

NEW JERSEY

Court of Errors and Appeals.

LEONARD L. F. APPLEBY

ads.

} In Debt.

THE STATE OF NEW JERSEY. }

*Chas. F. Cowen*  
Brief of Mercer Beasley, Jr., Counsel for Leonard  
L. F. Appleby, Plaintiff in Error.

Statement.

In 1867 one J. Elmer Stout was clerk of the county of Middlesex, and gave a joint and several official bond in the penal sum of five thousand dollars. The defendant, Leonard L. F. Appleby, was one of the sureties on that bond.

The declaration, judgment and statement of facts agreed upon as necessary to make intelligible the various exceptions of the defendant, fully disclose the various breaches of the conditions of the bond, on which the 10 suit was brought.

The action was commenced in the Supreme Court, and the venue laid in the county of Hudson.

A jury was waived, and the cause was tried before Justice Knapp.

The trial resulted in the finding of all the issues in favor of the plaintiff, and judgment was rendered for the sum of \$1,864.09, besides costs of suit.

Exceptions have been taken by the defendant to the findings of the various issues, and error assigned thereon. I will take up the said exceptions in the order in which they occur, referring to the facts agreed upon and 10 printed as part of the record, whenever it becomes necessary so to do.

The findings of the several issues are found in *Printed Book*, beginning at the middle of *page 12*.

The first issue found is that the writing obligation<sup>034</sup> is the deed of the defendant.

To that, of course, there is no exception taken, or error assigned.

The finding on the second issue is, that the clerk did not faithfully, &c., execute and perform, &c., the duties 20 of his office.

An exception was taken and has been sealed to this finding, but as this issue is only general in its form, it is sufficient, perhaps, to say that the objections which we shall urge to some of the other findings apply fully to this.

The finding of the third issue is that the said clerk did negligently and carelessly enter in a margin left for that purpose, opposite to the abstract of a certain mortgage made by, &c., dated August 19th, 1858, duly registered, according to law, in a certain book, &c., for registering mortgages, &c., a minute of the redemption, payment and discharge of the said mortgage, although, in 30 fact, the said mortgage was not produced to him cancelled, or with a receipt thereon, signed by the said mortgagee, or her executors, administrators or assigns, in manner and form as the said plaintiff has in his declaration herein, in that behalf alleged.

Now that finding, of course, finds the issue as the breach is laid in the declaration.

By our statute entitled "An act concerning mortgages," sections 23, 24, 25, *Revision, page 707*, the duty of the clerk, as to the cancellation of mortgages, is defined.

He is required and allowed to cancel mortgages on the margin of the books of mortgages as follows:

By the twenty-third section the clerk is required to cancel a mortgage on the margin of the book, upon the production of the mortgage to him, canceled, or a receipt thereon, signed by the mortgagee.

The plaintiff complains that in this case the clerk canceled the mortgage in question, although it was not produced to him canceled, or with a *receipt thereon* signed by the mortgagee.

The pleader was evidently aware that, in setting out the breach, it was necessary for him to show that the clerk did not have the mortgage, canceled, produced before him, or a receipt thereon, &c., because the pleader clearly saw that under those circumstances the clerk was entitled and required to cancel the mortgage on the margin of the book.

But there are other conditions under which it becomes the duty of the clerk to cancel mortgages on the margin of the books of mortgages.

By the twenty-fourth section of the said act, (*Revision, page 707*), where a decree has been made by the chancellor that a mortgage is satisfied, upon the filing of a certified copy of such decree in his office, the clerk shall cancel the said mortgage on the margin of the book opposite the record thereof.

And then again, and more particularly, by the twenty-fifth section of the same act, (*Revision, page 707*), a county clerk is required to cancel a mortgage upon the margin of book whenever there shall be presented to him a certificate signed by the mortgagee, his heirs, &c., specifying that such mortgage has been paid, or otherwise satisfied and discharged.

*Nowhere* in the record does it appear that the said clerk did not cancel the mortgage in question *under the circumstances* allowed by the twenty-fourth or twenty-fifth sections of said act.

Was the pleader right in supposing that he would not show a breach of the bond, without doing as he did, and charging that the mortgage in question was not canceled of record by the said clerk in the manner allowed and prescribed by the twenty-third section of the act con-  
10 cerning mortgages.

If, then, it was necessary that it should be charged in the declaration (as it was charged) that the clerk did not cancel the said mortgage, as permitted by the twenty-third section, then it is clear that it was equally essential to the setting out of a good breach, that the pleader should have treated the twenty-fourth and twenty fifth sections as he did the twenty-third, and have charged in his declaration that the clerk did not cancel the said mortgage of record, in the manner and under the cir-  
20 cumstances permitted by the said two last named sections.

The question then is, is it necessary that the circumstances under which a clerk might cancel a mortgage, be charged not to exist or have happened.

The finding of the fourth issue is, "that the said clerk, while acting as clerk as aforesaid, did *wilfully* enter in a margin, &c., the cancellation," &c.

This finding is not supported or authorized by the evidence in the cause. See Statement of facts, *pdge 16*. On that page it will appear that it was agreed, as a fact in the case, that the act of cancellation complained of was done "accidentally and by mistake." See *line 25* on said *16th page*. And the facts as they are there set out show that there was nothing "*wilful*" about the act. 10 We contend, then, that this finding of the fourth issue is certainly wrong.

The findings of the fifth and sixth issues are simply that said Cook and Bernheimer, the real parties in interest as plaintiffs in this suit, had no knowledge that the mortgage in question, although canceled of record, was not paid, and that they, at the time when they purchased the said lands, believed that the said mortgage had been paid. We make no objection to those findings. Indeed, the facts agreed on show them to be authorized. 20

There are some matters upon which error has been assigned, which go to the very right of the plaintiff to recover substantial damage.

Upon the question of damage—

What damages have been proved? What is the proper measure of damage under the proofs?

The court will bear in mind that this suit is brought against a surety on the official bond of a county clerk.

We contend that all that the surety on such a bond can be called upon to pay is for *actual damage proved*, by 30 the plaintiff, *to have been suffered by him*.

We insist that the plaintiff in this suit has *not* the right against our client, a *mere surety*, to claim damages against us for *the loss of his bargain*; but that all he is entitled to ask of us is such sum as he *proves* he has lost, *actually lost*, by reason of the carelessness of our principal, the county clerk.

This is not a case in which the doctrine of compensation for loss of bargain, is properly applicable.

The court will recollect, or will see, by reading the statement of facts agreed upon and brought up as part of the record, that all that appears is that Messrs. Cook and Bernheimer, the plaintiffs in interest, thought, from their own inspections of the records, that a certain mortgage for a thousand dollars upon the lands by them afterwards purchased, was paid off, as they saw the cancellation of it on the margin of the book of record; 10 whereas, in fact, that mortgage was not paid, but had been canceled by the clerk through mistake.

Under that misapprehension the said plaintiffs attended the sheriff's sale of that property, and became the purchasers thereof at such sale. There were other persons present at the sale; they took their chances with others, outbid them, and became the purchasers.

They then afterwards learn that the thousand dollar mortgage was still a lien upon the premises, and eventually *pay off the same and keep the property.* They choose 20 to adopt this course.

Those are substantially the facts as they appear, and the question is, what is the proper measure of damage under those facts.

The right to profits or value of a bargain can only arise between parties to the contract.

