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Notice of Appeal.

(Filed, February 16, 1928.)

IN CHANCERY OF NEW JERSEY.

10

Between:

VASSAR HOLDING Co., a
Corporation,
Complainant,

and

WILLIAM A. DUNLAP, et als.,
Defendants.

On Bill, &c.
Notice
of Appeal.

20

To Osborne & Marsellis Co., William A. Dunlap,
Julia F. Dunlap and Johan R. Johnson or
Philip Goodell, their Solicitor:

The complainant, Vassar Holding Co., a cor-
poration, hereby appeals from the order made in
the above entitled cause on the 30th day of Janu-
ary, 1928, and from the whole and every part
thereof, to the Court of Errors and Appeals in
the last resort in all causes.

30

Dated, February 14, 1928.

THOMAS BRUNETTO,
Solicitor for and of counsel with
complainant, Vassar Holding Co. 40

Bill of Complaint.

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

10 THOMAS BRUNETTO,
Solicitor for and of counsel with
complainant, Vassar Holding Co.

The order in the above entitled matter was made by the Chancellor on the advise of Vice-Chancellor Maja Leon Berry.

A true copy.
THOMAS BARBER,
Clerk.

20

Bill of Complaint.

(Filed, October 13, 1926.)

IN CHANCERY OF NEW JERSEY.

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

30 The complainant, Vassar Holding Co., a corporation of the State of New Jersey, respectfully shows that:

40 1. On July 10, 1923, Joseph Chiera and Bessie Chiera, his wife, being indebted to Charles Zimmer in the sum of \$15,000.00, executed to him a bond of that date to secure that sum, payable on July 10, 1925, with interest at the rate of six per centum per annum, payable half yearly from the date of the bond.

Bill of Complaint.

2. To secure payment of the bond, said Joseph Chiera and Bessie Chiera, his wife, executed to said Charles Zimmer 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 Register's Office of Essex County, in Book G 49 of mortgages, pages 49-51, on July 19, 1923. 10

3. The mortgaged premises are described as follows: 20

All that tract or parcel of land and premises, situate, lying, and being in the Town of Bloomfield, in the County of Essex and State of New Jersey.

BEGINNING at a point in the westerly side of Bloomfield Avenue, said point being distant northerly along same 177 feet from its intersection with the northerly side of Hill Street as said street and avenue are now monumented, which point of beginning is in the northerly line of land now belonging to Meta Fissler, formerly of Peter Condict; from thence running along said westerly side of Bloomfield Avenue north 21 degrees 34 minutes west 100 feet to the southerly line of land now or formerly belonging to John W. Schuchman; thence along same south 68 de- 40

Bill of Complaint.

10 grees 58 minutes west 263.32 feet to a corner in said land; thence still along same and line of land belonging to Kate A. Knapp south 21 degrees 34 minutes east 100 feet to aforesaid mentioned line of land now belonging to Meta Fissler formerly Peter Condict; thence along same north 68 degrees 58 minutes east 263.32 feet to the westerly line of Bloomfield Avenue at the place of BEGINNING.

The above description being made in accordance with survey made by Ernest Baechlin, dated September 9, 1921.

20 4. On September 23, 1926, said Charles Zimmer by written assignment assigned said bond and mortgage to complainant, which assignment having first been duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was recorded in the Register's Office of Essex County on October 7, 1926.

30 5. On October 24, 1923, Joseph Chiera and Bessie Chiera, his wife, mortgaged said land to the Phoenix Building and Loan Association of the City of Newark, for \$50,000, which mortgage was on November 3, 1923, registered in the Register's Office of Essex County in Book T 49 of Mortgages, on page 402.

40 6. On October 24, 1923, the said Charles Zimmer postponed the lien of his mortgage in favor of the mortgage to the Phoenix Building and Loan Association of the City of Newark, recorded

Bill of Complaint.

in Book T 49, page 402, so that the aforesaid mortgage to the said Phoenix Building and Loan Association would be a prior lien of record to that of the said Charles Zimmer, which postponement is dated October 24, 1923, and was recorded in the Essex County Register's Office on November 13, 1923, in Book 75 of postponements for said county, on page 231. 10

7. On November 2, 1923, Joseph Chiera and Bessie Chiera, his wife, mortgaged a part of said land to Melanie Dynner, Trustee, for \$25,717.10, which mortgage was on November 20, 1923, registered in the Register's Office of Essex County, in Book F 50 of Mortgages, on page 27. 20

The premises so as aforesaid mortgaged to Melanie Dynner are as follows:

All that tract or parcel of land and premises situate, lying and being in the town of Bloomfield, in the County of Essex and State of New Jersey. BEGINNING at a point in the west side of Bloomfield Avenue, said point being distant north along same 117 feet from its intersection with the north side of Hill Street, as said street and avenue are now monumented, which point of beginning is in the north line of land now belonging to Meta Fissler, formerly of Peter Condict; thence along said west side of Bloomfield Avenue north 21 degrees 34 minutes west 100 feet to the south line of land now or formerly belonging to John W. Schuchman; thence along same south 68 degrees 58 minutes west 100 feet; thence south 21 degrees 34 minutes east 40

Bill of Complaint.

100 feet to the aforementioned land now belonging to Meto Fissler, formerly of Peter Condict; thence along same north 68 degrees 58 minutes east 100 feet to the west line of Bloomfield Avenue at the BEGINNING.

10

8. On November 2, 1923, the said Melanie Dynner, Trustee, made a declaration of trust, which declaration of trust was on November 14, 1924, recorded in the Essex County Register's Office in Book 168 of assignments of mortgages for said county, on page 293, and in and by which said declaration of trust the said Melanie Dynner, Trustee, declared that the said mortgage was given to her for the purpose of securing and aiding the completion of the building on the premises described in said mortgage, and to secure to the several contractors and creditors, the amounts due them for labor performed and materials furnished in the erection and completion of said building; and further declared that Johan R. Johnson has an interest in said mortgage held by the said trustee, to the extent of \$9,690.93, and that the said trustee holds the legal title to said mortgage in trust for the said Johan R. Johnson "to the extent of the above sum and others."

20

30

9. Solicitor of the complainant has been informed that some of the beneficiaries entitled to the proceeds of the said mortgage are: Benjamin Cohn, trading as Uptown Iron Works, Benjamin Wulach, Alfonso D'Alessio, Daniel Kennedy, Alfred J. Hoffman, Bernard Mindes, John E. Talmadge, Jr., Joseph Falcone and Leonard E. Cousins.

40

Bill of Complaint.

Because of the failure of the trustees to name the beneficiaries having an interest in the said mortgage, the said Charles Zimmer alleges that he does not know the nature of the said trust; neither does he know whether any or all of the said alleged beneficiaries have any interest in the said lands and premises, by virtue of the aforesaid mortgage; neither has the said Charles Zimmer any knowledge as to whether there are any other beneficiaries who might have an interest in the said lands and premises by virtue of the aforesaid mortgage; neither has he knowledge of the amount, if any, that may be due to any or all of the aforesaid or unnamed beneficiaries, or if such interest exists or amount is owing, if the same is held by or due to any or all of the aforesaid or unnamed beneficiaries in an individual or representative capacity.

10

20

Any interest which the said Melanie Dynner, Trustee, the above named beneficiaries, as well as all unnamed beneficiaries have in said land is subject to the lien of complainant's mortgage.

10. By written assignment dated May 21, 1924, Johan R. Johnson assigned all his right, title and interest in and to the aforesaid mortgage recorded in Book F 50, page 27 unto The Osborne & Marsellis Co. as security for the indebtedness due by the said Johan R. Johnson to the said Osborne & Marsellis Co., which assignment was recorded on November 14, 1924, in Book 168 of Assignments for Essex County, on page 294.

30

Any interest which the said Johan R. Johnson and the Osborne & Marsellis Co. have in said

40

Bill of Complaint.

land is subject to the lien of complainant's mortgage.

10 11. On December 10, 1923, Joseph Chiera and Bessie Chiera, his wife, mortgaged the same land as covered by the complainant's mortgage to Johnson Investment Corporation, for \$10,000., which mortgage was on December 11, 1923, recorded in the Register's Office of Essex County in Book H 50 of Mortgages, page 116.

Any interest which the said Johnson Investment Corporation has in said land is subject to the lien of complainant's mortgage.

20 12. On August 15, 1923, A. J. Krohn & Sons, Inc., a corporation, filed in the office of the Clerk of the County of Essex, a lien under the act entitled "An Act to secure to Mechanics and others payment for their labor and materials in erecting any building and the supplements thereto," against the said mortgaged premises and the buildings thereon, as against Joseph Chiera and Bessie Chiera, his wife, owners, and Nathan Salzman, Phoenix Building & Loan Association of the City of Newark, Carl J. Duvneck and Charles Zimmer, mortgagees, for the sum of \$235.00, which lien claim is recorded in Book 15 of lien claims, on page 24.

30 Any interest which the said A. J. Krohn & Sons, Inc., a corporation, has in said land is subject to the lien of complainant's mortgage.

40 13. On June 30, 1924, Orange Screen Company, a corporation, filed in the office of the Clerk of the County of Essex, a lien under the act entitled

Bill of Complaint.

"An Act to secure to Mechanics and others payment for their labor and materials in erecting any building and the supplements thereto," against the said mortgaged premises, as against Joseph Chiera, builder, and Theresa Calandra, owner, for the sum of \$400, which lien claim is recorded in Book 15 of lien claims on page 466. 10

Any interest which the said Orange Screen Company, a corporation, has in said land is subject to the lien of complainant's mortgage.

14. On August 27, 1923, Joseph Chiera and Bessie Chiera, his wife, conveyed the said mortgaged premises by deed of that date to Theresa Calandra, in fee, which deed was on February 11, 1924, recorded in the Essex County Register's Office in Book A 70 of Deeds, on page 128. 20

15. On May 7, 1925, Theresa Calandra, single, conveyed said land by deed of that date to William A. Dunlap, in fee; which deed was on June 3, 1925, recorded in the Register's Office of Essex County, in Book E 72 of Deeds, on page 297.

Said deed to the said William A. Dunlap was a warranty deed and recites that the said conveyance was made subject to all liens and encumbrances and municipal liens. 30

Any interest which the said William A. Dunlap has in said land is subject to the lien of complainant's mortgage.

15a. Said William A. Dunlap is married and his wife's name is Julia F. Dunlap.

Any claim or interest she may have by way of inchoate right of dower, or otherwise, is subject to complainant's mortgage. 40

Bill of Complaint.

16. On June 11, 1923, Peoples Investment & Realty Co., a New Jersey corporation, recovered a judgment in the Second District Court of the City of Newark against Guiseppe Chiera and Tony Chiera, in the sum of \$400 damages and \$24 costs, which judgment was on June 14, 1923, docketed in the Essex Common Pleas Court in Book 23 of Docketed Judgments for Essex County, on page 269. 10

17. On March 26, 1923, Philip Montano recovered a judgment in the Second District Court of the City of Newark against Guiseppe Chiera and Tony Chiera in the sum of \$100 damages and \$9 costs, which judgment was on June 14, 1923, docketed in the Essex Common Pleas Court in Book 23 of Docketed Judgments for said County, on page 270. 20

18. On July 18, 1923, Peoples Investment & Realty Company recovered a judgment in the East Orange District Court of the City of East Orange against Guiseppe Chiera and Tony Chiera in the sum of \$200 damages and \$14.50 costs, which judgment was on July 19, 1923, docketed in the Essex Common Pleas Court in Book 23 of docketed judgments for said county, on page 309. 30

19. On September 20, 1924, and September 22, 1924, Peoples Investment & Realty Co., a New Jersey Corporation, and Philip Montano, caused executions on the aforesaid three judgments to be issued out of the Essex Common Pleas Court, directed to the Sheriff of the County of Essex, and in and by which executions the said Sheriff 40

Bill of Complaint.

of the County of Essex was commanded to make the sum of damages and costs due on the aforesaid three judgments out of the goods and chattels of the said Guiseppe Chiera and Tony Chiera; and if sufficient goods and chattels of the said Guiseppe Chiera and Tony Chiera could not be found whereof to make the same, then the said Sheriff was commanded to make the aforesaid damages and costs of the lands, tenements, hereditaments and real estate, whereof the said defendants, Guiseppe Chiera and Tony Chiera were seized on June 14, 1923, and June 14, 1924, and July 19, 1924, or at any time afterwards in whosoever hands the same may be. 10

20. On December 6, 1924, the Peoples Investment & Realty Co., a New Jersey corporation, assigned said Judgment to Ferdinando Calandra, which assignment was recorded in the Clerk's Office of Essex County on October 7, 1926. 20

21. On December 4, 1924, the said Philip Montano assigned said judgment to Ferdinando Calandra, which assignment was recorded in the Clerk's Office of Essex County on October 7, 1926. 30

22. On October 6, 1926, the said Ferdinando Calandra postponed the lien of his judgments in favor of the mortgage to Charles Zimmer so that the aforesaid mortgage of the said Charles Zimmer would be a prior lien of record to that of the judgments held by the said Ferdinando Calandra, which postponement was recorded October 7, 1926. 40

Bill of Complaint.

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

10 23. 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 and by insurers satisfactory to the mortgagee, 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 per centum per annum, should be a lien on said land added to the amount of the mortgage debt and secured by the mortgage.

20 24. Said mortgagors failed to keep the buildings on said land insured against loss or damage by fire in sufficient sum; and on October 8, 1926, complainant caused the same to be insured in the Hanover Insurance Company in the sum of \$17,000.00 for one year, and paid the sum of \$193.80 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 any of the defendants.

30 25. Said Joseph Chiera and Bessie Chiera, his wife, Theresa Calandra and William A. Dunlap, or one of them, have always been in possession of the mortgaged premises.

40

Bill of Complaint.

26. The principal sum of \$15,000.00 with interest thereon, from July 10, 1925, is due upon complainant's bond and mortgage.

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

10

1. That Wm. A. Dunlap, Julia F. Dunlap, Melanie Dynner, Trustee, John R. Johnson, Osborne & Marsellis Co., Benjamin Cohn, trading as Uptown Iron Works, Benjamin Wulach, Alfonso D'Alessio, Daniel Kennedy, Alfred J. Hoffman, Bernard Mindes, John E. Talmadge, Jr., Joseph Falcone and Leonard E. Cousins, Johnson Investment Corporation, Aaron J. Krohn, A. J. Krohn & Sons, Inc., Orange Screen Company, L. & L. Holding Company and Ferdinando Calandra, who are the defendants in this suit, may answer the bill of complaint, and each statement therein made.

20

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

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

30

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 its mortgage, with interest and costs.

40

Amendment to Bill of Complaint.

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

10 THOMAS BRUNETTO,
Solicitor for and of Counsel
with Complainant.

Amendment to Bill of Complaint.

(Filed, November 24, 1926.)

IN CHANCERY OF NEW JERSEY.

20 Between: }
VASSAR HOLDING Co., a corp., }
Complainant, }
and }
WILLIAM A. DUNLAP, et als., }
Defendants. }
On Bill, &c.
Amendment
to Bill of
Complaint.

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

The bill of complaint in the above entitled matter is amended by adding to paragraph one of the prayer for relief in the bill of complaint, page nine, the following:

“Theresa Calandra, Joseph Chiera and Bessie Chiera, as party defendants.”

40 THOS. BRUNETTO,
Solicitor of Complainant.

Answer.

(Filed, November 26, 1926.)

IN CHANCERY OF NEW JERSEY.

Between: } 10
VASSAR HOLDING Co., a }
Corporation, }
Complainant, }
and }
WILLIAM A. DUNLAP, et als., }
Defendants. } 20
On Bill, &c.
Answer.

The answer of Osborne & Marsellis Company, a corporation, with its principal place of business at No. 272 Bellevue Avenue, Upper Montclair, New Jersey, and of William R. Dunlap and Julia F. Dunlap, residing at No. 20 Wellesley Road, Upper Montclair, New Jersey, respectfully shows that:

1. They admit the allegations of paragraph 1 of the bill of complaint, except as to the amount of the indebtedness which defendants allege was \$12,000.00 and not \$15,000.00 30

2. They admit the allegations of paragraph 2, 3, 4, 5, 6, 7 and 8.

3. They have no knowledge as to the truth or falsity of the allegations of paragraph 9. 40

Answer.

4. They admit the allegations of paragraph 10 and 11.

10 5. They have no knowledge as to the truth or falsity of the allegations of paragraphs 12, 13 and 14.

6. They admit the allegations of paragraphs 15 and 15a.

7. They have no knowledge of the truth or falsity of the allegations of paragraphs 16, 17, 18, 19, 20, 21, 22, 23 and 24, and leave the complainant to its proof.

20 8. They admit the allegations of paragraph 25.

9. They deny the allegations of paragraph 26, alleging that the principal amount due on the bond and mortgage is \$12,000.00 less any interest that may have been paid on the difference between \$15,000.00 and \$12,000.00 for the two years, July 10, 1923, to July 10, 1925, to wit, the sum of \$360.00 leaving a balance of \$11,640.00 and interest from July 10, 1925.

30 PHILIP GOODELL,
Solicitor for Defendants.

I hereby consent to the above answer being filed as of time.

THOS. BRUNETTO,
Solicitor for Complainant.

Notice to Strike Out Paragraphs 1 and 9 of Answer.

(Filed, December 16, 1926.)

IN CHANCERY OF NEW JERSEY.

Between:

VASSAR HOLDING Co., a
Corporation,
Complainant,

and

WILLIAM A. DUNLAP, et als.,
Defendants.

On Bill, &c.
Notice to
Strike Out
Paragraphs
1 and 9 of
Answer.

10

20

To Osborne Marsellis Company, a corporation,
William A. Dunlap and Juliet F. Dunlap, de-
fendants.

Sirs and Madam:

PLEASE TAKE NOTICE, that on Tuesday, December 14th, 1926, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, at Chancery Chambers, 1060 Broad Street, Newark, N. J., I will apply to the Chancellor for an order striking out paragraphs one and nine of the answer filed by the above named defendants in the above entitled cause upon the following grounds:

30

a. That paragraph one of said answer is sham.

40

Affidavit.

IN CHANCERY OF NEW JERSEY.

Between:

10

VASSAR HOLDING Co., a
corporation,
Complainant,

and

WILLIAM A. DUNLAP, et als.,
Defendants.

On Bill, &c.
Affidavit.

20

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

Charles Zimmer, of full age, being duly sworn according to law, upon his oath deposes and says, that he is the Charles Zimmer who formerly owned a mortgage, dated July 10, 1923, made by Joseph Chiera and Bessie Chiera, his wife, in the nominal sum of \$15,000.00, same being the mortgage under foreclosure in the above entitled cause; that he is the Charles Zimmer who afterwards assigned said mortgage to the Vassar Holding Co.; deponent says that the most that he advanced on the said mortgage in the way of money or value was \$12,000.00; that he paid this money to his attorneys, Lowy & Lowy, for disbursements; that he is advised by Lowy & Lowy that the money was disbursed as follows:

30

40

To the \$12,000.00 was added \$306.50 due Joseph Chiera and Bessie Chiera from Lowy & Lowy on

Affidavit.

another account, and \$543.50 due them from a third account, making a total of \$12,850.00, disbursed as follows:

1923			
July 18,	To Johan R. Johnson,	\$2,000.00	10
	“ L. E. Cousins,	500.00	
	“ Lowy & Lowy for services,	50.00	
	“ paying off Duveneck		
	mortgage,	10,300.00	
		<hr/>	
		\$12,850.00	

Deponent says that he never paid any more money to Joseph Chiera, except the money that he paid to Messrs. Lowy & Lowy. 20

CHARLES ZIMMER.

Subscribed and sworn to this
13th day of December, 1926.

Before me,
MALVERN HAMEL,
Notary Public of
New Jersey. 30

A true copy.
THOMAS BARBER,
Clerk.

40

Order Denying Motion to Strike Out.

(Filed, December 16, 1926.)

IN CHANCERY OF NEW JERSEY.

Between:

10

VASSAR HOLDING Co., a Corporation,

Complainant,

and

WILLIAM A. DUNLAP, et als.,

Defendants.

On Bill, &c.

Order Denying Motion to Strike Out.

20

This matter being opened to the court by Thomas Brunetto, solicitor of the complainant Vassar Holding Co., in the presence of Philip Goodell, solicitor for the Osborne & Marsellis Company and William A. Dunlap, and on arguments being heard; and it appearing that the defense interposed by the Osborne & Marsellis Company is, subject to the proof of the facts therein alleged on the hearing, a good defense:

30

It is on this 16th day of December, nineteen hundred and twenty-six, hereby ORDERED that the motion of the complainant, that the answer of the Osborne & Marsellis Company be stricken out, be and hereby is denied, with costs.

Respectfully advised,

JOHN H. BACKES,

V. C.

A true copy.

40

THOMAS BARBER,
Clerk.

E. R. WALKER,

C.

Answer and Counterclaim of Joseph Chiera and Bessie Chiera, his wife, and Theresa Calandra.

(Filed, February 15, 1927.)

IN CHANCERY OF NEW JERSEY.

Between:

VASSAR HOLDING Co., a corp.,

Complainant,

and

WILLIAM A. DUNLAP, et als.,

Defendants.

On Bill, &c.

