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# New Jersey Court of Errors and Appeals

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## Summons

*(Filed Aug. 13, 1919)*

State of New Jersey:

*To Elston E. Pearce:*

You are summoned to answer the annexed  
complaint of Margaret Murray in an  
L. S. action at law in the Supreme Court. 20  
And take notice that unless you file  
your answer to said complaint with the  
Clerk of the Supreme Court at Trenton within  
twenty days after service upon you of said writ  
and the annexed complaint, the plaintiff may pro-  
ceed with the suit and judgment may be entered  
against you.

WITNESS, William S. Gummere, Chief Justice of  
the Supreme Court, at Trenton, this thirty-first 30  
day of July, Nineteen Hundred and Nineteen.

EDWIN B. & PHILIP GOODELL,  
Attorneys,

ENOCH L. JOHNSON,

Clerk.

**Complaint***(Filed August 13, 1919)*

## NEW JERSEY SUPREME COURT

ESSEX COUNTY

10

MARGARET MURRAY,  vs. ELSTON E. PEARCE,	Plaintiff,  Defendant.	}	Action at Law.
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(Summons issued July 31, 1919.)

20 The plaintiff, Margaret Murray, of the Town of Montclair in the County of Essex and State of New Jersey, says that.

1. On September 15th, 1916, the defendant, Elston E. Pearce, executed his bond of that date to Philip Goodell in the penal sum of \$10,000, conditioned for the payment of \$5,000 on September 15th, 1918, with interest at the rate of five and one-half per centum per annum.

30 2. To secure said bond the defendant, Elston E. Pearce, and Alice Duval Pearce, his wife, executed a mortgage of the same date to the said Philip Goodell, upon certain lands and premises whereof the defendant was seized in fee simple, situate, lying and being in the Town of Boonton, in the County of Morris and State of New Jersey, particularly described as follows:

40 Beginning at the most Easterly corner of lot No. 2 in a line of Division Street; thence running

## Complaint

along a line of lot No. 2 North 40 degrees West, 119 feet to the corner of lots No. 8 and 9 on Mechanic Street; thence along line of lot No. 8 North 50 degrees East, and parallel to Division Street, 50 feet; thence South 40 degrees East, 119 feet to Division Street; thence South 50 degrees West, 50 feet to the point or place of Beginning. Containing 5950 feet superficial. Being a part of a tract of 7.82 acres that Abraham T. Peer conveyed to Nicholas N. Jacobus by deed dated May 29th, 1855, and is numbered on a map or diagram of the same as lot No. 3 on Division Street. 10

3. On January 13th, 1919, the said Philip Goodell assigned said bond and mortgage to the plaintiff.

4. On November 21st, 1916, the defendant Elston E. Pearce, and Alice Duval Pearce, his wife, conveyed the lands described in paragraph 2 of this complaint to David W. Miller, in fee. 20

5. On January 31st, 1918, the said David W. Miller and Phebe C. Miller, his wife, conveyed the lands described in paragraph 2 of this complaint to Thomas F. Roche and Mary E. Roche, his wife.

6. On April 21st, 1919, a final decree for the sale of said lands and premises and the foreclosure of said mortgage was made by the Court of Chancery in the suit brought for that purpose by Margaret Murray against Elston E. Pearce, Thomas F. Roche and Mary E. Roche, the owners of said property, and by said decree it was adjudged that there was then due to Margaret Murray upon said mortgage and the bond which the same was intended to secure, the sum of \$5,165, 30 40

## Complaint

together with lawful interest thereon from April 21st, 1919, until the same should be paid and satisfied, and the costs of said complainant, which were taxed at \$162.16, and said decree directed that a writ of *feri facias* be issued to the Sheriff of the County of Morris commanding him to make  
10 sale of the mortgaged premises to make the said sum with lawful interest thereon from April 21st, 1919, and complainant's costs.

7. On June 9th, 1919, and within six months from the commencement of this action the said Sheriff, by virtue of said writ of execution, duly sold the said premises according to law, to Margaret Murray for the sum of \$3,000, she being the highest bidder therefor.

20 8. The Sheriff's lawful fees and disbursements upon said execution amounted to \$96.44, which were thereupon paid by the complainant to said Sheriff, all of which appears upon the execution which was duly returned into said Court of Chancery.

30 9. At the date of said sale there was due to the complainant \$5,464.93, and after crediting the amount for which said property was purchased there remains due to Margaret Murray upon the bond of the defendant the sum of \$2,464.93.

10. The said sum of \$2,464.93 has not been paid nor has any part thereof.

40 11. On July 29th, 1919, and within six months after said Sheriff's sale, and prior to the institution of this suit, plaintiff filed in the Office of the Clerk of the County of Morris, the County in which said mortgaged premises are situate, a

## Complaint

written notice of her intention to institute this action, setting forth the Court in which it was proposed to begin said action, the names of the parties to said bond and action, the book and page of record of said mortgage, together with the description of the mortgaged premises, according to the statute in such case made and provided, a copy of which notice is hereto annexed and made a part hereof. 10

12. Plaintiff's action against said defendant was commenced within six months from the date of the sale of said mortgaged premises.

Plaintiff demands of the defendant \$2,464.93 with lawful interest from June 9th, 1919.

EDWIN B. & PHILIP GOODELL, 20  
Attorneys of Plaintiff.

**Notice of Suit**

*Annexed to Complaint*

*To whom it may concern:*

10 TAKE NOTICE that a suit or action is about to be instituted in the New Jersey Supreme Court by Margaret Murray, plaintiff, against Elston E. Pearce, defendant, for the recovery of \$2,464.93 with interest thereon at the rate of six per centum from June 9th, 1919. That suit will be instituted to recover the balance due on a bond executed and delivered by said Elston E. Pearce to Philip Goodell, which bond bears date of September 15th, 1916. Said bond was intended to be secured by a mortgage bearing even date therewith, given by 20 Elston E. Pearce and Alice Duval Pearce, his wife, to Philip Goodell, which mortgage was recorded in the Clerk's Office of Morris County on October 11th, 1916, in Book R 7 of Mortgages for said County, pages 512 etc., and the property embraced in the said mortgage is described as follows:

30 All that certain tract or parcel of land and premises situate, lying and being in the Town of Boonton in the County of Morris and State of New Jersey:

40 Beginning at the most Easterly corner of lot No. 2 in a line of Division Street; thence running along a line of lot No. 2 North forty degrees West, one hundred and nineteen feet to the corner of lots No. 8 and 9 on Mechanic Street; thence along line of lot No. 8 North fifty degrees East, and parallel to Division Street, fifty feet; thence South forty degrees East, one hundred and nineteen feet to

## Notice of Suit

Division Street; thence South fifty degrees West, fifty feet to the point or place of Beginning. Containing fifty-nine hundred and fifty feet superficial. Being a part of a tract of 7.82 acres that Abraham T. Peer conveyed to Nicholas N. Jacobus by deed dated May 29th, 1855, and is numbered on a map or diagram of the same as lot No. 3 on Division Street. 10

MARGARET MURRAY.

Edwin B. & Philip Goodell,  
Attorneys of Plaintiff.

*To the within named defendant:*

Take notice that if you intend to make a defense to the within stated action, you are required to file an affidavit of merits within ten days from the 20

service hereof upon you, and even in case such affidavit shall be filed, you are further required to file an answer within twenty days from the date of such service, and that in default of the filing of such affidavit or answer, judgment will be entered against you.

EDWIN B. & PHILIP GOODELL,  
Attorneys of Plaintiff. 30

**Answer***(Filed August 26, 1919)*

## NEW JERSEY SUPREME COURT

ESSEX COUNTY

10

MARGARET MURRAY,

Plaintiff,

vs.

ELSTON E. PEARCE,

Defendant.

} Action at Law.

20 The defendant, Elston E. Pearce, who resides in the Township of Lakewood, in the County of Ocean and State of New Jersey, answering the complaint of the plaintiff, says:

## FIRST DEFENSE

1. He denies all and every the allegations set forth and contained in the said complaint.

## SECOND DEFENSE

30 1. He admits paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10 and 12.

2. He has not sufficient information to form a belief as to the matter contained in paragraphs 3, 11.

40 3. He denies that he is in anywise indebted and liable to the plaintiff upon the bond and mortgage in said complaint mentioned and as therein charged and alleged because this defendant says

## Answer

that the premises described in said mortgage were granted and conveyed as stated in said complaint subject to the lien of said mortgage and that the said plaintiff or her assignor without the knowledge or consent of this defendant did enter into an agreement with the purchaser of the said mortgaged premises by virtue whereof the time for the payment of the amount due upon said bond and mortgage was extended and that the said plaintiff or her assignor although requested by this defendant so to do, did fail and refuse to foreclose the said mortgage immediately upon the maturity of the debt thereby secured. 10

## THIRD DEFENSE

1. He denies that he is in anywise indebted and liable to the plaintiff upon the bond and mortgage in said complaint mentioned and as therein charged and alleged because the time of payment having been extended as set forth in the second defense subsequent to the maturity of the debt secured by the said bond and mortgage, the building situate upon the mortgaged premises was destroyed by fire and plaintiff or her assignor did receive the insurance moneys paid in consequence of the damage to said building, but the said plaintiff or her assignor did not apply the insurance moneys so received on account of the amount due upon said bond and mortgage as should of right been done and released all interest therein paying the said insurance moneys to the purchaser of the said mortgaged premises. 20 30

WILFRED H. JAYNE, JR.,  
Atty. of Defendant. 40

A true copy,  
Enoch L. Johnson,  
Clerk.

**Reply***(Filed Sep. 29, 1919)*

## NEW JERSEY SUPREME COURT

ESSEX COUNTY

10

MARGARET MURRAY,

Plaintiff,

vs.

ELSTON E. PEARCE,

Defendant.

Action at Law.

The plaintiff, in reply to the answer of the de-  
20 fendant, says:

1. The plaintiff denies the allegations in para-  
graph 3 of the second defense, that she or her as-  
signor made any agreement with the purchaser ex-  
tending the time of payment of the amount due on  
the bond and mortgage, and denies that she or her  
assignor was instructed by the defendant to fore-  
close the mortgage and failed to do so.

2. The plaintiff denies the allegation contained  
30 in the third defense, and further in reply to the  
third defense and to paragraph 3 of the second de-  
fense, the plaintiff alleges that the said defenses  
have been heretofore raised by the defendant in a  
Court of competent jurisdiction, the Court of  
Chancery of the State of New Jersey.

EDWIN B. & PHILIP GOODELL,  
40 Plaintiff's Attorneys.

**Testimony**

## NEW JERSEY SUPREME COURT

## ESSEX CIRCUIT

Monday, February 9, 1920. 10

MARGARET MURRAY,

vs.

ELSTON E. PEARCE.

} Action at Law,

Before HON. WORRALL F. MOUNTAIN, J., without a jury.

20

For plaintiff appear Messrs. Edwin B. & Philip Goodell, by Philip Goodell, Esq., and Theodore McC. Marsh, Esq.

For defendant appears Wilfred H. Jayne, Jr., Esq.

(By consent, the trial proceeds before the Court without a jury.)

Mr. Goodell: It is agreed by counsel for the de- 30  
fense that all the facts alleged by the plaintiff are admitted. He admits them all in his pleading, except for the filing of the statutory *lis pendens*. I have the certified copy here, and an assignment from myself to the plaintiff. They are here. I offer them in evidence.

Mr. Jayne: If your Honor please, I cannot quite assent to that general expression of my ad- 40  
mission.

## Testimony

Certified copy of *lis pendens* offered in evidence and marked Exhibit P-1; assignment of mortgage from Philip Goodell to Margaret Murray, dated January 13, 1919, offered in evidence and marked Exhibit P-2.

10 Mr. Jayne: If your Honor please, I think if I stated on the record what I admit we would get at it much more expeditiously.

The Court: All right, we will try it that way.

20 Mr. Jayne: The defendant admits that on September 15, 1916, he executed a bond of that date to one Philip Goodell, in the penal sum of \$10,000, conditioned for the payment of \$5,000 on September 15, 1918, with interest at the rate of five and a half per cent per annum, and that to secure the bond a mortgage was simultaneously executed and delivered covering property in the town of Boonton, in the County of Morris and State of New Jersey, the property as described in the complaint; that on January 13, 1919, Philip Goodell assigned the bond and mortgage to the plaintiff; that on November 21, 1916, the present defendant, Elston E. Pearce, together with his wife, conveyed the mortgaged premises to David W. Miller in fee and subject to the mortgage. Further, that  
30 on January 31st, 1918, the said David W. Miller, together with his wife, conveyed the lands, the mortgaged premises, to one Thomas F. Roche and Mary E. Roche; that on April 21, 1919, a final decree was entered in the Court of Chancery of New Jersey for the sale of the lands and premises in a suit instituted and prosecuted to foreclose this mortgage, wherein it was adjudged that there  
40 was due upon the mortgage the amounts stated in the complaint in this action. It is admitted

## Testimony

that on June 9, 1919, the property was struck off and sold by the Sheriff of Morris County to the plaintiff in this suit for the sum of \$3,000. It is also admitted that the full amount due as represented by the execution in the foreclosure sale was as stated in the complaint.

The Court: What sum was that? Will you state that? 10

Mr. Jayne: \$5464.93.

And, as I have already admitted, the property was struck off and sold for \$3000. I am not disposed to admit the statutory requirements for the institution of this suit.

Mr. Goodell: You mean the filing of the *lis pendens*?

Mr. Jayne: Yes, the filing of the notice. I understand that that has been done. The date has been given. The suit was commenced within the time required. 20

Counsel desires me to admit, and this I am disposed to do, that if the purchase price of \$3,000 at the foreclosure sale is credited on the amount of the decree in chancery, including the sheriff's costs, there will be a balance due of \$2464.93, upon which interest, it is claimed, should be computed from June 9, 1919.

