INDEX

ABRIDGEMENT OF PLEADINGS.

Between	
VITO SAN GIACOMO, *Complainant-Appellant,*	*On Appeal from the Court of Chancery.*
and	
ORATON INVESTMENT COMPANY, a corporation, *Defendant-Appellee.*	*Abridgement of Pleadings.*

A bill for an accounting was filed by the complainant-appellant against the defendant-appellee and all the matters in dispute have been adjusted by the parties hereto, excepting that which is hereinafter described.

Complainant-appellant asks that he be reimbursed by the defendant-appellee in the amount of $892.50 interest on a mortgage in which the defendant-appellee was the mortgagee. The jurisdiction of the Court to try this matter was admitted.

On September 17, 1917, Vito San Giacomo obtained a warranty deed to premises located at 303 Sherman avenue, Newark, N. J., from Maria Martha Loprete and her husband, Demetrio Loprete, subject to the mortgage in question.

Sometime prior thereto on September 22, 1915, Maria Martha Loprete, the then owner had leased the premises in question for a period of five years to the defendant-appellee, and the defendant-appellee, immediately leased back same premises for the same period to Demetrio Loprete, the husband of Maria Martha Loprete.

Abridgement of Pleadings.

On the same time and as part of the same transaction the defendant-appellee loaned to Maria Martha Loprete the sum of Four Thousand ($4,000.00) Dollars and took back as security for the payment of this Four Thousand ($4,000.00) dollars a three year mortgage. The mortgage provided that no interest was to be charged.

The question before this Court is whether or not a legal rate of interest on the unpaid balance of this mortgage should run after the maturity date or whether no interest was due to the defendant-appellee. If the defendant-appellee was entitled to interest, the Court below should be affirmed; if the defendant-appellee was not entitled to interest, the Court below should be reversed and the defendant-appellee ordered to return to the complainant-appellant $892.50, the amount of interest paid.

This abridgement of pleadings is filed by agreement of the parties in lieu of the pleadings.

"We agree on the above abridgement of pleadings."

GEORGE A. HENDERSON,
Solicitor for and of Counsel
with Complainant-Appellant.

LINDABURY, STEELMAN,
ZINK & LAFFERTY,
Solicitors for and of Counsel
with Defendant-Appellee.

ORDER OF REFERENCE.

Filed September 6, 1927.

IN CHANCERY OF NEW JERSEY.

Between VITO SAN GIACOMO, *Complainant,* *and* ORATON INVESTMENT CO., a corporation, and CHRISTIAN FEIGENSPAN BREWERY Co., a corporation, *Defendants.*	*On Bill, &c.* *Order of Reference.*

This matter being opened to the Court by George A. Henderson, solicitor of the complainant, and it appearing that Zink & Lafferty, solicitors of the defendant, have consented hereto:

It is, on this 6th day of September, nineteen hundred and twenty-seven, on motion of George A. Henderson, solicitor of the complainant, ORDERED that the above-entitled cause be referred to Hon. J. H. Backes one of the Vice-Chancellors of this Court, hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein.

E. R. WALKER,
C.

We hereby consent to the entry of the foregoing order.

ZINK & LAFFERTY,
Solicitors of Defendants.

A true copy.
THOMAS BARBER.

Exhibit C. 1.

EXHIBIT C. 1.

3008—General Lease.

THIS INDENTURE, Made the twenty second day of September, One Thousand Nine Hundred and Fifteen, BETWEEN ORATON INVESTMENT COMPANY, of the City of Newark, County of Essex, and State of New Jersey, of the first part, and DEMETRIO LOPRETE, of the same place, party of the second part,

WITNESSETH, That the said party of the first part has Let and by these presents does grant, demise, and to farm let, unto the said party of the Second Part the store on the first floor and the cellar thereunder of the premises known and designated as No. 303 Sherman Avenue, Newark, New Jersey, with the appurtenances, for the term of five years, from the first day of October, One Thousand Nine Hundred and Fifteen at the Yearly Rent or Sum of Twelve Dollars, to be paid in equal monthly payments

AND it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom.

AND the said party of the second part does covenant pay to the said party of the first part, the said yearly rent as herein specified to make all necessary repairs to the said demised premises and to pay all water rents or charges thereon at his own expense and cost. That he will not sublet nor underlet the demised premises or any part thereof, nor assign this lease without the written consent of the party of the first part.

Exhibit C. 1.

And he further covenants to and with the party of the first part that he will conduct a liquor saloon on the said premises, and that, during the term of this lease, he will sell no beer, ale and porter, therein, except that brewed by Christian Feigenspan, a Corporation, in accordance with the terms of a certain agreement between the parties hereto, and Christian Feigenspan, a Corporation, dated September 20, 1915. And he further covenants to and with the party of the first part that he will not remove his said saloon to any other location nor will he apply for a transfer of his saloon license, or any renewal thereof, to any other location or to any other person during the term of this lease.

AND that at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

AND the said party of the first part do covenant that the said party of the second part on paying the said yearly rent, and performing the covenants aforesaid shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

The party of the second part further covenants and agrees with the party of the first part to pay to the said party of the first part the sum of Four Thousand Dollars, such payments to be made weekly and to be based on the sales of beer, ale and porter sold by the parties of the second part, on said premises, on the basis of One dollar per barrel of such sales. According to the agreement above referred to. A breach

Exhibit C. 1.

of this condition to void this lease at the option of the party of the first part.

In Witness Whereof the party of the first part has caused these presents to be signed by its and attested by its and its common seal to be hereto affixed, the day and year first above written; and the party of the second party has hereunto set his hand and seal the day and year first above written.

ORATON INVESTMENT COMPANY,

By Christian P. Feigenspan
President.

Attest:

F. P. MOORE
Secretary.

(seal)

Demetrio Laporte (L. s.)

Witness
as to D. L.
Newton H. Porter

LEASE.

ORATON INVESTMENT COMPANY

To

DEMETRIO LOPRETE.

Dated, Sept. 22nd 1915

Exhibit C. 2.

EXHIBIT C. 2.

2043—Bond—Tax and Interest Default Clause.

Know all Men by these Presents, That WE MARIA MARTA LOPRETE AND DEMETRIO LOPRETE, HER HUSBAND, of the City of Newark, Essex County, New Jersey, are held and firmly bound unto ORATON INVESTMENT COMPANY, a corporation organized and existing under the laws of the State of New Jersey, in the sum of EIGHT THOUSAND DOLLARS, lawful money of the United States of America to be paid to the said Oraton Investment Company, its successors or assigns, To which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators,

firmly by these presents. Sealed with our Seals and Dated the twenty second day of September, One Thousand Nine Hundred and Fifteen.

