

1878

# New Jersey Court of Errors and Appeals.

Between BRIDGET O'NEILL and others, <div style="text-align: right;"><i>Appellants,</i></div> and EDMUND J. CLEVELAND <i>et al.</i> , Ex- utors, &c., <div style="text-align: right;"><i>Appellees.</i></div>	}	<i>On Appeal.</i>
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## POINTS ON PART OF THE APPELLANTS.

I. The answer of defendants sets up that 15 per cent. bonus was taken by the complainants. Proof of such fact, by the testimony of Jacob Davis, and not denied by the complainants; proof being that O'Neill, the mortgagor, only received \$1,891.25, the mortgage being for \$2,225. The answer sets up an usurious agreement, which is substantiated by the evidence.

In the case above there is neither variance nor failure of proof, and if there was, the case cited below would cure the defect.

See Hallock v. Com. Ins. Co., 2 Dutcher, 268,

in which it was decided, "that if there was a variance between the pleading and proof, it would be immaterial, unless the party was misled or prejudiced by it."

In the above case, the evidence shows, beyond a doubt, that bonus was paid. Davis testifies

that he was acting for the estate in the matter, and paid the money to Edmund J. Cleveland, the executor, who managed the affairs of the estate.

The only discrepancy (if it is a discrepancy) is, that while fifteen per cent. was taken by Davis, who acted as agent for the estate in the transaction, but fourteen per cent. was received by the executors. But that is not material. The proof is that the defendant O'Neill, the mortgagor, got no part of that fifteen per cent., all of it being retained out of the money, so that he got that much less than the mortgage calls for. And besides, Cleveland, in his testimony, does not contradict the fact of the fifteen per cent. being taken, and taken without his authority, and that he received no part of it. It should be taken as conclusive that he did receive it. He gives no account of what he did with it, and the presumption is that the estate got it. Davis being agent for the estate, his acts bind the estate; the law being well settled on that point.

II. An executor is responsible for the acts of his co-executor. Any profit made by an executor in the management of the estate's affairs inures to the benefit of the estate.

Joint executors and administrators are possessed of the estate, each as of the entirety, and

consequently the act of each is the act of all.

Redfield on Wills, chap. 8, pg. 222, 2d ed.

A contract made with one executor is made with all.

Nation v. Toser, 1 Crom. Mees & Rosc, 174.

In law executors are regarded as one person, each having an interest in the whole estate, which is incapable of separation from the interest of the others, or of assignment independent of that of the others.

Story on Agency, § 256.

See also, 2 Vesey, 844.

If an executor by his negligence permits his co-executor to receive and waste the estate, he is liable to the heirs and next of kin.

Clark v. Clark, 8 Paige, 152.

From the the above cases it would seem beyond a doubt that the law holds an executor or administrator for the acts of the other. By the cases cited below it is clear that the estate in this case is liable.

In Story on Agency, § 211, it is laid down, that it may be laid down as a general principle in all cases, where a person is either actively or constructively an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers.

See also 1 Vesey, Jr., 289.

2 do 317.

7 Watts, 472.

Also, Voorhees v. Stoothoff, 6 Halsted, 171. (Reprint.)

Hough v. Harvey, 71 Ill.

It is a general doctrine of law that the principal is held liable to third persons in a civil suit for

the frauds, deceits, concealments, misrepresentations, torts and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or participate in, or indeed known of such misconduct. In all such cases *respondent ouster* applies, and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal or indirectly with him through the instrumentality of his agents.

In every such case the principal holds out his agent as competent and fit to be trusted, and thereby in effect he warrants his fidelity and good conduct in all matters within the scope of his agency.

Story on Agency, § 452.

The general right of one executor to bind the whole, and thereby to convey title to the effects belonging to the estate, is carefully considered in

Hertell v. Bogert, 9 Paige, 52,

in which case it is laid down that he has that power.

From the cases above stated it would seem that the estate in this case is liable for the amount received by Mr. Davis, who acted as the agent of the estate, from O'Neill, the mortgagor. As to the alleged variance between the allegations in the answer and the proof, the cases I think all go to show that no variance between the pleadings and proof exists in this case.

W. R. WILSON,

*Of Counsel with Appellant.*

# Court of Errors and Appeals.

Between  
BRIDGET O'NEILL and others,  
*Appellants,*  
and  
EDMUND J. CLEVELAND et al.,  
Executors, *Appellees.*

*On Appeal.*  
*Points of Ap-  
pellees.*

I. No usury has been proved. The alleged transaction was with a third party, not with the principal.

Muir vs. Savings Inst., 1 C. E. Green, 537.  
Conover vs. Van Mater, 3 C. E. Green, 481.  
Spring vs. Reed, 1 Stewart, 345.  
Manning vs. Young, 1 Stewart, 568.

II. The proof does not correspond with the pleadings and the case comes within the rule that the defence of usury must be strictly proved, and where the proofs do not correspond with the pleadings the defence fails.

