INDEX.

NOTICE OF APPEAL.

Filed June 21, 1922.

SECOND DISTRICT COURT OF THE CITY OF NEWARK.

HOMESTEAD BUILDING CO., a corporation, *Plaintiff,* *vs.* WAVERLY BUILDING AND LOAN ASSOCIATION, a corporation, *Defendant.*	*On Contract.* *Notice of Appeal.*

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To Michael J. Quigley, Esq., Attorney of Plaintiff,

SIR:

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TAKE NOTICE that the defendant hereby appeals to the New Jersey Supreme Court from the judgment of the Second District Court of the City of Newark, rendered in the above-stated action on the tenth day of June, 1922.

Dated June 16, 1922.

PHILIP J. SCHOTLAND,
Attorney for Defendant.

Service of a true copy of the within notice of appeal is hereby acknowledged this 19th day of June, A. D. 1922.

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MICHAEL J. QUIGLEY,
Attorney for Plaintiff.

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GROUNDS OF APPEAL.

New Jersey Supreme Court

HOMESTEAD BUILDING CO., a corporation, *Plaintiff-Appellee,* *vs.* WAVERLY BUILDING AND LOAN ASSOCIATION, a corporation, *Defendant-Appellant.*	*On Appeal.* *Grounds of Appeal.*

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The following are the specifications of the determinations of the Second District Court from which the defendant appeals:

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1. The Court erred in rendering judgment for the plaintiff and against the defendant.

2. The Court erred in overruling the motion for judgment in its favor, on the ground that the plaintiff, being a corporation, cannot sue to recover money usuriously paid on its own bond.

3. The plaintiff cannot recover money voluntarily paid pursuant to agreement and in accordance with the terms of the loan made.

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PHILIP J. SCHOTLAND,
Attorney for Defendant-Appellant.

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STATE OF DEMAND.

Filed February 1, 1922.

SECOND DISTRICT COURT
OF THE CITY OF NEWARK.

HOMESTEAD BUILDING CO., a corporation, *Plaintiff,* *vs.* WAVERLY BUILDING AND LOAN ASSOCIATION, a corporation, *Defendant.*	*On Contract.* *State of Demand.*

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The plaintiff demands of the defendant the sum of three hundred dollars for that whereas:

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The defendant heretofore to wit: on or about the fourteenth day of June, 1921, granted a loan to the plaintiff on certain property in the City of Newark, Essex County, New Jersey, in the sum of ten thousand dollars.

That the money on said loan was paid over to the plaintiff and to certain other people entitled to the same on June fourteenth, 1921.

The defendant retained four months' interest on said loan amounting to the sum of two hundred dollars, although the defendant was not entitled to the same.

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That on or about the fourteenth day of September, 1921, the defendant offered to the plaintiff a check of fifty dollars, being a refund of one month's interest on said mortgage, which the plaintiff refused to accept in full payment of the overcharge made by the defendant.

Plaintiff demands as damages the said sum of two hundred dollars, together with interests and costs.

MICHAEL J. QUIGLEY,
Attorney of Plaintiff.

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TRANSCRIPT OF CLERK'S DOCKET.

HOMESTEAD BUILDING CO., a corporation,
Plaintiff,

vs.

10 WAVERLY BUILDING AND LOAN ASSOCIATION OF THE CITY OF NEWARK, a corporation,
Defendant.

PLAINTIFF'S COSTS.

Summons	$ 2.10
Mileage	.08
Listing fee	1.50
Attorney's fee	7.80
Total costs	$11.48

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Michael J. Quigley, plaintiff's attorney.

Philip J. Schotland, defendant's attorney.

A summons in the above-stated cause was issued on the second day of December, 1921, returnable on the sixteenth day of December, 1921, wherein the plaintiff demands of the defendant the sum of three hundred dollars.

30 The plaintiff filed a state of demand February 1st, 1922.

The summons was served and returned as follows:

"The President or other head officer not being found "I served the within summons December, 1921, at the "residence of John Breuning, on a member of his family "above the age of fourteen years by reading it to her "and giving her a copy thereof, the said John Breuning "being Secretary of the Waverly Building and Loan "Association of the City of Newark, the within-named "defendant.

"DANIEL J. LYNCH,

40 *"Sergeant-at-Arms of the Second District Court."*

Transcript of Clerk's Docket.

December 16, 1921. This cause was adjourned by the plaintiff to December 30th, and from time to time thereafter until February 1st, 1922.

February 1st, 1922. The plaintiff and defendant appeared and the cause was tried at this time. Benjamin Handsman was sworn in behalf of the plaintiff. Philip J. Schotland was sworn in behalf of the defendant. The evidence being closed, the Court reserved decision.

