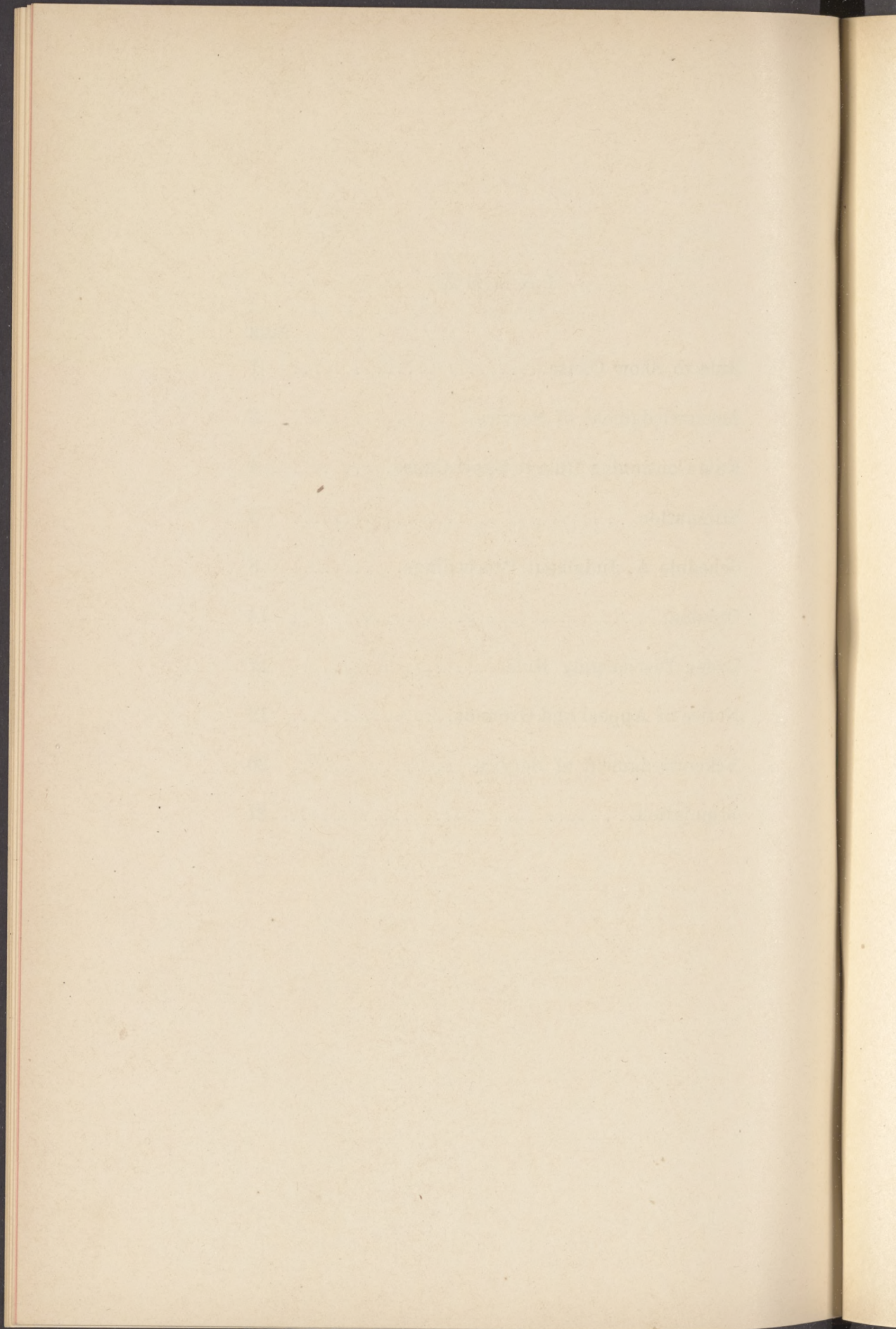


I N D E X

	PAGE
Rule to Show Cause.....	1
Acknowledgment of Service.....	3
Rule Continuing Rule to Show Cause.....	4
Stipulation.	5
Schedule A, Judgment Proceedings.....	8
Opinion.	14
Order Discharging Rule.....	17
Notice of Appeal and Grounds.....	19
Acknowledgment of Service.....	20
Stipulation.	21



RULE TO SHOW CAUSE.

NEW JERSEY SUPREME COURT.

ALBERT H. KNOETTNER, AL- BERT KNOETTNER, and HARRY KNOETTNER, part- ners, trading under the firm name of A. H. KNOETTNER & SONS, <i>Plaintiffs,</i>	} In Debt on Bond and Warrant of Attorney. Rule to Show Cause.	10
v. INTEGRITY CORPORATION OF NEW JERSEY, <i>et al.,</i> <i>Defendants.</i>		20

Upon reading and filing the affidavit of C. Armel Nutter and Harold P. Nutter, made on behalf of Fidelity Mortgage Finance Company, Incorporated, a creditor of William B. Fox and Alice E. Fox, two of the defendants in the above cause.

It is, on this 19th day of April, 1929, on motion of W. Louis Bossle, of counsel with said applicant, 30 Fidelity Mortgage Finance Company, Incorporated, ordered that the plaintiffs and Marie Elizabeth Fox, show cause before the Supreme Court of the State of New Jersey, on Tuesday, the sixth day of May, 1930, at the Supreme Court room, State House, in the City of Trenton, at the hour of 10:30 o'clock in

the forenoon of that day, why the judgment entered in the above cause on the 14th day of November, 1927, should not be set aside and cancelled of record for the reasons set forth in the said affidavit;

And it is further ordered that the parties and each of them have leave to take depositions and other evidence to be used on the hearing of this
10 cause before a Supreme Court Commissioner or Supreme Court Examiner, with four days' notice to the opposite party;

It is further ordered that in the meantime, the Sheriff of Camden County desist and refrain and he is hereby restrained and enjoined from proceeding to sell the lands covered by the mortgage of Fidelity Mortgage Finance Company, Incorporated, which lands are known and designated as lots Nos. 32 and 33, Section L, Division A, on plan of Haddonleigh
20 Revised and are situate in the Township of Haddon, County of Camden and State of New Jersey; until the further order of this Court.

It is further ordered that a copy of this rule and of the said affidavit, which copies need not be certified, be served upon said plaintiffs or their attorney of record and said Marie Elizabeth Fox or her attorney of record and the Sheriff of Camden County within three days from the date hereof.

Let the above rule be entered.

30

FRANK T. LLOYD,
Justice, Supreme Court.

ACKNOWLEDGMENT OF SERVICE.

NEW JERSEY SUPREME COURT.

ALBERT H. KNOETTNER, AL-
BERT KNOETTNER, and
HARRY KNOETTNER, part-
ners, trading under the
firm name of A. H.
KNOETTNER & SONS,
Plaintiffs,

v.

INTEGRITY CORPORATION OF
NEW JERSEY, *et al.,*
Defendants.

In Debt on Bond and
Warrant of Attorney.
Acknowledgment of
Service.

10

20

Service of a copy of affidavits and the rule to show
cause made herein on the 19th day of April, 1930, is
hereby acknowledged, this 19th day of April, 1930.

CLIFFORD A. BALDWIN,

Attorney for Albert H.

Knoettner, Albert 30

Knoettner, and Harry

Knoettner, partners,

trading under the firm

name of A. H. Knoett-

ner & Sons.

WADDINGTON & MATHEWS,

Attorney of Marie Eliz-

abeth Fox.

RULE CONTINUING RULE TO SHOW CAUSE.

NEW JERSEY SUPREME COURT.

10	ALBERT H. KNOETTNER, AL-	}	In Debt on Bond with Warrant of Attorney. Rule Continuing Rule to Show Cause.
	BERT KNOETTNER, and		
	HARRY KNOETTNER, part-		
	ners, trading under the		
	firm name of A. H.		
	KNOETTNER & SONS,		
	<i>Plaintiffs,</i>		
	v.		
	INTEGRITY CORPORATION OF		
20	NEW JERSEY, <i>et al.</i> ,	}	
	<i>Defendants.</i>		

It appearing that the attorneys for the above parties consent to this rule;

It is, on this fifth day of May, 1930, ordered that the rule to show cause why judgment in the above case should not be set aside and declared to be wholly null and void, which was returnable before the above Court on Tuesday, May 6th, 1930, be and the same hereby is continued and made returnable before the above Court, at Trenton, as aforesaid, on January 20, 1931, at the hour of eleven o'clock A. M., or as soon thereafter as counsel can be heard.

FRANK T. LLOYD,
Justice, Supreme Court.

We hereby consent to the entry of this order.

WADDINGTON & MATHEWS,
*Attorneys for Marie Elizabeth
Fox, Assignee of Plaintiff,
Respondent.*

W. LOUIS BOSSLE,
*Attorney for Prosecutor Ap-
plicant, Fidelity Mortgage
Finance Company, Incor-
porated.*

10

STIPULATION.

NEW JERSEY SUPREME COURT.

ALBERT H. KNOETTNER, AL-
BERT KNOETTNER, and
HARRY KNOETTNER, part-
ners, trading under the
firm name of A. H.
KNOETTNER & SONS,
Plaintiffs,

v.

INTEGRITY CORPORATION OF
NEW JERSEY, *et al.,*
*Defendants.**

Action at Law.
In Debt on Bond with
Warrant of Attorney.
Stipulation.

20

30

It is stipulated and agreed by and between Wad-
dington & Mathews, attorneys for Marie Elizabeth

Fox the assignee of plaintiffs, respondent, and W. Louis Bossle, attorney for Fidelity Mortgage Finance Company, Incorporated, prosecutor of the rule, that the motion to set aside and cancel of record the judgment entered herein shall be heard and determined upon the facts as hereinafter stated and that this shall be the state of the case as agreed
10 upon between the respective attorneys of the parties:

1. Judgment was entered on the fourteenth day of November, 1927, against the defendants, Integrity Corporation of New Jersey, Harold Paul Fox, Edward Earl Fox, William B. Fox and Alice E. Fox, by confession on bond and warrant of attorney in the sum of \$1378.00 debt and \$8.00 costs of suit, pursuant to proceedings on bond and warrant of attorney in this court, a true copy of which is annexed
20 hereto and made a part hereof and marked Schedule A.

