioned further, that said Obligor shall not apply for any deduction by reason of the accompanying Mortgage from the taxable value of the lands therein described and embraced; and shall produce to the said Obligee his Executors, Administrators or Assigns, receipts for all taxes, assessments and charges in nature thereof laid or levied upon the said mortgaged premises within thirty days after the same shall first become due and payable and shall and will keep the buildings erected and to be erected upon the said lands insured against loss or damage by fire in such safe and responsible (non-mutual) Fire Insurance Company or Companies as shall be satisfactory to said Obligee and endorse or assign and deliver all policies and certificates thereof to the said Obligee as collateral security for the payment of the principal and interest aforesaid, the aggregate amount of which insurance shall not be less than Fifteen Thousand dollars, without any fraud or further delay; then the above obligation to be

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void, or else to be and remain in full force and virtue.

AND PROVIDED FURTHER, however, and it is hereby expressly agreed, that if default shall be made in the production in any year of the tax or any other receipts, as herein provided and covenanted as aforesaid, or in payment of said taxes, assessments and charges as herein agreed as aforesaid, or in keeping the buildings erected upon said
10 lands insured, and the policies and certificates thereof assigned or endorsed as aforesaid, or if at any time default shall be made in payment of interest as aforesaid for the space of thirty days after any semi-annual payment thereof shall fall due, then and in every such case, whether it be the first or any subsequent default, the whole principal debt aforesaid shall, at the option of the said Obligee, his Executors, Administrators or Assigns, become
20 principal debt, and all interest thereon, may be enforced and recovered at once, anything herein contained to the contrary notwithstanding.

AND PROVIDED FURTHER, that in default of insurance or production of tax or any other receipts and payment of taxes, assessments and charges as aforesaid, the said Obligee his executors, Administrators or Assigns, shall have the option to effect such insurance, and pay such taxes, assessments and charges and the premium or premiums paid for
30 effecting such insurance and the amount paid for such taxes, assessments and charges as aforesaid, shall be added to the principal moneys hereby secured and payable on demand, with legal interest, in like money.

Elizabeth W Wood (SEAL)
Chas H Wood (SEAL)

SEALED AND DELIVERED
IN THE PRESENCE OF

On 1st page 2nd line "s"
erased from "Wood" be-
fore signing
W Zimmerman

To _____ Esq.,
Or any other Attorney of any Court of Law in 10
New Jersey, or elsewhere:

This is to authorize you to appear for us or either
of us in any Court of competent jurisdiction, in case
of the breach of the condition of the above Bond,
and confess judgment for the penalty therein con-
tained, as of the last or any subsequent term, with
costs of suit and release of errors; and this shall
be your sufficient warrant.

WITNESS our hands and seals this twenty-first
day of April Anno Domini one thousand nine hun- 20
dred and twenty-one.

Elizabeth W Wood (SEAL)
Chas H. Wood (SEAL)

SEALED AND DELIVERED
IN THE PRESENCE OF

On 1st page, 2nd line letter
"s" erased from "Wood"
before signing
W Zimmerman

(Endorsed)

30

BOND AND WARRANT.

Elizabeth W. Woods et al
to
Seraph F. Lillig
Dated Apr. 21-1921
For \$36,500.
New Holland Hotel

EXHIBIT C2.

MORTGAGE.

THIS INDENTURE, made the twenty-first day of April, in the year of our Lord one thousand nine hundred and twenty-one (1921) BETWEEN
10 ELIZABETH W. WOOD and CHARLES H. WOOD her husband, of Bryn Mawr, Pennsylvania, parties of the first part, and SERAPH F. LILLIG, of the City of Atlantic City, County of Atlantic and State of New Jersey, party of the second part: WHEREAS, the said Elizabeth W. Wood and Charles H. Wood in and by their certain Obligation or writing obligatory, under their hands and seals duly executed, and bearing even date herewith, stand bound unto the said party of the second part, in the
20 sum of SEVENTY THREE THOUSAND DOLLARS lawful money of the United States of America, conditioned for the payment of the just sum of THIRTY SIX THOUSAND FIVE HUNDRED DOLLARS like lawful money as aforesaid, payable at the expiration of five years from the date thereof together with interest thereon at and after the rate of six per centum per annum, payable semi-annually in like lawful money as aforesaid, without any fraud or further delay; and should pay all taxes, assess-
30 ments and charges in nature thereof that might be laid or levied upon the lands and premises herein-after described immediately upon their assessment; and conditioned further, that said party of the first part should not apply for any deduction, by reason of this Mortgage, from the taxable value of the lands therein described and embraced; and should produce

to the said party of the second part his heirs, Executors, Administrators, or Assigns, receipts for all taxes, assessments and charges in nature thereof laid or levied upon the said mortgaged premises within thirty days after the same should first become due and payable, and should and would keep the buildings erected and to be erected upon the said lands insured against loss or damage by fire in such safe and responsible stock (non-mutual) Fire Insurance Company or Companies as should be satisfactory to said party of the second part, and endorse or assign and deliver all policies and certificates thereof to the said party of the second part as collateral security for the payment of the principal and interest aforesaid, the aggregate amount of which insurance shall not be less than Fifteen Thousand Dollars.

AND PROVIDED FURTHER, however, and it was thereby expressly agreed, that if default should be made in the production in any year of the tax or any other receipts, as therein provided and covenanted as aforesaid, or in payment of said taxes, assessments and charges as therein agreed as aforesaid, or in keeping the buildings erected upon said lands insured and the policies and certificates thereof assigned or endorsed as aforesaid, or if at any time default should be made in payment of interest as aforesaid for the space of thirty days after any semi-annual payment thereof should fall due, then and in every such case, whether it be the first or any subsequent default the whole principal debt aforesaid should, at the option of the said party of the second part, his heirs, Executors, Administrators or Assigns, become due and payable immediately, and payment of said principal debt, and all

interest thereon, might be enforced and recovered at once, anything therein contained to the contrary notwithstanding.