Taylor vs. Morris, 7 C. E. Green, 606.  
Crane vs. Homoeopathic Ins. Co., 12 C. E. Green, 484.  
Frank vs. Morris, Am. Law Reg. N. S., xii, 327.

The variance is found in the following particulars :

1. The transaction as proved was between the mortgagor and one Jacob Davis ; as charged it was directly with the mortgagees.
2. As proved, it appears that only one of the complainants, who are executors, was concerned either directly or indirectly, with the commissions taken. As charged, both complainants took usury.

Turner vs. Hardy, 9 M. & W., 770.

3. The sum proved to have come to the hands of this single executor is less than that charged in the Answer.

III. Where there are two executors, one cannot, without the consent of the other, prejudice the trust estate by an usurious transaction.

In this transaction the estate derived no benefit from the commissions taken by Mr. Davis.

EDWARD S. ATWATER,  
*Of Counsel with Appellees.*

NEW JERSEY COURT OF ERRORS AND APPEALS

IN SENATE

January 10, 1888

REPORT OF THE

COMMISSIONERS OF THE LAND OFFICE  
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE  
ON JANUARY 10, 1888

ALBANY: PUBLISHED BY THE STATE OF NEW YORK,  
1888

74  
Clerks Table

## New Jersey Court of Errors and Appeals.

Between

BRIDGET O'NEILL and others,  
*Appellants,*  
and

EDMUND J. CLEVELAND, et al. Execu-  
tors, &c. *Appellees.*

*On Appeal.*

WILLIAM R. WILSON,

*Solicitor and of Counsel with Appellants.*

EDWARD S. ATWATER,

*Solicitor and of Counsel with Appellees.*

A bill to foreclose was filed in the cause by Edmund J. 10  
Cleveland, Executor, and Harriet C. Cleveland, Executrix  
of Joseph Cleveland, deceased, against Bridget O'Neill, Ad-  
ministratrix, &c., of Michael O'Neill, deceased, and others,  
for the foreclosure of certain mortgaged premises in the City  
of Elizabeth, Union County, New Jersey. The mortgage  
is dated May 14, 1874, and was given by one Michael  
O'Neill and wife, to the complainants in the foreclosure suit,  
and the appellees in this cause, and was given to secure the  
sum of \$2,225 in three years from the date thereof, and was  
duly acknowledged according to law, and recorded in Book 20  
33 of mortgages for Union County, page 351, &c., May  
29, 1874.

And that after the making of said mortgage and on or  
about December 29, 1876, the said Michael O'Neill departed  
this life intestate, leaving Mary Ellen O'Neill, Ann Eliza-  
beth O'Neill, Hester Catharine O'Neill, Joseph Protese  
O'Neill, Michael James O'Neill and Thomas William  
O'Neill, his children and heirs at law, and also leaving his

widow Bridget O'Neill, surviving him, to whom letters of administration were granted, and she took upon herself the burden of administration of her husband's estate, which administratrix and children are the appellees in this suit.

The bill also prayed for answer under oath, and also that the defendants and all claiming under them may be foreclosed of and from all equity of redemption of in and to said mortgaged premises; and also that writ of subpoena under the seal of the Court of Chancery might issue against  
10 all the defendants.

The bill also set out that the whole of the principal, together with large arrears of interest, is still due the complainants.

EDWARD S. ATWATER,  
*Solicitor and of Counsel with Complainants.*

#### ANSWER OF DEFENDANTS.

The joint and several answers of Bridget O'Neill, Bridget O'Neill, administratrix of Michael O'Neill, deceased, and Mary Ellen O'Neill, Ann Elizabeth O'Neill, Hester  
20 Catharine O'Neill, Joseph Protese O'Neill, Michael James O'Neill, Thomas William O'Neill, infants, under the age of twenty-one years, by Henry S. Little, their guardian, defendants to the bill of complainant, of Edmund J. Cleveland, executor, and Harriet C. Cleveland, executrix of Joseph C. Cleveland, deceased, complainants, filed in the above cause.

These defendants now, and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies  
30 in the complainants' said bill of complaint contained, for answer thereto or unto so much and such parts thereof, as these defendants are advised, is material for them to make answer unto. They answer and say that they admit that the said Michael O'Neill, in his lifetime, did make and execute a<sup>d</sup> indenture of mortgage of such date and of such purport as is

in complainants' bill, mentioned and set forth, and that said mortgage was acknowledged and recorded as in said bill of complaint set forth, but deny that said Michael O'Neill, deceased, at the time of the execution and delivery thereof, was indebted to the said complainants in the sum of two thousand two hundred and twenty-five dollars, or in any other way or manner than hereinafter set forth.

And these defendants further answering, say that they admit that said Michael O'Neill, in his lifetime, executed and delivered to the said complainants, the bond mentioned and described in said bill; that the same was of even date with said mortgage for two thousand two hundred and twenty-five dollars, and payable in three years, with lawful interest, at seven per cent. per annum, payable semi annually; but these defendants deny that at the time said Michael O'Neill executed and delivered said bond, he was indebted to the complainants in the sum of two thousand two hundred and twenty-five dollars, the amount of said bond, or in any other way or manner than hereafter set forth.