2. The defendants, William B. Fox and Alice E. Fox, his wife were owners of a dwelling house situate in the Township of Haddon, County of Camden and State of New Jersey, situate on Lots 32 and 33, Section "L," Division A, Plan of Haddonleigh Revised. They acquired title to this property on
30 June 21st, 1927, and owned it at the time the judgment herein was entered and the mortgage herein-after mentioned was created.

3. On November 16th, 1927, defendants William B. Fox and Alice E. Fox, his wife, executed a bond to Integrity Corporation of New Jersey for

\$4,000.00 and as collateral thereto gave a mortgage on Lots 32 and 33, Section "L," Division A, on Plan of Haddonleigh Revised to the defendant, Integrity Corporation of New Jersey for \$4,000.00, which mortgage was recorded on that day in the office of the Register of Deeds of Camden County in Book 322 of Mortgages, page 368.

10

4. The defendant, Integrity Corporation of New Jersey, assigned said bond and mortgage for value to Fidelity Mortgage Finance Company, Incorporated, the prosecutor of this rule on November 17th, 1927. Said mortgage has not been paid.

5. The plaintiffs, Albert H. Knoettner, Albert Knoettner and Harry Knoettner, partners, trading under the firm name of A. H. Knoettner & Sons assigned their judgment for value to Marie Elizabeth Fox, the respondent on February 27th, 1930. Said judgment has not been paid. 20

6. That the sum of \$326.63 mentioned in the affidavit of Harry Knoettner forming part of the proceedings on bond and warrant in this case was the balance due for work upon the dwelling house situated on Lots 32 and 33, Section "L," Division A, Plan of Haddonleigh Revised.

30

7. No depositions nor the affidavits upon which the rule to show cause was allowed shall be used on the return of the rule to show cause, and the issue herein shall be confined to the regularity and efficacy of the proceedings herein on their face, and the right

of the prosecutor, Fidelity Mortgage Finance Company, Incorporated, to maintain these proceedings.

WADDINGTON & MATHEWS,
Attorney of Marie Elizabeth Fox, Respondent.

W. LOUIS BOSSLE,
Attorney of Fidelity Mortgage Finance Company Incorporated, Prosecutor.

10

SCHEDULE A.

20 KNOW ALL MEN BY THESE PRESENTS,
that Integrity Corporation of New Jersey, a New Jersey corporation, Harold Paul Fox, Edward Earl Fox, William B. Fox, and Alice E. Fox, all of the Township of Haddon, County of Camden and State of New Jersey, (hereinafter called the Obligors) are held and firmly bound unto Albert H. Knoettner, Albert Knoettner and Harry Knoettner, partners trading under the firm name of A. H. Knoettner & Sons, of the Borough of Audubon, County of Camden and
30 State of New Jersey, (hereinafter called the Obligees) in the sum of Thirteen hundred seventy-eight dollars lawful money of the United States of America, to be paid to the said Albert H. Knoettner, Albert Knoettner and Harry Knoettner, partners trading under the firm name of A. H. Knoettner & Sons, or their certain Attorney, Executors, Administra-

tors or Assigns; to which payment well and truly to be made we do hereby bind ourselves, our and each of our successors, Heirs, Executors and Administrators jointly and severally firmly by these Presents.

Sealed with our Seals dated the Third day of November in the year of our Lord one thousand nine hundred and twenty-seven.

10

THE CONDITION OF THIS OBLIGATION IS SUCH, that if the above bounden Obligors, their successors, Heirs, Executors, Administrators, or any of them, shall and do well and truly pay, or cause to be paid unto the above named Obligees, their certain Attorney, Executors, Administrators or Assigns, the just sum of Six Hundred Eighty-nine Dollars, within one day from the date hereof, with interest thereon at six per centum per annum, without any fraud or further delay, then the above Obligation to be void, or else to be and remain in full force and virtue.

20

INTEGRITY CORPORATION
OF NEW JERSEY

By Harold Paul Fox,

President.

Attest Edward Earl Fox

Secretary.

Harold Paul Fox (Seal)

Edward Earl Fox (Seal)

William B. Fox (Seal)

Alice E. Fox (Seal)

30

Sealed and Delivered
in the presence of
Harry Knoettner

To Clifford W. Baldwin, Esq.

Or to any other Attorney of any Court of Law in New Jersey or elsewhere:

This is to authorize you to appear for us and each or either of us in any court of competent jurisdiction, in case of the breach of the condition of the above bond, and confess judgment for the penalty
10 therein contained as of the last or any subsequent term with costs of suit and release of errors; and this shall be your sufficient warrant.

WITNESS our hands and seals this Third day of November Anno Domini one thousand nine hundred and twenty-seven.

INTEGRITY CORPORATION
OF NEW JERSEY

By Harold Paul Fox,

President.

20

Attest Edward Earl Fox

Secretary

Harold Paul Fox (Seal)

Edward Earl Fox (Seal)

William B. Fox (Seal)

Alice E. Fox (Seal)

Sealed and Delivered
in the presence of
Harry Knoettner

30

State of New Jersey }
Camden County } ss.

Harry Knoettner being duly sworn on his saith, that the true consideration of the Bond, of which the preceding is a copy, and on which judgment is about to be confessed, was and is the sum of Six 10
Hundred Eighty-nine Dollars (\$689.00) of which \$326.63 represented a balance of indebtedness by Integrity Corporation of New Jersey to the Obligees in said bond named for certain plumbing and heating upon one job and of which \$347.37 represented a balance of indebtedness owing by Integrity Corporation of New Jersey to the Obligees in said bond for plumbing and heating work done upon a certain other job and of which \$15.00 represented the 20
amount required to be paid by the Obligees in said bond unto their attorney for his services in reducing said bond to judgment, for which outlay said Integrity Corporation of New Jersey agreed to reimburse said Obligees and as to the other Obligors in said bond named, to wit: Harold Paul Fox, Edward Earl Fox, William B. Fox and Alice E. Fox, the true consideration of said bond was their joint and several agreement to guarantee all of said indebtedness owing by the Integrity Corporation of New Jersey aforesaid unto said Obligees, and that 30
the debt for which judgment is confessed is justly and honestly due and owing to said Albert H. Knoettner, Albert Knoettner and Harry Knoettner, partners trading under the firm name of A. H. Knoettner & Sons, and that the judgment is not confessed to answer any fraudulent intent or purpose,

or to protect the property of the defendants from
other creditors.

Harry Knoettner

Sworn to and subscribed
this Tenth day of Novem-
ber A. D. nineteen hun-
dred and twenty - seven

10 before me

Clifford A. Baldwin
Master in Chancery of N. J.

NEW JERSEY SUPREME COURT.

Of the term of October

In the year of our Lord one thousand nine hundred
and twenty-seven.

20

ALBERT H. KNOETTNER, AL-
BERT KNOETTNER, and
HARRY KNOETTNER, part-
ners, trading under the
firm name of A. H.
KNOETTNER & SONS,
Plaintiffs,

v.

30 INTEGRITY CORPORATION OF
NEW JERSEY, *et als.,*
Defendants.

In Debt on Bond and
Warrant of Attorney.

The defendant's appearance to this action is en-
tered, and judgment confessed to the plaintiff for

the sum mentioned in the above Obligation, by virtue of a Warrant of Attorney thereunto annexed, and pursuant to the directions of an Act entitled "An Act directing the mode of entering judgments on Bonds with Warrants of Attorney to confess judgments," whereupon it is considered that the said Albert H. Knoettner, Albert Knoettner and Harry Knoettner, partners trading under the firm name of A. H. Knoettner & Sons, do recover against the said Integrity Corporation of New Jersey, Harold Paul Fox, Edward Earl Fox, William B. Fox and Alice E. Fox the sum of Thirteen Hundred Seventy-eight dollars debt, and eight dollars costs of suit. 10

Judgment signed, and ordered to be entered according to law, this 12th day of November in the year of our Lord one thousand nine hundred and twenty-seven. 20

EDWIN G. C. BLEAKLY,
Sup. Ct. Comm'r.

OPINION.

NEW JERSEY SUPREME COURT.

No. 415. January Term, 1931.

10

ALBERT H. KNOETTNER, AL-
BERT KNOETTNER, and
HARRY KNOETTNER, part-
ners, trading under the
firm name of A. H.
KNOETTNER & SONS,
Plaintiffs,

20

v.

INTEGRITY CORPORATION OF
NEW JERSEY, *et al.,*
Defendants.

Submitted January Term, 1931. Decided June
29, 1931.

30

Before JUSTICES CASE, DALY and DONGES.

For the prosecutor of the rule, W. LOUIS BOSSLE.
Contra, WADDINGTON & MATHEWS.

Per Curiam:

This is on a rule to show cause issued to Fidelity Mortgage Finance Company, Incorporated, prosecutor, and directed against Marie Elizabeth Fox, respondent. Respondent is the assignee of a judgment rendered in favor of the plaintiffs against the defendants by confession on bond and warrant of attorney. Two of the defendants, namely, William B. Fox and Alice E. Fox, his wife, subsequent to the entry of the judgment, executed a bond and a mortgage on real estate to co-defendant, Integrity Corporation of New Jersey, which mortgagee assigned the bond and mortgage to Fidelity Mortgage Finance Company, Incorporated. The last named corporation, prosecutor, seeks by its rule to have the judgment set aside and cancelled of record upon the ground that the affidavit annexed to the bond, upon which judgment was confessed, is insufficient in that it does not set forth the true consideration of the bond for which the judgment was confessed. 10 20

The affidavit recites that except for \$15.00, which, by the terms of the bond, was to be paid by the obligors for reducing the bond to judgment, the amount of the obligation was made up of \$326.63, an indebtedness by Integrity Corporation of New Jersey to the obligees "for certain plumbing and heating upon one job," and \$347.37 "for plumbing and heating work done upon a certain other job * * * for which outlay said Integrity Corporation of New Jersey agreed to reimburse said obligees and and as to the other obligors in said bond named, to wit, Harold Paul Fox, Edward Earl Fox, William B. Fox and Alice E. Fox, the true consideration of said bond was their joint and several agreement to 30

guarantee all of said indebtedness owing by the Integrity Corporation of New Jersey aforesaid unto said obligees;" to which is appended the usual recital that the debt is justly and honestly due and that the judgment is not confessed to answer any fraudulent intent or purpose. The case comes to us on a brief stipulation of facts, within which is the
10 statement that the sum of \$326.63 was the balance due for work upon the dwelling house situated on Lots 32 and 33, Section "L," Division A, Plan of Haddonleigh Revised, which is the property upon which the prosecutor's mortgage was given.