Answer and Counterclaim of Joseph Chiera and Bessie Chiera, his wife, and Theresa Calandra.

10

The answer of the defendants, Joseph Chiera and Bessie Chiera, his wife, and Theresa Calandra.

20

These defendants, Joseph Chiera and Bessie Chiera, his wife, the real owners of the equity of redemption, and Theresa Calandra, their trustee, answering the bill of complaint, say that:

1. Paragraphs one to six inclusive are admitted.

2. These defendants admit that part of paragraph seven which states that Joseph Chiera and Bessie Chiera, his wife, executed a mortgage on November 2, 1923, to Melanie Dynner as trustee. These defendants further answering said paragraph say that the said mortgage was executed by them to the said Melanie Dynner, trustee, and delivered to Philip Lowy, who was to hold same in escrow and not to record same until directed to do so by the defendants, Joseph Chiera and Bessie Chiera, his wife. The said mortgage

30

40

Answer and Counterclaim of Joseph Chiera and Bessie Chiera, His Wife, and Theresa Calandra.

was executed and delivered by the said Joseph Chiera and Bessie Chiera, his wife, upon the express agreement with the several contractors and persons for whose benefit said mortgage was executed, that they would extend credit and material and labor for the purpose of completing the building which was then in the course of construction upon the lands described in the bill of complaint, that the trustee was not to record said mortgage until advised by defendants Joseph Chiera and Bessie Chiera, his wife. The said mortgage was recorded November 20, 1923, contrary to the agreement which the said defendants, Joseph Chiera and Bessie Chiera, his wife, and the said trustee entered into. All of the persons for whose benefit said mortgage was executed by the said Joseph Chiera and Bessie Chiera, his wife, have failed to carry out their part of the agreement, although often requested to do so by the said Joseph Chiera and Bessie Chiera, his wife.

3. Paragraph eight of the bill of complaint is admitted with the exception of the allegation "That Johan R. Johnson has an interest in said mortgage held by the said trustee, to the extent of \$9,690.93, and that the said trustee holds the legal title to said mortgage in trust for the said Johan R. Johnson to the extent of the above sum and others." As to that the defendants deny. These defendants further answering said allegation say that the mortgage to the said Melanie Dynner is void for the want of consideration.

Answer and Counterclaim of Joseph Chiera and Bessie Chiera, His Wife, and Theresa Calandra.

4. As to paragraph nine defendants say that there are no moneys due to the supposed beneficiaries mentioned in said mortgage.

5. Defendants admit paragraphs ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four and twenty-five.

6. The defendants were compelled to expend large sums of money to supply new material, new labor for work which was improperly done by the beneficiaries of the said mortgage of which Melanie Dynner was the trustee. These defendants further answering the allegations of the bill of complaint relating to the said mortgage to Melanie Dynner as trustee say "that by reason of the failure of the persons for whose benefit said mortgage was given to complete their contracts with these defendants to supply proper labor and material for the completion of said building, these defendants were compelled to expend large sums of money to complete the work, labor and furnish the material which should have been furnished by said beneficiaries." Said sums of money were derived from and paid out of the proceeds of a mortgage which the defendants, Joseph Chiera and Bessie Chiera, his wife, executed to the Johnson Investment Corporation, on December 10th, 1923, nominally in the sum of \$10,000.00.

7. That the said mortgage given to the said Melanie Dynner as trustee is null and void and not alien upon the premises described in the bill

Answer and Counterclaim of Joseph Chiera and Bessie Chiera, His Wife, and Theresa Calandra.

of complaint, as the persons for whose benefit said mortgage was given, failed to furnish the consideration which said mortgage was given for.

10 8. These defendants further answering said bill of complaint say that the mortgages covering said premises should be in the following order of priority:

1. Phoenix Building and Loan Association in the nominal sum of \$50,000.00.

20 2. Vassar Holding Co., complainant, in the nominal sum of \$15,000.00.

3. Johnson Investment Corporation, in the nominal sum of \$10,000.00.

30 9. The mortgage of said Melanie Dynner is not a lien for the reason that all the persons for whose benefit said mortgage was given failed to carry out their contracts with these defendants, and said mortgage was delivered to the said trustee contrary to defendants' agreement with the trustee.

COUNTERCLAIM.

By way of counterclaim against Melanie Dynner, trustee, these defendants repeat the allegations set forth in paragraphs one to eight, inclusive, in their answer and pray that:

40 1. That said Melanie Dynner, trustee, may answer this counterclaim.

Answer and Counterclaim of Joseph Chiera and Bessie Chiera, His Wife, and Theresa Calandra.

2. That the bond and mortgage executed by the defendants, Joseph Chiera and Bessie Chiera, his wife, be declared not a lien upon the premises described in the bill of complaint and void and of no affect. 10

3. That the said Melanie Dynner, trustee, be decreed that she cancel the said mortgage of record and deliver the bond and mortgage to said defendants, Joseph Chiera and Bessie Chiera, his wife, and that the assignments of a part of said mortgage to Johan R. Johnson and from Johan R. Johnson to Osborne & Marsellis Co., be declared null and void and of no affect. 20

CHAS. S. SMITH,
Solicitor of Defendants, Joseph Chiera, Bessie Chiera and Theresa Calandra.

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Interlocutory Decree.

(Filed, February 28th, 1927.)

IN CHANCERY OF NEW JERSEY.

10 Between:

VASSAR HOLDING Co., a
Corporation,
Compl't,
and

WILLIAM A. DUNLAP, et als.,
Def'ts.

20

On Bill, &c.
Interlocutory
Decree.

This cause being opened to the Court by Thomas Brunetto, of counsel with the complainant, and it appearing that process of subpoena for the appearance of the defendant hath been duly issued and returned served upon William A. Dunlap, Julia F. Dunlap, Melanie Dynner, Trustee, Johan R. Johnson, Osborne & Marsellis Co., Benjamin Cohn, trading as Uptown Iron Works, Alfonso D'Alessio, Daniel Kennedy, Alfred J. Hoffman, Bernard Mindes, John E. Talmadge, Jr., Joseph Falcone and Leonard E. Cousins, Johnson Investment Corporation, Aaron J. Krohn, A. J. Krohn & Sons, Inc., Orange Screen Company, L. & L. Holding Company, Ferdinando Calandra, Theresa Calandra, Joseph Chiera and Bessie Chiera, Melanie Goodman (nee Dynner), Trustee, Edward M. Halpern and Benjamin Wulach, and that

30 the said defendants have not appeared and filed

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Interlocutory Decree.

any answer to said bill within the time limited by law, disputing the priority of complainant's mortgage, nor at any other time, nor has taken any other steps in this cause, but have wholly failed and neglected so to do:

10

IT IS THEREUPON, on this 28th day of February, in the year of our Lord one thousand nine hundred and twenty-seven, ordered, adjudged and decreed that the said bill be taken as confessed as against Melanie Dynner, Trustee, Johan R. Johnson, Benjamin Cohn, trading as Uptown Iron Works, Alfonso D'Alessio, Daniel Kennedy, Alfred J. Hoffman, Bernard Mindes, John E. Talmadge, Jr., Joseph Falcone and Leonard E. Cousins, Aaron J. Krohn, A. J. Krohn & Sons, Inc., Orange Screen Company, L. & L. Holding Company, Ferdinando Calandra, Theresa Calandra, Joseph Chiera and Bessie Chiera, Melanie Goodman (nee Dynner), Trustee, Edward M. Halpern and Benjamin Wulach, and that it be referred to John P. Manning, Esquire, one of the Masters of this Court, to ascertain and report the amount due to the said complainant for principal and interest upon the mortgage held by complainant upon the premises mentioned and described in the said bill of complaint, and also the amount due, if anything, to the said defendants upon their respective mortgages and judgments and to report accordingly; and also to ascertain and report the order and priority of the said several mortgages and judgments respectively, and whether they all embrace the same premises; and whether the said mortgaged premises should be sold together or in parcels, and if in parcels, in what

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Master's Report.

order, and that the said Master do make his report thereon with all convenient speed. And all further equity is reserved until the coming in of the said Master's report.

10 Respectfully advised,

BAYARD STOCKTON,
A. M.

E. R. WALKER,
C.

A true copy.
THOMAS BARBER,
Clerk.

20

Master's Report.

(Filed, November 17, 1927.)

IN CHANCERY OF NEW JERSEY.

Between:

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VASSAR HOLDING Co., a corp.,
Complainant,
and
WM. A. DUNLAP, et als.,
Defendants.

On Bill to
Foreclose.
Master's
Report.

40 In pursuance of an order of this Court, entered in the above entitled cause, bearing date the twenty-eighth day of February, 1927, I have been at-

Master's Report.

tended by Thomas Brunetto, Esquire, the solicitor of the complainant, by Philip B. Goodell, Esquire, the solicitor for William A. Dunlap, defendant, and also solicitor for the Osborne Marsellis Company, and Johann Johnson, and Charles B. Smith, Esquire, solicitor for Joseph Chiera and Teresa Calandra, and in the presence of the parties attending me, I have considered of the matters thereby referred to me.

10

And the solicitor of the complainant produced before me the mortgage in its bill mentioned, bearing date the twenty-third day of July, 1923, and made and executed by Joseph Chiera and Bessie Chiera, his wife, to Charles Zimmer, which said mortgage was duly acknowledged according to law, by the said mortgagor, and recorded as in said bill mentioned, as appears by endorsements thereon; and the complainant's solicitor also produced before me the bond intended to be secured by the said mortgage, which said bond and mortgage are marked Exhibits 1 and 2 for the complainant.

20

And the solicitor of the complainant also produced before me an assignment of the said bond and mortgage, dated September 23, 1926, made and executed by Charles Zimmer to the complainant, which said assignment was duly acknowledged according to law and recorded as in the bill mentioned as appears by endorsements thereon, which said assignment is marked Exhibit 3 for the complainant.

30

And I find that there is due to the complainant on its said mortgage, the sum of Twelve thousand Dollars (\$12,000) for principal and not the sum

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Master's Report.

of Fifteen thousand Dollars (\$15,000). It appears from the testimony of Charles Zimmer, the mortgagee, to whom the said mortgage was executed and delivered, had loaned through the office of Mr. Lowy the sum of twelve thousand dollars (\$12,000) and *not* Fifteen Thousand Dollars (\$15,000), although the mortgage and also the bond that was executed and delivered to Mr. Zimmer was in the sum of Fifteen Thousand Dollars (\$15,000).

And I, therefore, find that there is due to the complainant on its said mortgage for principal and interest on this date the sum of Twelve Thousand Eight Hundred Sixty Eight Dollars and Eighty Cents (\$12,868.80) and I have appended hereto a schedule marked Schedule "A," showing how this amount of principal and interest due to the complainant was reached. Included in the aforementioned amount is the sum of One Hundred and Ninety-three Dollars and Eighty Cents (\$193.80) which was for insurance premiums paid by the said complainant. The amount of the principal that is due the complainant is Twelve Thousand Dollars (\$12,000), with interest thereon from July 10th, 1925, to the date hereof, at 6% per annum, which said interest amounts to the sum of \$1,644.00, adding to the amount of the principal and interest due the complainant the sum of One Hundred Ninety-three Dollars and Eighty Cents (\$193.80), making a grand total of \$13,857.80. There is to be deducted from this grand total of \$13,857.80 the sum of \$360.00 which the excess amount of interest that was paid on the mortgage of \$15,000. This leaves the net amount due to the complainant of \$13,497.80.

Master's Report.

And I further certify and report that the Schedule hereto annexed and making part of this, my report, marked Schedule "A," contains a statement and account of the principal and interest money due to the said complainant on the said mortgage as well as a statement of the credits due thereon, to which for greater certainty I refer.

I further report that the solicitor for the defendant, Johnson Investment Corporation, said solicitor being Samuel O. Offen, produced before me the mortgage in said complainant's bill mentioned, bearing date the tenth day of December, 1923, and made and executed by Joseph Chiera and Bessie Chiera, his wife, to Johnson Investment Corporation, which said mortgage was duly acknowledged according to law by the said Joseph Chiera and Bessie Chiera, his wife, and recorded as in the bill mentioned, as appears by endorsements thereon; and the said solicitor of the said defendant, Johnson Investment Corporation, also produced before me the bond intended to be secured by said mortgage, which said bond and mortgage are marked Exhibits D 1 and D 2 for the said defendant, Johnson Investment Corporation.

And I further report that it appears by the affidavit of the said Samuel O. Offen that there is due to the said defendant, Johnson Investment Corporation, which said affidavit is hereto annexed for principal and interest up to the tenth day of March, 1927, the sum of \$11,950.00, and there is to be added thereto interest from March, 1927, to the date of this report the further sum for interest amounting to \$350, making the grand total due to the Johnson Investment Corp. the sum of \$12,300.

Master's Report.

And I certify and report that the schedule hereto annexed and making part of this, my report, marked Schedule "B," contains a statement and account of the principal and interest money due to the said Johnson Investment Corporation, to which for greater certainty I refer. 10

And I further report that Alfred J. Hoffman produced before me his affidavit, which is annexed to this, my report, and which the said Alfred J. Hoffman states that there is due to him for principal the sum of \$968.00, together with interest thereon from November 2nd, 1923, to March 9th, 1927, making a total of \$1,105.32, to which is to be added for interest from March 9th to the date of this, my report, the further sum of \$33.88, making the grand total due to the said Alfred J. Hoffman, the sum of \$1,139.20. 20

And I further certify and report that the schedule annexed and making part of this, my report, marked Schedule "L," contains a statement of the principal and interest money due to the said Alfred J. Hoffman, to which for greater certainty I refer.

And I further report that the said The Osborne and Marsellis Company produced before me the mortgage in said complainant's bill mentioned, dated November 2, 1923, made and executed by Joseph Chiera and Bessie Chiera, his wife, to Melanie Dynner, Trustee, which said mortgage is duly acknowledged according to law and recorded as in the bill mentioned, as appears by endorsements thereon and the said The Osborne and Marsellis Company also produced before me the bond intended to be secured by said mortgage, which 40

Master's Report.

said bond and mortgage are marked Exhibits 3 and 4 for the defendant, The Osborne and Marsellis Company.

And I further report that the said Melanie Dynner assigned the said Bond and Mortgage to Johan R. Johnson by assignment of mortgage dated November 2, 1923, and recorded as in the bill mentioned and as appears by endorsement thereon, which said assignment has been marked Exhibit D-5 for the defendant, The Osborne and Marsellis Company. 10

And I further report that the said Johan Johnson assigned the bond and mortgage to The Osborne and Marsellis Company by assignment of mortgage dated May 21, 1924, and recorded as in the bill mentioned and as appears by endorsement thereon, which said assignment has been marked Exhibit D-6 for the defendant, The Osborne and Marsellis Company. 20

And I find that there is due to the said The Osborne and Marsellis Company on its said mortgage for principal and interest on this date, the sum of \$11,968.61.

And I certify and report that the schedule hereto annexed and making part of this, my report, marked Schedule "D" contains a statement and account of the principal and interest money due to the said The Osborne and Marsellis Company, to which for greater certainty I refer. 30

And I further certify and report that the same premises comprised in the complainant's mortgage first above mentioned is also comprised in the mortgage made by Joseph Chiera and Bessie Chiera, his wife, to Johnson Investment Corpora- 40

Master's Report.

tion and that the said mortgage of the said complainant was made and executed prior to the mortgages held by the said defendant, The Johnson Investment Corporation, and by Melanie Dynner, Trustee, and is entitled to priority in payment, and that the mortgage to Melanie Dynner is a lien on only a part of the premises described in complainant's said mortgage, but was executed and recorded prior to the mortgage given to the defendant, Johnson Investment Corporation, and is entitled to be secondly paid, and that the mortgage to Johnson Investment Corporation is entitled to be thirdly paid, and that it is necessary that the whole of the said mortgaged premises should be sold to raise and pay the monies due to the complainant, and to the defendants, Osborne Marsellis Company (who are the assignees of the Melanie Dynner mortgage), Johnson Investment Corporation, and Albert J. Hoffman, together with the costs of this suit.

And I further report that the complainant has incurred expenses for obtaining certificates of search in the Courts and public offices of this State against or in relation to the title to the mortgaged premises to the amount of \$196.46; and I have examined the abstracts of search and the statements of fees, and in my opinion, such searches were necessary for the proper foreclosure of the said mortgages, which said certificate of search is marked Exhibit C 6 for complainant.

All of which is respectfully submitted this thirty-first day of October, 1927.

JOHN P. MANNING,
Master in Chancery of New Jersey.

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Schedule "A."

BOND bearing date July 10, 1923, in the penal sum of \$30,000, conditioned for the payment of \$15,000, in two years from the date thereof, with interest at the rate of six per cent. per annum, secured to be paid by the mortgage in the complainant's bill mentioned. The actual amount that was loaned on said bond secured by said mortgage was the sum of \$12,000 and <i>not</i> the sum of \$15,000 and the actual amount that is due to the complainant on principal in the sum of.....	\$12,000.	10
Interest from July 10th, 1925, to the date hereof, October 31st, 1927, is.....	1,664.	20
Insurance premiums paid by complainant	193.80	
	<hr/>	
Amount due complainant this 31st day of October, 1927	\$13,857.80	
Less a credit for interest paid on \$15,000, which amounts to the sum of	360.	
	<hr/>	
Net amount due to the complainant	\$13,497.80	30

Schedule "B."

BOND bearing date December 10, 1923, in the penal sum of \$200,000., conditioned for the payment of \$10,000., in one year from the date thereof, with interest at the rate of six per cent. per annum, se-

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Schedules, Annexed to Master's Report.

	cured to be paid by the mortgage in the complainant's bill mentioned	\$10,000.	
	With interest from December 10th, 1923, to October 31st, 1927	2,300.	
10	Amount due to Johnson Investment Corp.	\$12,300.	

Schedule "C."

20	BOND bearing date November 2, 1923, in the penal sum of \$51,434.20 conditioned for the payment of the sum of \$25,717.10, in three years from the date thereof, with interest at the rate of six per cent. per annum secured to be paid by the mortgage in the complainant's bill mentioned	\$ 9,690.93	
	With interest thereon from November 2, 1923, to October 31, 1927	2,277.68	
	Amount due to O. & M.	\$11,968.61	

Schedule "D."

40	BOND bearing date November 2, 1923, in the penal sum of \$51,434.20, conditioned for the payment of the sum of \$25,717.10, in three years from the date thereof, with interest at the rate of six per cent. per annum secured to be paid		
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Depositions.

	by the mortgage in the complainant's bill mentioned. Amount due one Alfred J. Hoffman, who was one of the beneficiaries under the aforementioned mortgage	\$ 968.00	
	With interest from November 2, 1923, to October 31, 1927	171.20	10
	Amount due to Alfred J. Hoffman.....	\$1,139.20	

Depositions.

IN CHANCERY OF NEW JERSEY. 20

Between:			
	VASSAR HOLDING Co., a Corporation, <i>Complainant,</i>	} On Bill, etc. Depositions.	
	and		
	WILLIAM A. DUNLAP, et als., <i>Defendants.</i>		30

Depositions in the above entitled cause taken before me, the Master to whom the said cause was referred by an Interlocutory Decree, bearing date the 28th day of February, 1927, on Friday, the 18th day of March, 1927, at two o'clock in the afternoon, at my office, 763 Broad Street, Newark, New Jersey, and in the presence of Thomas Bru-

Depositions.

netto, Esquire, solicitor for complainant, Philip B. Goodell, Esquire, solicitor for William A. Dunlap, the Osborne Marsellis Company, and Johann Johnson, and Charles S. Smith, Esquire, appearing for Joseph Chiera and Teresa Calandra.

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JOHN P. MANNING,
Master in Chancery of New Jersey.

State of New Jersey,)
County of Essex,) ss.:

I, Ruth E. Whiteley, do solemnly swear that
20 I will faithfully and truly take stenographically and reproduce in typewriting the testimony to be given in a certain cause wherein Vassar Holding Co., a corporation, is complainant, and William A. Dunlap, et als., are defendants, so help me God.

RUTH E. WHITELEY.

Subscribed and sworn to before me this
30 18th day of March, 1927.

JOHN P. MANNING,
Master in Chancery of New Jersey.

40

Joseph Chiera—Direct Examination.

JOSEPH CHIERA, being duly sworn according to law, testified as follows:

Examination by Mr. Brunetto:

Q. I show you a bond from Joseph Chiera and Bessie Chiera, his wife, to Charles Zimmer which has been marked Exhibit C 1 and ask you if that is your signature on that (showing witness paper)? A. Yes, that is my signature. 10

Q. And I call your attention to the signature of Bessie Chiera, is that your wife's signature? A. Yes.

Q. You executed the bond and mortgage to Mr. Zimmer? A. Yes. 20

Mr. Brunetto: I offer this in evidence.

Q. And I call your attention to Exhibit C 2, which is a mortgage dated July 10th, 1923, and ask you is that your signature (showing witness paper)? A. Yes.

Q. And is that the signature of your wife, Bessie Chiera? A. Yes.

Q. This mortgage is to secure \$15,000? A. Yes. 30

Q. You signed that? A. Yes.

Mr. Brunetto: I offer that in evidence; also assignment from Charles Zimmer to the Vassar Holding Company, dated September 23, 1926, which has been signed, executed and acknowledged. Same received and marked Exhibits C 2 and C 3.