March 30th. The Court rendered judgment in favor of the plaintiff and against the defendant in the sum of One hundred fifty-six dollars and seventy-five cents damages with costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of one hundred fifty-six dollars damages with costs.

March 31st. Rule to show cause filed, returnable April 7th, 1922.

June 10th. Rule vacated.

June 21st. Notice of appeal filed.

SECOND DISTRICT COURT
OF THE CITY OF NEWARK.

HOMESTEAD BUILDING CO., a corporation *Plaintiff,* *vs.* WAVERLY BUILDING AND LOAN ASSOCIATION, a corporation, *Defendant.*	*On Contract.* *Certificate.*

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I, JAMES, E. GARRIGAN, Clerk of the Second District Court of the City of Newark, do hereby certify the foregoing transcript to be a true transcript of the record and proceedings had in the said court in the above-entitled cause as it appears on Page 57386 in Docket 146 of said court.

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Dated August 1st, 1922.

JAMES E. GARRIGAN, (SEAL)
Clerk.

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RULE TO SHOW CAUSE.

Filed March 31, 1922.

SECOND DISTRICT COURT
OF THE CITY OF NEWARK.

HOMESTEAD BUILDING COMPANY, a corporation, *Plaintiff,* *vs.* WAVERLY BUILDING AND LOAN ASSOCIATION, *Defendant.*	*On Contract.* *Rule to Show Cause.*

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This matter being opened to the Court by Philip J. Schotland, attorney for defendant, upon an application for a rule to show cause why a new trial should not be granted in the above-entitled cause, on the grounds: 20

First: That the District Court had no jurisdiction to maintain the action.

Second: That the plaintiff was barred by the Act relating to Usury, P. L. 1902, page 459, from maintaining the action.

Third: That the judgment was erroneous. 30

It is, on this 31st day of March, 1922, ORDERED, that the plaintiff show cause before this Court, at Newark, on the seventh day of April, 1922, at ten o'clock in the forenoon, or as soon thereafter as the matter may be heard, why a new trial should not be granted in the above-entitled cause, or a judgment rendered in favor of the defendant, instead of the plaintiff.

And it is further ORDERED, that a copy of this order be served upon the attorney for the said plaintiff, within two days from the date hereof. 40

Rule to Show Cause.

And it is further ORDERED, that in the meantime and until the further order of this Court, all proceedings in said cause be, and the same are, hereby stayed.

And it is further ORDERED, that the granting of the within rule to show cause shall not be a waiver of any grounds of appeal existing in favor of the defendant, and that the judgment entered in this cause shall, for the purpose of reserving the right of appeal to either party hereto, run from the date that judgment is entered upon this rule.

LOUIS R. FREUND,
Judge.

ORDER DISMISSING RULE TO SHOW CAUSE.

Filed June 10, 1922.

SECOND DISTRICT COURT
OF THE CITY OF NEWARK.

HOMESTEAD BUILDING CO., a corporation, *Plaintiff,* *vs.* WAVERLY BUILDING AND LOAN ASSOCIATION, a corporation, *Defendant.*	*On Contract.* *Order Dismissing Rule to Show Cause.*

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A rule to show cause having been entered in this cause on the thirty-first day of March, nineteen hundred and twenty-two, and this cause having been argued by Michael J. Quigley, of counsel for the plaintiff, and Philip J. Schotland, of counsel for the defendant, and the Court having considered the same and finding no cause for making the rule absolute;

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It is thereupon, on this 10th day of June, nineteen hundred and twenty-two, on motion of Michael J. Quigley, ORDERED that the said rule to show cause be, and the same is, hereby dismissed, and the judgment is hereby confirmed.

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LOUIS R. FREUND,
Judge.

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STATE OF THE CASE SETTLED BY COURT.

SECOND DISTRICT COURT, CITY OF NEWARK.

HOMESTEAD BUILDING COMPANY, a corporation, *Plaintiff,* vs. WAVERLY BUILDING & LOAN ASSOCIATION, a corporation, *Defendant.*	*On Appeal. State of the Case Settled by Court.*

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On March 8th, 1921, the plaintiff applied to the defendant for a mortgage loan of ten thousand ($10,000) dollars upon lands, with building thereon in the course of construction. The Board of Directors of the defendant association granted the loan. During the course of construction, defendant association determined to reject that loan, but after the payment of a new committee fee, in May, 1921, it again agreed to grant such loan, upon condition that one thousand ($1,000) dollars thereof be credited by a prepaid certificate of stock of the association, to be assigned by the plaintiff company to the association as security additional to the mortgage. On June 14, 1921, the defendant association not having sufficient cash funds on hand, consummated the loan by giving the plaintiff company six thousand ($6,000) dollars in cash and four thousand ($4,000) dollars in prepaid stock. In accordance with agreement between the parties, a one thousand ($1,000) dollar certificate of the prepaid stock was assigned by the plaintiff company to the defendant association as further security. At the time of the consummation of the loan, June 14, 1921, the defendant association deducted from the cash proceeds two hundred ($200) dollars as interest from March 8, 1921, to date of