We consider that the affidavit is susceptible of the interpretation that in the sale of the plumbing materials to Integrity Corporation of New Jersey the firm of A. H. Knoettner & Sons received also the guarantee from the owners of the properties that
20 the bill would be paid. If that be so, then there was consideration for the bond. There is nothing in the record from which fraud may be inferred; certainly no fraud is proved. The judgment was of record prior to the execution and delivery of the mortgage and, of course, prior to the assignment to the prosecutor of the rule. The prosecutor, therefore, had notice. The prosecutor had no rights in the property or against the parties at the time the judgment was entered. It is rather difficult to determine
30 the ground upon which the prosecutor, a complete stranger to the transaction at the time it occurred, and whose after acquired interest was taken with constructive notice, and who undertakes neither to allege nor to prove fraud, may properly intervene.

The prosecutor asserts that it is not concerned with the proposition of whether or not there was

any consideration for the guarantee but that its only concern is as to the sufficiency of the affidavit. This position is probably one of necessity, as the plain inference from the proofs is that there was consideration. Against this bald attack we think the affidavit is sufficient.

The rule will be discharged.

10

ORDER DISCHARGING RULE.

NEW JERSEY SUPREME COURT.

No. 415. January Term, 1931.

20

ALBERT H. KNOETTNER, AL-
BERT KNOETTNER, and
HARRY KNOETTNER, part-
ners, trading under the
firm name of A. H.
KNOETTNER & SONS,

Plaintiffs,

v.

INTEGRITY CORPORATION OF
NEW JERSEY, *et al.*,

Defendants.

In Debt on Bond and
Warrant of Attorney.

On Rule to Show
Cause.

Order Discharging
Rule.

30

This matter being opened to the Court by Wad-
dington & Mathews, attorneys of the respondent on

the rule to show cause in the above-entitled matter why said judgment should not be set aside and vacated, and it appearing that the said rule to show cause has been argued before this Court and the Court being of the opinion that the same should be discharged and a *per curiam* memorandum opinion to that effect having been filed;

- 10 It is, therefore, on this seventh day of July, A. D. 1931, ordered that the rule to show cause on the 14th day of November, 1927, should not be set aside and cancelled of record, be and the same is hereby discharged with costs.

Let the above rule be entered.

By the Court,

CLARENCE E. CASE,
C. J.

Entered July 8, 1931.

- 20 On motion of
WADDINGTON & MATHEWS,
Attorneys.

NOTICE OF APPEAL AND GROUNDS.

NEW JERSEY SUPREME COURT.

ALBERT H. KNOETTNER, AL-
BERT KNOETTNER, and
HARRY KNOETTNER, part-
ners, trading under the
firm name of A. H.
KNOETTNER & SONS,
Plaintiffs,
v.
INTEGRITY CORPORATION OF
NEW JERSEY, *et al.,*
Defendants.

In Debt on Bond and
Warrant of Attorney.
On Rule to Show
Cause.
Notice of Appeal and
Grounds.

10

20

*To Waddington and Mathews, Esquires, Attorneys
for Marie Elizabeth Fox, Assignee of Plaintiffs,
Respondents:*

Take notice, that Joseph L. Smith and Albert Rob-
bins, receivers of the prosecutor, Fidelity Mortgage 30
Finance Company, Incorporated, by leave of Court,
appeal from the whole of the order discharging the
rule to show cause entered in this matter on the
ground that the judgment entered by confession here-
in is void as to the prosecutor, because the affidavit
reciting the consideration of the bond as to the de-

endants therein, William B. Fox and Alice E. Fox is insufficient.

Dated July 27th, 1931.

W. LOUIS BOSSLE,

*Attorney of Joseph L. Smith
and Albert Robbins, Receiv-
ers of Fidelity Mortgage Fi-
nance Company, Incorpo-
rated, Prosecutor.*

10

ACKNOWLEDGMENT OF SERVICE.

NEW JERSEY SUPREME COURT.

20

ALBERT H. KNOETTNER, AL-
BERT KNOETTNER, and
HARRY KNOETTNER, part-
ners, trading under the
firm name of A. H.
KNOETTNER & SONS,
Plaintiffs,

v.

INTEGRITY CORPORATION OF
30 NEW JERSEY, *et al.,*
Defendants.

In Debt on Bond and
Warrant of Attorney.
Acknowledgment of
Service.

Service of a copy of the notice of appeal and grounds given on behalf of Joseph L. Smith and

Albert Robbins, the receivers of Fidelity Mortgage Finance Company, Incorporated, prosecutor, is hereby acknowledged this 29th day of July, 1931.

WADDINGTON & MATHEWS,
Attorneys for Marie Elizabeth
Fox, Assignee of Plaintiffs,
Respondent.

10

STIPULATION.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

ALBERT H. KNOETTNER, AL-
BERT KNOETTNER, and
HARRY KNOETTNER, part-
ners, trading under the
firm name of A. H.
KNOETTNER & SONS,
Plaintiffs,

v.

INTEGRITY CORPORATION OF
NEW JERSEY, *et al.,*
Defendants.

On Appeal from the
New Jersey Supreme
Court.
Stipulation.

20

30

It is hereby stipulated and agreed by and between
Waddington and Mathews, attorneys for Marie
Elizabeth Fox, the assignee of plaintiff, respondent-

appellee, and W. Louis Bossle, attorney for James L. Smith and Albert Robbins, receivers of Fidelity Mortgage Finance Company, Incorporated, prosecutor-appellant, as follows:

1. Subsequent to the argument of the rule to show cause before the Supreme Court, and prior to the
!0 determination of the matters in dispute herein by that court, Messrs. James L. Smith and Albert Robbins were appointed receivers of the prosecutor, Fidelity Mortgage Finance Company, Incorporated, by the Court of Chancery of New Jersey. Leave of the Court of Chancery has been first obtained by Messrs. Smith and Robbins before perfecting this appeal.

Dated September 21st, 1931.

20

WADDINGTON & MATHEWS,
*Attorneys of Marie Elizabeth
Fox, Respondent-Appellee.*

W. LOUIS BOSSLE,
*Attorney of James L. Smith
and Albert Robbins, Receiv-
ers of Fidelity Mortgage Fi-
nance Company, Incorpo-
rated, Prosecutor-Appellant.*

30

NEW JERSEY COURT OF ERRORS
AND APPEALS.

ALBERT H. KNOETTNER, ALBERT KNOETTNER and
HARRY KNOETTNER, partners, trading under
the firm name of A. H. KNOETTNER
& SONS,

Plaintiffs,

v.

INTEGRITY CORPORATION OF NEW JERSEY, *et al.*,
Defendants.

ACTION AT LAW.

ON RULE TO SHOW CAUSE.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF OF PROSECUTOR-APPELLANTS.

FACTS.

This is an application to set aside, vacate, and have declared null and void, the judgment entered by confession herein on bond and warrant of attorney. The judgment was entered on November 14, 1927, for \$1,378.00 debt and \$10.00 costs (S. of C., p. 6, l. 10). The judgment was entered on a bond made by Integrity Corporation of New Jersey, Harold Paul Fox, Edward Earl Fox, William B. Fox and Alice E. Fox (S. of C., p. 8, Schedule A). The affidavit on which the judgment was entered shows that Integrity Corporation of New Jersey was the principal debtor and that William B. Fox and Alice E. Fox and the other obligors were guarantors (S. of C., p. 10, l. 34). Judgment was entered against all (S. of C., p. 12, l. 35).

Two days after the judgment was entered, that is, on November 16, 1927, the defendants, William B. Fox and Alice E. Fox, created a bond and mortgage on their property situate on Lots 32 and 33, Section "L," Division A, Plan of Haddonleigh, Revised (S. of C., p. 6, l. 30), which is now held by assignment by Fidelity Mortgage Finance Company, Incorporated, the prosecutor of this rule (S. of C., p. 7, l. 3). The judgment herein is therefore an apparent lien on the mortgaged premises, prior to the lien of the mortgage (the mortgage having been recorded on the day it was given (S. of C., p. 6, l. 37)).

Fidelity Mortgage Finance Company, Incorporated

ated, has attacked this judgment as to the two defendants, William B. Fox and Alice E. Fox, only (S. of C., p. 1, l. 25); and has applied to have it set aside, vacated, and declared null and void by reason of defects appearing on the face of the proceedings. All the facts have been stipulated, and it was further stipulated that the testimony taken should not be used in making the motion, nor even the affidavits upon which the rule was procured, but that the sole ground of attack should relate to the regularity and sufficiency of the proceedings by which the judgment was entered (S. of C., pp. 5, 6 and 7).

While a decision on the rule to show cause was pending, Messrs. James L. Smith and Albert Robbins were appointed receivers of the prosecutor, Fidelity Mortgage Finance Company, Incorporated, by the Court of Chancery of New Jersey. The receivers obtained the consent of the Court of Chancery to take this appeal, before perfecting it (S. of C., pp. 22).

POINTS.

1. The insufficiency of the affidavit to support a judgment against William B. Fox and Alice E. Fox.

(a) An analysis of the affidavit.

(b) The application of the law thereto.

2. The invalidity of the judgment.

3. The right of the prosecutor to attack the judgment.
4. The question of laches.
5. The *per curiam* opinion of the Supreme Court.
6. The divisibility of the judgment.