And these defendants further answering, say that the said mortgage and bond were given to secure a loan of eighteen hundred and ninety-one dollars and twenty-five cents, made to said Michael O'Neill, deceased, by said complainants, and that no more than that sum was advanced to said Michael O'Neill, deceased, by said complainants, upon said bond, nor was the said Michael O'Neill, in his lifetime, at the time of the execution and delivery of said mortgage and bond, indebted to the said complainants, in any greater sum than eighteen hundred and ninety-one dollars and twenty-five cents.

And these defendants further answering, say that by the contract for said loan, which was made between the said complainants and the said Michael O'Neill, deceased, it was agreed that said complainants should reserve and take, and in pursuance of such agreement, said complainants did reserve and take the sum of three hundred and thirty-three dollars and seventy-five cents, as a premium or bonus for said loan, and that the said sum of three hundred and thirty-three dollars and seventy-five cents was taken and served

over and above, and in addition to the sum of seven per cent. per annum, reserved and taken as mentioned in said bond, and the condition of said mortgage, and that the difference between the sum actually advanced as aforesaid, and the nominal amount of said bond and of said mortgage was the premium or bonus aforesaid, and was so taken and reserved as aforesaid.

10 And these defendants further answering, say that the contract for said loan was made in the State of New Jersey, and the said bond and mortgage were also executed and delivered therein, and that they, as well as the contract for said loan, should be held amenable to the laws thereof.

20 And these defendants further answering, say that by an act of the Legislature of this State, entitled, "A further supplement to the act entitled, 'an act against usury,'" approved April 12, 1864, it is amongst other things enacted that, "in all cases of suits at law, or in equity to enforce any note, bill, bond, mortgage, contract, covenants, conveyance or assurance, which shall be hereafter made for the payment or  
 20 "delivery of any money, wares, merchandise, goods or chattels, lent, and on which a higher rate of interest shall be reserved or taken than was, or is allowed by the laws of the place where the contract was made or is to be performed, the amount or value actually lent, without interest, or costs of suit may be recovered, and no more, and if any premium or illegal interest shall have been paid to the lender, the sum or sums so paid shall be deducted from the amount that may be due as aforesaid, and recovery had for the balance only."

30 And these defendants further answering, say that by a further supplement to said act, approved March 15, 1866, it is amongst other things further enacted by the Legislature of this State, that "upon all contracts hereafter made for the loan of or forbearance or giving day of payment for any money, wares, merchandise, goods or chattels, it shall be lawful for any person or persons, or body corporate, to take the value of seven dollars for the forbearance of one hundred dollars for a year, and after that rate for a greater or

“less sum, or for a longer or shorter period, and that when interest is allowed by law, the legal rate shall be seven per centum per annum, anything in the act to which this is a supplement to the contrary, notwithstanding, and that so much of the said act as conflicts with the supplement, be and the same is hereby repealed.”

And these defendants therefore say, that the said contract and bond and mortgage were and are illegal and usurious, and that the said complainants are only entitled to a decree in this cause, for the amount actually advanced as aforesaid,<sup>10</sup> without interest, or costs of suit,

And these defendants deny that the whole amount of said bond and mortgage, or that the whole amount actually advanced and loaned as aforesaid remains due and unpaid, and therefore these defendants pray that the said complainants may be compelled to prove and establish what portions of the amount actually loaned and advanced by the complainants, as aforesaid, still remains due and owing to the said complainants, and that these defendants may not be decreed to<sup>20</sup> pay any more than the amount which shall so be found due, and that the same may be referred to a master to take an account of the amount so remaining due.

And these defendants further answering insist upon the statutes above set forth, and claim the same benefit therefrom, as if they had pleaded the same.

And these defendants deny all unlawful combination and confederacy in said bill charged, without that, that any other matter or thing, material for these defendants to make answer un.o, and not herein or hereby well and sufficiently<sup>30</sup> answered, confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants.

All which matters and things these defendants are ready to aver, maintain and prove as the honorable court shall direct, or prays to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAM R. WILSON,  
*Solicitor for said Defendants.*

W. J. MAGIE,  
*Of Counsel with Defendants.*

NEW JERSEY, SS.

Bridget O'Neill, one of the above named defendants, being duly sworn on her oath saith that the matters and things set forth in the above answer, so far as relate to her own acts are true, and so far as relate to the acts of others, she believes them to be true.

BRIDGET O'NEILL.

Sworn and subscribed before }  
10 me, October 26, 1877. }

ANDREW FGAN,  
*Justice of the Peace.*

NEW JERSEY, SS.

Henry S. Little, the guardian of the infant defendants within mentioned, being duly sworn according to law, on his oath, saith that the facts and allegations in the within answer set forth and contained, so far as they relate to the act and deeds of this deponent are true, and so far as they relate to the acts and deeds of other persons, he believes them to be true, and further saith not.