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closing, June 14, 1921. The bond and mortgage executed by the plaintiff company embraced a clause to the effect that interest thereon was to run from March 8, 1921. It was apparent that interest, even if charged from March 8, 1921, to date of consummation should only be one hundred and fifty ($150) dollars, and accordingly the defendant association returned to the plaintiff company the sum of fifty ($50) dollars. After the execution of the mortgage and the usual adjustments between the parties, plaintiff corporation instituted suit for one hundred and fifty ($150) dollars, claiming that such sum was in excess of the interest due defendant association.

Judgment was rendered for plaintiff in the sum of one hundred and fifty-six dollars and seventy-five cents ($156.75), six dollars and seventy-five cents ($6.75) thereof being interest on the sum of one hundred and fifty ($150) dollars.

Exceptions prayed and granted.

In Witness Whereof, I have hereunto set my hand this 27th day of July, 1922.

LOUIS R. FREUND,
Judge.

Attested:

James E. Garrigan,
Clerk.

EXHIBIT D. 1 (Mortgage).

THIS INDENTURE, Made the eighth day of March, in the year of our Lord One Thousand Nine Hundred and twenty-one, BETWEEN Homestead Building Company, a corporation duly organized and existing under the laws of the State of New Jersey, and having its principal office in the City of Newark, in the County of Essex and State of New Jersey, party of the First Part; AND Waverly Building and Loan Association, a corporation of the State of New Jersey, party of the Second Part;

WHEREAS, the said party of the first part is justly indebted to the said party of the second part, in the sum of Ten Thousand Dollars, lawful money of the United States of America, secured to be paid by its certain bond or obligation, bearing even date with these presents, in the penal sum of Twenty Thousand Dollars, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of Ten Thousand Dollars, lawful money as aforesaid, to the said party of the second part, its successors or assigns, in the manner following, viz.: By the payment of twenty-five cents per week on each of fifty shares of the capital stock of said Association owned by party of the first part and standing in its name on the books of said Association, and assigned to said party of the second part as collateral security for the payment hereof, and on which this loan is based, on Tuesday night of each and every week hereafter, or such other time as may hereafter be appointed for that purpose, until the said shares shall attain the par value of Two Hundred Dollars each, together with interest on said sum of Ten Thousand Dollars, to be computed from the date hereof at the rate of six per cent. per annum and payable weekly at the same time and in the same manner as the stock-payments aforesaid, and also all fines that may become due, as provided for by the Constitution and By-Laws of

said Association, which have been duly assented to by said party of the first part and are made a part hereof.

And it is thereby expressly agreed, that should any default be made in the payment of the said interest, or installment on said shares, 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 on said shares remain unpaid and in arrear for the space of three months 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 three months or should the said party of the first part refuse or neglect for ninety days after demand to produce and exhibit to the party of the second part the vouchers showing the payments of such tax, assessment, water rent or other lien due and payable, 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 Ten Thousand Dollars or the unpaid residue thereof with all arrearage of interest thereon, fines, shall at the option of the said 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 thereinbefore contained to the contrary thereof in any wise notwithstanding; as by the said bond or obligation, and the conditions thereof, reference being thereunto had, may more fully appear.

Now this indenture witnesseth, That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according

to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to it in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, and to its successors and assigns forever, ALL that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

BEGINNING on the westerly line of Homestead Road at a point therein distant northerly one hundred and thirty-three feet and seventy-two one-hundredths of a foot from the intersection of the same with the northerly line of Hawthorne Ave., from thence running in a course north fifty-four degrees six minutes west one hundred and thirteen feet and fourteen one-hundredths of a foot, from thence running in a course north forty-six degrees two minutes east thirty-three feet and fifty-one one-hundredths of a foot, from thence running in a course south fifty-four degrees six minutes east one hundred and seven feet and twenty-five one-hundredths of a foot to the westerly line of Homestead Road and thence running southerly along the westerly line of Homestead Road in a course south thirty-five degrees fifty-four minutes west thirty-three feet to the point or place of BEGINNING.

Being part of the same premises conveyed to party of the first part by Benjamin Handsman and Rebekah Handsman, his wife by deed dated Sept. 1, 1920, and recorded in the Essex County Register's Office in Bk. N 64 of deeds for said County on page 15.

