

NEW JERSEY Court of Errors and Appeals

MARGARET DORMAN,
Plaintiff-Appellant,

vs.

WEST JERSEY TITLE AND
GUARANTY COMPANY,
Defendant-Respondent.

} On Appeal from
Supreme Court.

Appellant's Brief.

FACTS.

The trial judge directed a verdict for the defendant, and the appeal is from the judgment entered on the verdict. The substantial facts are not in dispute. They are these: Plaintiff was entitled to approximately \$1,200 from her mother's estate, and one Thomas Tobin, of Philadelphia, collected it for her and turned it over. At that time he suggested that she invest \$1,000. Appellant agreed to this, and Tobin took \$1,000 of the money and invested it in a bond and mortgage, in plaintiff's name, on property in Atlantic City, New Jersey. After the mortgage was recorded he presented it, together with the bond, to the plaintiff and suggested that he be allowed to take care of it, because she had no place for their safe-keeping. She

consented to this. Tobin was allowed to collect the interest as it accrued, and it was transmitted to the appellant. Tobin continued to pay the interest to appellant until sometime in 1915, when payments ceased, and inquiry by the appellant disclosed that the mortgage had been cancelled in 1907. It then developed that Tobin had taken the bond and mortgage to the office of the defendant company and delivered it for cancellation. The defendant company caused the mortgage to be cancelled, and passed its check to Tobin for the principal. A new mortgage was placed on the same premises for \$1,500 to another party, which mortgage was subsequently foreclosed and the property bought in by a purchaser wholly innocent of the fact that the appellant had not been paid the amount due her. Tobin never notified the appellant that he had collected the principal of the mortgage, nor did he ever pay her. The action was instituted against the defendant upon the theory that it had appropriated appellant's property and that the cancellation of the mortgage and the turning over of the money to Tobin was without her authority or consent. Her testimony was that she never gave Tobin any authority to collect the principal, nor did she know that he had collected it. The limit of her authority to him was to collect the interest. This testimony was not disputed. The motion for direction was predicated upon the theory that the possession of the bond and mortgage by Tobin justified the defendant in believing that he had authority to order its cancellation and to collect the debt. The trial judge adopted this theory, and said that the appellant had clothed Tobin with apparent authority to collect the principal.

We first moved for a direction for the plaintiff, believing that upon the undisputed facts the action of the defendant was a trespass upon plaintiff's rights, but out of abundant caution we withdrew our motion thinking that minds might differ as to the inferences to be drawn from the fact of the possession of the bond and mortgage by Tobin, and thus create a jury question.

LAW.

Lawson v. Nicholson, 52 *Equity*, page 821, is opposed to the view adopted by the trial judge. From the undisputed facts it was at least a jury question as to whether or no Tobin was the agent of the appellant for the purpose of surrendering the mortgage for cancellation and collecting the principal, and equally so was it a jury question as to whether or no the appellant was estopped from asserting that he was not her agent. For the purpose of the application of the legal rule the facts in *Lawson v. Nicholson* are quite similar to the facts in the case at bar. At page 822 the Court said:

“It is obvious that in this inquiry the problem to be solved is, Was Leslie the scrivener, the agent of the appellant in the affair in question? It is not, and cannot be, pretended that he was such in point of fact; the evidence is undisputed that Miss Lawson, now Mrs. Birckhead, the appellant, never had the intention, and never did by expression, confer such authority upon him. If the agency claimed existed it must have been by imputation of law from the circumstances incident to the transaction. It is a case ever regulated, and regulated wholly, by the doctrine of estoppel, for the question always in such investigations is, Has the obligee acted in such a way as to lead the obligor, or his representative, reasonably to the conclusion that the alleged agent had the right to receive payment of the obligation? It is deemed that it is at all times to be regarded as a fact, to be ascertained by a construction of the given circumstances, and not, as seems to be indicated in some of the authorities, as a thing to be regulated, in some instances, by legal definitions. It is a matter of fact to be interpreted by such rules as are applied in other cases of the same class.”

A number of cases have followed the cited case, and while the facts have not been precisely the same, they have been somewhat similar and the same result has been reached. See *Brewster v. Entes*, 97 *Atlantic Reporter*, page 156; *Leithiff v. Dennis*, 98 *Atlantic* 242; *Steadman v. Foster*, 83 *Equity* 641; 93 *Atlantic* 353; *Heyder v. Excelsior B. & L. Assoc.*, 42 *Equity* 403.

In *Second Corpus Juris*, page 883, the rule is expressed:

“Mere possession of a chattel by whatever means acquired, if there is no other evidence of property or authority to sell, will not enable the agent to give good title.”

We insist that in the face of the sworn testimony that there was no authority in Tobin to use the mortgage in the way he did; that a jury should not be permitted to build an inference that he was the agent of the appellant for the purpose of surrendering it for cancellation and collecting the debt, but viewed most favorably to the respondent it is plain that it was at least a question for the jury to say whether the acts of the appellant in allowing him to collect the interest and have possession of the bond and mortgage warranted the respondent in believing that he had authority or that she is estopped from asserting to the contrary. It will not be overlooked that there is no proof to show that the respondent knew that Tobin had had possession of the papers.

The judgment should be reversed.

Respectfully submitted,

C. L. COLE,
Attorney of Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JUNE TERM, 1918.

MARGARET DORMAN,	}	ON APPEAL FROM	
Plaintiff-Appellant,			SUPREME COURT.
vs.			
WEST JERSEY TITLE & GUARANTY			
COMPANY,			
Defendant-Respondent.			

BRIEF ON BEHALF OF RESPONDENT.

STATEMENT OF CASE.

The defendant is sued by the plaintiff to recover \$1,000 and interest, the amount due upon a mortgage made by one Herbert to herself, covering premises in Atlantic City, upon the theory that the defendant, receiving said mortgage from one Tobin, caused the same to be cancelled of record and paid the amount due thereon to Tobin, who never paid the plaintiff.

The Trial Judge directed a verdict for the defendant upon the ground that the facts were undisputed and the only inference which could be legitimately drawn by the jury, from such undisputed facts, was that the plaintiff,

by her conduct, clothed Tobin with apparent and ostensible authority to receive both the principal and interest on the mortgage. (C., p. 23, l. 31.)

The case is in this court for review, upon an exception taken with reference to action of the Trial Judge in directing a verdict for the defendant.

FACTS.

In May, 1897, plaintiff employed Tobin, whom she had known for three or four years and in whom she had implicit confidence, to collect for the plaintiff her share in her mother's estate. This was done because they did not trust the man who had charge of the estate. This money was paid to Tobin and the plaintiff told him to retain \$1,000 thereof for investment and give her a check for the balance. Tobin invested the money on a mortgage covering 131 North Missouri avenue, Atlantic City, New Jersey. Plaintiff depended entirely upon Tobin to invest the money and obtain for her proper security. (C., p. 13, l. 2.)

The bond and mortgage, when executed, were brought to the plaintiff, who told Tobin to retain them for her as she had no place to keep them.

Half-yearly thereafter, until 1907, Tobin, with the assent of the plaintiff, collected the interest from Herbert, the mortgagor, and paid the same to her. The last payment of interest was made to the plaintiff in 1915 by Tobin, which interest was then paid to the plaintiff at her residence, where it was brought by Tobin. The plaintiff made no investigation as to the value of the security. She did not examine the mortgaged premises

until after the mortgage had been created, but accepted Tobin's word that it was a good mortgage. (C., p. 14, l. 35.) Plaintiff never came personally in contact with Herbert, the owner of the property.