AND PROVIDED FURTHER, that in default of insurance or production of tax or any other receipts and payment of taxes, assessments and charges as aforesaid, the said party of the second part, his heirs, Executors, Administrators or Assigns, should
10 have the option to effect such insurance, and pay such taxes, assessments and charges; and the premium or premiums paid for effecting such insurance and the amount paid for such taxes, assessments and charges as aforesaid, should be added to the principal moneys thereby secured and payable on demand, with legal interest, in like money, as in and by the said recited obligation and condition thereof, relation thereunto being had, may more
20 fully and at large appear. NOW THIS INDENTURE WITNESSETH, that the said party of the first part, as well for and in consideration of the aforesaid debt or principal sum of Thirty-six Thousand Five Hundred dollars and for the better securing the payment thereof unto the said party of the second part, his heirs, Executors, Administrators or Assigns, in discharge of the said obligation above recited, as for and in consideration of the further sum of one dollar, in specie, well and truly paid to
30 the said party of the first part by the said party of the second part, at and before the ensealing and delivery hereof, the receipt of which one dollar is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release and confirm, unto the said party of the second part, his Heirs and Assigns, ALL that lot, tract

or parcel of land and premises, situate, lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows: BEGINNING at a point in the West line of New York Avenue at the distance of four hundred and fifty-eight feet South from the Southerly line of Pacific Avenue, and extending thence (1) Westwardly and parallel with Pacific Avenue one hundred and fifty-five feet; thence (2) Southwardly parallel with New York Avenue along other land of said Cornelius Dubois and of Westminister Avenue, sixty-seven feet; thence (3) Eastwardly and parallel with Pacific Avenue one hundred and fifty-five feet to the Westerly line of New York Avenue; thence (4) Northwardly along said Westerly line of New York Avenue sixty-seven feet to the place of beginning. 10

Being the same premises conveyed to the present grantor by deed from Seraph F. Lillig et ux, bearing even date herewith and intended to be forthwith recorded. 20

This mortgage being given to secure the payment of part of the purchase price therein mentioned.

TOGETHER with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances whatsoever to the same belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof: 30

TO HAVE AND TO HOLD the said hereditaments and premises above described and granted, or intended so to be, with the appurtenances, unto the said party of the second part, his Heirs and Assigns, to and for the only proper use, benefit and

behoof of the said party of the second part, his Heirs and Assigns forever.

PROVIDED ALWAYS, NEVERTHELESS, that if the said Elizabeth W. Wood and Charles H. Wood, their Heirs, executors, Administrators and Assigns, do and shall well and truly pay, or cause to be paid, unto the said party of the second part, or to his certain Attorney or Attorneys, Executors, Administrators or Assigns, the aforesaid debt or sum of Thirty-six Thousand Five Hundred Dollars on the day and time hereinbefore mentioned and appointed for the payment thereof, together with interest for the same, in like money in way and manner hereinbefore specified therefor, without any fraud or further delay, and without any deduction, defalcation or abatement to be made, for or in respect of any taxes, charges, or assessments whatsoever, together with the taxes, assessments and charges hereinabove mentioned; and shall produce to the said Obligee, his heirs, Executors, Administrators or Assigns, receipts for all taxes, assessments and charges laid or levied upon said premises within thirty days after the same shall first become due and payable, and shall have faithfully kept and performed the condition and agreement in said obligation contained and herein recited, as to insuring and keeping insured the said premises; that then and from thenceforth, as well this present Indenture and the estate hereby granted, as the said OBLIGATION above recited, shall cease, determine and become absolutely null and void, to all intents and purposes; anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

AND the said Elizabeth W. Wood and Charles H. Wood, for themselves, their Heirs, Executors

and Administrators do covenant and grant to and with the said party of the second part, his heirs, Executors, Administrators and Assigns, that the said party of the first part, their Heirs and Assigns, shall not and will not apply for, or claim any deduction by reason of this Mortgage from the taxable value of said lands and premises; and that the said party of the second part his heirs, Executors, Administrators and Assigns, shall and may from time to time, and at all times after default shall be made in the performance of the provisos or conditions herein recited or contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said party of the first part, their Heirs or Assigns, or of any other person or persons whatsoever. 10

IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written. 20

Elizabeth W Wood (SEAL)

Charles H Wood (SEAL)

SIGNED, SEALED AND DELIVERED

IN THE PRESENCE OF

On 1st page, lines 4 and 8; on 3rd page lines 9, 10 and 29, letter "s" erased from word "Wood" before signing.

W. Zimmerman

STATE OF New Jersey }
 Atlantic COUNTY, } ss.

REMEMBERED, That on this twenty-first day of April in the year of our Lord one thousand nine hundred and twenty-one before me A Notary Public of New Jersey personally appeared Elizabeth W. Wood and Charles H. Wood, her husband, who, I am satisfied are the grantors mentioned in the within
 10 Mortgage, and I having first made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed. And the said
 being of full age, on a private examination apart from said husband before me acknowledged that signed, sealed and delivered the same as voluntary act and deed, freely, without any fear, threats or compulsion of said husband. All of which is hereby certified.

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Wilbur Zimmerman
 Notary Public
 State New Jersey

(Endorsed)

MORTGAGE

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Elizabeth W. Woods et vir
 to

Seraph F. Lillig

Premises: New Holland Hotel

Dated 4/21 191 \$36,500.

Received April 28, 1921, at 8 A. M. and
 recorded in Abstract in the Clerk's Of-

Office of Atlantic County, at Mays Landing, N. J. in Book of Mortgages, No. 210 page 349 &c.

Edwin A. Parker
Clerk DDA
M Abstract

CONCLUSIONS.

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(Filed November 3, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

SERAPH F. LILLIG,
Complainant,

and

JOSEPH MCGARRITY,
et als.,

Defendants.

On Bill, &c.
Conclusions.

20

Where a real estate mortgage was originally free from usury, the subsequent payment of a premium to secure an extension of time did not render it usurious, but the premium should be credited as a payment on the principal of the mortgage as of the time it was paid. 30

MR. WILLIAM I. GARRISON for complainant.
MESSRS. CASSMAN & GOTTLIEB for defendants.

INGERSOLL, V. C.

The bond and mortgage in this cause were executed on the 21st day of April, 1921, and after becoming due, the date of payment was, on the 4th day of May, 1929, extended to the 21st day of April, 1932. For that extension, the defendant agreed and did pay, on said date, the sum of \$1095 as a bonus.

10 Under the terms of the bond and mortgage, as extended, there became due and payable on October 21, 1929, one-half year's interest, amounting to the sum of \$1095. Under the terms of said bond and mortgage, the entire principal sum should, at the option of the mortgagee, become due and payable should any instalment of interest remain unpaid for the space of thirty days after the same became due.

20 On October 21, 1929, one-half year's interest fell due upon complainant's bond and mortgage and remained unpaid for more than thirty days thereafter, and the complainant has elected that the whole principal sum, with all unpaid interest, should become due.

