

ESSEX COUNTY CIRCUIT COURT.

MARIE A. PFEIFFER,

*Plaintiff,**vs.*

JAMES E. CROSSLEY,

*Defendant.**On Appeal.
Notice of
Appeal.**To Louis J. Beers,**Attorney for Plaintiff-Appellee:*

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PLEASE TAKE NOTICE that James E. Crossley, the defendant in the above stated cause, hereby appeals to the Court of Errors and Appeals in the last resort of all causes in New Jersey, from the whole of the judgment entered in this cause, on the following grounds:

1. Because the Trial Court should have directed a verdict in favor of the defendant instead of ordering the entering of judgment in favor of plaintiff.

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2. Because the plaintiff in warranting the payment of the face of the mortgage, was entitled to all the security that went with the mortgage, viz., the bond.

3. Because the mortgage was not the debt, but was merely security for the debt created by the bond.

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4. Because the defendant was absolved from paying the deficiency on the ground that the plaintiff did not sue upon the bond for the deficiency within the time required by the statute.

5. Because no suit was brought on the bond for the deficiency, either before or after the foreclosure of said mortgage.

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6. Because the plaintiff absolved the defendant from his guaranty upon the mortgage, she having waived the right to sue upon the bond by the lapse of time under the statute, thereby she has elected to relieve the defendant from his surety, as well as relieving the mortgagor and bondsmen from any deficiency.

7. Because by reason of the wording of the mortgage:

10 “He does hereby guarantee unto the said Marie A. Pfeiffer, the payment of the face of said mortgage.”

He was still entitled to the benefit of the bond or the security accompanying the mortgage.

8. Because the plaintiff neglected to exhaust the security held by her before bringing suit against the defendant, she not having brought suit upon the bond.

20 9. Because if the plaintiff had pursued her remedy upon the bond accompanying the mortgage within the time limited by law, the defendant might have been relieved from his surety.

10. Because there was no evidence before the Court that the bondsmen were insolvent, and that the deficiency could not have been collected from the bondsmen.

30 11. Because the plaintiff did not assign the bond accompanying the mortgage to the defendant, to enable him to have sued upon the bond in order to protect his surety.

ABNER KALISCH,

Attorney for Defendant.

Filed August 2nd, 1918.

Service of a copy of within Notice of Appeal is hereby acknowledged the 2nd day of August, 1918.

LOUIS J. BEERS,

Attorney for Appellee.

New Jersey Court of Errors and Appeals

MARIE A. PFEIFFER,

Plaintiff,

vs.

JAMES E. CROSSLEY,

Defendant.

*Action at Law.
On Appeal
from Essex
Circuit Court.*

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STATE OF NEW JERSEY,
ESSEX COUNTY.

ss.

Bernard Ford, Special Deputy Sheriff of the County aforesaid, being duly sworn, on his oath deposes and says that on the 2nd day of April, A. D., 1913, he delivered personally to the said defendant, James E. Crossley, a true copy of the within summons and complaint, with a ten days' notice endorsed thereon.

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BERNARD FORD,
Special Deputy Sheriff.

Subscribed and sworn to this fourth day
of April, A. D., 1913.

GEORGE E. CARPENTER,

Master in Chancery of New Jersey.

I hereby appoint and depute Bernard Ford to
serve the within writ.

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Witness my hand and seal this first
[SEAL] day of April, 1913.

JOHN F. MONAHAN,

Sheriff.

By HARVEY W. KEOUGH,

Under Sheriff.

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By BERNARD FORD, *Special Deputy.*

Served the within Summons and Complaint, with a ten days' notice endorsed thereon April 2, 1913, personally upon James E. Crossley, within named defendant, at his usual place of abode, 97 North Arlington avenue, East Orange, N. J.

JOHN F. MONAHAN,
Sheriff.

10 By BERNARD FORD,
Special Deputy.

ESSEX COUNTY CIRCUIT COURT.

20	MARIE A. PFEIFFER, <div style="text-align: center;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> JAMES E. CROSSLEY, <div style="text-align: center;"><i>Defendant.</i></div>	}	<i>Complaint.</i> <i>Summons and</i> <i>Action</i> <i>At Law.</i>
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The State of New Jersey to James E. Crossley:

30 You are summoned to answer the annexed complaint of Marie A. Pfeiffer in an action at law in the Circuit Court of the County of Essex, and take notice, that unless you file your answer to said complaint with the Clerk of the said Circuit Court, at Newark, within twenty days after service upon you of the writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

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Witness, William S. Gummere, Chief Justice,
and one of the Judges of said Circuit Court, at
Newark, this thirty-first day of March, Nineteen
Hundred and Thirteen.

JOSEPH McDONOUGH,
Clerk.

LOUIS J. BEERS, *Attorney.*

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ESSEX COUNTY CIRCUIT COURT.

MARIE A. PFEIFFER,
Plaintiff,

vs.

JAMES E. CROSSLEY.
Defendant.

Complaint.

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The plaintiff resides at Number 29 Gould Ave-
nue, in the City of Newark, in the County of Essex
and State of New Jersey, and says:

1. That on or about the 15th day of May, 1911,
the plaintiff executed a deed to C. Victoria Peddie,
of the City of East Orange, in said County and
State, of certain premises situated on Academy,
Silk and Henry Streets in the City of Newark, and
as part consideration for said deed the said James
E. Crossley executed a deed of assignment of a cer-
tain indenture of mortgage bearing date the 15th
day of May, 1911, in the sum of \$5,700., which
mortgage was made by Nellie A. Smith of the City

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of East Orange, in the County of Essex in said State of New Jersey, to the said James E. Crossley; that said mortgage and assignment thereof are recorded in the office of the Register of the said County; that after the execution of said deed and said assignment of mortgage, but before the delivery of the same, in order to induce the said plaintiff to deliver the said deed and accept said assignment of mortgage the said defendant, James E. Crossley,
10 on the 17th day of May, 1911, entered into a certain agreement of guaranty, a copy of which is hereto annexed to the complaint and made a part thereof.

3. That subsequently, on or about the 8th day of June, 1911, the interest due on said mortgage, being largely in arrears, the said plaintiff filed her bill in the Court of Chancery of New Jersey, to foreclose her said mortgage.
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4. That a final decree was made in said foreclosure suit, and on the 30th day of July, 1912, the said mortgaged premises were sold at public vendue by the Sheriff of said County of Essex, to the highest bidder for the sum of \$3,150.

5. The plaintiff therefore demands of the defendant, on his guarantee aforesaid, the sum of
30 \$2,550., being the difference between the face of the mortgage and the price which the property brought at the Sheriff's sale aforesaid.

LOUIS J. BEERS,
Attorney of Plaintiff

The following is a true copy of the guaranty sued upon:

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Newark, N. J., May 17, 1911.

Whereas, I, James E. Crossley, have on the 15th day of May, 1911, assigned a certain mortgage in the sum of \$5,700. to Marie A. Pfeiffer, which mortgage was made by Nellie A. Smith, to the said James E. Crossley, dated February 7, 1907, and recorded in Book Q of mortgages, pages 572-575, the said assignment being a part consideration of a certain deed made by Marie A. Pfeiffer to C. Victoria Peddie, bearing date the 15th day of May, 1911, for premises situate on Academy Street, Silk and Henry Streets, in the City of Newark. Now, therefore, I, James E. Crossley, of the City of East Orange, in further consideration of the said deed made by the said Marie A. Pfeiffer to the said C. Victoria Peddie, do hereby guaranty unto the said Marie A. Pfeiffer the payment of the face of the said mortgage.