The Condition of the above Obligation is such, That if the above bounden MARIA MARTA LOPRETE AND DEMETRIO LOPRETE, their heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above named Oraton Investment Company, its successors or assigns, the just and full sum of Four Thousand Dollars the twenty second day of September, which will be in the year One Thousand Nine Hundred and Eighteen without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

And it is hereby expressly Agreed, that should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the

premises described in the mortgage accompanying this bond, and become due and payable, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of sixty 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 Four Thousand Dollars, shall at the option of the said Oraton Investment Company, its successors 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.

Maria Marta Loprete (L. S.)
Demetrio Loprete (L. S.)

Signed, Sealed and Delivered
in the presence of

Newton H. Porter

BOND.

MARIA MARTA LOPRETE AND
DEMETRIO LOPRETE,
to
ORATON INVESTMENT COMPANY.

Dated September 22nd 1915.
Amount, $4000.
Date, Sept. 22nd 1915.
Due, Sept. 22nd 1918.
(No interest).

EXHIBIT C. 3.

2027—Mortgage to a Corporation—Tax and Insurance Clause.

THIS INDENTURE, made the twenty second day of September, in the year of our Lord One Thousand Nine Hundred and Fifteen, BETWEEN MARIA MARTA LOPRETE AND DEMETRIO LOPRETE, HER HUSBAND, of the City of Newark, in the County of Essex and State of New Jersey, of the First Part;

AND ORATON INVESTMENT COMPANY, a corporation organized and existing under the laws of the State of New Jersey, having its principal office in the City of Newark, in the County of Essex, and State of New Jersey, of the Second Part,

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Four Thousand Dollars, 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 presents do give, grant, bargain, sell, alien, enfeoff, convey and confirm to the said party of the second part and to their successors and assigns forever,

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

BEGINNING at the northwest corner of Concord Street and Sherman Avenue, thence run-

ning northerly along the westerly line of Sherman Avenue, North, thirty degrees fifty-five minutes East, twenty-five feet; thence northwesterly parallel with Concord Street, North, fifty-nine degrees five minutes West, one hundred feet; thence Southewesterly parallel with the first course, South, fifty-nine degrees five minutes West, twenty-five feet to the Northerly line of Concord Street; thence Southeasterly, along the Northerly line of Concord Street, South, thirty degrees fifty-five minutes East, one hundred feet to the point or place of BEGINNING.

Being the same premises conveyed to the said Maria Marta Loprete by deed of Michael DeVita and wife, bearing even date herewith and not yet recorded, this mortgage being given to secure a part of the purchase price thereof.

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;

To have and to hold, all and singular the above described lands and premises, with the appurtenances, unto the said party of the second part, their successors and assigns, to the only proper use, benefit, and behoof of the said party of the second part, their successors and assigns forever

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, or administrators, do and shall well and truly pay, or cause to be paid, to the said party of the second part or to their certain attorney or

attorneys, successors or assigns, the sum of FOUR THOUSAND DOLLARS, in three years from the date hereof, according to the conditions of a certain Bond bearing even date herewith, in the penal sum of EIGHT THOUSAND DOLLARS, 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;

And the said party of the first part, their heirs, executors and administrators, do covenant and grant to and with the said party of the second part, its successors and assigns, that the said party of the first part, their heirs and 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; and the said parties of the first part, their heirs, executors and administrators do covenant and grant to and with the said party of the second part, their successors and assigns, that the said party of the second part, their successors and assigns, shall and may from time to time, and at all times after default shall be made in the performance of 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

Exhibit C. 3.

party of the first part their heirs or assigns, or of any other person or persons whatsoever. And it is also agreed by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss or damage by fire in some safe and responsible Insurance Company or Companies, to an amount not less than Four Thousand dollars, and assign the policy and certificate thereof to the said party of the second part as collateral security for the payment of the principal and interest aforesaid; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said Bond or obligation, and secured by these presents, and payable on demand with legal interest.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

MARIA MARTA LOPRETE (L. S.)
DEMETRIO LOPRETE (L. S.)

Signed, Sealed and Delivered
in the presence of

Newton H. Porter

Exhibit C. 3.

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

Be it Remembered, That on this twenty second day of September, in the year of our Lord One Thousand Nine Hundred and Fifteen, before me a Master in Chancery of the State of New Jersey, personally appeared MARIA MARTA LOPRETE AND DEMETRIO LOPRETE, 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 delivered the same as their voluntary act and deed, for the uses and purposes therein expressed:

And the said MARIA MARTA LOPRETE 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, FREELY, without any fear, threats or compulsion of her said husband

Newton H. Porter
Master in Chancery of New Jersey.

Compared by Carrallton
Cancelled of Record this 4 day of Nov. 1926

Howard S. Dodd, Register

Fee Paid Nov-4 1926 Present this Mt 8 in the rear for cancellation

Received Register's Office Sep 24 3 10-11 P. M. 1915

Exhibit C. 4.

The within mortgage has been paid and satisfied, the Register will cancel same of record.

Oraton Investment Company
Christian F. Feigenspan Pres.

Oraton Investment Company New Jersey Incorporated 1909

Attest:

W B Moore
Secry.

EXHIBIT C. 4.

N. J. Warranty Deed—151

THIS INDENTURE Made the 10th day of September, in the year of our Lord One Thousand Nine Hundred and Seventeen,

BETWEEN MARIA MARTA LOPRETE and DEMETRIO LOPRETE, her husband, of the City of Philadelphia, in the County of Philadelphia and State of Pennsylvania, party of the first part;

AND VITO SAN GIACOMO, of the City of Newark, in the County of Essex and State of New Jersey, party of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of ONE DOLLAR and other good and valuable considerations, 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 being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever,

Exhibit C. 4.

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

BEGINNING at the Northwest corner of Concord Street and Sherman Avenue, thence running Northerly along the Westerly line of Sherman Avenue, North, thirty degrees fifty-five minutes East, twenty-five feet; thence Northwesterly parallel with Concord Street North fifty-nine degrees five minutes West, one hundred feet; thence Southwesterly parallel with the first course South, fifty-nine degrees five minutes West twenty-five feet to the Northerly line of Concord Street; thence Southeasterly along the Northerly line of Concord Street, South thirty degrees fifty-five minutes East one hundred feet to the point or place of BEGINNING.

CONVEYED subject to the several mortgages, one originally in the sum of Six Thousand Dollars, held by a Building & Loan Association, and the other originally in the sum of Four Thousand Dollars.

TOGETHER with all and singular the houses, buildings, trees, ways, waters, 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,

Exhibit C. 4.

To have and to Hold, all and singular the above described 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:

And the said Party of the First Part, do for themselves, their heirs, executors and administrators covenant and agree to and with the said party of the second part, his heirs and assigns, that they, the said Party of the First Part, are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

And also that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid;

And also, that they, the said Party of the First Part, will Warrant, secure, and forever defend the said land and premises unto the said Party of the Second Part, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

Exhibit C. 4.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

DEMETRIO LOPRETE (L. S.)
MARIA MARTA LOPRETE (L. S.)