Where one of the parties to a contract (and only then under certain circumstances) does something, or fails to do something, by means of which the other party to such contract either loses the benefit or value of his 30 bargain, or the direct profits naturally arising therefrom, then in such a case, the loser can look, perhaps, to the party with whom he has been dealing, for compensation for such loss.

But in this case we contend that there is no "right to a bargain" in the case. There was no bargain about it. The plaintiffs bought the property under a *misapprehension* as to the amount of encumbrance on it, and that misapprehension arose from a piece of carelessness 40 on the part of the defendant's principal, viz.: the county

clerk. And this suit is against us as surety on the bond of such clerk. Now we are liable, under such circumstances, for any *loss* that happens to a purchaser under the facts detailed; but surely the plaintiffs cannot look to us to make good to them what they may choose to think they *believed to be* "their bargain."

If this be the proper view of the question, as we think it is, then it follows that the plaintiffs did not go far enough in their proofs of damage. They have not enough proof on the subject upon which to base a verdict.

All they did was to prove that after they had bought the property at sheriff's sale they, the plaintiffs, were called upon to pay a certain sum, viz.: the amount of the thousand dollar mortgage and interest, and upon that their damages were assessed at that sum.

Now why should that be done as against us? What we were liable for was for any *loss* that happened to them by reason of act done under the false impression which they received from the mistaken cancellation in the book of record. Suppose the land which they purchased was worth much more than they paid for it, with the amount of this mortgage added. In such case they lose nothing by the wrong cancellation which they saw, but actually made a profit.

There is another view of the case in this connection.

The property was purchased by plaintiffs at sheriff's sale under *feri facias*. They had a mere *belief* that a certain mortgage, which really was then a lien upon the property, had been paid off; under *that belief, so far as the case appears confined to them*, they bid a certain sum for the property, and it was struck off to them. It then turns out that they have to pay a mortgage which, by the fault of defendant's principal, they thought had before been paid. What was their damage?

They cannot be paid a damage for their mere *mistaken belief*, nor can they recover from us for their *disappointment*. The question is, what did the carelessness of our principal *eventually cost* them. At the public sale, unless the other bidders were under the same false impression as

the plaintiffs with regard to the improper cancellation of that mortgage, the plaintiffs suffered no loss at all. They got the property just that much cheaper than they would have got it; that is, if the other bidders thought as they did, that the mortgage was not a lien upon the premises, they, the other bidders, would have bid just that much more than they did bid.

If the other bidders, for example, bid, say four thousand dollars, under the belief that there was a thousand  
10 dollar mortgage, an outstanding lien upon the premises, it is fair to presume that they would have bid five thousand dollars for that same property, if they knew that the thousand dollar mortgage was paid off.

That is just the way in which this case stands. The plaintiffs should *show* the *actual loss* they have suffered, when they bring suit against a surety on a bond. They should show that the property *was sold* at that sheriff's sale *as clear of* that thousand dollar mortgage; that the other bidders present bid and were under that impres-  
20 sion. That is the way to show a right to recover as loss against a surety. What they have shown is a mere *disappointment*, and that they did not get as good a bargain as they *thought* they were getting.

And then again—

The judgment in this case has been entered for the damage supposed to have been proved. It should have been entered for the penalty.

The suit was on a bond in the penalty of five thousand dollars.

30 Judgment should have been for that sum.

There can be but one suit on a bond.

That being so, and this judgment being entered up for about eighteen hundred dollars, what remedy would remain to anyone having another cause of action on this same bond over and above the eighteen hundred dollars, and within the limit of the five thousand?

The judgment should be entered for the penalty, and stand as security for future breaches. See *Roll v. Max-*

well, 2 South., 493; *Webb v. Fish*, 1 South., 371; 4 Dutch., 488.

Clerks are only authorized to cancel mortgages in the manner and under the circumstances enumerated in the twenty-third, twenty-fourth and twenty-fifth sections of the act entitled "An act concerning mortgages," and when, as in this case, the clerk, acting outside of his *line of duty*, canceled a mortgage, he did it merely by *color* of his office, and not by *virtue* of it.

Where a sheriff, having a writ commanding him to 10 sell the goods of one person, levied upon and sold the goods of another, it was held in that case that he was acting by mere color of his office, and not by virtue of it, and that a suit for such act would not lie against the bondsmen on his official bond. *State v. Conover*, 4 Dutch., 224.

Respectfully submitted,

CHAS. T. COWENHOVEN,  
MERCER BEASLEY, JR.

<sup>2</sup>  
Recorder of deeds is liable for a  
false certificate of search only to the  
person who employs him and not  
to other persons who may have relied  
on the certificate

*Commonwealth v. Harmer*  
6 Phil. & Rep. p. 90

That there is no duty in absence of  
special employment

*Kahl vs Love* 80 p. 5

*Crosby vs Vliet - Dixon J. Papine Circuit*  
N. J. Law Journal 1880 p. 57-

*Natfarms Bank vs Stard* 100 N. J. 195  
and case cited in opinion

*Hammeman vs B. Lagon* 81 Penn 256  
The Bond is not responsible for acts  
done by color of office

demanded record and certificate from the clerk and then the clerk would have been responsible to him for any damages sustained by errors in search -

If the Clerk fails or omits to do certain acts he is liable for the penalty -

The Clerk is simply responsible for the safe keeping of the Records. *Simmons v McCarty*

The Clerk has no exclusive right to search the records - *10. D. v. p 287-*

If recording a paper he does so by mistake he is responsible only to the person requiring him to make the record -

If an entry is made by mistake the Clerk is responsible to the party who employed him to make entry -

The Cancellation of a mortgage on the record is only Prima facie

evidence of its discharge not conclusive

1 - *Green Chancery p 118*

As to the fact of payment Enquiry should be made - *S. C. E. Green - p 394*

Respectfully Submitted

Mercer Beasley  
Charles Sorenson

Tested was signed and judgment entered in his case before the exceptions were taken as it had been understood between Counsel

the case was to be reviewed upon exceptions - upon application to Judge Knapp

exceptions were signed in

# New Jersey Court of Errors and Appeals.

APPLEBY,  
VS.  
STATE OF NEW JERSEY.

In Debt.  
On Writ of Error  
to Supreme Court.

## Brief for Defendant in Error.

The facts in this case are noted on pages 18, 19, 20, 21 and 22 of the printed case, to which I beg to refer, as fully stating the reason of this suit.

I confine myself to answering the points made by the plaintiff in error in the argument of his counsel.

A. Upon examining the defendant's brief I find that his first objection is that the declaration does not allege that the Court of Chancery had *not* decreed that the mortgage was satisfied, and does not allege that a satisfaction piece was *not* presented to the clerk signed by the mortgagee, his heirs, &c., and thus negative the methods of cancellation, pointed out in 24th and 25th sections page 707 of the Revision..

1st. The 24th section was originally enacted in 1866 (P. L. 1866, p. 879), and provides that when it is decreed by the Court of Chancery that a mortgage is satisfied, upon filing a certified copy of the decree, &c., the clerk shall enter on the margin of the record of the mortgage "*that the same was cancelled by decree in Chancery filed in his office, entering the date of such decree and filing.*"

This was not the entry alleged in the declaration to have been made by the clerk. His entry was "*a minute of the redemption payment and discharge*" of the mortgage, which entry was authorized only under the circumstances of section 23, page 707, of Revision.