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(Signed) JAMES E. CROSSLEY.

ESSEX COUNTY CIRCUIT COURT.

MARIE A. PFEIFFER,
Plaintiff,
 vs.
 JAMES E. CROSSLEY,
Defendant.

Action at Law.
Affidavit.

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STATE OF NEW JERSEY,

COUNTY OF ESSEX,

ss:

10 James E. Crossley, of full age, being duly sworn on his oath saith, that he is the defendant in the above stated cause, and he believes that he has a just and legal defense to the said action on the merits of the case.

J. E. CROSSLEY.

Sworn and subscribed to before me this eighth day of April, A. D., 1913.

FRED PROUT,

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A Master in Chancery of New Jersey.

ESSEX COUNTY CIRCUIT COURT.

MARIE A. PFEIFFER,

Plaintiff,

vs.

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JAMES E. CROSSLEY,

Defendant.

Answer.

The defendant, James E. Crossley, residing at No. 97 North Arlington Avenue, in the City of East Orange, County of Essex and State of New Jersey, says:

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1. The defendant denies the truth of the matters as contained in the complaint.
2. That the said plaintiff entered into a written agreement with C. Victoria Peddie for an exchange of property mentioned in the complaint, in which the mortgage assigned by the defendant was included. 10
3. The defendant denies that there was any consideration passed for said security or guarantee referred to in the complaint.
4. The defendant is not indebted to the said plaintiff for the reason that the said agreement of surety or guarantee was incorrectly drawn, and did not contain the whole agreement, as the agreement between the parties was that the said defendant was willing to take the mortgage, or the property at the face value of the mortgage. 20
5. The defendant is not indebted to the said plaintiff as the said plaintiff caused the said premises to be bought in, at a nominal price, by a friend of her husband's, which is held in trust for said plaintiff. 30
6. The defendant is not indebted to the said plaintiff as the said premises are of great value, to wit, the value of \$10,000.00.
7. The defendant is not indebted to the said plaintiff by reason of the said plaintiff having forfeited her rights of action against the bond and has also forfeited the same against any surety or guarantee of the same. 40

8. The defendant is not indebted to the said plaintiff as the said plaintiff has not properly followed the statute prescribing the only course in which suit may be brought for deficiency on a bond after foreclosure.

10 9. The defendant is not indebted to the said plaintiff as the said defendant is relieved and released from any responsibility on the surety or guarantee referred to in the said complaint by reason of the plaintiff's action in pursuit of her remedy, which has deprived the defendant from any recourse to the bond, or redemption of the mortgaged premises.

20 10. The defendant is not indebted to the said plaintiff upon the said surety or guarantee, in said complaint, by reason of the plaintiff depriving the said defendant from the benefit of the bond and redemption of the mortgaged premises and the debt which was secured.

30 11. The defendant is not indebted to the said plaintiff because the said plaintiff has failed to bring her action within the time in accordance with the statute, to wit, Laws of the State of New Jersey, to wit, "An Act concerning proceedings on bonds and mortgages given for the same indebtedness and the foreclosure and sale of mortgaged premises thereunder."

40 **PROCEDURE ON BOND WHERE DEBT IS NOT SATISFIED BY FORECLOSURE; LIMITATIONS.** Sec. 2. That in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be, first, to foreclose the mortgage, and

if at the sale of the mortgaged premises under said foreclosure proceedings the said premises should not sell for a sum sufficient to satisfy said debt, interest and costs, then and in such case it shall be lawful to proceed on the bond for the deficiency, and that all suits on said bond shall be commenced within six months from the date of the sale of said mortgaged premises, and judgment shall be rendered and execution issue only for the balance of the debt and costs of suit. (P. L. 1880, p. 255, as amended P. L. 1881, p. 184), and the several supplements and amendments thereto. 10

12. The defendant is not indebted to the plaintiff for the reason that the said defendant on several occasions offered to take the said premises or the assignment of said mortgage and pay the face value therefor, which was refused by the said plaintiff. 20

13. The defendant is not indebted to the plaintiff by reason of the said plaintiff extending an unreasonable time for the payment of said mortgage.

14. The defendant is not indebted to the said plaintiff by reason of the said plaintiff failing to exercise due diligence in the collection and payment of her said mortgage. 30

15. The defendant is not indebted to the plaintiff by reason of the said plaintiff's failure to place the said defendant in a position whereby he might have received the benefits to which he was entitled or should have been entitled, if the said plaintiff had pursued her remedies in accordance with law and within a reasonable time. 40

16. The defendant is not indebted to the plaintiff for the reason that the defendant was not made a party or given any notice of the foreclosure suit of said mortgage by the said plaintiff.

10 17. The defendant is not indebted to the plaintiff for the reason that the complaint does not show that the sale of the mortgaged premises mentioned in the complaint was confirmed by the Chancellor in accordance with the statute, which would create a deficiency.

EGNER & PROUT,
Attorneys for Defendant.

ESSEX COUNTY CIRCUIT COURT.

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MARIE PEIFFER,

Plaintiff,

vs.

JAMES E. CROSSLEY,

Defendant.

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STATE OF NEW JERSEY,

COUNTY OF ESSEX.

ss.

40 James E. Crossley, of full age, being duly sworn upon his oath deposes and says that he is the

defendant in the above stated case, and that the foregoing answer is not filed by him in said cause for the purpose of delay, and he further says that he believes that he has a just and legal defense to said action on the merits of the case.

J. E. CROSSLEY.

Sworn to and subscribed before me
this 18th day of April, A. D. 1913.

FRED PROUT,

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*A Master in Chancery
of New Jersey.*

ESSEX COUNTY CIRCUIT COURT.

MARIE A. PFEIFFER,
Plaintiff,

vs.

JAMES E. CROSSLEY,
Defendant.

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*Action at Law.
Stipulation.*

It is hereby stipulated between counsel of the
respective parties as follows:

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1. That the complainant foreclosed the mortgage in question, and that James E. Crossley was not made a defendant, and the only parties made defendants in the foreclosure were Patrick H. Smith and Nellie A. Smith, the mortgagors and bondsman.

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2. That there was a sale of the mortgaged premises on the sixteenth day of July, 1912, and that said sale was confirmed on the tenth day of August, 1912, and a deed delivered by the Sheriff of the County of Essex to William Schiffenhaus.

3. That the complainant never proceeded upon the bond accompanying the mortgage, for deficiency, after the foreclosure.

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4. And it is further stipulated that the above stipulations are to be used on argument either on motion or final hearing in the above entitled matter, without producing the records.

LOUIS J. BEERS,
Attorney for Plaintiff.

EGNER & PROUT,
Attorneys for Defendant.

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ESSEX COUNTY CIRCUIT COURT.

MARIE A. PFEIFFER,
Plaintiff,

vs.

JAMES E. CROSSLEY,
Defendant.

Action at Law.
Reply.

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1. Plaintiff denies the fourth paragraph, wherein it is stated that the agreement of surety or guarantee was incorrectly drawn, and did not contain

the whole agreement, but admits that the agreement between the parties was that the defendant was willing to take the mortgage for the property, at the face value of the mortgage.

2. Plaintiff denies the fifth paragraph of said answer.

3. Plaintiff denies the seventh paragraph of said answer. 10

4. Plaintiff denies the eighth paragraph of said answer.

5. Plaintiff denies the ninth paragraph of said answer.

6. Plaintiff denies the tenth paragraph of said answer. 20

7. Plaintiff denies the eleventh paragraph of said answer.

8. The plaintiff denies the twelfth paragraph of said answer.

9. The plaintiff denies the thirteenth, fourteenth and fifteenth paragraphs of said answer. 30

10. The plaintiff denies the sixteenth paragraph of said answer.

11. The plaintiff denies the seventeenth paragraph of said answer.

LOUIS J. BEERS,
Attorney of Defendant.