The defendants insist that the said sum of \$1095 should be credited as payment of interest due October 21, 1929 and such credit being made, the principal amount is not now due and the foreclosure proceedings are premature.

30 The only question raised, therefore, is what application should be made of the money admittedly taken as a bonus? I find no later pronouncement than *Ruh v. Dwiggins*, 77 N. J. Eq. 117, in which it was held that a subsequent payment of premium to secure an extension of time for the payment of a mortgage originally free from usury did not render it usurious, but the premium should be credited as a payment on the principal of the mortgage as of the time it was paid. The general rule is univer-

sally recognized that if a transaction or an obligation is free from usury in its origin, no subsequent usurious transaction respecting it can affect it with the taint of usury, the theory being that the question whether a contract is usurious or not must be decided with reference to the time when it was entered into. 3 A. L. R., p. 874, and annotations on page 877.

It follows, therefore, that this payment should be applied to the principal sum and not as a payment of interest and, therefore, interest became due on October 21, 1929, and remained due for a space of thirty days, and by reason of the election, the entire principal sum then became due. 10

A decree will be advised in accordance with these views. If counsel cannot agree upon the amount due, they may make application to the Court to determine the same.

read and considered the pleadings and proofs, and having heard and considered the arguments of counsel, and it appearing to the Court that the complainant is entitled to the relief sought and prayed for by him in his bill of complaint, and it appearing to the satisfaction of the Court that the mortgage sought to be foreclosed in this suit was given to secure the payment of Thirty-six thousand five hundred dollars (\$36,500.00); that there is now due on said mortgage for principal the sum of Thirty- 10
five thousand four hundred five dollars (\$35,405.00), the mortgage having been reduced to that amount on May 4, 1929, by a payment of One thousand ninety-five dollars (\$1,095.00) on account of the principal; that there is now due on said mortgage interest as follows: interest at the rate of six per cent per annum on the sum of \$36,500.00, which amount the mortgage was given to secure, from April 21, 1929, to May 4, 1929, the date on which the principal was 20
reduced, amounting to seventy-nine dollars and eight cents (\$79.08), and interest at the rate of six per cent per annum on the sum of \$35,405.00, the amount to which the principal was reduced, from May 4, 1929, to November 25, 1930, amounting to three thousand three hundred ten dollars and thirty-seven cents (\$3,310.37), or a total of three thousand three hundred eighty-nine dollars and forty-five cents, \$3,389.45), making a total due on said mortgage for principal and interest the sum 30
of thirty-eight thousand seven hundred ninety-four dollars and forty-five cents (\$38,794.45), together with one thousand one hundred seventy-eight dollars and ninety-five cents (\$1,178.95) which complainant was obliged to advance for fire insurance premiums, and interest thereon from July 29, 1929, the date on which said premiums were paid, until November 25, 1930, at the rate of six per cent per annum, amount-

ing to ninety-three dollars and seventy-two cents (\$93.72), making a total of forty thousand sixty-seven dollars and twelve cents (\$40,067.12), together with interest thereon from the date of this decree; and it appearing that fees for necessary searches proper for the foreclosure of the complainant's said mortgage, amounting to the sum of forty-eight dollars and forty-six cents (\$48.46), is a proper charge to be taxed in the costs of this suit; and it further

10 appearing that the amount due the defendant, Elizabeth W. Wood, for principal and interest is the sum of \$22,193.33 together with interest on said mortgage from the date of this decree; and that the premises comprised and described in the complainant's mortgage are the same premises comprised and described in the mortgage of the defendant, Elizabeth W. Wood, and that the said complainant's mortgage was made and recorded prior to the mortgage of defendant, Elizabeth W. Wood, and entitled to

20 priority of payment; and it further appearing that it is necessary and advisable that the mortgaged premises described in the complainant's bill of complaint should be sold to raise and pay the monies due to the complainant and to the defendant, Elizabeth W. Wood, respectively, together with costs of suit;

It is, therefore, on this 25th day of November, nineteen hundred and thirty, ordered, adjudged, and decreed, that the said mortgaged premises be sold to raise and satisfy the monies due to the complainant and to the defendant, Elizabeth W. Wood, that

30 is to say, in the first place, to pay and satisfy unto the complainant the sum of \$40,067.12, together with lawful interest thereon, to be computed from the date of this decree, together with the complainant's costs in this cause to be taxed, in which shall be included a counsel fee of \$250.00 dollars, which is hereby allowed to said complainant, and that the

said sum of \$48.46 for search fees be included in said taxed costs; and in the second place, to pay unto the defendant, Elizabeth W. Wood, the sum of \$22,193.33, together with lawful interest thereon from the date of this decree, with her costs to be taxed, and that a writ of *feri facias* do issue for that purpose out of this Court, directed to the Sheriff of the County of Atlantic, commanding him to make sale, according to law, of the said mortgaged premises, and that out of the money arising from such sale, he pay to the complainant, or to his solicitor, his said debt, interest and costs; and also to the aforesaid defendant, Elizabeth W. Wood, her said debt, interest and costs, in manner aforesaid, or to her solicitors; and in case more money should be raised by the said sale than shall be sufficient to answer such several payments, that such surplus be brought into this Court, to abide the further order of the Court, unless otherwise previously disposed of by the order of this Court; and that the said Sheriff make return without delay of this proceedings by virtue of the said writ. 10

And it is further ordered, adjudged and decreed, that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, when sold as aforesaid by virtue of this decree. 20

Respectfully advised,

E. R. WALKER,

C. 30

R. H. INGERSOLL,

V. C.

AMENDED NOTICE OF APPEAL.

(Filed December 3, 1930.)

IN CHANCERY OF NEW JERSEY.

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Between SERAPH F. LILLIG, <i>Complainant,</i> and JOSEPH MCGARRITY, <i>et als.,</i> <i>Defendants.</i>	}	On Bill &c. Amended Notice of Appeal.
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The defendants, Joseph McGarrity and Kathryn McGarrity, his wife, appeal from the final decree made in the above entitled cause by the Chancellor, Edwin Robert Walker, on the advice of Vice-Chancellor Robert H. Ingersoll, on November 25, 1930, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all

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Dated: December 2, 1930.

CASSMAN & GOTTLIEB,
Solicitors for and of Counsel
with defendants, Joseph Mc-
Garrity and Kathryn Mc-
Garrity.

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

HARRY CASSMAN,
*Of Counsel with defendants,
Joseph McGarrity and
Kathryn McGarrity.*

PETITION OF APPEAL.