If a decree had been filed in the office of the clerk under section 24, the entry would have stated that the mortgage was cancelled by the decree and would give the date of the decree and of its filing, and it would not go further than this.

But there is no assignment of error to cover this point so far as this 24th section is concerned. No notice will be taken of errors not founded upon precise exceptions taken.

Perth Amboy Manuf. Co. vs. Condit, 1 Zabriskie 660.

Coxe vs. Field, 1 Green 216.

Williams vs. Sheppard, 1 Green 76.

The 25th section was originally enacted in 1869 (P. L. 1869, p. 1361) and was not law at the time the entry upon the margin of the record was made by the clerk.

The declaration and statement of facts both show that the entry was made on May 7, 1868. (Printed case, pages 5 and 19.)

2d. It is now too late to make this objection to the declaration. The defendant has not demurred but has pleaded to the declaration, and has gone to trial and judgment without objection on this ground.

Powell on Appellate Proceedings, sections 114, 117 and 127. Section 117, "Fair and honest dealings require that the objection should be made at an early period and in due time to avoid the evil of delay, or the objection is considered to be waived. Therefore formal objections to the pleadings or the process and the like must be made in season and before pleading or it will be too late."

D., L. & W. R. R. Co. vs. Dailey, 8 Vroom 525.

3d. From the declaration it sufficiently appears that the mortgage was existing, unpaid and unsatisfied, at the time of the cancellation of the record and unaffected by any of the circumstances contemplated in the sections 24 and 25, Revision, page 707, referred to by counsel.

B. The second point in defendant's brief is that the finding that the clerk acted *wilfully* in entering the minute of redemption is not justified by the facts.

The 3d section of the statement of facts sets forth what was done by the clerk. If the facts there recited do not show that the clerk's act was wilful, they certainly support the finding that he acted in a negligent manner. It is not claimed by the defendant that the clerk's negligent and careless acting in this matter will not support the judgment.

No assignment of error covers this point made by counsel in his brief.

If this is error it is not one which injuriously affects the rights of the defendant upon a review of the whole record.

Powell Appellate Proceedings, sec. 112.

C. The next objection urged by counsel is that the damages awarded in this case are compensation for loss of a bargain, and not compensation for actual loss occasioned by the negligence of the clerk.

There is no exception to support this objection.

(See cases cited above in support of this.)

In point of fact by the statement of facts, it appears that Cook & Bernheimer before the purchase, examined the registry of the mortgage and finding the clerk's minute of redemption of payment and discharge, and therefore believing the mortgage to be paid, and rely-

ing upon the correctness of such entry, they paid for the lands their full value, and subsequently were compelled by decree of the Court of Chancery to pay \$1531.59 to satisfy the mortgage. This \$1531.59 was above the actual value of the land, and was the actual loss occasioned by the clerk's negligence.

D. The next objection is that the judgment was not entered for the penalty.

I do not understand from the record that this appears to be the case; if it so appears it is a mistake in copying the record or in the return to the writ herein, which the Court will allow to be amended. Even if judgment has been entered in the manner claimed for damages and not for the penalty, this Court will not reverse the judgment below on that account, but will allow amendment.

Hunt vs. Allen, 2 Zabriskie 533, the Court says upon considering an objection of this kind, "But admitting such entry to be erroneous, the Court is reluctant to reverse for such clerical error. The Court will suspend judgment in this case until an amendment can be made by the Court below."

To the same effect see Webb vs. Fish, 1 Southard 371.

The assignment of error in this respect is printed with the assignments of error in the case, but does not appear among the assignments of error on file and joined in by the plaintiff, and this Court has not allowed the amendment of the assignment of errors by its addition. If motion is made to amend by adding this assignment, we respectfully ask to be allowed to allege diminution of the record and have a writ of certiorari, that the record may be corrected according to the truth.

(NOTE.—Since preparing the above, the plaintiff in error has signified that he will withdraw this objection to the record.)

E. The next objection made by the defendant is, that the bondsman is not responsible for acts done by *color* of office, but only for those done by *virtue* of office, and that this cancellation was by *color* only of the office. And he cites in support of his position *State vs. Conover*, 4 Dutch. 224, where it is held that in case a sheriff commanded by the writ to levy on and sell the goods of A, levies on and sells the goods of B, he acts merely by *color* of his office in levying on the goods of B.

Our case differs from this. The clerk's bond is conditioned that "he will well and truly, faithfully and "impartially execute and perform," &c., "according to law *as well with respect to all persons concerned as the State of New Jersey*," &c.

The clerk, (Revision, page 707, *sec.* 17,) is required to provide books for registering mortgages, "to which "books every person shall have access and may search "the same," &c.

In *Lum vs. McCarty*, 10 Vroom, 289, the Court says "they are in fact public records and are public property, kept ~~as~~ a public place at the public expense, "for the public benefit."

In the same case the Court holds that the clerk is responsible for the safe keeping of the records, and because of that responsibility may regulate the manner in which they may be examined by the public.

The records are made by the clerk in ways pointed out by the law, and he cannot in any way change, add to or take away from them except according to law. If he makes an entry in these records otherwise than in a manner designated in the law, either wilfully or negligently, he fails to "well and truly," execute the duties of his office, and is responsible to those to whom the duty is due, that is in the words of the bond "as well to those concerned," (meaning those injured by the failure to do his duty, or by his negligent and careless performance of it) "as to the State of New Jersey."

The entire real estate interests of New Jersey depend upon the care exercised in the proper preservation of the records, so that the public may examine them and rely upon their correctness, otherwise of what use are they.

The greatest mischief will be done if negligent false entries made by the clerk can be called by his bondsmen acts done merely by color of his office.

By virtue of his office, by the *authority derived from that office*, he alone could certify on the margin of the record that a mortgage was paid and satisfied. If he falsely so certifies under the style and name of his office, does he not do it by virtue thereof?

Color of office implies an illegal claim of authority by virtue of the office to do the act or thing in question, and imports a design to do an act in excess of authority.

Burwall vs. Acker, 23 Wendell 606.

Winter vs. Kinney, 1 New York 365.

Kelly vs. McCormack, 28 New York 318.

There was no design upon the part of the clerk to act in excess of his authority in the cancellation of this mortgage. He undertook to cancel a record he had a lawful right to cancel, but through gross carelessness he cancelled the wrong record.

It was a gross blunder made while acting by virtue of his office.

F. Counsel urges there is no duty to Cook and Bernheimer in the absence of special employment.

This case is not parallel to any of the cases he cites.

There was a special employment of this clerk to preserve these records according to law free from false entries wilfully or negligently made by him, so that the public could search them and rely upon their correctness. Indeed this was the most important duty he had to discharge in and about his employment in this public office.

If the clerk fails to properly record a mortgage brought to him by A to be recorded, for which A pays, he must be held responsible by A—such is the doctrine laid down in cases cited by counsel. But this is not our case; our case is one where he fails to properly preserve a record originally correctly made.