Q. Mr. Chiera, I now show you estoppel certificate from Joseph Chiera, et als., to the Vassar 40

Joseph Chiera—Cross Examination.

Holding Company, which has been marked Exhibit C 4, and I call your attention to the signature, Joseph Chiera and Bessie Chiera and Teresa Calandra; did you see these people sign this estoppel certificate (showing paper)? A. Yes.

10 Q. Is that your signature, and the signatures of your wife and sister-in-law? A. Yes.

Q. They signed and acknowledged it? A. Yes.

Q. And it is dated September 30th, 1926? A. Yes.

Cross Examination by Mr. Goodell:

Q. In the estoppel certificate you say that there is \$15,000. due on the mortgage; how much money did Mr. Zimmer pay you? A. \$15,000.

20 Q. How did he pay it, Mr. Chiera? A. I signed the mortgage and he paid the money to Mr. Lowy.

Q. Because the mortgage is for \$15,000. you assume that he paid Mr. Lowy \$15,000? A. Yes.

Q. Did you make any agreement with Mr. Zimmer that if he loaned you \$12,000. you would pay \$15,000.? A. No.

Q. Do you know what Mr. Lowy did with that money? A. He paid the laborers, etc.

30 Q. Did Mr. Lowy ever give you a statement of what he did with that money? A. He said he paid the money due under the contract.

Q. Have you that with you? A. No.

Q. Did he ever pay you any money personally? A. No.

Q. So that the only money due on this mortgage is what Mr. Lowy paid to the contractors? A. Yes. That is right.

40

William A. Dunlap—Direct Examination.

Re-direct by Mr. Brunetto:

Q. Have you ever paid any interest yourself on account of this bond and mortgage? A. I do not remember.

10

WILLIAM A. DUNLAP, being duly sworn according to law, upon his oath deposes and testifies as follows:

Q. Are you the secretary of the Osborne Marsellis Company, one of the defendants? A. Yes.

Q. Are you familiar with their accounts and credits? A. Yes.

Q. Has anything ever been paid to them by the owner of the property on account of their interest in the third mortgage on this property standing in the name of Melannie Dynner, in trust for certain creditors? A. No.

20

Q. Is the Osborne Marsellis Company still owner of Mr. Johnson's interest in that property? A. Yes.

By Mr. Brunetto:

30

Q. Mr. Dunlap, have you been collecting the rents and income out of this property?

Mr. Goodell: I object to that. It is not relevant. Mr. Dunlap is the receiver of rents; first under arrangement with the parties and laterally as receiver appointed by the Court.

40

The Master: The objection is sustained.

Johan R. Johnson—Direct Examination.

Q. Out of the rents that you have collected out of the premises, have you paid any interest on the second mortgage? A. Yes. I sent a check to Mr. Lowy on account of the interest.

10 Q. How much was that check for? A. I don't recall at the present moment.

Q. It was for \$450.00, wasn't it? A. Yes, it was.

Q. I show you a statement, Mr. Dunlap, and ask you if you have seen that before (witness being shown paper)? A. Yes. This is a copy of a report of receipts and disbursements under the trustees' agreement covering the premises under foreclosure.

20 Mr. Brunetto: I offer this in evidence.

The Master: The same will be received and marked Exhibit C 4.

Q. And you say that this payment of interest of \$450. was six months interest on the mortgage of \$15,000.? A. Yes.

30 JOHAN R. JOHNSON, being duly sworn according to law, upon his oath deposed and testified as follows:

Q. I show you duplicate of record signed and acknowledged by Melanie Dynner, admitting that she is the holder of a certain mortgage in the sum of \$25,717.00 recorded in book F 50 of mortgages for Essex County, and that she holds an interest
40 in the sum of \$9,690.93 in trust for one J. R.

Johan R. Johnson—Cross Examination.

Johnson; are you the J. R. Johnson for whom Miss Dynner held the mortgage in trust? A. Yes. I never received one penny of it.

Q. So that there is due you \$9,690.93 and interest from the time of the mortgage? A. Right.

Q. That you have assigned to the Osborne Marsellis Company? A. Yes. 10

Mr. Goodell: I offer the declaration of trust and the assignment; I can't offer the mortgage because although I have a copy of it here, I have been unable to get it certified.

Cross Examination by Mr. Smith:

20

Q. What constituted your interest in this trust mortgage, Mr. Johnson, to the extent of \$9,690.93? A. It was for carpenter work.

Q. Were you the carpenter contractor on the job? A. I was.

Q. To whom did you render the bills? A. To the Marsellis Company.

Q. What bills do you mean? A. What bills do you mean?

Q. What did the \$9,690.93 represent? A. The work I did. 30

Q. Any materials? A. Yes, all the woodwork in the house, sash, doors, and all.

Q. From whom did you buy the material?

Mr. Goodell: I object to this line of examination. It is not cross examination in so far as Mr. Smith's examination is direct testimony. 40

Depositions.

Mr. Smith: I leave the Court to rule. He states he has an interest in the trust mortgage. I am trying to find out how he acquired it.

10 Mr. Goodell: Miss Dynner assigned it to him; that is in the record.

Mr. Smith: I withdraw the question.

Depositions.

IN CHANCERY OF NEW JERSEY.

20 Between:

VASSAR HOLDING COMPANY,
a corporation,
Complainant,

and

WILLIAM A. DUNLAP, et als.,
Defendants.

On Bill, etc.
Depositions.

30

Further depositions in the above entitled cause taken before me, the Master to whom the said cause was referred by an order heretofore recited herein, on Wednesday, the twenty-third day of March, 1927, at two o'clock in the afternoon, at my office, 334 Prudential Building, Newark, New Jersey, and in the presence of Thomas A. Brunetto, solicitor for complainant; Philip Goodell, representing William A. Dunlap, the Osborne

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Charles Zimmer—Direct Examination.

Marsellis Company and Johann Johnson; and Charles S. Smith, representing Joseph Chiera, Bessie Chiera and Teresa Calandra.

JOHN B. MANNING,
Master in Chancery of New Jersey. 10

CHARLES ZIMMER, being duly sworn according to law, upon his oath deposed and testified as follows:

Examination by Mr. Brunetto:

Q. Through Mr. Lowy did you negotiate a loan to Joseph Chiera on property in Bloomfield, New Jersey? A. Yes. 20

Q. How much did you agree to lend Mr. Chiera?

Mr. Goodell: I object to that. The bond and mortgage speak for themselves.

Mr. Brunetto: Then I will phrase the question a little differently.

Q. How much did you lend Mr. Chiera? A. Mr. Lowy told me \$12,000. 30

Q. That's what you gave Mr. Lowy? A. Yes.

Q. And for that you received a bond and mortgage from Mr. Chiera for \$15,000.? A. Yes, for two years.

Q. That same mortgage you later assigned to the Vassar Holding Company? A. Yes.

Q. What did they pay you for that? 40

Charles Zimmer—Direct Examination.

Mr. Goodell: I object to the form of the question.

Q. How much did you receive from them for the mortgage? A. I didn't receive anything.

10 Q. You gave Mr. Lowy the \$12,000., and after two years you were to get \$15,000.? A. Yes.

Q. But you didn't get it? A. No.

Q. How much did you get? A. Only six per cent. interest.

Q. Did you get the \$12,000. back? A. No.

Q. Mr. Zimmer, you didn't have anything to do with this transaction, Mr. Philip Lowy, who is now dead, handled the whole thing for you? A. Yes.

20 Mr. Goodell: I object to the question.

The Master: I will admit the question.

Q. He was your attorney? A. Yes.

Q. Mr. Zimmer, I now show you a bill of complaint in a certain cause wherein Charles Zimmer is the complainant and Harry B. O'Connell, Sheriff of Essex County, and Ferdinand Calandra and others are defendants, docket 62/53, and I show the signature Charles Zimmer and ask you if that is your signature? A. That is my signature.

30 Q. Mr. Zimmer, this paper which I call your attention to is an affidavit purporting to be an affidavit sworn to on the 27th of February, 1926, before Goldie Gottlieb; you swore to that affidavit, didn't you? A. Yes.

40 Mr. Brunetto: I am now offering in evidence the bill of complaint in a certain cause wherein Charles Zimmer is complain-

Mr. Bernard Mindes—Direct Examination.

ant and Harry B. O'Connell, Sheriff of Essex County, and Ferdinand Calandra are defendants, Docket 60/253, which was received in the office of the Clerk in Chancery, March fourth, 1926.

Mr. Goodell: I object to its entry on the ground that the suit is not between the same parties and it is immaterial and irrelevant. 10

The bill of complaint is objected to. However, the affidavit attached to it would not be objected to.

The Master: It is a file of the Court and will be accepted.

Mr. Smith: I make a motion that the Master report only on the first and second mortgages and the balance of the money be paid into the Court. 20

MR. BERNARD MINDES, being duly sworn according to law, testified as follows:

I want to offer in evidence certificate by the Trustee, Melannie Dynner, that Bernard Mindes has an interest in that Trustee's mortgage to the extent of \$1,000. 30

The Master: I will not accept that without some proof of the signature of Melannie Dynner.

Mr. Mindes: I might say that Melannie Dynner is an attorney at law of the State of New Jersey, and she had offices 40

Herman Waldman—Direct Examination.

with Lowy and Lowy, and Mr. Waldman, who is here today, will identify her signature.

10 HERMAN WALDMAN, being duly sworn according to law, testified as follows:

I am an attorney at law of the State of New Jersey and a solicitor of the Court of Chancery and have my office at 19 Clinton Street, Newark, New Jersey. I know Melannie Dynner, and the signature attached to the paper that has been offered in evidence by Mr. Bernard Mindes is the signature of the said Melannie Dynner.

20

The Master: The same will be received and marked in evidence.

MR. MINDES, recalled.

30 The amount of \$1,000.00 is still due to me besides the interest thereon at six per cent. per annum from November 2nd, 1923.

Mr. Smith: I object on the general motion that I have made to the Court.

The Master: The objection will be overruled.

I will allow an exception.

40

Charles Zimmer—Direct Examination.

MR. ZIMMER, recalled, and examined by Mr. Brunetto:

Q. When you swore to this affidavit which is attached to the bill of complaint in file No. 50-263, on the 27th day of February, 1926, you knew the contents before you swore to that? A. Sure. 10

Q. And what was in that affidavit was true? A. Yes.

Mr. Brunetto: This is the original file in the case of Charles Zimmer, complainant, and Harry B. O'Connell, Sheriff of Essex, and Ferdinand Calandra, defendants, which I offer in evidence.

The Master: The same will be received. 20

Q. I show you the bill of complaint in the case in the Court of Chancery wherein Charles Zimmer is complainant and William A. Dunlap and others are defendants, which was filed by Herman Waldman, solicitor of the complainant, on or about March 30th, 1926, and I call your attention to the signature to this affidavit dated the 27th day of March, 1926, and ask if that is your signature? A. That's my signature. 30

Mr. Brunetto: I now offer that bill of complaint in evidence which is filed in Docket 60-413. Same is received and marked in evidence.

Q. Mr. Zimmer, before you signed that affidavit, you read it? A. Yes.

Q. And whatever you said in that affidavit was true? A. Yes. 40

Malvern Hammil—Direct Examination.

Q. You read the bill of complaint? A. Yes.

Q. And all the statements in there were true?
A. Yes.

Q. Now, you say your attorney, Philip Lowy,
handled this loan for you with the Chieras? A.
10 Yes.

Q. And you say you gave him \$12,000.; you
didn't expect to give your attorney any more
money for the \$15,000. mortgage, did you? A. No.

Q. You have received interest on this mortgage
in the sum of \$15,000. for two years? A. Yes, for
two years.

Q. Part of it was paid by the Chieras and part
by Mr. Dunlap? A. I received the money from
20 Mr. Lowy's office and I don't know whether it was
paid by Mr. Chiera or by Mr. Dunlap.

Q. The interest on this bond and mortgage in
the sum of \$15,000. was paid to July 10th, 1925?
A. Yes. For two years it was paid.

30 MALVERN HAMMIL, being duly sworn according to law, upon her oath deposed and testified as follows:

Examination by Mr. Goodell:

Q. Were you the bookkeeper in Mr. Lowy's office at the time of this transaction? A. I was office manager and the books were kept under my direction.

Q. Will you turn to your record of receipts and disbursements which had to do with the loan to
40 the Chieras?

Malvern Hammil—Direct Examination.

Mr. Brunetto: I desire to enter an objection to this testimony, first, because the books which they are offering in evidence are the books of Philip Lowy, and he is dead. The only person to testify as to the books would be the executors of Mr. Lowy's estate; then I enter a second objection, ir-
10 respective to what they show, this testimony would be irrelevant and immaterial to the issue herein.

Mr. Goodell: The firm is Lowy and Lowy. We want to show how the money was paid out by Mr. Lowy.

The Master: The testimony will be accepted.
20

Q. How much money did you receive from Mr. Zimmer on this account? A. I don't know.

Q. Did you have anything to do with the making of this statement (showing witness paper)?

Mr. Brunetto: I object to that because the statement is not in evidence and I don't know what it is.

Mr. Goodell: You can read it.
30

Q. Were these books kept under your direction?
A. Mr. Philip Lowy kept the books.

Q. It was a partnership, wasn't it? A. Yes, but Mr. Lowy kept his own books.

Q. Then they were kept under your direction?
A. Yes.

Mr. Goodell: The witness will be excused. The books will also be excused, for
40 the present.

Mr. Herman Waldman—Direct Examination.

Mr. Howard F. Kirk—Direct Examination.

MR. HERMAN WALDMAN, recalled:

By Mr. Brunetto:

10 Q. You were the solicitor of record for the complainant in a certain suit wherein Charles Zimmer was complainant and William A. Dunlap was defendant, in the Court of Chancery, wherein the bill was filed March 30th, 1926; you presented the bill? A. I did.

Q. And the contents of the bill were true so far as you know? A. Yes.

20 Q. You were also the solicitor in another matter in the Court of Chancery wherein Charles Zimmer was the complainant and Harry B. O'Connell, Sheriff of Essex County, and Ferdinand Calandra were defendants? A. Yes.

Q. And the contents of the bill in that case were true? A. So far as I know.

30 MR. HOWARD F. KIRK, being duly sworn according to law, testified as follows:

By Mr. Brunetto:

Q. You are an attorney at law and counsellor of the State of New Jersey? A. I am.

Q. You are connected with the Vassar Holding Company, the complainant in this cause? A. I am its secretary.

40 Q. Are you familiar with the facts relating to the assignment of mortgage from Joseph Chiera

Depositions.

to Charles Zimmer and from Charles Zimmer to the Vassar Holding Company? A. I am.

Q. I show you an estoppel certificate which has been marked Exhibit C 4 and ask you whether or not you have seen that estoppel certificate before? A. Yes. 10

Q. When? A. Around the first of October, 1926.

Q. That was before the corporation took the assignment of this mortgage? A. Yes.

Q. I show you an assignment marked Exhibit C 3 from Charles Zimmer to the Vassar Holding Company, the complainant, and I show you bond and mortgage marked Exhibits C 1 and C 2, and ask whether the Vassar Holding Company are the holders of said bond and mortgage and assignments? A. Yes, they are. 20

Q. They hold them today? A. They do.

Depositions.

IN CHANCERY OF NEW JERSEY.

Between:

VASSAR HOLDING COMPANY,
a corporation,
Complainant,

and

WILLIAM A. DUNLAP, et als.,
Defendants.

30 On Bill, etc.
Depositions.

40 Further depositions in the above entitled cause, taken before me, the Master to whom the said

Depositions.

cause was referred by an order heretofore recited herein, on Thursday, the thirty-first day of March, 1927, at two o'clock in the afternoon, at my office, 334 Prudential Building, Newark, New Jersey, and in the presence of Thomas A. Brunetto, solicitor for the complainant; Philip Goodell, representing William A. Dunlap, the Osborne Marsellis Company and Johann Johnson; and Charles S. Smith, representing Joseph Chiera, Bessie Chiera, and Teresa Calandra.

JOHN P. MANNING,
Master in Chancery of New Jersey.

Mr. Goodell: I offer for the attention of the Master, affidavit of Charles Zimmer, dated December 13th, 1926. The original of this affidavit is on file with the Clerk in Chancery in this cause, having been used on the argument of the motion to strike out the answer of the Osborne Marsellis Company.

Mr. Brunetto: I desire to offer an objection to the said affidavit being offered in evidence on behalf of the said defendant on the ground that the same is incompetent, and upon the additional ground that complainant is entitled to cross examine Charles Zimmer on the contents of the said affidavit; that the said Charles Zimmer not being produced by the said defendant; also upon the additional ground that the facts stated in said affidavit are facts contained in a book of Philip Lowy which was offered in evidence by the said defendant and not admitted.

40

Johann Johnson—Direct Examination.

JOHANN JOHNSON, being recalled, testified as follows:

Examination by Mr. Goodell:

Q. Did you ever have any conversation with Mr. Chiera about the amount due on this mortgage? A. Yes. 10

Mr. Brunetto: I object to that unless Mr. Chiera himself were asked if he had any such conversation and then Mr. Johnson could testify to impeach him.

Mr. Goodell: The reason this testimony is offered is that Mr. Chiera testified that there was \$15,000. due; I now want to show that that has not always been his story. 20

The Master: I will admit it.

Q. What did Mr. Chiera tell you? A. When the \$15,000. was disbursed between the contractors, we had to sign a release and I said to Chiera I ought to get \$5,000., or I won't sign, and then he came and said, "I can only give you \$2,000., because I only got \$12,000." 30

Cross Examination by Mr. Brunetto:

Q. When did that take place? A. That was around the 18th or 20th of July, 1923, when I got that money.

Q. Was Mr. Zimmer present? A. No. He brought the money to me.

Q. That was a conversation between yourself and Chiera? A. Yes. 40

Johann Johnson—Cross Examination.

10 Mr. Brunetto: I move to strike out the conversation between the witness and Mr. Chiera on the ground that any statement made by Chiera in the absence of Zimmer is not binding on the complainant.

10 The Master: The motion will be denied. Exception allowed.

Further Cross Examination by Mr. Brunetto:

Q. Did Chiera say that he expected to get any more money from Zimmer? A. No. He said that he was short, that he only got \$12,000. He said he thought he could give me more money later.

20 Q. But he told you Lowy had given him \$12,000. on the second mortgage. A. Yes.

By Mr. Goodell:

Q. Did Mr. Chiera say anything to lead you to think that he might get more money on this mortgage, or tell you that all the money he was to get was \$12,000.? A. He didn't say.

30

40

Depositions.

IN CHANCERY OF NEW JERSEY.

Between:

VASSAR HOLDING COMPANY,
a corporation,
Complainant,

and

WILLIAM A. DUNLAP, et als.,
Defendants.

10 On Bill, etc.
Depositions.

Further depositions in the above entitled cause, taken before me, the Master to whom the said cause was referred by an order heretofore recited herein, on Monday, the twenty-fifth day of April, 1927, at two o'clock in the afternoon, at my office, 334 Prudential Building, Newark, New Jersey, and in the presence of Thomas A. Brunetto, solicitor for the complainant, and Philip Goodell, representing William A. Dunlap, the Osborne Marsellis Company and Johann Johnson.

20 30

JOHN P. MANNING,
Master in Chancery of New Jersey.

Mr. Thomas Brunetto, solicitor for the complainant, makes application to take further testimony in the cause.

Mr. Goodell objects on the grounds that the testimony has been closed several weeks ago by the master and that this application is made after the brief has been filed for the answering defendants.

40

Mr. Charles Zimmer—Direct Examination.

The Master: The objection will be overruled and the testimony will be allowed to be taken, and if the Master considers the same of value the same will be used and if not, same will not be used and not filed.

10

MR. CHARLES ZIMMER, being recalled and re-sworn, testified as follows:

Examination by Mr. Brunetto:

Q. Mr. Zimmer, did you ever meet Mr. Chiera, the mortgagor in this case, before the execution of the bond and mortgage? A. I saw him, yes.

20

Q. Did you meet him before you agreed to loan him the money? A. No.

Q. Did you make any agreement with him as to loaning him the money? A. Nothing at all.

Q. In your previous testimony you say you gave to Mr. Lowy \$12000.? A. Yes.

Q. Do you know how much money Mr. Lowy paid to Mr. Chiera? A. I don't know.

30

Q. Mr. Philip Lowy, who died since this suit was started, was your lawyer? A. Yes. I used to trust him with my money.

Q. Did Mr. Lowy have more money of yours other than this \$12000.? A. Not at that time.

Q. You gave Mr. Lowy \$12000. and you received a bond and mortgage for \$15000.; how was the difference to be made up? A. I don't know anything about it. I always thought whatever he done was right. I don't know what he done.

40

Mr. Charles Zimmer—Direct Examination.

Q. When you say that you received six per cent. as interest, did you receive that interest on \$12000 or on \$15000.? A. I will tell you the truth. I don't know how he used to pay me. I used to believe Mr. Lowy like my own father and I don't know if he paid me interest for \$15000. or not.

10

Q. But the bond and mortgage was for \$15000.? A. Yes.

Q. Was the other \$3000. to be a bonus? A. This I don't know anything about.

Mr. Goodell: I object.