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(Filed November 29, 1930.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

SERAPH F. LILLIG,
*Complainant-
Respondent,*

and

JOSEPH MCGARRITY,
*et als.,
Defendants-
Appellants.*

} On Appeal from the
Court of Chancery.
Petition of Appeal.

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*To the Honorable the Court of Errors and Appeals
in the Last Resort in All Causes:*

The petition of Joseph McGarrity and Kathryn McGarrity, his wife, the appellants in the above entitled cause respectfully show that:

1. Petitioners find themselves aggrieved by final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date November 25th, 1930, in a certain cause in said Court of Chancery wherein the said Seraph F. Lillig was complainant and the said Joseph McGarrity and Kathryn McGarrity, his wife, were defendants, in this respect to wit, that the said decree adjudges that the said mortgaged premises
10 be sold to raise and satisfy the monies due to the complainant; that the complainant be allowed costs in this cause to be taxed in which shall be included counsel fee of \$250.00; that a writ of *feri facias* do issue out of the Court of Chancery to the sheriff of the County of Atlantic commanding him to make sale of the mortgaged premises and out of the money arising from such sale to pay to the complainant his said debt, interest, and costs; that the defendants stand debarred and foreclosed of and from all
20 equity of redemption of, in, and to, the said mortgaged premises.

And petitioners appeal from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that it decrees that the mortgaged premises be sold to pay and satisfy the money due to the complainant, whereas in fact and in law no monies were due and payable to the complainant; it decrees that the complainant be allowed costs to be taxed in which shall be in-
30 cluded a counsel fee of \$250.00, whereas the complainant was not entitled to costs and counsel fee; it decrees that the defendants be debarred and foreclosed of all equity of redemption of, in, and to the said mortgaged premises, whereas in fact and in law there was no default in any of the terms, covenants, or conditions of said mortgage.

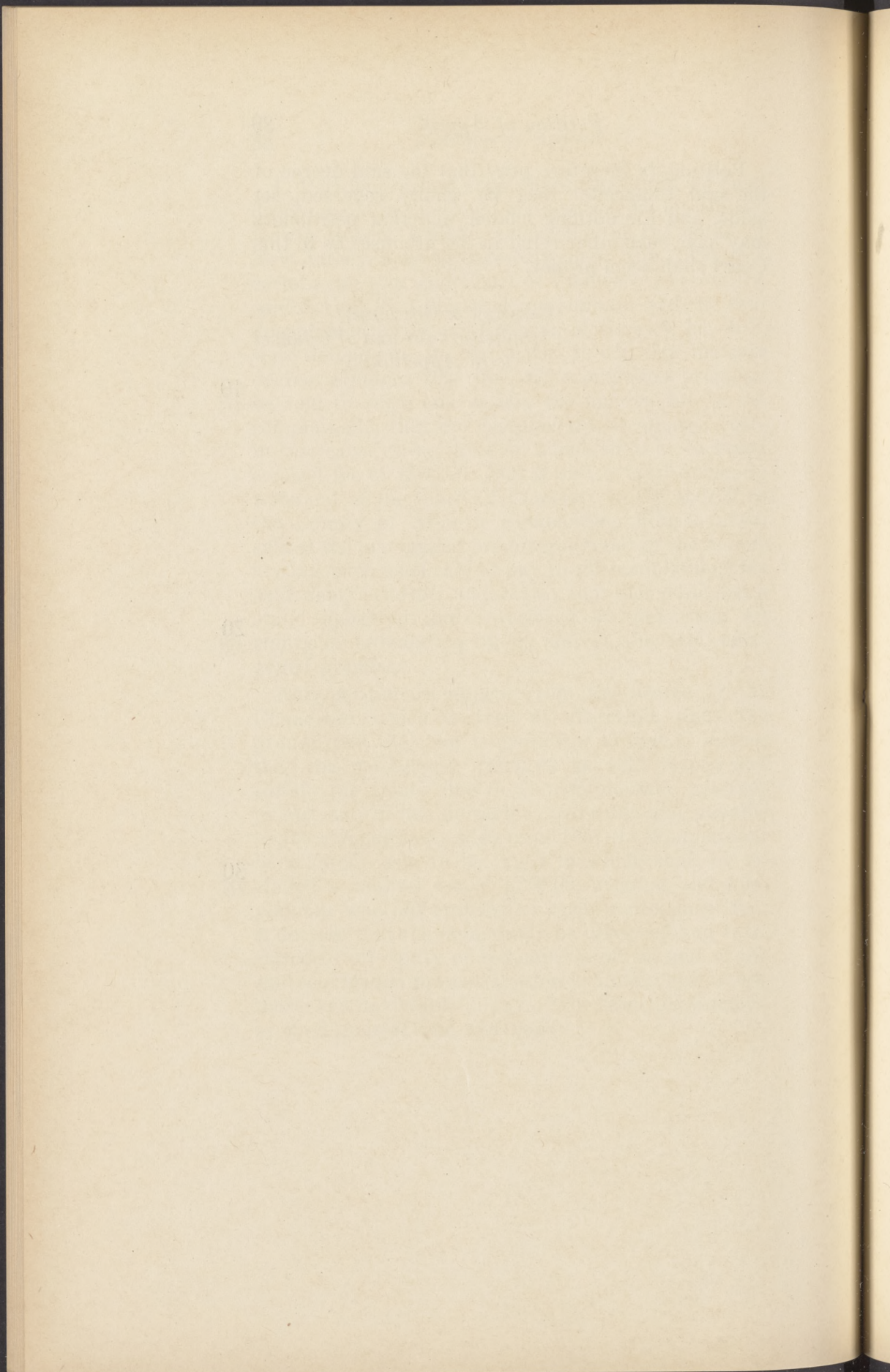
Petitioners therefore pray that the said decree of the said Chancellor may be wholly reversed, set aside, and for nothing holden, and that petitioners may have such other relief in the premises as to this Court shall seem proper.

CASSMAN & GOTTLIEB,
*Solicitors for and of Counsel
with Appellants.*

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NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between

SERAPH F. LILLIG,
Complainant-Respondent,

and

JOSEPH MCGARRITY and KATHRYN MCGARRITY,
Defendants-Appellants.

ON BILL, &C.

ON APPEAL FROM THE COURT OF CHANCERY.

BRIEF FOR APPELLANTS.

PRELIMINARY STATEMENT.

This case is before this Court on appeal from a decree of the Court of Chancery of New Jersey advised by Vice-Chancellor Ingersoll ordering the sale

of mortgaged premises to satisfy the amount ascertained to be due on the said mortgage.