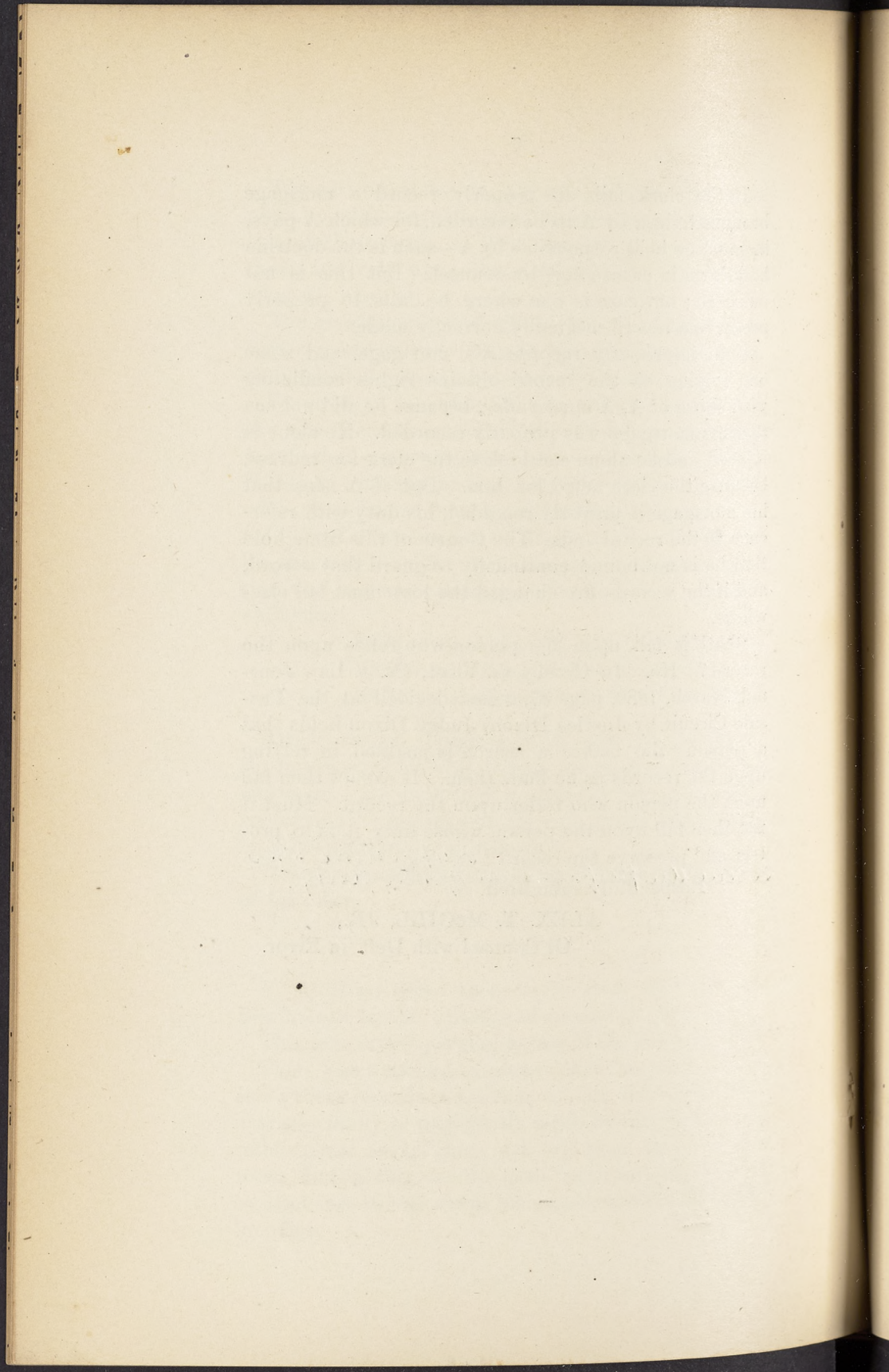
If he improperly records A's mortgage, and some one relying on the record obtains rights conflicting with those of A, A must suffer, because he did not see that his mortgage was properly recorded. He alone is injured and he alone can look to the clerk for redress, because the clerk acted for him. But if A sees that his mortgage is properly recorded, his duty with reference to the record ends. The Courts of this State hold that he is not bound continually to guard that record, and if the records are changed the loss must fall elsewhere.

Shall it fall upon the person who relies upon the record? No. In Crosby vs. Vleet, (N. J. Law Journal, March, 1880, page 87, a case decided at the Passaic Circuit by Justice Dixon) Judge Dixon holds that a person who makes a search is justified in relying upon the records as he finds them. It cannot then fall upon the person who relies upon the record. Must it not then fall upon the person whose duty it is to protect and preserve the record? *or upon those who receive the performance of that duty?*

Respectfully submitted,

ALEX. T. MCGILL, JR.,

Of Counsel with Deft. in Error.



# Court of Errors & Appeals. 1

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THE STATE OF NEW JERSEY

*vs.*

LEONARD L. F. APPLEBY.

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*In Debt.*

## **Writ of Error.**

[Filed February 27, 1882.] 2

STATE OF NEW JERSEY, *ss.*:

The State of New Jersey to Manning M.  
Knapp, Esquire, Judge of our Circuit

[*l. s.*] Court, at Jersey City, in and for the  
County of Hudson, greeting :

Because in the record and proceedings and also  
in the giving of judgment in a plaint which was in 3  
a New Jersey Supreme Court, holden at Jersey  
City, in and for the County of Hudson, between the  
State of New Jersey, plaintiff, and Leonard L. F.  
Appleby, defendant, in a plea of debt, manifest  
error hath intervened, to the great damage of the  
said Leonard L. F. Appleby, as by his complaint

2 COURT OF ERRORS AND APPEALS.

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we are informed, we being willing that speedy justice should be done to the parties aforesaid, in this behalf do command you distinctly and openly to send under your seal the record and proceedings aforesaid, with all things touching and concerning the same, to our New Jersey Court of Errors and Appeals, on the first Tuesday of March next, together with this writ that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right and according to the law ought to be done.

Witness his Honor, Theodore Runyon, at Trenton aforesaid, the twenty-sixth day of February, A. D. eighteen hundred and eighty-two.

HENRY C. KELSEY,  
*Clerk.*

5 C. T. COWENHOVEN,  
*Attorney.*

It is ordered that the writ of error issued in this case be allowed, and the plaintiff in error having entered into recognizance, agreeably to the statute in such cases made and provided, that further proceedings be stayed on the judgment in the original action until the said writ of error now depending between the parties be determined.

6 The answer of the Justices of the Supreme Court of New Jersey within named: The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals in a certain schedule to this writ annexed, as within we are commanded.

**Copy of Judgment.**

As yet of the twentieth day of September, A. D. eighteen hundred and seventy-seven. Witness Mercer Beasley, Esq., Chief Justice.

BENJ. F. LEE,  
*Clerk.*

7

HUDSON COUNTY, *ss.*:

Leonard L. F. Appleby, the defendant in this suit, was summoned to answer unto the State of New Jersey, the plaintiff therein, of a plea that he render unto said plaintiff the sum of five thousand dollars, which to it he owes and from it unjustly detains; and thereupon the said plaintiff, by Alexander T. McGill, Jr., its attorney, complains: For that whereas, the said defendant, heretofore, to wit, on the twelfth day of November, A. D. eighteen hundred and sixty-seven, at the City of Jersey City, in the County of Hudson aforesaid, by his certain bond or writing obligatory, sealed with the seal of the said defendant, and now shown to the Court here (a true copy of which said bond or writing obligatory is hereunto annexed), the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid did acknowledge himself to be held and firmly bound unto the plaintiff in the sum of five thousand dollars, above demanded, to be paid unto the said plaintiff by the said defendant, or his heirs, executors and administrators, which said bond or writing obligatory was and is subject to a certain condition thereunder written, to wit, that if J. Elmer Stout, therein named, should well and truly execute the office of Clerk of the Court of Common Pleas and General Quarter Sessions for the said County of Middlesex,

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and in all things touching and concerning said office should well and truly, faithfully and impartially execute and perform the same, according to law, as well with respect to all persons concerned as the State of New Jersey, and at the expiration of his said office should deliver to his successor in office all the books, papers, records and writings remaining  
10 in the same, or appertaining thereto, then that the said bond or writing obligatory should be void, otherwise it should remain in full force and virtue, as by the aforesaid bond or writing obligatory, and by the condition thereof, will more fully and at large appear.