H. S. LITTLE,  
Guardian, &c.

Sworn and subscribed before }  
me, this 26th day of Octo- }  
ber, 1877. }

JOS. K. WELLS,  
*M. C. C.*

30

Replication to the above answer was filed November 15, 1877.

Examination of witnesses in above cause taken at my office, in the City of Elizabeth, on the twenty-seventh day of November, A. D., 1877, before me, Geo. T. Parrot, one of the Masters and Examiners of said Court, pursuant to notice hereto annexed, in the presence of Edward S. Atwater, Solicitor, and of Counsel for the complainant, and of William R. Wilson, Solicitor of the defendants.

The complainants produced before me in evidence the bond made by Michael O'Neill to Edmund J. Cleveland, 10 Executor, and Harriet C. Cleveland, Executrix of Joseph Cleveland, deceased, dated May 14, 1874, to secure the payment of \$2,225 in three years from date, with interest at 7 per cent. per annum, payable semi-annually, which bond is marked Exhibit A.

Also the mortgage made by Michael O'Neill and wife to said Executors of Joseph Cleveland, deceased, dated May 14, 1874, to secure the payment of the above bond, on land in the City of Elizabeth, Union County, New Jersey, and rested.

Examination of witnesses on part of defendant in above-20 stated cause, taken this eighteenth day of December, A. D., 1877, before me, at my office, in the City of Elizabeth, in presence of William R. Wilson, Solicitor of the defendants, and Edward S. Atwater, Solicitor of the complainants

JACOB DAVIS being duly sworn, says he resides in the City of Elizabeth, and is acquainted with the complainants.

Q. Did you negotiate a loan between Michael O'Neill 30 and wife, and the complainants, about May 14, 1874?

A. Mr. O'Neill came to me and said he had been building a new house, and had been disappointed in getting money on mortgage he had, (objection as to what Mr. O'Neill said) and wanted to know if I didn't know some one of whom I could get him \$2,000 or so. I told him I would try and see what I could do for him. Said he would like to get it for three years, and that he would pay fifteen per cent. for it if he could get it for three years. I spoke to Mr. Cleveland—

Edmund J.—asked him if he had any money he could loan out on mortgage. He said the estate had some, but didn't like to loan it out for so long a time. Feared they might want it. I think in a few days Mr. Cleveland came to conclusion that they could loan him \$2,000. Then Mr. O'Neill came up. I told him they would let him have \$2,000; he thought they couldn't get through with that, and wanted to know if they couldn't let him have more. To best of my belief, he said then that if they would make it up to \$2,300 or \$2,350, I can't recollect which—that he would take that amount, and Mr. Cleveland consented to let him have that amount. That is about as I recollect it.

10 Mr. O'Neill came up a great many times, and gave me considerable bother about it.

Q. Was any part of this fifteen per cent. deducted from the loan?

A. When I paid him the loan I took out the fifteen per cent. I am not certain what I did with that money now.

Q. Did you pay Mr. Cleveland any money in lieu of the money got in consideration of this loan?

A. My impression is that I did.

Q. How much, if you know?

A. I can't say for certain.

*Cross-examined:*

20 I am certain I paid him something; I did, of course. It was only a voluntary thing on my part. I think I paid him the amount of money I got. I mean it was a voluntary thing on my part in assisting Mr. Cleveland in putting out the money and Mr. O'Neill in getting it. Mr. Cleveland didn't want to put out the money; I had to persuade him to let him (O'Neill) have the money. Mr. O'Neill wanted to get the money very much; it was his own offer; he was glad to get it at fifteen per cent., and thanked me for getting it for him. I don't think Mr. O'Neill had much to do with Mr. Cleveland. Mr. O'Neill came to me to get the money two or three times before I spoke to Mr. Cleve-

30 land about it. I acted as Mr. O'Neill's agent in negotiating

the matter with Mr. Cleveland ; I paid all the money out for him, paid his bills.

(Being shown paper, says) :

This is the check Mr. Cleveland gave me in this transaction for that mortgage.

(Check dated May 27, 1874, on First National Bank, to order of Jacob Davis, for \$2,225, by Edmund J. Cleveland, executor of the estate of Joseph Cleveland, endorsed by Jacob Davis, offered in evidence and marked Exhibit C, on part of complainant, says) :

This is my endorsement on this check. I used this check in the Bank ; deposited it to my own credit. The arrangement about the fifteen per cent. was between Mr. O'Neill and myself. I think I introduced Mr. O'Neill to Mr. Cleveland before the loan was made ; my impression is that I introduced him about that time.

Q. After you got this check did you deliver the mortgage<sup>20</sup> to Mr. Cleveland ?

A. I can't recollect that ; he got the mortgage ; I can't recollect that ; I might have given it to him ; I can't recollect.

*Re-direct :*

Q. In the above loan you also acted as the agent of Mr. Cleveland, didn't you ?

30

(Objected to as leading. Question withdrawn.)