The position taken by the defendant is that stated in the answer. First, the plaintiff neglected and failed to foreclose the mortgage as requested by the present defendant. Secondly, that the building situated upon the mortgaged premises was destroyed by fire subsequent to the sale of the mortgaged premises by this present defendant to Miller, and ultimately from Miller to Roche; that the property was insured, and the insurance was, 30  
40

## Testimony

by provision in the mortgage in the usual nature, payable to the mortgagee, and this mortgagee, who was Mr. Philip Goodell, after the mortgage became due, collected a sum of insurance, which remains to be shown, from the insurance company, under the mortgagee clause.

10 As I stated, I should like to have my opening considered in the consideration of my admissions on the record.

The Court: Then this is your defense to the plaintiff's case that you are outlining now?

Mr. Jayne: Yes. Accordingly, while I have stated the amounts which the plaintiff claims are due, I state that they would be the amounts if my defense was eliminated.

20 The Court: Yes, I understand.

Mr. Goodell: I want the record, if your Honor please, to show clearly that that is where the stipulation as to the admissions ends. Mr. Jayne states the amount to be due if his defense fails. That is an admission on both parts, and there the admission stops. After that he is outlining his defense.

30 The Court: I do not understand you. He has stated what he would admit, and he now states that these admissions that he has made as to the amount are subject to a defense which he wants to interpose.

Mr. Goodell: Yes, so far as that amount, and including his statement that it is subject to his defense, I think the record shows that there is a stipulation, and I agree to it to that point, but after that I do not want to be put in a position

40 to seem to agree to it.

The Court: I understand that you do not agree to his defense.

## Testimony

Mr. Jayne: I wanted to state my defense because I felt the position of the plaintiff was very clear to your Honor.

The Court: Yes. You claim that the premises were destroyed by fire and the mortgagee collected some of the insurance money and did not apply it to the mortgage. Is that it? 10

Mr. Jayne: Yes, that is it exactly; but repaid the money without the consent of the present defendant.

The Court: Repaid the money?

Mr. Jayne: Yes, or paid it over; and, having received the insurance money, he paid it to the owner of the equity, Roche, leaving the same mortgage standing, without the consent of the defendant. 20

The Court: What other defenses have you besides that?

Mr. Jayne: The first one to which I referred, namely, that the present defendant requested the mortgagee to foreclose the mortgage upon default and that his request was not complied with, with the result that during the delay the building was destroyed by fire, and that, notwithstanding the request of the defendant to foreclose the mortgage, the mortgagee accepted payment of interest from the owner of the equity and continued the loan. 30

The Court: Now, according to the second defense, how much money do you claim was paid over to the owner of the equity?

Mr. Jayne: Well, it is upward of \$1600. I am obliged to prove that by the other side. The witness who knows that is in court. 40

The Court: Is that all you have to say?

## Testimony

10 Mr. Jayne: Well, further than this: My friend made some reference to the fact that my answer was not sufficiently specific to indicate to him the defense. I think it is; but, if there is any question about that, I should like at this time to ask to amend my answer so that that defense could be properly pleaded.

Mr. Goodell: I made a remark about that to Mr. Jayne, but at that time I thought he was referring to a different defense than he outlined here. I think his answer is sufficient on that defense.

The Court: I think your answer is sufficient under the defense as you have outlined it to me, Mr. Jayne. I do not think it needs any amendment. If it does I will let you amend, if you find that it is necessary.

20 Have you any witnesses, or do you rest on the stipulation?

Mr. Goodell: My witnesses are in rebuttal, your Honor.

The Court: Then we will consider that the admission on behalf of the plaintiff and as made by Mr. Jayne represent your case, and then Mr. Jayne has witnesses, I presume.

30 Mr. Goodell: The only possible exception is the figure of interest. I suppose that is a mere matter of calculation.

The Court: We can agree on the interest, I suppose.

Mr. Goodell: It is \$98.70.

Plaintiff rests.

Defendant's: Philip Goodell—Direct

PHILIP GOODELL sworn in behalf of defendant:

Direct-examination by Mr. Jayne:

Q. Mr. Goodell, you are an attorney at law and counsellor at law, are you not? A. I am. 10

Q. Are you personally acquainted with Mr. Elston E. Pearce, the defendant? A. I am.

Q. And you represented him professionally? A. I have at times, but not for years.

Q. Well, you represented him professionally in 1918, did you not—or 1916, rather? A. I guess I did at that time sometimes.

Q. You did practically all of his legal business at that time, did you not? A. I don't think so. I have no way of knowing. 20

Q. You also grant loans and speculate on real estate, do you not? A. Well, that is a double question. I do not speculate on real estate when I can help it, and I try to make loans for clients and make some for myself.

Q. You are the Philip Goodell named in the bond and mortgage offered in evidence in this case, are you not? A. I am.

Q. Who is Maragaret Murray, the plaintiff in this case? A. She is the stenographer in my office. 30

Q. Is it true that there was no consideration paid by the plaintiff in this suit to you for the assignment to her of the bond and mortgage? A. A. It is true; she holds it on trust for me, I suppose.

Q. You granted upon this property at the time of the execution of the bond and mortgage obviously the sum of \$5,000, did you not? A. No, 40

## Defendant's: Philip Goodell—Direct

not exactly. Do you want me to go into the consideration for the bond? I do not think it is in issue.

10 Q. You mean your hesitancy in answering the question is because part of the consideration was not paid? A. No hesitancy at all, except that it is not relevant.

Mr. Marsh: I object. It is not relevant to the defense; it is immaterial.

The Court: I sustain the objection.

Q. It was your opinion at that time that the property was ample security for a loan of \$5,000, was it not?

Objected to as immaterial.

Objection sustained.

20 Mr. Jayne: Will your Honor allow me to be heard on that point? I want to present this phase of it, your Honor. I think it is material in that it will show from one who knew the property, as I expect to develop, that the property was good security for the loan of \$5,000 at that time.

The Court: What difference would it make whether it was or was not?

30 Mr. Jayne: Well, I do not think it has any great strength except that it may have some bearing—

The Court: The same amount would be due on the bond whether the property was good security or otherwise.

40 Mr. Jayne: Except when the same situation is ultimately created, where the present defendant is changed from the owner of the equity into a quasi surety of the mortgaged premises, the premises being li-

Defendant's: Philip Goodell—Direct

able for the debt; then the acts on the part of the mortgagee, of which I complain on behalf of the defendant, may be important, and the change of the character of the property by reason of the acts of which we complain will be material. This question is preliminary to that and it is asked for that purpose. 10

The Court: I will sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. So, subsequently, Mr. Goodell, the property was sold, as stipulated in the record, by Pearce to Miller and Miller to Roche. You knew of that at about the time those conveyances were made, did you not? A. Yes. 20

Q. Did Roche go into the possession of the property? A. He collected the rents; he didn't live there or occupy it.

Q. Well, he assumed ownership of the property, did he not? A. Yes.

Q. Do you recall when this mortgage became due? A. The mortgage became due—

Mr. Marsh: It speaks for itself.

Witness: It speaks for itself. I think it was the 15th day of September, 1918. 30

The Court: Isn't it in evidence?

Mr. Marsh: I think they might as well be marked.

By the Court: Q. How long a mortgage was it? A. A two year mortgage.

Mr. Jayne: That is not what I am trying to elicit.

By Mr. Jayne: Q. When did the mortgage become due? 40

Defendant's: Philip Goodell—Direct

Mr. Marsh: I object to the question because it speaks for itself.

The Court: Will counsel agree to put this bond and mortgage in evidence? I think they should be put in evidence.

10 Mr. Jayne: Yes.

Bond marked Exhibit P-3; mortgage marked Exhibit P-4.

Q. You refer now to the terms of the mortgage, do you not? A. You asked me when the mortgage was due.

Q. Let me ask you if under the terms of that mortgage upon default in interest you did not have the option of calling the mortgage—

20 Mr. Marsh: I object to the question. The bond speaks for itself.

Mr. Jayne: Let me finish my question.

Q. —and if you did not prior to September 15, 1918, have occasion by reason of such default to call the amount due on the mortgage? A. I did not have occasion to call the amount due. One time Mr. Roche was a couple of days over thirty days in arrears on a part of his interest, a small part. I did not exercise my option to call the mortgage.

30 Q. That was in payment of interest? A. Yes, due March, 1900 and—

Q. And he did not pay it within thirty days, did he? A. Not quite; he paid part of it and the rest of it a few days later.

Q. And you advised Mr. Pearce, the defendant, of that defalcation on the part of Mr. Roche? A. I may have; I don't remember.

40 Q. Did he advise you to foreclose the mortgage? A. I don't remember his doing so at that

Defendant's: Philip Goodell—Direct

time. If he did, he did it in writing. I don't think he did.

Q. Have you no recollection of his so advising you? A. No.

Q. Have you a letter in which he so advised you? A. I don't remember it; I may. 10

Q. May I refresh your recollection and ask you if you received a letter from him in response to your notice to him that a default had been made—

Mr. Marsh: Have you any objection to my showing him his files?

Mr. Jayne: It is my witness.

Q. —in which he requested you not only to foreclose, but to apply for a receiver? A. I have all his letters here. I do not carry them all in my head.

Q. What do you recall about the matter? A. You mentioned a receiver. I have a letter in which he told me how to do things; he told me how to apply for a receiver. It was his habit to tell me how to do things. 20

Q. You knew as a lawyer, when he asked you to apply for a receiver, it was necessary for you to proceed to foreclose the mortgage, did you not? A. Well, if you want my expert advice on it, I knew I could not apply for a receiver without applying for a foreclosure. 30

Q. So that his letter to you, you understood, was to the effect that you should proceed to foreclose and apply for a receiver? A. I didn't say that, Mr. Jayne.

Q. Well, is that the fact? A. I said I had his letters here.

Mr. Marsh: It seems to me, if your Honor please, he asks for the contents of a let- 40

Defendant's: Philip Goodell—Direct

ter, and if there is such a letter it should be produced. This is his witness, and if there is such a letter he must produce the letter and not ask for the contents of the letter.

10 The Court: That is what you should do, Mr. Jayne.

Mr. Jayne: I asked for a letter, your Honor. I am not asking for all the letters that my adversary has in his possession, I do not want all the letters; I want that letter.

The Court: The point is whether there is such a letter.

20 Witness: You have not served me with any notice to produce. If the letter is here, I will produce it.

Mr. Jayne: I refer to the letter of April 10, 1918.

(Plaintiff's counsel hands paper to witness.)

Witness: This is the letter referring to a receiver.

Q. You received this letter bearing date April 10, 1918, from Mr. Pearce? A. Yes, I did.

30 Q. That is Mr. Pearce's handwriting, is it not? A. I believe so.

Q. You are familiar with it, are you not? A. Yes.

Mr. Jayne: I would like to offer this letter.

Mr. Marsh: I have no objection. I would like to have it read to the Court.

40 The paper referred to is marked Exhibit D-1.

Defendant's: Philip Goodell—Direct

Mr. Jayne (Reading): "April 10 1918. Dear Phil: Replying to your letter, I should think the logical course to pursue would be to apply for a receiver for rents and then proceed with your foreclosure, as I do not see why the property would not bring well over the mortgage at even a forced sale. Perhaps a deed could be gotten without much difficulty, and that would be interesting in view of the income. Kindly send me another collateral note on the Port-au-Peck matter, as I mislaid the one you sent me. Yours truly, Elston." 10

The Court: That is Elston Pearce, is it?

Mr. Jayne: Yes.

Q. And this letter was addressed to you, was it not? A. It got to me; I guess it was addressed. 20

Q. I show you a letter dated April 9, 1918, (paper shown to witness). Is that your signature attached to that letter? A. Yes, sir.

Q. Did you write that letter? A. Yes.

Q. Was the letter marked Exhibit D-1 in reply to this letter of April 9, 1918, which I have just shown you? A. Yes, it is dated the next day, isn't it?

Mr. Jayne: I offer this letter in evidence.

Mr. Marsh: I have no objection. 30

The letter referred to is marked Exhibit D-2.

Mr. Jayne (reading): "April 9, 1918. Mr. Elston E. Pearce, Third street, Lakewood, New Jersey. Dear Elston: The Boonton mortgage interest will be overdue thirty days on the 15th, or, strictly speaking, on the 14th. I want to do about call- 40

Defendant's: Philip Goodell—Direct

10 ing the mortgage whatever you say. You are on the bond, and I do not expect under any circumstances to take the property, but expect you to pay the mortgage. If you want it foreclosed, I will do it, or if you want to take the mortgage by assignment, I will be glad to do it that way." The latter part of the letter has nothing whatever to do with this.

Witness: No, it is signed by me.

Q. Did you proceed to have a receiver appointed and foreclose the mortgage pursuant to Mr. Pearce's letter of April 10th? A. If I had I couldn't have foreclosed eight or ten months later. No, is the answer.

20 Q. Why don't you answer no, then? A. I didn't proceed at that time because my interest was paid.

Q. It was not paid within the thirty days, was it? A. Not all of it.

Q. And your answer is, then, that you did not comply with the request made by Mr. Pearce in his letter of April 10th? A. The answer is on the record.

30 The Court: Mr. Goodell, you can answer yes or no.

Mr. Marsh: I do not think the question was put as a direct question. He asked what was the answer. If he asks the question, I have no doubt it will be answered.

Mr. Jayne: I am trying very hard to be courteous.

40 Witness: I want to be courteous, too, Mr. Jayne, but your first question was framed—

Mr. Jayne: I must object to the witness arguing with me over the matter.

Defendant's: Philip Goodell—Direct

The Court: I sustain the objection.

Suppose you confine yourself to answering the questions, Mr. Goodell. You are a witness now, not a lawyer.

Q. (Question read as follows: "And your answer is, then, that you did not comply with the request made by Mr. Pearce in his letter of April 10th?") A. May I see the letter of April 10th? 10  
(Paper shown to witness.)

Except to send him a note. There was no request in the letter.

Mr. Jayne: You still insist on arguing with me.

Witness: I think that is a fair answer.

Mr. Goodell, did you proceed to foreclose the mortgage marked as an exhibit in this case and proceed to apply for a receiver for the mortgaged premises pursuant to the suggestion made in the letter of Mr. Pearce, which letter is marked Exhibit D-1? 20

Mr. Marsh: I object to the question. That is a double question.