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ESSEX COUNTY CIRCUIT COURT.

MARIE A. PFEIFFER,
Plaintiff,

vs.

JAMES E. CROSSLEY,
Defendant.

Action at Law.
Stipulation.

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It is hereby stipulated between counsel that the above entitled matter will be adjourned for two weeks, until the week of March 2nd, 1914, and not moved by either party in the meantime.

Dated February 14, 1914.

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LOUIS J. BEERS,
Attorney for Plaintiff.
EGNER & PROUT,
Attorneys for Defendant.

ESSEX COUNTY CIRCUIT COURT.

30 MARIE A. PFEIFFER,
Plaintiff,

vs.

JAMES E. CROSSLEY,
Defendant.

Action at Law.
Stipulation.

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It is hereby stipulated and agreed between counsel that the above entitled matter shall not be

moved for trial until the twenty-fifth day of October, 1915.

Dated October 7, 1915.

LOUIS J. BEERS,
Attorney for Plaintiff.

EGNER & PROUT,
Attorneys for Defendant.

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ESSEX COUNTY CIRCUIT COURT.

MARIE A. PFEIFFER,
Plaintiff,

vs.

JAMES E. CROSSLEY,
Defendant.

Action at Law.

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Stipulation.

It is hereby stipulated between the respective counsel in the above entitled matter that the above entitled matter shall not be moved for trial until November 15th, 1915. 30

Dated October 21st, 1915.

LOUIS J. BEERS,
Attorney for Plaintiff.

EGNER & PROUT,
Attorneys for Defendant.

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ESSEX COUNTY CIRCUIT COURT.

	MARIE A. PFEIFFER, <i>Plaintiff,</i>	<i>Action at Law. Order.</i>
	<i>vs.</i>	
10	JAMES E. CROSSLEY, <i>Defendant.</i>	

Notice of a motion for leave to file an amended
 complaint having been given by the plaintiff, and
 notice of a motion to strike out the original com-
 plaint having been given by the defendant, and
 both of said motions having been argued before
 20 Frederic Adams, Esq., Judge of said Court, by
 Louis J. Beers and Fred Prout, Attorneys, respec-
 tively of plaintiff and defendant,

It is, on this 16th day of June, 1916, ordered,
 that plaintiff have leave to file the annexed amended
 complaint, and that the decision on the motion to
 strike out the complaint be held in abeyance until
 the trial of the issue of said case.

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Let the foregoing order be entered.

FREDERIC ADAMS,

Circuit Court Judge.

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ESSEX COUNTY CIRCUIT COURT.

 MARIE A. PFEIFFER,

Plaintiff,
vs.

JAMES E. CROSSLEY,

Defendant.

At Law.
Amended
Complaint.

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The plaintiff, residing at 29 Gould Avenue, in the City of Newark, Essex County, New Jersey, says:

1. That on or about April 18, 1911, one Peter Pfeiffer was her agent for the sale of property situated at Academy, Silk and Henry Streets, in the City of Newark, Essex County, New Jersey, and was authorized by her to enter into an agreement to sell the same for \$15,000. 20

2. That on or about said day said Peter Pfeiffer entered into an agreement with one Wilkinson Crossley to sell said property for \$15,000. and take in payment of the same a certain indenture of mortgage dated Feb. 7th, 1910, in the sum of \$5,700. made by Nellie A. Smith to the defendant, James E. Crossley, on property on the southeast side of Amherst Street in the City of East Orange, Essex County, New Jersey, together with a purchase money mortgage on the property to be conveyed and sold. 30

3. That said defendant, who was acting as the agent of said Wilkinson Crossley, represented to 40

the plaintiff that the interest on said mortgage of Nellie A. Smith had always been promptly paid and that the interest on said mortgage was then paid up to the last preceding interest date.

10 4. That subsequently, upon learning that the interest on said mortgage was in fact not paid as represented but was greatly in arrears, this plaintiff repudiated said contract of sale, and refused to convey said property on Academy Street and accept an assignment of said mortgage.

20 5. That thereupon, in order to induce this plaintiff to carry out said agreement of sale which she had repudiated, as aforesaid, because of said false representations of said defendant, James E. Crossley, as to the interest, the said defendant, James E. Crossley, on or about May 17th, 1911, entered into a certain agreement of guarantee (a copy of which is hereto annexed and made a part hereof), and this plaintiff executed a deed for said premises to C. Victoria Peddie, of the City of East Orange, the assignee of the said Wilkinson Crossley, and the said James E. Crossley executed a deed of assignment on said mortgage to Nellie A. Smith to this plaintiff. Plaintiff says that she proceeded
30 with said transaction which she had repudiated because of said false representation and fraud, solely in consideration of the giving of said guarantee by the said defendant, James E. Crossley, and not pursuant to any obligation upon said agreement.

40 6. That subsequently this plaintiff made demand upon said Nellie A. Smith of the arrearages of interest together with the principal sum due on

said mortgage, but payment thereof was refused.

7. That plaintiff thereupon demanded of this defendant that he pay this plaintiff the face of said mortgage according to the terms of said guarantee, and that he perform the said contract of guaranty, and take back an assignment of said mortgage of Nellie A. Smith.

8. That said defendant, James E. Crossley, absolutely refused to perform said contract of guarantee, but requested that this plaintiff proceed to foreclose the mortgage for him. 10

9. That this plaintiff thereupon caused a bill to be filed in the Court of Chancery of New Jersey to foreclose said mortgage, in which bill Nellie A. Smith and Patrick H. Smith, her husband, were the parties defendant. 20

10. That a decree was made in said foreclosure suit and on July 30th, 1912, the said mortgaged premises of the said Nellie A. Smith were sold at public vendue by the said Sheriff of Essex County to the highest bidder for the sum of \$3,150. Said sale was confirmed by order of the Court of Chancery on August 10, 1912.

11. That said foreclosure suit was begun and carried on at the request of this defendant; that this defendant had actual knowledge of the pendency thereof, and of the decree for sale of the mortgaged premises, and had notice of the time and place of said Sheriff's sale. 30

12. That by reason of the foreclosure and sale of said premises there remains due to the plaintiff 40

from this defendant on said contract of guaranty the sum of \$2,550.

13. Plaintiff demanded said sum of \$2,550. from this defendant, James E. Crossley, but payment was refused and this defendant still refuses to pay the same.

10 Plaintiff demands as damages \$2,550., together with lawful interest from July 30th, 1912.

LOUIS J. BEERS,
Attorney of the Plaintiff.

The following is a true copy of the guaranty sued upon:

Newark, N. J., May 17th, 1911.

20 Whereas, I, James E. Crossley, have on the 15th day of May, 1911, assigned a certain mortgage in the sum of \$5,700. to Maria A. Pfeiffer, which mortgage was made by Nellie A. Smith to the said James E. Crossley, dated February 7th, 1907, and recorded in Book Q of mortgages, page 572-575, the said assignments being a part consideration of a certain deed made by Maria A. Pfeiffer to C. Victoria Peddie, bearing date the 15th day of May, 1911,
30 for premises situated on Academy Street, Silk and Henry Streets, in the City of Newark, Now, therefore, I, James E. Crossley, of the City of East Orange, in further consideration of said deed made by the said Maria A. Pfeiffer, to the said C. Victoria Peddie, do hereby guaranty unto the said Maria A. Pfeiffer the payment of the face of the said mortgage.