STATEMENT OF CASE.

There is no dispute about the pertinent facts, which are as follows:

The bond and mortgage in this cause were executed on the 21st day of April, 1921 (pages 18 and 22, State of Case), and on April 21, 1929, there became due and payable to the complainant below, the holder of said bond and mortgage, from the defendants below, the principal sum of \$36,500. On May 4, 1929, said complainant and the defendants entered into an agreement that the time of payment of the sum mentioned in said mortgage be extended, whereby the said principal sum of said bond and mortgage should be payable on April 21, 1932, for the extension and in consideration whereof, the defendants agreed to pay to said complainant the sum of \$1,095 over and above the principal sum due on said mortgage, and 6% per annum as stipulated in said mortgage, which sum of \$1,095 the defendants paid the said complainant on said date.

Under the terms of the bond and mortgage as extended, there became due and payable to the complainant on October 21, 1929, one-half year's interest amounting to \$1,095. The complainant not having received said payment for the space of thirty days thereafter, elected, in accordance with the terms of the bond and mortgage, to declare the principal sum due and payable and filed his bill to fore-

close said mortgage (page 1, State of Case). To said bill the defendants filed an answer setting up the usury as aforesaid and praying the Court to apply the sum of \$1095, paid as a bonus, as an advance payment of interest on said mortgage (page 7, State of Case).

At the time of final hearing, the defendants admitted the execution of the bond and mortgage, the complainant admitted the receipt of \$1,095 as a usurious payment (page 12, State of Case). Counsel for all parties in interest agreed that the only question was the legal one as to what application the Court of Chancery would make of such payment admittedly taken as usury. Argument was had on that point, the defendants contending it should be credited as an advance payment of the interest, for the non-payment of which the mortgage was foreclosed, and the complainant contending that it should be credited on the principal as of the date when paid. In due course of time, the Vice-Chancellor filed his conclusions (page 29, State of Case), in which he held that the payment should be applied to the principal sum and not as a payment of interest, and that therefore interest became due on October 21, 1929, and remained due for the space of thirty days, and by reason of the election the principal sum became due and payable.

On November 25, 1930, a decree was advised in accordance with the views of the Vice-Chancellor (page 32, State of Case), and from that decree this appeal is taken.

SPECIFICATION OF GROUNDS OF APPEAL.

1. The Court of Chancery erred in not applying the usurious payment as an advance payment of the interest, for the non-payment of which the mortgage was foreclosed.

2. The Court of Chancery erred in allowing costs and counsel fees to the complainant, in view of the fact that complainant and defendants were each successful in substantial issues.

ARGUMENT OF LAW.

I.

THE USURIOUS PAYMENT MADE BY THE DEFENDANTS TO THE COMPLAINANT SHOULD BE CREDITED AS AN ADVANCE PAYMENT OF THE INTEREST, FOR THE NON-PAYMENT OF WHICH THE MORTGAGE WAS FORECLOSED.

It would seem that since the decision of Vice-Chancellor Pitney in *Leipziger v. Van Saun*, 64 N. J. Eq. 37, the question as to the application of a payment such as is involved in this case is no longer an open one in New Jersey. In that case, a bill was filed by the mortgagee to foreclose a mortgage dated January 2, 1901, to secure the payment of \$24,000

in one year, with interest payable semi-annually, with the usual clause giving the right to the mortgagee to declare principal due on failure to pay the interest within thirty days after maturity. The right to foreclose was based on the failure to pay interest due July 2, 1901. The defense was usury in taking \$1200 as a bonus out of the principal of \$24,000 on the delivery of the mortgage. The Vice-Chancellor held that the taking of the usury had been established, and the bill was prematurely filed because the sum of \$1200 retained out of the principal at the delivery of the mortgage must be applied to the payment of interest if any accrues, hence the mortgagor was under no liability, legal or equitable, to pay interest on July 2, 1901. In the opinion, at the top of page 43, the Vice-Chancellor states:

“Further, if we look at the contract in the aspect most favorable to the lender, and treat it as one to pay interest semi-annually on \$24,000, the sum of \$1200 retained out of the \$24,000 nominally loaned must be credited as payment in advance on account of interest.”

And so, in the case of *Benson v. Reinshagen*, 75 N. J. Eq. 358, the question arose as to whether a payment should be credited to interest, for the non-payment of which a default could be declared, or to an installment of principal, the default in payment of which gave rise to no right to foreclose. The Court held at page 361 that:

“With respect to the April period, I have, as above stated, given the defendants the fullest benefit of their testimony and have held that

that should be credited as interest, so that there was no default at that time.”

The Court, however, held that as to a subsequent payment, the creditor had, in the absence of a specific appropriation of that payment by the debtor, appropriated that payment to the principal and that therefore there was a default in that interest payment. The latter question was decided in such manner entirely on the theory that a creditor has, up to the time the controversy arises, the right to credit a payment in the manner he desires provided the debtor gives no directions as to its appropriation.

In *Moncrief v. Palmer*, 114 Atl. 181, a Rhode Island case, it was held that equity may, at the instance of the maker of a usurious mortgage which contains a provision for sale in case of default without notice to him, apply the usurious payments in satisfaction of legal interest in advance so as to avoid a default and threatened sale. In that case, the Court in the opinion stated:

“From the bill it appears that the complainant (defendant in our case) has made payments largely in advance of legal interest on the loan. There has been no application of this excess which the Court should recognize, but the Court should direct such application to be made as appears most beneficial to the complainant (defendants). Ordinarily it would be for the benefit of the borrower that such excess should be directed in reduction of the principal of the loan. The complainant (defendants) is asking that it should be directed to the payment of in-

terest in advance on said loan so that he may not be in default. In view of the terms of sale contained in the mortgage, it appears desirable that the complainant should be protected against a sale which may be had without actual notice to him."

The Court of Errors and Appeals, in *Terhune v. Colton*, 12 N. J. Eq. 313, held:

"When a debtor owing several debts makes a payment to a creditor, he has a right to apply to which debt he pleases; if he makes no specific appropriation, the creditor may apply it as he pleases; and where neither party appropriates it, the law will apply it according to its own notion of the intrinsic justice of the case; but all cases in which the courts have made the appropriation seem to be those in which neither party has appropriated it before a controversy arose."

It is earnestly urged that no appropriation was made nor could it have been made by either party in the present case, and that a court of equity, not favoring forfeitures and resolving every doubt against a usurer, will in any case make such application of the usurious payment as will be most beneficial to the mortgagor.