It was not until 1916, after Tobin failed to continue remittances of interest to the plaintiff, that she made any demand on him for the surrender of her papers, the same having been in his possession since the time the mortgage was created. Tobin disappeared in 1916, and then, for the first time, plaintiff made an effort to obtain the papers from him and found that he had absconded and the mortgage had been cancelled nine years before. (C., p. 15, l. 32.)

Plaintiff testified that she permitted Tobin to retain possession of the papers because he could keep them better than she could and he could look after the same for her and see that the fire insurance was kept up and would save her the trouble. (C., p. 16, l. 17.)

The plaintiff also testified as follows:

"Ques. You depended entirely upon him to look
"after the investment, to keep the fire insurance up
"and keep your papers and collect your interest and
"pay it over to you?"

"Ans. Yes.

"Ques. And you had confidence in him because
"you thought he was perfectly honest at that time?"

"Ans. Yes."

The defendant had many dealings with Tobin, who placed money on mortgages and many times had paid money to him. He was understood to be a man of excellent reputation.

In 1907 Herbert, the mortgagor, sold the premises covered by the mortgage, and, as a new mortgage was to be created, it became necessary to cancel the plaintiff's mortgage. Herbert told the representative of the defendant that Tobin had been collecting the interest and representing Miss Dorman in the matter, and, based upon that information, the representative of the defendant applied to Tobin for the papers, in order that the mortgage debt might be liquidated and the mortgage cancelled. A receipt was given to Tobin for the papers, in which receipt was inserted the amount due on the mortgage. (C., p. 19, l. 30.)

The mortgaged premises were conveyed by Herbert to the Middleton Real Estate Company, a new mortgage was created, adjustments were made, a cheque for \$1,000 and interest was drawn to the order of Tobin, as attorney, the mortgage receipted for cancellation and the balance of the consideration paid to Herbert. Subsequently the defendant sent the mortgage to the County Clerk's office for cancellation.

The defendant knew from Tobin and Herbert that the interest had been paid regularly by Herbert to Tobin for the plaintiff. In 1915 the new mortgage, which was created at the time the mortgage of the plaintiff was cancelled, was foreclosed and the premises sold by the Sheriff, and the purchaser at such sale sold the premises to Max Grappa in January, 1916. (C., p. 8, l. 10, *et seq.*)

The recital of facts set forth in the appellant's brief is not strictly accurate. Plaintiff did not testify that Tobin suggested he be allowed to take care of the papers because plaintiff had no place for safe-keeping. The

plaintiff testified that Tobin kept the papers and that he said that he would keep them in his safe. (C., p. 10, l. 1.)

The plaintiff also testified as follows:

“Ques. Why did you let him have possession of that mortgage?”

“Ans. Because I thought he could keep it better than I could, and he said that he would look after it for me and see that the fire insurance was kept up, and would save me that trouble.”

Apparently the papers never were in the possession of the plaintiff. The proof is that Tobin brought the same to the house where plaintiff then resided and immediately took them away, at her suggestion and with her consent. There is nothing to show that she ever had them in her hands.

Plaintiff also testified that she did not give Tobin any authority to surrender the mortgage or accept for her the principal thereof or agree that the mortgage should be cancelled of record.

ARGUMENT.

We insist that the action of the learned Trial Judge in directing a verdict for the defendant was justified, because:

1. The undisputed facts show that the plaintiff, by her conduct, conferred upon Tobin authority to act for her, in collecting the principal of the mortgage and arranging for its satisfaction.

2. The complainant does not disclose any cause of action against the defendant which would warrant a recovery in this suit.

FIRST.

The defendant was the agent of Herbert, the mortgagor, in the payment and satisfaction of the mortgage and the cancellation of the record thereof. As such agent, the defendant knew that Tobin had negotiated the loan in the first instance, had paid the money advanced on the mortgage to the mortgagor, had possession of the papers, collected the interest, presented the mortgage for payment at the time of settlement, and received the principal as attorney of the plaintiff. During all of which time the plaintiff had not come in contact with the owner of the premises. Plaintiff admitted that the reason she permitted Tobin to retain the mortgage was because she thought he could keep it better and look after it for her and see that the fire insurance was kept up, so it would save her that trouble.

Manifestly, the plaintiff is estopped because, by her conduct, she gave to Tobin the power to practice a fraud upon the owner of the mortgaged premises or other innocent parties who became involved in the transaction. The Court, therefore, should not interfere for her protection at the expense of those who had been deceived and misled by such fraud, made possibly only by the conduct of the plaintiff herself.

This case, in our judgment, is controlled by the opinion of Chancellor Runyon, in *Haines vs. Pohlman*, 25 Eq., 179, in which it is held:

“It is well settled that the debtor is authorized to infer that an attorney or scrivener who has been employed to make a loan is empowered to receive both principal and interest, from his having possession of the bond and mortgage given for the loan, or of the former only. The numerous cases on this point will be found collected in *Williams vs. Walker*, 2 *Sandf. Ch.*, 325. See also *Hatfield vs. Reynolds*, 34 *Barb.*, 612; *Megary vs. Funtis*, 5 *Sandf. Sup. C. R.*, 376. But the inference in such cases is founded on the custody of the securities, and it ceases whenever they are withdrawn by the creditor; and it is incumbent on the debtor who makes payment to the attorney or agent, relying upon such inference, to show that the securities were in his possession on each occasion when the payments were made.”

The principle of law declared in this case has never been questioned or modified in any way by any subsequent authority in New Jersey. The said principle is also supported by the following authorities in other jurisdictions:

Wilcox vs. Carr, 37 *Fed.*, 130.

Kent vs. Condon, 33 *Fed.*, 228.

Thornton vs. Lanther, 48 *N. E.*, 412.

Sessions vs. Kent, 39 *N. W.*, 914.

Jones vs. Dulick, 55 *Pac.*, 522.

Story on Agency, p. 104.

27 *Cyc.*, 1389.

The basis of the opinions in most of these cases is the general proposition that where one or two innocent persons must suffer, that one who has placed his agent in the position to perpetuate the fraud must bear the burden of the situation created by his own conduct.

ANSWER TO BRIEF ON BEHALF OF
PLAINTIFF.

The undisputed facts, we submit, were sufficient to warrant the defendant in believing that Tobin had ample authority, from plaintiff, to receive payment of the mortgage and surrender the latter for cancellation, and the jury could not arrive at any other rational conclusion than that the plaintiff was estopped from asserting the contrary.

The case upon which the plaintiff relies, *i. e.*, *Lawson vs. Nicholson*, 52 Eq., 821, is not, in our opinion, controlling. In that case Chief Justice Beasley found but one single circumstance having a tendency to render reasonable the inference that the scrivener was the agent of the mortgagee, clothed with authority to receive payment of the principal money secured, which was that the person who paid off the mortgage found the same in the hands of the scrivener. But it also appeared that such person did not have any knowledge of the circumstances under which the scrivener obtained possession of the mortgage, or the fact that the mortgage had been drawn by said scrivener many years before. The mortgage itself was placed in the hands of the mortgagee immediately upon its execution and retained for many years, until the paper, with a lot of other papers, were handed to the scrivener upon the understanding that they were to be kept in the latter's fire-proof, and it was by breaking into this bundle and by criminally abstracting the mortgage that the scrivener obtained possession thereof. Furthermore, it appeared in that case that the payment

of interest to the scrivener was in pursuance of an express direction from the mortgagee to the owner of the property, which authority, limited to the interest alone, the Chief Justice held, negatived the supposition that the principal could be paid to such agent.