It is further agreed that if the party of the first part shall make default in the payment of any taxes, or assessments that may be assessed or levied against the said

premises, it shall be lawful for said party of the second part to pay such assessments or taxes, and the amount so paid shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation and secured by these presents, payable on demand, with interest at the rate of six per cent. per annum, from the time of payment of such taxes or assessments. 10

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances;

TO HAVE AND TO HOLD the above granted and described premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to its and their own proper use, benefit and behoof forever. AND the said party of the first part, and its successors or assigns, the above described and granted premises, and every part thereof, with the appurtenances, in the quiet and peaceable possession of the said party of the second part, its successors, legal representatives and assigns against every person whomsoever will WARRANT and forever DEFEND. 20 30

PROVIDED ALWAYS, and these presents are upon this express condition, that if the said party of the first part, its successors or assigns, shall well and truly pay unto the said party of the second part, its successors or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void. 40

Exhibit D. 1 (Mortgage).

And it is also agreed, by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected, and to be erected upon the lands above conveyed, insured against loss or damage by fire, in some safe and responsible insurance company or companies to an amount approved of by the said party of the second part, its successors or assigns, and assign the policy and certificate thereof to the said party of the second part; and in default thereof it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation and secured by these presents, payable on demand with interest at the rate of six per cent. per annum, from the time of payment of such premium or premiums.

And the said party of the first part, the owner of the lands above described, for itself, its successors and assigns, does further covenant and agree to and with the said party of the second part, its successors and assigns, that it or they will not claim and shall not be entitled to any credit on the interest payable on this mortgage for taxes paid on the real property embraced herein, but will pay and bear all such taxes, so that the mortgagee shall receive the rate of interest above agreed on without reduction or abatement.

In Witness Whereof, the said party of the first part has caused these presents to be signed by its president, attested by its Secretary and its corporate seal to be hereto affixed the day and year first above written.

HOMESTEAD BUILDING COMPANY,

Per Jacob Ruby,

Pres.

Attest:

Benjamin Handsman,

Sec'y.

Exhibit D. 1 (Mortgage).

State of New Jersey, }
County of Essex. } *ss.*

Be It Remembered, That on this sixteenth day of June, the year of our Lord One Thousand Nine Hundred and Twenty-one, before me, the subscriber, a Notary Public, personally appeared Benjamin Handsman, who being by me duly sworn, doth depose and make proof to my satisfaction, that he well knows the corporate seal of Homestead Building Company, a corporation, the mortgagor mentioned in the within Indenture; that the seal thereto affixed is the proper corporate seal of the said company; that the same was so affixed thereto and the said mortgage signed and delivered by Jacob Ruby, who was at the date and execution thereof, the president of said company, in the presence of the said deponent, as the voluntary act and deed of the said company, and that the said deponent thereupon signed the same as subscribing witness.

BENJAMIN HANDSMAN.

Sworn and subscribed before me
on the day and year aforesaid.

Helen Jedell,
Notary Public of New Jersey.

Exhibit D. 1 (Mortgage).

MORTGAGE.

Homestead Building Company, a corporation,

To

10 Waverly Building and Loan Association, a corporation.

Dated, March 8, 1921.

Received in the Register's Office of the County of Essex, N. J., on the 18th day of June, A. D. 1921, at 9.42 o'clock in the
20 forenoon, and Recorded in Book Z43 of Mortgages for said County, on pages 562-564.

HOWARD S. DODD,
Register.

PHILIP J. SCHOTLAND,
Counsellor at Law,
Union Bldg., 9 Clinton St.,
30 Newark, N. J.

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EXHIBIT D. 1 (Bond).

Know All Men by These Presents: That Homestead Building Company, a Corporation, duly organized and existing under the laws of the State of New Jersey, and having its principal office in the City of Newark, County of Essex and State of New Jersey, and Benjamin Handsman, Jacob Ruby, and Rebecca Handsman of the City of Newark, in the County of Essex and State of New Jersey, are held and firmly bound unto Waverly Building and Loan Association, a body corporate of the State of New Jersey, in the sum of Twenty Thousand Dollars, lawful money of the United States of America, to be paid to the said Association, its successors or assigns, for which payment well and truly to be made, it and they bind itself, its successors or assigns, and their heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with its, their seals, Dated the Eighth day of March, One Thousand Nine Hundred and twenty-one.