The general rule is that in the absence of the parties' intention to make a different application, a payment made on an indebtedness consisting of principal and interest, not applied by either the debtor

or creditor, will be applied first to the interest due and then to the principal.

48 C. J. p. 662, note 69 and cases cited.

The Court below rested its decision on the case of *Ruh v. Dwiggin*s, 77 N. J. Eq. 117, in which it was held that where a mortgage is originally free from usury, the subsequent payment of a premium to secure an extension of time did not render it usurious but the premium should be credited as a payment on the principal of the mortgage as of the time it was paid.

We do not doubt that as an abstract proposition of law, that statement is entirely correct, but it is urged that it is not applicable to the present facts. In that case it nowhere appears that the mortgage was foreclosed for a default in the payment of interest, or, if it was, that the usurious payment was sufficient to cover the amount in default. There is in the present case an added factor that as far as can be ascertained from the reports does not appear in *Ruh v. Dwiggin*s or in any of the cases upon which it relies as authority, and that takes it out of the rule laid down by those cases. In the present case, it appears without dispute that the amount of the bonus paid was sufficient to cover the interest payment, for the nonpayment of which the mortgage was foreclosed. In the case relied on by the Vice-Chancellor, and the authorities cited therein, it nowhere appears that the usurious payment was enough so that if applied to the amount in default, it would have prevented a foreclosure and sale. Those cases do not deal with the question of whether the usurious payment should be credited to interest

or principal, since no such question was raised, and hence could not be deemed to have been settled by such decisions. They did not involve the same facts as exist in the present instance and can have no binding effect as a precedent. If, as the facts may have been in those cases, the payment by the present defendants to the complainant did not equal the amount in default, we have no doubt that the decision relied on by the Vice-Chancellor would have been dispositive of this case, and our only right would have been to have the amount of the bonus applied on the principal and a decree entered accordingly. We do not contend that the mortgage in the present instance, which was originally valid, was rendered usurious by the subsequent payment of a bonus to secure the extension. Our only contention is that having paid a bonus, we are entitled to have it credited as an advance payment of interest. It is a question governed more by the rules of application of payment than by the rules regarding usury.

II.

THE FAILURE OF THE DEFENDANTS TO KEEP THE MORTGAGED PREMISES INSURED AGAINST FIRE, AS PROVIDED BY THE MORTGAGE, WAS NOT A DEFAULT FOR WHICH THE MORTGAGE COULD BE FORECLOSED.

The amended bill of complaint also set up the failure of the defendant to keep the property insured, as provided for by the mortgage, as a default

for which the mortgage could be foreclosed. The opinion of the Vice-Chancellor made no mention of this phase of the matter, and it is a reasonable deduction that not having based his decision on that, he was convinced that the failure of the mortgagor to pay the fire insurance premiums gave rise to no right on the part of the mortgagee to foreclose. The very terms of the bond and mortgage militate against the right of the mortgagee to foreclose on such ground. After reciting that the mortgagor shall keep the mortgaged premises insured against fire and in default of his so doing, giving the mortgagee the right to do so, the mortgage provides: "which sum (that is, the sum paid by the mortgagee for fire insurance), with interest at the rate of six per cent per annum, is a lien on said premises added to the amount of the mortgage debt." It would seem that the reasonable meaning of these words is that the mortgagee may add whatever payments he has made for fire insurance, together with legal interest thereon, to the principal sum secured by the mortgage.

The Court of Chancery has so held in the case of *Kapschandi v. Sipos*, 98 N. J. Eq. 520, where it was held that:

"Under P. L. 1918, Chap. 226, Sec. 6, a covenant in a mortgage in the words there specified gives the mortgagee no right to foreclose for the mortgagor's default in performance of a covenant to keep the mortgaged premises insured for the benefit of the mortgagee."

At the top of page 522, the Court states:

"There was concededly a failure by the de-

fendants to comply with the covenants to insure the mortgaged premises for the benefit of the complainant mortgagee. Evidence was offered by defendants tending to show a waiver by complainant and tending to show that their failure had been induced by complainant's conduct. This need not be considered, however, for the reason that under the terms of the mortgage and under the provisions of our statutes, the defendants' default in this particular gives complainant no right to demand payment or to foreclose.

The covenant in the mortgage in question under which complainant claims a right to foreclose for default in insurance is in the language set forth in the first paragraph of Section 6 of the 1918 Supplement to the Mortgage Act (P. L. 1918, Chap. 226, Sec. 6). The second paragraph of that section defines the meaning and effect of a covenant in such language, and in so doing omits any and all meaning and effect for or reference to the clause relative to default in insurance. The statute therefore deprives that clause in the covenant of any effect, and the complainant has no right to foreclose for defendants' failure to insure."

III.

WHERE EACH PARTY TO A SUIT IS SUCCESSFUL ON ONE OR MORE SUBSTANTIAL ISSUES, NO COSTS OR COUNSEL FEE WILL BE ALLOWED TO EITHER.

In the court below, the complainant and defendants were each successful in substantial issues. The complainant obtained a decree for the foreclosure of the mortgage as prayed for by him in his bill, and the defendants established the usurious payment as claimed by their answer and were allowed a credit therefor. It is contended that under such a state of facts, the Court erred in allowing costs and counsel fee to the complainant.

It is a universal rule that where each party to a suit is successful on one or more substantial issues, no costs or counsel fees, as a general rule, will be allowed to either.

Horner v. Heinecke, 86 N. J. Eq. 176;

Beall v. N. Y. &c. Water Co., 87 N. J. Eq. 390;

Folkman v. Myers, 93 N. J. Eq. 215.

The Chancery Act (P. L. 1902, p. 540, Sec. 91, as amended P. L. 1910, p. 427), provides that:

“Except where it is otherwise provided by this Act or some other law, it shall be in the discretion of the Court of Chancery to award costs or not. * * *”

1 *Comp. Stat.*, p. 442, Sec. 84.

While the above statute in terms makes the granting of costs discretionary, that discretion has been uniformly exercised to deny costs to either party under circumstances such as exist in the present case.