Signed, Sealed and Delivered
in the Presence of

S. A. Belisto.

State of Pennsylvania, }
County of Philadelphia, } *ss.*

Be it Remembered, That on this 10th day of September, in the year of our Lord One Thousand Nine Hundred and Seventeen, before me, the subscriber, a Foreign Commissioner of Deeds for New Jersey in Pennsylvania, residing in the City of Philadelphia personally appeared MARIA MARTA LOPRETE and DEMETRIO LOPRETE, her husband, who, I am satisfied, are the grantor 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 voluntary act and deed, for the uses and purposes therein expressed; and the said MARIA MARTA LOPRETE, wife as aforesaid, being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

Exhibit C. 4.

SAMUEL A. BELSITO,
Foreign Commissioner of Deeds,
for New Jersey,
2203 Frankford Avenue,
(SEAL) Philadelphia, Pa.
Received Register's Office Sep 14 12:22 P M

Compared
Book held by 7
Paper held by 5
Read by 5

DEED.

MARIA MARTA LOPRETE and
DEMETRIO LOPRETE, her
husband,

To

VITO SAN GIACOMO,

Dated, Sept. 10th, 1917

Received in the Register's Office of the County of Essex, N. J. on the 14th day of September A. D., 1917, at 12:22 o'clock, in the afternoon and Recorded in Book 059 of DEEDS for said County, on pages 23-24

Walter A. Evans
Register

David Longfelder
2nd Ward Boh.
63 Park View Terr
Newark, N. J.

Exhibit D. 1.

EXHIBIT D. 1.

THIS AGREEMENT, entered into this twentieth day of September, 1915, between ORATON INVESTMENT COMPANY, of the first part, MARIA MARTA LOPRETE, of the second part, CHRISTIAN FEIGENSPAN, A Corporation, of the third part, and DEMETRIO LOPRETE, of the fourth part, all of the City of Newark, County of Essex and State of New Jersey, WITNESSETH:

That the said parties for and in consideration of the sum of One Dollar each to the other in hand duly paid, the receipt whereof is hereby acknowledged, and of the mutual covenants hereinafter contained, have agreed to and with each other as follows:

1. The party of the first part agrees to convey the premises Nos. 299 and 301 Sherman Avenue, Newark, New Jersey, to the party of the second part for the sum of Thirteen Thousand Five Hundred ($13,500.) Dollars.

2. The party of the first part further agrees to loan the party of the second part the sum of Four Thousand ($4000.) Dollars, without interest.

3. The party of the second part agrees to execute a mortgage to the party of the first part for the sum of Seventeen Thousand Five Hundred ($17,500.) Dollars, covering premises Nos. 299 and 301 and 303 Sherman Avenue, Newark, New Jersey, interest to be paid semi-annually at the rate of five per cent on the sum of Thirteen Thousand Five Hundred ($13,500.) Dollars; mortgage to be drawn for three years.

4. The said party of the second part agrees to execute a lease to the party of the first part

Exhibit D. 1.

covering the entire first or store floor and cellar thereunder of the premises No. 303 Sherman Avenue, Newark, New Jersey, for a period of five years at a rental of One Dollar per month, payable monthly in advance, the party of the second part to make all repairs, and the said lease to contain no covenant against assigning or subletting.

5. The party of the second part further agrees to execute a lease of the store and cellar thereunder of the premises No. 301 Sherman Avenue, Newark, New Jersey, to the said party of the first part, for a period of five years, at a rental of One Dollar per month, payable monthly in advance, the party of the second part to make all repairs, and the lease to contain no covenant against assigning or subletting. In the event that the party of the first part fails to secure a tenant for the premises No. 301 Sherman Avenue, Newark, New Jersey, within four months from the date hereof, the said party of the first part will surrender this lease to the party of the second part. Said surrender to be upon the condition that if the said premises are rented for saloon purposes that the said party of the second part will rent only to such party or parties who will purchase exclusively from the party of the third part the Beer, Ale and Porter required in conducting a saloon business at No. 301 Sherman Avenue, Newark, New Jersey, for a period of five years. The party of the first part agrees in case it sublets the store No. 301 Sherman Avenue that it will not rent it for a lower figure than Forty ($40.) Dollars per month; and in the event it is rented for Forty ($40.) Dollars or more per month, that the party of the second part will receive the benefit for such rentals.

Exhibit D. 1.

6. The said party of the second part agrees to pay, in addition to the semi-annual interest on the sum of Thirteen Thousand Five Hundred ($13,500.) Dollars, the yearly taxes and water rents and all other changes against said premises Nos. 299, 301 and 303 Sherman Avenue, aforesaid, and also Forty ($40.) Dollars per month to apply on the principal sum of Thirteen Thousand Five Hundred ($13,500.) Dollars.

7. It is agreed by and between the parties hereto that the said mortgage of Seventeen Thousand Five Hundred ($17,500.) Dollars is to be subject to a first mortgage of Six Thousand ($6000.) Dollars on the premises No. 303 Sherman Avenue, now held by the Second Ward Building & Loan Association.

8. The party of the first part agrees to sublet the store No. 303 Sherman Avenue, Newark, New Jersey, to the party of the fourth part for the purpose of conducting a saloon at the aforesaid premises at a rental of $1.00 per month. The said lease to contain covenants which will insure the performance of the terms of this agreement.

And the party of the first part further agrees that should the store No. 303 Sherman Avenue be vacated by the party of the fourth part at any time during the period of this lease, that it, the party of the first part, will not sublet the said store at a lower rental than Forty ($40.) Dollars per month, unless the party of the second part should consent to a lower rental. It being understood, however, that this covenant does not carry any liability from the party of the first part to the party of the second part to pay the rental of Forty ($40.) Dollars per month, it being the intent to give the party of the second

Exhibit D. 1.

part the privilege of naming the amount of the future rental of the store should the party of the fourth part vacate the same. Should the premises No. 303 Sherman Avenue be rented at the sum of Forty ($40.) Dollars per month or more, the said party of the second part is to receive the benefit of such rental.

It is further agreed that this arrangement in no way breaks the lease given by the party of the second part to the party of the first part for a period of five years at One Dollar per month.

9. The party of the fourth part agrees in consideration of the renting of the said premises No. 303 Sherman Avenue, Newark, New Jersey, to, pay the party of the first part One Dollar per barrel additional to the price which the said party of the fourth part has agreed to pay to the party of the third part for the Beer, Ale and Porter to be purchased by the party of the fourth part from the party of the third part during his occupancy of the aforesaid premises. Said Dollar per barrel to be credited on the loan of Four Thousand ($4000.) Dollars made by the party of the first part to the party of the second part until the sum of Four Thousand ($4000.) Dollars shall have been paid. The said payments to be made weekly, based upon the number of barrels purchased each week.