Q. Did you transact the business connected with the above loan for Mr. Cleveland ?

A. I took the money, but about passing the papers I can't say. Mr. O'Neill transacted all the business with me.

*Re-cross :*

This fifteen per cent. was paid for getting the money. Mr. O'Neill couldn't get the money anywhere; he would give it, and was glad to get it. I don't think that was pay for my services in getting the money; don't think I would charge anybody fifteen per cent. to get the money.

JACOB DAVIS.

Sworn and subscribed }  
before me, }  
10                   GEO. T. PARROT,  
                                  *M. C. C.*

HARRIET C. CLEVELAND, a witness produced on part of the defendant.

(Counsel for complainant objects to swearing of this witness on ground that she is party to the suit in a representative capacity, and has not elected to be a witness in her own behalf.)

She then being duly sworn, says :

(Counsel of complainant here objects to all evidence this witness shall give, as incompetent.)

I am the executrix of Joseph Cleveland, deceased, and was an executrix of said Estate about May 14, 1874.

Q. And as such executrix, you made a loan to one Michael O'Neill?

A. I had nothing to do with the business. My son had charge of the transaction. I have no knowledge of the amount for which the mortgage was given. My son has charge of the books of the estate. I presume entries of loans are made in those books.

Q. Do you know whether an entry of the loan on the mortgage made by Michael O'Neill and wife, marked Exhibit B in this cause was made in those books?

A. The books will show. I was served with a subpoena,

requiring me to produce those books. My son has those books here. If an entry of that kind is there, I know nothing about it. I could have access to those books at all times.

*Q.* Do you know whether any per cent. and how much was paid to the estate in the negotiating of this loan?

*A.* I have no knowledge of the transaction as regards that.

*Q.* Has your son ever said anything to you about it.

(Objected to.)

*A.* We often talk over matters of the estate. I couldn't 10 give anything definite on that point.

*Q.* Have you ever heard this matter talked over?

*A.* Of course we discuss these things with the rest of our business transactions. I don't know anything about these things. I understand as an executrix, that it is my duty to account occasionally.

*Q.* And that when you account you make out a statement. How can you make out a statement without examining the books?

*A.* This business is transacted entirely through my son. 20 My son and I talk over the affairs of the estate, but I dismiss it from my mind. I confide entirely in him. Believe that he will do what is right.

*Q.* Don't you know that fifteen per cent. was taken for negotiating this loan; hasn't your son told you at some time?

*A.* He might and he might not; I couldn't be positive. I do not know whether he has or not; I don't remember.

*Cross-examined:*

I don't know anything about such an amount having been 30 taken. Of course I am innocent of these things; know nothing about the matter. I know the O'Neill mortgage was held by the estate. So far as I know, the estate has not received anything more than the mortgage and interest. I can't answer anything definite at all. I don't know anything about any commission having been paid to the estate for that money; there might have been and might not.

*Re-direct :*

Q. Mrs. Cleveland, what do you mean by the expression "as far as I know?"

A. I don't know how to answer that. I have stated all the knowledge I have of the transaction I know about the mortgage; presume I knew at the time of the transaction what was done, but I didn't charge my mind with it at all.

10 Q. On your oath don't you know that fifteen per cent. of this money went into the funds of the estate?

A. I have told you all I know about it; have told you as far as my memory serves; have nothing further to tell.

Q. Then you refuse to answer that question?

A. How can I answer it if I don't know?

HARRIET C. CLEVELAND.

Sworn and subscribed }  
before me, }

GEO. T. PARROT,

20

*M. C. C.*

Adjourned, by consent, to December 26, 1877, 10 A. M.

GEO. T. PARROT, *M. C. C.*

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30 Examination of witnesses on part of complainant resumed after adjournments by consent of and in presence of Edward S. Atwater, of Counsel with complainant, and of William R. Wilson, Solicitor of the defendant.

EDMUND J. CLEVELAND, a witness produced on part of complainant, being duly sworn, says:

I am one of the executors of Joseph Cleveland, deceased, and one of the complainants in this cause. (Being shown Exhibits A. and B. on part of the complainant.) This bond

and mortgage were delivered to me about the time they bear date. To best of my recollection they were delivered to me by Mr. Jacob Davis. At the time they were delivered to me I gave him this check in payment of the mortgage. That check was paid. (Exhibit C.) The estate of Joseph Cleveland did not receive any portion of the proceeds of that bond and mortgage. They paid full amount of the money and received the mortgage. The estate of Joseph Cleveland paid twenty-two hundred and twenty-five dollars for that mortgage. As executor of that estate I keep a book of accounts. I have that book with me. It appears in the cash 10 book, under the date of May 27th, 1874. This is the entry of the investment in the mortgage. It reads: "May 27th, 1874—bond and mortgage of Michael O'Neill, dated May 14th, at 3 years, \$2,225." Save the interest that has since been paid, there is no other credit to the estate from that investment, but that interest has been paid in full up to November 14, 1876, and ten dollars on account since that date. As mortgagee, I have, according to the terms of the mortgage, paid seventy dollars for affecting insurance on the mortgaged premises. That also appears in my book. I 20 made such payment because Mrs. O'Neill failed to pay it. The principal sum of twenty-two hundred and twenty-five dollars is due and owing on this bond and mortgage, and interest thereon from Nov. 14, 1876, less ten dollars, paid on account. There is also due the further sum of twenty dollars for insurance. There has been a settlement of the estate since that mortgage was taken, and that mortgage was taken into the account with the assets. It was part of the assets at the time I settled. Mrs. O'Neill has promised to pay the mortgage by selling the property, and either paying the estate 30 out of the proceeds of the property, or by having the buyer assume the mortgage. She has collected the rents of the property which she told me amounted to \$29 per month, and has appropriated the money to her own uses—she told me so, and that this was the principal part of the money she and her family had to live upon, and has neglected to pay the taxes, and the property has been sold for taxes. She has appointed different times on which she promised to pay the