The Condition of the above obligation is such that if the above bounden The Homestead Building Company, a corporation, Benjamin Handsman, Jacob Ruby and Rebecca Handsman, its successors and assigns, and their heirs, executors or administrators, shall well and truly pay, or cause to be paid unto the above named Association, its successors or assigns, the just and full sum of Ten Thousand Dollars in the manner following, viz: By the payment of Twenty-five cents on each of Forty-five shares of the capital stock of said Association, owned by the said Homestead Building Company, and standing in its name on the books of said Association, and assign to it as collateral security for the payment thereof, and on which this loan is based, on the Tuesday Night of each and every week hereafter, or such other time as may hereafter be appointed for that purpose, until the said shares shall attain the par value of Two Hundred Dollars each,

together with interest on said sum of Ten Thousand Dollars to be computed from the date hereof at the rate of six per cent. per annum, and payable weekly at the same time and in the same manner as the stock-payments aforesaid, and also all fines that may become due as provided for by the Constitution and By-Laws of said Association, which have been duly assented to by said obligor, and made a part hereof, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

And it is hereby expressly agreed, that should any default be made in the payment of the said interest, or installment on said shares, 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 the mortgage accompanying this bond, and become due and payable; and should the said interest or installment on said shares remain unpaid and in arrears for the space of three months 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 three months or should the said obligor refuse or neglect for ninety days after demand to produce and exhibit to the obligee the vouchers showing the payments of such tax, assessment, water rent or other lien due and payable, 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 Ten Thousand Dollars or the balance thereof remaining unpaid with all arreage of interest thereon and fines shall, 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 may not

Exhibit D. 1 (Bond).

then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

It is further agreed that if the party of the first part shall make default in the payment of any taxes or assessments that may be assessed or levied against the premises described in the mortgage accompanying this bond, it shall be lawful for said party of the second part to pay such assessments or taxes, and the amount so paid shall be a lien on the said premises described in the mortgage accompanying this bond, added to the amount of this bond or obligation and secured by the mortgage accompanying this bond, payable on demand, with interest at the rate of six per cent. per annum, from the time of payment of such taxes or assessments.

HOMESTEAD BUILDING COMPANY,

Per JACOB RUBY,
President.

Signed sealed and delivered
in the presence of:

HELEN JEDELL.

Attest:

BENJAMIN HANDSMAN,
Sec'y.

JACOB RUBY, (L. S.)
BENJAMIN HANDSMAN, (L. S.)
REBECCA HANDSMAN. (L. S.)

Exhibit D. 1 (Bond).

For Value Received, the Homestead Building Company, a Corporation, the within named obligor, does hereby assign, transfer, and set over unto the Waverly Building and Loan Association of Newark, N. J., the Fifty shares of stock, held by it in said Association, as collateral security for the payment of the debt mentioned in the within bond. And in case of default in payment of the dues, interest, cost of insurance or taxes upon premises mortgaged to the Association, or fines for non-payment of same, it hereby authorizes the Waverly Building & Loan Association to make sale of said Fifty shares of stock, at auction, at any general meeting thereafter and in its name to make and execute a transfer of said Fifty shares of stock to the purchaser of same, applying the proceeds of said sale to payment of said loan.

And further it does hereby elect to treat all past and future payments of dues on said stock as credits on the within bond and mortgage accompanying the same, and authorize and direct the officers of said Association to so appropriate and credit the same.

In Witness Whereof, The Homestead Building Company, a Corporation, has caused these presents to be signed by its President, attested by its secretary, and its corporate seal to be hereto affixed, this 16th day of June, A. D. 1921.

HOMESTEAD BUILDING COMPANY,

Per Jacob Ruby,
Pres.

Attest:

Benjamin Handsman,
Sec'y.

(Revenue stamps
attached.)

EXHIBIT D. 2.

THE WAVERLY BUILDING AND LOAN ASSOCIATION
OF NEWARK, N. J.

Organized December 7th, 1909.

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Meeting Room:
Kemper's Hall, Cor. Waverly Ave. & Hunterdon St.

OFFICERS:

Herman Scheininger, Pres. Louis Gertwagen, Treasurer
Louis Nurkin, Vice-Pres. John Zipfel, Jr., Secretary

Shareholders' Meeting:
Every Tuesday of Each Month.

Directors' Meeting:
First Tuesday of Each Month.

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Newark, N. J., Mar. 1, 1921

The undersigned desire to procure a Loan of $24,000 on the following described property: 2—2 family houses, 1 & 2 Homestead Park.

Value of Ground $4,000
Dimensions of Ground 66x110 .....
Value of Building $30,000
Dimensions of Building 22x60 each .....
Rents per month $360
Insured for $ .....
Additional Security offered .....
Remarks: .....

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Signature Benj. Handsman. Address 33 Homestead Park

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Exhibit D. 2.

We have examined the property described above and place the following values thereon.

Ground $4000.00

Buildings $24000.00

Louis Grauss, M. Steiner, Anthony Kousky, Louis Nurkin, Edward Baatz, Committee.

10 Committee: Louis Grauss, Edward Baatz, Max Steiner, Anthony Kousky, Louis Nurkin.

And recommend a loan of $20,000.00/100.