10. The said party of the first part agrees that when the sum of Four Thousand ($4000.) Dollars shall have been paid, to release the premises No. 303 Sherman Avenue, Newark, New Jersey, from the mortgage of Seventeen Thousand Five Hundred ($17,500.) Dollars given by the party of the second part to the party of the first part.

Exhibit D. 1.

11. The said party of the third part agrees to loan to the said party of the fourth part certain moneys for the purpose of paying the license fee at the premises No. 303 Sherman Avenue, aforesaid.

12. The said party of the fourth part agrees to purchase exclusively from the said party of the third part the Beer, Ale and Porter brewed and manufactured by the said party of the third part for use and sale in the said saloon conducted on the premises No. 303 Sherman Avenue, Newark, New Jersey. And the said party of the fourth part also agrees that if he occupies the premises No. 301 Sherman Avenue, Newark, New Jersey, and conducts a saloon there that he will also purchase exclusively from the said party of the third part the Beer, Ale and Porter brewed and manufactured by the said party of the third part for use and sale in the said saloon premises No. 301 Sherman Avenue, aforesaid, as long as he occupies the same between the date hereof and September 20th, 1920. This covenant is made to bind the said party of the fourth part to purchase from the party of the third part the Beer, Ale and Porter for use and sale at either or both places should the said party of the fourth part conduct either one or both.

13. The said additional One Dollar per barrel to be paid by the party of the fourth part to the party of the first part if he should move his saloon to No. 301 Sherman Avenue, as if he should continue at No. 303 Sherman Avenue.

14. The price of the Beer, Ale and Porter to be purchased by the party of the fourth part from the party of the third part as above referred to as having been mutually agreed upon

Exhibit D. 1.

has been stipulated in a memorandum made on September 15th, 1915.

15. This agreement is to be subject to the party of the second part obtaining title to the property No. 303 Sherman Avenue, Newark, New Jersey.

16. Mtge on 303 Sherman Ave to be $4000. and on 299 & 301 Sherman Ave $13500.

17. Party of the fourth part to receive lease of store 301 Sherman Ave on same terms as in 303 Sherman Ave.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written. (Signed) Attest for Oraton Investment Co.

Wm. Rose, Secty.

ORATON INVESTMENT COMPANY
By
(Signed) Edwin C. Feigenspan,
Pres.
(Signed) Maria Marta Loprete (L. S.)
CHRISTIAN FEIGENSPAN, A Corporation

By
(Signed) C. W. Feigenspan, Pres.
(Signed) Demetrio Loprete (L. S.)

Exhibit D. 1.

(Signed) for Chr. Feigenspan Corp

ATTEST:

J. A. Stengel
(Wm. Rose)
Secty.

(Wm. Rose)

(Signed) Michael Devito
as to Maria Marta Loprete

ARTICLES OF AGREEMENT

BETWEEN

ORATON INVESTMENT COMPANY,
MARIA MARTA LOPRETE,
CHRISTIAN FEIGENSPAN,
a Corporation,
DEMETRIO LOPRETE

September 20th, 1915.

TESTIMONY.

IN CHANCERY OF NEW JERSEY,

February 15, 1928.

Between

VITO SAN GIACOMO,
Complainant,

and

ORATON INVESTMENT CO., a corporation, and CHRISTIAN FEIGENSPAN BREWING COMPANY,
Defendants.

Transcript of shorthand notes of testimony taken in the above-entitled matter before his Honor, John H. Backes, Vice-Chancellor, at the Chancery Chambers, in the City of Newark, New Jersey, in the presence of George A. Henderson for complainant; and James Lafferty for defendants.

Mr. Henderson: I offer the deed, bond and mortgage and lease.

(Papers marked Exhibits C. 1, 2 and 3.)

VITO SAN GIACOMO, sworn for complainant.

Direct examination by Mr. Henderson.

Q You are the complainant in this suit? A Yes, sir.

Q And the owner of the premises at 303 Sherman avenue? A Yes, sir.

Q And you took the deed from Mr. and Mrs. Loprete in 1917? A Yes, sir.

Q That was on the 10th of September? A Yes, sir.

Q What are the premises used for, Mr. San Giacomo? A Saloon and family house. First floor is for saloon, upstairs for families.

Q Do you know whose beer, ale and porter is used on those premises? A Feigenspan's.

Q When you took the deed from Loprete did any money pass? A Three thousand dollars, he owed me.

Q He owed you $3,000? A Yes, sir.

Q Is that why they gave you a deed for the property? A That is why I took the deed.

Q Did you pay them anything whatever? A No; the property wasn't worth what I paid.

Q That was in settlement of — A (Interrupted.) There was no settlement. Just $3,000 he owed me and he turned the house over to me.

Q Now, in 1926, did you desire to place a mortgage on the property? A Yes, sir.

Q And did you get Mr. Calandra to obtain the mortgage for you? A Yes, sir.

Q And make a search for you? A Yes, sir.

Q And what did you learn from Mr. Calendra? A I learned there was a $4,000 mortgage from the Oraton Investment Company—from Feigenspan. I said "that ought to be paid off with the dollar a barrel—commission on the beer." He says, "No; you owe eleven hundred and some odd dollars."

The Court: Who was this?

The Witness: Mr. Calandra.

The Court: Attorney for who?

Mr. Henderson: He was getting a mortgage for Mr. San Giacomo, and he learned—I think we will practically stipulate the fact.

Q He told you— A (Interrupting.) He told me that there was a mortgage for $4,000—$1,800 on the mortgage which credit was twenty-one hundred and some dollars, I think—I am not sure how much. It was for the dollar a barrel and interest eleven hundred and some odd dollars.

Q What did you do then? A I didn't want to pay it. I told Mr Calandra I had an argument; I said, "Why should I pay?"

The Court: I am not interested in that.

Q Eventually it was paid. A I paid it. So finally I paid it because I couldn't put the other mortgage on unless I cleaned up this one.

Q Then you received back your cancelled mortgage and bond with it? A Yes, sir.

Q These two here? A Yes, sir.

(Not cross examined.)

MORRIS HELLER, sworn for complainant.

Direct examination by Mr. Henderson.

Q Mr. Heller, you conducted or owned a store, 303 Sherman avenue, didn't you? A Yes, sir; saloon.

Q Saloon. After Mr. Loprete gave up the business? A Yes, sir.

Q Whose beer, ale and porter was used there? A Well, I used Feigenspan's.

Q Did you pay for the beer each week? A I did.

Q Now when you paid, what sum did you pay?

The Court: What did you pay?