40 (Signed) JAMES E. CROSSLEY.

ESSEX COUNTY CIRCUIT COURT.

MARIA A. PFEIFFER,

Plaintiff,

vs.

JAMES E. CROSSLEY,

Defendant.

At Law.

Answer to

Amended

Complaint.

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The defendant, James E. Crossley, residing at No. 97 North Arlington Avenue, in the City of East Orange, County of Essex, and State of New Jersey, says:

1. The defendant denies the truth of the matters as contained in the complaint.

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2. As to paragraph 1: This defendant has no knowledge as to what the said plaintiff authorized her agent, or alleged agent, Peter Pfeiffer, leaves the complainant to her proofs.

3. As to paragraph 2 of the complaint: This defendant answering says the contract, if any, was in writing and in possession of the said plaintiff, and this defendant neither denies or admits what said contract contains, as said contract speaks for itself, but denies that said contract has any relevancy to the suit in question.

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4. As to paragraph 3 of said complaint: This defendant denies that acting as the agent of Wilkinson Crossley, he represented to the plaintiff that the interest on said mortgage of Nellie A. Smith

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had always been promptly paid, and that the interest on said mortgage was then paid up to last preceding interest day.

5. As to paragraph 4 of said complaint: This defendant denies that subsequently the plaintiff upon learning that the interest on said mortgage was not paid as represented, but was greatly in arrears, repudiated said contract of sale and refused to convey said property on Academy Street, and accept an assignment of said mortgage.

6. As to paragraph 5 of said answer: He denies that in order to induce the plaintiff to carry out said agreement of sale, which she alleges she had repudiated, as aforesaid, because of said alleged false representations of this defendant as to the interest, that this defendant on or about the 17th day of May, 1911, entered into a certain agreement or guarantee as annexed to said complaint, but admits he signed a writing, of which the writing last referred to purports to be a copy, leaving said plaintiff to proof of the writing, but says said writing was not given for the purposes alleged in said complaint and was wholly without consideration. This defendant admits the said plaintiff executed the deed to certain premises to C. Victoria Peddie, and this defendant executed the deed of assignment of the Bond and Mortgage of Nellie A. Smith to the plaintiff. This defendant denies that the said plaintiff proceeded with said transaction, which she alleges she repudiated because of false representations and fraud, in consideration of the giving of said guarantee by this defendant, and denies that it was not in pursuance to any obligation upon said agreement, and denies there was any

fraud or false representations as alleged in said complaint by this defendant.

7. As to paragraph 6 of said complaint: This defendant says he has no knowledge as to the alleged demand upon Nellie A. Smith for arrears of interest and principal, and that payment was refused and for the purpose of this answer, denies same.

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8. As to paragraph 7 of said complaint: This defendant denies that the said plaintiff demanded this defendant that he pay the plaintiff the face of said mortgage according to the terms of said guarantee, and that he perform the said contract of guarantee and take back an assignment of said mortgage of Nellie A. Smith.

9. As to paragraph 8 of said complaint: This defendant denies that he absolutely refused to perform said contract of guarantee; denies that he requested the said plaintiff to foreclose the mortgage for him.

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10. As to paragraph 9 of said complaint: This defendant admits that the plaintiff caused a bill to be filed in the Court of Chancery to foreclose said mortgage; and that the only party defendants were Nellie A. Smith and Patrick H. Smith; and that this defendant was not made a party defendant.

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11. As to paragraph 10 of said complaint: This defendant admits that a decree was made in said foreclosure suit, not on the 30th day of July, 1912, as appears in said complaint, but at an earlier date, and was sold at about the 30th day of July, 1912, and said sale was confirmed by the Chancellor on

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the 10th day of August, 1912, and admits that said premises sold for the sum of \$3,150.

12. As to paragraph 11: This defendant denies that said foreclosure suit was begun and carried on at his request, and denies that he had any knowledge of the decree of sale and the time and place of said sale, as alleged in said complaint.

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13. As to paragraph 12 of said complaint: This defendant denies that by reason of the foreclosure and sale of said premises there remains due to the plaintiff, or from this defendant, on said contract of guarantee the sum of \$2,550, or any other sum.

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14. As to paragraph 13 of said complaint: This defendant denies that the said plaintiff demanded from him the sum of \$2,550, as alleged in said complaint.

This defendant further answering said complaint, and particularly paragraphs 12 and 13 of said complaint, says:

First Defense. Defendant denies that said complaint sets up any cause of action.

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Second Defense. Defendant denies that there was any consideration past for said security, or guarantee referred to in the complaint.

Third Defense. Defendant is not indebted to the said plaintiff, as the said plaintiff allowed the said property to be bought in at a nominal price.

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Fourth Defense. This defendant is not indebted to the said plaintiff, as the said premises are of great value, to wit, the value of \$10,000.

Fifth Defense. The defendant is not indebted to the said plaintiff by reason of the said plaintiff having forfeited her rights of action against the bond and has also forfeited the same against any surety or guarantee of the same.

Sixth Defense. That said mortgage, guaranteed as aforesaid, was accompanied by a bond, being an ordinary first bond and mortgage covering real estate in the City of East Orange, which bond and mortgage were due at the time the same was assigned by this defendant, the said plaintiff electing to foreclose same and sold said mortgaged premises by public vendue by the Sheriff of Essex County on the 30th day of July, 1912, which sale was confirmed by the Chancellor August 10, 1912; and that said plaintiff failed to sue upon said bond accompanying said mortgage; and that action upon said bond has now become barred by the statute of limitations and by reason therefor the said plaintiff has forfeited said mortgage debt, and the security guaranteed, and has thus forfeited her right of action against this defendant upon the guarantee.

Seventh Defense. The defendant is not indebted to the said plaintiff because the said plaintiff has failed to bring her action within the time in accordance with the statute, to wit, Laws of the State of New Jersey, to wit, "An Act concerning proceedings on bonds and mortgages given for the same indebtedness and the foreclosure and sale of mortgaged premises thereunder."

PROCEDURE ON BOND WHERE DEBT IS NOT SATISFIED BY FORECLOSURE; LIMITATIONS. Sec. 2. That in all cases where a bond and mortgage has or may hereafter be given for the

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same debt, all proceedings to collect said debt shall be, first, to foreclose the mortgage, and if at the sale of the mortgaged premises under said foreclosure proceedings the said premises should not sell for a sum sufficient to satisfy said debt, interest and costs, then and in such case it shall be lawful to proceed on the bond for the deficiency, and that all suits on said bond shall be commenced within
 10 mortgaged premises, and judgment shall be rendered and execution issue only for the balance of the debt and costs of suit. (P. L. 1880, p. 255, as amended P. L. 1881, p. 184), and the several supplements and amendments thereto.

20 Eighth Defense. That said mortgaged debt guaranteed comes within the statute aforesaid, and that said debt has become barred by reason of the laches of the said plaintiff in bringing suit on said bond accompanying said mortgage, said plaintiff having elected to place said debt within the statute of limitations is bound by her acts and having permitted the debt to become barred by the statute of limitations, the guarantee not waiving this statute or in any way changing the debt, the plaintiff's forfeiture of the debt forfeits the guarantee, and the statute barring the debt bars the guarantee.

30 Ninth Defense. The defendant is not indebted to the said plaintiff because the said plaintiff has not properly followed the statute prescribing the only course in which suit can be brought for deficiency on a bond after foreclosure; and has relieved and released said defendant from any responsibility or surety or guarantee referred to in the said complaint by reason of the plaintiff's actions in pursuit of her remedy, which has deprived
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the defendant from any recourse to the bond, or redemption of the mortgaged premises.