Yet the said plaintiff in fact saith that the said J. Elmer Stout hath not well and truly executed the office of Clerk of the Court of Common Pleas and General Quarter Sessions for the said County of Middlesex, and has not in all things touching and concerning said office, well and truly, faithfully  
11 and impartially executed and performed the same according to law, as well with respect to all persons concerned as the State of New Jersey.

And the said plaintiff, for assigning a further breach of the said condition of said bond or writing obligatory, according to the form of the Statute in such case made and provided, further avers and says that after the making of the said bond or writing obligatory by the said defendant, to wit, on the seventh day of May, A. D. eighteen hundred and sixty-eight, and after the said J. Elmer Stout had entered upon his duties as such clerk as aforesaid,  
12 and while he continued to be such clerk, said J. Elmer Stout did negligently and carelessly enter, in a margin left for that purpose, opposite to the abstract of a certain mortgage made by one John Manning to Mary V. Laughton, bearing date on the nineteenth day of August, A. D. eighteen hundred and fifty-eight, duly registered, according to law,

in a certain book theretofore provided by the Clerk of the Court of Common Pleas of Middlesex County aforesaid, for registering mortgages and defeasible deeds in the nature of mortgages of lands, tenements, and hereditaments lying and being within said County of Middlesex, a minute of the redemption, payment and discharge of said mortgage, although in fact the said mortgage was not produced to him, cancelled, or with a receipt thereon signed by the mortgagee, or her executors, administrators or assigns. 13

And the said plaintiff for assigning a further breach of the said condition of said bond or writing obligatory according to the form of the statute in such case made and provided, further avers and says that after the making of said bond or writing obligatory by the said defendant, to wit. on the seventh day of May, A. D. eighteen hundred and sixty-eight, and after the said J. Elmer Stout had entered upon his duties as such clerk as aforesaid, 14 and while he continued to be such clerk, said J. Elmer Stout did willfully enter in a margin left for that purpose, opposite to the abstract of a certain mortgage made by one John Manning to Mary V. Loughton, bearing date on the nineteenth day of August, A. D. eighteen hundred and fifty-eight, duly registered according to law, in a certain book theretofore provided by the clerk of the Court of Common Pleas of Middlesex County aforesaid, for registering mortgages and defeasible deeds in the nature of mortgages of lands, tenements and hereditaments lying and being within said County of Middlesex, a minute of the redemption, payment and discharge of said mortgage, although, in fact, the said mortgage was not produced to him cancelled or with a receipt thereon signed by the mortgagee or her executors, administrators or assigns. 15

## 6 COURT OF ERRORS AND APPEALS.

And the said plaintiff further avers that afterwards, to wit, on or about the second day of September, A. D. eighteen hundred and seventy-five, Martin Lupardus, sheriff of said County of Middlesex, by virtue of a writ of *feri facias* theretofore duly issued out of the Court of Chancery of New Jersey, upon a decree in a cause therein pending, wherein one Buchanan was the complainant and John Manning and others were the defendants, having first advertised the sale according to law in such case provided, offered the lands described in said mortgage and other land for sale at public vendue, and Martin R. Cook and Jacques A. Bernheimer, who had before then examined the registry of said mortgage and found the minute of said redemption, payment and discharge, and relied upon said minute of said redemption, payment and discharge, and therefrom believed that said mortgage was in fact paid, satisfied and cancelled, and not knowing that said mortgage was not paid, satisfied and discharged, did bid for and purchase said mortgaged lands at their full value, and did pay said sheriff in full therefor the amount of their bid the purchase money thereof.

And the said plaintiff further avers that afterwards, to wit, on the seventh day of March, A. D. eighteen hundred and seventy-six, while said Martin R. Cook and Jacques A. Bernheimer were yet the owners of said land purchased by them as aforesaid, Lydia C. Harris, Sarah E. Bloodgood and Amanda Bloodgood, to whom the said mortgage had before then been duly assigned, with Thompson S. Harris, the husband of Lydia C. Harris, filed their bill against said Martin R. Cook and Jacques A. Bernheimer in the Court of Chancery of New Jersey, for the purpose of having the said cancellation of the registry of said mortgage declared null and void, and for the foreclosure of the said

mortgage and sale of the mortgaged premises; and such proceedings were thereupon had that in the month of June, A. D. eighteen hundred and seventy-seven, by the final decree of said Court of Chancery it was decreed that said cancellation and discharge of said registry was null and void, and a writ of *fiero facias* issue out of said Court to the Sheriff of the County of Middlesex, commanding him to sell 19 said mortgaged premises according to law, and from the money arising from such sale to pay the complainants their mortgage debt, interest and costs; and that to prevent the sale of said lands, under said decree, the said Martin R. Cook and Jacques A. Bernheimer did afterwards, to wit, on the second day of July, A. D. eighteen hundred and seventy-seven, pay to the said Lydia C. Harris, Sarah E. Bloodgood, Amanda Bloodgood and Thompson S. Harris, the amount of their mortgage debt, interest and the costs of said last-mentioned suit, to wit, the sum of one thousand five hundred and thirty one 20 dollars and fifty-nine cents.

By reason of the premises the said bond or writing obligatory hath become forfeited, and an action hath by the said breach thereof accrued to the said plaintiff to demand and have from the said defendant the aforesaid sum of five thousand dollars above demanded; yet the said defendant, although often requested so to do, has not as yet paid the said sum of money so the said plaintiff, or any part or parcel thereof, but to pay the same or any part thereof 21 has hitherto wholly neglected and refused, and still does neglect and refuse, to wit, at the city of Jersey City, in the County of Hudson aforesaid, to the damage of the said plaintiff of five thousand dollars; and therefore the said plaintiff brings suit, &c.

The following is a copy of the writing obligatory and condition upon which the foregoing declaration is founded, and to which reference is therein made:

22 “ Know all men by these presents, that we, J. Elmer Stout, Amos Robbins, Leonard F. Appleby, P. Vanderbelt Spader, Miles Ross, John Henry Campbell, all of the county of Middlesex, are held and firmly bound unto the State of New Jersey, in the sum of five thousand dollars to be paid unto the State of New Jersey, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

“ Sealed with our seals. Dated the twelfth day of November, in the year of our Lord one thousand eight hundred and sixty-seven.

23 “ The condition of this obligation is such, that if the above-bounden J. Elmer Stout shall well and truly execute the office of clerk of the Court of Common Pleas and General Quarter Sessions for the county of Middlesex, and in all things touching and concerning said office, shall well and truly faithfully and impartially, execute and perform the same, according to law, as well with respect to all persons concerned as the State of New Jersey, and at the expiration of his said office, shall deliver to his successor in office all the books, papers, records and writings remaining in the same, or appertaining thereto, then this obligation to be void, otherwise to remain in full force and virtue.