The Witness: Well, different prices. I don't remember exactly what I paid, but whatever the bill—

The Court: (Interrupting.) Whatever the bill showed you paid?

The Witness: Yes, sir.

Q Was anything said about the one dollar arrangement to you? A I had nothing to do with it.

Q And you did not pay any extra dollar?

The Court: Were you a tenant in the place?

The Witness: Yes, sir.

The Court: Under whom?

The Witness: Under Loprete.

The Court: Did you rent from Loprete?

The Witness: I bought the premises from Loprete, yes, sir.

The Court: You ran the saloon for yourself.

The Witness: Yes, sir.

The Court: Paid for the beer out of your own money?

The Witness: Yes, sir.

The Court: And paid, as you understood, the current price for the beer?

The Witness: Current price for the beer.

Morris Heller, cross.

Cross examination by Mr. Lafferty.

Q Later you rented from San Giacomo, when he became the owner? A When he became the owner I paid him the rent, that is all.

Mr. Henderson: I am told that Mr. Calandra has left.

Mr. Henderson: I think we might stipulate on the record as to the amount that was paid in the way of principal and interest on this mortgage.

The Court: Is that all you wanted to prove by Mr. Calendra?

Mr. Henderson: No. I wanted to prove by him that Mr. San Giacomo objected to paying this, but it was finally paid.

The Court: You will admit that, won't you?

Mr. Lafferty: I will admit it, sure.

Mr. Henderson: We claim that we made an overpayment of interest.

The Court: If you paid too much interest the Oraton Investment Company will pay you back without any law suit.

Mr. Henderson: We paid interest of $1,130.03 and there was also paid on the mortgage $1,832.69.

The Court: You paid those two amounts, $2,962.72.

Mr. Lafferty: I have a statement showing how that was. I am perfectly willing to stipulate that the interest and principal was computed according to this statement, and that is what was paid.

Conclusion of Vice-Chancellor.

The Court: They say there was several hundred dollars interest paid too much.

Mr. Lafferty: The difference $237.22 is computed as interest on interest. We will pay that back if that is improper.

The Court: That is improper.

CONCLUSION OF THE VICE-CHANCELLOR.

The Court: I intimated to you gentlemen at the opening of the case that the complainant had an adequate remedy at law for moneys had and received, and, you, Mr. Lafferty, said that you did not raise the point and wanted me to dispose of the case on the merits; that if your clients owed anything they wanted to repay it; and you have not defended on the ground that the payment made to your client was voluntary. The situation as it is presented by counsel's statement of the facts is this. Some years ago the defendant loaned to the complainant's grantor four thousand dollars on bond and mortgage for three years. The loan was to be without interest. The bond and mortgage calls for payment in three years from date. The printed portions of these documents providing for interest are stricken out. The three years were up long ago. The complainant bought the property subject to the mortgage and recently sold it. He agreed to convey it clear of the mortgage and under pressure of the performance of that agreement he paid the defendant what was due on the principal and interest from the due day. The interest was paid under protest, and now the complainant wants it back. He is not entitled to it. The contention

Conclusion of Vice-Chancellor.

that the loan was to be without interest is true, but the loan was for a period of three years. There was to be no interest during that time. The obligation was to pay the debt on a day stipulated, and upon default the defendant became entitled to interest at the legal rate from the date of the default. The bill will be dismissed.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between

VITO SAN GIACOMO,
Complainant,

and

ORATON INVESTMENT CO., a corporation, and CHRISTIAN FEIGENSPAN BREWERY CO., a corporation,
Defendants.

On Bill, &c.

Final Decree.

The above matter coming on to be heard in the presence of George A. Henderson, solicitor for and of counsel with the complainant, and James L. R. Lafferty, solicitor for and of counsel with the defendants, and the Court having considered the evidence and arguments of counsel, and the Court being satisfied that the bill of complaint should be dismissed;

It is, on this 28th day of February, 1928, ORDERED that the bill of complaint filed herein be, and the same is hereby dismissed, without costs to either party.

Respectfully advised,

JOHN H. BACKES,
Vice-Chancellor.

I hereby consent to the form of the above decree.

GEORGE A. HENDERSON,
Solicitor for and of Counsel with Complainant.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between	
VITO SAN GIACOMO, *Complainant,*	*On Bill.*
and	*Notice of Appeal.*
ORATON INVESTMENT COMPANY, *Defendant.*	

The complainant, Vito San Giacomo, hereby appeals from the final decree made in the above-entitled cause on Tuesday, February 28, 1928, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated March 5, 1928, Newark, New Jersey.

GEORGE A. HENDERSON,
Solicitor for and of Counsel
with Complainant.

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

GEORGE A. HENDERSON,
Of Counsel with Complainant.

Service of the within notice is hereby acknowledged this day of March, 1928.

ZINK & LAFFERTY,
Attorneys of Defendant.

AMENDED NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between	
VITO SAN GIACOMO, *Complainant,*	*On Bill.*
and	*Amended Notice of Appeal.*
ORATON INVESTMENT COMPANY, *Defendant.*	

The complainant, Vito San Giacomo, hereby appeals from the final decree made by the Chancellor on the advice of Vice-Chancellor John H. Backes, in the above-entitled cause on Tuesday, February 28, 1928, and from the whole and every part thereof, to the Court of Erros and Appeals in the last resort in all causes.

Dated March 12, 1928. Newark, New Jersey.

GEORGE A. HENDERSON,
Solicitor for and of Counsel
with Complainant.

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

GEORGE A. HENDERSON,
Of Counsel with Complainant.

I consent to the filing of the above amended notice of appeal.

ZINK & LAFFERTY,
Solicitors for and of Counsel
with Defendants.

PETITION OF APPEAL.

New Jersey Court of Errors and Appeals

Between	
VITO SAN GIACOMO, *Complainant-Appellant,*	*On Appeal from the Court of Chancery.*
and	
ORATON INVESTMENT COMPANY, a corporation, *Defendant-Appellee.*	*Petition of Appeal.*

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

The petition of Vito San Giacomo, the appellant in the above-entitled cause, respectfully shows that:

(1) Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Honorable John H. Backes, *V.-C.*, bearing date Feb. 28, 1928, in a certain cause in said Court of Chancery wherein the said Vito San Giacomo was complainant and the said Oraton Investment Company was defendant, in this respect, to wit, that the said decree orders that the complainant's bill of complaint be dismissed.

(2) And your petitioner appeals from the order of the Chancellor as aforesaid, upon the ground that the same is erroneous in that the Court of Chancery should order that the prayer

in the bill of complaint be granted and the above defendant should have been ordered to return to complainant the sum of $892.50.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden and that petitioner may have such other relief in the premises as this Court shall deem proper.

Dated March 10, 1928.