By Mr. Brunetto:

Q. When you filed your foreclosure bill on or about the 27th day of March, 1926, you read the bill of complaint prepared by your lawyer, Mr. Waldmann? A. Yes.

20

Q. And in paragraph 31 of the bill of complaint it says that the whole amount of principal with interest thereon from July 10, 1925, was due upon complainant's bond and mortgage; the complainant being yourself; what did you mean by that? A. What are you asking me about?

30

Q. What did you mean by the word "principal"? A. What was coming to me.

Q. What did you think was coming to you? A. What we made it out for was \$12000. I have got \$12000. invested in your company.

Q. But the mortgage was for \$15000., and you received interest on \$15000.? A. This I don't remember. Mr. Lowy didn't pay me interest on \$15000.

40

Mr. Charles Zimmer—Direct Examination.

Q. Mr. Lowy didn't pay you interest on \$15000.?
A. No, I never got it.

Q. Then the only interest you got for those two years was on \$12000.? A. Yes.

10 Q. I call your attention to the fact that on or about the 15th day of December, 1926, you swore to an affidavit in this cause, namely, the Vassar Holding Company against William A. Dunlap and others, and in that you say that the most you advanced on said mortgage in the way of money was \$12000.; that you paid this money to Lowy and Lowy for disbursements, and then the affidavit further states that you were advised by Lowy and Lowy that the money was disbursed as follows: To the \$12000. was added \$306.50 due 20 Joseph Chiera and Bessie Chiera from Lowy and Lowy on another account and \$543.50 due them from a third account, making a total of \$12,850; disbursed as follows: 1923, July 18, Johann R. Johnson \$2,000. to L. E. Cousins, \$500.; to Lowy and Lowy for services, \$50.00, paying off Duveneck mortgage, \$10,300., making a total of \$12,850., and in the said affidavit the said Charles Zimmer states that he never paid any more money 30 to Joseph Chiera except the money he paid to Lowy and Lowy.

Q. Do you know anything of any other account that Chiera had with Lowy? A. No.

Q. Do you know what other account the \$543.00 came off then? A. No, I don't know anything about it.

40 Q. At the time that you made this affidavit did you know anything about a Duveneck mortgage?
A. No.

William A. Dunlap—Direct Examination.

Q. Did you call Mr. Lowy's attention, at the time that you got this bond and mortgage, to the fact that it was for \$15,000., when you only gave him \$12,000.? A. No. I didn't.

Mr. Goodell: I object. It doesn't make 10 any difference whether he called his attention to it or not.

The Master: Objection sustained.

By the Master:

Q. The only amount of money that you advanced to Lowy and Lowy on the Chiera loan was \$12,000.? A. That's all. 20

By Mr. Goodell:

Q. Mr. Zimmer, you state that you got interest only on \$12,000; that would be \$360; are you sure that you didn't get \$450. sometimes? A. Then Mr. Lowy got it.

Q. I show you a check which purports to be endorsed by you, is that your signature (showing witness check)? A. Yes. That's my signature. 30

Q. You don't remember what interest you actually did get then? A. No.

WILLIAM A. DUNLAP, recalled:

Examination by Mr. Brunetto:

Q. Mr. Dunlap, the last time you were on the witness stand I asked you whether you had paid 40

William A. Dunlap—Direct Examination.

any interest on the second mortgage and your answer was yes, and that you had paid \$450.; that was six months' interest on the mortgage which is being foreclosed; which was made by Joseph Chiera and Bessie Chiera, his wife, to Charles Zimmer and later assigned to the Vassar Holding Company, on property 382 Bloomfield Avenue and to which you are holding a deed in trust for Teresa Calandra; I now show you a check on the Peoples' National Bank, dated August 20th, 1925, payable to the order of Charles Zimmer for \$450. and signed "William A. Dunlap, Trustee," and ask you whether or not you drew that check (showing witness check)? A. I did.

20 Mr. Brunetto: I offer that check.

Q. At the time that you paid that installment of interest you were holding the title of the property as trustee for Teresa Calandra and other persons? A. Yes.

Q. And at that time you understood that the principal due on the second mortgage now being foreclosed, made by Joseph Chiera and Bessie Chiera, his wife, was for \$15,000? A. That was the amount stipulated in the mortgage.

Q. That was why you paid \$450. as six months' interest? A. Yes, on the principal sum of \$15,000.

Mr. Goodell: No cross examination.

Howard F. Kirk—Direct Examination.

HOWARD F. KIRK, being recalled, testified as follows:

Examination by Mr. Brunetto:

Q. Prior to the assignment of the mortgage originally made by Joseph Chiera and Bessie Chiera, his wife, to Charles Zimmer, which mortgage was dated July 10th, 1923, and recorded in Book G 49 of mortgages, I now show you the bond and mortgage which have been marked as exhibits in this cause; did you make any inquiries of anyone on behalf of the Vassar Holding Company as to what was due on that bond and mortgage? A. I did. I interviewed Joseph Chiera and asked him how much was due on the bond and mortgage and he said \$15,000., and I told him I wanted to get an estoppel certificate to that effect.

Q. Did you at any time inquire of anyone else besides Chiera, before the Vassar Holding Company took the assignment as to what there was due? A. Yes. I asked Mr. Waldmann, Zimmer's attorney, and he told me there was \$15,000. due.

Q. You mean Mr. Waldman, the solicitor in the proceedings wherein Charles Zimmer is complainant and William A. Dunlap and others are defendants in Docket 60-413, the bill of complaint of which was signed on or about March 30th, 1926?

Mr. Goodell: I object. Not to his talking to Mr. Waldmann, but as to what Mr. Waldmann said, because if he told him that

Howard F. Kirk—Direct Examination.

there was \$15,000. due that didn't make it so.

By Mr. Brunetto:

10 Q. Did you inquire of anyone else? A. I inquired of Mr. Waldmann who represented Mr. Zimmer and he told me that there was \$15,000. due.

Q. Do you know who had physical possession of the bond and mortgage before its delivery to the Vassar Holding Company? A. Mr. Waldmann.

20 Q. To whom did you deliver the check for the assignment of this bond and mortgage? A. I delivered to Mr. Waldmann a check made payable to Mr. Zimmer.

Q. And subsequent to the conversation that you had with Mr. Chiera, you received the estoppel certificate dated September 30th, 1926, which has been offered in evidence? A. I did. I saw that and upon the strength of it I delivered the check of the Vassar Holding Company to Mr. Waldmann.

30 Q. Have you that check with you? A. No. I have not got it with me.

Q. Do you remember the date? A. Some time in October, I believe.

Mr. Goodell: It is set up in the testimony.

40 Q. Mr. Kirk, at the time you delivered the check for the \$12,000. to Mr. Waldmann, for Mr. Zimmer, this is the assignment that you received which

Howard F. Kirk—Cross Examination.

has been offered in evidence and marked Exhibit C 3? A. That is the one.

Q. Was the estoppel certificate delivered to you at the same time, or before or after the bond and mortgage and the assignment? A. Before. I saw the bond and mortgage and the estoppel certificate before I would deliver any check. 10

Cross Examination by Mr. Goodell:

Q. You are an attorney at law of New Jersey? A. Yes.

Q. Did you note when you took the assignment that no representations were made therein as to the amount due? A. Yes. I noted that. 20

Q. You know as a counsellor that it is usual to have such representation made? A. I don't say that I do.

Q. Did you comment on it? A. I did.

Q. To whom? A. To Mr. Waldmann.

Q. But you accepted it as it was? A. Yes. I asked Mr. Waldmann if there was \$15,000. due and he said there was.

Q. Mr. Zimmer did not put that clause in the assignment? A. I did not feel that it was necessary. 30

Mr. Goodell: I object as to how he felt.

A. (Cont'd) I didn't think it was necessary as it was a valid, full assignment of a fifteen thousand dollars mortgage. 40

Joseph Goldring—Direct Examination.

JOSEPH GOLDRING, being duly sworn according to law, upon his oath deposed and testified as follows:

Examination by Mr. Brunetto:

- 10 Q. Where do you live? A. In Newark.
 Q. You are an officer of the complainant corporation, the Vassar Holding Company? A. Yes.
 Q. What is your official position? A. I am president.
 Q. How long have you been president of said company? A. Close to three years.
 Q. Were you an officer of the company in the months of September and October, 1926? A. Yes.
 20 Q. Do you know anything about the facts relating to the assignment of a mortgage from Charles Zimmer to the Vassar Holding Company on or about the sixth day of October, 1926? A. Yes.
 Q. Did you make any inquiries of anyone in regard to the amount which was due on the said bond and mortgage before the Vassar Holding Company took the said assignment? A. Yes.
 30 Mr. Goodell: I object. What difference does it make?
 The Master: It will be admitted.
 Q. From whom did you inquire? A. I inquired of Joseph Chiera first.
 Q. What did Mr. Chiera say as to the amount due on the said bond? A. He said the mortgage was for \$15,000., and I asked him about interest, which was running from July, 1925, wasn't it?
 40 Mr. Brunetto: That is in the evidence.

Exceptions to Master's Report.

IN CHANCERY OF NEW JERSEY.

(Filed, November 17, 1927.)

Between:

VASSAR HOLDING Co., a corp.,
Complainant,
 and
 WILLIAM A. DUNLAP, et als.,
Defendants.

On Bill, &c.
 Exceptions
 to Master's
 Report.

10

Exceptions taken by complainant to the report of John P. Manning, Special Master, filed November 16, 1927.

20

FIRST EXCEPTION.

For that the said special master has reported as follows:

“And I find that there is due to the complainant on its said mortgage, the sum of Twelve Thousand Dollars (\$12,000) for principal and not the sum of Fifteen Thousand Dollars (\$15,000). It appears from the testimony of Charles Zimmer, the mortgagee, to whom the said mortgage was executed and delivered, had loaned through the office of Mr. Lowy the sum of Twelve Thousand Dollars (\$12,000.) and *not* Fifteen Thousand Dollars (\$15,000.), although the mortgage and also the bond that was executed and delivered to Mr. Zimmer was in the sum of Fifteen Thousand Dollars (\$15,000).”

30

40

Exceptions to Master's Report.

Whereas, he should have reported that there was due on complainant's said bond and mortgage the sum of \$15,000. with interest thereon from July 10, 1925, to date of said report.

10 SECOND EXCEPTION.

For that the said special master has reported as follows:

20 "And I, therefore, find that there is due to the complainant on its said mortgage for principal and interest on this date the sum of Twelve Thousand Eight Hundred Sixty Eight Dollars and Eighty Cents (\$12,868.80) and I have appended hereto a schedule marked Schedule 'A,' showing how this amount of principal and interest due to the complainant was reached. Included in the
 30 aforementioned amount in the sum of One Hundred and Ninety Three Dollars and Eighty Cents (\$193.80), which was for insurance premiums paid by the said complainant. The amount of the principal that is due the complainant is Twelve Thousand Dollars (\$12,000), with interest thereon from July 10th, 1925, to the date hereof, at 6% per annum, which said interest amounts to the sum of \$1,664.00, adding to the amount of the principal and interest due the complainant the sum of One Hundred Ninety Three Dollars and Eighty Cents (\$193.80), making a grand total of \$13,857.80. There is to be deducted from this grand total of \$13,857.80 the sum of \$360.00, which was the excess amount of interest that was paid on the mortgage of \$15,000. This leaves the net
 40 amount due to the complainant of \$13,497.80.

Exceptions to Master's Report.

"And I further certify and report that the Schedule hereto annexed and making part of this, my report marked Schedule 'A,' contains a statement and account of the principal and interest money due to the said complainant on the said mortgage as well as a statement of the credits due thereon, to which for greater certainty I refer." 10

Whereas, he should have certified and reported that there was due complainant the sum of \$15,000. with interest from July 10, 1925, to date of his report, plus the sum of \$193.80, being fire insurance premium paid by the complainant, making a total of \$17,274.30.

In all which particulars the report of said master is, as the said complainant is advised, erroneous and contrary to law and the evidence and the said complainant appeals therefrom to the judgment of this honorable court. 20

THOMAS BRUNETTO,
Solicitor of Complainant.

A true copy.

THOMAS BARBER,
Clerk. 30

Notice of Hearing.

(Filed, November 28, 1927.)

IN CHANCERY OF NEW JERSEY.

10	Between: VASSAR HOLDING Co., a corp., <i>Complainant,</i> and WILLIAM A. DUNLAP, et als., <i>Defendants.</i>	}	On Bill, &c. Notice of Hearing.
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Sir:

20 TAKE NOTICE, that the above cause will be brought to a hearing before the Chancellor, at Chancery Chambers, Industrial Building, 1060 Broad Street, Newark, New Jersey, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, on Tuesday, November 29, 1927, upon the exceptions taken by the complainant to the report of John P. Manning, one of the Masters of this Court, bearing date October 31, 1927.

30 Dated, November 19, 1927.

THOMAS BRUNETTO,
Solicitor of Complainant.

To

PHILIP B. GOODELL, Esq.,
Sol'r. of defendants, William A. Dunlap,
Osborne and Marsellis Company and
Johann Johnson.

40

Letter of Vice Chancellor Maja Leon Berry.

COURT OF CHANCERY OF NEW JERSEY,

TOMS RIVER, N. J.

December 23, 1927.

Chambers of

MAJA LEON BERRY,
Vice Chancellor.

10

THOMAS BRUNETTO, Esq.,
9 Clinton Street,
Newark, N. J.

PHILIP GOODELL, Esq.,
491 Bloomfield Avenue,
Montclair, N. J.

20

Gentlemen:

In the matter of Vassar Holding Company vs. William Dunlap, I have examined the file in this cause very carefully and have read and considered the briefs of counsel submitted on the exceptions to the master's report and I am writing to advise you that I will advise an order confirming the master's report. There are really only two questions involved in this controversy, the first being as to the availability of the defence of usury to the defendants Osborn and Marsellis Company. This defendant stands in the position of a subsequent mortgagee defendant and there is ample authority in this state to the effect that the defence of usury is available to a subsequent mortgagee defendant, in a foreclosure suit. Brolasky vs. Miller, 9 N. J. Eq., 807; Truesdell vs. Dowden,

30

40

Letter of Vice Chancellor Maja Leon Berry.

47 N. J. Eq., 399; Berk vs. Isquith Productions, Inc., 98 N. J. Eq., 608, 131 A., 526.

The other question is as to the effect of the estoppel certificate signed by the defendants Chiara and Calandra on the rights of Osborn and Marsellis Company. The mortgage in which Osborn and Marsellis Company have an interest and by reason of which they are made parties defendant is dated November 2, 1923, and recorded November 20, 1923. The estoppel certificate is dated September 30, 1926. This was four days after the assignment of the Zimmer mortgage to the complainant and obviously the estoppel certificate was not relied upon by the assignee; but irrespective of this fact, an estoppel certificate executed by Chiara and Calandra nearly three years after the Osborn and Marsellis Company mortgage was placed on record, cannot prejudice their rights as mortgagee. The estoppel certificate may operate as a waiver on the part of Chiara and Calandra to the defence of usury but it cannot take away from Osborn and Marsellis Company the rights which accrued to them under their mortgage upon its execution and recording.

I will advise an order confirming the master's report, as I agree with him on his findings of fact.

I am returning to Mr. Brunetto the estoppel certificate referred to, copy of Bill of Complaint Zimmer vs. Dunlap, Docket 60, page 413, copy of answer Riley vs. Hopkinson, docket 35, page

Order on Exceptions to Master's Report.

366, and copy of answer Kohn vs. Kelly, docket 30, page 699.

Very truly yours,

MAJA LEON BERRY.

MLB:S

10

P. S. It is suggested in briefs of counsel that the defence of usury is not properly pleaded, but if not, the answer may be amended to properly present this question.

Order on Exceptions to Master's Report.

20

(Filed, January 30, 1928.)

IN CHANCERY OF NEW JERSEY.

Between:

VASSAR HOLDING Co., a
Corporation,
Complainant,

and

WILLIAM A. DUNLAP, et al.,
Defendants.

On Bill, &c.
Order on
Exceptions
to Master's
Report.

30

Exceptions having been filed by the complainant, Vassar Holding Co., to the report of John P. Manning, one of the masters of this Court,

40

Order on Exceptions to Master's Report.

10 on the matters referred to him by an order of this Court made on the 28th day of February, 1927, and the matter coming on to be heard in the presence of Thomas Brunetto, solicitor of the complainant, and Philip Goodell, solicitor of the defendants, Osborne & Marsellis Co., William A. Dunlap, Julia F. Dunlap, and Johan R. Johnson, and the Court having considered the matter, and the arguments of counsel thereon:

It is, on this 30th day of January, Nineteen hundred and twenty-eight, ORDERED that the said master's report be and the same is hereby in all things ratified and confirmed according to the true tenor and meaning thereof.

20 It is FURTHER ORDERED that taxed costs and a counsel fee of One hundred.....dollars be allowed to Philip Goodell, solicitor of the defendants aforesaid, to be paid by the complainant.

Respectfully advised,

MAJA LEON BERRY,
V. C.

30 E. R. WALKER,
C.

A true copy.
THOMAS BARBER,
Clerk.

40

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between:

VASSAR HOLDING Co., a Corporation,
Complainant-Appellant,

and

WILLIAM A. DUNLAP, et als.,
Defendants-Appellee.

On Bill, &c.
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 Vassar Holding Co., a corporation of the State of New Jersey, the complainant-appellant in the above-stated cause, respectfully shows that your petitioner finds itself aggrieved by an Order made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the 30th day of January, 1928, wherein Vassar Holding Co., a corporation of the State of New Jersey, was complainant and William A. Dunlap, Julia F. Dunlap, Osborne & Marsellis Co. and Johan R. Johnson were defendants, in this respect, to wit: that the said order adjudged that:

30

The said master's report be and the same is hereby in all things ratified and confirmed according to the true tenor and meaning thereof.

40

Petition on Appeal.

And it is further ordered that taxed costs and a counsel fee of One Hundred Dollars be allowed to Philip Goodell, solicitor of the defendant aforesaid, to be paid by the complainant.

10 And your petitioner humbly appeals from that part of the order of the Chancellor which orders as aforesaid, upon the ground that the same is erroneous and contrary to law and equity for the following reasons:

1. That the Chancellor erred in ratifying and confirming that part of the Special Master's report which stated that there was due upon complainant's bond and mortgage the sum of \$12,-
20 000.00, same being against the evidence submitted to the Master.

2. The Chancellor erred in ratifying and confirming that part of the Special Master's report which found that there was due to complainant the sum of \$13,664.00 plus \$193.80 for insurance premiums, making a total due of \$13,857.80, same being against the evidence submitted to the Master.

30 3. The Chancellor erred in ratifying and confirming that part of the Special Master's report where he deducted from the grand total, which he found due on complainant's bond and mortgage, the sum of \$360.00 for excess interest which has been paid on complainant's bond and mortgage of \$15,000.00, same being against the evidence submitted to the Master.

40 4. Because there were no facts set out in the Master's report and the evidence attached to said

Petition on Appeal.

report upon which said order ratifying and confirming the Master's report was based, same being against the evidence submitted to the Master.

5. That there were no proper proofs of any facts warranting the Chancellor to ratify and confirm that part of the Master's report which found that there was due complainant the sum of \$12,-
10 000.00.

6. That under the proofs before the Chancellor this Chancellor should have sustained complainant's exceptions to the Master's report.

7. That there was nothing before the court justifying an award of counsel fees to the solicitor of the defendants, William A. Dunlap, Julia F. Dunlap, Osborne & Marsellis Co. and Johna R. Johnson. 20

8. That complainant being the holder in good faith and for value of a bond and mortgage in the sum of \$15,000.00 and the original mortgagors and the owner of the equity of redemption having executed and delivered an estoppel certificate to the complainant prior to the complainant taking the assignment of said bond and mortgage, the original mortgagors and any other person who had any interest in said premises by virtue of any mortgage or deed executed by the original mortgagors were estopped from questioning the amount due on complainant's mortgage. 30

9. That said order was made upon insufficient proofs. 40

Petition on Appeal.

10. The said order was made contrary to the evidence submitted to the master.

10 11. Said order was made contrary to law and equity for the reason that the defendants acquired interest into said premises subsequent to the execution and recording of complainant's mortgage and with the knowledge that said mortgage was a lien upon said premises to secure the sum of \$15,000.00.

12. That the Chancellor erred in ratifying and confirming the said Master's report, same being contrary to law and equity.

20 13. That the said order was made contrary to law and evidence as said defendants are estopped to question the amount due on complainant's mortgage as the person or persons from whom they derived their interest were estopped for the reason of the estoppel certificate.

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

30 *Thos Brunetto*
Solicitor for and of Counsel with
Complainant-Appellant.

I conceive that there is good cause for the foregoing appeal.

40 *Thos Brunetto*
of Counsel with Complainant-Appellant.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between:

VASSAR HOLDING Co., a
Corporation,
Complainant-Appellant,

and

WILLIAM A. DUNLAP, et al.,
Defendants-Appellee.

On Appeal
From the
Court of
Chancery.

Answer to
Petition
of Appeal.

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The answer of WILLIAM A. DUNLAP, JULIA F. DUNLAP, OSBORNE & MARSELLIS CO. and JOHAN R. JOHNSON, the above named appellees, to the petition of appeal of the Vassar Holding Co., the above-named appellant.