Tenth Defense. The defendant is not indebted to the plaintiff for the reason that the defendant was not made a party to said foreclosure suit, and said plaintiff failing to exercise due diligence in the payment and collection of her said bond and mortgage, and permitting the security guaranteed to be forfeited and placed out of the reach of this defendant, which was of great value, to wit, the value of \$10,000. 10

Eleventh Defense. The complaint does not set forth any cause of action because it does not allege that a lis pendens was filed and suit begun upon the bond for deficiency, as provided by statute.

Twelfth Defense. The plaintiff disposed of property and mortgage, and all securities under the mortgage for an inadequate price, without notice, without making defendant a party, and without tendering the securities; therefore depriving the defendant, and placing out of his reach the securities guaranteed through the plaintiff's own acts and laches, after electing to pursue her remedy. Therefore she cannot proceed to hold the guarantor on the guarantee, having forfeited the securities to which the guarantor was entitled, if called upon to pay the guarantee. 20 30

Thirteenth Defense. This defendant objects to answering the amended complaint, and saves and reserves the right to move to strike out said complaint without further notice on the hearing of the said cause, upon the grounds that the said complaint sets forth no cause of action, and upon the 40

several reasons and grounds set forth in this answer.

FRED PROUT,
Attorney for Defendant.

ESSEX COUNTY CIRCUIT COURT.

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MARIA A. PFEIFFER,
Plaintiff,

vs.

JAMES E. CROSSLEY,
Defendant.

Action at Law.
Order of
Substitution.

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I do hereby substitute Abner Kalisch as attorney in the above cause in my place.

FRED PROUT.

Nov. 2, 1916.

ESSEX COUNTY CLERK'S OFFICE.

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STATE OF NEW JERSEY,
COUNTY OF ESSEX,

ss.

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I, Joseph McDonough, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, do hereby certify that the foregoing is a true and correct transcript of all the proceedings

in the case of Marie A. Pfeiffer vs. James E. Crossley, and the same is taken from and compared with original records on file and as the same now remains on the files of said office.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this 13th day of October, A. D. 1917.

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JOSEPH McDONOUGH,
Clerk.

ESSEX COUNTY CIRCUIT COURT.

<p>MARIA A. PFEIFFER, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>JAMES E. CROSSLEY, <i>Defendant.</i></p>	}	<p><i>Action at Law.</i></p> <p><i>Case Certified</i> <i>to Supreme Court.</i></p>	20
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The following facts were established on the trial of this cause at the September Term, 1916, of the Essex Circuit Court. 30

(1) On February 7, 1907, Nellie A. Smith and husband executed their bond to James E. Crossley in the penal sum of \$11,400 conditioned for the payment of \$5,700 in one year with interest, and secured the same by a mortgage on property in Essex County, New Jersey.

(2) Prior to May 15, 1911, the plaintiff agreed

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to sell a certain property owned by her in the City of Newark for \$15,000. and to accept in part payment an assignment of the aforesaid Smith bond and mortgage.

10 (3) On or before May 15, 1911, the plaintiff and her husband conveyed the property in Newark to C. Victoria Peddie, and James E. Crossley, who was a brother-in-law of C. Victoria Peddie, assigned the Smith bond and mortgage to the plaintiff, the same being overdue.

(4) At the same time that the deed was delivered to C. Victoria Peddie, the said James E. Crossley executed and delivered to the plaintiff a written guarantee, of which the following is a copy:

“Newark, N. J., May 17, 1911.

20 “Whereas, I, James E. Crossley, have on this 15th day of May, 1911, assigned a certain mortgage in the sum of \$5,700. to Maria A. Pfeiffer, which mortgage was made by Nellie A. Smith to the said James E. Crossley, dated Feb. 7, 1907, and recorded in Book G of mortgages, pages 572-575, the said assignment being a part consideration of a certain deed made by Maria A. Pfeiffer to C. Victoria Peddie, bearing date the 15th day of May, 1911, for
30 premises situate on Academy Street, Silk and Henry Streets, in the City of Newark.

“Now, therefore, I, James E. Crossley, of the City of East Orange; in further consideration of the said deed made by the said Maria A. Pfeiffer to the said C. Victoria Peddie, do hereby guarantee unto the said Maria A. Pfeiffer the payment of the face of the said mortgage.

40 “(Signed) JAMES E. CROSSLEY.”

(5) The plaintiff foreclosed this mortgage, and a decree was entered in said suit on March 6, 1912, and execution issued thereon. James E. Crossley was not made a defendant in this foreclosure.

(6) The property was sold under the execution issued in this foreclosure suit by the Sheriff of the County of Essex on July 30, 1912, to William Schiffenhaus, for \$3,150, and the sale was confirmed on August 10, 1912. 10

(7) The balance of principal due the plaintiff over the amount realized from the sale was \$2,550.

(8) The defendant was not requested at any time to accept a re-assignment of this Smith mortgage, but was requested by Mr. Pfeiffer to make the guarantee good and take the property off his hands before the foreclosure sale. 20

Defendant requested the plaintiff's husband to have her foreclose this mortgage.

(9) No suit was brought on the bond of Nellie A. Smith and husband, which accompanied the mortgage guaranteed by the defendant to recover the deficiency within six months after the foreclosure sale, or at any other time. 30

(10) Suit was not started by the plaintiff against the defendant on his guarantee within six months after the foreclosure sale.

(11) Upon the trial of the cause at the Essex Circuit, seven questions were submitted to the jury and answered by them. 40

They were as follows:

10 Question 1. Did Mr. Peter Pfeiffer, acting for the plaintiff, refuse to deliver the deed from Marie A. Pfeiffer to C. Victoria Peddie, until the defendant had signed and delivered a written guarantee to pay the face of the mortgage given by Nellie A. Smith and Patrick H. Smith, her husband, to the said James E. Crossley for \$5,700. and then about to be assigned by the said Crossley as part of the consideration for the deed?

Answer. Yes.

20 Question 2. Was the guarantee in question executed and delivered in order to satisfy the demand of Mr. Peter Pfeiffer, acting for the plaintiff, and to obtain the delivery of the deed to C. Victoria Peddie?

Answer. Yes.

Question 3. Was there consideration for the execution and delivery of the guarantee by James E. Crossley?

Answer. Yes.

30 Question 4. Was the guarantee executed after the delivery of the deed to C. Victoria Peddie and without any consideration?

Answer. No.

Question 5. Did Mr. James E. Crossley request the plaintiff to have his wife foreclose the Smith mortgage?

Answer. Yes.

40 Question 6. Did James E. Crossley offer to pay

the plaintiff the face of the Smith mortgage either before or after the foreclosure sale?

Answer. No.

Question 7. Did James E. Crossley offer to pay the amount due the plaintiff on the Smith mortgage at any time after the foreclosure sale if the plaintiff would cause the property to be conveyed to them?

Answer. No.

10

The plaintiff contends that on these facts and the finding by the jury, judgment should be entered against the defendant and in her favor for \$2,550., being the balance of the principal due on this Smith mortgage, the payment of which had been guaranteed by the defendant, with interest from July 30, 1911, the date of the Sheriff's sale; while the defendant contends that there can be no recovery by the plaintiff for the reason that an act of the Legislature, entitled, "An Act concerning proceedings on bonds and mortgages given for the same indebtedness and the foreclosure and sale of mortgaged premises thereunder," approved March 12, 1880, P. L. 1880, page 255, and the amendments thereof, P. L. 1881, page 184, and supplements thereto, P. L. 1907, page 563, apply and prevent the plaintiff from recovering, and that judgment should be entered for the defendant.