The Court: I sustain the objection. I do not think it is a fair question. There is nothing in that letter but a suggestion. That is not an order. In the letter of Mr. Pearce that I am speaking of he makes a suggestion; it is not an order to his attorney, and it is unfair to Mr. Goodell to say, "pursuant to this," indicating that it is an order. 30

Mr. Jayne: I did not mean it in that sense, but I meant it as a result of receiving this letter. He wrote and asked him what he wanted him to do about it, and he has said that this was in reply to his inquiry. 40

Defendant's: Philip Goodell—Direct

The Court: Reframe your question, and I will rule on the question.

10 Q. Did you upon receipt of the letter marked Exhibit D-1 apply for the appointment of a receiver or institute a foreclosure suit to foreclose the mortgage which is an exhibit in this case? A. No, but I would like to point out that the mortgage was not due.

Q. After the owner of the equity, Mr. Roche, had been in default in the payment of interest for a period of thirty days did you accept interest from him? A. Yes.

20 Q. Did you subsequent to that time, subsequent to the payment of the interest which should have been paid in March, also accept another payment on account of interest?

Mr. Marsh: I think that question should be made more specific, if your Honor please. When was it? I think if we get the time in the witness could answer the question.

The Court: Yes, let us find out when, Mr. Jayne.

30 Q. You ultimately received the payment of interest which accrued in March, 1918, did you not? A. Yes.

Q. Did you also receive other payments of interest? A. Yes.

Q. When? A. After the mortgage was due and called, he paid me six months interest, due September 15, 1918.

40 Q. Then, after the mortgage became due, which was subsequent to September 15, 1918, you accepted further interest, did you, from the owner of the equity? A. Only the one payment that I have told about.

Defendant's: Philip Goodell—Direct

Q. Well, that was for a period of six months?

A. Yes, ending September 15, 1918.

The Court: In other words, that paid interest up to the end of the term of the mortgage?

Witness: It reduced the amount due.

Q. Interest was received by you from the owner of the equity, Roche, in addition to the interest to which you just now referred, was it not, extending it beyond September 15, 1918? A. I would like to follow the question, but I do not. 10

Q. Well, I do not think you want to. A. I told you about all the interest that I received.

Q. Is that all of it? You never received any other interest? A. Not after the interest due September 15, 1918.

Q. Did you not make provision with the owner of the equity, Roche, whereby you collected rents on account of the interest and principal? 20

Mr. Marsh: When?

Mr. Jayne: After September, 1918.

Mr. Marsh: I object to this. I do not see how it relates to the defense.

The Court: I will admit it.

A. I want to answer that further than yes or no. Mr. Roche consented, knowing that he was in default, that the rents be paid to me. There was no agreement with him in connection with it, and when it began I don't remember. 30

Q. You received the rents pursuant to Mr. Roche's consent, as you say, did you not? A. Yes.

Q. And you received it from the tenants? A. Through the agent, who collected it all.

Q. It was agreed between Mr. Roche and yourself that the rents should be payable to you, was it not? A. Yes. 40

Defendant's: Philip Goodell—Direct

Q. And they were to be applied by you on account of interest which was accruing subsequent to September 15, 1918? A. I don't remember that there was any definite agreement. They were to be applied to the property.

10 Q. Well, those rent payments which you were collecting applied to interest accruing subsequent to September 15, 1918? A. Is that a question? I thought it was a statement.

The Court: Do you want to answer it or don't you want to answer it?

Witness: Well, I thought I told the whole truth about it. I said that I didn't remember—there was no agreement as to how the rents were to apply. The rents were turned over to me and credited on my books to the Boonton property. There  
20 were arrears of insurance, and so forth.

The Court: Were the rents handed over to you by Roche or were any of them to be applied to interest that accrued after September, 1918?

Witness: Not by direct agreement, no.

Q. Well, were they so applied? A. There again I will have to make an explanation, if the question is relevant. \$3000 of the \$5000 belonged to a client; the investment was taken in my name by the client's request. My recollection is that one  
30 time I paid six months interest; comparatively recently I paid six months interest over to the client's funds out of the general account received from the rent. Otherwise than that, no.

Q. You did not receive any further rents after the foreclosure suit was instituted, did you? A. Yes, if they have been paid to me; I think there  
40 have been some since January last.

Q. Now, between the time of the foreclosure,

Defendant's: Philip Goodell—Direct

the filing of the bill of foreclosure, and the sale of the mortgaged premises, did you receive rents?

A. My impression is that I did. I could easily have told to the cent what I received if I had known it. It is on my books in Montclair; it isn't here. All the rents that have been paid have been paid to me, except what the agent retains. 10

Mr. Jayne: To obviate the necessity of producing the record, if your Honor please, I would like to ask the other side if they will admit that the foreclosure suit was instituted presumably in the early part of January, 1919?

Mr. Marsh: I assume that to be the case.

Mr. Jayne: I have here the Chancery subpoena served upon this defendant in that suit. 20

Witness: I think that is a fact.

Mr. Marsh: I think the decree was entered in April.

Witness: Early in January, I think.

Mr. Jayne: It is agreed that the foreclosure suit for the foreclosure of this mortgage was instituted about the 1st of January, the early part of January, 1919?

Mr. Marsh: I am willing to concede that, but I object to the materiality of it. 30

The Court: I will admit it.

Q. What is your answer, that it was?

Witness: It was, yes; I think probably the day before the subpoena. The practice is to get it out promptly.

Q. After the mortgage became due, in September, 1918, you extended the payment of it to Roche did you not? A. I did not. 40

Defendant's: Philip Goodell—Direct

Q. Did Roche endeavor to get a loan with which to satisfy this mortgage? A. He told me—

Mr. Marsh: I object to the question as immaterial.

The Court: I sustain the objection.

10 Q. Did you not agree with him that you would not foreclose your mortgage pending the time that he might have within which to negotiate a building and loan mortgage on this property? A. I told Mr. Roche that if he would bestir himself and find a building and loan, that while I would make no definite agreement with him, that I wouldn't foreclose at once.

Q. And when did you say this to him, prior to or subsequent to September, 1918? A. Both.

20 Q. And, of course, the understanding was that he should pay interest, was it not? A. Yes.

Q. Otherwise you would not have agreed to extend the time, would you? A. There wasn't any agreement about interest, except the original agreement in the bond.

Q. Well, you say that he agreed to pay interest. A. There was no new agreement. I will put it that way.

30 Q. Well, you have already testified that you had that understanding with him. A. I would like to qualify, if I may, Mr. Jayne. My telling Mr. Roche that was always subject—I told him that if Mr. Pearce insisted upon a foreclosure, I couldn't wait any longer.

Q. You waited for him, then, in any event, from September, 1918, until January, 1919? A. Yes, with Mr. Pearce's consent.

40 Mr. Jayne: I move that the latter part of that be stricken out.

Defendant's: Philip Goodell—Direct

The Court: No, I will not strike that out.

Mr. Jayne: It is not responsive, if your Honor please, to my question. Won't your Honor strike it out as not responsive?

The Court: No, I said I would not strike it out.

Q. Subsequent to the default in the interest payments which accrued in March, 1918, the building was destroyed by fire, was it not? A. Oh, no, it was damaged; it was not destroyed entirely. 10

Q. Approximately when did that occur? A. To the best of my knowledge and belief, it was in June, 1918.

Q. At that time, at the time of the damage of the mortgaged premises, the property was insured, was it not? A. Yes. 20

Q. In what amount? A. I think I speak the truth when I say \$5000.

Q. A mortgagee clause was contained in that policy?

Mr. Marsh: I object. I think the policy itself should be produced.

The Court: I sustain the objection.

Mr. Jayne: I call upon you to produce it.

Witness: Those are all new ones.

Mr. Marsh: Have you got the policy? 30

Witness: I am afraid not.

Mr. Marsh: We agreed on that in our conversation this morning. What do you want admitted, Mr. Jayne?

Mr. Jayne: That there was a mortgagee clause in this policy of insurance, making the loss, if any, payable to Philip Goodell, the mortgagee. 40

Mr. Marsh: Yes, the usual, standard mortgagee form.

Defendant's: Philip Goodell—Direct

Mr. Jayne: As his interest might appear, I suppose.

Q. That is the fact, is it not, Mr. Goodell?

Mr. Marsh: I have admitted it.

Q. Subsequent to that fire the insurance company made an adjustment of the loss and damage?  
10 A. They did.

Q. And a draft was drawn on the insurance company in payment of the damage to your order, was it not? A. There were two companies, two drafts to my order, and to the order of others.

Q. They were drawn to your order? A. And others.

Q. They were paid to you pursuant to the terms of the insurance policy, as mortgagee, were they not? A. They were never paid to me; they  
20 were drawn to me.

Q. Please do not evade a perfectly obvious situation. These drafts were drawn to your order and others, you say? A. Yes.

Q. They were drawn to you pursuant to the provisions made in the policy for your benefit as mortgagee of the property, were they not? A. I suppose so.

Q. Well, you had no other interest in the insurance, had you? A. None.  
30

Q. How much were those drafts? A. Just enough to restore the building; I don't recall the figures.

Q. Approximately? A. Approximately—well, I haven't any clear notion, but approximately—I know they were under \$2000. My memory was that they were \$1600; Mr. Rice says a little more.

40 Q. Well, you know that they were at least

Defendant's: Philip Goodell—Direct

\$1600, do you? A. I believe so. I know they were \$797 apiece, and there were two of them.

Q. You indorsed the drafts, I suppose? A. I indorsed them.

Q. And you turned them over to Mr. Roche?  
A. Yes. 10

Q. Who was at that time the owner of the equity? A. Yes, after I visited the property and found that it had been restored, that the damage had been restored.

Q. Mr. Roche had repaired the property in the meanwhile, had he not? A. Yes, at his order, yes.

Q. Now, you did not tell Mr. Pearce that you had received this insurance draft, did you? A. I don't remember doing it at that time; I guess I told him later. 20

Q. Of course, under those circumstances, you did not notify Pearce that you were turning it over to Roche? A. No, I didn't notify him, that I remember.

Q. So far as you know, Pearce did not know anything about that particular transaction, did he? A. So far as I know, he did not.

Q. Now, you cannot recall just when you received the insurance money, can you? A. No. It dragged a long while.

Q. Some time in September? A. No, I think it was later than that. 30

Q. It was after the mortgage became due, in any event, was it not? A. Yes, it was.

Q. The property preceding the fire was of what character, Mr. Goodell? A. Well, it was 50 feet—I have forgotten the dimensions—50 feet by 150, and it had a cement block building on it, with a 40 flat roof; the back end of it had been built for a

Defendant's: Philip Goodell—Direct

moving picture theatre; the front of it had two little stores and little apartments over it, and the patrons of the moving picture theatre were supposed to go down between the two stores.

10 Q. How many stories high was it? A. Only one, I think, and eight or nine rooms above it; it was two stories in front.

Q. Two stories high? A. Yes.

Q. And it was that way before the fire? A. Yes.

Q. Or was it three stories high before the fire? A. I don't think so.

Q. Do you know what the rentals were in gross for the property preceding the fire?

20 Mr. Marsh: I object to the question as immaterial.

The Court: How is that material, Mr. Jayne?

Mr. Jayne: I think it has a bearing as to whether the security of the mortgaged premises was impaired by reason of the action of the mortgagee. That is under my first defense.

30 The Court: I do not see how that is material. As I understand, the first defense is that Mr. Goodell permitted the owner of the property to pay interest after the thirty day period; that is, that the period indicated in the mortgage as the limit was reached and passed, and Mr. Goodell then permitted interest to be paid. And I understand that your second defense is that the fire insurance was paid to him and was turned by him over to the owner, and that that should be credited. Those two defenses are quite

40

Defendant's: Philip Goodell—Direct

clear and distinct. The issues are well defined. What have the rentals to do with the situation?

Mr. Jayne: I thought that under the first defense possibly I should show in addition to the fact that he permitted the mortgage to run and continue, that it resulted to the detriment and damage of the present defendant. I do not want to take an impossible or ridiculous position, but the position I take is this: that if on the maturity of this debt, under the default of payment of interest, the original mortgagor, who was not the owner of the equity, certainly, to all intents and purposes, has been irregular, having been advised to apply for a receiver and foreclose the mortgage. In spite of the vigorous manner in which the defendant indicated that the matter should be handled, he went on and collected interest and made arrangements for the receipt of rents, and allowed the mortgage to continue on, and received interest. I think if the mortgagee does that and it results to the detriment of the mortgagor, the mortgagor has suffered to that extent.

The Court: I understood that the only credit that you claimed was a credit for the insurance money.

Mr. Jayne: Yes. The first defense is to bar his recovery and the second is the amount of this insurance money.

The Court: That is sort of a counter-claim?

Mr. Jayne: Yes.

Defendant's: Philip Goodell—Cross

The Court: I sustain the objection.

Defendant's Counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10 CROSS-EXAMINATION by Mr. Marsh:

Q. Mr. Goodell, in April, 1918, did you have any other correspondence with Mr. Pearce after the receipt of the letter of April 10th? A. I think I did.

Mr. Marsh (to Defendant's Counsel): Have you got the letters of April 12th and 16th?

Mr. Jane: I think so. (Handing paper to Mr. Marsh.)

20 Q. Did you write that letter (paper shown to witness)? A. Yes.

Q. Was that sent in answer to Mr. Pearce's letter to you of April 10th? A. Yes.

The letter identified by witness, dated April 12, 1918, is offered in evidence and marked Exhibit P-5.

Q. Did you receive any answer to that letter of April 12th from Mr. Pearce (paper shown to witness)? A. I don't think so.

30 Q. I show you this letter. Did you send that letter to Mr. Pearce? Is that your letter? A. Yes.

The letter identified by witness, dated April 16, 1918, is offered in evidence and marked Exhibit P-6.

Q. Did you receive any answer to this letter of April 16, 1918, from Mr. Pearce? A. I think not;  
40 I don't remember any. I may have one in my files. I don't remember it.