On the other hand, it will be observed that in the case at bar Tobin negotiated the loan in the first instance, and when the mortgagee executed the papers they went in Tobin's possession. They were never actually in the possession of the mortgagee. The plaintiff permitted Tobin to retain the mortgage, so that he could look after it for her, to see that the insurance was kept up and collect the interest, and the mortgagor, for whom the defendant was acting, in the satisfaction of the debt on the mortgage and the cancellation of the latter, had knowledge of these facts, when the principal of the mortgage was paid to Tobin and a cheque given to him as attorney for the plaintiff.

We do not claim that mere possession of the mortgage by Tobin, coupled with the collection of interest, would warrant the mortgagor or the defendant in assuming that Tobin had authority from the plaintiff to collect the principal, but we do insist that the conduct of the plaintiff in this case was of such a character as to require the imposition upon her of any loss brought about entirely by the manner in which she permitted Tobin to handle the entire transaction from the time the mortgage was created until it was satisfied of record.

The cases of *Brewster vs. Entes* and *Leitheiff vs. Dennis* relate to the power and authority of an agent to assign a mortgage. Such cases, in our judgment, do not have any bearing upon this question, much less control the situation.

The facts of *Heyder vs. Excelsior, etc.*, 42 Eq., 403, are entirely at variance with the situation here under consideration, but it was there held that where one gives to another the power to practice a fraud on innocent parties the Court will not interfere in his protection at the expense of those who have been deceived by such fraud.

In *Stedman vs. Foster*, 83 Eq., 642, the supposed agent, to whom the payments were made, did not have possession of the papers at the time of such payments. The papers were retained by the mortgagee.

Another case which is not cited upon the plaintiff's case is *Cox vs. Cutter*, 28 Eq., 13, where authority on the part of an agent to receive the principal of the mortgage was denied, but in that case, while the interest was paid to the agent from time to time, he did not have possession of the mortgage papers.

SECOND.

The gist of the plaintiff's action was to recover from the defendant the sum of \$1,000, money had and received by the defendant for the use of the plaintiff.

An application was made to strike out the complaint in this cause because it did not disclose any cause of action. The Supreme Court sustained the complaint in a per curiam opinion, which is not reported, upon the ground that the cancellation of the mortgage amounted to a conversion by the defendant. The following is a quotation from the opinion:

“It was payable according to its terms to the plaintiff and the defendant is to be charged as dealing with it as the property of the plaintiff, and

“when defendant converted it to its own use it became bound to pay its value to the plaintiff; this it did not do but paid it to Tobin without authority of the plaintiff; this the defendant could not do except at its own risk.

“When the defendant disposed of plaintiff’s property for value it was bound to account to her for money had and received for her use, an obligation that could not be discharged by paying the money to an unauthorized person.”

It will be observed, however, that the complaint is not predicated upon the theory of negligence, trespass or the unlawful conversion, but solely for money had and received by the defendant for the use of the plaintiff.

It will be observed that the complaint does not set forth any express contract between the plaintiff and defendant which would warrant the recovery of the amount claimed. Therefore, if the plaintiff is entitled to recover the amount due from the defendant in an action on contract, it must be upon the theory that there was an implied obligation on the part of the defendant, upon the cancellation of the plaintiff’s mortgage, to pay to her the amount collected thereon. This implied obligation must necessarily be predicated upon the fact that the cancellation occurred with the plaintiff’s consent, either given prior to the time the mortgage was satisfied, or by subsequent ratification. The complaint expressly denies any prior authority; consequently, the only rational theory of the plaintiff’s cause of action is that the cancellation of the mortgage was subsequently ratified by the plaintiff.

The fact that the plaintiff has sued the defendant for money had and received by it, for her, as the result of the cancellation of the mortgage, is, in our opinion, suf-

ficient ratification of such cancellation. In other words, the plaintiff cannot, in one breath, contend that she is entitled to the money as the result of the cancellation, and at the same time deny the authority of the defendant to cancel.

We contend, therefore, that if Tobin was clothed with authority, so far as the plaintiff was concerned, to deliver the mortgage to the defendant for cancellation, the defendant is exonerated by the payment of the proceeds of such money to Tobin as plaintiff's agent.

The following authorities are submitted in support of this proposition:

“If a complainant, who alleges that a deed was
 “delivered without his authority and contrary to his
 “instructions, afterwards, with full knowledge that
 “his instructions had been disobeyed by his agent,
 “brings a suit at law for the price, and prosecutes
 “it to final decision, this is an affirmance of the de-
 “livery by which he is bound; and he cannot after-
 “wards maintain a suit in this court to set aside the
 “delivery of the deed on the ground that he was
 “mistaken in another matter, the amount which the
 “defendant had agreed to pay for the farm.”

Titus vs. Phillips, 18 E., 75.

This case was reversed in *18 E., 75*, upon the ground that when the prior suit was brought the plaintiff did not know of the circumstances of the delivery, which does not abridge the doctrine announced in the lower court.

If a principal, with knowledge of the facts, brings suit against a third person, basing his right of action upon a contract made by an agent without authority, he there-

by ratifies such contract, and the same rule applies if he attempts in any other way to enforce or take advantage of such contract.

31 Cyc., 1280.

Every ratification relates back and is equivalent to prior authority. It is a well settled rule, subject to certain exceptions, that a ratification relates back to the time when the unauthorized act was done and makes it as effective from that moment as though it had been originally authorized, and that, therefore, upon ratification the parties, to all intents and purposes, stand in the same position as though the person assuming to act as agent had acted under authority previously conferred.

31 Cyc., 1283.

A debtor is authorized to infer that an agent, having power to direct the cancellation of a mortgage, is also empowered to receive the principal thereof.

Haines vs. Pohlman, 25 Eq., 179.

Story on Agency, Sec. 98.

Dunlap Paley on Agency, 275.

Wolstenholme vs. Davis, Freem. Ch., 289.

Hayden vs. Assn., 42 Eq., 403.

Baldwin vs. Howell, 45 Eq., 519.

It seems to us that the plaintiff has mistaken her remedy by reason of this situation. A bill in equity should have been filed to reinstate the mortgage upon the authority of *Heyder vs. Excelsior*, above cited, decided by this Court in 1886, which holds:

“Cancellation of a mortgage on the record is only
“*prima facie* evidence of its discharge, and it is left

“to the owner making the allegation to prove the
“cancelling to have been done by fraud, accident or
“mistake. Such proof being made, the mortgage
“will be established, even against subsequent pur-
“chasers or mortgagees without notice.”

We submit, therefore, that the judgment appealed from
should be affirmed.

LEWIS STARR,
Attorney for Defendant-Respondent.

EXHIBIT.

No. 11210.

Jan. 4, 1907.

Received of Mr. Thomas Toban the following papers:
Bond and mortgage from Herbert to Dorman; recorded
46; page 424, to be cancelled on delivery of check to
Mr. Toban for principal \$1,000 and interest on \$1,000
from Nov. 28, 1906, to date of settlement.

Fire insurance policy for \$500 and searches.

P2
3/14/18
L.

EXHIBIT.

Voucher No. 2492

Check No.

App. No. 11210

WEST JERSEY TITLE & GUARANTY COMPANY,

To Thomas Tobin, Atty., Dr.

Amount required to satisfy mtge. made by Herbert to
Dorman, rec. 46424, prop. E. I. Mo. Ave. S. of Baltic.