1. THE INSUFFICIENCY OF THE AFFIDAVIT
TO SUPPORT A JUDGMENT ENTERED
AGAINST WILLIAM B. FOX AND ALICE
E. FOX.

(A) AN ANALYSIS OF THE AFFIDAVIT.

Since the attack on the judgment herein relates solely to the form in which the judgment is entered, and not by reason of any extrinsic matters, the necessity of limiting the attack to the record itself, is apparent. The only interest which the prosecutor-appellants have in the matter arises by reason of the entry of the judgment against William B. Fox and Alice E. Fox and not as to the other defendants. It is the land of the defendants, William B. Fox and Alice E. Fox, which is covered by the prosecutor's mortgage, against which the judgment herein is an apparent lien.

The bond upon which the judgment in this case is founded is the joint and several obligation of Integrity Corporation of New Jersey, Harold Paul Fox, Edward Earl Fox, William B. Fox, and Alice

E. Fox, to the firm of A. H. Knoettner & Sons, for the just sum of \$689.00 (S. of C., pp. 8-9).

From the affidavit upon which judgment was confessed (S. of C., pp. 10-11), we learn that of these joint and several obligors, Integrity Corporation of New Jersey was the debtor, or principal, and that the other obligors, Harold Paul Fox, Edward Earl Fox, William B. Fox and Alice E. Fox, were guarantors of the indebtedness due from Integrity Corporation of New Jersey to A. H. Knoettner & Sons. And thereby, we also learn that the bond contains dual obligations, viz.:

(a) That of the debtor to pay its creditor, and

(b) That of the guarantors to pay the debtor's creditor.

In other words, the dual nature of the bond is, first, the obligation of Integrity Corporation of New Jersey, to pay to A. H. Knoettner & Sons, a debt it owes, and, second, the obligations of Harold Paul Fox, Edward Earl Fox, William B. Fox and Alice E. Fox, to pay that same debt—not because they owed it to themselves, but because they guaranteed payment of the debt of Integrity Corporation of New Jersey.

As to these dual obligations, the affidavit expresses the consideration for each of them in the following language:

“the true consideration * * * is the sum of \$689.00, of which \$326.63 represented a *balance of indebtedness* by Integrity Corporation of New Jersey, to the obligees in said bond named,

for certain plumbing and heating done upon one job and of which \$347.37 represented *a balance of indebtedness owing* by Integrity Corporation of New Jersey to the obligees in said bond for plumbing and heating work done upon a certain other job * * *, and as to the other obligors in said bond named, to wit: Harold Paul Fox, Edward Earl Fox, William B. Fox and Alice E. Fox, the true consideration of said bond was their joint and several agreement to guarantee all of said indebtedness owing by the Integrity Corporation of New Jersey aforesaid unto said obligees * * *." (Italics are ours.)

Thus, referring to that part of the affidavit relating to the consideration of the bond as to Integrity Corporation, we find two phrases which we have written in italics, viz.: "a balance of indebtedness" and "a balance of indebtedness owing." The phrase, "a balance of indebtedness," used in the sense in which it is used in the affidavit, presupposes a state of being where two things have existed before there could have been a "balance of indebtedness," viz.:

- (1) A past indebtedness, and
- (2) A payment on account.

The result or remainder is, "the balance of indebtedness."

The word "balance" is defined in 6 *Corpus Juris*, 1170, as follows:

"In a general sense it may be defined as what remains or is left over; remainder, or residue, especially when the term is employed in the phrases, 'balance of my estate' and 'balance of my moneys,' and other phrases of similar na-

ture. In an account a balance is the conclusion or result of the debit and credit sides of an account."

Other definitions are of the same tenor.

Therefore, the word "balance" or the phrase, "balance of indebtedness," as used in the affidavit, only refers to some past transaction between Integrity Corporation of New Jersey and A. H. Knoettner & Sons. The use of the word "owing," being the past participle of the verb "owe," makes this fact more definite. Certainly there was no presently contracted indebtedness between Integrity Corporation of New Jersey and A. H. Knoettner & Sons, at the time the bond was signed, with the possible exception of the \$15.00 item of attorney's fees. The plumbing and heating work had been done because the affidavit refers to the balance of indebtedness "for work done." There had been a payment on account of the charge for that work because the affidavit refers to "a balance of indebtedness." The conclusion is therefore inescapable, that by giving all of the statements made in the affidavit the most fair and liberal construction possible, the consideration for the bond as between Integrity Corporation of New Jersey and A. H. Knoettner & Sons, was a past consideration—a pre-existing liability.

As to the consideration for the several contracts of guaranty mentioned in the affidavit, all that is said of them is that the consideration "was their joint and several agreement to guarantee all of said indebtedness owing by Integrity Corporation of New Jersey aforesaid unto said obligees."

This statement shows no consideration whatever

for the obligation to guarantee. At the most it shows but a reason or motive why the guarantors signed the bond. We are completely left in the dark as to whether there was consideration for the agreement to guarantee, and, unless a consideration can be inferred from the whole transaction, then it must be concluded that the affidavit does not express any.

To illustrate the foregoing, an agreement to guarantee is no legal contract whatever unless there is a consideration for the agreement.

“A promise to pay the debt of another is *nudum pactum* and void for want of consideration, unless there is some new benefit to the obligor or some detriment to the obligee as a promise of forbearance or the like.” 13 *Corpus Juris*, 321.

“Motive and consideration must be distinguished for they are not the same thing. The fact that there is a motive for a promise does not supply the element of consideration; and conversely the fact that there is no motive for a promise will not deprive it of consideration.” 13 *Corpus Juris*, 325.

“As in the case of other contracts, it is essential to a valid contract or guaranty that it be based on a sufficient legal consideration * * * a mere naked promise to pay the existing debt of another without any consideration for such promise is void.” 28 *Corpus Juris*, 915.

Thus, from an analysis of the bond and the affidavit upon which judgment was entered, we must come to three conclusions, viz:

(1) the bond contains the dual obligation of the debtor and its guarantors;

(2) although the affidavit undoubtedly expresses a consideration for the bond as between debtor and creditor only, nevertheless, that consideration was a past or pre-existing consideration; and

(3) the affidavit expresses no consideration whatever as to the other dual obligations being the contracts of guaranty, unless a consideration therefor can be inferred from the dual transaction. In the light of this analysis we consider the application of legal principles to the statements contained in the affidavit.

B—THE APPLICATION OF THE LAW THERE TO.

The statute 1 C. S. 221, sec. 11, requires the plaintiff, his attorney or agent at the time of confessing judgment to make affidavit of the true consideration of the bond for which the judgment is confessed. This statute, and the sufficiency of affidavits made pursuant thereto, have been passed upon many times by our courts.

Klapp v. Ely, 27 N. J. L. 555;

Keys v. Smith, 67 N. J. L. 190;

Reading v. Reading, 24 N. J. L. 358;

Strong v. Gaskill, 59 Atl. 339 (not officially reported).

In the case of *Klapp v. Ely, supra*, the Court said:

“A judgment, therefore, entered by confession without the existence of a *bona fide* debt, or without an affidavit disclosing the true consideration of the judgment, is in direct contravention of the spirit of the law and the clear intent of the Legislature.”

In the case of *Strong v. Gaskill, supra*, this Court said:

“If the affidavit had omitted to state the consideration, or had stated it falsely, the resulting judgment would be a nullity.”

Now, it is elementary that in contracts involving dual parts that there must be considerations to support each of their parts, unless the one consideration is sufficient to support both. And where there is a bond with a dual obligation and a separate consideration as to each part of it, then the consideration of that bond which should be set forth in the affidavit for the entry of judgment, is the two considerations for which it was given. It most certainly would not be a compliance with the act to set forth only one of such considerations and omit the other.

Thus, in the bond in this case there must not only be a consideration for the obligation of Integrity Corporation of New Jersey to A. H. Knoettner & Sons, but a consideration for the contracts of the guarantors, unless, the consideration between Integrity Corporation of New Jersey, and A. H. Knoettner & Sons is also sufficient to support the contracts of guaranty.

It is a well settled rule that where the contract of guaranty or surety is made contemporaneously with the principal contract, the consideration of the principal contract is sufficient to support the collateral contract and there need be no separate consideration as to the guarantees. But this rule is only true when the consideration of the principal contract is a present and valuable one. It is not true where, for instance, the consideration for the principal contract is past, or pre-existing.

“Where the guaranty is made subsequent to the creation of the debt and was not the inducement to it, the consideration of the original debt will not support it; there must be some new and additional consideration having an immediate respect to such liability.” 28 *Corpus Juris*, 919.

Whitehead v. American Lamp & Brass Co.,
70 N. J. Eq. 581;

Grob v. Gross, 83 N. J. L. 430;

S. Kasson & Sons v. Harris, 154 Atl. 728
(not officially reported).

In the case of *Whitehead v. American Lamp & Brass Co.*, *supra*, it was held that a guaranty of past indebtedness to a third person without consideration passing to the guarantor is unenforceable against the guarantor.

In the case of *Grob v. Gross*, *supra*, it was held that a promise by one, who had theretofore revoked his guarantee to pay plaintiff for flour furnished another up to a certain amount, to stand by his guarantee, if made after the flour was furnished, was without consideration and unenforceable. In commenting on this case, the respondent, in her

brief submitted to the Supreme Court, contended that the above principle was not enunciated by that case, but that it was ample authority for the principal that a verbal promise to answer for the existing debt of another is invalid where not in writing. Notwithstanding this comment, however, there will not be found any reference to the statute of frauds in that case. The Court said:

“This promise made as it was after the goods had been furnished to Mrs. Bier, was the promise to pay the debt of another, and was without any consideration.”

The case of *S. Kasson & Sons v. Harris*, *supra*, decided by this Court on May 18th, 1931, clearly recognizes and enunciates the foregoing principles.

Applying the foregoing principles to the case at bar it requires but little deduction to ascertain wherein the affidavit is insufficient, and also, wherein it is quite probable, that there was no consideration sufficient to support the contracts of guaranty. As has been pointed out before, the consideration for the bond moving between Integrity Corporation of New Jersey and A. H. Knoettner & Sons was a past or pre-existing indebtedness. And as we have already seen, such a consideration was insufficient to support the contracts of Harold Paul Fox, Edward Earl Fox, William B. Fox and Alice E. Fox. Therefore, unless there was some other consideration for the contracts of guaranty, and unless such consideration was set forth in the affidavit, upon which judgment was entered, the requisites of the statute have not been complied with, and the judgment is a nullity.