Defendant's: Philip Goodell—Cross

Q. Did you see Mr. Pearce or have any conversation with him concerning the subject matter of this letter of April 16, 1918? A. I don't remember seeing Mr. Pearce until late in the summer of 1918. Then I talked with him on this proposition.

Q. Why did you not take action to foreclose in April, 1918? A. Because Mr. Roche paid the interest, and I had the option to foreclose, and I chose not to exercise it. His interest was paid within a day or two of the default. 10

Mr. Marsh (to defendant's counsel):  
Have you got the letters of September 28th and October 30, 1918?

Mr. Jayne: Yes. (Handing papers to Mr. Marsh.)

Q. After the mortgage fell due, in September, 1918, did you have any correspondence with Mr. Pearce? A. Yes. 20

Q. I show you a letter dated September 28th 1918 (paper shown to witness). Did you write that letter? A. Yes.

The letter identified by the witness, dated September 28th, 1918, is offered in evidence and marked Exhibit P-7.

Q. Did you receive any answer to that letter from Mr. Pearce? A. What date is that letter? 30

Q. September 28th, 1918. A. Yes, I did.

Q. I show you this letter of September 30, 1918 (paper shown to witness). Is that from Mr. Pearce? A. Yes.

Q. Is that in his handwriting? A. Yes.

The letter identified by the witness, dated September 30, 1918, is offered in evidence and marked Exhibit P-8. 40

Q. After you received the letter of September

## Defendant's: Philip Goodell—Cross

30th did you answer it or did you take any action concerning it? A. I think I did answer it; I don't remember.

Q. Well, I show you a letter of October 30, 1918 (paper shown to witness). Is that your letter?

10 A. Yes, that is my letter to Mr. Pearce.

The letter identified by witness, dated October 30, 1918, is offered in evidence and marked Exhibit P-9.

Q. Did you have any other correspondence with Mr. Pearce between the time that the mortgage fell due, in September, 1918, up to the time when you instituted foreclosure proceedings than have already been offered in evidence? A. I don't remember any; I think not. To be sure, I would  
20 have to refer to my files.

Q. Did you have any conversations with Mr. Pearce during that time with respect to the mortgage? A. I don't think so, not after it fell due.

Q. Did you at any time discuss the question of the foreclosure of this mortgage with Mr. Pearce? A. I did.

Q. When? A. In the summer of 1918.

Q. Well, what took place? A. At Bayhead.

Q. What happened, what was said at the time  
30 of this conversation? A. Mr. Pearce came over there and we spoke of the mortgage coming due. I told him that I was afraid that he would be called on to protect his bond, and I told him that I should look to him to do it. He told me he wouldn't do it if he could get out of it, and my recollection is that I told him then that I thought that Mr. Roche's chance to get out of it was to get another  
40 loan, and that Mr. Roche had told me that he had prospects of getting a loan, and I thought it would

## Defendant's: Philip Goodell—Cross

be better policy to let him try than to foreclose immediately and discourage him, that it might be harder for him to get it if we started to foreclose than otherwise.

Q. And what did Mr. Pearce say? A. My recollection is that he gave me no definite instructions, but indications of what he wanted. I wrote him again on September 28th, I think it was, because he did leave it indefinite. I think he told me he would let me know, and he didn't let me know. 10

Q. You had a conversation with Mr. Roche, after the mortgage fell due, in September, 1918, I understand? A. Several of them.

Q. That related to the payment of the principal of the mortgage? A. Yes.

Q. Did you at any time receive any consideration or promise on the part of Mr. Roche with respect to any statement you may have made to him? A. No, none whatever. I carefully avoided making any promises to Mr. Roche. 20

Q. Did you ever enter into any contract with Mr. Roche with respect to the extension of the time for the payment for the mortgage? A. None whatever; I made him no promises.

Q. Did you extend the time of payment to any definite period? A. No.

Q. Did you make any promise or agreement to Mr. Roche as to what you would do with respect to the payment? A. None whatever. I told him that my policy was not to insist on my rights immediately, hoping that he could get a loan and repay this one, but I made no promise to him. 30

Q. You referred to the question of payment of interest that was to continue during this time before you foreclosed. What interest did you refer 40

## Defendant's: Philip Goodell—Cross

to? A. The interest on the principal sum, as called for in the bond. There was no agreement about the interest at all.

Q. There was no additional agreement with respect to the payment of interest after the mortgage or bond fell due? A. None whatever.

Q. Did you represent Mr. Pearce in any way, as an attorney in fact or at law, in connection with these matters? A. None whatever, in no way whatever.

Q. When the property was burned by fire, in July, 1918, did you look at the property? A. I looked at the property before I turned the drafts over.

Q. Did you look at it after the fire? A. Yes; not before it was repaired, though.

Q. Not before it was repaired? A. No, but after the fire.

Q. You did examine it before you turned over the drafts? A. Yes.

Q. In what condition was the property?

Mr. Jayne: If your Honor please, are we not in the same situation, or in the same field, that I was forbidden to enter? Your Honor ruled that I was not permitted to prove the changed condition of this property. These present interrogatories tend in the same direction.

The Court: This is cross-examination. This is different. You opened the door; he did not. Mr. Marsh has a right on cross-examination to enlarge upon or explain the scope or meaning or sense of anything that was brought out on direct-examination, and you brought out on direct-examination that

Defendant's: Philip Goodell—Cross

the insurance was paid by the witness to Mr. Roche after the edifice, whatever it was, had been repaired. After the fire had taken place and the repairs had been made he had gone up there and looked at it. This is proper on cross-examination.

10

Mr. Jayne: I do not see what bearing the condition of the property would have upon the question. I endeavored to make inquiry, and your Honor ruled that it was not material and excluded me from going into the question as to whether there was a changed condition of the property. This question, as I recall it, asks him if he had seen the condition of the property before and after, and what the condition was.

20

Mr. Marsh: My recollection of the situation is that counsel for the other side asked whether the building was two or three stories. He asked as to certain other facts, and then he opened the door as to rents collected. I permitted the first part of the examination and objected to rents collected, because I could not see that that gave any indication as to whether or not the property had been restored to its original value.

30

The Court: I will admit the question.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Question read.)

Mr. Jayne: I think he ought to indicate what time it was.

Q. When did you see this property as to the date of the fire? A. I can't place the date. The property had been restored at the time—

Objected to.

Defendant's: Philip Goodell—Cross

Witness: —and I had the drafts in my possession at the time.

Mr. Jayne: One moment. If your Honor please, I move that the answer be stricken out.

The Court: I will not strike it out. Suppose you start anew. Ask your question and give Mr. Jayne a chance to object.

10 Q. Did you examine the property after the fire occurred? A. I did.

Q. And at the time you made that investigation, or inspection, of the property had anything been done to the property?

Objected to.

Objection overruled.

20 Mr. Jayne: I would like to state my ground. I object on the ground that it is incompetent and immaterial, on the ground that it makes no difference, so far as the defense is concerned, whether the mortgaged premises were restored by the owner of the equity or not.

The Court: Proceed.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30 (Question read.)

A. The fire loss had been repaired and the building restored.

Q. Now, can you approximate the time when you were there, if you cannot give us the exact date, with respect to the time the mortgage fell due or when you instituted the foreclosure proceeding?

40 A. Well, it is pretty hazy in my memory, but I think it was early in the fall, the 1st of November, or something like that.

## Defendant's: Philip Goodell—Re-direct

Q. What year? A. 1918. It was while I had the draft in my possession, before I gave it up.

Q. In your opinion, what was the condition of the security, so far as it affected your mortgage?

A. It was absolutely restored. The roof was what was burned off, and that was new.

Q. And the condition then was as good as before, prior to the fire? 10

Mr. Jayne: I object for the same reason.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. As good or better, yes.

RE-DIRECT-EXAMINATION by Mr. Jayne: 20

Q. Mr. Goodell, your letter of September 28th, which is addressed to the defendant, marked Exhibit P-7—I note you say in that letter that in the meantime the insurance has been settled at approximately \$2600.00. How do you reconcile that with your previous testimony? A. Because at that time it was true. It turned out that the policies had an eighty per cent clause, and the owner and the insured, the companies, fell into a dispute about it. I think the agreed loss was \$2600, or I thought so at that time. Mr. Roche now tells me that he told me the agreed loss was \$2200, but I was under the impression that was correct when I wrote the letter. 30

Q. Exhibit P-8 was a letter from Mr. Pearce to yourself. That was in reply to the letter of September 28th? A. Yes, I judge so from the dates.

Q. Well, will you say it was? A. I would judge so from the dates. 40

Defendant's: Thomas F. Roche—Direct

Q. Then the part of this letter which says, "Under the conditions outlined in your letter," that referred to your letter of September 28th, did it not? A. I think so; I judge so.

10

THOMAS F. ROCHE, sworn in behalf of defendant:

Direct-examination by Mr. Jayne:

Q. Mr. Roche, you were the owner of the property covered by the mortgage in this case, were you not? A. Yes, sir.

20 Q. What agreement did you have with Mr. Goodell with respect to his delay in foreclosing the mortgage?

Mr. Marsh: I object to the question. There is nothing to indicate that he had any agreement. It calls for a conclusion on the part of the witness that there was such agreement. There has got to be something to lead up to that.

30 The Court: Yes, whether there was an agreement or not depends entirely upon what the parties had said or done or written. I sustain the objection. Reframe your question and I will admit it.

Q. You requested that Mr. Goodell should hold the mortgage after it was due so that you would get a loan elsewhere, did you not?

Objected to as leading.

40 The Court: Do not lead the witness; let him tell what happened.

Q. Isn't that so?

Defendant's: Thomas F. Roche—Direct

Mr. Marsh: I object to the question as leading.

The Court: I sustain the objection.

Q. What conversation did you have with Mr. Goodell, if any, concerning an extension of time to replace the mortgage on your property? 10

Mr. Marsh: If you will fix the time I will not object.

The Court: I will overrule the objection and admit the question.

(Question read.)

A. None.

Q. You tried to negotiate another loan, did you not? A. I did.

Q. And you were still endeavoring to get another loan subsequent to September, 1918, were you not? 20

Objected to as immaterial.

Objection overruled.

A. I did.

Q. And did you make arrangements with Mr. Goodell with respect to the collection of rents for the property?

Mr. Marsh: I object to that question as immaterial. I do not see how that has any bearing on this defense.

The Court: How has it any bearing, Mr. Jayne? 30

Mr. Jayne: Your Honor will appreciate the difficulty I am experiencing in examining hostile witnesses. This is a witness for the plaintiff.

The Court: This has nothing to do with the hostility of the witness. 40

Mr. Jayne: I cannot frame my question

Defendant's: Thomas F. Roche—Direct

10 at first blush to show its materiality. The point is that there was an arrangement made for the extension of time. We contend that it was agreed that if he would assign the rents of the property over to Mr. Goodell on account of interest and principal, he would extend the mortgage for him to allow him to get a loan elsewhere.

The Court: I will admit the question.  
(Question read.)

A. I did not.

Q. Were the rents paid to Mr. Goodell after September, 1918? A. I don't remember.

20 Q. Well, you know what became of the rents of your own property, do you not? A. Mr. Moss paid me certain rents; I don't know just what time they were for.

Q. You mean to say that you do not know where the rents for your property were being paid after September, 1918?

Mr. Marsh: I object to the question. He is arguing with his own witness. There is nothing to indicate that the witness is hostile at all. He is not a party.

30 The Court: I think the question is bad in form. I sustain the objection.

Question withdrawn.

Q. Have you no knowledge of where the rents went from your property? A. They went to me.

Q. After September, 1918? A. I don't know that.

Q. Well, where did they go? A. I don't know.

40 Q. Have you no knowledge of where the rents went? A. No.

Q. Don't you know that they went to Mr. Goodell? A. I do not.

Defendant's: Thomas F. Roche—Direct

Q. Did you try to collect the rents? A. I had an agent collect them.

Q. Did you not collect them from the agent? A. He sent me a check.

Q. Did you get all the rents after September, 1918? A. I don't remember. 10

Q. Do you know that Mr. Goodell got some of the rents? A. I do now, yes.

Q. Well, you knew it then, did you not? You knew he was to collect some of the rents? A. I don't know who was to collect, no.

Q. Well, what did you have the agent for? A. He was to collect them for me at the time I had the property.

Q. Did you discharge him from that duty? A. I did not. 20

Q. Did he pay the rents to you then? A. He did not.

Q. Well, why don't you explain the situation, Mr. Roche? A. Mr. Moss sent me the rent, perhaps for three or four months. They were always behind in their payments. There were perhaps one or two tenants. The rents didn't amount to very much. The theatre had burned down. The rents didn't amount to much. I think it ran about \$17 a month.

Q. Mr. Goodell testified on the stand that subsequent to September, 1918, as the result of a conversation, the rents were collected by him. A. That may be true; it was around that time; it may be true. 30

Q. And you agreed that the rents should be collected by him on account of interest, did you not? A. I didn't agree about anything. 40

Q. Well, you told him he could do it? We will

## Defendant's: Thomas F. Roche—Direct

eliminate the word "agree." You assented to that arrangement, did you? A. I didn't know there was any arrangement about collecting the rents by Mr. Goodell. I know I was to lose the property, and that was all there was to it.

10 Q. The property was damaged by fire, was it not? A. Yes, sir.

Q. And you restored the damage, did you? A. Yes, sir.

Q. And after you had made the repairs occasioned by the fire Mr. Goodell paid you the insurance moneys? A. Yes, sir.

Q. What is your best recollection, Mr. Roche, as to the amount of insurance which Mr. Goodell received and turned over to you? A. About  
20 \$1800.

Q. \$1800? A. Yes.

Q. That was about what time? About what time was that paid over, Mr. Roche? A. In the fall sometime; I don't remember the month.

Q. Well, October or November? A. September or October.

Q. Well, it was after the mortgage fell due, anyway, was it not? A. I don't remember that.

30 Q. Was the character of the building on the mortgaged premises changed after the fire, after the work of repairing was done, after the fire, other than what it was before the fire? A. No, sir.