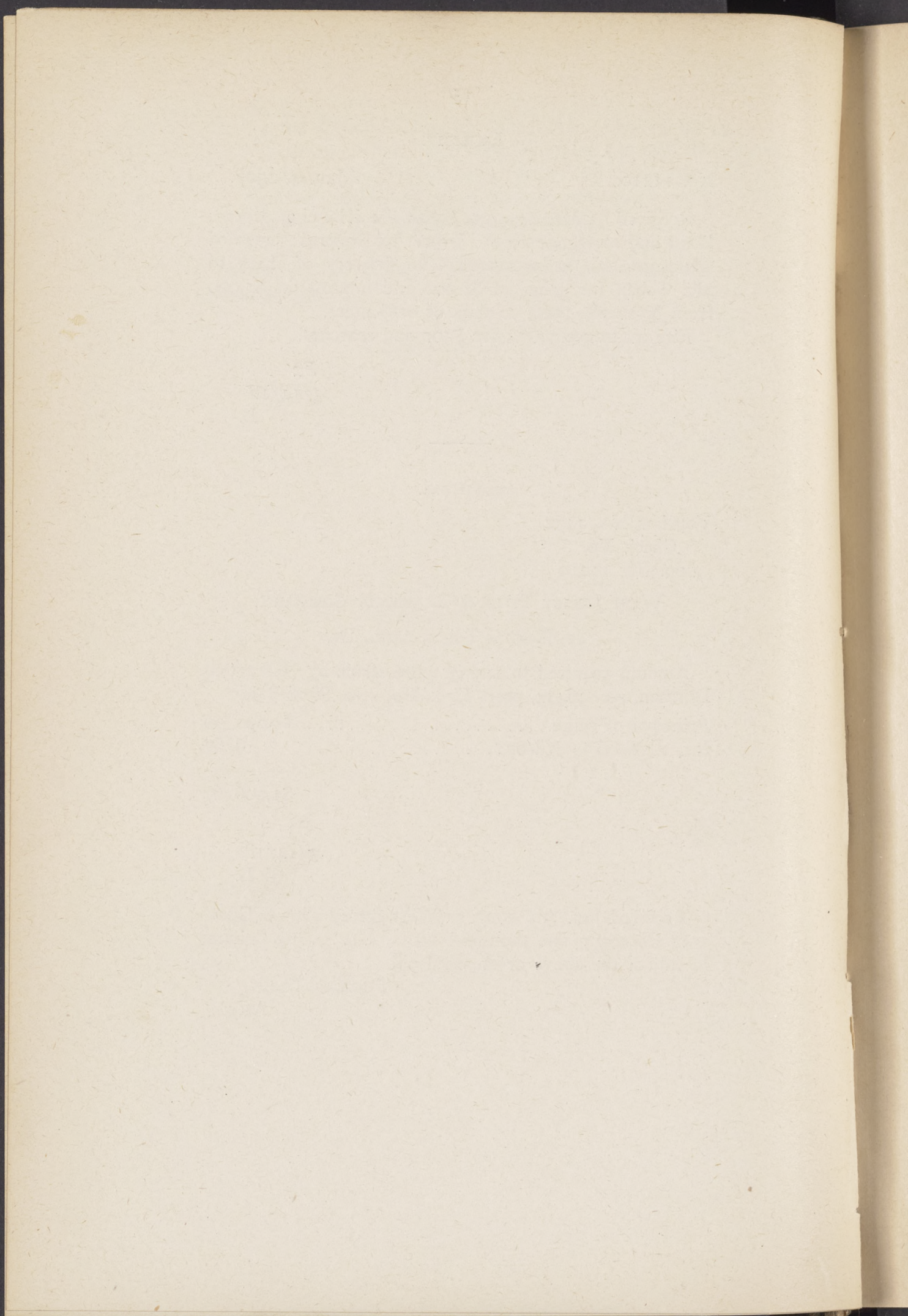
Principal of mtge.....	\$1,000 00
Int. 1/28/06 to 1/8/07.....	6 67

\$1,006 67

P3
3/14/18
L.

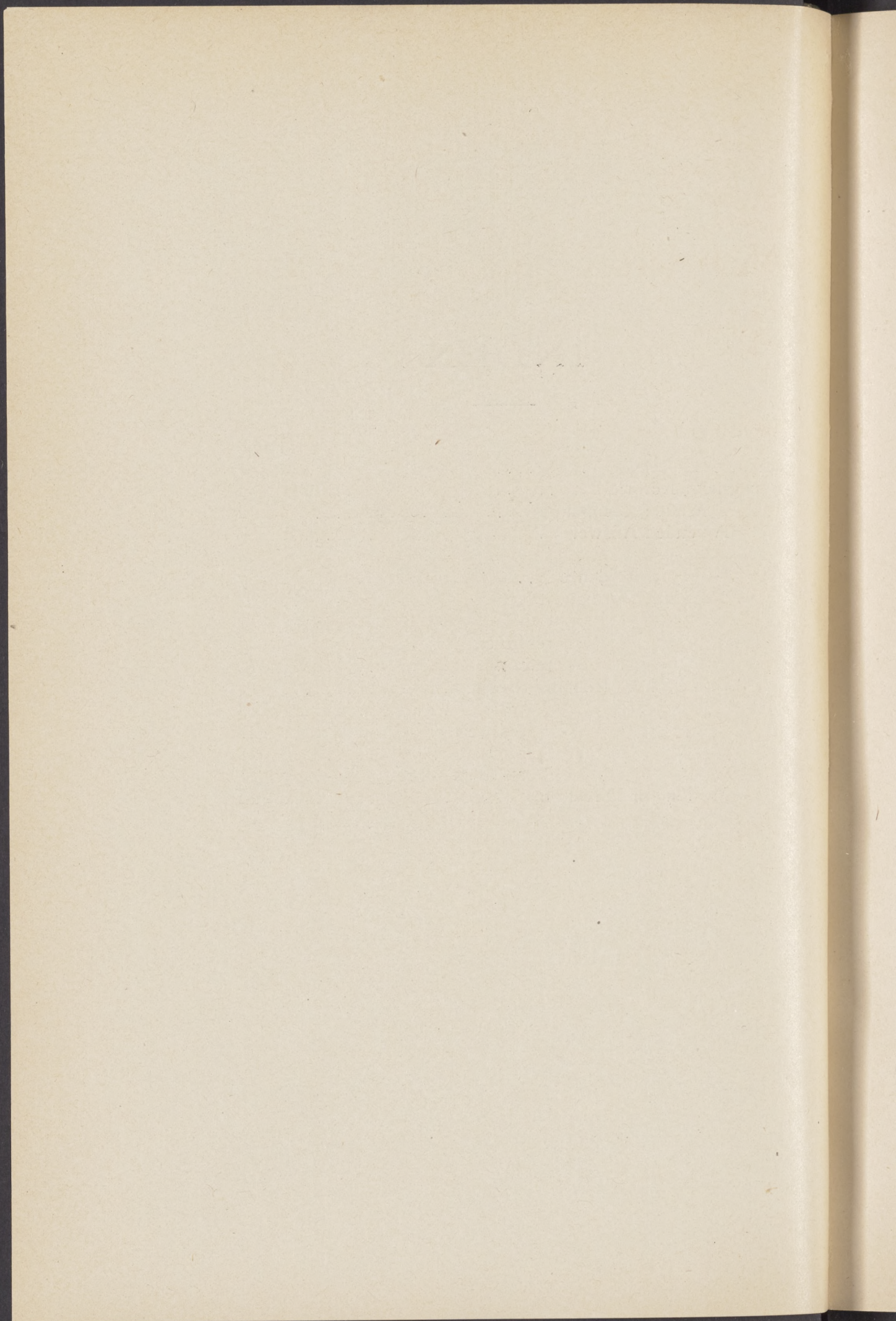
Received Jan. 7th, 1907, of West Jersey Title & Guar-
anty Company one thousand six.....67 dollars,
in full of the above or annexed bill.