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Being in doubt as to the foregoing question of law, whether said acts of the Legislature apply to this case, I do hereby certify the same to be argued before the Bar of the Supreme Court for its advisory opinion.

WILLARD W. CUTLER,
Judge Essex County Circuit Court.

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ESSEX COUNTY CIRCUIT COURT.

24872

MARIE A. PFEIFFER, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> JAMES E. CROSSLEY, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law. By the Court. After Verdict.</i>
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Judgment entered July 24, A. D., 1918.

Damage\$3,463.75

Costs 85.62

 \$3,549.27

20 Judgment by the Court in the above entitled Action at Law was rendered on the twenty-fourth day of July, A. D. nineteen hundred and eighteen, in favor of the said plaintiff, Marie A. Pfeiffer against James E. Crossley, defendant, for the sum of thirty-four hundred sixty-three dollars and seventy-five cents damage, and the sum of eighty-five dollars and sixty-two cents costs.

Judgment entered and signed July 24, A. D. 1918.

WILLIAM S. GUMMERE,

Judge.

30 Book 94—page 567.

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STATE OF NEW JERSEY, COUNTY OF ESSEX.	}	ss.
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I, John H. Scott, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the records and proceedings in the case of Marie A. Pfeiffer *vs.* James E. Crossley, and the same is taken from and compared with original records on file in my office and as the same now remains on the files of said office. 10

IN TESTIMONY WHEREOF, I have here-
unto set my hand and affixed the official
(L. S.) seal of said Court and County at New-
ark, N. J., this 13th day of August, A.
D., 1918.

JOHN H. SCOTT,
Clerk. 20

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New Jersey Court of Errors and Appeals

MARIE A. PFEIFFER,

Plaintiff,

vs.

JAMES E. CROSSLEY,

Defendant.

On Appeal.

Brief on Behalf of the Plaintiff-Appellee.

Statement.

This is an appeal from the judgment entered in favor of the plaintiff-appellee and against defendant-appellant, in the Essex Circuit Court at the direction of the Supreme Court on case certified.

The suit which resulted in said judgment was had upon a contract in writing of defendant, of which the following is a true copy:

Newark, N. J., May 17, 1911

Whereas, I, James E. Crossley, have, on the 15th day of May, 1911, assigned a certain mortgage in the sum of \$5,700 to Marie A. Pfeiffer, which mortgage was made by Nellie A. Smith to the said James E. Crossley, dated February 7, 1907, and recorded in Book Q of Mortgages, pages 572-575, the said assignment being a part consideration of a certain deed made by Marie A. Pfeiffer to C. Victoria Peddie, bearing date the 15th day of May, 1911, for premises situate on Academy Street, Silk and Henry Streets, in the City of Newark. Now, therefore, I, James E. Crossley, of the City of East Orange, in further consideration of the said deed made by the said Marie A. Pfeiffer to the said C. Victoria Peddie, do hereby guarantee unto the said Marie A. Pfeiffer the payment of the face of the said mortgage.

(Signed) James E. Crossley.

The Circuit Court being in doubt as to whether "An act concerning proceedings on Bonds and Mortgages given for the same indebtedness and the Foreclosure and Sale of Mortgaged Premises thereunder," approved March 12, 1880, P. L. 1880, page 255, and the amendments thereof, P. L. 1881, page 184 and the supplements thereto, P. L. 1907, page 563, applied to this case, certified same to the Supreme Court for its advisory opinion which court directed the entry of a judgment for plaintiff, from which judgment this appeal is taken.

The suit in the Circuit Court was not upon a bond or contract in

independent contract of the defendant-appellant—a contract guaranteeing payment of the face of the mortgage and not collection thereof—to which the Smiths, the makers of the bond and mortgage were not privy. Judgment against the defendant, James E. Crossley (assuming that the mortgage had not been foreclosed, and it might here be stated that the jury found that the mortgage was foreclosed at the request of defendant, see state of case, page 32, question 5) would not affect the bond and mortgage, the same would remain intact, and proceedings could be had thereon according to the statute. Defendant's contract being an independent undertaking, the plaintiff was not obliged to institute proceedings on the bond and mortgage according to the statute, and therefore, the provisions of said act relating to proceedings on bonds and mortgages given for the same indebtedness, which requires suit to be brought upon the bond within six months after sale of the premises under foreclosure, do not apply to the contract of defendant. The foreclosure of the mortgage by the plaintiff at the request of the defendant, was equivalent to a demand for payment of the face of the mortgage, which, defendant, by the said contract undertook to do. *Wilkinson Gaddis Co. v. Van Riper*, 63 N. J. L. 394; *Columbia Co. v. Kemmet*, 67 N. J. L. 18; *Manchester Building Association v. Shuart*, 74 N. J. L. 563; *Hoey v. Jarman*, 39 N. J. L. 523, *affirmed*, 40 N. J. L. 379; *Pleasantville Loan Society v. Moore*, 70 N. J. L. 306.

In *Knight v. Cape May Sand Company*, 83 N. J. L., page 597, at 601, the Court said:

“We agree with the Supreme Court that the statute which provides ‘that in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be first to foreclose the mortgage,’ must be strictly construed, as it is, as is said by Chief Justice Beasley, ‘in derogation of the common law force inherent in the bond and mortgage.’

It was not intended, however, that the strictness with which this statute should be construed should attain to that degree as to destroy its purport and efficacy. The statute was enacted to counteract a prevailing evil which then existed and which was very oppressive to mortgage debtors.

Its palpable object is to prevent an obligee of a bond from suing thereon, until he shall have first foreclosed the mortgage, which has been given as collateral security for the payment of the bond. Before the passage of the act the mortgagee could foreclose his mortgage and bring his action on the bond at the same time, if he saw fit, and thus harass the mortgage debtor and put him to needless expense and costs.

It was at such oppressive proceedings that the statute aimed. It would follow, therefore, that in order to effectuate the policy of the law the strictness of construction required to be given to the statute should be within the bounds of a liberal sense and not an illiberal one.”

The defendant in this suit is, of course, not a mortgagor, nor can this suit be held to be oppressive, for a judgment against the defendant would not affect the right of the maker of the bond and mortgage to insist that proceedings thereon must be had according to the statute relating to bonds and mortgages.

In *McMurray v. Noyes*, 72 N. Y. 524, the Court said:

“The distinction between the guarantee of *payment* and one of *collection* is that in the former the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed against the guarantor without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not, except under special circumstances, any defense to the guarantor, while in the latter the undertaking is, that if the demand cannot be collected by the regular proceedings against the principal debtor, failure to collect of him by those means are conditions precedent to the liability of the guarantor, etc.”

In *Adams v. Wallace*, 51 Pacific Rep. 14; 119 Cal. 67, one Pierce gave his note and mortgage to plaintiff, and the defendant gave his contract of guaranty to the plaintiff, and plaintiff brought suit against defendant on this guaranty, without foreclosing the mortgage or suing Pierce on the note.

Section 726 of the Code of Civil Procedure of California provides “There shall be but one action for recovery of any debt secured by mortgage, and that shall be by a foreclosure of the mortgage.”

The Court held:

“This is not an action for the collection of the mortgagor’s debt as such. It is an action upon an independent contract of the defendant, with which the mortgagor had nothing to do, and which might have been entered into by the parties without his knowledge, or against his wishes. There is no privity or mutuality or joint liability between the principal and his guarantor. The plaintiff is entitled to recover.”