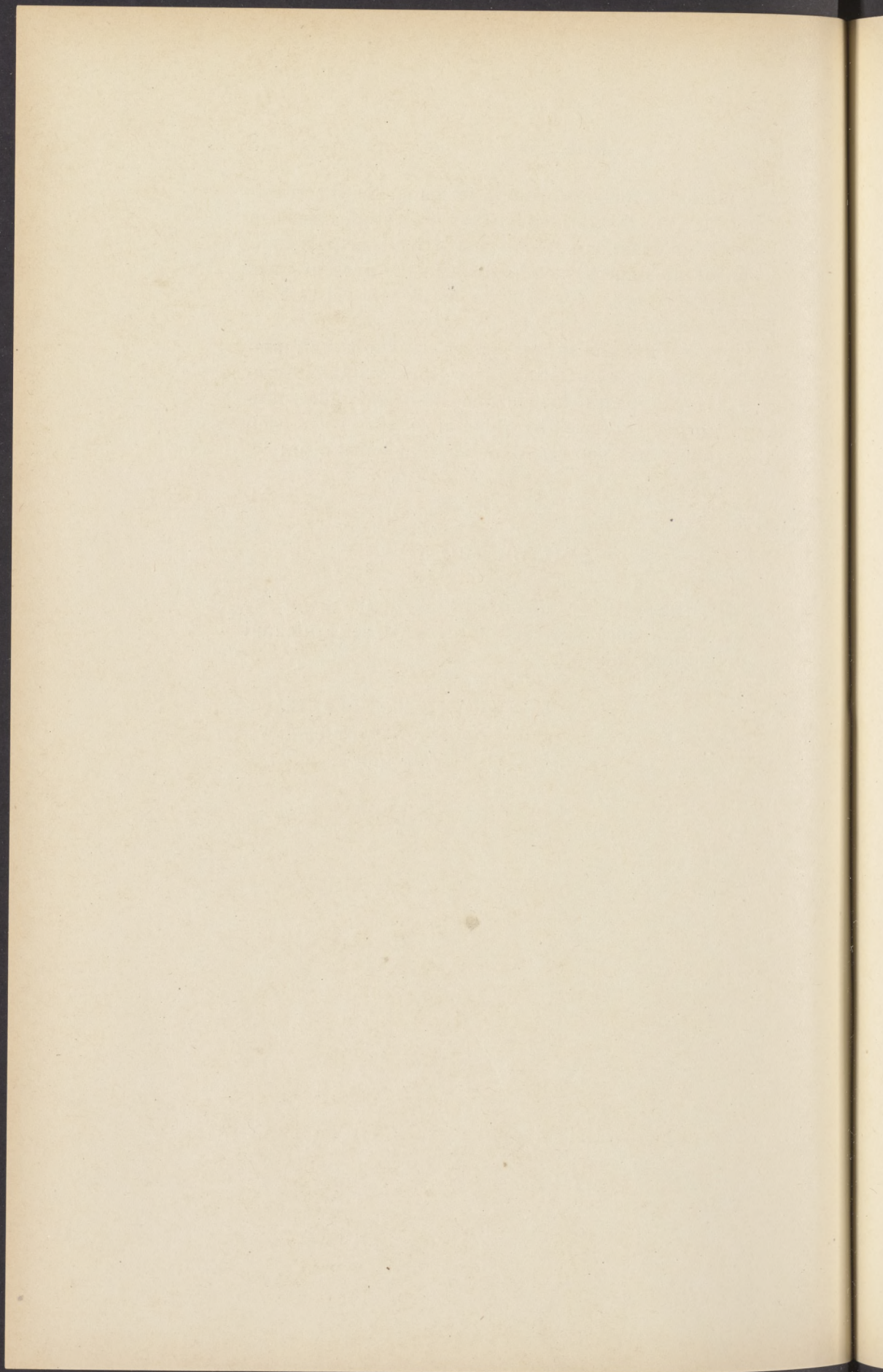
In *Folkman v. Myers*, 93 N. J. Eq. 215, Vice-Chancellor Leaming in the opinion states:

“While the statute makes costs in the circumstances here existing discretionary, that discretion appears to be almost, if not quite, uniformly exercised by a denial of costs when each party has succeeded in part in substantial issues.”

CONCLUSION.

It is respectfully submitted that the decree of the Court of Chancery should be reversed, set aside and for nothing holden.

CASSMAN & GOTTLIEB,
*Solicitors of Defendants-
Appellants.*



NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

SERAPH F. LILLIG,
Complainant-Respondent,

and

JOSEPH MCGARRITY, *et als.,*
Defendants-Appellants.

ON BILL, &c.

ON APPEAL FROM CHANCERY.

BRIEF FOR RESPONDENT.

PRELIMINARY STATEMENT.

This case is before this Court on appeal from
decree of the Court of Chancery of New Jersey,
advised by Vice-Chancellor Ingersoll ordering the

sale of mortgaged premises to satisfy the amount ascertained to be due on the said mortgage.

STATEMENT OF CASE.

The bond and mortgage in this cause were executed on the 21st day of April, 1921, and on April 21, 1929, there became due and payable to the complainant below, the holder of said bond and mortgage, from the defendants below, the principal sum of \$36,500. On May 4, 1929, said complainant and the defendants entered into an agreement that the time of payment of the sum mentioned in said mortgage be extended, whereby the said principal sum of said bond and mortgage should be payable on April 21, 1932, for the extension and in consideration whereof, the defendants agreed to pay to said complainant the sum of \$1,095 over and above the principal sum due on said mortgage, and 6% per annum as stipulated in said mortgage, which sum of \$1,095 the defendants paid the said complainant on said date.

Under the terms of the bond and mortgage as extended, there became due and payable to the complainant on October 21, 1929, one-half year's interest amounting to \$1,095. The complainant not having received said payment for the space of thirty days thereafter, elected, in accordance with the terms of the bond and mortgage, to declare the principal sum due and payable and filed his bill to foreclose said mortgage. To said bill the defendants filed an answer setting up the usury as aforesaid and praying

the Court to apply the sum of \$1,095, paid as a bonus, as an advance payment of interest on said mortgage.

At the time of final hearing, the defendants admitted the execution of the bond and mortgage, the complainant admitted the receipt of \$1,095 as a usurious payment. Counsel for all parties in interest agreed that the only question was the legal one as to what application the Court of Chancery would make of such payment admittedly taken as usury. Argument was had on that point, the defendants contending it should be credited as an advance payment of the interest, for the non-payment of which the mortgage was foreclosed, and the complainant contending that it should be credited on the principal as of the date when paid. In due course of time, the Vice-Chancellor filed his conclusions, in which he held that the payment should be applied to the principal sum and not as a payment of interest, and that, therefore, interest became due on October 21, 1929, and remained due for the space of thirty days, and by reason of the election the principal sum became due and payable.

On November 25, 1930, a decree was advised in accordance with the views of the Vice-Chancellor, and from that decree this appeal is taken.