THOMAS TOBIN,
Atty.



INDEX

	Page.
Notice of Appeal,	1
Judgment Record,	2
Amended Complaint,	2
Amended Answer,	4
Testimony—	
Offers in Evidence,	7
Margaret Dorman, direct,	8
cross,	11
re-direct,	15
re-cross,	16
Frederick C. Robbins, direct,	17
cross,	18
re-direct,	21
re-cross,	21
re-called—direct,	21
Motion for Direction,	22



New Jersey Supreme Court

ATLANTIC COUNTY.

MARGARET DORMAN,
Plaintiff-Appellant,
vs.
WEST JERSEY TITLE &
GUARANTY COMPANY,
Defendant-Respondent.

} Action at Law.

NOTICE OF APPEAL.

To Honorable Lewis Starr, Attorney of Defendant-Respondent:

Take notice that the plaintiff appeals to the Court of 10
Errors from the whole of the judgment entered in this
cause on the following grounds:

1. The Court directed a verdict for the defendant when it should have directed a verdict for the plaintiff.
2. The Court decided that the actions of the plaintiff clothe Thomas Tobin with apparent authority to authorize the cancellation of the mortgage and receive the proceeds thereof, when it should have decided that under the evidence Tobin had no authority in fact or in law to authorize the cancellation of the mortgage or 20
receive the proceeds thereof.

C. L. COLE,
Attorney of Appellant.

Due and legal service acknowledged this 5th day of April, 1918, by

LEWIS STARR,
Atty. of Respdt.

Filed April 8th, 1918.

ENOCH L. JOHNSON,
Clerk.

NEW JERSEY SUPREME COURT.

10 MARGARET DORMAN)
 vs.) Action at Law.
WEST JERSEY TITLE)
 & GUARANTY CO.) On Postea.

JUDGMENT RECORD.

(*Filed May 3, 1918.*)

20

Judgment for Defendant.
Lewis Starr, Attorney.

West Jersey Title & Guaranty Co., the defendant in this cause, was summoned to answer unto Margaret Dorman, the plaintiff therein in an action at law, upon the following complaint:

(Summons issued July 22, 1916.)

30 The plaintiff, Margaret Dorman, a resident of the City of Atlantic City, County of Atlantic and State of New Jersey, says that:

1. That on and before January 16, 1907, she was the holder and owner of a certain mortgage made by Townsend Herbert to herself for one thousand dollars (\$1,000), which covered certain premises in Atlantic City, New Jersey, on the easterly side of Missouri

Avenue, one hundred feet south of Baltic Avenue, twenty-three feet in width by one hundred three feet in depth.

2. That she entrusted the care and sake-keeping of said mortgage to one Thomas Tobin, who, without her authority, knowledge or consent, delivered the same to defendant, West Jersey Title & Guaranty Company, at its office in Atlantic City, New Jersey.

3. That said company on or about said day, without her authority, knowledge or consent, caused said mort- 10
gage to be cancelled of record in the clerk's office of the County of Atlantic at Mays Landing, where the same had been duly recorded, and paid to said Thomas Tobin the said sum of one thousand dollars with accrued interest in satisfaction and payment of the same, but the said Thomas Tobin never paid the same to plaintiff.

4. That thereafter there was placed of record in said clerk's office a mortgage covering said premises, made by Middleton Real Estate Company, then owner, to John T. Irving and Charles W. Maurer, and there- 20
after proceedings were had in the Court of Chancery of this State to foreclose this mortgage, which ultimately in the sale of the premises by the sheriff of Atlantic County to Rose E. Irving, executrix of the estate of John T. Irving, deceased, in whom the title still is.

5. Plaintiff has demanded of the defendant the said sum of one thousand dollars (\$1,000) with interest from the first day of January, nineteen hundred and fifteen, since which time plaintiff has received no interest 30
on her said mortgage or said amount, but said defendant has refused to pay.

Plaintiff demands the sum of one thousand dollars (\$1,000) with interest from the first day of January, nineteen hundred and fifteen, as damages, besides costs.

C. L. COLE,

Attorney for Plaintiff.

(Filed March 15, 1918.)

The defendant, a corporation under the laws of the State of New Jersey, by this answer:

1. Admits the facts set forth in paragraph one of the complaint.
2. Admits that the plaintiff entrusted the care and safe-keeping of the mortgage, referred to in paragraph one of the complaint, to Thomas Tobin.
3. Except as admitted herein, defendant denies paragraph two of the complaint.
- 10** 4. Denies the facts set forth in paragraph three of the complaint.
5. Avers that it has no knowledge or information sufficient to form a belief as to the truth of the statements contained in paragraph four of the complaint, and requires plaintiff to make proof of the facts stated therein.

First Defense.

1. Avers that plaintiff entrusted the care and safe-
20 keeping of the mortgage, referred to in the complaint, to the said Thomas Tobin, as her agent, who as such, and with the authority, knowledge and consent of the plaintiff, delivered the mortgage to the defendant, in order that the same might be canceled of record.
2. Avers that pursuant to such authority and consent of the plaintiff, and at the request of said Tobin as her agent, defendant caused said mortgage to be cancelled of record.
3. Avers that defendant paid to the said Tobin, as
30 the agent and representative of the plaintiff, the proceeds of said mortgage, and the said Tobin received the same with the authority and consent of the plaintiff.

Second Defense.

1. Defendant performed each and every duty it owed to the plaintiff.

Third Defense.

1. The conduct of the plaintiff contributed to the loss suffered by her and the injury complained of in said complaint.

LEWIS STARR,
Attorney of Defendant.

(Filed Feb. 27, 1917.)

Fourth Defense.

1. The said Thomas Tobin, as the agent of the plaintiff, loaned the plaintiff's money upon the mortgage referred to in the complaint. 10

2. The plaintiff gave to the said Tobin the sum of \$1,000 to be invested upon the mortgage referred to in the complaint.

3. After the mortgage was made to the plaintiff, the latter permitted Tobin, as her agent, to retain possession of the said mortgage, and bond and other papers accompanying the same.

4. After the creation of the mortgage and until the same was canceled, the said Tobin, as the agent of the said plaintiff, collected the interest on said mortgage and paid such interest to the plaintiff. 20

5. After the said mortgage was canceled, the said Tobin paid to the plaintiff each year a sum of money equal to the interest which would have been due upon said mortgage, if the same had not been canceled.

6. The plaintiff is estopped from denying that the said Thomas Tobin had authority to collect the principal of said mortgage for the plaintiff and to request the defendant to cancel of record the said mortgage. 3

LEWIS STARR,
Attorney of Defendant.

(Filed Mar. 15, 1918.)

In reply to First Defense.

1. Plaintiff denies the statements in the first paragraph.

2. Plaintiff denies the statements in the second paragraph.

3. Plaintiff denies the statements in the third paragraph.

In reply to Second Defense.

1. Plaintiff denies the statements in the first paragraph.

In reply to Third Defense.

10 1. Plaintiff denies the statements in the first paragraph.

C. L. COLE,
Attorney for Plaintiff.

(Filed, Feb. 28, 1917.)

20 This cause was tried before LeRoy W. Loder, Judge of the Court of Common Pleas of Cumberland County, holding the Circuit Court of Atlantic County, by virtue of a rule entered in said Circuit Court by Hon. Howard Carrow, Circuit Court Judge, together with a jury, on the 14th day of March, 1918.