Defendant’s contract being an absolute guaranty of payment, the defense of laches is not available to him. But assuming defendant could legally interpose laches as a defense, the mortgage in this suit having been foreclosed at the request of defendant (see state of case, page 32, question 5) and the defendant having been requested before the sale to pay the amount due and take the mortgage, this defence must fail. *Hoey v. Jarman*, 39 N. J. L. 523, *affirmed*, 40 N. J. L. 379.

In the case of *Hellyer v. Baldwin*, 24 Vroom, page 141, cited in defendant’s brief, the collateral bond was given by the maker of the bond and mortgage and, in *Jarman v. Wiswall*, 9 C. E. Green, page 267, cited by defendant, the Court refers to the case of *Luce v. Hinds*, Clark, page 453: “The guarantor had guaranteed the collection of the mortgage.” This being a guaranty of collection

In *Executors of Sibley v. Stull, et als.*, 15 N. J. L. 332, the obligees of a bond assigned the same and all the moneys due and to become due thereon, and thereby guaranteed and warranted the prompt payment of all the moneys, principal and interest, which should become due upon the same, and at page 336 the Court said:

“I think the demurrer must be overruled. The liability of the defendant was not conditional, but absolute according to the expressed terms of their covenant. Plaintiffs were not bound to demand payment of the obligor, or to use due diligence, as in the case of mercantile securities; hence they were not obliged to give notice of non-payment. Nor is a special request necessary in this case, as in those cases where defendant’s liability is contingent or dependent upon the happening of some event, or upon the doing of something by the plaintiff.”

In *Pintard v. Davis*, 21 N. J. L. 632, which was a suit against a surety upon a bond, the sureties contended that after the money mentioned in the said bond became due, they requested the plaintiff to collect without delay of Mulford, the principal, who was then solvent, and able to pay, and so continued for eight years thereafter, and that the same could then have been collected of him, and that the plaintiff, without any reasonable excuse, neglected and refused to take any legal measures against him, or to proceed in any other way to collect the same, and that Mulford afterwards became insolvent and unable to pay the debt.

In this case CARPENTER, *Judge*, at page 634, second paragraph, said:

“But independent of this technical objection, which, however, is fatal to the legality of the plea, the defense cannot be maintained. The undertaking of such surety is absolute. It is his business to see whether the principal pays, and not that of the creditor. If he lies by, and the insolvency of the principal intervenes, he must abide by the loss, and cannot throw it on the creditor. Mere delay to require payment, without any binding contract for that purpose, and without fraud, will not discharge a surety; and upon the facts of this plea there could be no relief even in Chancery. Supposing the surety can call upon the creditor to do the most he can for his benefit, it must be upon terms that will secure the creditor from all the consequences of risk, delay or expense.”
Wright v. Simpson, 6 Ves. 734; 2 Story Eq. J., 849.

And in *Force v. Craig*, 7 N. J. L. 272, it was held that where a person assigns a sealed bill to another, and agrees to stand security thereon until paid, although the drawer lived three years in good credit after the bill became due, without being called upon by the holder for payment, and afterward fails, the assignor will be liable upon his special guaranty.

It was established at the trial that “the defendant was not requested at any time to accept a re-assignment of the Smith mort-

and take the property off his hands before the foreclosure sale.”
(See state of case, page 31, par. 4.)

“Defendant requested the plaintiff’s husband to have her foreclose this mortgage.” See State of Case, page 31, paragraph 4.

The foregoing is a complete answer to defendant’s contention that plaintiff’s conduct in not offering to, or assigning the bond to defendant caused him loss. It is perfectly clear from the whole course of dealing of the parties, plaintiff and defendant, that both regarded the Smith bond as worthless.

I respectfully submit that the judgment of plaintiff-appellee against defendant-appellant, should be affirmed.

Respectfully submitted,

LOUIS J. BEERS,
Attorney for Plaintiff-Appellee.



New Jersey Court of Errors and Appeals

MARIA A. PFEIFFER,

Plaintiff-Respondent,

vs.

JAMES E. CROSSLEY,

Defendant-Appellant.

On Appeal.

BRIEF

ABNER KALISCH,

Attorney for Defendant-Appellant.

Statement

The suit now under consideration was instituted to recover a sum for deficiency alleged by the complainant, Marie A. Pfeiffer, to be due her on the guarantee of a mortgage, which was accompanied by a bond, the mortgage covering certain real estate in the City of East Orange, and dated February 7, 1907, by Nellie A. Smith and husband, to the defendant, James E. Crossley, which mortgage was assigned by the defendant, Crossley, to the complainant, Pfeiffer, on the 15th day of May, 1911, for which the defendant, Crossley, made and signed the guaranty: "Now, therefore, I, James E. Crossley, of the City of East Orange, in further consideration of the said deed made by the said Marie A. Pfeiffer to the said Cornelia V. Peddie, do hereby guarantee unto the said Marie A. Pfeiffer the payment of the face of said mortgage."

It is stipulated and admitted that the bond and mortgage were made on February 7, 1907, over four years prior to the date of assignment, and over four years prior to the date of the guaranty (the mortgage was made for a period of six months). It was also proved and admitted that the complainant, Marie A. Pfeiffer, proceeded to foreclose the mortgage, and that there was a final decree entered, and a sale of said premises made on the 16th day of July, 1912; and it has been further stipulated that the sale was confirmed on the 10th day of August, 1912, and that the pleadings and summons show that the present suit against this defendant, Crossley, were instituted, and the pleadings were filed on the 31st day of March, 1913, showing that more than six months had elapsed after the consummation of the sale, and that no suit for deficiency was brought by the complainant, Marie A. Pfeiffer, upon the bond accompanying the mortgage, within the time as required by the statute; and it is further stipulated that no suit was ever brought on the bond for the deficiency, either before or after foreclosure of said mortgage.

At the trial, the defendant contended that there could be no recovery by the plaintiff for the reason that an Act of Legislature entitled, "An Act concerning proceedings on bond and mortgage given for the same indebtedness and the foreclosure and sale of mortgaged premises thereunder," approved March 12, 1880, P. L. 1880, page 225, and the amendments thereof, P. L. 1881, page 184 and supplements thereto, P. L. 1907, page 563. These acts apply and prevent a recovery by the plaintiff, and that judgment be entered for the defendant. The court being in doubt as to the foregoing question of law whether said acts applied to this case, certified the same to the Supreme Court for its advisory opinion- which said court subsequently directed a

verdict to be entered for the plaintiff and against the defendant and from which judgment this appeal is taken.

The guaranty does not give permission, nor is it a warrant, for an attorney to confess judgment, but is a simple guaranty, whereby the complainant must pursue the remedies as provided by statute, and protect to the defendant all securities on the debt which the defendant guaranteed.

In the case of *Hellyer vs. Baldwin*, 24 Vroom, p. 141, Justice Reed, delivering the opinion of the court held :

“The terms of the act requiring, in the case of a bond and mortgage given for the same debt, that the mortgage shall be first foreclosed (Rev. Sup. p. 490), are not waived by giving, with the bond, a warrant to confess judgment; and a judgment entered upon such bond before the foreclosure of the accompanying mortgage is irregular.”

After stating that a statute could be waived, says :

“But I am unable to perceive that any waiver of the statute can be found in the warrant to confess judgment.”

The practice of empowering an attorney to appear and confess judgment is a part of the common law procedure. 3 Blackstone Commentaries, 397.

The present statutory regulations respecting confession of judgment has been in existence for many years in this state.