24 “ J. ELMER STOUT. [L. s.]  
 “ AMOS ROBBINS. [L. s.]  
 “ LEONARD L. F. APPLEBY. [L. s.]  
 “ P. VANDERBELT SPADER. [L. s.]  
 “ MILES ROSS. [L. s.]  
 “ JOHN H. CAMPBELL. [L. s.]

And the said defendant, by Charles T. Cowenhoven, his attorney, comes and defends the wrong

and injury, when, &c., and says that the said supposed writing obligation is not his deed; and of this he puts himself upon the country, &c.

And for a further plea in this behalf, the said defendant, by leave of the Court here for this purpose first had and obtained, according to the form of the statute, &c., says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against him, the said defendant, because he says that the said J. Elmer Stout hath well and truly executed the office of clerk of the Court of Common Pleas and General Quarter Sessions for the said county of Middlesex, and has in all things touching and concerning said office well and truly, faithfully and impartially, executed and performed the same, according to law, as well with respect to all persons concerned as the State of New Jersey; and of this the said defendant puts himself upon the country. 25

And for a further plea in this behalf, the said defendant by like leave, &c., says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against him, because he says that the said J. Elmer Stout did not, while clerk as aforesaid, negligently and carelessly enter in a margin left for that purpose, opposite to the abstract of a certain mortgage made by one John Manning to Mary V. Laughton, bearing date on the nineteenth day of August, anno domini eighteen hundred and fifty-eight, duly registered according to law, in a certain book theretofore provided by the clerk of the Court of Common Pleas of the county of Middlesex aforesaid, for registering mortgages and defeasible deeds in the nature of mortgages of lands, tenements and hereditaments, lying and being within said county of Middlesex, a minute of the redemption, payment and discharge of 26 27

the said mortgage, although in fact the said mortgage was not produced to him canceled, or with a receipt thereon signed by the said mortgagee or her executors, administrators or assigns, in manner and form as the said plaintiffs have in their said declaration above thereof in that behalf, alleged ; and of this the said defendant puts himself upon the  
28 country.

And for a further plea in this behalf the said defendant, by like leave, &c., says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against him, because he says that the said J. Elmer Stout did not, while acting as clerk as aforesaid, willfully enter in a margin left for that purpose opposite to the abstract of a certain mortgage made by one John Manning to Mary V. Loughton, bearing date on the nineteenth day of August, A. D. eighteen hundred and fifty-eight, duly registered according to law, in a certain  
29 book theretofore provided by the clerk of the Court of Common Pleas of Middlesex county aforesaid, for registering mortgages and defeasible deeds, in the nature of mortgages of lands, tenements, and hereditaments lying and being within said county of Middlesex, a minute of the redemption, payment and discharge of said mortgage, although in fact the said mortgage was not produced to him canceled or with a receipt thereon signed by the mortgagee or her executors, administrators or assigns, in manner and form as the said plaintiffs have in their  
30 said declaration above thereof in that behalf alleged ; and of this the said defendant puts himself upon the country.

And for a further plea in this behalf, the said defendant, by like leave, &c., says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against him, because he says

that the said Martin A. Cook and Jacques A. Bernheimer, in the purchase of the said lands in the said declaration mentioned, and in the mode and manner in the said declaration mentioned, and at and before the time of the said purchase, had full knowledge and notice of the existence of the said mortgage made by the said John Manning to the said Mary V. Laughton then being and subsisting as a lien on the said lands, and this the said defendant is ready to verify ; wherefore, he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against him, &c. 31

And for a further plea in this behalf the said defendant, by like leave, &c., says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against him, because he says that the said Martin A. Cook and Jacques A. Bernheimer, prior to or at the time of the said purchase by them, the said Martin A. Cook and Jacques A. Bernheimer of the said lands in the said declaration mentioned, were bound to use due, reasonable and proper diligence in the examination and inquiry touching mortgages affecting the same, and that the said Martin A. Cook and Jacques A. Bernheimer in the purchase of the said lands in the said declaration mentioned, and in the mode and manner in the said declaration mentioned, did not use due, reasonable and proper diligence in the examination and inquiry touching mortgages affecting the said lands prior to or at the time of the said purchase thereof by them, the said Martin A. Cook and Jacques A. Bernheimer, but that, on the contrary thereof, the said Martin A. Cook and Jacques A. Bernheimer were grossly negligent in the premises, and this the said defendant is ready to verify ; wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against him, &c. 32 33

And the said plaintiff, as to the first, second, third and fourth pleas of the said defendant by him firstly, secondly, thirdly and fourthly above pleaded, and whereof he hath put himself upon the country, doth the like.

And the said plaintiff, as to the said plea of the said defendant, by him fifthly above pleaded, saith  
34 that the said plaintiff by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining its aforesaid action thereof against the said defendant, because it saith that the said Martin A. Cook and Jacques A. Bernheimer, in the purchase of said lands in the said declaration mentioned, and in the mode and manner in said declaration mentioned, and at and before the time of the said purchase, did not have full knowledge and notice or any knowledge or notice of the existence of the said mortgage made by  
35 John Manning to the said Mary V. Laughton then being and subsisting as a lien on said lands ; and of this it puts itself upon the country.

And the said plaintiff as to the said plea of the said defendant by him sixthly above pleaded, saith that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining its aforesaid action thereof against the said defendant, because it saith that the said Martin A. Cook and Jacques A. Bernheimer, prior to and at the time of the said purchase by them, the said Martin A. Cook and Jacques A. Bernheimer, of the said lands in  
36 the said declaration mentioned, did use reasonable and proper diligence in the examination and inquiry touching mortgages affecting the said lands prior to and at the time of the said purchase thereof by them, the said Martin R. Cook and Jacques A. Bernheimer, and that the said Martin R. Cook and

Jacques A. Bernheimer were not grossly negligent in the premises ; and of this it puts itself upon the country.

Therefore, let a jury thereupon come before the Chief Justice, or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Jersey City; in and for the County of Hudson, on the first Tuesday of December, in the year of our Lord one thousand eight hundred and eighty, by whom, &c., and the same day is given to the parties aforesaid there, &c. 37

And now at this day, to wit : the sixteenth day of February, A. D. eighteen hundred and eighty-one, before our said Supreme Court, at Trenton, comes the said plaintiff, by its attorney aforesaid, and the Justice before whom, &c., having sent hither his record had before him in these words, to wit :

Afterwards, to wit, on the seventh day of December, in the year of our Lord one thousand eight hundred and eighty, at a Circuit Court holden at the Court House, in the City of Jersey City, in and for the County of Hudson, before the Hon. Manning M. Knapp, one of the Justices of the Supreme Court of the State of New Jersey, according to the form of the statute in such case made and provided, comes as well the said within named plaintiffs; as the said defendants, by their respective attorneys within mentioned, and the attorneys aforesaid having agreed to waive trial by jury, and having submitted the determination of the issues to the determination of the said Circuit Court, without jury, and the said Circuit Court did find and say as to the first issue within joined, that the within mentioned writing obligatory is the deed of the said defendant, as the said plaintiff hath within in that behalf alleged ; 38 39

14 COURT OF ERRORS AND APPEALS.

as to the second issue within joined, did find and say that J. Elmer Stout hath not well and truly executed the office of Clerk of the Court of Common Pleas and General Quarter Sessions for the said County of Middlesex, and hath not, in all things touching and concerning said office well, truly, faithfully and impartially executed and performed the same, according to law, as well with respect to all persons concerned as the State of New Jersey.