The jury rendered a general verdict of no cause of action against the plaintiff and in favor of the defendant.

Costs, \$.....

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff its costs, which are taxed at \$.....

31 Judgment entered April 2, 1918.

WM. S. GUMMERE, C. J.

I, Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of

the judgment entered in the above-stated cause as the same remains on file and of record in my office.

[SEAL.] In testimony whereof I have set my hand and the seal of said Court this twenty-second day of April, A. D. nineteen hundred and eighteen.

ENOCH L. JOHNSON,
Clerk.

NEW JERSEY SUPREME COURT.

10

ATLANTIC COUNTY.

MARGARET DORMAN, <i>Plaintiff,</i>	}	Action at law.
<i>vs.</i>		
WEST JERSEY TITLE AND GUARANTY COMPANY, <i>Defendant.</i>	}	

20

MAYS LANDING, N. J., March 14th, 1918.

TESTIMONY.

Before Hon. LeRoy W. Loder, Judge, and Jury.

Appearances—For the plaintiff, C. L. Cole, Esq.;
for the defendant, Lewis Starr, Esq.

Jury impaneled and sworn.

Mr. Cole—I want to offer in evidence mortgage book forty-six of this county, page 444, showing mortgage dated the twenty-eighth of May, 1897, made by Townsend Herbert to Margaret Dorman for a thousand dollars, covering property in Atlantic City, on the east side of Missouri Avenue, and on the margin showing a cancellation of that mortgage on January sixteenth, 8.45, 1907, by the direction of the West Jersey Title and Guaranty Company.

30

(Mortgage book admitted in evidence but not marked.)

I want to offer mortgage book eighty-eight at page 350, showing mortgage from the Middleton Real Estate Company to John T. Irvin and others, dated the thirteenth day of December, 1906, and it covers the same property as in the mortgage from Herbert to Dorman.

(Mortgage book admitted but not marked.)

- 10 Then I offer deed book 550, at page 490, showing a deed dated the thirtieth day of August, 1915, made by Joseph R. Bartlett, Sheriff of the County of Atlantic, to Rose E. Irving, executrix, and it shows a foreclosure of the mortgage in book 88, and covers the same property.

(Deed book admitted but not marked.)

- 20 Then I offer deed book 552, at page 281, dated the tenth day of January, 1916, showing a deed from Rose E. Irving, executrix, to Max Grappa for an expressed consideration of \$1,900, and covers the property in question.

(Deed book admitted but not marked.)

Miss Margaret Dorman, sworn.

Direct examination, by Mr. Cole:

Q. Miss Dorman, where do you live?

A. Atlantic City.

Q. How long have you lived there?

A. About twenty-five years—twenty-six years.

- 31 Q. Do you know Thomas Tobin?

A. Yes.

Q. Did you at one time let him have a thousand dollars, or give it to him to invest for you?

A. I did.

Q. Do you recall about when that was?

A. In 1900—1897.

Q. Where did you give him the money; where were you?

A. In Philadelphia. I went to Philadelphia.

Q. Now, you state to the jury in your way just how you come to give him that money.

A. My mother had died, and there was settling of the estate, and while we didn't trust the man that had charge of it, so we got Mr. Tobin to get our money for us, my brother and I, my sister was not of age, and he got the money, and he paid it to me in his office, and I gave him a thousand dollars to put out, he kept a thousand dollars to put out on a mortgage. **10**

Q. How did you come to give him a thousand dollars to put out on a mortgage?

A. He settled up the estate, and he said, "Hadn't I—did I want a mortgage?" and I said yes, and he put it out on a mortgage.

Q. Then you gave him the thousand dollars, did you?

A. Yes.

Q. Did you know finally where that mortgage was, what property it covered? **20**

A. Yes.

Q. He told you, did he?

A. Yes.

Q. Now, did he bring the bond and mortgage to you after the mortgage had ben placed?

A. He brought it to our house, and he said he would—

Q. At your house; now, where was that?

A. 1805 Ontario Avenue.

Q. Philadelphia? **30**

A. Atlantic City.

Q. Anybody present when he brought it there?

A. My stepfather, Mr. Borton.

Q. What did he say to you?

A. He said—

Mr. Starr—Wait a minute. I object. We are not bound by conversations.

Q. What became of the bond and mortgage?

A. He kept it for me because I had no place to keep it, and he said he would keep it in his safe.

Mr. Starr—Conversations I object to.

Q. Not what he told you. Did he take the bond and mortgage?

A. Yes.

Q. Now, from that time did you get the interest on it?

A. Yes, sir.

10 Q. Up until what time?

A. 1915, November twenty-eighth it was due; I got it in December.

Q. Have you had any interest since that time?

A. No.

Q. Have you or not ever received the thousand dollars principal?

A. No.

Q. When did you first know that your mortgage had been canceled of record?

20 A. In the spring of 1916.

Q. How did you make that discovery?

A. We asked—I wrote to him to send me my papers, and he didn't do it. I wrote to him twice that I wanted him, so we asked Mr. Devine to look it up; we had heard that the—

Q. Never mind about that. At all events, after you didn't get a reply from him as the result of that did you learn your mortgage had been canceled?

A. Yes, sir.

30 Q. That was the first you knew of it?

A. First I knew of it.

Q. Have you ever received that bond and mortgage back?

A. No.

Q. Did you authorize him to receive that thousand dollars for you?

A. I did not.

Q. Did you authorize him to have that mortgage canceled of record?

A. I did not.

Q. Did you have anything to do with its cancellation?

A. I did not.

Q. Did you know that the West Jersey Title Company was going to pay him the thousand dollars on that mortgage?

A. I did not.

Q. Did you authorize the West Jersey Title Company to pay him the thousand dollars? **10**

A. No.

Q. Did he in any way inform you that mortgage was going to be paid off?

A. Not at all.

Q. Now, have you had any business experience?

A. No.

Cross-examination, by Mr. Starr:

Q. Miss Dorman, how long prior to May, 1897, had you known Mr. Tobin? **20**

A. Why, about three or four years.

Q. Had he transacted any business for you?

A. No.

Q. How did you happen to go to him to get the money from your mother's estate?

A. Because we knew him, and we thought he was an honest man and would do it.

Q. And you were living in Philadelphia at that time?

A. No, living in Atlantic City. **30**

Q. Was his place of business in Philadelphia, Mr. Tobin's place of business in Philadelphia?

A. Both Philadelphia and Atlantic City.

Q. He did business in both places?

A. Yes.

Q. And was your mother's estate settled in Philadelphia or Atlantic City?

A. In Philadelphia.

Q. And how much was your share of the estate?

A. I don't know the exact amount, but it was one thousand one hundred and thirty some dollars, I think.

Q. It was about one hundred and thirty dollars more than the thousand dollars?

A. Yes.

Q. Who was the executor or administrator of your mother's estate?

A. Mr. Wilkinson.

10 Q. Mr. Wilkinson, and where did he live?

A. Why, he lived in Philadelphia.

Q. Now, when you got the money from your mother's estate, was it in the shape of a check from Mr. Wilkinson to your order or was it made to Mr. Tobin's order, do you remember that?

A. I don't remember.

Q. You don't know whether Mr. Wilkinson paid the money directly to you or paid it to Mr. Tobin?

A. He paid it to Mr. Tobin, as he made out the—as
20 he transacted the business.

Q. Now, then, did Mr. Tobin draw a check to you or give you the money, give you the one thousand dollars, or did you simply tell him to retain the money and invest it?