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that an order was, on January 30, 1928, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said order, these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe that the said order is in all respects agreeable to equity; and they pray that the same may be af-

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Stipulation.

firmed, with costs to be taxed in favor of these appellees.

(Sgd.) PHILIP GOODELL,
Solicitor for and of Counsel with Appellees.

10

Stipulation.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

(Filed, May 9, 1928.)

Between:

20

VASSAR HOLDING Co., a
Corporation,
Complainant-Appellant,

and

WILLIAM A. DUNLAP, et als.,
Defendants-Appellees.

On Bill, &c.
Stipulation.

30

It is mutually agreed and stipulated between Thomas Brunetto, solicitor of complainant-appellant, and Philip Goodell, solicitor of defendants-appellees, that the printed state of the case in the above-entitled matter shall consist of the following: Bill of Complaint, filed October 13, 1926, Amendment to Bill of Complaint, filed November 24, 1926, Answer of Osborne & Marsellis Co., filed November 26, 1926, Answer of Joseph Chiera and Bessie Chiera, his wife, and Theresa Calan-

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Stipulation.

dra, filed February 15, 1927, Notice of Motion to Strike Out Answer of Osborne & Marsellis Co., filed Dec. 16, 1926, Order Denying Motion to Strike Out, filed December 16, 1926, Interlocutory Decree and Order of Reference, filed February 28, 1927, Testimony taken before Special Master and Report, filed Nov. 17, 1927, Affidavit of Charles Zimmer of Dec. 13, 1926, offered in evidence, Exceptions to Master's Report, filed November 17, 1927, Notice of Hearing on Exceptions to Master's Report, filed Nov. 28, 1927, Letter of Vice Chancellor Maja Leon Berry on Exceptions to Master's Report, Order Sustaining Master's Report, filed January 30, 1928, Notice of Appeal from Order Sustaining Master's Report, filed Feb. 16, 1928, Petition of Appeal, filed , Answer to Petition of Appeal, filed . Of the exhibits, Abstract of Mortgage from Chiera to Zimmer, Assignment of Mortgage from Zimmer to Vassar Holding Co., Estoppel Certificate, paragraphs 1, 2, 3, 4, 5, 19, 19a, 30 and 31 of the Bill of Complaint in the case of Charles Zimmer vs. Dunlap, et als., docket 60/413, and affidavit of Charles Zimmer attached thereto, and the Bill of Complaint in the case of Charles Zimmer vs. Harry B. O'Connell, Sheriff of the County of Essex, et al., docket 60/253, and affidavit of complainant attached thereto.

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THOMAS BRUNETTO,
Solicitor for and of Counsel with
Complainant-Appellant.

PHILIP GOODELL,
Solicitor for and of Counsel with
Defendants-Appellees.

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Dated, April 30, 1928.

Exhibits:

THIS INDENTURE, Made the tenth day of July, in the year of Our Lord One Thousand Nine Hundred and Twenty Three,

10 BETWEEN JOSEPH CHIERA and BESSIE CHIERA, his wife, of the Town of Bloomfield, in the County of Essex and State of New Jersey, of the First Part

AND CHARLES ZIMMER, of the City of Newark, in the County of Essex and State of New Jersey, of the Second Part;

20 WITNESSETH, That the said party of the first part, for and in the consideration of the sum of FIFTEEN THOUSAND DOLLARS, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, enfeoffed, conveyed and confirmed, and by these 30 presents do give, grant, bargain, sell, alien, enfeoff, convey and confirm to the said party of the second part, and to his heirs and assigns forever,

ALL that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Town of Bloomfield, in the County of Essex and State of New Jersey.

40 BEGINNING at a point in the westerly side of Bloomfield Avenue, said point being dis-

Exhibits.

tant northerly along same one hundred and seventy seven feet from its intersection with the northerly side of Hill Street as said street and avenue are now monumented, which point of beginning is in the northerly line of land now belonging to Meta Fissler, formerly of Peter Condict; from thence running along said westerly side of Bloomfield Avenue north twenty one degrees thirty four minutes west one hundred feet to the southerly line of land now or formerly belonging to John W. Schuchman; thence along same south sixty eight degrees fifty eight minutes west two hundred and sixty three feet and thirty two one hundredths of a foot to a corner in said land; thence still along same and line of land belonging to Kate A. Knapp south twenty one degrees thirty four minutes east one hundred feet to aforesaid mentioned line of land now belonging to Meta Fissler formerly Peter Condict; thence along same north sixty eight degrees fifty eight minutes east two hundred and sixty three feet and thirty two one hundredths of a foot to the westerly line of Bloomfield Avenue at the place of BEGINNING. The above description being made in accordance with survey made by Ernest Baechlin dated September 9, 1921. 10 20 30

BEING the same premises conveyed to the said party of the first part by Martha Caffrey Flannagan, et als., by deed dated August 10, 1921, and recorded in the Essex County 40

Exhibits.

Register's office in book Q 65 of deeds for said county, on page 528.

10 TOGETHER with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging, or in anywise appertaining.

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof:

20 TO HAVE AND TO HOLD, all and singular the above-described tract or lot of land and premises with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

30 PROVIDED ALWAYS, and it is agreed by and between the parties to these presents, that if the said party of the first part, their heirs, executors, administrators or assigns do and shall well and truly pay, or cause to be paid, to the said party of the second part, or to his certain attorney or attorneys, heirs, executors, administrators or assigns, the sum of Fifteen Thousand Dollars in two years from the date hereof, with lawful interest for the same, at the rate of six per centum per annum, payable semi-annually, according to the conditions of a certain bond bearing even date herewith, in the penal sum of THIRTY THOU-

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Exhibits.

SAND dollars, made by said party of the first part to said party of the second part, without any deduction or defalcation for taxes, assessments or any other imposition whatsoever; then and from thenceforth, these presents and said obligation, and everything herein and therein contained, shall cease and be void; anything herein and therein contained to the contrary in anywise notwithstanding. 10

AND THE SAID party of the first part, for themselves, their heirs, executors, administrators and assigns do covenant and grant to and with the said party of the second part his heirs, executors, administrators or assigns that the said party of the first part, their heirs, executors, administrators, or assigns shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon, or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof; 20

AND shall keep the premises above conveyed free and clear from all charges for taxes, assessments, water rents or other municipal or governmental rate, charge, imposition or lien; 30

AND shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss or damage by fire, by insurers, through such broker or brokers and in an 40

Exhibits.

amount approved or selected by the said party of the second part, his heirs, executors, administrators, agents, attorneys or assigns and assign the policy and certificate thereof to the said party of the second part, his heirs, executors, administrators or assigns as collateral security for the payment of the principal and interest aforesaid;

10

AND THAT IF SAID party of the first part, their heirs or assigns shall neglect to pay all or any tax, assessment, or other municipal or governmental rate, charge, imposition or lien against the premises described in this mortgage or any premium for insurance as aforesaid on any day whereon the same shall become due and payable, then it shall be lawful for the party of the second part or his heirs, executors, administrators or assigns to pay such charges, and the sum or sums so paid shall be a lien on the said mortgaged premises added to the amount secured hereby, and the whole payable in sixty days after such payment, with lawful interest,

20

AND THAT IF SAID party of the first part, their heirs or assigns shall at any time fail, neglect, refuse or be unable to insure or keep insured, the building or buildings now erected or to be erected upon the lands and premises above conveyed as above provided and stipulated, and to assign the policy or policies of insurance as above provided and stipulated, then at once upon the happening of said default, neglect, refusal or inability, the aforesaid principal sum of money with all arrearages of interest thereon shall at the

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Exhibits.

option of the said party of the second part, his heirs, executors, administrators or assigns become and be due and payable immediately thereafter, although the time above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding;

10

AND THAT if default be made in the payment of the said interest or any part thereof on any day whereon the same is made payable as hereinbefore expressed, and should the same remain unpaid and in arrears for the space of thirty days, or if default be made in the payment of any of said taxes, water rents or other municipal or governmental rate, charge, imposition or lien on any day whereon the same shall become due and payable and should the same remain unpaid and in arrears for the space of sixty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of money with all arrearages of interest thereon shall at the option of the said party of the second part, his heirs, executors, administrators or assigns become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding;

20

30

AND THAT the said party of the second part, his heirs, executors, administrators or assigns, shall and may, from time to time, and all times after default shall be made in the performance of

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Exhibits.

10 the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said party of the first part, their heirs or assigns, or of any other person or persons whatsoever.

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

BESSIE CHIERA, (L. S.)
JOSEPH CHIERA. (L. S.)

20

Signed, Sealed and Delivered }
in the presence of }

GEORGE F. JORDAN.

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

30

40 BE IT REMEMBERED, That on this 17th day of July, in the year of Our Lord One Thousand Nine Hundred and Twenty Three, before me, the subscriber, a Notary Public personally appeared JOSEPH CHIERA and BESSIE CHIERA, his wife, who, I am satisfied are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon, they acknowledged that they signed, sealed and

Exhibits.

delivered the same as their voluntary act and deed, for the uses and purposes therein expressed: And the said BESSIE CHIERA being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed 10
FREELY, without any fear, threats or compulsion of her said husband.

(Seal) GEORGE F. JORDAN,
Notary Public
of New Jersey.

MORTGAGE.

JOSEPH CHIERA and BESSIE CHIERA, his wife, 20

—to—

CHARLES ZIMMER.

Dated, July 10, 1923.

Received in the Office of the Register of the County of Essex, N. J., on the 19th day of July, A. D., 1923, at 10:43 o'clock in the forenoon, and Recorded in Book G-49 of MORTGAGES for said County, on page 49-51. 30

Compared by 28 and 29.

HOWARD S. DODD,
Register.

Law Offices
LOWY & LOWY
19 Clinton Street
Newark, N. J. 40

Exhibits.

IN CHANCERY OF NEW JERSEY.

Between:

10 VASSAR HOLDING Co., a corporation,
Complt.,

and

WILLIAM A. DUNLAP, et al.,
Defts.

ON BILL, ETC.

20 Exhibit C 2 for Complt.

JOHN P. MANNING,
Master.

IN CHANCERY OF NEW JERSEY.

Between:

30 PHOENIX B. & L. Ass'n,
Complt.,

and

WM. A. DUNLAP, et als.,
Defts.

40 Exhibit D 2 for Vassar Holding Co.

JOHN P. MANNING,
Special Master.

Assignment of Mortgage.

KNOW ALL MEN BY THESE PRESENTS,
That, I, CHARLES ZIMMER, party of the first
part, in consideration of the sum of One Dollar
and other good and valuable consideration, law-
ful money of the United States of America, to me
in hand paid by VASSAR HOLDING CO., a New
Jersey Corporation, party of the second part, at
or before the ensealing and delivery of these
presents, the receipt whereof is hereby acknowl-
edged, have granted, bargained, sold, assigned,
transferred and set over, and by these presents
do grant, bargain, sell, assign, transfer and set
over unto the said party of the second part, its
successors and assigns, an Indenture of Mortgage
bearing date the Tenth day of July, Nineteen Hun-
dred and Twenty-three, made by Joseph Chiera
and Bessie Chiera, his wife, to me, on lands in the
Town of Bloomfield, New Jersey, to secure the
payment of the sum of Fifteen Thousand Dollars,
which mortgage is recorded in the Register's Of-
fice of the County of Essex, in book G 49 of mort-
gages, on pages 49-51.

TOGETHER with the bond or obligation
therein described, and the money due and to grow
due thereon, with the interest. TO HAVE AND
TO HOLD, the same unto the said party of the
second part, its successors or assigns forever, sub-
ject only to the proviso in the said Indenture of
Mortgage mentioned; AND I do hereby make,
constitute and appoint the said party of the sec-
ond part, my true and lawful attorney, irrevoca-
ble, in my name, or otherwise, but at its proper
costs and charges, to have, use and take all lawful
ways and means for the recovery of all the said

Assignment of Mortgage.

money and interest; and in case of payment, to discharge the same as fully as I might or could do if these presents were not made.

10 IN WITNESS WHEREOF, I have hereunto set my Hand and Seal the Twenty-third day of September, Nineteen Hundred and Twenty-six.

CHARLES ZIMMER. (L. S.)

Signed, Sealed and Delivered in the presence of

HERMAN WALDMAN.

20

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

30 Be it remembered, That on this twenty-third day of September, in the year of Our Lord One Thousand Nine Hundred and Twenty-six, before me, a Master in Chancery of New Jersey, personally appeared Charles Zimmer, who, I am satisfied is the assignor in the within deed of assignment named; and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

HERMAN WALDMAN,
A Master in Chancery of New Jersey.

40

Assignment of Mortgage.

IN CHANCERY OF NEW JERSEY

Between

VASSAR HOLDING Co., a corporation, 10
Complt.,

and

WILLIAM A. DUNLAP, et als.,
Defts.

On Bill, Etc.

Exhibit C 3 for Complt. 20

JOHN P. MANNING,
Master in Chancery of New Jersey.

IN CHANCERY OF NEW JERSEY.

Between

PHOENIX BUILDING & LOAN ASSOCIATION OF THE
CITY OF NEWARK, a corp. of New Jersey, 30
Complt.,

and

WILLIAM A. DUNLAP, et als.,
Defendants.

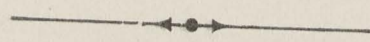
Exhibit D 3 for Vassar Holding Co.

JOHN P. MANNING,
Special Master.

40

Assignment of Mortgage.

ASSIGNMENT OF MORTGAGE.

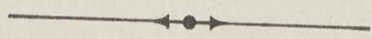


CHARLES ZIMMER

10

to

VASSER HOLDING Co., a New Jersey Corporation.



Dated, September 23, 1926.

Compared by 38 and 59.

20

Received in the Register's Office of the County of Essex, N. J., on the 7th day of October, A. D., 1926, at 3:34 o'clock in the afternoon, and recorded in Book 183 of Assignments of Mortgages for said County on page 205.

HOWARD S. DODD,
Register.

LAW OFFICE
THOMAS BRUNETTO
9-15 Clinton St., Room 1002
Newark, N. J.

30

40

Estoppel Certificate.

THE UNDERSIGNED, owning an interest in the premises 382-388 Bloomfield Avenue, Bloomfield, N. J., covered by mortgage for Fifteen Thousand (\$15,000.00) Dollars and interest, dated July 10, 1923, and recorded July 19, 1923, in the office of the Register of the County of Essex in liber G 49 of Section of mortgages, at pages 49-51, which mortgage is about to be assigned by Charles Zimmer, the holder, to Vassar Holding Co., a corporation of the State of New Jersey, hereby certifies, in consideration of one dollar paid and to enable said assignment to be made and accepted, that said mortgage, so to be assigned, is a valid lien on said premises for the full amount of principal and interest due thereon, namely, Fifteen Thousand (\$15,000.00) Dollars, with interest at six per cent. per annum from July 10, 1925, and that there are no defenses or offsets to said mortgage, or to the bond which it secures.

10

20

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

Dated, the Thirtieth day of September, 1926.

JOSEPH CHIERA, (L. S.)
BESSIE CHIERA, (L. S.)
TERESA CALANDRA. (L. S.)

30

Witness:

GENNARO LANDOLFO,
Notary Public
for New Jersey.

(Seal)

40

Estoppel Certificate.

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

10 Be it remembered, that on this thirtieth day of
September, in the year of our Lord One Thousand
Nine Hundred and Twenty-six, before me, the sub-
scriber, a notary public of New Jersey, personally
appeared Joseph Chiera, Bessie Chiera and
Teresa Calandra, who, I am satisfied, are the
grantors mentioned in the within instrument, to
whom I first made known the contents thereof,
and thereupon they acknowledged that they
signed, sealed and delivered the same as their vol-
untary act and deed, for the uses and purposes
therein expressed.

20

GENNARO LANDOLFO,
Notary Public of New Jersey.
(Seal)

JOSEPH CHIERA, et als.

with

30 VASSAR HOLDING Co., a corp. of N. J.

ESTOPPEL CERTIFICATE

40

THOMAS BRUNETTO,
9 Clinton St.,
Newark, New Jersey.

Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

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

The complainant, Charles Zimmer, of the City 10
of Newark, County of Essex and State of New
Jersey, respectfully shows that:

1. On July 10, 1923, Joseph Chiera and Bessie
Chiera, his wife, being indebted to complainant
in the sum of \$15,000, executed to him a bond
of that date to secure that sum, payable on July
10, 1925, with interest at the rate of six per cen-
tum per annum, payable half yearly from the date
of the bond. 20

2. To secure payment of the bond, said Joseph
Chiera and Bessie Chiera, his wife, executed to
said complainant a mortgage of even date with
the bond; and thereby conveyed to him, in fee,
the land hereinafter described, on the express con-
dition that such conveyance should be void if pay-
ment should be made according to the terms of
the bond. Which mortgage, having been first duly
acknowledged, and the certificate of acknowledg- 30
ment duly endorsed thereon was recorded in the
Register's Office of Essex County, in Book G 49
of mortgages, pages 49-51, on July 19, 1923.

3. The mortgaged premises are described as
follows:

All that tract or parcel of land and prem- 40
ises, situate, lying and being in the Town of

Bill of Complaint.

Bloomfield, in the County of Essex and State of New Jersey.

10 BEGINNING at a point in the westerly side of Bloomfield Avenue, said point being distant northerly along same 177 feet from its intersection with the northerly side of Hill Street as said street and avenue are now monumented, which point of beginning is in the northerly line of land now belonging to Meta Fissler, formerly of Peter Condict; from thence running along said westerly side of Bloomfield Avenue north 21 degrees 34 minutes west 100 feet to the southerly line of land now or formerly belonging to John W. Schuchman; thence along same south 68 degrees 58 minutes west 263.32 feet to a corner in said land; thence still along same and line

20 of land belonging to Kate A. Knapp south 21 degrees 34 minutes east 100 feet to aforesaid mentioned line of land now belonging to Meta Fissler, formerly Peter Condict; thence along same north 68 degrees 58 minutes east 263.32 feet to the westerly line of Bloomfield Avenue at the place of BEGINNING.

30

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 representatives or assigns, become immediately due.

40

Bill of Complaint.

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 the principal of the mortgage debt, 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 per centum per annum, should be a lien on said land added to the amount of the mortgage debt and secured by the mortgage.

10

19. On May 7, 1925, Theresa Calandra, single, conveyed said land, by deed of that date, to Wm. A. Dunlap, in fee; which deed was on June 3, 1925, recorded in the Register's Office of Essex County, in Book K 72 of deeds, on page 297.

20

Said deed to the said Wm. A. Dunlap was a warranty deed and recites that the said conveyance was made subject to all liens and encumbrances and municipal liens.

Any interest which the said Wm. A. Dunlap has in said land is subject to the lien of complainant's mortgage.

30

19a. Said Wm. A. Dunlap is married and his wife's name is Julia F. Dunlap.

Any claim or interest she may have, by way of inchoate right of dower, or otherwise, is subject to complainant's mortgage.

40

Affidavit.

30. Said Joseph Chiera and Bessie Chiera, his wife, Theresa Calandra and Wm. A. Dunlap, or one of them, has always been in possession of the mortgaged premises.

10 31. The whole amount of principal, with interest thereon, from July 10, 1925, is due upon complainant's bond and mortgage.

Affidavit.

IN CHANCERY OF NEW JERSEY.

20 Between:

CHARLES ZIMMER,
Complainant,

and

WM. A. DUNLAP, et al.,
Defendants.

On Bill to
Foreclose.
Affidavit.

30 State of New Jersey, }
County of Essex, } ss.:

Charles Zimmer, of full age, being duly sworn, according to law, on his oath deposes and says:

1. I am the complainant in the foregoing bill. I have read the bill of complaint and say that the matters and things therein contained, so far as they are within my knowledge, are true, and as to such matters as are in the knowledge of other persons, I believe them to be true.

40

Affidavit.

2. On July 10, 1923, Joseph Chiera and Bessie Chiera, his wife, mortgaged the lands described in paragraph 3 of the bill of complaint, to me, to secure the sum of Fifteen Thousand Dollars (\$15,000.), which mortgage was on July 19, 1923, recorded in the Essex County Register's Office in Book G 49 of mortgages on pages 49-51, and is more fully set forth in the bill of complaint attached hereto. 10

3. Prior to the recording of my mortgage, there were three judgments docketed in the Essex Common Pleas Court against Guiseppa Chiera, of which judgments I had no knowledge at the time I paid out the proceeds of the said mortgage loan to Joseph Chiera and Bessie Chiera, his wife. 20

4. The assignee of the said judgments now claims that said three judgments are a prior lien to my mortgage and he has instructed the sheriff to sell the property, in pursuance to executions issued on said judgments.

5. The said judgments were not constructive notice to me as they were recovered and indexed in a name other than the holder of the record title, and I claim that they are not a lien prior to my mortgage, but are subject to the lien thereof, yet, if the contention of the holder of the judgments is correct, my mortgage will be cut off and extinguished as a lien on said premises. 30

CHARLES ZIMMER.

Sworn to and subscribed before me this
27th day of March, 1926.

MALVERN HAMEL,
Notary Public
of New Jersey.