March 8th, 1921.

To be finished as per plans and as promised.

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OPINION OF SUPREME COURT.

Filed February 20, 1923.

NEW JERSEY SUPREME COURT.

HOMESTEAD BUILDING CO., *Plaintiff-Appellee,* *vs.* WAVERLY BUILDING & LOAN ASSOCIATION, *Defendant-Appellant.*	10

Argued November Term, 1922, before Justices Parker, Bergen and Minturn.

Michael J. Quigley, for plaintiff-appellee. 20

Philip J. Schotland, for defendant-appellant.

Per Curiam:

The state of the case shows that on March 8th, 1921, plaintiff applied to the defendant for a loan upon a mortgage of $10,000 and executed a mortgage as of that date; that on June 14th, 1921, the defendant not having sufficient cash to make the loan gave the plaintiff $6,000 cash and $4,000 in prepaid stock but retained interest on the mortgage from the date of execution amounting to $150. 30 For this sum the plaintiff brought suit and recovered and the defendant appeals. The only question is whether the plaintiff was bound to pay interest from the date of the mortgage or from the date he was paid the money. The Trial Court determined it was from the date the money was paid, and this we think was right. It is quite manifest from the state of the case that the money was not being held for the plaintiff from March 8th, because they were not able to consummate the loan in cash on June

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14th. There is no dispute about the facts but the defendant claims that according to the mortgage they are entitled to have interest from March 8th, although they did not pay the money until June 14th, 1921. Our opinion is that they are only entitled to interest from the time they advanced the money unless there was some arrangement that the defendant was to hold the money subject to the plaintiff's order, and there is no such proof.

The judgment will be affirmed with costs.

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NOTICE OF APPEAL AND GROUNDS.

Filed March 24, 1923.

NEW JERSEY SUPREME COURT.

HOMESTEAD BUILDING CO., a corporation, *Plaintiff-Appellee,* *vs.* WAVERLY BUILDING & LOAN ASSOCIATION, a corporation, *Defendant-Appellant.*	*On Appeal from Second District Court of City of Newark.* *Notice of Appeal and Grounds.*

10

To Michael J. Quigley, Esq., attorney of plaintiff-appellee:

SIR:

PLEASE TAKE NOTICE, that the defendant-appellant in the above-stated cause, hereby appeals from the whole of the judgment entered therein, to the New Jersey Court of Errors and Appeals in the last resort in all causes, on the following ground:

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That the Supreme Court erred in affirming the judgment of the District Court which it should have reversed.

Dated March 20, 1923.

PHILIP J. SCHOTLAND,
Attorney for and of Counsel with Defendant-Appellant.

30

Service of a true copy of the within notice of appeal and grounds is hereby acknowledged this twenty-first day of March, A. D. 1923.

M. J. QUIGLEY,
Attorney for Plaintiff-Appellee.

40

New Jersey Court of Errors and Appeals

HOMESTEAD BUILDING COMPANY, a corporation, *Plaintiff-Appellee,* *vs.* WAVERLY BUILDING AND LOAN ASSOCIATION, a corporation, *Defendant-Appellant.*	*On Appeal from Supreme Court.*

BRIEF FOR PLAINTIFF-APPELLEE

FACTS

The facts are set forth in the "State of the Case" settled by the District Court, State of the Case, pages 10 and 11 and in the *per curiam* opinion of the Supreme Court, State of the Case, pages 25 and 26.

The statement of facts in the brief of appellant is misleading and untrue. It states that the loan in question was granted March 8, 1921, and that the interest which the appellant kept, is interest from the date the loan was actually granted. It is true the loan was originally granted on that date, but the same was subsequently withdrawn by the appellant itself. A new application was made in May and a new loan granted on different terms. State case, page 10, lines 21 to 28.

It also states that there is no evidence as to when the building was finished. No such question was raised in the Court below.

It also states that the Court below did not allow appellant any interest for the time the appellee took

to complete the building or to have its security for the loan ~~prepaid~~ prepared and delivered and no time for the solicitor of the appellant to search the title and ascertain whether or not the security offered was good legally. No such questions were raised in the Court below.

ARGUMENT

POINT I

No transcript of the record of the proceeding in the Court below has been filed in this Court, and, consequently, there is nothing before this Court for review.

Bergen vs. *Lebret,* 1 N. J. Adv. R., page 483.

I am informed by the clerk of this court that the only papers filed in this court, are, the return of the notice of appeal, consisting of the notice of appeal, grounds of appeal and order on affirmance of the judgment below.

Only two questions were raised and decided in the Court below.