A. I told him to retain the thousand dollars, and he gave me the check for the rest.

Q. So that you told him to retain the one thousand dollars and invest it for you, is that right?

A. Yes.

30 Q. Did you know where he was to invest it?

A. Yes, he told me.

Q. He told you. Where did he tell you the mortgage was invested?

A. 131 North Missouri.

Q. And did you know that at the time?

A. Yes, when he invested, he told me at the time where he had put the mortgage.

Q. Did you go and look at that property?

A. No, I didn't look at it.

Q. You depended entirely upon Mr. Tobin to invest the money and obtain for you the proper security, that is right, isn't it?

A. Yes.

Q. And were the papers, the bond and mortgage, were they ever delivered to you or retained by Mr. Tobin?

A. He brought them to the house and then he kept them for me, and then he took them and kept them. **10**

Q. He brought them there and showed them to you?

A. Yes.

Q. And then took them right away again?

A. Yes.

Q. And always retained them?

A. Yes.

Q. And he collected the interest as it fell due from time to time, did he?

A. Yes.

Q. And you assented to that arrangement? **20**

A. Yes.

Q. And he paid over to you the interest as it fell due?

A. Yes.

Q. Until you say some time in November, 1915?

A. Yes, when the last payment—he paid the last payment in 1915.

Q. And on what date?

A. Well, he paid it some time in the middle of December, I don't remember the exact date.

Q. And that paid up until the twenty-eighth of November? **30**

A. 1915, yes.

Q. So that you got interest from Mr. Tobin from the twenty-eighth of November, 1915?

A. Yes.

Q. Up to that date?

A. Yes.

Q. Had you seen Mr. Tobin in the meantime be-

tween 1897, when the mortgage was created, and 1915, when he gave you the last installment of interest?

A. Oh, yes.

Q. Did you get the interest by going to his office, or did he send it to you?

A. No, he generally paid it when he came to the house; he had business with my stepfather, and he came to the house, and he mostly brought it with him, and gave it to me.

10 Q. And he gave you the cash?

A. Yes, sometimes, sometimes check.

Q. You say he had business with your stepfather; what was that business?

Mr. Cole—I object. It is not relevant, and it is not cross-examination.

Objection sustained.

Q. Did he have any other business dealings with you during that period?

A. No, none whatever.

20 Q. Did you ever talk with him about the mortgage?

A. Only asked if it was a good mortgage.

Q. And he told you it was a good mortgage?

A. Yes.

Q. And you were satisfied with that statement; you made no investigation yourself?

A. No.

Q. In other words, you depended entirely upon Mr. Tobin, didn't you?

A. Because I thought a mortgage was safe.

30 Q. And you depended entirely upon him?

A. Yes, sir; on that answer.

Q. Did you ever suggest to him that there ought to be a change of that investment, ever talk with him about changing the investment?

A. No, only to ask him if it was a good mortgage.

Q. You never came in contact personally with the owner of the property?

A. No.

Q. The mortgagor?

A. No.

Q. And you never asked Mr. Tobin to give you the bond and mortgage, and you permitted him to retain it?

A. Until 1916, in the spring, I wrote to him for it; I wrote him twice to send it to me.

Q. But that was after there was a default in the payment of the interest?

A. Yes, but I didn't know that.

Q. In November, 1915?

A. Yes, not before 1915, but in the spring I heard he was not doing right and I wrote for my papers.

Q. That was the first time you made any effort to get the papers of him?

A. Yes.

Q. Now, after you learned from Mr. Tobin, or, rather, after you wrote the letters to Mr. Tobin to have the papers returned to you, did you go to see him?

A. No, I didn't know where he was.

Q. He disappeared, did he?

20

A. Yes.

Q. Had gone away somewhere and you didn't know where he was?

A. I didn't know where he was; I wrote, and he didn't answer, and I couldn't find him.

Q. Then what did you do?

A. Asked Mr. Devine to look it up. We had heard the property was sold while we had started to investigate.

Q. You started to investigate at that time, and that was when you discovered that the mortgage had been canceled nine years before? 30

A. Yes.

Re-direct examination, by Mr. Cole:

Q. You say that he brought the bond and mortgage to you, showed it to you, and then took it away? How did he come to do that?

A. Well, he said that—

Mr. Starr—I object to the conversation, if your Honor please. I doubt very much whether she can give the conversation.

Mr. Cole—But he has on cross-examination built up an inference the jury might possibly draw. Now, in that situation we have a right to show why this plaintiff parted with the possession of that mortgage.

10 The Court—I think it is permissible. I will permit it.

Mr. Starr—Ground is, we are not bound by any statements made between the plaintiff and Mr. Tobin at that time.

Exception noted for defendant.

Q. Why did you let him have possession of that mortgage?

A. Because I thought he could keep it better than I could, and he said that he would look after it for me and see that the fire insurance was kept up, and would
20 save me that trouble.

Q. Did you have any place in which to keep that bond and mortgage for safe keeping.

A. No.

Q. Any safe in your home?

A. No.

Q. Now, you said, in answer to Judge Starr's question, that you depended entirely upon him, meaning Mr. Tobin. Did you intend to imply by that that you depended upon him to have this mortgage canceled
30 and collect the money?

A. None whatever. I didn't think he had anything to do with anything like that, that he could do it.

Re-cross examination, by Mr. Starr:

Q. You depended upon him to look after the investment, to keep the fire insurance up and keep your papers, and collect your interest and pay it over to you, that is what you depended on him to do, did you not?

A. Yes.

Q. And you had confidence in him because you thought he was perfectly honest at that time?

A. Yes.

Frederick C. Robbins, sworn.

Direct examination, by Mr. Cole:

Q. What is your position with the West Jersey Title Company, the defendant?

A. I have charge of the Atlantic City office, and assistant treasurer in the company. 10

Q. Did you have in 1907?

A. Yes, sir.

Q. Did you have anything to do with the transaction of the cancellation of the mortgage in question here?

A. I don't think so.

Q. Know who did?

A. I think Miss Kirtland, who is now Mrs. Miller, did.

Q. I show you a check of the Title Company, number 5272, dated January seventh, 1907, drawn to your order and by you endorsed, to Thomas Tobin, attorney, and ask you whether that check went through the bank and was paid? 20

A. Yes, sir.

Q. Does that check represent the payment of the thousand dollar mortgage that is in question here?

A. Yes, sir.

Q. Did you ever meet Miss Dorman in connection with the transaction?

A. Never did.

Q. In paying that money over to Mr. Tobin, did you assume that he had authority to accept the payment?

A. Yes, sir.

Mr. Cole—I offer the check.

(Check admitted in evidence and marked *Exhibit P 1.*)

Q. Did you or someone from the company send the mortgage to the County Clerk's office for cancellation?

A. Yes, sir.

Q. Do you recall what became of the mortgage after it was canceled, and the bond?

A. I don't remember. The custom would be that it would follow the property, the canceled mortgage, to the new owner.

Q. You don't recall whether it was in fact turned
10 over to Mr. Tobin, do you?

A. I don't recall that fact.

Cross examination, by Mr. Starr:

Q. Mr. Robbins, how long had you known Mr. Tobin prior to 1907 when the settlement was made for this property?

A. I have known Mr. Tobin ever since I have been with the Title Company, which was some time about 1895.

20 Q. And what was Mr. Tobin's business?

A. He was in the real estate business.

Q. In Philadelphia and Atlantic City?

A. He had an office in Philadelphia.

Q. Had you come in contact with him personally as a representative of the Title Company before that time?

A. A great many times.

Q. In what way did you come in contact with him, and what business did you, representing the Title Company, transact with him?