40

Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

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

10 The complainant, Charles Zimmer, of the City of Newark, County of Essex, and State of New Jersey, respectfully shows that:

1. On July 10, 1923, Joseph Chiera and Bessie Chiera, his wife, were seized in fee simple of lands and premises, situate, lying and being in the Town of Bloomfield, in the County of Essex and State of New Jersey, and described as follows:

20 BEGINNING at a point in the westerly side of Bloomfield Avenue, said point being distant northerly along same 177 feet from its intersection with the northerly side of Hill Street as said street and avenue are now monumented, which point of beginning is in the northerly line of land now belonging to Meta Fissler, formerly of Peter Condict; from thence running along said westerly side of Bloomfield Avenue north 21 degrees 34 minutes west 100 feet to the southerly line of land now or formerly belonging to John W. Schuchman; thence along same south 68 degrees 58 minutes west 263.32 feet to a corner in said land; thence still along same and line of land belonging to Kate A. Knapp south 21 degrees 34 minutes east 100 feet to aforesaid mentioned line of land now belonging to Meta Fissler, formerly Peter Condict; 30 thence along same north 68 degrees 58 min- 40

Bill of Complaint.

utes east 263.32 feet to the westerly line of Bloomfield Avenue at the place of BEGINNING.

The above description being made in accordance with survey made by Ernest Baechlin, dated September 9, 1921. 10

2. On the said date, said Joseph Chiera and Bessie Chiera, his wife, mortgaged the said lands to the complainant, to secure the sum of \$15,000., payable on July 10, 1925, which mortgage having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was recorded in the Essex County Register's Office on July 19, 1923, in Book G 49 of mortgages for said county, on page 49. 20

3. On June 11, 1923, Peoples Investment & Realty Co., a New Jersey Corporation, recovered a judgment in the Second District Court of the City of Newark, against Guiseppa Chiera, in the sum of \$400. damages and \$24. costs, which judgment was on June 14, 1923, docketed in the Essex Common Pleas Court in Book 23 of Docketed Judgments for said county, on page 269. 30

4. On March 26, 1923, Philip Montano recovered a judgment in the Second District Court of the City of Newark, against Guiseppa Chiera, in the sum of \$100 damages and \$9 costs, which judgment was on June 14, 1923, docketed in the Essex Common Pleas Court in Book 23 of Docketed Judgments for said county, on page 270. 40

Bill of Complaint.

5. On July 18, 1923, Peoples Investment & Realty Company recovered a judgment in the East Orange District Court of the City of East Orange, against Guiseppe Chiera, in the sum of \$200. damages and \$14.50 costs, which judgment was on July 19, 1923, docketed in the Essex Common Pleas Court in Book 23 of Docketed Judgments for said county, on page 309.

6. On September 20, 1924, and September 22, 1924, Peoples Investment & Realty Co., a New Jersey Corporation, and Philip Montano, caused executions on the aforesaid three judgments to be issued out of the Essex Common Pleas Court, directed to the Sheriff of the County of Essex, and in and by which executions the said Sheriff of the County of Essex was commanded to make the sum of damages and costs due on the aforesaid three judgments out of the goods and chattels of the said Guiseppe Chiera; and if sufficient goods and chattels of the said Guiseppe Chiera could not be found whereof to make the same, then the said Sheriff was commanded to make the aforesaid damages and costs, of the lands, tenements, hereditaments and real estate, whereof the said defendant Guiseppe Chiera was seized on June 14, 1923, and June 14, 1924, and July 19, 1924, or at any time afterwards in whosoever hands the same may be.

7. In pursuance to the three executions as aforesaid, the Sheriff of the County of Essex did on September 20, 1924, and on September 22, 1924, levy upon the lands described in paragraph 1 of

Bill of Complaint.

this complaint, and which lands and premises are covered by the complainant's mortgage.

8. The Sheriff of the County of Essex did in due form of law, advertise the said lands and premises described in paragraph 1 of this complaint, to be sold at public vendue to be held in the Sheriff's Office in the Court House of Essex County, New Jersey, which sale has been adjourned from time to time until March 2, 1926.

9. The complainant alleges that although the three judgments against Guiseppe Chiera were docketed prior to the recording of his mortgage, the same are not a lien prior to complainant's mortgage, because the said complainant is a bona fide holder of his said mortgage for value and without notice of the three judgments against Guiseppe Chiera, more fully described in paragraphs 3, 4 and 5. The said three judgments were entered and indexed under the name of Guiseppe Chiera, while the record title to the lands described in paragraph 1 of this complaint was in the name of Joseph Chiera.

10. The complainant admits that the name Joseph when translated into Italian is called Guiseppe, but charges that in all cases where a judgment is entered and indexed under a Christian

Bill of Complaint.

name other than that appearing in the deed for the property to the defendant, that such judgment, even though it be against the same person, is not notice to a bona fide purchaser or holder of a mortgage for value, and is, therefore, not a lien on the property described in the deed to such defendant, as the law knows only of one Christian name.

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11. Complainant further alleges that he has been informed that the said Peoples Investment & Realty Co. and Philip Montano, have assigned all their right, title and interest in and to the said three judgments to Ferdinando Calandra, who resides in the City and State of New York, and which assignment is not recorded in the Essex County Clerk's Office, and the said Ferdinando Calandra has informed the complainant that the Sheriff of the County of Essex was directed by him to sell the said premises on March 2, 1926.

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The defendant Ferdinando Calandra claims that the aforesaid three judgments against Guisepe Chiera are prior to the lien of complainant's mortgage, and that a sale by the Sheriff on any or all of the said three judgments would cut off and extinguish the lien of complainant's mortgage, in which event, the complainant alleges that he will suffer irreparable injury.

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

1. That Harry B. O'Connell, Sheriff of the County of Essex, and Ferdinando Calandra, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

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Bill of Complaint.

2. That the said Harry B. O'Connell, Sheriff of the County of Essex, and Ferdinando Calandra, their counsel, attorneys, solicitors, officers and agents, and each and every one of them, may be restrained and enjoined from selling at public vendue and from proceeding further against the lands and premises described in paragraph 1 of the complaint, under any of the three executions issued on the judgments against Guisepe Chiera as aforesaid, and now in the hands of the Sheriff of the County of Essex.

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3. That the complainant may be decreed to be a bona fide holder for value of his said mortgage without notice of any of the three judgments against Guisepe Chiera and held by the defendant Ferdinando Calandra.

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4. That it be decreed that the defendant Ferdinando Calandra, his heirs and assigns, has no estate, interest or right in, or encumbrance upon said lands or any part thereof.

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

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HERMAN WALDMAN,
Solicitor for and of Counsel
with Complainant.

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Affidavit.

IN CHANCERY OF NEW JERSEY.

Between:

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CHARLES ZIMMER,
Complainant,

and

HARRY B. O'CONNELL, Sheriff of
the County of Essex, and
FERDINANDO CALANDRA,
Defendants.

On Bill for
Injunction.

Affidavit.

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

Charles Zimmer, of full age, being duly sworn,
according to law, on his oath deposes and says:

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1. I am the complainant in the foregoing bill.
I have read the bill of complaint and say that the
matters and things therein contained, so far as
they are within my knowledge, are true, and as
to such matters as are in the knowledge of other
persons, I believe them to be true.

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2. On July 10, 1923, Joseph Chiera and Bessie
Chiera, his wife, mortgaged the lands described in
paragraph One of the bill of complaint, to me, to
secure the sum of \$15,000., which mortgage is more
fully set forth in paragraph Two of the bill of
complaint.

Affidavit.

3. Prior to the recording of my mortgage, there
were three judgments docketed in the Essex Com-
mon Pleas Court against Guiseppe Chiera, of
which judgments I had no knowledge at the time
I paid out the proceeds of the said mortgage loan
to Joseph Chiera and Bessie Chiera, his wife. 10

4. The assignee of the said judgments now
claims that said three judgments are a prior lien
to my mortgage and he has instructed the sheriff
to sell the property on March 2nd, 1926, in pur-
suance to executions issued on said judgments.

5. The said judgments were not notice to me as
they were recovered and indexed in a name other
than the holder of the record title, and I claim
that they are not a lien on the property covered
by my mortgage, yet, if the contention of the
holder of the judgments is correct, my mortgage
will be cut off and extinguished as a lien on said
premises. 20

CHARLES ZIMMER.

Sworn to and subscribed before me this
27th day of February, 1926. 30

GOLDIE GOTTLIEB,
Notary Public
of New Jersey.

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67 MAY.T.1928

No 6/

New Jersey Court of Errors and Appeals 10

Between

VASSAR HOLDING Co., a
corporation,
Complainant-Appellant,

and

WILLIAM A. DUNLAP, et als.,
Defendants-Appellees.

On Bill, etc.
On Appeal
From Order
Confirming
Master's
Report.

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BRIEF OF COMPLAINANT-APPELLANT.

This is an appeal by complainant-appellant from
an order of the Chancellor sustaining and confirm-
ing Master's Report in a foreclosure suit.

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Facts.

1. The bill in this case is filed to foreclose a
mortgage given by the defendants-appellees, Jo-
seph Chiera and Bessie Chiera, his wife, to Charles
Zimmer, payable in two years from July 10, 1923,
which mortgage was given to secure the sum of
\$15,000 as set forth in paragraph 1 of the bill of
complaint, and which mortgage is second and sub-

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sequent to a building and loan mortgage in the sum of \$50,000. The defendants-appellees, Osborne & Marsellis Co., William A. Dunlap and Julia F. Dunlap, admit by their answer the execution of the bond and mortgage, but deny that the amount of indebtedness is \$15,000 and state it is \$12,000. (See State of the Case, pp. 2 to 14, inclusive.)

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2. Charles Zimmer, the mortgagee, by written assignment, bearing date September 23, 1926, assigned said mortgage to the complainant-appellant on or about October 6, 1926. (See State of the Case, pp. 93 to 94.)

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3. Prior to the execution and delivery of the assignment of said bond and mortgage to the complainant-appellant the mortgagors and the owner of the equity of redemption executed and delivered to complainant-appellant a written declaration of no set off under seal. (See State of the Case, pp. 97 and 98.)

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4. At the time of the delivery of the assignment from the said Charles Zimmer to complainant-appellant, complainant-appellant again made inquiry of Herman Waldman, who was the solicitor for the said Charles Zimmer, as to the amount due on said bond and mortgage and the complainant-appellant was then informed by the said Herman Waldman that the full amount of \$15,000, with interest from July 10, 1925, was due on said mortgage. (See testimony of Howard F. Kirk, State of the Case, pp. 54 and 55, also testimony of Joseph Goldring, State of the Case, p. 68.)

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5. Complainant-appellant relying on the estoppel certificate and on the information furnished to

it by the said Herman Waldman, who was the solicitor for said Charles Zimmer, and Joseph Chiera, one of the mortgagors, and on the declaration of no set off under seal, delivered or caused to be delivered, its check to the said Herman Waldman in the sum of \$12,000 for the purchase of said bond and mortgage. (See State of the Case, pp. 41, 42, and testimony of Howard F. Kirk, secretary of the Vassar Holding Co., pp. 54, 55, 65, 66 and 67, also testimony of Mr. Goldring, president of complainant-appellant corporation, p. 68.)

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6. On November 2, 1923, the mortgagors, Joseph Chiera and Bessie Chiera, executed a mortgage to one Melanie Dymmer, as trustee, in the sum of \$25,717.10, which mortgage is subsequent to the mortgage held by complainant-appellant.

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7. On November 2, 1923, the said Melanie Dymmer, trustee, assigned said mortgage to J. R. Johnson, which assignment is recorded in Book 168 of Assignments of Mortgages for Essex County, pages 293-294.

8. On May 21, 1924, Johan R. Johnson assigned said mortgage to The Osborne & Marsellis Co., which assignment is recorded in Book 168 of Assignments of Mortgages for Essex County, page 294.

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Aug. 27, 1923
9. On ~~May 7, 1925~~, Joseph Chiera and Bessie Chiera, his wife, conveyed said mortgaged premises to one Teresa Calandra.

10. On May 7, 1925, Teresa Calandra conveyed said premise to William A. Dunlap. The deed

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from Calandra to Dunlap recited that said conveyance was made subject to all liens and encumbrances and municipal liens.

10 11. Two answers have been filed; one by the original mortgagors, Joseph Chiera and Bessie Chiera, his wife, and the owner of the equity of redemption (see State of the Case, pp. 23 and 27), and the other by the defendants-appellees, Osborne & Marsellis Co., William A. Dunlap and Julia F. Dunlap, his wife, who hold the legal title to said premises in trust for Teresa Calandra. (See State of the Case, p. 16.)

20 12. The defendants-appellees, Joseph Chiera, Bessie Chiera and Teresa Calandra, by their answer, paragraph one, admit paragraph one of the bill of complaint, which paragraph alleges: That the said Joseph Chiera and Bessie Chiera, his wife, were on July 10, 1923, indebted to Charles Zimmer in the sum of \$15,000 and executed to him a bond of that date to secure that sum, payable on July 10, 1925, with interest at the rate of six per centum per annum, payable half yearly from the date of the bond. Paragraph two of the bill of complaint, is also admitted by said defendants-
30 ~~appellees~~, which paragraph alleges that to secure the payment of said bond the said Joseph Chiera and Bessie Chiera, his wife, executed to said Charles Zimmer a mortgage of even date with the bond; and thereby conveyed to him, in fee, the land thereafter described on the express condition that said conveyance should be void if payment should be made according to the terms of the bond, which mortgage, having been first duly
40 acknowledged, and the certificate of acknowledgement duly endorsed thereon was recorded in the

Register's Office of Essex County, in Book G 49 of Mortgages, pages 49-51, on July 19, 1923. By their answer said defendants-appellees do not deny paragraph twenty-six of the bill of complaint (State of the Case, p. 13), which alleges that the principal sum of \$15,000 with interest thereon from July 10, 1925, is due upon complainant-appellant's bond and mortgage. In paragraph eight
10 of their answer (State of the Case, p. 26) defendant-appellees say that the mortgages covering said premises should be in the following order in priority:

1. Phoenix Building and Loan Association in the nominal sum of \$50,000.

2. Vassar Holding Co., complainant-appellant, in the nominal sum of \$15,000 (which is the mortgage under foreclosure). 20

3. Johnson Investment Corporation, in the nominal sum of \$10,000.

13. The defendants-appellees, Osborne & Marsellis Co., William A. Dunlap and Julia F. Dunlap, by paragraph one of their answer (State of the Case, pp. 15 and 16) admit paragraph one of the bill of complaint, except as to the amount of the indebtedness which they allege was \$12,000 and not \$15,000. They also admit paragraph two of the bill of complaint by the second paragraph of their answer. The allegations of the answer of said defendants-appellees in which they attempt to attack the amount due on complainant-appellant's mortgage are as follows: In paragraph one of their answer they state: 30
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“They admit the allegation of paragraph one of the bill of complaint except as to the amount of the indebtedness which defendants allege was \$12,000.00 and not \$15,000.00.”

And in paragraph nine of their answer they state:

10 “They deny the allegations of paragraph twenty-six, alleging that the principal amount due on the bond and mortgage is \$12,000.00 less any interest that may have been paid on the difference between \$15,000.00 and \$12,000.00 for the two years, July 10, 1923 to July 10, 1925, to wit, the sum of \$360.00, leaving a balance of \$11,640.00 and interest from July 10, 1923.”

20 There being no dispute as to the priority of the complainant-appellant’s mortgage the matter on February 28, 1927, was referred to John P. Manning, Esquire, one of the Masters of the Court of Chancery, by an interlocutory decree, to ascertain and report the amount due to complainant-appellant for principal and interest due upon its mortgage. (See State of the Case, pp. 28 to 30.)

30 The special master pursuant to said order heard the matter in controversy on the following days: November 17, 1927, March 18, 1927, March 23, 1927, March 31, 1927, April 25, 1927; and on November 17, 1927, he filed his report (see State of the Case, pp. 30 to 39) and on November 17, 1927, complainant-appellant filed exceptions to the master’s report (State of the Case, pp. 69 to 71), and on November 19, 1927, served upon the defendants-appellees notice that said exceptions would be brought to a hearing before the Chancellor on

40 November 29, 1927. (See State of the Case, p. 72.)

14. The Honorable Maja Leon Berry informed the solicitor for complainant-appellant and the solicitor for the defendants-appellees that he had decided to sustain the master’s report by writing to said solicitors a letter stating the reasons for sustaining said master’s report, which letter is set forth on pages 73 to 75 of the State of the Case.

15. On January 30, 1928, the Chancellor advised an order that the master’s report be ratified and confirmed according to the true tenor and meaning thereof. Said order is set forth on pages 75 and 76 of the State of the Case.

ARGUMENT.

POINT I.

1. As the answer of the defendant-appellee, Osborne & Marsellis Co., admits the execution of the mortgage as a security for the debt and both the bond and mortgage being instruments under seal, therefore, the presumption is that the amount called for in said mortgage was due and owing from the mortgagors to the mortgagee at the time of the execution of said instruments. Both the bond and mortgage are under seal and the mortgage is set forth in the State of the Case, on pages 84 to 91.

2. Said defendants-appellees have not pleaded any facts by their answer indicating the reason why the mortgage was made for \$15,000.00 instead of \$12,000.00 as they claim that is the amount of indebtedness from the mortgagors to the mortgagee at the time of the execution of said bond

and mortgage. Therefore, in the absence of any pleading of that character which would enable the complainant-appellant to prepare for trial and meet the facts of said pleading, the complainant-appellant has nothing to meet said issue when the matter is to be heard for final hearing. However, said defendants-appellees claim a partial failure of consideration. The burden of proof is upon them to establish the amount actually advanced. Therefore, the presumption of fact being that the sum mentioned in the mortgage as the consideration is the actual amount secured, said defendants-appellees in order to prove that a different amount is due or was actually advanced must be very convincing. The defendants-appellees have the burden of proof of this particular fact and they rely solely on the testimony of Charles Zimmer, the mortgagee, and they produced him before the master. (See State of the Case, pp. 46 to 49, pp. 51 to 52 and pp. 60 to 63.) On page 47 of the State of the Case, line 30, he testified he loaned Chiera \$12,000.00, that is, he gave Mr. Lowy, his attorney, that amount and for that he received a bond and mortgage of \$15,000, which mortgage was for two years, that being the same which was assigned to complainant-appellant. On page 48 he states that for the \$12,000.00 in two years later he was to receive \$15,000.00. He later said he did not get the \$12,000.00 and that he did not know anything about the transaction and that Philip Lowy, who at the time was dead, handled the whole thing for him, Mr. Lowy being his attorney. On page 52, he testified that he had given his attorney \$12,000.00 and did not expect to give him any more for the \$15,000.00 mortgage. On April 25, 1927, he was recalled and on page 60 of the State of the Case,

evidence of

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he testified that prior to the execution of the bond and mortgage he met one of the mortgagors, Mr. Chiera. On page 60 of the State of the Case, lines 30 to 40, he was asked:

“If he had given Mr. Lowy \$12,000.00 and how the difference was to be made up and his answer was ‘I don’t know anything about it. I always thought whatever he done was right. I don’t know what he done.’”