2. Could the appellee, a corporation, charge usury on the part of the appellant?

3. Was appellant entitled to charge interest from March 8, 1921?

POINT 2

Can the appellee, a corporation, charge usury on the part of the appellant?

It is true that a corporation cannot plead or set up the *defense* of usury to an action brought *against* it. P. L., 1902, page 459, 4 C. S., 5706.

The act has been construed not to apply to the ordinary debts of a corporation but to coupon mortgage bonds only, which are bought in the open market and which go into the hands of the public for investment.

> *Seacoast, etc., Co.* vs. *American Trusts Co.*, 89 N. J. Eq., 293; affirmed by this Court in 113 Atl. 489.
>
> *Mazaria* vs. *Hudson, etc., Co.*, 80 N. J. L., 35.
> *Lembeck* vs. *Jarvis, etc., Co.*, 70 N. J. E., 757.

POINT 3

Was appellant entitled to charge interest on the loan from March 8th, 1921?

Appellant relies on the case of *Muir* vs. *Newark Savings Institution*, 16 N. J. Eq., page 537, in which this Court held that it was not illegal to take interest "for money actually on hand and subject to the call of the borrower during the time he is engaged in completing his securities." That case is the law on the subject but it has no application to the facts before us.

The Court below found as a fact that the loan offered on March 8, 1921, was subsequently withdrawn by the appellant. Case, page 10, lines 21-23. Therefore under no conceivable theory can interest be charged or collected from that date. In May, 1921, a new application for the loan was made, a new committee fee paid and a new committee appointed and a new loan was granted, calling for additional security. Case, page 10, lines 23-29.

At the time the loan was consummated, June 14, 1921, the Court found as a fact, that the appellant did not have sufficient cash funds on hand. Case,

page 10, liens 30-35, and the appellee was given four thousand dollars ($4,000) in prepaid stock, and six thousand dollars ($6,000) in cash, less deductions, including the over-charge of two hundred dollars interest. The appellant did not have "the money actually on hand" even on the date of the consummation of the loan nor was it held "subject to the call of the borrower during the time he is engaged in completing the securities."

It is true the appellant now attempts for the first time to complain that it was not allowed interest for the time it took appellee to complete the building or to have its security prepared and the property searched. No such question was raised below.

We respectfully urge, that there is no error in the judgment of the Court below, and the same should be affirmed.

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HUGO WOERNER,
On Brief.

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New Jersey Court of Errors and Appeals

HOMESTEAD BUILDING COMPANY, a corporation, *Plaintiff-Appellee,* *vs.* WAVERLY BUILDING & LOAN ASSOCIATION, a corporation, *Defendant-Appellant.*	*On Appeal from the Judgment of the Supreme Court which Affirmed the Second District Court of the City of Newark*

APPELLANT'S BRIEF.

Facts.

The plaintiff brought suit in the Second District Court of the City of Newark to recover two hundred dollars, representing four months' interest which the defendant, a building and loan association, organized under the Building & Loan Act of this State, and doing business in the City of Newark, deducted from the proceeds of a loan made on the bond of the plaintiff company, secured by its mortgage on real estate in the City of Newark.

The plaintiff company applied on March 1, 1921, for a loan of twenty-four thousand dollars on two parcels of real estate in the City of Newark, and on March 8, 1921, the defendant building and loan association granted a loan of twenty thousand dollars on both parcels, which is ten thousand dollars on each (see Exhibit D. 2, pp. 23-24, State of the Case). One of the loans was paid out and is not in dispute. The one that is in dispute is the one which was paid on June 14, 1921, and from the proceeds of which the defendant association deducted four months' interest, at the rate of fifty dollars per month, one of which was returned to the plaintiff before this action was commenced, by its check for fifty dollars, it having been deducted through an error on the part of

the secretary of the association. The state of demand erroneously states that the loan in question was granted on or about the 14th of June, and the money was paid out on the 14th of June. The real fact is, that the loan was granted on March 8th, as appears from Exhibit D. 2, on page 24 of the State of the Case, and the interest, which the building and loan association kept, is interest from the date that the loan was actually granted. The application (Exhibit D. 2), above referred to, shows in the very last line on page 24 of the State of the Case, that the building is to be finished as per plans and as promised, showing that it was a construction loan; in other words, a loan on a building not yet completed. There is no evidence as to when the building was completed.

Under these circumstances, the Court below gave judgment for the plaintiff corporation, against the defendant building and loan association, for the full amount of the claim, one hundred and fifty dollars, with interest, which is a judgment for all the interest charged up to the date that the money was actually paid to the plaintiff corporation, and does not allow the defendant building and loan association any interest for any time that the plaintiff took to complete the building, or to have its security for the loan prepared and delivered, and no time for the solicitor for the building and loan association to search the title and ascertain whether or not the security offered was good legally. Upon this state of facts, the Supreme Court affirmed the judgment of the District Court in a per curiam opinion, appearing on page 25 of the State of the Case, without touching upon the legal questions involved.