There is no such consideration set forth in the affidavit, and the presumption is that there was none. In the case of *S. Kasson & Sons v. Harris*, *supra*, the Court speaking of that consideration said:

“Such a guaranty is strictly construed, and must be supported by a consideration moving to the guarantor, or the renunciation of something substantial by the party who is guaranteed and that something must be more than a mere consent to do what the law requires should be done.”

Although the stipulated facts show that part of the indebtedness for which judgment was entered was for work done on the house owned by William B. Fox and Alice E. Fox (S. of C., p. 7, line 23), that fact, standing alone, shows no consideration for the guaranty on their part. When the owners, William B. Fox and Alice E. Fox, signed the bond which was their guaranty, the contemplated work according to the affidavit had already been done. What consideration therefore, was there for the guaranty? Was there a direct payment of a valuable consideration to the guarantors? If so, it is not set forth. Was there some advantage or benefit to them? Or to their principal, Integrity Corporation of New Jersey? If so, it is not mentioned. Was there some disadvantage or detriment to A. H. Knoettner & Sons? If so, that is not mentioned. Although our Courts have held that no artificiality need be exhibited in drafting the affidavit, and that it need not be precise and technical (*Strong v. Gaskill*, *supra*), nevertheless, the Court cannot supply by guess what the affidavit omits to say. The in-

escapable conclusion is that the only consideration contemplated between the parties to the bond was the consideration moving between Integrity Corporation of New Jersey and A. H. Knoettner & Sons. Since that consideration was not sufficient to support the contracts of guaranty, they are without consideration—*nudam pactum*—and void. The affidavit, upon which the judgment was entered, omitting to show any valid consideration, is wholly insufficient.

2. THE INVALIDITY OF THE JUDGMENT.

The Courts of this State were for a period of years undecided as to the exact construction to be placed on the statute concerning the entry of judgments by confession, where the affidavits on which they were entered were insufficient. The Legislature has on numerous occasions changed the statute so that some of the earlier cases are not decisive of the law with regard to the later enactments. Now, however, the law is well settled, in this Court as well as in the inferior Courts of this State, that a judgment entered upon an affidavit which omits to set forth the consideration for the obligation, or which insufficiently sets it forth, is void. Some variance may be shown in the earlier cases, but those of a later date are of one accord.

Kleeman v. Baltz Brewing Co., 70 N. J. L. 202;

Strong v. Gaskill, 59 Atl. 339 (not officially reported);

Modern Security Co. v. Fleming, 6 Misc. 730, 142 Atl. 649.

The affidavit in this cause, omitting to show any consideration for the bond as to the guarantors for the reasons hereinbefore set forth, is insufficient under the statute, and the judgment entered herein is void. If not void *in toto*, it is at least void as to the guarantors, William B. Fox and Alice E. Fox.

3. THE RIGHT OF THE PROSECUTOR TO ATTACK THE JUDGMENT.

Since the Supreme Court has raised the question of the right of the prosecutor, the appellants herein, to attack the validity of the judgment, the following is offered to dispel that doubt.

It must be remembered that it is contended that the judgment which is sought to be set aside herein is void. It is not contended that the judgment is void by reason of fraud, but because it is insufficient in the law to be a judgment.

The appellants are the receivers of a mortgagee. The judgment was entered in the Supreme Court two days prior to the giving and recording of the mortgage. The mortgage was given as collateral security with the bond of William B. Fox and Alice E. Fox. The judgment was entered against those persons *inter alia*. The prosecutor of the rule is therefore a creditor of William B. Fox and Alice E. Fox to the same extent as the respondent claims to be, except that the prosecutor of the rule has not obtained a judgment on its debt.

The right of a subsequent mortgagee to apply to vacate a void judgment does not seem to have been directly passed upon by our Courts. However, the

judgment debtor may make such application, *Reading v. Reading*, 24 N. J. L. 358; or his executors or administrators, *Young v. Stout*, 10 N. J. L. 302; or his creditors, *Warwick v. Petty*, 44 N. J. L. 542; *Shallcross v. Deats*, 43 N. J. L. 177; and a subsequent purchaser of the debtor, *Keyes v. Smith*, 67 N. J. L. 190; *McLaughlin v. Cross*, 68 N. J. L. 599.

In the case of *Keyes v. Smith*, *supra*, the Court said:

“That the applying creditor, as the grantee of the defendant, may be heard to attack the judgment incumbering the land conveyed appears to be settled. *Reed v. Bainbridge*, 4 N. J. Law 351; *Canan v. Carryell*, 1 N. J. Law 3.”

In the case of *McLaughlin v. Cross*, *supra*, the Court reviewed the authorities in this State and held:

“It is urged that it does not appear that the defendants in certiorari were *bona fide* purchasers for value, without notice of the judgment. I do not understand that such a status is essential. The deed recited does show a purchase for value. *The purchasers had a right to rely on the invalidity of the docketing of the judgment, and therefore ignore it.* Their standing to make the application in order to relieve their property from the cloud of the judgment has not been questioned, and was, we think, unquestionable. * * * The practice is quite general to afford relief against void judgments to *any person interested.*” (Italics ours.)

The general rule is stated in 34 *Corpus Juris*, 410, as follows:

“A judgment by confession may be vacated or set aside for good cause shown at the instance of a *bona fide* purchaser or claimant of property upon which the judgment is an apparent lien, or by others whose rights or interests are affected by the judgment.”

34 *Corpus Juris*, 509, Sec. 811.

“A void judgment is one that has merely the semblance of a judgment without some essential element or elements upon which its validity as such depends. * * * It is not binding on anyone; it raises no lien or estoppel; it does not impair or affect the rights of anyone.”

34 *Corpus Juris*, 514.

“On the other hand, a judgment which is absolutely void is entitled to no authority or respect, and therefore may be impeached in collateral proceedings by anyone with whose rights or interests it conflicts.”

The respondent, in her brief which was submitted to the Supreme Court, cited the cases of *Ely v. Parkhurst*, 25 N. J. L. 188; *Hoyt v. Hoyt*, 16 N. J. L. 138; and *Evans v. Adams*, 15 N. J. L. 373, as authority for the proposition that a confessed judgment would not be set aside upon the application of a subsequent judgment creditor for a defect in the affidavit. Although these cases are apparent authority for such a statement, yet they were decided at a time when the statute concerning the entry of judg-

ment by confession substantially differed from the statute under which the judgment in question was entered. The latter cases cited herein are declarative of the law applicable to the instant case.

4. THE QUESTION OF LACHES.

In her brief submitted to the Supreme Court, the respondent raised the question of laches. In that brief she asks whether the prosecutor, having constructive notice of the nullity of the judgment, should of right be permitted to wait from November 17, 1927, to April 19, 1929, before procuring the rule to show cause, and, in the meantime allow the respondent to purchase the judgment, innocently and for value, and then to move to set it aside. In the first place there are no facts showing the innocence of the purchase. None were stipulated, and since all of the facts were stipulated, and that fact was not, it cannot be presumed. However, it would seem dispositive of such a question to point out that such constructive notice was as applicable to the respondent-appellee as to the prosecutor-appellant. If the judgment is void on its face, the respondent had an equal opportunity to ascertain that fact. The purchase of a void judgment, that is, a judgment void on its face, cannot be an innocent purchase.

“A judgment which is void * * * is a mere nullity; it is not binding on anyone; it does not impair or affect the rights of anyone, unless by the agreement of the parties concerned; it confers no rights upon the party in whose favor

it is given; and affords no protection to persons acting under it * * * but it is not necessary to take any steps to vacate or avoid it until an effort is made to enforce it." 34 *Corpus Juris*, 509-510.

It is only too apparent that the ordinary rules pertaining to the application to open a judgment within a reasonable or prescribed time, do not apply in cases of a void judgment. Such a judgment, being a nullity, may be set aside at any time.

5. THE PER CURIAM OPINION OF THE SUPREME COURT.

Speaking of the issues herein, which were presented to it, the Supreme Court said:

"We consider that the affidavit is susceptible of the interpretation that in the sale of the plumbing materials to Integrity Corporation of New Jersey the firm of A. H. Knoettner & Sons received also the guarantee from the owners of the properties that the bill would be paid. If that be so, then there was consideration for the bond."

That decision does not, and did not, meet the issues raised by the rule to show cause. We have no doubt but that the affidavit does show a sufficient consideration as between Integrity Corporation of New Jersey and A. H. Knoettner & Sons to support a judgment by the latter against the former. But we do most earnestly contend that that considera-

tion was past or pre-existing, and as such, not sufficient to support the contracts of guaranty.

The decision of the Supreme Court does not consider whether or not there was consideration for the contracts of guaranty. All that it decides is that, in the interpretation of the affidavit, the firm of A. H. Knoettner & Sons, in making the sale of plumbing materials to Integrity Corporation of New Jersey, received the guaranties of the owners of the properties. But can we presume that a consideration arises from interest alone? Does the mere fact that the owners of the property enter into a guarantee, to secure the payment of materials furnished to their property, support and show a consideration for the contract of guaranty?

To illustrate our contention, suppose I had been the builder of a house for F and his wife, and, during the course of construction I had purchased materials from K. Later, there was a payment on account of the indebtedness, leaving a balance of indebtedness amounting to \$326.63. K then wanted additional security for the payment of that balance, and as a result F and his wife joined in a bond, payable within one day from its date, with warrant of attorney to confess judgment, as guarantors, with I to K. I gained nothing by this transaction. There was no disadvantage or detriment to K. F and his wife received no benefit.

Thereafter judgment was entered on the bond and the affidavit was drawn as in this case. Can it be presumed that the consideration between I and K, which unquestionably was a past or pre-existing consideration, was sufficient to furnish a consideration for the collateral contracts of F and his wife

also? Can the mere fact that F and his wife had an interest in the matter by reason of owning the property furnish such consideration? We respectfully contend that it would not, and that the contracts of guaranty were without consideration. If we may infer at all, is not this illustration the limit to which our inferences may go from the facts which have been stipulated?