30 A. He was a man who placed money on mortgages and was a real estate agent, did a general real estate business, and naturally came to our office in business matters.

Q. And have you paid money to him?

A. Yes, sir.

Q. At that time Mr. Tobin was a man of excellent reputation, was he not?

A. Mr. Tobin stood, I think, about as well as the ordinary business man stands in most any community.

He was always thought to be honest, straightforward, so far as I know.

Q. And that was your understanding of his reputation and character when you transacted business with him?

A. Yes, sir.

Q. And paid money to him?

A. Yes, sir.

Q. And as the representative of the Title Company, had you paid money to him before that time as agent or attorney for other people? **10**

A. I would assume so beyond question. I have no data of any particular instance.

Q. Now, did you have a general knowledge of the transaction which resulted in the payment to Mr. Tobin of the thousand dollar mortgage and the cancellation of that mortgage?

A. By reason of being in charge of the office.

Q. Now, what was the transaction by which that mortgage was canceled and the thousand dollars paid? **20**

A. Mr. Tobin brought the mortgage to us, for which we gave him a receipt, stating that the amount due on the mortgage was a certain amount, whatever that receipt may call for and interest.

Q. Have you a copy of the receipt? Is that a copy of the receipt which was given to Mr. Tobin when he turned over the papers?

A. Yes, sir.

Q. You knew from Mr. Herbert, the owner of the property, did you not, that Mr. Tobin had been collecting the interest, and that he had been representing Miss Dorman in that matter? **30**

A. Yes, sir.

Q. And that was the reason why you applied to him for the papers?

A. Yes, sir.

Q. Now, the property, I understand, was sold by the owner, and it was necessary to have this mortgage

canceled of record as a new mortgage was to be created; that is the situation, isn't it?

A. Yes, sir.

Q. Now, have you the statement of the settlement which was made at the time?

10 A. There is a copy of it there with the papers. On January 7th, 1907, the settlement was made in which the property was conveyed by Mr. and Mrs. Herbert to the Middleton Real Estate Company for a consideration of \$1,900. There were certain adjustments made, as to the water and sewerage, and fire insurance, as usual in the settlement, and Mr. Irving was the new mortgage, who took a new mortgage at that time on the property, and that money that Mr. Irving put up, together with the money that was put up by the Middleton Real Estate Company, that paid off the mortgage of one thousand dollars and interest to January 8th, 1907, also paid some other bills, and paid the balance of the money in settlement to Mr. Herbert.

20 Q. And the thousand dollar mortgage is the mortgage which was made to Miss Dorman?

A. That was the mortgage which was held and delivered to us by Mr. Tobin.

Q. Did you also take a receipt from Mr. Tobin at the time the check was turned over to him; is that the receipt which was given?

A. Yes, sir.

(Receipt given to Tobin for bond and mortgage offered and admitted in evidence and marked *Exhibit P2.*)

30

(Receipt from Tobin for the \$1,000 check offered and admitted in evidence, and marked *Exhibit P3.*)

Q. Then when the settlement was made, the mortgage which you obtained from Mr. Tobin was sent to the County Clerk's office by you for cancellation?

A. Yes, sir.

Q. That is right, isn't it?

A. Yes, sir.

Q. You knew at that time, did you not, that Mr. Tobin had been collecting the interest from time to time from Mr. Herbert?

A. Yes, sir.

Re-direct examination, by Mr. Cole:

Q. Can you recall how you got your information that Mr. Tobin was collecting the interest on this thousand dollar mortgage?

A. Mr. Tobin, Judge, came into my office quite a good deal in those days, and I think that he told me, and I think that Mr. Herbert told me. 10

Q. In other words, it was hearsay, so far as you are concerned?

A. Sir?

Q. It was purely hearsay, what somebody had told you?

A. Yes, sir.

Re-cross examination, by Mr. Starr:

Q. You never saw Miss Dorman, did you? 20

A. Never had seen Miss Dorman until this morning.

Mr. Cole—It is agreed that the mortgaged property was at the time of the cancellation of the mortgage and is now worth at least \$1,500. Plaintiff rests.

DEFENDANT'S TESTIMONY.

Frederick C. Robbins, recalled.

30

Direct examination, by Mr. Starr:

Q. Since this suit has been brought by Miss Dorman against the Title Company have you endeavored to locate Tobin?

A. Yes, sir.

Q. Have you been able to find him?

A. No, sir.

Q. Did you get any trace of him?

A. Can't locate him at all. I looked where he had an office on Walnut Street, below Sixth, and went there on three or four occasions, and finally found the janitress of the building. It is a very old-fashioned place, and up on the third or fourth floor, she told me that Mr. Tobin still kept his office there, but that she had not seen him for three years, and that he came to that office at times, because when she opened the door to go in to clean his office she had seen where papers had been moved, and knew that he had been there some time,
10 possible during the night. I then went to the people who owned the building, where he paid his rent, and they had not seen him, but said that he was behind in his rent, but they occasionally got checks, and I could not locate Mr. Tobin in Philadelphia.

Q. In other words, he was a very elusive quantity?

A. Hard to find.

Defendant rests.

Testimony closed.

Mr. Cole—I ask your Honor to direct a verdict in this case for \$1,127.33, which is the principal of the thousand dollars, and interest thereon from November 28th, 1915, to date. My notion is that there is no jury question here. There is nothing in this case, in my opinion, from which the jury would have a right to find the Title Company had anything before them which warranted them in assuming that Mr. Tobin had a
30 right to present this mortgage for cancellation and receive our money. Assuming to be true all that has been testified to by Miss Dorman as to her relations with Mr. Tobin, that did not amount, and she could not be possibly interpreted to give him authority to cancel this mortgage and collect that money.

Mr. Starr—Now, my motion is that the binding instructions be given the jury to find for the defendant,

though we practically concede, at least I concede for the purposes of my motion, that the matter should be determined by your Honor as a question of law.

Mr. Cole—May it please your Honor, upon reflection, it may be possible that the Appellate Court would say that there are facts here from which reasonable minds might differ as to the inferences that could be built up, and having that view, I will withdraw my motion for a direction, and will submit the case to the jury, as far as I am concerned, of course opposing the motion of counsel for the defendant that there be a direction in favor of the defendant, because manifestly there must be a jury question here at best.

Mr. Starr—My motion, if your Honor please, is to direct a verdict for the defendant upon the ground that it appears in the case that Tobin, as the agent of the plaintiff, was instrumental in loaning the plaintiff's money on the mortgage in 1897, and that the money, either retained by Tobin or given by the plaintiff to Tobin to be applied for that purpose, and that Tobin, as the agent of the plaintiff, retained possession of the securities, attended to the collection of interest and the arrangement of fire insurance, that when the mortgage was paid by the Title Company, the Title Company was justified in assuming that Tobin had authority as the agent of the plaintiff to collect the principal and provide for the cancellation of the mortgage, and that the plaintiff is now estopped from denying that Tobin had authority to collect the principal of the mortgage and to direct that the mortgage be canceled of record, and that the plaintiff is not entitled to recover in this action.

The Court—I still think, gentlemen, that no jury question is involved. The facts are undisputed, and it seems to me the only inference that would be legitimate for a jury to draw from the undisputed facts is that the plaintiff, by her conduct, clothed Tobin with apparent and ostensible authority to receive both principal and interest due on this mortgage. These being

my views, it becomes the duty of the Court to say that no jury question is involved, and the Court grants the motion of the defendant. The jury will return a verdict of no cause for action.

(Exception noted for plaintiff.)

at
e
ct