interest, but wholly failed to do so. She advised me to foreclose, in order that a title to the property might be obtained. She had a purchaser for it, but could not sell it, because she could not make title. I understood the foreclosure was brought with her consent. She gave me the names and ages of her children, for the purpose of foreclosure

*Cross-examined :*

As executor I invested the money in the mortgage. The  
10 mortgage is made out direct from Michael O'Neill and wife to the executors ; it was made to them because the money was invested by the estate of Joseph Cleveland ; the money was in my hands as executor for investment at the time. The executors of Joseph Cleveland loaned this money to Mr. O'Neill on recommendation of Mr. Jacob Davis. I am associated with him in business in Horse Railroad, and I mentioned to him that the estate of Joseph Cleveland had some money to loan on bond and mortgage. He did not act as the agent of the estate in negotiating this loan.

20 Q. In what capacity did he act for the estate in the matter ?

A. He didn't act in any capacity ; he simply recommended Mr. O'Neill as being a good man to loan the money to. I do not recollect seeing O'Neill until after the transaction.

Q. If you were acting for the estate why didn't you see O'Neill personally in the matter ?

A. Because I had perfect confidence in the recommendation of Mr. Davis and in the searchers of the title.

30 Q. To whom was the money given to be paid to Mr. O'Neill, or was it paid to him directly ?

A. The check already in evidence was made payable to the order of Jacob Davis. Of my own knowledge I do not know whether the full amount of the check was paid by Mr. Davis for the mortgage. I did not tell Mr. Davis to deduct anything from that amount.

40 Q. Did you not have a conversation with Mr. Davis on or about the time of taking this loan, directing or authorizing him to deduct fifteen per cent. from the amount ?

A. I did not. He didn't need any authority, and I didn't direct him.

Q. Didn't he have some authority from you to take fifteen per cent. or some other per cent. for this money, and wasn't it on that condition that the estate loaned the money; that is, that a certain bonus was to be retained or to be got for the money?

A. The estate loaned the money, dollar for dollar.

Q. Then you mean to say that no percentage or bonus was charged for this money loaned to Mr. O'Neill?

A. I did not charge any bonus; the estate did not receive any bonus; as one of the executors of the estate I did not receive any bonus. If any bonus at all was paid by O'Neill Mr. Davis was the man who got it.

Q. And kept it, as far as you know?

A. I have already stated that of my own knowledge I know nothing of the settlement between Mr. Davis and O'Neill.

Q. Did Mr. Davis and yourself have a conversation about this matter as to the amount which the estate was to loan, and what percentage the estate was to receive for the money loaned?

A. We had no conversation about the matter, only that seven per cent. interest was to be paid for the loan per annum.

Q. Then you say that no percentage or bonus was charged O'Neill for that money?

A. No percentage or bonus was charged by me.

Q. After the transaction had been consummated, did Mr. Davis give you check or money for any money he had received from Mr. O'Neill?

A. Mr. Davis has made payments at various times to me for various services performed.

Q. Did he pay you anything for services performed in the O'Neill matter?

A. He made me a payment of some money for having procured the loan as commissions for doing so personally.

Q. How much did he pay in that O'Neill matter, and how did he pay you, in check or money?

A. I do not recollect at the present time ; whatever amount I received was a transaction between Mr. Davis and myself, without regard to the estate of Joseph Cleveland. This book is the book of original entries ; I also have a ledger ; there is no other book in which any entry of the transaction in reference to this mortgage is made, and no other entries made in this book except the two to which attention has been directed.

Q. Did you make any counter-charge of the commissions you received from Mr. Davis in this O'Neill matter ?

A. These books are the estate books, and the commissions were my private property paid to me individually by Mr. Davis ; understood so at the time between me and Mr. Davis, and of course they were not entered on the books of the estate. Whatever commissions I received I pocketed ; sometimes I receive commissions for other services performed for Mr. Davis. My mother was executrix and I consulted her in matter of investing the money ; I don't recollect talking with her about the commissions I received or the salary I received or any other of my private business or receipts.

EDMUND J. CLEVELAND.

Sworn and subscribed before me, this January 25, 1878. }

GEO. T. PARROT, *M. C. C.*

The complainants' solicitor declares testimony on his part closed, and complainants' counsel states that he withdraws his objection to the admissability of the testimony of Harriet C. Cleveland.