SPECIFICATION OF GROUNDS OF APPEAL.

The defendants-appellants assign in their specification as grounds of appeal:

1. The Court of Chancery erred in not applying the usurious payment as an advance payment of the interest, for the non-payment of which the mortgage was foreclosed.

2. The Court of Chancery erred in allowing costs and counsel fees to the complainant, in view of the fact that complainant and the defendants were each successful in substantial issues.

ARGUMENT OF LAW.

I.

THE USURIOUS PAYMENT MADE BY THE DEFENDANTS TO THE COMPLAINANT SHOULD BE CREDITED AS A PAYMENT ON ACCOUNT OF THE REDUCTION OF THE PRINCIPAL OF SAID MORTGAGE, AND SHOULD NOT BE APPLIED AS A PAYMENT OF INTEREST ON SAID MORTGAGE.

In the case of *Laing v. Martin, and others*, 26 N. J. Equity 93, Chancellor Runyon held:

“A payment by a mortgagor to the holder of the mortgage in suit, made and received as a premium for an extension of the time for payment of the principal of the mortgage, should be credited on the mortgage as of the time when the payment was made.”

In deciding this case, the Chancellor cited *Nightingale v. Meginnis*, 34 N. J. Law 461, as a case in point, which opinion was written by Chief Justice Beasley, and also cited *Trusdell v. Jones*, 23 N. J. Equity 121, 554, which case also was decided by Chief Justice Beasley.

The case of *Ruh v. Dwiggins, et al.*, 76 Atlantic Reporter 243, is a case on all fours with the one now at issue. Vice-Chancellor Garrison held:

“Where a deed secured by a real estate mortgage was originally free from usury, the subsequent payment of a premium to secure the extension of time did not render the deed usurious, but the premium should be credited as a payment on the principal of the mortgage as of the time it was paid.”

and held further:

“Under the authorities, this payment made and received as a premium for the extension of the time of the payment of the principal of the mortgage should be credited on the mortgage as of the time when the payment was made.”

citing:

“*Laing v. Martin*, 26 N. J. Eq. 93 (Chan. Runyon, 1875); *Hutchinson v. Abbott*, 33 N. J. Eq. 382 (Chan. Runyon, 1881). Since the original transaction was free from taint, the subsequent payment of the premium does not affect it. See cases collected in *Hann v. Dekater*, 20 Atl. 658 (Bird, V. C., 1890), to which add Ter-

hune v. Taylor, 27 N. J. Eq. 80 (Chan. Runyon, 1876).”

It will be noted, that the solicitors for the defendants-appellants have cited several cases to support their contention that the premium should be credited toward the payment of the interest on the mortgage, but in the cases cited by them the mortgages were usurious at their inception, while, in the case at issue, the premium was not paid for the granting or the making of the mortgage, but was given as a premium for the extension of the mortgage after the same had become due and payable.

II.

THE FAILURE OF THE DEFENDANTS TO KEEP THE MORTGAGED PREMISES INSURED AGAINST FIRE, AS PROVIDED BY THE MORTGAGE, WAS NOT A DEFAULT FOR WHICH THE MORTGAGE COULD BE FORECLOSED.

There is no contention by the complainant-respondent that he is entitled to foreclose the mortgage by reason of the defendants-appellants failing to keep the premises insured. The amended bill of foreclosure simply states that the premium for fire insurance in the amount of \$1,178.95, which was paid by the complainant as premium to insure the premises, should be credited to and become part of the principal of said mortgage. Under the terms of the mortgage there was a stipulation to the effect

that a default in the payment of interest should be operative to accelerate the date of the payment of the principal debt and the payment of the insurance premium became part of the principal debt. Complainant foreclosed his mortgage for the non-payment of interest. As provided by the mortgage, the full amount of the principal, together with the insurance premium, became due and payable. In the case of *Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Broadway-Stevens Co., et al.*, 148 Atlantic Reporter 575, Vice-Chancellor Leaming held:

“Default of a mortgagor in the payment of interest or taxes, or in the performance of other covenants of the mortgagor, will not be operative to accelerate the date fixed for the payment of the principal debt, in the absence of a specific stipulation of the parties to that effect in the mortgage * * *.”

Since that stipulation was contained in the mortgage in the case at issue, the mortgagee had the right to foreclose his mortgage upon the non-payment of interest and all of the monies due to the complainant on account of said mortgage became due and payable upon the default in the non-payment of interest.

In the above case, Vice-Chancellor Leaming construes the Act of 1918, Chapter 226, page 816, Sections 5 and 6, which Act provides for the interpretation of the different covenants contained in the usual mortgage.

III.

WHERE EACH PARTY TO A SUIT IS SUCCESSFUL ON ONE OR MORE SUBSTANTIAL ISSUES, IT IS DISCRETIONARY WITH THE COURT WHETHER COSTS OR COUNSEL FEES WILL BE ALLOWED.

Vice-Chancellor Ingersoll, who heard this matter in the Court below, ruled that the complainant was allowed fees of approximately those allowed in uncontested foreclosure matters, he basing his right to do so in conformity with the Chancery Act (P. L. 1902, p. 540, Sec. 91, as amended P. L. 1910, p. 427), which provides as follows:

“Except where it is otherwise provided by this Act or some other law, it shall be in the discretion of the Court of Chancery to award costs or not * * *.”

1 *Comp. Stat.*, p. 442, Sec. 84.

The cases cited by the defendants-appellants stating the view that where each party to a suit is successful on one or more substantial issues, no costs or counsel fee will be allowed to either, seems to be cases other than for the foreclosure of mortgages, and the case relied upon for this principal by the defendants-appellants is *Folkman v. Myers*, 93 N. J. Eq. 215, which case was a proceeding to quiet title to land, which proposition is clearly different from the foreclosure of a mortgage where it is just a

question of fact to determine the amount due on a mortgage.

If the proposition contended by the defendants-appellants was true, in suits involving the foreclosure of a mortgage there would be no costs allowed where there was a discrepancy between the amount contended in the bill and that actually proven before a Vice-Chancellor or a Master. Clearly, this is not the law in the State of New Jersey.

As above cited, it is clearly within the discretion of the Vice-Chancellor whether he would allow costs in this proceeding and, in his discretion, he believed that costs should be allowed as provided in the final decree, and should not be disturbed by this Court.

CONCLUSION.

It is respectfully submitted that the decree appealed from should be confirmed.

WILLIAM I. GARRISON,
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with Respondent, Seraph F.
Lillig.*

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