We respectfully submit that the decision of the Supreme Court in discharging the rule to show cause was error.

6. THE DIVISIBILITY OF THE JUDGMENT.

In her brief submitted to the Supreme Court, the respondent questioned the right of the prosecutor to have the judgment set aside *in toto* when the prosecutor's only interest was by reason of the judgment being against William B. Fox and Alice E. Fox. She contends that since the interest of the prosecutor is thus limited the relief it seeks should be likewise limited. It is, in the first place, questionable as to what form the relief should take, and it seems to be a question not yet decided in New Jersey. The general rule is as follows:

"By some authorities a judgment against two or more defendants jointly is regarded as an entirety, so that if it is irregular, erroneous, or void as to one of the defendants, it is equally so as to all; but other decisions hold that a judgment may be valid and enforceable as to all or some of the defendants, although voidable or void as to others." 33 *Corpus Juris*, 1130.

We have been unable to find any case in point in New Jersey. There is little indication as to what attitude New Jersey may take. There is no statute on the subject and presumably, therefore, the common law prevails. At common law a joint judgment, void as to one, is mere nullity, and is void as to all. *Grey v. Stewart*, 74 Va. 351.

* * * * *

In conclusion therefore it is respectfully submitted that the prosecutor-appellants has the right to maintain these proceedings and that the affidavit on which judgment was entered herein does not state or show any consideration as to the contract of guaranty of the defendants, William B. Fox and Alice E. Fox, and should, therefore, be set aside, vacated and declared null and void.

W. LOUIS BOSSLE,
Attorney and Counsel for
James L. Smith and Albert
Robbins, Receivers of Fi-
delity Mortgage Finance
Company, Incorporated,
Prosecutor-Appellants.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

ALBERT H. KNOETTNER, ALBERT KNOETTNER and
HARRY KNOETTNER, partners, trading under
the firm name of A. H.
KNOETTNER & SONS,
Plaintiffs,

v.

INTEGRITY CORPORATION OF NEW JERSEY, *et al.*,
Defendants.

ACTION AT LAW.

ON RULE TO SHOW CAUSE.

ON APPEAL FROM THE NEW JERSEY SUPREME COURT.

BRIEF ON BEHALF OF RESPONDENT-
APPELLEE, MARIE ELIZABETH FOX.

FACTS.

The facts are shown by the state of the case, which is short, and are substantially as set forth in the brief of the appellant.

POINTS.

Counsel for appellee will endeavor to answer the points raised by the appellant in the order in which they are arranged in its brief so far as possible, but there may of necessity be a certain amount of comingling from the very nature of the case.

1. THE INSUFFICIENCY OF THE AFFIDAVIT
TO SUPPORT A JUDGMENT ENTERED
AGAINST WILLIAM B. FOX AND ALICE
E. FOX.

(a) AN ANALYSIS OF THE AFFIDAVIT.

(b) THE APPLICATION OF THE LAW THERETO.

It will be noted at the outset that the attack is against the judgment as an absolutely void judgment solely because of the statements contained in the affidavit thereto. No fraud is alleged or proved. There is none, in fact.

The appellant attempts to demonstrate that there

is a dual obligation in the bond (a) that of the debtor to pay its creditor, and (b) that of the guarantors to pay the debtor's creditors. How can this be so? If the debtor pays the creditor what becomes of the obligation of the guarantors? Do they have to pay it again? And the creditor be paid twice? There is no such dual obligation, as can be seen in a moment by examining the bond. It is a joint and several obligation of all the obligors. While the affidavit to the judgment may set forth different considerations why the various obligors executed the bond, this cannot affect their liability thereon. One is as much liable as any of the others or all the others.

At this point it might be well to note that there are three distinct things referred to by the appellant in this case: The judgment, the bond and the contract of guaranty referred to in the affidavit. Appellant has jumbled the three together and after milling them about for a time concludes that because the statement in the affidavit does not show what the consideration was for *the contract of guaranty*, therefore, there was none, or if there was it might have been insufficient to support the contract of guaranty if suit had been brought upon it and the guarantors chose to set up lack of consideration as a defense; *ergo* the judgment is absolutely void. It is attempting to perform the conjuror's trick of putting the judgment, the bond and the contract of guaranty into a silk hat, saying "hocus pocus" over the hodgepodge and triumphantly extracting from the hat a "void judgment." Since a contract of guaranty must be in writing, and if it were not this would be a defense against such contract upon

the part of the obligors, I am surprised that it did not contend that because the affidavit did not specifically set forth that the contract of guaranty was in writing, the judgment was also void for that reason. I think it missed one. So, I will supply it.

Now, so far as the judgment being valid in the full amount thereof against the defendant, Integrity Corporation, there is no question. In fact, counsel for the appellant in his brief before the Supreme Court, stated:

“Of course, the affidavit may show a sufficient consideration with which to hold the judgment against Integrity Corporation of New Jersey, and as to the judgment against that corporation we have no complaint and make no attack.”

Since then, however, he has changed his attitude somewhat and contends that the judgment is void as against everybody (see Point 6).

The statute governing the right to attack the judgment is found in 1 Compiled Statutes, page 221, Section 11, and provides in part that the affidavit must be “of the true consideration of the bill, bond, deed, note or other instrument of writing or demand, for which the said judgment shall be confessed.” It is obvious that the attack of the appellant is directed solely to an alleged insufficiency in the affidavit upon this point and to no other ground whatsoever. No fraud is claimed and no other reason set forth.

The ground of the attack is that the affidavit, insofar as William B. Fox and Alice E. Fox is concerned, does not set forth *the consideration upon which the contract of guaranty referred to in the*

affidavit is based. Manifestly, prior to the passage of this Act, judgments could be entered upon bond and warrant without the necessity of the affidavit, and there is now required only such things in the affidavit as the statute specifically provides. Nothing more is made necessary. It need not even state from whom or by whom the debt is owing.

Scudder v. Coryell, 10 N. J. L. 340.

There could be no clearer exposition of *the consideration for the bond* than that set forth in the affidavit and if, as the appellant contends, the statement of the joint and several agreement to guarantee the said indebtedness is simply a reason for William B. Fox and Alice E. Fox and the others signing the bond, it can at the most be mere surplusage. It is the consideration of the *bond* which is required to be stated—not the consideration of a collateral agreement which is itself set forth as the consideration or reason for the *sureties signing the bond*.

The consideration is the price *or motive* of the contract.

Blackstone, as cited by Justice Ewing in *Latham v. Lawrence*, 11 N. J. L. 322.

And that is clearly and fully set forth in the affidavit.

Naturally, our first thought is of the fundamental purpose of the statute. This has been most clearly set forth in the case of *Evans v. Adams*, 15 N. J. L. 373, on page 375, by Chief Justice Hornblower. His language is as follows:

“It was to prevent the signing of fraudulent judgments, by an appeal to the conscience of

the plaintiff, as to the fairness of the transaction. It was only to interpose an additional guard against fraud, and was never intended as a criterion by which the fraud, or *bona fides*, of a judgment, was to be tested. Nor was it designed to introduce a new rule of law, admitting third persons to take advantage of errors or irregularities in prior judgments. On the contrary, if the proceedings are regular, and the affidavit full and complete, yet, if the judgment is fraudulent, it is void as against purchasers and judgment creditors; on the other hand, if honest, though irregular, it is binding against everybody but the defendant. A different rule would introduce a flood of litigation, between struggling judgment creditors, the result of which would often be that the honest creditor who had made some mistake in his proceedings would be defeated, while the fraudulent and more practiced one, with his regular judgment, studiously prepared for the occasion, would be preferred. Such was never the design of the statute."

How much of this refreshingly logical statement has been obliterated by *Clapp v. Ely*, 27 N. J. L. 555, cited by prosecutor, may be difficult of determination, but we think that it can be clearly seen hereafter that the particular point involved in the case at bar has not been disturbed.

The case of *Clapp v. Ely* is an interesting one because it so voluminously reversed or, rather, modified the judgment in the lower Court and some aspects of the law as it had theretofore stood, and

because such various opinions were expressed by the Judges that it is somewhat difficult to tell exactly for what the case is authority. In *Warwick v. Petty*, 44 N. J. L. 542, the Court says that *Clapp v. Ely* settled several things, one of which was that it was held that *creditors whose rights are affected* can contest the *validity* of the confessed judgment, but further says "that it cannot be affirmed that it was decided in that case that judgment confessed for an existing debt then actually due and owing will be set aside on the application of other judgment creditors for the sole reason that the affidavit did not truly state the consideration." The remarks of the Court at pp. 548-549 are also very pertinent.

In *Keys v. Smith*, 67 N. J. L. 190, the Court says that: "This question thus left unanswered plainly refers only to cases where the affidavit does set forth a consideration, but fails to state it truly." By inference, therefore, only, it might be considered that if the affidavit failed to show any consideration (assuming there was one intended), the creditor might attack it.

The difficulty with the prosecutor's contention in the present case is that he is attempting to show neither that the consideration set forth in the affidavit was not the true consideration, nor that it failed to state any consideration in the sense that none at all was alleged, but simply and solely that the consideration alleged so far as William B. Fox and Alice E. Fox were concerned, admitting it to be true, is not a legally sufficient consideration to support a contract of guaranty, attempting to draw the conclusion that therefore the consideration for the bond is not set forth. But these are two sub-

stantially different propositions. The attack is against a formal judgment. Does a *judgment* necessarily have to have a consideration to support it? Would a bond upon which judgment was entered without fraud necessarily have to have a consideration to support it? Does the statutory provision referred to herein, requiring the true consideration to be shown, intend to vitiate a perfectly valid judgment entered upon the sealed bond, for which no consideration was given or any ever intended? We think not, where no fraud is alleged or proved.

In the first place, no consideration is necessary to support the sealed instrument where none was intended by the parties.