Testimony in above cause on part of defendants, taken before me, in presence of Edward S. Atwater, solicitor of complainants, and William R. Wilson, solicitor of defendants, this February 1st, 1878.

JACOB DAVIS, a witness recalled on part of defendants, says :

I received \$2,225 from Mr. Cleveland for Mr. O'Neill's mortgage ; I don't know whether as agent or what. I don't know how I was acting—whether as agent or not. Mr. Cleveland said he would let Mr. O'Neill have the money. I understood it was money of the estate that he had. I paid Mr. O'Neill, or for him, on his bills, \$1891.25 of that money ; the balance of \$333.75, excepting one per cent. (*i. e.*, \$22.25), I gave to Mr. Cleveland—paid it by check to his order. Mr. O'Neill got no part of that \$333.75. At time of making loan with Mr. O'Neill he agreed to give me fifteen per cent. for getting the money.

*Q.* To be given to you for your services, or to be given to the party of whom the money was obtained ?

*A.* It was to go of course to the party the money was got from. I understood the money was coming from the Cleveland estate ; I acted for Mr. Cleveland ; I suppose the money belonged to the estate and that he had all to do about it.

*Q.* Did Mr. Cleveland tell you whose money it was you were to loan ?

*A.* I understood it was the estates money.

(Further examination adjourned by consent to Saturday, 2d instant, at 2 p. m.)

GEO. T. PARROT, *M. C. C.*

Examination of witnesses in above cause on part of defendant continued in presence of Edward S. Atwater, Solicitor of the Complainant, and William R. Wilson, Solicitor of Defendant, February 2d, 1878, Jacob Davis being further examined.

*Cross-examined :*

The check I produce is the one I spoke of in my direct examination. Check dated June 3d, 1874, for \$311.50 to order of E. J. Cleveland, Esq., on First National Bank offered in evidence and marked Exhibit E, on part of complainant. I saw nothing of Mrs. Cleveland in this matter; had no transaction with her.

JACOB DAVIS.

Sworn and subscribed be- }  
fore me, }

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GEO. T. PARROT, *M. C. C.*

BRIDGET O'NEILL, a witness produced in her own behalf, being duly sworn says :

I am the widow of Michael O'Neill, deceased, also administratrix of his estate, and one of the defendants in this cause. I am acquainted with the fact of the giving of the bond and mortgage under foreclosure in this cause, being given by my husband and myself. Foreclosure was commenced after I had taken out letters of administration. I never asked Mr. Cleveland or any other person to have this mortgage foreclosed. I had a conversation with Mr. Cleveland before this foreclosure was commenced. He came down and asked me if I had the interest. I didn't have it; one of the times I gave him ten dollars to apply on interest or on the insurance. The last time he was down he said he couldn't wait any longer, that he was losing fifty cents a day, that he had applied to his lawyer and had him apply to the Orphan's Court and see how long it would take to have it sold, that it would be five months, that he didn't wish to wait that long, that when it would be sold I might not agree to it, and then it would take longer. I told him I would pay the interest if I could; he wanted me to sign over the rents to him; I declined to do it. I did not like to do it. I had to take some of the rent to live on, the most of it. I know a bonus was taken; my husband paid fifteen per cent. bonus.

*Cross-examined :*

I know a bonus was taken, because my husband told me ; he showed me the paper when he came home. Mr. Wilson has the paper. I never told Mr. Wolfskill that I would keep Mr. Cleveland out of this money for a year and collect the rents for my own use. I used some of this money—the rent money—to pay to the Building and Loan Association on account of their mortgage—only a few months payments. I didn't pay the taxes of 1876 and 1877, on this property ; 10 I haven't paid any insurance ; I didn't consent that the foreclosure be commenced ; Mr. Cleveland said he would have to foreclose, that he couldn't be losing by me.

*Q.* Didn't you decline to pay the costs of an order in the Orphan's Court to sell the property ?

*A.* No ; I declined to give an order on the tenants to pay the rent to Mr. Cleveland ; there was talk of selling the property through Wolfskill, he was an agent ; he didn't make an offer ; he asked the lowest figure I would put it at, 20 I said \$4,000 ; he said say \$3,000 ; I said no, \$3,500 was the lowest that I would say ; he never spoke to me since about it ; I asked him then if he had a purchaser ; he said no, but that he might get one. I didn't promise, to my knowledge, to call on July 16th, and settle with Mr. Cleveland—not on a certain date. I might have said a date, but I don't recollect the certain date. I told Mr. Cleveland that I was told if I applied to the Chancellor I could get the property sold. I gave him the names of my children because he said he wanted to foreclose, and I knew he could get them 30 any way by applying to the census.

*Re-direct :*

I didn't have the money to pay the taxes and insurance on that property ; I had nothing to support my six children with if I assigned the rents to him ; the rents I get from this house are my only means of subsistence ; only one little girl is working ; my husband left no estate and I am entirely dependant

on my own exertions now. He left other real estate encumbered ; I get no rent from the other places ; I live in one of them.