To which finding of this issue the said defendants except, because such finding is not authorized by the statement of facts hereto annexed and made a part of the record in this case, which exception is hereby allowed and sealed accordingly.

M. M. KNAPP,

[L. S.]

J. S. C.

And as to the third issue within joined, did find and say that the said J. Elmer Stout did, while clerk as aforesaid, negligently and carelessly enter in a margin left for that purpose, opposite to the abstract of a certain mortgage made by one John Manning to Mary V. Laughton, having date on the nineteenth day of August, A. D. eighteen hundred and fifty-eight, duly registered according to law in a certain book theretofore provided by the Clerk of the Court of Common Pleas of the County of Middlesex aforesaid, for registering mortgages and defeasable deeds in the nature of mortgages of lands, tenements and hereditaments, lying and being in the said County of Middlesex, a minute of the redemption, payment and discharge of the said mortgage, although in fact the said mortgage was not produced to him cancelled, or with a receipt thereon signed by the said mortgagee, or her executors, administrators, or assigns, in manner and form as the

said plaintiff has in its declaration herein in that behalf alleged.

To which finding of this issue the said defendants except, because such finding is not authorized by the statement of facts hereto annexed and made a part of the record in this case, which exception is hereby allowed and sealed accordingly.

M. M. KNAPP. 43

[L. s.]

J. S. C.

And as to the fourth issue within joined, did find and say that the said J. Elmer Stout did, while acting as clerk as aforesaid, *wilfully enter* in a margin left for that purpose, opposite to the abstract of a certain mortgage made by one John Manning to Mary V. Laughton, bearing date on the nineteenth day of August, A. D. eighteen hundred and fifty-eight, duly registered according to law, in a certain book theretofore provided by the Clerk of the Court of Common Pleas of Middlesex County aforesaid, for registering mortgages and defeasible deeds in the nature of mortgages of lands, tenements and hereditaments, lying and being within said County of Middlesex, a minute of the redemption, payment and discharge of said mortgage, although in fact the said mortgage was not produced to him cancelled or with a receipt thereon signed by the mortgagee or her executors, administrators or assigns, in manner and form as the said plaintiff has in its said declaration herein in that behalf alleged. 44

To which finding of this issue the said defendants except, because such finding is not authorized by the statement of facts hereto annexed and made a part of the record in this case, and also because said finding finds that the defendant wilfully did the act complained of, which exception is hereby allowed and sealed accordingly. 45

M. M. KNAPP,

[L. s.]

J. S. C.

And as to the fifth issue within joined, did find and say that the said Martin R. Cook and Jacques A. Bernheimer, in the purchase of the said lands in the said declaration mentioned, and in the mode and manner in the said declaration mentioned, and at and before the time of the said purchase, did not have full knowledge and notice, or any knowl-  
 46 edge or notice of the existence of the said mortgage made by John Manning to the said Mary V. Laughton, then being and subsisting as a lien on said lands.

To which finding of this issue the said defendants except, because such finding is not authorized by the statement of facts hereto annexed and made a part of the record in this case, which exception is hereby allowed and sealed accordingly.

M. M. KNAPP,

*J. S. C.*

[L. S.]

And as to the sixth issue within joined, did find and say that the said Martin R. Cook and Jacques A. Bernheimer, prior to the time of the said purchase by them, the said Martin R. Cook and Jacques A. Bernheimer, of the said lands in the said declaration mentioned, did use reasonable and proper diligence in the examination and inquiry touching mortgages affecting the said land prior to and at the time of the said purchase thereof by them, the said Martin R. Cook and Jacques A. Bernheimer, and that the said Martin R. Cook and Jacques A. Bernheimer were not grossly negligent in the prem-  
 48 ises.

To which finding of this issue the said defendants except, because such finding is not authorized by the statement of facts hereto annexed and made a part of the record, which exception is hereby allowed and sealed accordingly.

M. M. KNAPP,

*J. S. C.*

[L. S.]

And it assures the damages of the said plaintiff, on the occasion of the detaining the within debt, over and above its costs and charges by it about its suit in that behalf expended, to one thousand eight hundred and sixty-four dollars and nine cents (\$1,864.09), and for those costs and charges to six cents.

Therefore it is considered that the said plaintiff 49  
do recover against the said defendant the said dam-  
ages by the Court aforesaid, in form aforesaid  
found, to one thousand eight hundred and sixty-  
four dollars and nine cents, by reason of the breach  
of the condition of the bond or written obligations  
in the plaintiff's declaration mentioned, given in the  
penal sum of five thousand dollars debt, and also  
fifty-three dollars and twenty-three cents for its costs  
and charges aforesaid, by the court now here ad-  
judged to the said plaintiff and with its assent,  
which said damages, costs and charges, in the  
whole, amount to one thousand nine hundred and 50  
seventeen dollars and thirty-two cents.

Judgment signed this sixteenth day of February,  
A. D. eighteen hundred and eighty-one.

M. BEASLEY,  
*Chief Justice.*

I, Benjamin F. Lee, clerk of the Supreme Court  
of the State of New Jersey, do certify that the fore-  
going is a true copy of the judgment in above-stated  
cause as the same remains of record in my office. 51

In testimony whereof, I have hereto set my hand  
and seal of said Court, at Trenton, this  
[L.S.] first day of March, A. D. eighteen hun-  
dred and eighty-two.

BENJ. F. LEE, *Clk.*

**Statement of Facts.**

[Filed February 27, 1882.]

The following statement of facts is agreed upon in this cause:

52 11. The due execution of the bond by the defendant as alleged in the declaration, which bond is as follows:

“ Know all men by these presents, that we, J. Elmer Stout, Amos Robins, Leonard F. Appleby, P. Vanderbilt Spader, Miles Ross, John Henry Campbell, all of the county of Middlesex, are held and firmly bound unto the State of New Jersey in the sum of \$5,000, to be paid unto the State of New Jersey, to which payment well and truly to be made, we bind ourselves, our heirs, executors and  
53 administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the 12th day of November, in the year of our Lord 1867.

“ The condition of this obligation is such, that if the above-bounden J. Elmer Stout shall well and truly execute the office of clerk of the Court of Common Pleas and General Sessions for the county of Middlesex, and in all things touching and concerning said office, shall well and truly, faithfully and impartially execute and perform the same, according to law, as well with respect to all persons  
54 concerned as the State of New Jersey, and at the expiration of his said office, shall deliver to his successor in office all the books, papers, records and writings remaining in the same, or appertaining

thereto, then this obligation to be void, otherwise to remain in full force and virtue.