Aller v. Aller, 40 N. J. L. 446;

U. & G. Rubber Manufacturing Co. v. Conrad, 80 N. J. L. 286.

Hence, a judgment regularly entered by confession on such bond must be equally valid. Again referring to *Latham v. Lawrence*, *supra*, the consideration is the price or *motive* of the contract and where no consideration in the sense of "price" is required, a statement of motive or "reason," as the appellant has called it, cannot help but be sufficient. What more could in truth be shown?

Sureties upon a bond are just as liable as the principal, even though the entire consideration for the bond passed to the principal.

Bishop v. Smith, 57 Atl. 874.

Suppose, for instance, in the case at bar, there being four sureties, each of these sureties had received a consideration for the original contract of

guaranty and each of these considerations had been different, would it have been necessary for the affiant to have set forth in detail the consideration which each surety or guarantor received in addition to the actual consideration for the bond, in order to comply with the intent of the statute?

Another thing for which *Clapp v. Ely* and *Warwick v. Petty* are both authorities is that a judgment is good for so much as is actually due and owing at the time of the entry of the judgment. In this case admittedly the entire amount set forth in the affidavit was due. The appellant's claim is not that it was not, but that none of it was due against Alice E. Fox and William B. Fox for the reasons which it has stated. If its contention be true, any subsequent mortgagee of any surety on a bond under seal could nullify any judgment entered thereon simply by showing that no consideration passed to the surety, even though none was intended, and hence perfectly responsible sureties accepted by the judgment creditor upon a sealed instrument would be freed from liability thereon for the sole reason stated. This would result in a most outrageous fraud upon the judgment creditor, and instead of being an instrument for the prevention of fraud would be exactly the reverse. It would reverse all previous decisions on the binding effect of a sealed instrument and judgment obtained thereon and make them all depend on whether or not something of value passed to the sureties individually.

The case of *Whitehead v. American Lamp and Brass Co.*, 70 N. J. E. 581, cited by the appellant, is rather unconvincing if it is to be taken as authority for the general proposition that a guarantee

of a past indebtedness, as well as present and future advances, has no consideration to support it so far as the past account is concerned under any circumstances. The weakness of this as a general proposition appears very marked by the statement of the Court on page 583, beginning on line 23. In other words, whether or not there was consideration depends upon the entire facts, and the burden is upon the prosecutor to show those facts.

Furthermore, the case of *Grob v. Gross*, 83 N. J. L. 430, is simply authority for a well-known principle that a verbal promise to answer for the existing debt of another is invalid where not in writing.

In short, the contention of the appellee is that the principles laid down in the cases cited by the appellant are inapplicable to the case at bar, as they have nothing to do with the consideration for the *bond*; that it is fundamental that a contract can be made for the benefit of a third party and that a consideration passing to that third party is sufficient to support such a contract; that a sealed instrument is valid whether it has a consideration or not, if in the latter case none was intended; that the consideration required to be stated by the statute is the consideration for the *bond* and not for some collateral contract which might have induced the sureties to sign the bond; where no consideration was intended to pass to the sureties on the bond the statutory requirement is fulfilled by setting forth the actual facts, as in this case, particularly where there is no fraud alleged or proved against the prosecutor.

It is interesting to note in connection with the appellant's contention that at the time the judg-

ment was entered and for some time prior thereto William B. Fox and Alice E. Fox were the owners of the property on which one of the jobs of work referred to in the affidavit was performed and which formed part of the consideration for the bond.

However, we think that there is complete confusion between the possible necessary consideration to support what is assumed to be an original simple contract of guaranty and the consideration for the bond, a sealed instrument, which latter is what the statute requires to be inserted in the affidavit.

Glancing for a moment at the cases cited by the appellant, it is quite obvious that they are authority for the proposition: that a contract of guaranty made subsequent to and separate from the original contract must have a separate consideration to support it. It then takes considerable space in arguing what is a palpable fact—that the indebtedness for which the bond was given was in existence at the time the bond was made. Of course it was. If it had not been due and owing at that time the bond could not have been properly given and it could have been attacked (by the obligors at least) on that ground.

*Modern Security Company of Philadelphia
v. James E. Fleming, et al.*, 6 Misc. Rep.
730.

From this he reasons that the judgment in this case is void.

Now, appellant overlooks the fact (1) that the bond is under seal and a consideration is presumed; (2) that any consideration which may or may not

have existed for the *contract of guaranty* has absolutely nothing to do with the consideration for the *bond*, which is required to be stated in the affidavit; (3) that there need be no consideration for the *bond* (in the sense of a legal consideration necessary to support a simple contract) because anyone perfectly solvent can give away his property, become bound on a sealed instrument or in any other way, if he so desires, and a *subsequent* creditor cannot attack such gift or liability; (4) that what the statute requires is a true statement of the exact transaction as it occurred.

The case of *Strong v. Gaskill*, 59 Atl. 339, cited by appellant, is exactly in accordance with the appellee's contention. How it helps the appellant's contention is difficult to determine. The Court says:

"If the affidavit state the consideration by giving truthfully the substance of the transaction, a judgment entered for an honest demand for an actual indebtedness, and without fraudulent purpose, will not be open to the attack of other creditors merely because the affidavit is inartificially drawn. The word 'true,' in this connection, means that which is frank and actual, rather than that which is precise and technical.

* * * The entire transaction is characterized by honesty of dealing and frankness of statement. The matters to which adverse criticism is directed are of form, not of substance. Under these circumstances, the requirements of the statute have been followed, and the judgment will not be disturbed."

This Honorable Court approved these statements made by the Court below.

The affidavit neither fails to state the consideration for the *bond* nor states it falsely. It simply fails to state what the consideration was for the original contract of guaranty liability on which was the reason some of the defendants executed the bond as sureties or guarantors.

In *Kleeman v. J. P. Baltz Brewing Co.*, 70 N. J. L. 202, there was clearly shown a false statement of consideration. The consideration set forth was money loaned; the actual consideration was beer sold. Nor does this case show that the attack was made other than by the original defendant in the judgment on the bond.

I do not dispute the principles laid down in the cases cited by the appellant. But they have nothing to do with the case at bar, which is a judgment founded on a bond or sealed instrument totally unrelated to the contract of guaranty itself except insofar as that existing contract was the motive, or inducement or reason for some of the defendants executing the bond.

Appellant has not shown that there was no consideration to support the original contract of guaranty, but his sole contention is that because *that consideration was not stated in the affidavit made at the time the judgment on the bond was entered, therefore the judgment is no good.*

The consideration for the *bond*, which is what the statute requires, is fully and completely set forth as the amount of money due the Knoettner for the work done as set forth in the affidavit. Had the affidavit stopped there it would have certainly been

sufficient. How then can it be less so because the *reason* why the *sureties* signed the bond are set forth? The sureties would have been equally bound whether the consideration which they received for becoming sureties was a past consideration, a present consideration or whether there was no consideration at all intended, so far as they were concerned. It was a sealed instrument, and they are bound along with the principal, *provided there was a valid consideration supporting the bond which is truly set forth in the affidavit*. That there is is clearly shown by the affidavit and that it is true is admitted by the appellant.

It seems to me the appellant has confused the question of setting aside a judgment based upon a bond because the affidavit does not state the consideration of the *bond*, and the setting aside of the judgment as against sureties because the affidavit does not allege that the sureties received something of value for their execution of a sealed instrument. It is the consideration of the *bond* which is required; not the consideration, if any, which passed to the sureties upon signing it.

3. THE RIGHT OF THE PROSECUTOR TO ATTACK THE JUDGMENT.

The appellant has cited a number of authorities to support its right as a subsequent mortgagee of two of the judgment debtors to attack this judgment, but has shown no authority directly in its favor. Of course this would not be fatal to its case if it were able to show authorities in which the *principle* for

which it contends had been sustained. But it has not.

In fact there is direct authority to the contrary. It was certainly the law prior to *Clapp v. Ely* that a judgment signed by virtue of a warrant of attorney would not be set aside upon the application of a subsequent judgment creditor for a defect in the affidavit.

Ely v. Parkhurst, 25 N. J. L. 188;

Hoyt v. Hoyt, 16 N. J. L. 138;

Evans v. Adams, *supra*.

A careful examination of *Ely v. Parkhurst*, *supra*; *Clapp v. Ely*, *supra*, which overruled it in certain respects only; *Warwick v. Petty*, *supra*, and *Keys v. Smith*, *supra*, shows clearly that this proposition was left undisturbed and hence it is still the law, so far as formal defects are concerned. Certainly the prosecutor is in no better position than a subsequent judgment creditor, being a subsequent mortgagee.

Let us assume for the moment that a bond under seal requires a consideration to support it (which is of course emphatically denied). How can the appellant, who is nothing but a creditor whose debt accrued after the bond was made, claim the invalidity of an otherwise perfectly valid judgment just because the affidavit setting forth that a previous or contemporaneous contract of guaranty is the consideration of some of the sureties or guarantors signing the bond does not go further and show in detail what the consideration was that supported the contract of guaranty? Is that what the

statute requires? It does not say so. The cases do not say it says so.

Now, let us suppose a bond is executed for love and affection and that that fact was set forth as the consideration in an affidavit attached to a judgment on that bond. Would the judgment be any the less valid as against a *subsequent* mortgagee or creditor than one founded on a monetary consideration? Cannot a man who is solvent give away his property if he so desires as against creditors who become such afterward with constructive knowledge of the gift? Suppose that William B. Fox and his wife had deeded the particular property covered by appellant's mortgage to the Integrity Corporation or the appellee in this case by deed under seal, duly recorded prior to appellant's mortgage and the deed had distinctly recited that it was a gift and purely voluntary and without any consideration whatsoever. Could appellant, whose mortgage was executed subsequently, now set aside this deed even on the ground of fraud? How could he? There was no fraud in the deed. The fraud would have been in the execution of a mortgage upon property which the mortgagors did not own and his action would be against them alone. How much stronger is this case then where the judgment is entered on a bond for a *bona fide* debt and the mortgage properly given? There is no fraud in either the judgment or the mortgage.