GEORGE A. HENDERSON,
Solicitor for and of Counsel
with Appellant.

Sat below

EDWIN ROBERT WALKER, *C.*
JOHN H. BACKES, *V.-C.*

Service of the within petition of appeal is hereby acknowledged this day of March, 1928.

ZINK & LAFFERTY,
Solicitors for and of Counsel
with Defendant-Appellee.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between VITO SAN GIACOMO, *Complainant-Appellant,* *and* ORATON INVESTMENT COMPANY, a corporation, *Defendant-Appellee.*	*On Appeal from the Court of Chancery.* *Answer to Petition of Appeal.*

The answer of the above named defendant-appellee to the petition of appeal of the above named complainant-appellant.

This appellee, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a decree was, on the 28th day of February, 1928, last past, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof this petition prays to be referred thereto and the same shall be produced and this appellee is advised and believes that the said decree is agreeable to equity and it prays that the same may be affirmed, with costs to be adjudged to this appellee.

LINDABURY, STEELMAN,
ZINK & LAFFERTY,
Solicitors for and of Counsel
with Defendant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between VITO SAN GIACOMO, *Complainant-Appellant,* *and* ORATON INVESTMENT COMPANY, *Defendant-Appellee.*	*On Appeal from the Court of Chancery.*

BRIEF OF COMPLAINANT-APPELLANT.

On September 22, 1915, Marie M. Loprete and her husband, Demetrio Loprete, entered into a lengthy agreement (Exhibit D. 1, p. 19) with defendant-appellee whereby among other things it was agreed that it would lend them $4,000.00 without interest (p. 19, l. 29), and upon payment of the $4,000.00 would release the mortgage (p. 22, l. 33), given to secure payment of this sum. At the same time in accordance with this agreement the Lopretes gave to the defendant-appellee herein, a bond and mortgage (Exhibits C. 2 and C. 3) in the sum of Four thousand ($4,000.00) dollars, without interest, on the premises involved located at 303 Sherman avenue, Newark, N. J., the maturity date of which was three years later. Payments were gradually (as described below) made on the principal to the amount of $2,167.31, leaving a final balance due thereon of $1,832.69 (p. 30, l. 32).

The $4,000.00 was loaned to the Lopretes to start a saloon business at the above address, and it was to be repaid at the rate of one dollar per barrel (p. 22, l. 25) on every barrel of beer, ale and porter of Christian Feigenspan, a corpora-

tion (of which defendant was a subsidiary) used on the premises, and no such commodity other than Feigenspan's was to be sold. The corporation, Christian Feigenspan, was also a party to the above agreement (Exhibit D. 1).

On September 17, 1917, complainant-appellant purchased the property (Exhibit C. 4) subject to the above mortgage, therein described as "originally in the sum of Four thousand ($4,000.00) dollars" (p. 19, l. 30).

On or about November 3, 1926, having sought to have the mortgage cancelled he was informed by defendant-appellee that there was due $2,-962.72 (p. 30, l. 33). He learned that this was made up of $1,832.69 unpaid balance of the principal, $892.81 interest and $237.22 in interest on interest (which last sum was later repaid complainant, p. 31, l. 3). Complainant thought that the entire mortgage had long since been cleared off (p. 27, l. 33). He, however, paid these sums, under protest, after objection, because he had to remove the encumbrance of this mortgage in order to place a new mortgage on the premises (p. 28, l. 16), (p. 30, l. 23), (p. 31, l. 38).

It is the contention of complainant that defendant improperly exacted this interest, and that it should be returned. The jurisdiction of the Court below to try the issue was admitted (p. 1, l. 25).

Complainant's suit was originally for an accounting. All the items in dispute were adjusted excepting the $892.81 interest, which matter went to a hearing, and the Court decided that the bill asking for the return to complainant of this interest should be dismissed. The Court said "The contention that the loan was to be without interest is true, but the loan was for a period of

three years. There was to be no interest during that time. The obligation was to pay the defendant on a day stipulated, and upon default the defendant became entitled to interest at the legal rate from the date of the default. The bill will be dismissed" (p. 31, l. 40).

This, complainant-appellant contends, is an erroneous finding of facts by the Court, and the Court erroneously decided that the defendant-appellee was entitled to the interest involved and dismissed the bill. The complainant appeals from the alleged error of the Court in failing to decide that complainant was entitled to the relief asked, and in dismissing complainant's bill.

Complainant relies upon the four following Points:

(1) The agreement between the parties at the time of the loan provided that no interest was to be charged on the loan, and the term of this agreement remained unchanged.

(2) Under the bond and mortgage on which interest is claimed the mortgagee was not at any time entitled to interest.

(3) Defendant was not entitled after the maturity date to any interest until a demand was made for payment of the principal, and payment of the principal was made before it was demanded, consequently no interest can be exacted.

(4) Even if the mortgagee had been entitled after maturity to demand interest, his failure to do so bars him.

POINT ONE.

The agreement between the parties at the time of the loan provided that no interest was to be charged, and the terms of this agreement remained unchanged.

An agreement was placed in evidence by the defendant and marked Exhibit "D. 1" (pp. 19-25). The bond and mortgage were in evidence and referred to this agreement (Exhibits C. 2 and C. 3, pp. 7-14). In the bond and mortgage every reference to interest has been eliminated or obliterated from the paper. On the outside of the bond there has been obliterated two printed lines, one reading "interest payable" and the other reading "interest rate," after which followed a percentage mark; in their place in parentheses was typewritten "no interest" (p. 8, l. 40).

The agreement referred to is very important and a perusal of it conclusively confirms the fact that it was for the loan of Four thousand ($4,-000.00) dollars without any interest. Paragraph two of this agreement reads "party of the first part" (the defendant-appellee) "further agrees to loan to the party of the second part the sum of Four thousand dollars ($4,000.00) *without interest*" (p. 19, l. 27). No limit of time after which interest would be charged, is set forth in this agreement.

Further on in this agreement paragraph ten reads (p. 22, l. 32), "the said party of the first part agrees that when the sum of Four thousand ($4,000.00) dollars shall have been paid, to release the premises No. 303 Sherman avenue, Newark, N. J., from a mortgage of $17,500 given by the party of the second part to the party of the first part." Here, too, nothing is said about

the $4,000.00 ever carrying interest but merely that the premises will be released from the mortgage when the $4,000.00 shall have been repaid. We might note here that the agreement provides earlier therein for two mortgages, one $13,-500.00 with interest at 5%, and the other, the mortgage for $4,000.00. This makes the $17,500.-00, spoken of as though it were one mortgage. The $4,000.00 mortgage was to be on the premises at 303 Sherman avenue and the $13,500 to be on the premises 299-301 Sherman avenue (p. 24, l. 10), Paragraph 6 of this agreement (p. 21, l. 1) provides for all the payments to be made. It set forth taxes, water rents, semi-annual interest on the $13,500 mortgage, and all other charges, but never a word about interest on the $4,000.00.