Q. Wasn't there a story taken off the building? A. No, sir.

Q. Or half a story taken off the building? A. No, sir.

40 Q. What is your business, Mr. Roche? A. Real estate.

Defendant's: Elston E. Pearce—Direct

CROSS-EXAMINATION by Mr. Marsh:

Q. Mr. Roche, do you know how much it cost you to make those repairs after the time of the fire?

Objected to as immaterial and incompetent.

Objection overruled.

10

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. About \$2000.

Q. Was the building after it had been repaired as good as it was before the fire?

Objected to.

A. Better.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

20

Exception noted as ground of appeal.

Q. What is your answer? A. Better.

ELSTON E. PEARCE, defendant, sworn in his own behalf:

Direct-examination by Mr. Jayne:

Q. Mr. Pearce, you are a resident of Lakewood, are you? A. I am. 30

Q. You have lived there how many years, approximately? A. About four—three going on four, I believe.

Q. You are the defendant in this case? A. I am.

Q. And you executed the bond? A. I did.

40

Q. Were you living in Boonton in April, 1918? A. No, I was living at Lakewood.

Defendant's: Elston E. Pearce—Direct

Q. And from then on to the month of September you were living where? A. Lakewood.

Q. You had some correspondence with Mr. Goodell in April? A. I did.

Q. Concerning this mortgage? A. I did.

10 Q. And you wrote the letter already marked in evidence, advising the appointment of a receiver? A. I did, and I also went to see Mr. Goodell about the time of the letter, or a day or two later.

Q. Where was this? A. At his office, in Montclair.

Q. And what did you say to him? A. I asked him to start foreclosure and to get a receiver for the rents, and he said he thought it would be impossible to get a receiver for the rents, because  
20 Mr. Roche could show such a large value in the property that there would be no court that would grant a receivership.

By the Court: Q. About when was that, Mr. Pearce? A. That was about the 10th or 12th of April, I think, right after my letter to him suggesting that he apply for a receiver, whatever time that was; that was about the 12th or 13th of April, 1918.

By Mr. Jayne: Q. Was it after you had received notice that Roche had defaulted? A. It was.  
30

Q. You received the letters marked in evidence in this case? A. I did.

Q. The mortgage was not foreclosed? A. It was not.

Q. Did you know that any arrangement had been made between Mr. Goodell and Roche providing for the extension of the payment of the  
40 mortgage?

Defendant's: Elston E. Pearce—Direct

Mr. Marsh: I object to the question. There is no basis whatever in the evidence that there was any arrangement for the extension.

The Court: I will admit the question.

Plaintiff's Counsel prays an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

(Question read.)

A. I did not.

Q. Did you consent to any arrangement for the extension of the payment of the mortgage? A. I did not.

Q. Did you consent that the default made in the payment of interest, the interest accruing in March, 1918, that the option to elect that the whole amount of the mortgage should become due should be waived? A. I did not; on the contrary, I asked him to foreclose. 20

Q. Subsequently there was a fire which damaged the mortgaged premises. You were not present at that time in Boonton, were you? A. I was not; I didn't know anything about the fire until in September, when Mr. Goodell informed me that the arrangement had been made for the payment of this \$2600 worth of insurance and the replacing of the mortgage, and so forth. That was the first I knew that there had been any fire. 30

Q. Did you consent that any insurance moneys received by Mr. Goodell, as mortgagee, should be repaid to the owner of the equity, Mr. Roche? A. I did not.

Q. That calls for an explanation of your letter replying to Mr. Goodell's letter of September 28th. I show you Exhibit P-8, a letter addressed 40

Defendant's: Elston E. Pearce—Cross

to "Dear Phil" (paper shown to witness). Who is that? A. That is Mr. Goodell.

Q. In which you say, "under the conditions outlined in your letter." To what letter do you refer? A. The letter of September 28th.

10 Q. And what conditions therein stated did you refer to? A. The condition that a mortgage—that there be a building loan mortgage of \$4000, and that a thousand dollars would be paid off on the principal of this mortgage.

Q. And what about the insurance? A. The insurance would be applied to that reduction.

Q. And in what amount? A. In the amount of \$1000, to be applied to the—

Q. What amount, as to the gross amount— A. 20 \$2600 insurance.

Q. Subsequently this mortgage was foreclosed and the property was advertised for sale at sheriff's sale? A. It was.

CROSS-EXAMINATION by Mr. Marsh:

Q. Do I understand you to say that you called on Mr. Goodell and had a conversation with him on April 12, 1918? A. I said that I called on him at approximately the time of my letter to him 30 suggesting a receivership for the rents. Whether it was the 12th or 13th, whatever the date was—

Q. It was within one or two days after the letter? A. Two or three days after the letter.

Q. Do you recall receiving a letter of the date of April 16th, which has been offered in evidence?

A. Yes.

Q. Was that after you called at his office? A. 40 May I see the letter, please?

(Plaintiff's Counsel hands paper to witness.)

That was after.

Defendant's: Elston E. Pearce—Cross

Q. That was after you had been there. Did you answer this letter? A. I think I did.

Q. Have you any copy of such an answer? A. That I am not sure, whether there is any copy there or not.

Q. Have you anything to indicate that you answered that letter? A. I don't think I have. 10

Q. After you received the letter of October 30, 1918, did you see Mr. Goodell with reference to that?

(Paper shown to witness.)

A. No, I did not.

Q. Did you make any inquiry from Mr. Goodell at or about that time with respect to the use of the insurance moneys? A. I had had this letter from Mr. Goodell, stating that the insurance was settled at \$2600 and it was to be applied in that fashion; he was going to get his loan. I considered the matter was closed. 20

Q. You had no interview with Mr. Goodell about it? A. I did not.

Q. And there is no correspondence on your part about that, excepting the one letter of September 30th, or whatever it is? A. No.

Q. And you did not answer or pay any attention to this letter of October 30th? A. I did not, no. 30

Q. Mr. Pearce, did you know of any arrangement by which the building was to be refitted after the fire? A. I did not.

Q. From that letter of September 28th, did you not understand that the money applied on the insurance was to go into the building? A. I did not.

Mr. Jayne: I object to that. 40

Q. You did not understand it that way? A. No.

Defendant's: Elston E. Pearce—Cross

Q. Did you understand that the building was being repaired after the time of the fire? A. At what time do you refer to?

10 Q. In September, 1918. A. I understood the insurance had been paid, or arrangements for the insurance had been made, and it was being taken care of.

Q. Did you understand that the building was being repaired? A. No further than stated in that letter.

20 Q. Well, that says so, does it not? A. I don't recall that it says so; it probably does. I took it for granted that the insurance was settled, and, naturally, there would be a repairing of the building. The only information I had was contained in that letter.

Q. And the only thing you did with respect to this matter is contained in your letter of September 30th? A. No, I went to see Mr. Goodell.

Q. When? A. I think on receipt of this letter in September.

Q. Which letter? A. This one here.

Q. We have been discussing two. A. The one of September 28th.

Q. You went to see him? A. Yes, I did.

30 Q. Did he tell you what was being done? A. He told me the insurance had been settled for \$2500 or \$2600, whatever the amount was that was mentioned, and he said that everything was all taken care of and it was going to work out very well.

40 Q. And did you make any objection? A. I thought the plan was very good. I think I wrote him a few days later that I considered that the plan as outlined in his letter was the best thing to do at that time.

Defendant's: Elston E. Pearce—Cross

Q. Did you know that no foreclosure proceedings had been started prior to April, 1918? A. No.

Q. Did you urge Mr. Goodell or say anything to him in conversation with respect to an immediate foreclosure? A. He stated that the insurance was being paid by the— 10

Q. No. Did you say anything to him at that time about an immediate foreclosure? A. No, I did not.

Defendant rests.

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PHILIP GOODELL, re-called in behalf of plaintiff in rebuttal: 20

Direct-examination by Mr. Marsh:

Q. Mr. Goodell, Mr. Pearce has testified to having come to your office on or about April 12, 1918, and discussed with you the contents of his letter of April 10th. Did you have such a conversation? A. I believe not.

Q. Was Mr. Pearce in your office at any time between the letter of April—between your receipt of his letter of April 10th and your letter of April 16th, 1918? A. To the best of my belief, he was not. It is hard to recall away back there, but— 30

Q. Did you have any conversation with Mr. Pearce about that period in which you discussed the question of a foreclosure or a receiver of rents? 40

Mr. Jayne: I object to that as not being strict rebuttal.

Plaintiff's: Philip Goodell—Direct

The Court: I sustain the objection.

10 Q. Did you have any conversation with Mr. Pearce at Bayhead after the time of these letters of September 28 and October 30, 1918? A. Positively not. I left Bayhead with my family early in September. Mr. Pearce was there in Bayhead, as I testified before. I can't locate the date. It was in August, or I think it was the first gasless Sunday under the war restrictions. That would fix the date. I had left with my family early in September, and have never been back there since. So that he is not telling the truth when he said he had a conversation with me after that date.

Q. Did you write a letter to Mr. Pearce under date of January 10, 1919?

20 (Paper shown to witness.)  
A. I did, and that is a copy of it.

Mr. Jayne: I object to it on the ground, not that it is a copy, but because I do not think it is relevant.

(The paper referred to is handed to the Court.)

The Court: I will admit the letter.

Defendant's Counsel prays an exception to this ruling of the Court.

30 Exception noted as ground of appeal.

The paper referred to is offered in evidence and marked Exhibit P-10.

Q. Did you receive any answer to that letter?

A. I think not.

Cross-examination waived.

40 Plaintiff rests.

Plaintiff's: Philip Goodell—Direct

Mr. Jayne: If your Honor please, I would like at this time to move for the direction of a verdict for the defendant on the ground that the testimony conclusively shows that the mortgagee extended the term of this loan without the consent of the defendant, the mortgagor, and accepted interest for the extension of the loan not only beyond the time of the original default, but beyond the term specified in the bond and mortgage, and the result of the extension was that the property was destroyed or damaged to some extent by fire; that the extension of the term of the mortgage arranged between the mortgagee and the owner of the equity, Roche, was without the consent of the mortgagor, and that it results in a release and discharge of the mortgagor, the defendant in this case, from liability for any deficiency on the bond.

The Court: Assuming that it is shown as a fact that the mortgagee did accept this interest after the thirty day limit, or after the mortgage had terminated, what cases have you got to sustain your claim that that releases the original party to the bond?

Mr. Jayne: I am not prepared to submit any line of cases at this time. I was going to suggest at the conclusion of the case, if the Court chose, under the circumstances, that leave be given to file a brief on the points raised.

The Court: I reserve decision on this motion.

Mr. Jayne: I further ask for a direction on the ground that the amount which the mortgagee received on account of insurance by reason of the interest which he had in the insurance as mortgagee of the premises shall be credited upon the amount claimed in this suit and interest computed accordingly upon any balance.

The Court: I reserve my decision.

**Exhibit P-1**

Notice of suit. A full copy is attached to the complaint.

10

**Exhibit P-2***Assignment of Mortgage*

Philip Goodell	}	Dated January 13, 1919
		Ack. January 13, 1919
to	}	before Henry W. Trim-
		ble, a Master of Chancery
Margaret Murray.		of New Jersey.

20

Assigns bond and mortgage dated September 15, 1916, mortgage recorded in the Clerk's Office of Morris County in Book R 7 of Mortgages, page 512.

**Exhibit P-3**

30 Bond Elston E. Pearce to Philip Goodell, dated September 15, 1916, conditioned for the payment of \$5000 on September 15, 1918, with interest at the rate of 5 1/2 per centum per annum, payable semi-annually, March 15 and September 15 in each year. No reference in this exhibit to any fire insurance policy.

**Exhibit P-4***Mortgage*

Elston E. Pearce and Alice Duval Pearce, his wife, to Philip Goodell	}	Dated Sept. 15, 1916 Ack. Sept. 26, 1916 Rec. Oct. 11, 1916 Book R 7, page 512. Secures \$5000, 2 yrs., 5 1/2%.	10
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Mortgages property in the Town of Boonton, County of Morris and State of New Jersey, described in the *lis pendens* attached to the complaint. Contains the following clause as to fire insurance, and that only, containing no other reference to the subject:

“And it is also agreed, by and between 20  
the parties to these presents, that the said  
parties 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, by insurers,  
and in an amount approved by the said  
party of the second part, his executors,  
administrators or assigns, and assign the  
policy and certificates thereof to the said  
party of the second part; and in default 30  
thereof, it shall be lawful for the said  
party of the second part to effect such in-  
surance, and the premium and premiums  
paid for effecting the same shall be a lien  
on the said mortgaged premises, added to  
the amount of the said bond or obligation,  
and secured by these presents, payable on  
demand, with interest at the rate of six 40  
per cent per annum, from the time of pay-  
ment of such premium or premiums.”

**Exhibit P-5**

Law Offices of

EDWIN B. and PHILIP GOODELL

Bank Building

Montclair, New Jersey.

10

April 12, 1918.

Mr. Elston E. Pearce,  
Third Street,  
Lakewood, N. J.

Dear Elston:

IN RE Boonton property.

20 Yours of the 10th is received. I can't apply  
for a receiver of rents until after I file my fore-  
closure bill. The time will be up Monday, and if  
you say to go ahead, I shall go ahead. I will send  
for Roche Monday and see about getting a deed.  
What would you be willing to pay him?

30 Of course, a foreclosure will add a couple of  
hundred dollars to the thing, and I doubt very  
much if you would get a receiver. On the other  
hand, you would have to come up here, look at  
the property and make affidavits as to its con-  
dition. The taxes are paid and the insurance was  
paid and only the first mortgage interest is in  
arrears, so it is hard to make it an extreme case  
for a receiver. It is only in extreme cases that  
you can get a receiver.

40 Of course, you and Roche are both residents  
and service can be had easily and promptly. We  
would have a foreclosure and a sale within three  
months. Meantime, if the tenants could be per-  
suaded to pay, they would be protected against  
any suit by Roche.

## Exhibit P-6

I hand you a new collateral note, which I trust you will be good enough to forward. Meantime, I think the bills have gone forward, showing about how we stand. Next month I expect you to pay the bill. If you want to save the interest, pay the \$500 too, but I have got to get some money from somewhere to spend. 10

Yours very truly,  
PHILIP GOODELL.