In the last analysis, appellant's attempt is to avoid the effect of a perfectly *bona fide* judgment which is a prior lien to its mortgage, because it took the mortgage without going to the trouble of having a proper search made of prior liens and encum-

brances, and it has trumped up this argument over the affidavit as a forlorn hope for relief from the effects of its own carelessness.

It has proved no standing in court; it has neither proved nor alleged any fraud on its rights; it has not even proved a formal defect in the affidavit, which is its sole contention.

4. THE QUESTION OF LACHES.

At first blush there might seem to be no place for laches in an attack upon a judgment for purely technical statutory reasons. It might seem that if the judgment were defective the attack could be made at any time. But it is fundamental that setting aside of a judgment is largely in the discretion of the Court in which the judgment was obtained, that the purpose of the statute is to prevent fraud and not to assist it, that it is apparent that the appellant's standing is, to say the least, doubtful when it should be clear, that there is no fraud shown, and that appellant waited from November 17th, 1927, until the 19th day of April, 1929, before procuring its rule; that in the meantime, on February 27th, 1929, the respondent purchased the judgment for value (S. C., p. 7).

The appellant claims it has the right to rely on the nullity of the judgment, which it claims to exist. Can it do so, when it all the time had constructive notice thereof, and allow the appellee to innocently and for value purchase the judgment, and then move to set it aside?

While this is not an equitable proceeding, cer-

tainly general equitable principles apply to setting aside a formal judgment in the discretion of the Court.

5. THE PER CURIAM OPINION OF THE SUPREME COURT.

Appellant says that the decision of the Supreme Court did not meet the issues raised by the rule to show cause. What it really means is that the Court brushed aside its irrelevant argument about the necessity of setting forth the consideration of the contract of guaranty as part of the affidavit of consideration of the bond. The Supreme Court not only met the real issue involved but properly disposed of it.

Appellant's argument under this head is but a repetition of the same contention made before, which the Supreme Court disposed of, and which this brief has already attempted to meet.

The illustration cited by appellant in the first place presumes a situation which does not appear in this case, and in the second assumes that if it did appear in this case it would help him, as a subsequent mortgagee. The argument might be of some force if this judgment was attacked on the ground that it was in fraud of the rights of a creditor who was a creditor at the time the bond was executed and the judgment entered. It has obviously no application to the present state of facts.

6. THE DIVISIBILITY OF THE JUDGMENT.

The rule to show cause allowed in this case, and the question the appellee is required to meet, is as follows:

“ORDERED that the plaintiffs and Marie Elizabeth Fox show cause * * * why the judgment entered in the above cause on the 14th day of November, 1927, should not be set aside and cancelled of record for the reasons set forth in the said affidavit.” Under this rule the appellant is obviously endeavoring to have the judgment vacated as to the two defendants, William B. Fox and Alice E. Fox only. It seems to us this should not be done on the rule as framed, as it is solely confined to the setting aside of the judgment in its entirety, and, in order to sustain the right to any relief, the prosecutor is obliged to show a valid reason for setting aside and cancelling of record the judgment *in toto*. While the matter is in the discretion of the Court to a large extent, the general rule is that in the absence of a prayer for general relief, the moving party should be confined to the relief asked for in his motion and at most relief necessarily incidental thereto.

42 *Corpus Juris*, 512.

Referring to the statement of appellant in its brief before the Supreme Court, part of which is quoted under Point 1, it can now be seen that it has changed this attitude.

Of course the judgment is good against the Integrity Corporation. It was a *bona fide* judgment

for a *bona fide* debt. But appellant now contends that it can and should be set aside *as against the Integrity Corporation* as well as the others for the reasons given. In other words a *bona fide* judgment creditor is to have his judgment taken away, wiped out and whisked away into thin air because there is some ethereal question concerning statements in the affidavit about a contract of guaranty which was the motive or inducement of some of the judgment creditors executing the bond upon which the judgment is based. And all for what? So that a subsequent mortgagee of two of these judgment debtors may obtain a priority upon certain property which he thought he had but did not have because of his own carelessness and negligence. If that would not perpetrate the most outrageous of frauds upon the judgment debtor and his assignee for value, then I am unable to conceive what fraud is.

SUMMARY.

The appellee, therefore, contends that the judgment of the Supreme Court should be affirmed because:

1. The rule to show cause was brought to set aside and cancel the entire judgment and the appellant only attempts to cancel it as to two out of the five judgment debtors.
2. That the affidavit accompanying the proceedings upon which the judgment was entered shows

the true consideration for the *bond*, which is all the statute requires.

3. That the judgment is valid and the affidavit complete, even if it can be assumed that there was no consideration passing to William B. Fox and Alice E. Fox for the *contract of guaranty*.

4. That it cannot be assumed that there was no consideration for the contract of guaranty.

5. That the burden is on the appellant to show that there was no consideration for the contract of guaranty, if that fact be material.

6. That the affidavit shows the true transaction and fully and substantially complies with the requirements of the statute.

7. That the prosecutor has shown no facts entitling it to attack the validity of the judgment in any event.

8. That setting aside the judgment would be a fraud upon the appellee, the assignee for value from the original judgment creditor of a *bona fide* judgment.

9. That appellant, a complete stranger to the transaction involving the bond and judgment at the time of the execution of the one and the entry of the other and who had at that time no rights in the property of any of the judgment debtors nor any interest in the matter whatsoever, and whose mort-

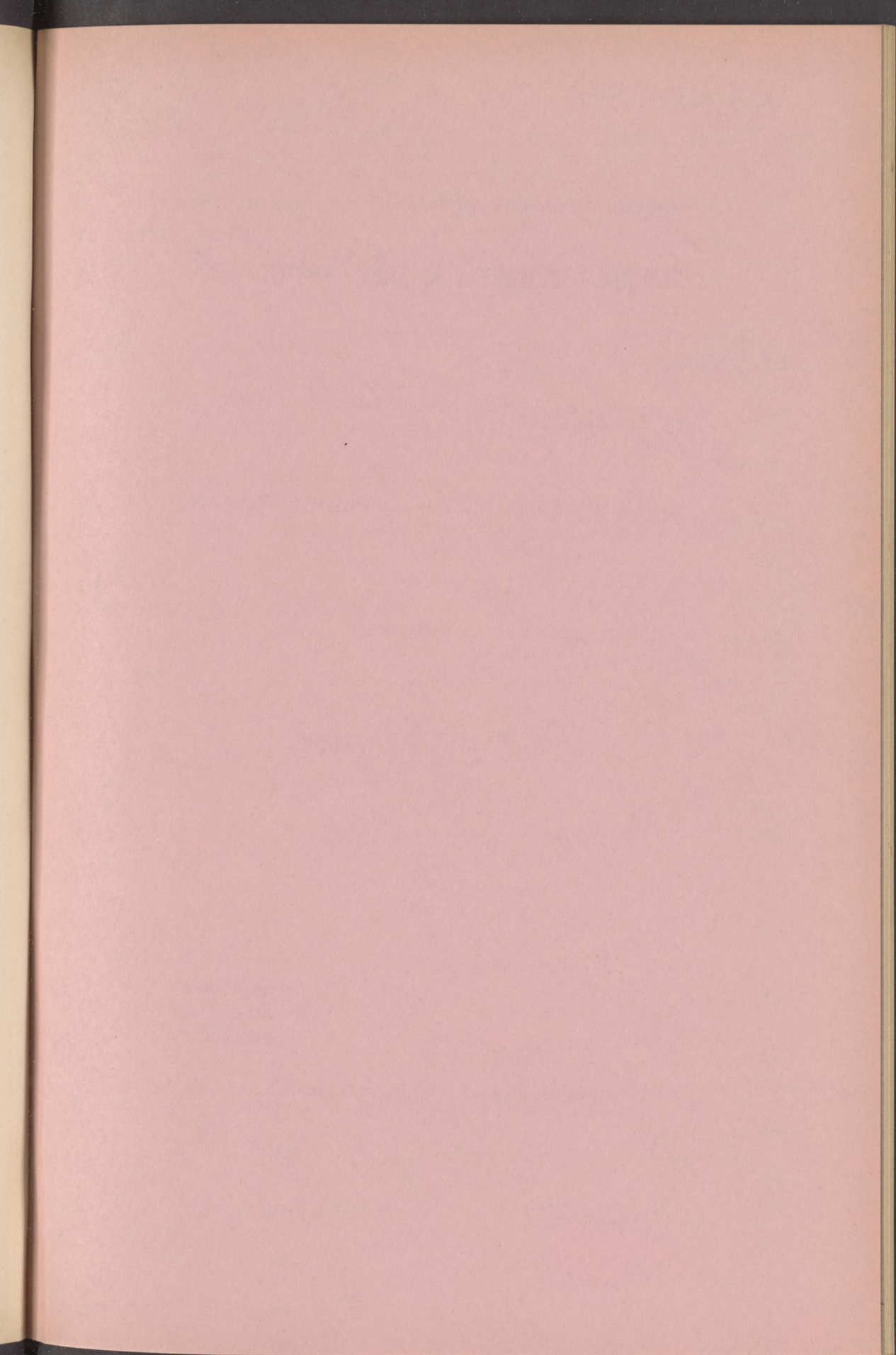
gage was taken with constructive notice of the judgment and who neither alleges nor proves any fraud, has no standing to attack the judgment even if it does not comply with the requirements of the statute.

10. The failure to meet the requirements of the statute does not make the judgment *ipso facto* void. It is voidable and can be attacked only by such persons as have a standing to attack it.

11. The appellant is guilty of laches.

Respectfully submitted,

WADDINGTON & MATHEWS,
Attorneys for and Counsel with
Appellee, Marie Elizabeth Fox.



gave was taken with constructive notice of the judgment and who neither alleges nor proves any fraud, has no standing to attack the judgment even if it does not comply with the requirements of the statute.

10. The failure to meet the requirements of the statute does not mean the judgment *ipso facto* void. It is voidable and can be attacked only by such persons as have a standing to attack it.

11. The appellant is guilty of laches.

Respectfully submitted,

WADDINGTON & MATHEWS,
Attorneys for and Counsel with
Appellee, Marie Elizabeth Fox