On page 61 his memory is again very vague and he does not remember how much interest he received. Between lines 30 and 40 he states that the mortgage was made out for \$12,000.00 and that he had \$12,000.00 invested in the company. On page 62 he states he never received interest on \$15,000.00 and the only interest he received was on \$12,000.00. On page 63, between lines 10 to 20, he again states that the only money that Lowy & Lowy had advanced on said bond and mortgage was \$12,000.00. Zimmer has contradicted himself before the master on a number of occasions, for example: On March 23, 1927 (State of the Case, pp. 46 to 49, on p. 48, lines 20 to 40, and p. 49, line 10), his attention was called to an affidavit with his signature attached to it in a certain cause wherein he was the complainant and Harry B. O’Connell, Sheriff of Essex County, and Ferdinand Calandra were defendants, docket 60/253, and he admitted that the same was his signature, which affidavit was sworn to on February 27, 1927, and which is set out in the State of the Case on pages 104 to 111. In said affidavit of said witness as set forth on pages 110 and 111, he swears, paragraph one on page 110, lines 20 to 30, that he was the complainant and that he

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had read the bill of complaint and said that the matters and things therein contained so far as they were within his knowledge were true. In paragraph two he swears that on July 10, 1923, Joseph Chiera and Bessie Chiera, his wife, mortgaged their lands to him for the sum of \$15,000.00. In paragraph two of the bill of complaint, filed 10 in said suit (State of the Case, p. 105, lines 10 to 20), said defendant alleges that Joseph Chiera and Bessie Chiera, his wife, mortgaged the lands to the complainant-appellant to secure the sum of \$15,000.00. On page 51 of the State of the Case, line 10, he admits that when he swore to said affidavit he was familiar with the contents of said affidavit and that the same were true. He was later shown a bill of complaint which was a file of the Court of Chancery, docket 60/413. That 20 was a suit wherein said witness was complainant and William A. Dunlap, et als., were defendants, instituted on behalf of said witness on March 30, 1926, which suit was instituted by said witness to foreclose the mortgage which he later assigned to complainant-appellant, this being the mortgage which is the subject matter of this suit. The bill of complaint in said suit is set out in the State of the Case herein, on pages 99 to 103. On page 30 51 of the State of the Case said witness was shown the affidavit attached to said bill of complaint, sworn to on March 27, 1927, and he was asked if that was his signature and he admitted that it was. He was asked whether prior to the signing of said affidavit if he had read it and he said "yes and whatever he said in said affidavit was true." On page 52 of the State of the Case, he said he had read the bill of complaint also and all the statements in said bill of complaint were true. On page 40 52 of the State of the Case, between lines 10 to 20,

he stated, that although he had given his attorney \$12,000.00 and did not expect to give him any more, he had received interest on \$15,000.00 for two years and that he had received said money from Mr. Lowy's office; that said interest on \$15,000.00 was paid to July 10, 1925. The material parts of said bill of complaint for the purpose of this case are the only parts printed in the State 10 of the Case, wherein said witness being the complainant in that suit and William A. Dunlap, et als., were defendants, are set forth on pages 99 to 103 of the State of the Case. In paragraph one, on page 99 the bill of complaint, alleges that on July 10, 1923, Joseph Chiera and Bessie Chiera, his wife, were indebted to the complainant (meaning the witness, Charles Zimmer) in the sum of \$15,000.00 and that on that day executed to him 20 to secure that sum a bond, which sum was payable July 10, 1925, with interest at the rate of six per centum per annum, and the bill of complaint (on p. 99 of the State of the Case) alleges that to secure the amount due on said bond Joseph Chiera and Bessie Chiera, his wife, executed a mortgage covering the premises which are being foreclosed and which is the mortgage for which the present proceedings are brought to foreclose. Paragraph 31 of said bill of complaint recites that 30 the whole amount of the principal with interest thereon from July 10, 1925, was due upon complainant's (meaning the witness, Charles Zimmer) bond and mortgage. On March 27, 1927, again we have the same witness swearing to an affidavit and filed in the Court of Chancery, by paragraph one, set forth on page 102 of the State of the Case, that he had read the bill of complaint and that the matters and things therein contained 40 were true so far as they were within his knowl-

edge. In paragraph two of said affidavit, set forth on page 103, line 10, he swears that on July 10, 1923, Joseph Chiera and Bessie Chiera, his wife, had mortgaged the lands described in paragraph three of the bill of complaint, to him to secure the sum of \$15,000.00. On page 60 of the State of the Case, the same witness said he had
 10 seen Chiera, but, however, made no agreement with him to loan him any money. At the top of page 61 he said he did not know whether he had received interest on \$12,000.00 or \$15,000.00. Towards the bottom of the page, he was asked the following questions:

20 "What did you mean by the word 'principal' and his answer was '*what was coming to him.*' He was then asked '*what did you think was coming to you*' and he answered \$12,000.00. *I have got \$12,000.00 invested in your company.*"

On page 62, he says he never got interest from Mr. Lowy on \$15,000.00. He was then asked on page 63, lines 20 to 30, if he had received interest only on \$12,000.00 which would be \$360.00 and whether he was sure he did not get \$450.00 he
 30 answered "that Mr. Lowy got it." He was then shown a check purporting to be endorsed by him and he admitted that it was his signature and he finally ended with "he did not remember what interest he actually got."

3. William A. Dunlap, another witness produced by the complainant, who held the property in trust for Miss Calandra, on pages 63 to 64 of the State of the Case, stated he paid \$450.00 and that
 40 was six months' interest on the mortgage which

was being foreclosed. He was then shown a check on the Peoples National Bank, dated August 20, 1925, payable to the order of Charles Zimmer and signed William A. Dunlap, trustee, and he said he drew that check. On lines 20 to 30 he stated, that at that time he held the property in trust for Teresa Calandra and that at that time he understood the second mortgage, which was then under
 10 foreclosure, was for \$15,000.00 and that the sum of \$450.00 was six months' interest.

4. The original mortgagors and the equitable owner of the equity of redemption of the premises during the foreclosure filed an answer (State of the Case, pp. 23 to 27); and by paragraph one of their answer they admit the first two paragraphs of the bill of complaint. (See State of the Case, pp. 2 and 3.) In other words, the fact of indebtedness is admitted. The defendant-appellee, Joseph Chiera, was produced by the complainant-appellant and on pages 41 to 43 of the State of the Case he testified that the mortgage was given to secure the sum of \$15,000.00. On cross examination he also testified that he had executed an estoppel certificate which stated there was \$15,000.00 due on the mortgage; that Zimmer had paid him \$15,000.00. Of course, the unfortunate part
 20 is that Mr. Lowy died prior to the taking of said testimony. 30

5. It is respectfully submitted that in view of the contradictions by the said Charles Zimmer in his testimony before the Special Master and in his affidavits that he filed in two other proceedings for the purpose of foreclosing the identical mortgage which is now being foreclosed by the
 40 complainant-appellant, that the said defendant-

10 appellee, Osborne & Marsellis Co., and the other defendant did not sustain the burden of proof before the Special Master and their proof not being of a very convincing nature, as required of them, therefore, they have failed to prove the allegations of their answer and overcome the presumption in favor of the complainant-appellant as to the amount which is due on said bond and mortgage by reason of both instruments being under seal.

POINT II.

20 1. Complainant-appellant prior to the taking of the assignment for said bond and mortgage took all reasonable precautions that a person could have taken under the circumstances, in that it inquired of the original mortgagors as to the amount which was due and it obtained an estoppel certificate under seal (State of the Case, pp. 97 and 98), which estoppel certificate reads as follows:

ESTOPPEL CERTIFICATE

30 THE UNDERSIGNED, owning an interest in the premises 382-388 Bloomfield Avenue, Bloomfield, N. J., covered by mortgage for Fifteen Thousand (\$15,000.00) Dollars, and interest, dated July 10, 1923, and recorded July 19, 1923, in the office of the Register of the County of Essex in liber G 49 of Section of Mortgages, at page 49-51, which mortgage is about to be assigned by Charles Zimmer, the holder to Vassar Holding Co., a corporation of the State of 40 New Jersey, hereby certifies, in consideration

of one dollar paid and to enable said assignment to be made and accepted, that said mortgage, so to be assigned, is a valid lien on said premises for the full amount of principal and interest due thereon, namely, Fifteen Thousand (\$15,000.00) Dollars, with interest at six per cent., per annum from July 10, 1925, and that there are no defenses or offsets to said mortgage, or to the bond which it secures. 10

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

Dated the Thirtieth day of September, 1926.

JOSEPH CHIERA (L. S.)
BESSIE CHIERA (L. S.) 20
TERESA CALANDRA (L. S.)

Witness:

GENNARO LANDOLFO,
Notary Public for New Jersey.

(Seal)

State of New Jersey, }
County of Essex, }ss.: 30

BE IT REMEMBERED, That on this Thirtieth day of September, in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me, the subscriber, A NOTARY PUBLIC OF NEW JERSEY, personally appeared Joseph Chiera, Bessie Chiera and Teresa Calandra, who, I am satisfied, are the grantors mentioned in the within In- 40

strument, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

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GENNARO LANDOLFO,
Notary Public of New Jersey.

(Seal)

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Said estoppel certificate is signed by the original mortgagors and the equitable owner of the premises in question. It is respectfully submitted that the complainant-appellant was not compelled to go any further. The testimony of this phase of the case is by Mr. Howard F. Kirk, the secretary of the Vassar Holding Co., and Mr. Joseph Goldring, the President of the Vassar Holding Co. Mr. Kirk, on page 65 of the State of the Case, testified that prior to the assignment of the mortgage in question he made inquiries on behalf of the Vassar Holding Co., of one Joseph Chiera, one of the original mortgagors, and asked him how much was due on said bond and mortgage and he was told there was \$15,000.00. He informed Mr. Chiera that he desired an estoppel certificate to that effect; and that he also inquired of one Mr. Waldman, who was Zimmer's attorney at the time, that the complainant-appellant was about to take the assignment of said mortgage and who was the solicitor of record for the said Charles Zimmer, and he was informed by Mr. Waldman that there was \$15,000.00 due. On pages 66 and 67 of the State of the Case he, Mr. Kirk, who was the secretary of complainant,

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testified that "he did not deliver the check until after the estoppel certificate was delivered to him."

2. An examination of the letter of the learned Vice Chancellor who decided the exceptions on the Master's Report in this case, which letter is set forth in full on pages 73 to 75 of the State of the Case, and which is the basis for the order now being appealed by the complainant-appellant, discloses this situation as his reasons for arriving at the conclusion sustaining the Master's Report. The Vice Chancellor must have misunderstood the evidence which had been submitted before the Special Master by the complainant-appellant when he says the following:

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"The other question is as to the effect of the estoppel certificate signed by the defendants Chiara and Calandra on the rights of Osborn and Marsellis Company. The mortgage in which Osborn and Marsellis Company have an interest and by reason of which they are made parties defendant is dated November 2, 1923, and recorded November 20, 1923. The estoppel certificate is dated September 30, 1926. This was four days after the assignment of the Zimmer mortgage to the complainant and obviously the estoppel certificate was not relied upon by the assignee; but irrespective of this fact, an estoppel certificate executed by Chaiara and Calandra nearly three years after the Osborn and Marsellis Company mortgage was placed on record, cannot prejudice their rights as mortgagee. The estoppel certificate may operate as a

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waiver on the part of Chiare and Calandra to the defence of usury but it cannot take away from Osborn and Marsellis Company the rights which accrued to them under their mortgage upon its execution and recording."

10 Therefore, it would appear that the learned Vice Chancellor had not carefully read the testimony of Mr. Howard F. Kirk, secretary of the complainant-appellant corporation, in that Mr. Kirk testified that he did not deliver the check until the estoppel certificate had been delivered to him as secretary of said corporation.

20 3. Vice Chancellor Pitney in the case of Magie vs. Reynolds, 51 Eq., 113, on pages 116 and 117, laid down the following rule:

30 "The well-settled rule in this state, as well as in other equitable jurisdictions, is that an assignee of a bond and mortgage takes it subject to all the equitable defences which the original obligors and mortgagors have thereto. This is so at law as well as in equity. It was so held at law in an action on a bond, in Barrow vs. Bispham, 6 Halst., 131, after an elaborate consideration of the authorities. And the same doctrine was held in equity by Chancellor Vroom, in Shannon vs. Marsellis, Saxt., 413. At page 424 the chancellor examines the authorities in England and New York, and quotes with approbation the language of Chancellor Kent, in which he states that it is the duty of the assignee to make inquiries of the obligor or mortgagor or person owning the equity of redemption before

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taking an assignment of the bond and mortgage. And see the remarks of the Lord Chancellor, in Matthew vs. Wallwyn, 4 Ves., 118 (at p. 127).

"This ruling was followed in Jaques vs. Esler, 3 Gr. Ch., 461, by Chancellor Haines, and by Chancellor Green in Woodruff vs. Depue, 1 McCart., 168, and by Chancellor Zabriskie in Conover vs. Vanmater, 3 C. E. Gr., 481, and again, by the same judge, in Coursen vs. Canfield, 6 C. E. Gr., 92, and has never been questioned or doubted, and finally has the approval of the court of errors and appeals in Atwater vs. Underhill, 7 C. E. Gr., 599 (at p. 606).

20 "The principle underlying this rule is that the mortgage is a mere incident of the debt which it is intended to secure, and a defence to the debt is a defence to the mortgage. If the mortgage is given to secure a negotiable promissory note, and the note is negotiated for value in the ordinary way before maturity, the holder will hold it and the mortgage free from all defences. 2 Jones Mort., Sec. 1487, and cases there cited. But if the mortgage to be given to secure a non-negotiable instrument, the assignee takes it subject to all defences to the bond or other instrument manifesting the indebtedness. 30

"In this aspect the assignment of a mortgage, through it assume, as it usually does, the form of a conveyance of land, differs from an ordinary conveyance in which the grantor for value takes the title free from all prior conveyances and equities of which he has no actual or constructive notice. Car-

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penter vs. Longan, 16 Wall., 271 (at p. 275);
Matthew vs. Wallwyn, 4 Ves., 118 (at p. 129);
Coote Mort., 301, et seq.”

That case was cited by the present Chancellor
in Nixon vs. Haslett, 74 Eq., 789, affirmed in 75
E., 302, on page 792, where he said as follows:

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“In Magie vs. Reynolds, 51 N. J. Eq. (6
Dick.), 113, a mortgage was procured to be
given by fraud and without any considera-
tion. It was assigned for a consideration,
and upon foreclosure under a cross-bill by
the mortgagors and owners of the equity of
redemption to have it canceled, Vice-Chan-
cellor Pitney held that the complainant’s bill
should be dismissed as to them, and that they
were entitled to have the bond and mortgage
delivered up to be canceled. This upon the
ground that the assignee of a mortgage takes
the same subject to all defences which the
mortgagor had to the debt which the mort-
gage was given to secure. He held, however,
that it is the duty of a person about to take
the assignment of a bond and mortgage to
inquire of the obligor and mortgagor as to
his liability thereon. It will be remembered
that this inquiry was made in the case at
bar, and the defendant and mortgagor gave
to the complainant a declaration in writing
that he had no charge, claim, demand, plea
or set-off upon, for or against the mortgage
in any way or manner, the declaration com-
mencing with the recital that the very mort-
gage in question was about to be assigned
from the holder to the assignee, who is the
complainant, and notice of which assignment

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had been received by the mortgagor who
made the declaration. To allow the defend-
ant’s claim in the face of his solemn declara-
tion in writing would be to overthrow the
whole doctrine of estoppel with reference to
the assignment of mortgages made after in-
quiry of the mortgagor or person owning the
equity of redemption as to whether the mort-
gage is due so that the intending purchaser
can safely take an assignment of it as a valid
and existing security.

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“In Woodruff vs. Morris Institute for Sav-
ings, 34 N. J. Eq. (7 Stew.), 174, Vice-Chan-
cellor Van Fleet held: ‘Where one person,
by either words or conduct, induces another
to believe that he may safely purchase certain
property, or take a certain security, and, sub-
sequently, relying on such representations,
acquires the property or security, the former
will never be permitted, in a court of equity,
to overthrow the title so acquired.’

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“In Magie vs. Reynolds, ubi supra, Vice-
Chancellor Pitney (6 Dick., 116) remarked
that Chancellor Vroom in Shannon vs. Mar-
sellis, 1 N. J. Eq. (Sax.), 413 (at p. 424), ex-
amined the authorities in England and New
York and quoted with approbation the lan-
guage of Chancellor Kent in which he stated
that it is the duty of the assignee to make
inquiries of the obligor or mortgagor or per-
son owning the equity of redemption before
taking an assignment of a bond and mort-
gage. He cites also Matthew vs. Wallwyn, 4
Ves., 118, in which Lord Chancellor Lough-
borough observed (at p. 127): ‘Persons most
conversant in conveyancing hold it extremely

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unfit and very rash, and a very indifferent security, to take an assignment of a mortgage without the privity of the mortgagor as to the sum really due; that in fact it does happen that assignments of mortgages are taken without calling upon the mortgagor; * * * but no conveyancer of established practice would recommend it as a good title to take an assignment of a mortgage without making the mortgagor a party, and being satisfied that the money was really due.'

"It appears that this estoppel will arise not only where a certificate in writing that there are no defences or set-offs against the mortgage is given, but even where oral statements are made to that effect (20 Am. & Eng. Encycl. L. [2d ed.], 1042)."

4. When the defendant-appellee, Osborne & Marsellis Company, took their assignment of the mortgage which is subsequent to the present mortgage they knew that complainant-appellant's mortgage was for \$15,000.00 as complainant-appellant's mortgage was already on record. Their rights also were derived from mortgage executed by Joseph Chiera and Bessie Chiera, his wife. If the original mortgagors and the owner of the equity of redemption are estopped by their actions and statements both verbal and written, as indicated by the testimony of Mr. Kirk and the execution and delivery of the estoppel certificate, the defendant-appellee, Osborne & Marsellis Company, and the other defendants who question the amount due on complainant's mortgage, should not be permitted to question the amount due on said mortgage.

5. In conclusion it is respectfully submitted that the order sustaining and confirming the Master's Report should be set aside and vacated for the following reasons:

1. That the defendant-appellee, Osborne & Marsellis Company, and the other defendants, cannot attack the amount due on complainant-appellant's mortgage as they have not properly pleaded sufficient facts so that complainant-appellant would be acquainted with what it was to meet prior to a hearing.

2. That the defendants-appellees, Osborne & Marsellis Company, William A. Dunlap, Julia F. Dunlap and Johan R. Johnson, have not sustained the burden of proof by convincing evidence to overcome the presumption in favor of the complainant-appellant as to the amount due on complainant-appellant's bond and mortgage as both instruments are under seal.

3. That by reason of the estoppel certificate and the actions of the original mortgagors and the equitable owner of the property in question, they being estopped, therefore, the owner of a junior mortgage is also estopped as the rule in this case should be the same as in a usury case where a junior mortgagee is only permitted to set up a defence of usury when said defence is set up with the consent or concurrence of the original mortgagors.

For the reasons above enumerated, it is respectfully submitted that the order advised by the Chancellor sustaining and confirming the Mas-

ter's Report should be reversed and set aside and that the Chancellor be directed to advise an order sustaining complainant-appellant's exceptions to the Master's Report.

Respectfully submitted,

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THOMAS BRUNETTO,
Solicitor for and of Counsel
with Complainant-Appellant.

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Gallo & Ackerman, Inc., 142 Liberty Street, 'Phones—Rector 7257-8.
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67 MAY.T.1928

New Jersey Court of Errors and Appeals

Between VASSAR HOLDING Co., a corporation, Complainant-Appellant, and WILLIAM A. DUNLAP, <i>et al.</i> , Defendant-Appellees.	}	On Bill, &c. On Appeal From Order Confirming Master's Report.
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**BRIEF FOR
DEFENDANT-APPELLEES.**

Facts.

The bill was filed in behalf of the Vassar Holding Co., the owner by assignment of a certain mortgage given by one Joseph Chiera to one Charles Zimmer, which mortgage was dated July 10, 1923, in the nominal amount of \$15,000.00. It was a second mortgage, subsequent to a Building & Loan mortgage in the sum of \$50,000.00. The mortgage was placed through the office of Lowy & Lowy. Junior to this mortgage, there was executed by the said Joseph Chiera a third mortgage for \$25,717.10 to one Melanie Dynner, in trust for various creditors of Joseph Chiera, among whom was Johan R. Johnson. His interest in the third mortgage amounted to \$9,690.93, and that interest he assigned to the Osborne & Marsellis Co. The Osborne & Marsellis Co. is the real defendant-appellee. Mr. Dunlap, who is secretary of that company, being the record holder of the equity of redemption, in order that rents might be properly applied, was afterwards ap-

pointed in this cause receiver of rents. When the foreclosure was begun, answer was filed in behalf of the Osborne & Marsellis Co. as printed in the Case on page 15, not disputing the priority of the mortgages, but alleging that \$12,000.00 was the original indebtedness and not \$15,000.00, and claiming in paragraph 9 of the answer that the true amount to be found due on the Vassar Holding Co.'s mortgage was \$12,000.00, less the sum of \$360.00, leaving a balance of \$11,640.00, and interest from July 10, 1925, the \$360.00 being interest that had been paid on the excess of \$15,000.00 over \$12,000.00, or \$3,000.00, for two years. This defense was advanced, and it is claimed that the proofs sustained it, because only \$12,000.00 had been advanced on the mortgage. This was the Master's finding, except that he included insurance premiums, to which no exception has been taken by either side. Exceptions were taken by the appellant to the Master's report as found on pages 69, 70 and 71 of the Case, on the ground that his findings were "erroneous and contrary to law and the evidence". Vice-Chancellor Berry, who heard the argument on the exceptions, confirmed the Master's report, and an appeal was taken on the grounds set forth in the petition of appeal, pages 77, 78, 79 and 80 of the Case.

By reference to the assignment to the complainant-appellant, on pages 93 and 94 of the Case, it will be seen that the usual warranty as to the amount due is conspicuous by its absence. It is to be noted that delivery was taken by the complainant-appellant for \$12,000.00 by Howard F. Kirk, an officer of the complainant corporation, and an experienced counsellor-at-law, who admits, on page 67 of the Case, line 20, that he noted that no such representation was made when he took the mortgage.

The defendant-appellees believe that the Master and Vice-Chancellor relied on certain features of the testimony in concluding that only \$12,000.00 had ever been advanced on the mortgage. These features are:

1. The absence of any representation as to the amount due in the assignment already commented upon.

2. Testimony of Chiera, page 42 of the Case, line 38, that the only money due on the mortgage was that paid out by Mr. Lowy. Mr. Lowy died before the testimony was taken and did not testify, but there is in evidence, at page 20 of the Case, an affidavit by Mr. Zimmer, which incorporates a statement from Lowy & Lowy showing that only \$12,000.00 had ever been paid out on account of this mortgage; that this was paid out in conjunction with \$850.00 from another account that belonged to Mr. Chiera.

3. Mr. Chiera's statement, as testified to by Mr. Johnson at page 57 of the Case, line 29, that Mr. Chiera got only \$12,000.00.

4. Mr. Zimmer's testimony, page 47 of the Case, line 32, that \$12,000.00 was what he gave Mr. Lowy (See also l. 10 of p. 48; l. 26 of p. 60; l. 34 of p. 60; l. 36 of p. 61, and Zimmer's reply to the Master on p. 63 at l. 20).