It is true that the mortgage had a due date three years later, but some due date was of course necessary and it was placed far in the future. This due date was merely the date on which the mortgagee could have come in and demanded the balance due on the mortgage. As he did not do so the mortgage was extended on the same terms until a demand should be made. Accordingly the provision for no interest is likewise extended. The case of *Jersey City* v. *O'Callaghan* cited below, under Point 2, is quite pertinent.

Among citations in point we find the following:

Wyckoff v. *Wyckoff*, 44 Equity 56, in which Vice-Chancellor Van Fleet said:

> "On a loan of money, the rate of interest agreed upon, or, if no interest be agreed upon, the rate allowed by law at the date of the contract, will be the rate which the contract will bear *until the money is paid.*"

22 Cyc. 1533, cites with approval the case of *Jersey City* v. *O'Callaghan* in 41 Law 349, cited below, and says:

> "But what has been termed the weight of opinion both as to the number and authority of cases is to the effect that the stipulated rate, whether it be greater or less than the legal rate will attend the contract until the payment of the debt."

Among the cases of other states, besides New Jersey we find *Casey* v. *Gibbons,* in the Supreme Court of California, 1902, holding "a mortgage debt bears the same rate of interest after, as before, maturity," and *Evans* v. *Rice,* 30 S. E. 463, in the Supreme Court of Virginia, which holds "The rate of interest reserved in the contract continues as an incident of the debt due, in absence of any stipulation to the contrary."

POINT TWO.

Defendant, under the mortgage in this case on which interest is claimed, was not at any time entitled to interest.

Our case is one in which there was an agreement as to interest. The money was loaned and it was expressly agreed that no interest was to be charged. From the written agreement, from the bond and mortgage, from the very actions of the parties in never thereafter raising the question of interest, and never demanding any interest after the due date until complainant wished to pay off the mortgage, we must conclude that there was never any intention on the part of the parties to this agreement that interest would ever be exacted.

Chief Justice Beasley, speaking for the Court of Errors and Appeals, in the case of *Jersey*

City v. *O'Callaghan,* which is reported in 41 Law, 349, at page 353, said:

> "Interest proper arises whenever money is lent or forborne with an understanding, express or implied, that an equivalent shall be given for its use, and in such case the rate of interest agreed upon, or, if none such be agreed upon, the rate then existing by law, is, in the absence of a new agreement, the rate to be paid until the return of the money. And this rate prevails notwithstanding any statutory change of the rate of interest during the interim. * * * *Loans that are intended to run for a long period of time, and which are designed to stand as permanent investments, are usually, in form, made payable after short terms of forbearance, so that, as a question of intention, it is not a strained construction of such transactions to imply, after pay-day has arrived, a renewal of the agreement with respect to interest, and that the loan is continued by mutual consent upon the original terms. Therefore on loans and on forbearances, the original rate of interest will rule until the repayment of the money,* unless the rate shall have been altered by a new agreement between the parties. In such cases it is interest and not damages that is to be assessed."
>
> 22 Cyc. 251, "If the contract provides for a certain rate of interest until the principal sum be paid, such contract will control the recovery as to the rate after maturity."

When the date of maturity arrived in 1918 defendant did not demand payment of the mortgage, and never demanded it until complainant, thinking the mortgage was paid (p. 27, l. 33)

sought to have it cancelled, and was then told that $2,962.71 would have to be paid before the mortgage could be cancelled.

The minds of the parties met on the question of interest. They were in accord that the only sum to be repaid was the $4,000.00. This is not a case where they failed to agree on interest. They did agree, and the outcome of their deliberations was an agreement that the indebtedness would be extinguished when the $4,000.00 was paid.

This was a joint adventure for the profit of both of the parties hereto. The owner was to conduct the business, and build up the trade and make his profit in the difference between the price of the beer sold to him and purchased from him; the defendant was to supply the $4,000.00 to enable the business to function and likewise make his profit from the business. Both parties were to profit from the sales, and the principal sum was to be paid off as barrels were supplied and their contents sold. No thought of interest was ever entertained or expressed.

POINT THREE.

Defendant was not entitled to any interest until a demand was made for payment of the principal. Payment of the principal was made before it was demanded, consequently no interest will lie.

This is not a case such as would come under *Ackers* v. *Winston,* 7 C. E. Green, 44, which holds "where the bond and mortgage calls for interest, without naming the rate, the rate fixed by the law at the date of the instruments will be chargeable." Our contract expressly said "No

interest" was to be charged. It was agreed—we might say—that a rate of nothing on each dollar was to be charged.

More than eight years after the due date of the mortgage, Nov. 3, 1926, the balance of the principal was paid. This was without any demand being made for it. Nor during that time was any interest demanded or even mentioned. This is significant and shows how the parties felt about the question of interest. It is true, there are cases that hold that "Where no rate of interest is agreed upon," the legal rate will lie after the maturity date of the mortgage. I respectfully submit that this cannot be understood to apply to our case, in which their mind did meet on the question of interest and the rate of interest was agreed upon, which was nothing on each dollar. Besides the principal, that interest, or "nil," is all the defendant was entitled to until it made a demand for the principal, from which date of demand the interest would run, if complainant failed to pay the principal. The agreement, for which the mortgage was given as collateral, simply said no interest was to be paid and the mortgage was intended to carry out the terms of this agreement.

In a suit on a demand note in *Scudder* v. *Morris,* 3 N. J. Law, 13, the Court said in passing "He promises to pay on demand, thus putting it in the power of the holder to entitle himself to interest when he might think proper; but until he makes a demand, the money is not actually due. *If it had been the intention of the parties that the money should draw interest, why not express it? Their omitting to do so leaves the fair conclusion that it was not intended.*" Our case went further than this. Every reference to interest is eliminated, and it is expressly set forth

wherever possible *that no interest is to be charged.*

POINT FOUR.

Even if the mortgagee had been entitled after maturity to demand interest, his failure to do so bars him.

The case of *Jones* v. *Haines,* 79 Equity 110, 113, and the extracts from 33 Corpus Juris, 191 and 239, all set forth below, indicate that where a creditor neglects to press his claim for a long period of time, he is not entitled to recover interest. In the instant case more than eight years elapsed from the maturity date, and more than eleven years elapsed from the date of execution of the agreement and the bond and mortgage, and no demand for or even mention of interest was ever made.

In *Jones* v. *Haines,* 79 Equity 110, 113, *V.-C.* Leaming said:

> "If interest should be here recovered it would necessarily be as interest and not by reason of any contract therefor; in such case interest will not be allowed where the delay in the payment of the principal is a result of the neglect of the claimant to force payment for so long a time."