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**Exhibit P-6**

Law Offices of

EDWIN B. and PHILIP GOODELL 20

491 Bloomfield Avenue

Montclair, New Jersey.

April 16, 1918.

Mr. Elston E. Pearce,  
Third Street,  
Lakewood, N. J.

Dear Elston: 30

Roche has sent me \$100 on account of interest and says he will pay the \$37.50 this week. Are you willing that I should accept it or do you feel that if I do accept it it will release you from your liability on the bond.

I am sorry I did not see you yesterday.

Very truly yours, 40

PHILIP GOODELL.

**Exhibit P-7**

Law Offices of  
EDWIN B. and PHILIP GOODELL  
Bank Building

10 Montclair, New Jersey.

September 28, 1918.

Mr. Elston E. Pearce,  
Third Street,  
Lakewood, N. J.

Dear Elston:

20 You never said anything about your pleasure  
in the Boonton mortgage. It is now due. I have  
nothing to do but to call it for payment.

30 Meantime, the insurance has been settled, at  
approximately \$2600, and Roche says that the  
building is being put back in condition and will  
be finished in a week or ten days. Of course, the  
time is right for him to get a Building and Loan  
loan. If you give me a little time, I can work  
him out of this situation far better than if by  
your silence you make it necessary for me to force  
him. I think he will have \$1000 over out of the  
insurance, after fixing it up, and then be able to  
get a B. & L. loan of \$4000, or perhaps bigger.

40 Will you not write me, telling me that you, as  
bondsman, consent to making any reasonable ar-  
rangement with him over a period of, say, sixty  
days? This will give him a chance to work out,  
and minimize the chance of your ever having to  
pay anything on the bond, because if I force him,  
I don't think he is going to particularly hump  
himself.

Yours very truly,  
PHILIP GOODELL.

PG/M

**Exhibit P-8**

E. E. PEARCE

Lakewood, N. J.

TIMBER

10

619 C

Phone 24-M  
Walnut  
and  
Locust  
Logs

Cord Wood  
Oak  
and  
Pine  
Piles

September 30, 1918. 20

Dear Phil:

Under the conditions outlined in your letter, it seems to me that the best plan to follow with Roche would be the one suggested by you, as this would clear up the whole matter.

Am enclosing check for \$22.00 interest as requested, take it for granted this is correct.

Will send you \$125.00 on 10th or thereabouts and another equal amount about 20th.

30

Yours,

ELSTON.

**Exhibit P-9**

Law Offices of

EDWIN B. and PHILIP GOODELL

10

491 Bloomfield Avenue

Montclair, New Jersey.

October 30, 1918.

Mr. Elston E. Pearce,  
Third Street,  
Lakewood, N. J.

Dear Elston:

20 Roche has got the building at Boonton practically fixed up, and he has paid the interest to September 15th. He has turned it into a garage and has rented it as a garage instead of a theatre.

He has now got a couple of Building and Loans interested and hopes to get a loan. I told him I would wait not over thirty days more. There will be no insurance, in case we have to foreclose, as the insurance is paid well ahead, and the interest is paid to September 15th, so it is in pretty good  
30 shape.

Yours very truly,

PHILIP GOODELL.

PG/M

**Exhibit P-10**

Jan. 10, 1919.

Mr. Elston E. Pearce,  
 Third Street,  
 Lakewood, N. J.

Dear Elston:

10

Mr. Roche has apparently been unable to make the arrangements he expected to, although he told me he had a \$5000 loan granted, and I have had the foreclosure search made and am beginning the foreclosure.

If you will pay off the mortgage I can get you a deed without expense, and you can get the rents from now on. I should be willing to let a small, but only a small mortgage stand there, because I don't want to worry about it again. When I say "small" I mean not to exceed \$3000. 20

This plan will give you a building with only one year's taxes unpaid, very little interest in arrears, and no costs. If you have to eventually take it, or pay a deficiency, probably nearly \$500 will be added to it, meaning costs, interest, sheriff's fees, and rents.

Very truly yours,

30

PG/MM

**Exhibit D-1**

This is printed in full in the evidence on page 23. 40

**Exhibit D-2**

This is printed in full in the evidence on page 23.

Very truly yours,

10

PHILIP GOODELL.

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**Findings of Fact and Postea**

*(Filed Mar. 22, 1920)*

NEW JERSEY SUPREME COURT

ESSEX CIRCUIT

20

MARGARET MURRAY,

Plaintiff,

vs.

ELSTON E. PEARCE,

Defendant.

Action at Law.

The motions for the direction of a verdict for the defendant are denied.

30

This case was tried before Hon. Worrall F. Mountain, J., to whom the same was referred for trial without a jury, by consent of the parties thereto, at the Essex Circuit, on February 9, 1920. After hearing the evidence and counsel for plaintiff and defendant, the Court finds the facts in issue to be as follows:

40

(1) On September 15, 1916, the defendant executed a bond, secured by a mortgage, to Philip

## Findings of Fact and Postea

Goodell, in the penal sum of \$10,000, conditioned for the payment of \$5,000 on September 15, 1918, with interest at five and one-half per cent per annum. A mortgage securing the bond was duly executed the same day by the defendant and his wife, Alice Duval Pearce, and covered lands and premises in the Town of Boonton, New Jersey, as described in the bill of complaint. The bond and mortgage were assigned by Philip Goodell to the plaintiff on January 13, 1919. 10

(2) The mortgaged premises were conveyed by the defendant and his wife on November 21, 1916, to David W. Miller, in fee. On January 31, 1918, Miller and wife conveyed the premises to Thomas F. Roche and wife.

(3) In June, 1918, the property was damaged by fire. At that time Goodell, as mortgagee, held an insurance policy in the amount of \$5,000, with the usual mortgagee clause attached. 20

(4) Goodell accepted interest due on the mortgage after Roche, the then owner, was in default for a period exceeding thirty days. He also accepted payments of interest after the mortgage was due and called. Some of the rents were applied to interest payments. 30

(5) The interval of time between the due date of the mortgage and the date when the foreclosure proceedings were commenced was not an extension of the mortgage, nor was there consideration therefor.

(6) Foreclosure proceedings were commenced in January, 1919. 40

## Findings of Fact and Postea

10 (7) On April 21, 1919, a final decree for the sale of said lands and premises and the foreclosure of said mortgage was made by the Court of Chancery in a suit brought by the plaintiff against Elston E. Pearce, Thomas F. Roche and Mary E. Roche, the owners of the said property, and by the said  
20 decree it was adjudged that there was then due to Margaret Murray upon the said mortgage and the bond which the same was intended to secure the sum of \$5,165, together with lawful interest thereon from April 21, 1919, until the same should be paid and satisfied, and the costs of said complainant which were taxed at \$162.16, and said decree directed that a writ of *feri facias* be issued to the Sheriff of the County of Morris, commanding him to make sale of the mortgaged premises  
20 to make the said sum, with lawful interest thereon from April 21, 1919, and complainant's costs.

(8) On June 9, 1919, and within six months from the commencement of this action, the Sheriff, by virtue of the writ of execution, duly sold the said premises, according to law, to Margaret Murray for \$3,000, she being the highest bidder therefor.

30 (9) The Sheriff's lawful fees and disbursements upon said execution amounted to \$96.44, which was paid by the complainant to the Sheriff, all of which appears upon the execution which was duly returned into the Court of Chancery.

40 (10) At the date of said sale there was due to the complainant \$5,464.93, and after crediting the amount for which said property was purchased, there remains due to Margaret Murray upon the bond of the defendant the sum of \$2,464.93.

## Findings of Fact and Postea

(11) The said sum of \$2,464.93 has not been paid, nor has any part thereof.

(12) Plaintiff's action against defendant was commenced within six months from the date of the sale of the said mortgaged premises.

(13) The insurance company settled its liability under the aforesaid policy by drawing two drafts, payable to Philip Goodell and others, aggregating \$1,594. These drafts were paid to Goodell after the mortgage became due, and were indorsed by Goodell and transmitted to Roche, who had made the repairs on the mortgaged premises. The defendant did not consent to the payment of these two drafts to Roche. 10

## CONCLUSIONS OF LAW 20

This action is brought for a deficiency of \$2,464.93 on a \$5,000 bond, securing a mortgage given by Pearce to Goodell, which was foreclosed. The plaintiff is Goodell's assignee. Pearce conveyed the property to Miller and Miller conveyed it to Roche. The latter owned it when foreclosure took place.

(A) The interest on the bond was due September 15th and March 15th. It was provided that \$5,000 should be due, at the option of Goodell, if the interest was thirty days in arrears. It became so, and at that time there was no sincere objection by Pearce to the receipt of the past due interest by Goodell. In this transaction Pearce was the principal debtor, and his obligation on the bond was not disturbed by Goodell in exercising his option. 30 40

## Findings of Fact and Postea

10 (B) The mortgage was due September 15, 1918. Foreclosure was commenced in January, 1919. The defendant insists that he ordered Goodell to foreclose, which was disregarded, and that Goodell made an agreement for the extension of the payment of the principal of the mortgage, thus releasing Pearce from liability.

20 As a matter of fact, Pearce neither ordered nor demanded that Goodell foreclose. He acquiesced in Goodell's attempts to adjust the matter without foreclosure. There was no agreement by Goodell with Roche to extend the time of payment of the principal sum due on the mortgage for a consideration. He applied the rents he received to the payment of mortgage interest; nor can it be said that the payment of interest due or past due was a consideration for such extension. It was not.

30 (C) The mortgaged premises were damaged by fire in June, 1918. The mortgage debt became due on September 15, 1918. After the mortgage debt became due the insurance company paid Goodell \$1,594. He indorsed drafts aggregating this amount to the owner of the fee for the purpose of reimbursement for costs of repairs to the building without the consent of the defendant.

40 The effect of the mortgagee clause was to give Goodell a lien upon the insurance money in case of loss, securing him by substituting the proceeds of the policy in place

## Findings of Fact and Postea

of the property, provided it burned. Money received by him from the insurance took the place of the property destroyed, and was still collateral until applied in payment by mutual consent, or by some exercise by Goodell of his right to demand payment of the debt, and upon default of payment to convert the securities. *Gordon v. Ware Savings Bank*, 115 Mass. 588, 591 (1); *Powers v. New England Fire Insurance Co.*, 38 Atl. Rep., 148, 149. Upon receipt of this insurance money (\$1,594), the mortgage was reduced *pro tanto*. *Peiffer v. Bates*, 19 Atl. Rep., 612. If Goodell thereafter chose to advance it to the owner of the fee, that could not revive the obligation. *Traphagen v. Lyons*, 38 N. J. Eq., 613, 616. 10 20

(D) The defendant is entitled to a credit of \$1,594 against \$2,464.93 as of the date of June 9, 1919.

(E) The defendant owes the plaintiff \$870.93, with interest from June 9, 1919, to February 9, 1920, amounting to \$34.80, making a total of \$905.73. 30

(F) The Court finds for the plaintiff and against the defendant for \$905.73.

Dated March 2, 1920.

WORRALL F. MOUNTAIN,  
Circuit Court Judge. 40

**Judgment**

## NEW JERSEY SUPREME COURT

10	MARGARET MURRAY, <div style="text-align: center;">vs.</div> ELSTON E. PEARCE,	Plaintiff,  Defendant.	}	Action at Law. On Postea.
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Edwin B. & Philip Goodell, Attorneys.

Judgment entered this twenty-second day of March, A. D., nineteen hundred and \$905.73 20    49.18 ————— \$954.91	twenty in favor of the plaintiff and against the defendant for the sum of nine hundred five dollars and seventy- three cents damages and forty-nine dollars and eighteen cents costs.
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C. J.

**Notice of Appeal***(Filed May 14, 1920)*

## NEW JERSEY SUPREME COURT

ESSEX COUNTY

10

MARGARET MURRAY,

Plaintiff,

ELSTON E. PEARCE,

vs.

Defendant.

Action at Law.

*To Wilfred H. Jayne, Jr., Esq.,*  
Attorney of Defendant.

20

Sir:

Take notice that the plaintiff appeals from the judgment entered in this cause, March 22d, 1920, in the New Jersey Supreme Court, Essex Circuit, to the Court of Errors and Appeals, because the judgment should have been entered for \$2,464.93 and interest from June 9th, 1919, instead of the amount actually allowed by the Trial Judge.

Dated, May 3d, 1920.

30

EDWIN B. & PHILIP GOODELL,  
Attorneys of Plaintiff.

Service of the within notice of appeal is hereby acknowledged this tenth day of May 1920.

WILFRED H. JAYNE, JR.,  
Attorney of Defendant.

40

**Grounds of Appeal**

NEW JERSEY COURT OF ERRORS AND APPEALS

10	MARGARET MURRAY, vs. ELSTON E. PEARCE,	}	Plaintiff, Defendant.	} Action at Law.
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The appellant states the following grounds of appeal:

1. That the Trial Judge erroneously deducted the sum of \$1,594.00 from the sum claimed by the plaintiff, holding that the defendant was entitled to the credit of the said sum.

2. Because the Trial Judge erred in his conclusion of the facts from the evidence, finding that the drafts for the said sum of \$1,594.00 were paid to one Philip Goodell, whereas the uncontradicted evidence is that the said sum was not paid to him, and that he never received the same or had it under his control.

3. Because the Trial Judge erred in finding that the defendant failed to agree with Philip Goodell that the insurance moneys, amounting to \$1,594.00 be paid over to one Roche, whereas the evidence shows that the defendant Pearce in a letter did so agree.

4. Because the Trial Judge allowed the defendant a credit of \$1,594.00 against the sum of \$2 464.-  
sued for.

EDWIN B. & PHILIP GOODELL,  
Attorneys of Plaintiff-Appellant.

Service of the within Grounds of Appeal is hereby acknowledged this tenth day of May 1920.

WILFRED H. JAYNE, JR.,  
Attorney of Defendant.