- |                          |         |    |
|--------------------------|---------|----|
| “ J. ELMER STOUT.        | [L. S.] |    |
| “ AMOS ROBINS.           | [L. S.] |    |
| “ LEONARD L. F. APPLEBY. | [L. S.] |    |
| “ P. VANDERBILT SPADER.  | [L. S.] |    |
| “ MILES ROSS.            | [L. S.] | 55 |
| “ JOHN H. CAMPBELL.      | [L. S.] |    |

2. J. Elmer Stout was clerk as in the declaration alleged when said bond was made and executed.

3. On May 7th, 1868, after said Stout had duly entered upon the duties of his office, and while he was clerk as aforesaid, one John Manning left a mortgage of \$2,200 (given by him to one Mary V. Laughton, on land in Middlesex county,) in the Middlesex county clerk's office, in order that the registry thereof might be canceled, he having paid 56 the said mortgage. Upon the same page of the same book in which the said \$2,200 mortgage was registered, a mortgage of \$1,000, (which is the mortgage of August 19th, 1858, mentioned in the declaration,) given by said Manning to said Laughton, was duly registered. Lewis H. Fernald, who was then an assistant of said Stout in said office, canceled the registry of said \$2,200 mortgage, but neglected to endorse on the mortgage itself that it was canceled. After Fernald's cancellation, Stout came in the office and took up the mortgage and went to the registry-book to cancel it. He referred to the 57 proper page, saw the names of the parties to the mortgage, above the registry of the \$1,000 mortgage, and without further examining the registry to see if it was the registry of the mortgage he was about to cancel, (the \$2,200 mortgage,) entered in a margin left for that purpose opposite to the abstract

of a certain mortgage made by one John Manning to Mary V. Laughton, bearing date on the 19th day of August, A. D. 1858, duly registered according to law in a certain book theretofore provided by the clerk of the Court of Common Pleas of Middlesex county aforesaid, for registering mortgages and defeasible deeds in the nature of mortgages of lands, 58 tenements and hereditaments lying and being within said county of Middlesex, a minute of the redemption, payment and discharge of said mortgage, although in fact the said mortgage was not produced to him canceled or with a receipt thereon signed by the mortgagee or her executors, administrators or assigns, which said minute of cancellation remains hitherto as made by said Stout in said margin.

4. That afterwards, to wit, on or about the 2d day of September, A. D. 1875, Martin Lupardus, 59 Sheriff of said county of Middlesex, by virtue of a writ of *feri facias* theretofore duly issued out of the Court of Chancery of New Jersey, upon a decree in a cause therein pending wherein one Buchanan was the complainant, and John Manning and others were the defendants, having first advertised the sale, according to law in such case provided, offered the lands described in said mortgage and other land for sale at public vendue, and Martin R. Cook and Jacques A. Bernheimer, who had before then, to wit, on the 1st day of September, 1875, examined the 60 registry of said mortgage, to wit, the \$1,000 mortgage, dated August 19th, 1858, aforesaid, and found the minute of said redemption, payment and discharge, relied upon said minute of said redemption, payment and discharge, and therefrom believed that said mortgage was in fact paid, satisfied and canceled, and not knowing that said mortgage was not

paid, satisfied and discharged, did bid for and purchase said mortgaged lands at their full value, and did pay said Sheriff in full therefor the amount of their bid, the purchase money thereof.

5. Said Cook and Bernheimer did not at any time cause said Stout or his successor or successors in said office to search the records of said office or to examine the said registry of said \$1,000 mortgage for any purpose. 61

6. That afterwards, to wit, on the 7th day of March, A. D. 1876, while said Martin R. Cook and Jacques A. Bernheimer were yet the owners of said land purchased by them as aforesaid, Lydia C. Harris, Sarah E. Bloodgood and Amanda Bloodgood, to whom the said mortgage had before then been duly assigned, with Thompson S. Harris, the husband of Lydia C. Harris, filed their bill against said Martin R. Cook and Jacques A. Bernheimer in the Court of Chancery of New Jersey, for the purpose of having the said cancellation of the registry of said mortgage declared null and void, and for the foreclosure of the said mortgage and sale of the mortgaged premises, and such proceedings were thereupon had that in the month of June, A. D. 1877, by the final decree of said Court of Chancery, it was decreed that said cancellation and discharge of said registry was null and void, and a writ of *feri facias* issue out of said Court to the Sheriff of the County of Middlesex, commanding him to sell said mortgaged premises according to law, and from the money arising from such sale to pay the complainants their mortgaged debt, interest and costs; and that to prevent the sale of said lands under said decree, the said Martin R. Cook and Jacques A. Bernheimer did afterwards, to wit, on the 2d day 62 63

of July, A. D. 1877, pay to the said Lydia C. Harris, Sarah E. Bloodgood, Amanda Bloodgood and Thompson S. Harris, the amount of their mortgaged debt, interest, and the costs of said last-mentioned suit, to wit, the sum on \$1,531.59.

64 CHAS. T. COWENHOVEN,  
*Attorney of Defendant.*

ALEX. T. MCGILL, JR.,  
*Attorney of Plaintiff.*

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**Joinder in Error.**

65 [Filed February 27, 1882.]

And hereupon, afterwards, to wit, on the first Tuesday of March, A. D. eighteen hundred and eighty-two, the said the State of New Jersey, by McGill & Taylor, its attorneys, comes into Court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and it prays here that the Court here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, &c.

MCGILL & TAYLOR,  
*Attorneys.*

ALEX. T. MCGILL, JR.,  
*Of Counsel with Defendant.*

**Assignment of Errors.**

[Filed February 27, 1882.]

Afterwards, that is to say, on the first Tuesday in March, in the year of our Lord one thousand eight hundred and eighty-two, in the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey, comes the said Leonard L. F. Appleby, by Charles T. Cowenhoven, his attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the judgment aforesaid, there is manifest error in this, to wit :

67

That it does not appear by the statement of facts agreed upon that the said clerk was required to certify to the correctness of the records in his office.

68

That it does not appear by the statement of facts agreed upon that there was any contract between the party desiring the search and the said clerk.

That it does not appear by the statement of facts agreed upon that there was any requisition made upon the clerk by the said party and hence there is no responsibility.

That it does not appear by the statement of facts agreed upon that the party desiring knowledge of the cancellation of the mortgage made any inquiry of the mortgagor or any other person, as it was his duty so to do.

69

That it does not appear by the statement of facts agreed upon that the party desiring the information demanded a search of the records and a certificate thereof from the clerk.

Because the clerk is only liable for the penalty.

Because the clerk, in the absence of any demand of a search or a certificate, is only responsible for the safe keeping of the records.

70 If there is a mistake in the recording of a paper, he is responsible only to the party who desired him to make the record ; if any entry is made by mistake he is responsible to the party who desired him to make the entry.

Because it does not appear by the statement of facts agreed upon that the clerk had the exclusive right to search the records or had the exclusive or sole access to them.

71 Because it does not appear in and by said declaration that no certificate authorizing the cancellation of the mortgage in question was presented to the said clerk, as authorized by the twenty-fifth section of the act entitled, &c., An act for the more certain discharge or cancellation of mortgages recorded in this State. (Laws 1869, p. 1361.)

Because this suit is brought against a surety on a bond, and it appears by the findings in this case that the agent of the principal on the bond *wilfully* did the act complained of, whereas sureties are not liable for the torts of their principal.

72 Because the clerk in this case was not authorized by virtue of his office, but only by color thereof to perform the act complained of.

*with error*  
~~Because the judgment in this case should have been for the penalty of the bond, and not for the amount of damages found to have been done.~~

Because no damage is shown by the facts proved in this case to have been done to the plaintiff.

Because the findings of the different issues are not authorized by the facts proved.

Therefore the said Leonard L. F. Appleby prays that the judgment aforesaid, by reason of the errors aforesaid and other errors appearing in the record and proceedings aforesaid, be reversed, annulled and held for nothing, and that the said Leonard L. F. Appleby may be restored in all things he has lost on occasion of the said judgment, and that the prosecutor of said plea in the name of said, the State of New Jersey, may rejoin to the said errors, &c. 73

CHARLES T. COWENHOVEN,

*Attorney of Defendart.*