ARGUMENT.

I.

The plaintiff, being a corporation, cannot plead usury and recover any part of the interest deducted from the proceeds of the loan upon its executed obligation.

P. L. 1902, P. 459.

> "No corporation shall hereafter plead or set up the defense of usury to any action brought against it to recover damages or enforce a remedy on any obligation executed by said corporation; provided, that this act shall not apply to any such action which is now pending."

In the case of *Lembeck* v. *Jarvis Terminal Cold Storage Co.*, 64 Atl. 126, 70 N. J. Eq. 757, Judge Reed, speaking for the Court of Errors and Appeals, after quoting the above statute, holds:

> "It is obvious, however, that the statute was passed to protect those that had made loans of money and had taken the paper or bonds of a corporation. As to such creditors it was doubtless intended to abolish the defense of usury *in toto*."

The above statute, as construed by the Court of Errors and Appeals, is dispositive of the case at bar, for here the building and loan association accepted the executed bond, secured by the executed mortgage of the plaintiff corporation, for the loan which was made, and comes directly within the language of the act which refers to an obligation executed. The obligation executed in the case at bar appears as Exhibit D. 1, on pages 12-22, inclusive, of the State of the Case.

It is true that the Supreme Court in *Mazarin* v. *Hudson County Real Estate & Building Co.*, 76 Atl. 322, 80 N. J. L. 35, held that the statute invoked did not bar a corporation from pleading usury on a contract to pay a broker a usurious commission; but a careful reading of Justice Garrison's opinion in the case shows that his decision is based upon the fact that the statute uses the words "obligation executed," and in his opinion an agreement to pay a broker a usurious commission is not

an obligation executed. This decision, therefore, is not in conflict with the Court of Errors and Appeals in the case above quoted, and does not change the construction of the statute here contended for by the building and loan association.

The plaintiff below accepted the proceeds of the loan on the above conditions, and actually paid the interest in question by permitting it to be deducted from the proceeds of the loan, and then brought the action to recover interest claimed to be usuriously paid upon its bond, secured by its mortgage.

II.

The defendant building and loan association claims that it is entitled to retain the interest from the date the mortgage was granted in accordance with its custom and rules and regulations; that it paid the money partly in cash and partly in prepaid stock, in accordance with the agreement made with the plaintiff at the time it granted the loan, and that it paid the money and delivered the prepaid stock (which bears interest) as soon as the plaintiff was ready with his security, and that under these circumstances the plaintiff, who acquiesced at the time of the arrangement, and at the time when the loan was granted and paid out, is not entitled to now maintain this action to recover the interest paid. The plaintiff, to be entitled to recover any interest paid, would have to show by a preponderance of the evidence, that the building and loan association did not have the money ready as agreed, and would have to show when it, the plaintiff, was ready with its security, and the building and loan association was not ready with its money. Unless this is shown, plaintiff cannot recover.

See *Muir* v. *Newark Savings Institution,* 17 N. J. Eq. 537, where Judge Elmer, speaking for the Court of Errors and Appeals, at p. 540, says:

> "No case has been produced which has held it to be illegal to reserve or take interest for money

actually on hand, and subject to the call of the borrower during the time he is engaged in completing his securities."

Defendant-appellant respectfully submits that usury cannot be presumed and where a plaintiff attempts to recover usurious interest paid, the burden of proof is upon him to show that there really was usury. In the case at bar, the only extent to which plaintiff's proof goes, as shown by the State of the Case settled by the Court is, the date of the application and the date when the money was actually paid out; the application which is Exhibit D. 2 appears on pages 23 and 24 of the State of the Case, and shows that the loan was granted March 8, 1921, and the very last line shows that it was a construction loan, for it reads: "To be finished as per plans and as promised."

Defendant respectfully submits that the burden of proof was on the plaintiff to show that defendant had no money being held for this loan until the building was finished, in order to recover any interest claimed to be usuriously paid, or how much money was kept on hand, and how much the defendant was short, for which it is wrongfully charging interest. There is no proof in the case that the prepaid stock, which was issued amounting to $4,000, did not bear interest from the same date as the plaintiff was called upon to pay interest on the loan, namely, March 8th.

For the reasons above given, and in accordance with the authorities cited, defendant-appellant respectfully submits that the judgment of the Supreme Court, affirming the judgment of the Second District Court, be reversed, and that judgment be directed to be entered in favor of the defendant-appellant.

Respectfully submitted,

PHILIP J. SCHOTLAND
Attorney for and of Counsel with
Defendant-Appellant.