## New Jersey Court of Errors and Appeals

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MARGARET MURRAY, Plaintiff-Appellant, vs. ELSTON E. PEARCE, Defendant-Respondent.	}
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### APPELLANT'S BRIEF

#### Statement of the Case

This is a suit brought by appellant against respondent, under the mortgage statute, on a deficiency after a sheriff's sale to satisfy a decree of the Court of Chancery based on a mortgage. The deficiency was found by the Trial Judge to be \$2464.93, as of date June 9th, 1919. He allowed a judgment for this sum less \$1594. From this allowance appellant appeals.

The sum of \$1594 was the aggregate represented by two drafts paid by two insurance companies as the result of a fire in the mortgaged premises. The fire occurred in June, 1918. The mortgage debt became due September 15th, 1918. In the fall of the same year, before foreclosure was begun, the building was restored, and one Roche, the owner of the equity of redemption at the time of the fire, the same having been con-

veyed to him by mesne conveyances from the respondent, applied to appellant's assignor, Goodell, to have him endorse the drafts each of which was drawn to the joint order of Goodell and Roche representing the insurance companies' payments of the loss, representing to Goodell that the loss had been entirely restored. Goodell, after visiting the mortgaged premises and ascertaining the truth of this representation, endorsed the drafts. After this the mortgage was foreclosed, a decree entered for the entire amount, in a suit which respondent was a party (C. p. 3, l. 35), and after the sheriff's sale a suit brought on the deficiency. The holding of the Trial Judge, was that the respondent was entitled to a credit of these insurance moneys. From this appellant has taken this appeal.

### **Grounds of Appeal**

The grounds of appeal, as found on page 74 of the Case, are as follows:

1. Because the credit of \$1594 was allowed to the respondent, whereas the respondent was not entitled to any such credit (C. p. 71, l. 22).

2. The Trial Judge erred (C. p. 70, l. 29) in finding that the drafts for \$1594 were paid to Goodell, whereas the uncontradicted evidence is that the said sum was not paid to him, that he never received the same or had it under his control (C. p. 33, l. 6).

3. Because the Trial Judge erred in finding that Pearce failed to agree with Goodell that the insurance moneys should be paid over to Roche, the owner of the equity of redemption on the restoration of the building whereas the evidence shows that the respondent Pearce, did so agree in writing (Exhibits P-7 and P-8, C. p. 62 and 63).

## BRIEF OF THE ARGUMENT

### **I. The money was never actually paid to Goodell, appellant's assignor, nor was it ever within his control.**

This point is raised, and is one of the grounds of appeal, because of the Trial Judge's apparent error in (C) of his Conclusions of the Law (C. p. 70, l. 29) where he says "After the mortgage debt became due the insurance company paid Goodell \$1594." In (13) of the Trial Court's Findings of Fact (p. 69, l. 14) he in a measure repeats this mistake. The fact is that the drafts being payable to the owner of the equity of redemption and the mortgagee, as is quite usual in these cases, and being in the possession of the owner, Goodell endorsed them, after ascertaining that the security was restored (C. p. 32, l. 19, l. 24; p. 33, l. 6, l. 9, l. 12). It will be noted that Goodell never had possession of the drafts except for the purpose of endorsing them and therefore had no control over the moneys. If the Trial Judge is right Goodell should not have endorsed the drafts, but neither the Trial Judge nor the respondent has ever pointed out how Goodell might have collected the money had he retained the drafts.

**II. The respondent, Pearce, consented to the application of the insurance moneys to the restoration of the building.**

The Trial Judge, in his Findings of Fact (p. 69, l. 17) says: "The defendant did not consent to the payment of these two drafts to Roche." It is alleged that this finding is quite contrary to the evidence. Exhibits P-7 and P-8, (pages 62 and 63), consist of an exchange of letters Goodell and Pearce, the respondent. In Goodell's letter of September 28th (Exhibit P-7) he shows that his plan was to allow Roche enough of the insurance moneys to restore the building, or, as he says "put it back in condition." In reply to this Pearce says (Exhibit P-8) "Under the conditions outlined in your letter it seems to me the best plan to follow with Roche would be the one suggested by you." It is true that Goodell in his letter erroneously stated the amount of the insurance, but as it is not claimed, nor was it the fact, that this was any more than a mistake, it does not affect the situation. The respondent in his testimony (p. 51, l. 40; p. 52, l. 1 to 20) attempted to show that the "conditions outlined in your letter" as referred to in his letter, meant the obtaining of a new mortgage and not the application of the insurance moneys to the restoration of the security but upon this point the letter must speak for itself. This attempt of the respondent to explain does not explain, and his letter of September 30th was correctly construed by its recipient as consenting to the application of the insurance moneys to the restoration of the security. It clearly appears from Goodell's letter that at that time he had not received the drafts, and

Goodell clearly discloses his plans in the premises. Pearce had every opportunity, had he been opposed to the plans, to have objected. Instead of that he acceded to the various plans in the letter as a whole. It is too late for him now, in order to save a judgment against himself, to attempt to say that his consent was to one only of the two distinct plans of action which at the time of his testimony he saw suggested in Goodell's letter of September 28th.

If this Court believes that Pearce consented to the restoration of the security, it is contended that the Trial Court's deduction of the insurance money from the amount claimed by the plaintiff below is clearly erroneous, and without proceeding further, it is respectfully submitted that judgment should be ordered entered for the appellant for the full amount of the deficiency.

**III. The insurance did not belong to Pearce, and he had no right or share in its benefits.**

The Trial Judge, by his finding, gives Mr. Pearce the benefit of the protection against disaster to the mortgaged premises, required by the mortgage for the benefit of the mortgagee, and paid for by the owner of the equity of redemption. It does not appear in the testimony directly that the insurance was paid for by Roche, but the undisputed fact that the drafts were drawn to the order of Roche and that Roche was the owner of the equity shows that he must have been the insured. Had Pearce paid for the insurance his name would have been on the drafts, and the rules governing its application would have been quite different. Had there been no

fire insurance, and the building been not restored, Pearce could not have complained at having to pay his bond. Why should he now, having neglected to insure the property for himself, and after having obtained the full benefit of the insurance provided by Mr. Roche (the mortgagee having taken great care that the building be restored, and the expense of this restoration having been \$2000, p. 49, l. 14) obtain the benefit a second time by having the amount of the insurance credited on his deficiency? It is a fair implication that the deficiency would have been larger had the building not been restored even though the insurance money was applied to the bond for the cost of restoration, \$2000 (p. 49, l. 13) was more than the insurance.

**IV. To permit a bondsman to insist on insurance moneys being applied to reducing the debt would largely defeat the purpose of the owner's protecting himself by fire insurance.**

Should it become the law that mortgagees must apply the proceeds of a partial fire loss to the face of the mortgage, or *pro tanto* release the bondsman, one of the great purposes of insurance would be defeated. Fire insurance is put on buildings, in exchange for a premium, so that in case of misfortune to one man, the owner of the building, the loss may be distributed, through the medium of the insurance company, over a large class of the members of the community at large. It is intended, in case of a fire, to provide a fund to restore the destroyed property. If the Trial Court's view shall prevail, namely, that in such a case the mortgagee is bound to apply the pro-

ceeds of the insurance to the mortgage bond, the owner of the equity would always have to seek elsewhere for money to make his repairs. In most cases the owner of the equity would be put to great inconvenience, and perhaps a permanent loss through lack of this money which the insurance was designed to afford and in many cases would lose his building through lack of use of his insurance money.

It is a well known fact that the insurance companies reserve the right, in their policies, to make the repairs themselves. Surely, had the insurance company exercised that option in this case, Mr. Pearce would not have claimed any credit on the bond.

**V. There is no rule of law requiring the application of the insurance moneys to the debt, for the benefit of the bondsman, where the security is restored.**

*Gordon vs. Ware Savings Bank*, 115 Mass., 588, distinguishing *Peiffer vs. Bates*, 45 N. J. Equity, 311, and *Traphagen vs. Lyons*, 11 Stewart, 613.

It is conceded that the case would have been very different, had the money actually been received by Goodell, credited on the debt, and afterwards advanced to Roche. The Trial Court seems to have decided the case almost as though these had been the facts. At the top of page 71 he says "Money received by him from the insurance took the place of the property destroyed." He quotes, in support of his point, *Peiffer vs. Bates*, 45 N. J. Equity, 311. This is the only New Jersey case that we discover governing the application of the fire insurance moneys as between mortgagee and mortgagor and subsequent encum-

brances. Here there was a complete loss of a building. The whole amount, \$3000, was paid to the mortgagee, reducing his mortgage to a very trifling sum, \$223. About four weeks later, apparently at the request of the owner of the equity of redemption, on the small sum still due being paid, the mortgage was assigned to the defendant Peiffer. He advanced thereon the sum of \$1500, and this money was used by the owner of the equity to build another building, in another place, on the mortgaged premises. Peiffer tried to contend, as against junior lienors, that his mortgage was still a prior lien. The Court of Errors and Appeals decided the case on the conclusions of the late Henry C. Pitney, then the Advisory Master. His decision hinges on the point that the money was actually paid to the first mortgagee, his debt satisfied, and there was an attempt to use the same instrument, that is, his mortgage, to secure a new debt. He implies that had the burned building been re-produced his point of view might have been different.

The Trial Judge cites *Traphagen vs. Lyons*, 38 N. J. Equity, 313. This was a case in which a junior lienor sought to establish the priority of his lien over a certain judgment which he contended was paid. The Trial Judge's reference to page 616 is undoubtedly to the allegation at the top of that page: "The doctrine on this subject is settled in New Jersey. It is that the power to revive an obligation discharged by payment is limited in its effect, and does not extend so as to affect rights acquired prior to such revival." To apply this case to the case at bar we must find that somehow the sum of \$1594 was paid to Goodell, the assignor of the appellant, and we must ignore the fact that the *Traphagen vs.*

*Lyons* case, which questioned the validity of an existing judgment, differed entirely from the case at bar. It would have been comparable with the case at bar only in case Goodell after crediting the insurance proceeds had turned them over to Roche *and the building had not been restored*. In the cases cited on page 616, in support of the decision quoted, there is no case except where the encumbrances sought to be revived had actually been paid. In the *Traphagen* case the Court of Errors confirmed the decree, not on the ground assigned in the Court of Chancery, but because the appellants failed to establish that the judgment in question had ever been paid.

The only case close to the case at bar is the Massachusetts case of *Gordon vs. Ware Savings Bank*. That case, so far as we can find, although forty-six years old, still stands as expressing the law. In that case, like the one at bar, was the question of a partial loss on mortgaged property. It was more extreme than the one at bar, in that the insurance moneys were actually paid to the mortgagee and *credited by him on the mortgage money*. Later, on the restoration of the security, the Savings Bank again advanced the money to the mortgagor. Junior lienors objected to this and brought suit against the bank, but the Court held that since the money had been properly applied "to the restoration of the impaired security for the benefit alike of all parties interested, *there are no equities in favor of the plaintiff which entitled him to appropriate that benefit exclusively to his own use*. On the contrary, it would be inequitable, even if such were his legal right by reason of the endorsement of the money, in the first instance, upon the note." This quotation is so exactly in point, and the circumstances

are so similar that there seems little reason for commenting on it. The Court says "The insurance was for indemnity to the mortgagor as well as to the mortgagee; to the mortgagee it was for protection of the security, not for payment of the debt, was collateral to the debt, money received for the insurance took the place of the property destroyed—" This is exactly the view that Goodell took. When the destroyed property was restored all the elements of the mortgage situation were again restored (Roche's testimony, p. 48, l. 32, and Goodell's testimony, p. 34, l. 14) and he allowed Roche, who had expended or contracted for a larger sum in the restoration, to have the money, as appears by the testimony.

**The trial judge was in error in crediting to the respondent \$1,594, and judgment should have been entered for \$2,464.93, with interest from June 9th, 1919.**

Respectfully submitted,

EDWIN B. PHILIP GOODELL,  
for the Appellant.

It is desired to briefly reply to certain points raised by respondent in his brief:

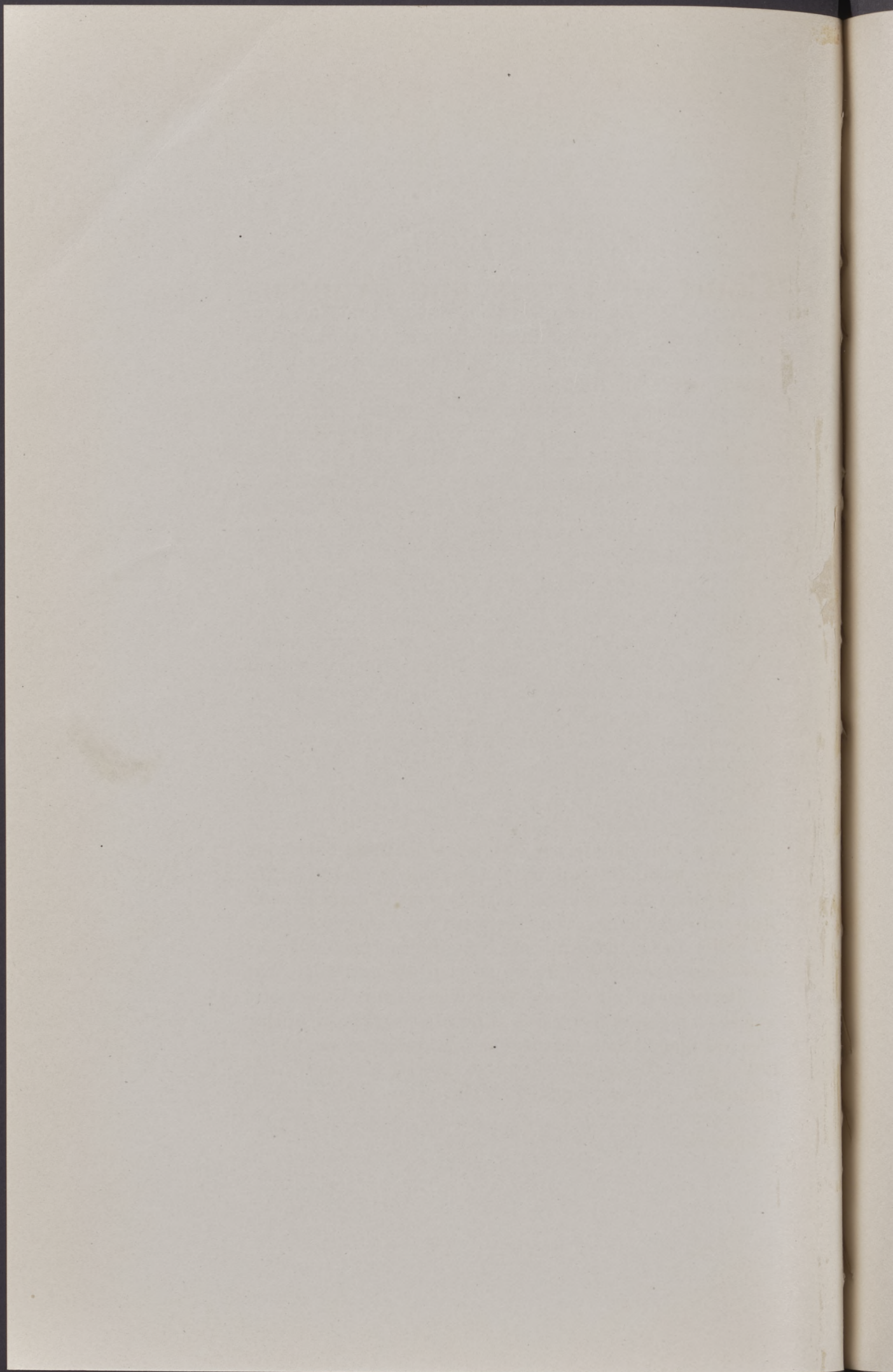
1. He cites Connecticut Insurance vs. Scammon, 4 Federal Reporter, 263, stating that "a situation precisely similar in this respect to that in the case at bar was involved in the case above cited." The draft in that case was drawn to the mortgagee alone, and he had complete control over it. It was not so in the case at bar. In that case also the building was not restored, and the court intimated that had it been restored the result might have been different. They quoted and distinguished Gordon vs. Ware, where, as in the case at bar, the building was restored.

2. In commenting on Gordon vs. Ware, the Massachusetts case, respondent's counsel says that at the time of the payment of the insurance moneys the obligation was not due. This does not appear in the case as reported. In fact, the implication is that it was overdue, for the Court remarks "At this time (when the proceeds of the insurance were returned to the owner by the bank) no actual demand had ever been made for the payment of the said note, and no interest was unpaid."

3. Respondent's counsel emphasizes strongly that at the time of the endorsement of the draft, by which act Goodell lost any control he had over it, the buildings were completely restored. This was true, and they had been restored without any expenditure or incurring of any obligation by the mortgagee, and the mortgagee had thereby lost any right, legal or equitable, which he might previously have had, to collect from the insurance company.

Respectfully submitted,

EDWIN B. and PHILIP GOODELL,  
Attorneys for Plaintiff-Appellant.



New Jersey  
Court of Errors and Appeals

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MARGARET MURRAY, Plaintiff-Appellant, v. ELSTON E. PEARCE, Defendant-Respondent.	} ON APPEAL
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BRIEF FOR RESPONDENT

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I.

STATEMENT OF CASE

The respondent (defendant below) was the owner in fee of certain real estate in the Town of Boonton, Morris County, New Jersey, and on September 15, 1916, executed a bond of that date to one Philip Goodell conditioned for the payment of \$5000 on September 15, 1918, and to secure the bond, a mortgage was simultaneously executed and delivered by him covering this real estate. On November 21, 1916, the respondent conveyed the mortgaged premises to one David W. Miller, subject to the mortgage, and on January 31, 1918, David W. Miller conveyed the mortgaged premises to Thomas F. Roche and Mary E. Roche. The mortgage was subsequently foreclosed and on June 9, 1919, was sold by the Sheriff of Morris County to the plaintiff in this suit for \$3000. This action was instituted to recover the deficiency due upon the bond, an amount claimed by the plaintiff to be \$2464.93.

At the trial this respondent interposed two matters of defense:

(a) That the plaintiff's assignor (Goodell, the mortgagee) failed to foreclose the mortgage after the debt became due, although requested by this respondent so to do and entered into an agreement with Roche (the owner of the mortgaged premises) for the extension of the mortgage, without the consent of this respondent.

(b) That the mortgagee after the maturity of the mortgage debt, collected insurance for damages to the mortgaged premises by fire, and although the debt was then due and the premises had been completely restored by the owner, paid the insurance moneys over to the owner, without the consent of this respondent and in this action had failed to credit the amount thereof upon the amount of the deficiency claimed.

The trial court found against this respondent upon the first matter of defense but found that this respondent was entitled to a credit for the insurance moneys amounting to \$1594, and it is from this finding that the plaintiff appeals.

## II.

### FINDINGS OF FACT BY TRIAL COURT

The following facts material in this appeal were found by the trial court to be established by the testimony:

(a) In June, 1918, the property was damaged by fire. At that time Goodell, as mortgagee, held an insurance policy in the amount of \$5000, **with the usual mortgagee clause attached.**

Case p. 67 line 20

(b) The insurance company settled its liability under the aforesaid policy by drawing two drafts, payable to Philip Goodell (mortgagee) and others, aggregating \$1594. These drafts were paid to Goodell **after the mortgage became due** and were endorsed by Goodell and transmitted to Roche (the owner) who **had made** the repairs

on the mortgaged premises. The defendant did not consent to the payment of these two drafts to Roche.

Case p. 69 line 10.

### III.

THERE WAS EVIDENCE BEFORE THE TRIAL COURT SUPPORTING THE FINDINGS OF FACT.

The respondent was not the owner of the mortgaged premises at the time of the foreclosure of the mortgage and at the time of the collection of the insurance.

Case p. 12 line 26

Case p. 19 line 16

The mortgage became due September 15, 1918.

Case p. 19 line 30 et seq.

The mortgaged premises were insured in the sum of \$5000, and the policy contained the usual mortgage clause, making the loss, if any, payable to Philip Goodell, as mortgagee.

Case p. 31 line 18 et seq.

The building upon the mortgaged premises was damaged by fire in June, 1918, and repaired by the owner. Subsequently, after the mortgage debt became due and after the building had been completely repaired, the insurance companies paid the sum of \$1594 to Philip Goodell, the mortgagee in settlement of the damage caused by the fire. This amount the mortgagee turned over to the owner of the premises without the knowledge or consent of this respondent.

Case p. 32 line 9 et seq.

It may be well to here point out that this action is prosecuted by the plaintiff in the interest of Philip Goodell, the mortgagee. The nominal plaintiff becoming the holder of the bond and mortgage without consideration and as trustee for Philip Goodell.

Case p. 17 line 30.

Much of the appellant's brief is devoted to the criticism of the trial court's findings upon matters of fact. The trial court found as a fact that the insurance companies paid Goodell \$1594. This finding is attacked by the appellant.

The following testimony is pertinent upon this issue:

Q. They were drawn to you pursuant to the provisions made in the policy for your benefit as mortgagee of the property, were they not?

A. I suppose so.

Q. Well, you had no other interest in the insurance, had you?

A. None.

Case p. 32 line 24 et seq.

"The loss was payable by the terms of the policy  
"to the mortgagee. The draft of the fire insurance  
"company was payable to the mortgagee's order.  
"\* \* \* \* The acts of complainant were equiv-  
"alent to a collection of the insurance, for it had  
"the draft in hand and endorsed it to Mr. Scam-  
"mon by ordinary commercial endorsement \* \*."

Conn. Ins. Co. v. Scammon, 4 Fed. Rep. 263, 272.

A situation precisely similar in this respect to that in the case at bar was involved in the case above cited.

The trial court also found as a fact that the defendant did not consent to the payment of this insurance to Roche.

Appellant likewise contends that this finding was erroneous.

Q. Of course, under those circumstances, you did not notify Pearce that you were turning it over to Roche?

A. No, I didn't notify him, that I remember.

Q. So far as you know, Pearce did not know anything about that particular transaction, did he?

A. So far as I know, he did not.

Case p. 33 line 20.

Q. Did you consent that any insurance moneys received by Mr. Goodell, as mortgagee, should be repaid to the owner of the equity, Mr. Roche?

A. I did not.

Case p. 51 line 32.

It is contended that this respondent consented to the re-lending of the insurance moneys by the mortgagee to Roche and that his consent is evidenced by his letter, Exhibit P-8. This letter, however, was in reply to Exhibit P-7, a letter from the mortgagee, which indicated to this respondent an arrangement whereby he would be relieved of all liability. The communication (Exhibit P-7) also represented as a fact that \$2600 of insurance had been allowed for the loss. This respondent's reply (Exhibit P-8) and any consent therein given was expressly put upon the conditions stated in Exhibit P-7. It is evident that the statements made in the letter of the mortgagee (Exhibit P-7) were untrue and the proposition therein stated and to which this respondent may be said to have consented was not carried out.

Case p. 51 line 39 et seq.

It seems well settled that this Court will not review the findings of fact in a court below, beyond ascertaining that there was evidence to support such findings.

Larned v. MacCarthy 56 Vroom 589.

Eberling v. Mutillod 90 N. J. L. 478.

Loveland v. McKeever Bros. 90 N. J. L. 704, 706.

Dilks v. Kelsey 59 Atl. Rep. 897.

## IV.

## THE INSURANCE MONEYS RECEIVED BY THE MORTGAGEE WERE PROPERLY ALLOWED AND CREDITED ON THE CLAIM AGAINST THE DEFENDANT

The receipt of the insurance moneys as mortgagee after the maturity of the mortgage debt and after the mortgaged premises had been completely repaired constituted a payment on account of the mortgage debt and reduced the mortgage pro tanto.

The mortgagee could not lawfully revive the lien for the original amount or expressed more accurately, could not revive the original obligation, by refunding or reloaning the money paid, to the prejudice of this respondent.

“The doctrine on this subject is settled in New Jersey. It is that the power to revive an obligation discharged by payment is limited in its effect and does not extend so as to affect rights acquired prior to such revival.”

*Traphagen v. Lyons* 38 N. J. Eq. 613, 616.

“It is clear to my mind that there was a payment upon the mortgage debt by which the lien upon the mortgaged premises was diminished. This being the case, it is not in the power of the mortgagee to revive the lien for the original amount by refunding or reloaning the money paid, to the prejudice of a bona fide encumbrancer whose encumbrance is subsequent to the mortgage but prior to the repayments.”

*Large v. VanDoren* 14 N. J. Eq. 208, 211.

The following cases are to the same effect and hold that a mortgagee cannot so revive the original obligation as against other parties in interest.

Bolles v. Wade 4 N. J. Eq. 458.  
 Robinson v. Urquhart 12 N. J. Eq. 515.  
 Hoy v. Bramhall 12 N. J. Eq. 563.  
 Hartshorne v. Hartshorne 2 N. J. Eq. 349.  
 Underhill v. Atwater 22 N. J. Eq. 16.  
 Stout v. VanKirk 10 N. J. Eq. 78.  
 Bogert v. Striker 42 N. E. 582.  
 Mead v. York 6 N. Y. 449.  
 Bowman v. Mauter 33 N. H. 530.  
 Gardner v. James 7 R. I. 396.  
 Mitchell v. Coombs 96 Pa. St. 430.  
 Jones on Mortgages (7th Ed.) Sec. 947 et seq.

It has been held by this Court that a mortgage cannot be revived in this manner as against a subsequent encumbrancer and that the amount received by the mortgagee from insurance is pro tanto a reduction of the mortgage.

"Counsel for defendant concedes that, under ordinary circumstances, payment of the insurance money would be discharge pro tanto of the mortgage and in this case would have left due only the \$222, interest in arrears, and that the mortgage could not be revived by an agreement between the owners of the equity and the mortgagee to which the intervening encumbrancer was not a party. This he admits to be the general rule."

Peiffer v. Bates 19 Atl. Rep. 612, 613.

"A revival or renewal of a mortgage or other encumbrance once paid, is tantamount to the execution of a new mortgage and the creation of a new encumbrance. No authority has been produced to sustain the position that the owner of the equity of redemption can create a new encumbrance on the mortgaged premises, which shall take precedence over the existing encumbrance, by a devotion of the money produced by the new encumbrance to the improvement of the premises and a corresponding increase in their value. No equity would

"arise from the circumstances that the security of  
 "the encumbrance thereby postponed was actually  
 "increased. In the case in hand, after the insurance  
 "was paid, the amount due on the first mortgage  
 "was \$222; the amount due on the second mort-  
 "gage was \$1141.28, in all \$1363.28. On payment  
 "of that sum of money, complainant had the right  
 "to redeem the premises, and it was not in the pow-  
 "er of the owner of the equity to increase that  
 "amount without complainant's consent. That  
 "consent was never obtained.

Peiffer v. Bates 19 Atl. Rep. 612, 613.

Counsel for appellant relies upon the decision in Gordon  
 v. Ware Savings Bank 115 Mass. 588. This decision is at  
 variance with the decision of this Court in Peiffer v. Bates,  
 Supra, and while this court in its decision in the latter case  
 did not refer to the Massachusetts decision, an examination  
 of the brief filed by the appellant in Peiffer v. Bates dis-  
 closes that the same Massachusetts decision was therein  
 relied upon and was not then followed by this Court.

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It may be added that in the Massachusetts case the in-  
 surance moneys were received by the mortgagee before the  
 mortgage was due.

It is submitted that this same principle established by the  
 decisions here cited is applicable to the case sub judice  
 and that the mortgagee could not after the maturity of the  
 mortgage debt and the complete restoration of the premises  
 by the owner, revive the original obligation as against this  
 respondent by paying over the insurance moneys to the  
 owner. It is contended that this respondent had a lawful  
 right to have this insurance in this situation applied in re-  
 duction of his liability.

It is respectfully submitted that the judgment of the Su-  
 preme Court should be affirmed.

Respectfully submitted,

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