> 33 Corpus Juris, 239, "It has been said that interest is never allowed where the delay is a result of the failure of the creditor to press the collection of his claim."

> 33 Corpus Juris, 191, "Where interest is claimed as damages, and not by reason of any contract therefor it will not be allowed if the delay in the payment of the principal debt is a result of the negligence of the creditor to demand such payment."

Conclusion.

We must remember that the mortgage on which stress has been laid was given as collateral security for the payment of the $4,000.00 loaned without interest pursuant to the written agreement. Under the agreement both the parties to this suit would profit financially.

This agreement provided for a loan of $4,000.00 without interest and further provided that on repayment of $4,000.00 the premises in question would be released from this mortgage given to secure its payment. No date within which this was to be repaid was mentioned in the agreement, from the original method of payment on each barrel sold, a definite date could not be fixed.

This $4,000.00 was repaid before any demand was made for it. The bond and mortgage say the money is to be loaned without interest. Every reference to interest is eliminated both from the body of the bond and mortgage and even from the printed back of same, on which is typed "no interest." No mention of, or demand for, interest was made at any time before the final payment, and more than eight years elapsed between the maturity date of the mortgage and payment of the principal, and more than eleven years elapsed between the loan and its final payment.

It is respectfully contended, in view of all these facts, that the dismissal of the complainant's bill was error, and this Honorable Court should reverse the Court below and order the return to the complainant-appellant by the defendant-appellee of the sum of $892.50 the amount of in-

terest unlawfully exacted, together with interest on same and costs of suit to be taxed.

Respectfully submitted,

GEORGE A. HENDERSON,
Solicitor for and of Counsel
with Complainant-Appellant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

VITO SAN GIACOMO,
Complainant-Appellant,

and

ORATON INVESTMENT COMPANY, a corporation,
Defendant-Appellee.

On Appeal from the Court of Chancery.

BRIEF OF DEFENDANT-APPELLEE.

Statement of Facts.

The defendant, Oraton Investment Company, and the defendant at trial, Christian Feigenspan, a corporation, are closely associated, the former being owned either entirely or practically so by the latter. On September 20, 1915, these two corporations entered into an agreement with Demetrio Loprete and his wife, Marie Marta Loprete. The agreement had to do with the purchase and lease of real estate. Paragraph 2 thereof provided that the Oraton Investment Company should loan to Marie Marta Loprete the sum of Four thousand dollars ($4,000.) without interest. Paragraph 9 provides that this loan shall be repaid by Demetrio Loprete, paying upon the purchase of beer, ale and porter One dollar ($1.00) per barrel in excess of the agreed price for those products, which extra dollar per barrel should be credited on account of the Four thousand dollars ($4,000.) loan.

In carrying out this agreement Demetrio Loprete and his wife executed to Oraton Investment Company a bond and mortgage, both dated September 22, 1915, conditioned for the payment

of Four thousand dollars ($4,000.) three years from date. The body of the bond contained no reference to interest. The body of the mortgage contained no reference to interest. There is a statement on the exterior of the bond where the interest rate usually appears as follows: "No Interest."

To summarize the facts, therefore, a bond and mortgage conditioned for the payment of Four thousand dollars ($4,000.) on a definite date, without interest, became due and payable on that date and was partially unpaid.

Thereafter, the complainant-appellant became the owner of the property and desiring the mortgage satisfied was required to and did pay interest on the unpaid balance at maturity until payment by him of the balance of principal. The question here involved is whether or not that interest was properly payable.

Brief of Argument.

The argument on behalf of the defendant-appellee will deal exclusively with the one question of whether or not an obligation payable on a certain date, without interest, bears interest after that date, if unpaid on that date.

Interest is divided into two classes. The one class of interest is a charge for the loan of money or for an agreement postponing the date on which it shall be payable, which agreement may be expressed or implied. The second class of interest is for damages sustained by reason of non-payment of money due or past due. The first is referred to in *Jersey City* v. *O'Callaghan,* 41 N. J. Law, pg. 349, as interest proper and the latter is referred to as damages.

The interest in the nature of damages arises from breach of a contract and it is a part of the damages arising by reason of the breach of that contract. Interest proper arises from an agreement. So long as that agreement continues in effect the interest is payable in accordance with the agreement. The Courts of New Jersey have said that where an agreement is made upon the loan of money for interest at a fixed rate it will be implied that the agreement continues from year to year after the maturity date unless an agreement to the contrary is made. This implication arises from a well-known practice in the money lending business of making loans which is intended to be for long terms, upon an agreement that by the term of the mortgage or other evidence of obligation they shall mature at the end of a short term.

It is submitted, however, that when a loan of money is made upon a consideration other than interest reserved, there can be no implication of the continuance of the loan, without interest, beyond the time when it became due by the terms of the agreement, and, certainly such an implication cannot arise in the absence of proof of the contract giving rise to the loan without interest, of the performance of that contract and of the continuance of performance thereof after the due date fixed by the evidence of obligation.

In the present case the contract of September 20th, is evidence of the consideration. It clearly establishes the fact that there was no agreement as to a rate of interest. There was no charge for money loaned and there was no charge for the withholding of the right to collect money due. The loan of money, therefore, was upon contract. The consideration was the performance of that contract. The time for performance was fixed

by the maturity date fixed in the bond and mortgage. Therefore, when the maturity date fixed in the bond and mortgage arrived and the money which was loaned without interest was unpaid there was a breach of that contract. While there might have been an implied agreement that interest would continue at the same rate had there been interest and had the loan been made for a consideration in the nature of interest there should be no implication that the contract continued where there was no evidence of a consideration which continued after the maturity of the contract and, therefore, after its breach.

It is submitted, therefore, that interest in the present case is in the nature of damages and that being in the nature of damages there is, by implication of law, an obligation to pay interest at the legal rate, that is, in this case, at the rate of six per cent. from the date of maturity of the contract.

Since the courts have implied an agreement in cases where money has been loaned for a consideration, or, as it has been called, true interest, it is submitted that it is proper for the Court at this time to consider a business practice well known and firmly established. That business practice is that where a note or other evidence of obligation has become due on a particular day and no interest is mentioned, interest is payable from and after the due date. The best example of this is in the banking business where notes are discounted or purchased by banks. They are made payable on a definite date. There is no mention of interest. Interest on that obligation accrues and is collected as a universal practice from the date of maturity.

It is, therefore, submitted that in the present case interest became due upon the bond of Demetrio Loprete and wife secured by mortgage upon property purchased by the complainant-appellant from the date on which that bond became payable by reason of the fact that upon that date there was a breach of agreement.

Respectfully submitted,

LINDABURY, STEELMAN,
ZINK & LAFFERTY,

Solicitors for and of Counsel with
Defendant-Appellee.