It is true that the witness Zimmer was not altogether a satisfactory witness, but he was unshaken on this point. An attempt is made, in behalf of the appellant, to discredit him by his affidavits in previous litigation over this mortgage, found at page 102 and page 110 of the Case. Both of these affidavits were in verification of bills of complaint filed.

The first one, found in part at page 99 of the Case, was a foreclosure bill to foreclose this mortgage, and recites in the first paragraph, in the form prescribed by the Rules of the Court of Chancery, that Chiera was indebted to Zimmer in the sum of \$15,000.00, and in the last paragraph of the bill that the full amount was due. It is true that ~~Chiera~~^{Zimmer} did verify this in the common form, being told, as he says, by his counsel to sign it. But there is no other statement in his affidavit which could possibly be construed as being untrue, the second paragraph found at the top of page 103 of the Case being literally true, as the mortgage was to secure the sum of \$15,000.00. The second affidavit contains the verification in common form, and the statement that the lands were mortgaged to secure the sum of \$15,000.00, but the bill contains no statement in reference to the size of the mortgage, except that they were mortgaged to secure the sum of \$15,000.00. Certainly there is nothing in either of these affidavits to change the facts as testified to by ~~Chiera~~^{Zimmer}, Mr. Lowy's statement contained in Zimmer's affidavit, and that Mr. Zimmer only advanced \$12,000.00, as testified to by him repeatedly. If Mr. Zimmer were the interested party in this suit, it might be different, but as the appellees were not parties to those two suits, they are certainly not bound by this verification of Zimmer's therein contained. Neither is there any contradiction of this testimony by anyone. It should have been the easiest thing in the world for the complainant to have produced evidence before the Master of the disbursement of the \$15,000.00, but nowhere does the complainant-appellant make any pretence that more than \$12,000.00 was ever advanced.

The appellant's whole case is an attempt to get back \$15,000.00 where \$12,000.00 only had been advanced on the mortgage, by pleading an estoppel

certificate by Chiera, who, by the way, was not the owner of the equity of redemption at the time he made the estoppel certificate (see paragraph 15 of the bill of complaint, p. 9 of the Case at l. 22), the estoppel certificate being dated September 30, 1926, and the assignment being dated September 23, 1926, and by attempting to show that the appellees had no technical right to show the amount actually due on the mortgage.

The complainant-appellant, in its notes of facts, has made some probably harmless misstatements. The date of the conveyance to Calandra, cited in paragraph 9 of its brief on the facts, should be August 27, 1923. The same paragraph of the bill, #14 found on page 9 of the Case, shows that this deed was not recorded until February 11, 1924.

In the latter part of paragraph 12 of the brief, the affirmation is made that the appellees do not deny paragraph 26 of the bill of complaint which alleges that the principal sum of \$15,000.00 is due. This is an entire untruth, and is corrected by the statement in paragraph 13 of appellant's brief, citing paragraph 9 of appellees' answer.

Vice-Chancellor Berry, in his opinion in the form of a letter filed in the cause, and printed in the Case at page 73, in speaking of the estoppel certificate, seems to have missed the point that it was in time. It is true that the estoppel certificate was dated several days after the date of the assignment of the Zimmer mortgage, but the evidence shows beyond dispute that the assignment was not delivered at the time of its date, but on October 6, 1926, after the execution of the estoppel certificate, and Mr. Kirk states that he did not buy the mortgage until he had the estoppel certificate.

Vice-Chancellor Berry's comment, however, did not deal with the estoppel certificate on this theory alone. See page 74 of the Case at line 20 and fol-

lowing, where he states that the estoppel certificate could operate only as a waiver on the part of Chiera, but did not take away Osborne & Marsellis Co.'s right which accrued to them under their mortgage upon its execution and recording. The estoppel certificate seems a little ridiculous, for Mr. Chiera had parted with the title two and one-half years before he made the estoppel certificate, and knew nothing about what had happened to the mortgage since. Mr. Dunlap had held the title for two years, and it was of Mr. Dunlap that inquiry should have been made.

So far as the inquiry of Mr. Waldman, Mr. Zimmer's counsel, goes, that again is futile. No answer on Mr. Waldman's part appears in the testimony. Even admitting that the testimony is true, and Mr. Waldman made a false statement, it is not binding on the appellees or the owner of the equity of redemption. It is to be noted that at the very time of making the inquiry, according to his own testimony Mr. Kirk paid \$12,000.00 for the mortgage, and took an assignment which he noticed went out of its way to avoid stating the amount due.

L A W.

POINT I.

The appellee has sustained the burden of proof as to the amount due by a preponderance of evidence.

As it is noted under the argument of the facts, there is no evidence introduced to contradict the fact that only \$12,000.00 was ever advanced on the mortgage, while there certainly is evidence to show the facts. Counsel for complainant argues that

there is a presumption to be overcome. Whether or not this is sound law, and whether or not the evidence is sufficient to overcome the presumption, he should not avail himself of this argument, because his petition of appeal (at page 77 of the Case) states no such ground for appeal.

He also argues that there are no facts pleaded giving reasons why \$12,000.00 was all that was due. It is pointed out that it was pleaded that only \$12,000.00 was due. The facts which lie back of this were a matter of evidence, and it is submitted they were included in the proof. The defense does not prove, or attempt to prove, usury, but simply proves the fact that no more than \$12,000.00 had ever been advanced. The Court of Chancery has already ruled on the validity of the answer on the motion to strike out, which was denied. (See page 22 of the book.) No appeal was taken from that order.

POINT II.

The defense was a proper defense, available to the Osborne and Marsellis Company, junior encumbrancer.

The defense is perhaps analogous to the defense of usury. Testimony of Johan R. Johnson (page 45, lines 20 to 35) shows that he took his interest in the mortgage for carpenter work. It was not an investment that he made, but security for moneys due him. He is not in the position of the purchaser of property who takes the property subject to existing mortgages, receiving an allowance for the face of those mortgages against the agreed purchase price. His assignee, The Osborne and Marsellis Company, is in the same position as he finds himself. Junior encumbrancers, such as the appellees,

are properly entitled to make any defense to a mortgage under foreclosure that exists. Certainly they are in this case, where the junior mortgage was taken as security for a debt. They are entitled to have their security made as strong as the facts will permit. See *Burke vs. Isquith Productions, Inc., et al.*, 98 N. J. Eq. 608, a comparatively recent decision by Vice-Chancellor Berry, which has not been upset, and which may be taken as stating the law. The Vice-Chancellor cites *Truesdell vs. Dowden*, 47 N. J. Eq. 396, which says, on page 399: "If the defendant is a mortgagee, and not a purchaser, he has the same right to interpose the defense of usury that any other junior encumbrancer would have. The clause in his mortgage, expressly declaring that the mortgaged premises were, when he took his mortgage, already subject to a prior mortgage, cannot, according to any rule of equity or jurisprudence with which I am acquainted, be held to preclude him from showing either that such prior mortgage is usurious or has been paid."

There is no statement in our facts that there was any recital of prior mortgages in the mortgage of which appellees hold a part, but certainly a mortgage, although in the nominal sum of \$15,000.00, on which no more than \$12,000.00 has ever been advanced, cannot be used for security for a debt larger than \$12,000.00 and interest.

This goes back to the early case of *Brolasky vs. Miller, et al.*, 9 N. J. Eq. 807, which holds that defense of usury was available only to the mortgagor, or those in privity with him. Of course the junior mortgagees are in privity with the mortgagor. In other words, they took part of his title.

It is to be noted that these cases cited are really to the point that there was a proper defense for the appellees to make, and that it was made properly, a point which has been decided on the motion to strike out the answer eighteen months ago.

POINT III.

The Master's report was a true, equitable and proper conclusion from the testimony and facts, and the Court of Chancery did not err in confirming the same, and the said Court should be affirmed.

Respectfully submitted,

PHILIP GOODELL,
Counsel for Defendant-Appellees.

67 MAY.T.1928

New Jersey Court of Errors and Appeals 10

Between

VASSAR HOLDING Co., a
corporation,
Complainant-Appellant,

and

WILLIAM A. DUNLAP, et al.,
Defendants-Appellees.

On Bill, &c.
On Appeal
From Order
Confirming
Master's
Report.

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**REPLY BRIEF OF COMPLAINANT-
APPELLANT.**

1. As counsel for Osborne & Marsellis Co., one of the defendants-appellees, admits that the Osborne & Marsellis Co. is the real defendant-appellee, therefore, complainant-appellant will discuss any of the rights that said defendant-appellee has in said premises in this reply brief. 30

2. Mr. Goodell in his brief, page 3, paragraph 2, refers to an affidavit of Mr. Zimmer, set forth on page twenty of the State of the Case. The affidavit in question was an affidavit filed on a 40

10 motion to strike out answer filed by the defendant-appellee and in the name of the other defendants-appellees, to wit, William A. Dunlap, Julia F. Dunlap and Johan R. Johnson. Of course, the affidavit was no evidence as to the actual amount due on complainant-appellant's mortgage. However, at the hearing Mr. Zimmer testified that (State of the Case, p. 62, lines 30 and 40) he did not know where the balance of \$543.00 came from. However, the fact is, that Lowy paid out more than \$12,000.00 according to that affidavit, to wit, \$12,850.00. Therefore, this witness does not know how much Lowy paid on complainant-appellant's mortgage.

20 3. Defendant-appellee, Osborne & Marsellis Co., produced a witness by the name of Malvern Hammil, who was a bookkeeper in Mr. Lowy's office at the time of the transaction (State of the Case, pp. 52 and 53), to corroborate Zimmer's story that there was only \$12,000.00 advanced. However, they failed to produce the books, which would have enlightened the special master and would show the actual amount of money paid out by Lowy & Lowy on complainant-appellant's mortgage. Of course, we have the additional fact that 30 Mr. Philip Lowy was dead at the time of the hearing and that Mr. Milton Lowy, a member of the said firm of Lowy & Lowy, was still alive, and if defendant-appellee were anxious to corroborate Zimmer's story they could have easily served a subpoena upon Mr. Lowy, as surviving member of the firm of Lowy & Lowy, or as executor of the estate of Philip Lowy, to produce the books of the partnership and in that way attempt to substantiate Zimmer's story. 40

4. Counsel for defendants-appellees on page 4 of his brief, lines 16 to 17, makes the allegation that there is no statement in reference to the size of the mortgage in any of the bills of complaint except that the lands were mortgaged to secure the sum of \$15,000.00. However, he overlooks the statement in paragraph 31 of the bill of complaint wherein Charles Zimmer was complainant and William A. Dunlap, et als., were defendants, which reads as follows: 10

“The whole amount of principal, with interest thereon, from July 10, 1925, is due upon complainant's bond and mortgage.”

Therefore, if Charles Zimmer on March 27, 1926, swore that he read the bill of complaint and that the matters and things therein contained, so far as they were within his knowledge, were true, there is no question as to whether he knew on that day whether the principal sum of \$15,000.00 was due or not. If that affidavit was true on that day that there was \$15,000.00 due with interest from July 10, 1925, then when he testified before the master that he only advanced \$12,000.00, then he committed perjury. However, if the story is that he was telling the truth before the master, then we say when he swore to the affidavit on March 27, 1926, in which he stated there was \$15,000.00 due him with interest from July 10, 1925, if that fact were not true, then he committed perjury on March 27, 1926. 20 30

5. For the above reasons Zimmer's testimony is not reliable and in the absence of any corroboration it should not be sufficient to overthrow the 40

presumption in favor of the complainant-appellant of the fact that both the bond and mortgage are under seal.

6. Counsel for defendants-appellees mentions the fact that defendants-appellees were not parties to the two suits in question (State of the Case, p. 4) which had been instituted by Mr. Zimmer; but the fact is, that Dunlap was made party defendant in said suits (see State of the Case, p. 101, paragraphs 19a and 30). On page 102 of the State of the Case, the name of William A. Dunlap is mentioned, and as the bill is not printed in full, therefore, complainant-appellant cannot refer to this Court the particular paragraph wherein defendant, William A. Dunlap, is mentioned as the record holder of the premises in question. However, on page 102 of the State of the Case, the affidavit attached to said bill is entitled: "Charles Zimmer, Complainant, and Wm. A. Dunlap, et al., Defendant." In the last paragraph of defendants-appellees' brief, at the bottom of page 4 and top of page 5, they raise the question that complainant-appellant's whole case is an attempt to get back \$15,000.00 where \$12,000.00 only had been advanced on the mortgage. However, the fact is that complainant-appellant purchased a mortgage of \$15,000.00 for \$12,000.00; it did not advance any money on account of any mortgage and it purchased said mortgage upon the representation made by the original mortgagors and the owner of the equity of redemption that the whole amount was due and that there were no claims or set offs against said mortgage (see Estoppel Certificate, S. of C., pp. 97 and 98).

7. Defendants-appellees at the top of page 5 of their brief mention that the estoppel certificate was only signed by Chiera, but the fact is, that said estoppel certificate was signed by the original mortgagors and Teresa Calandra, the equitable owner of redemption of said premises (see State of the Case, pp. 97 and 98). The fact is that William A. Dunlap, who is one of the defendants-appellees, and who is one of the parties who filed the answer in question on August 20, 1925, as trustee for Teresa Calandra, paid interest on \$15,000.00 by drawing a check for \$450.00, being six months' interest on \$15,000.00, to the order of Charles Zimmer, the main witness which defendants-appellees rely, to overcome the presumption in favor of the complainant-appellant as to the amount due on said bond and mortgage. At the bottom of page 5 and top of page 6 of defendants-appellees' brief they raise the question that by Chiera signing an estoppel certificate he could not take away the right of Osborne & Marsellis Co. which accrued to them under their mortgage upon its execution and recording. They then proceed by only mentioning Mr. Chiera: that Chiera had parted with the title and that inquiry should have been made of Dunlap, who held the title for two years. The facts are that Joseph Chiera and Bessie Chiera, being the original mortgagors, the bond and mortgage being to secure a certain amount, to wit, \$15,000.00, therefore, if they had any defense to said debt they had a perfect right to waive it and it is none of Osborne & Marsellis Co.'s business if they did not want to avail themselves of that defense. Dunlap's interest in the premises was as trustee for Teresa Calandra and Teresa Calandra having also executed said estoppel certificate, therefore, it was not necessary to

inquire of Dunlap because any defense that he could set up would have to be set up in behalf of Teresa Calandra, for whom he held the premises in question in trust. Of course, Dunlap, the trustee, had no other information at the time, otherwise he would never have paid \$450.00 for six months' interest on \$15,000.00, which was the face of the mortgage.

8. In point one of defendants-appellees' brief, pages 6 and 7, the question is raised that there is no evidence introduced to contradict the fact that only \$12,000.00 was ever advanced on the mortgage. The fact is just the opposite as Zimmer was the only witness produced by defendants-appellees to contradict the amount shown by the bond and mortgage. Complainant-appellant feels that his testimony has been greatly discredited and is of no value in proving the allegation of defendants-appellees that only \$12,000.00 was advanced.

9. In point two of defendants-appellees' brief, pages 7 and 8, the question is raised that the defense is perhaps analogous to the defense of usury, but it is respectfully submitted that if the intention of defendants-appellees was to raise the defense of usury in the present suit they should not have waited until the matter got before the Vice Chancellor on Exception to the Master's Report to plead said defense. The defense of usury being a personal defense the mortgagors only, and the only ones who can plead same are they or anyone with their consent or concurrence. There is no plea of usury filed by the original mortgagors or the owner of the equity of redemption, nor is there anywhere in the record any evidence that the

mortgagors have consented or concurred in the defendants-appellees availing themselves of said defense, in the case at bar.

10. Defendants-appellees cite the case of Truesdell vs. Dowden, 47 N. J. Eq., 396, and Brolasky vs. Miller, et al., 9 N. J. Eq., 807, as an authority for them. It is respectfully submitted that none of those cases apply to the case at bar. Truesdell vs. Dowden was a motion to strike out part of defendant's answer. The facts in that case were different from the case at bar. That case was an action to foreclose a mortgage.

In that case the opinion recites that the original mortgagor after the execution of said mortgage had conveyed said premises subject to the mortgage in question. As far as the record went, Dowden, who was made a defendant, filed an answer. He denied by his answer that the deed to him was what it purported to be, but said that it was only a mortgage and that he was holding the lands described in said deed as security for a debt that the grantor owed him and that upon payment of said debt he was to reconvey the land to his grantor. Vice Chancellor Van Fleet, on page 397, said:

"If this averment is true, there can be no doubt that the deed is a mortgage, and that, if that fact shall be established on the final hearing, the court will be compelled to treat the defendant as a junior encumbrancer, and not as the owner of the equity of redemption. The part of the answer just adverted to sets up no defence; it is merely explanatory, but this explanation is immediately followed by

a charge that the complainant's mortgage is usurious, and this charge is succeeded by a particular statement of the usury."

Therefore, that case is not an authority for defendants-appellees as it appears that the defendant was only a mortgagee and if the original mortgagor had given him a deed the presumption was that when he set up the defense of usury he was doing it with the consent and concurrence of the original mortgagor as up to that time the original mortgagor had not been made a party to that suit and as Vice Chancellor Van Fleet said in that case, if the fact was that the defendant was only a mortgagee, the original mortgagor was a necessary party and the suit could not proceed much further.

11. The case of *Brolasky vs. Miller* was a suit where the defense of usury was set up by the mortgagee who had a junior mortgage and who acquired title to the premises in question at a Sheriff's Sale and in that case if the defense of usury was permitted to be set up by him he was setting up same as the owner of the premises and not as a junior mortgagee. That case was again followed in *Pinell vs. Boyd*, where Justice Dickson for this Court delivered the opinion reported in 33 Eq., page 600. In that case the case of *Brolasky vs. Miller* is cited as an authority. The case of *Burke vs. Isquith Productions, Inc., et al.*, 98 N. J. Eq., is also cited as an authority by the defendants-appellees. However, that case does not apply to the case at bar. In that case a bill was filed to foreclose a mortgage. A Mr. Benjamin Staw, who was the original mortgagor, and also the owner of a second mortgage was made

a party defendant. In that capacity he contested the amount due on the mortgage. A motion was made to strike out his answer. As counsel for defendants-appellees, on page 1 of his brief, under facts, states that *Osborne & Marsellis Co.* is the real defendant-appellee, therefore, the *Burke vs. Isquith Productions, Inc.*, case is not an authority for said defendants-appellees. The same case is reported in 131 Atl., page 526. Counsel for complainant-appellant is citing the opinion, as reported in 131 Atl., on page 527, 5th paragraph, where the learned Vice Chancellor laid down the rule that the defense of usury is personal to the debtor and that while he lives no other person can interpose it except with his consent and concurrence, citing 27 Ruling Cases Law, R. C. L., page 282, on page 283.

DeWolf vs. Johnson, 10 Wheat., 367, 6 L. Ed., 343.

Defendants-appellees do not state in the case at bar that they are setting up the defense of usury with the *consent and concurrence of the original mortgagors*. On page 529 of 131 Atl., second paragraph, the opinion states that:

"Staw is now a defendant not only as obligor on the bond, but also as mortgagor, and I am of the opinion that the defense of usury is available to him."

The defendants-appellees do not appear in this case as original mortgagors nor do they appear to set up the defense, contesting the amount due on said mortgage with the consent or concurrence of the original mortgagors.

12. Defendants-appellees, under point one of their brief, pages 6 and 7, raise the question that complainant-appellant cannot raise the question of law, of the presumption of law in its favor as to the bond and mortgage being under seal as no such ground of appeal is set forth in the petition of appeal. However, said point is covered by paragraphs one, four, five and six of the petition of appeal (State of the Case, pp. 78 and 79).

In the last paragraph, on pages 5 and top of 6, of defendants-appellees' brief, mention is made about the estoppel certificate

"being ridiculous as Chiera had parted with the title two and one-half years before he made the estoppel certificate, and knew nothing about what had happened to the mortgage since."

The evidence is that the estoppel certificate was signed by both the original mortgagors and Miss Calandra for whom Dunlap held title in trust and there was no evidence before the Master that Chiera did not know what had occurred in the meantime. They also raise the point that the estoppel certificate was not executed and delivered until a short time prior to complainant-appellant purchasing the mortgage in question.

It is immaterial when the estoppel certificate was executed as long as the assignee relied on the facts recited in its estoppel certificate before it took an assignment of the mortgage in question and paid the considerations therefor.

In conclusion the order sustaining and confirming the master's report should be reversed and set aside for the reasons that the same is

inequitable and contrary to law in that none of the cases cited by the defendants-appellees in their brief are authorities in point. In each instance the junior mortgagee appeared in a dual capacity or stood in their place as the original mortgagor and as the owner of the premises in question. Under the cases and the rulings of this Court it appears that the only obligation upon the assignee of a mortgage is that he inquire of the original mortgagors whether he has any defenses to said mortgage, and in some of the cases they have gone a step further and have compelled the assignee to inquire of the owner of the equity of redemption. In the case at bar Osborne & Marsellis Co. and the other defendants-appellees stand only in the shoes of a junior mortgagee and complainant-appellant was not obliged to inquire of them or get an estoppel certificate from them as to the amount due on the mortgage it was taking an assignment of, as long as it had obtained an estoppel certificate from the original mortgagor and owner of equity of redemption.

For the above reasons the order sustaining and confirming the master's report should be set aside.

THOMAS BRUNETTO,
Solicitor for and of Counsel
with Complainant-Appellant.

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