BRIDGET O'NEILL.

Sworn and subscribed be- }  
me, Feb. 2, 1878. }

GEO. T. PARROT, *M. C. C.*

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### OPINION OF THE CHANCELLOR.

THE CHANCLOR :—The answer sets up usury. It alleges that there was a corrupt and unlawful agreement between the mortgagor and the complainants by which the latter should receive \$333.75 as a premium over and above lawful interest for a loan by them to him of \$1,891.25, and that they received that premium accordingly. The proof, if considered most favorably for the defence does not sustain it. It does  
20 not show that the complainants or either of them received that sum, but shows that one of them received on his own account as commissions \$311.50. The answer avers that the alleged contract for the payment of the premium was made with both executors. The proof does not sustain the allegation that there was a contract. The mortgagor, according to the proof, told Davis, who was his agent and not the agent of the complainants, that he would willingly give 15 per cent. for the money. Davis induced the complainants to  
30 make loan. They paid to Davis for the mortgage the whole amount of the principal mentioned in the mortgage \$2,225. He disbursed all of it except \$333.75 for and as agent of the mortgagor, and of that he appears to have retained \$22 25 for himself and to have given the rest to one of the executors, who received and retained it for his own individual use. Applying the rule which requires strict conformity of the proof to the pleading in such cases, the defense must be adjudged to have failed.

## PETITION OF APPEAL.

*To the Honorable, the Court of Appeals in the last resort in all causes of law :*

The humble petition of Bridget O'Neill, Mary Ellen O'Neill, Ann Elizabeth O'Neill, Hester Catharine O'Neill, Joseph Protese O'Neill, Michael James O'Neill, Thomas William O'Neill and Bridget O'Neill, Administratrix of Michael O'Neill, deceased, and Henry S. Little, Guardian <sup>10</sup> ad litem of Mary Ellen O'Neill, Ann Elizabeth O'Neill, Hester Catharine O'Neill, Joseph Protese O'Neill, Michael James O'Neill and Thomas William O'Neill, the appellants in the above stated cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Theodore Runyon, Chancellor of New Jersey, bearing date June fourteenth, 1878, wherein the said Edmund J. Cleveland and al., executors, &c., were complainants, and Bridget O'Neill and others, were defendants, in these respects, to wit: That the said <sup>20</sup> decree declared and adjudged that there was due on the mortgage of the said complainants, the sum of two thousand four hundred and ninety seven dollars and thirty-seven cents, and also that part which ratified and confirmed the report of the Master, and also that part which ordered the said mortgaged premises to be sold to pay said sum of money.

And your petitioners humbly appeal from that part of the said decree of the Chancellor, which decrees as aforesaid, upon the ground that it is erroneous, for that there is not due to said complainants in said cause the said sum of two thousand <sup>30</sup> four hundred and ninety-seven dollars and thirty-seven cents; and that said Master's Report ought not to have been ratified and confirmed, and that said premises ought not to have been decreed to have been sold to pay said sum of money.

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

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

Dated June 18, 1878.                      WILLIAM R. WILSON,  
*Solicitor for Appellants.*

A true copy.                      W. J. Magie, *of Counsel.*

HENRY C. KELSEY, *Clerk.*

To the above Petition of Appeal the Appellees filed within the proper time their answer.

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### EXHIBITS OF APPELLEES.

#### EXHIBIT A.

Bond of Michael O'Neill to Edmund J. Cleveland, and al., executors of Joseph Cleveland, deceased, dated May 14, 1874, to secure the sum of \$2,225, to be paid in three years from the date thereof, with interest at 7 per cent. per annum, payable semi-annually.

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#### EXHIBIT B.

Mortgage of Michael O'Neill and wife, to said Edmund J. Cleveland, and al., executors of Joseph Cleveland, deceased, dated May 14, 1874, to secure the payment of the above bond, on land in the City of Elizabeth, Union county, New Jersey.

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#### EXHIBIT C.

No. 74.                      ELIZABETH, N. J., May 27, 1874.  
First National Bank,

Pay to the order of Jacob Davis, twenty-two hundred and twenty-five dollars.

\$2,225.                      EDMUND J. CLEVELAND,  
*Executor of the Estate of Joseph Cleveland, dec'd.*

(Endorsed,)

JACOB DAVIS.

EXHIBIT E.

ELIZABETH, N. J., June 3d, 1874.

First National Bank of Elizabeth,

Pay to the order of E. J. Cleveland, Esq., three hundred  
and eleven  $\frac{50}{100}$  dollars.

Dolls., 311.50.

JACOB DAVIS.

(Endorsed,)

E. J. CLEVELAND.

117  
1872  
The Court of Appeals  
for the District of Columbia  
has granted a writ of habeas corpus  
to the said applicant.

1872

The Court of Appeals for the District of Columbia

COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

THE LAW OFFICE OF THE  
SOLICITOR OF WAR  
WASHINGTON, D. C.

JOSEPH BAKER