It is highly improbable that when this frequently employed form was signed the parties had any thought of the statute in question. If their intention had been to waive its provisions, there would have been an express allusion to the act.

The purpose of a warrant is to save the creditor the time, expense and trouble of being compelled to take the orderly steps of a suit; by it when the debt

becomes suable he can at once enter judgment. The debt upon this bond, by force of the statute, did not ripen for suit until the sale of the property covered by the collateral mortgage security had been applied in payment of the debt. In the language of the act, all proceedings shall be first to foreclose the mortgage.

Proceedings upon the bond can be taken only in case of a deficiency existing after the sale of the mortgaged premises, and then judgment can be entered for the amount of such deficiency only.

Laws of the State of New Jersey, to wit, "An act concerning proceedings on bond and mortgages given for the same indebtedness and the foreclosure and sale of mortgaged premises thereunder."

PROCEDURE ON BOND WHERE DEBT IS NOT SATISFIED BY FORECLOSURE; LIMITATIONS, Sec. 2: That in all cases, etc., P. L., 1880, p. 255, as amended P. L., 1881, p. 184, and the several supplements and amendments thereto.

General Statutes of the State of New Jersey, Revision of 1895, page 2112, Section 47.

Compiled Statutes 1910, Vol. 3, page 3421, Section 48.

In this case there was no warrant to confess judgment, nor any time specified when the debt should be paid. Therefore, there was nothing to relieve the complainant from following in detail the statute strictly in this case, and was compelled to bring suit upon the bond for deficiency against Nellie A. Smith and her husband, and thus protect the securities which had been guaranteed by the defendant, to which the defendant was entitled before holding the defendant upon his guaranty.

The defendant might have been and probably would have been a co-defendant, but having waived the right to sue upon the bond, by the lapse of time under the statute, by negligence and laches on the

part of the complainant, she has elected to relieve the defendant from his surety, as well relieving the mortgagor and bondsmen from any deficiency.

It cannot be said because the wording of the guaranty is that "He does hereby guarantee unto the said Marie A. Pfeiffer, the payment of the face of said mortgage" that this defendant is not entitled to the benefit of the bond or the securities covered by the mortgage, for the decisions all hold that the surety or guarantee is entitled to all the surety covered under his guaranty, notwithstanding that he had no notice of the surety or security.

In the case of *Jarman vs. Wiswall*, 9 C. E. Green, page 267. In this case, the chancellor quotes as authority, the case of *Luce vs. Hinds, Clark*, p. 453:

"The guarantor had guaranteed the collection of the mortgage; and it was held that, in a suit by the assignee of the bond and mortgage, for the foreclosure of the latter, against the mortgagor and the mortgagee, who had, on assigning to the plaintiff, guaranteed, as above stated, the decree should be, first, for the sale of the mortgaged premises; second, for a personal decree against the obligor for the deficiency; and third, for an execution against the guarantor for any deficiency after the return of the execution against the obligor."

Thus it appears that the security must be exhausted before execution against the guarantor,

Can the plaintiff, in law or equity, justify her laches in not proceeding against the defendant until after the statute of limitations had barred procedure against the obligor and bondsmen, and thus deprived the defendant and the bondsmen of their principal responsibility upon the undertaking, irrespective of the mortgage. If the plaintiff had a right to proceed against the defendant without bringing suit upon the bond, that right could only

exist by diligence on the part of the plaintiff, if at all, and in due time for the defendant to protect the securities guaranteed.

The right of subrogation, as set forth in "Sheldon on Subrogation," 1882, p. 100:

"And from this right of subrogation on part of the surety, it follows that the creditor must do nothing to defeat the right; if he takes the property from the principal debtor as a pledge or security for the debt, he must hold such property fairly and impartially, for the benefit of the surety, as well as for his own protection; and if he parts with such property without the knowledge and consent of the surety, he will lose his claim against the latter to the extent of the value of the property so surrendered.

"The surety is discharged, at least *pro tanto*, whenever, from the affirmative act of the creditor, the substitution of the surety to the rights and securities of the creditor can no longer be operated in favor of the surety."

As was said by Lord Brougham in *Hodgson vs. Shaw*, 3 Mylne & K., 183:

"The rule is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high; and the right results more from equity than from contract, or *quasi* contract, unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the court in this respect was luminously expounded in the argument of Sir Samuel Romilly, and Lord Eldon, in giving judg-

ment, sanctioned the exposition by his full approval. A surety will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor."

Hoey vs. Jarman, 10 Vroom, page 523. Decision by Chief Justice Beasley in the Supreme Court.

In this case there was a guaranty to pay on a specified date, and the issue in the case was that the guarantor contended that proceedings must be had upon the bond prior to bringing suit against the guarantor, and the whole decision appears to hinge on the fact that the guarantor was bound to pay at a certain time, and everything in the decision would indicate that if the guaranty had not contained those terms, it would have been necessary for the creditor to proceed upon the bond before he could hold the guarantor.

Pleasantville Loan Society vs. Moore, 41 Vroom, page 306. Decision by Justice Swayze in the Court of Errors and Appeals:

"While this case was on the guarantee of a non-negotiable promissory note, C. J. Mathews said, 'Both the laches of the plaintiff and the loss of the defendant must concur to constitute a defense.' The proofs in this case fail to show that any loss was attributable to delay in collecting the note."

Grier vs. Flitcraft, 12 Dickinson, 558:

"The principle under which a surety is held to be discharged if the time of payment named

in the contract be extended, is elementary. The surety with his principal, has entered into a contract with the creditor for the payment of the money. The time of payment is an essential incident of such contract. If the creditor surrenders or changes the contract, or postpones the time of payment without the consent of the surety, and thus prevents the latter from paying the debt at the time named in his contract, and from suing the principal for reimbursement, the creditor has violated the terms of the contract that he has relieved the surety from further liability."

Firemen's Insurance Company of Newark vs. Wilkinson, 8 Stewart, page 175:

"The surety has a vested interest in the contract between the primary debtor and the creditor, to the performance of which he has bound himself, and that contract cannot be altered without his consent, so as to affect his equitable or legal position; and if such modification be effected, the consequence is the exoneration of the surety from all liability. This principle is elementary and indisputable."

Degraw vs. Mechan, 3 Dickinson, 523. Quoting V. C. Greene:

"In this respect the mortgagee occupies an entirely different position from that of his surety. The latter, in virtue of his position as surety, acquires in himself a legal right of subrogation to all securities for the debt which comes to the possession of the creditor."

Respecting the distinction between an original promise to pay at a certain time, which I have already referred to, I wish to add that the wording in the Crossley guaranty is very significant, and even if the Court of Chancery would recognize the mortgage act in its fullest extent, and apply the

strict rules of law regarding the foreclosure, and the suit on the bond within the time limited by the act, the case of Crossley would have received a different construction by Vice-Chancellor Lewis, who rendered the opinion in the case of *Wyckoff vs. Holmes*.

The Crossley guaranty is that he guaranteed the payment of the face of the mortgage, but at no particular time and with the fact well known between all the parties that the mortgage was long overdue, so that the intention is clear that the assignee of the mortgage must, in order to hold the guarantor, proceed to collect that mortgage; of course, the bond is the debt and the mortgage is the security therefor, suit on the bond becomes absolutely necessary before Crossley could be held, for the purpose of determining whether or not the debt is collectible against the original obligor, before Crossley could be held, because as guarantor, he did not guarantee that he would pay the amount of the face of the mortgage, but guarantees the payment of it—by whom? Of course, by the original mortgagor.

It is far different where the guarantor gives a collateral mortgage, as in the case of *Wyckoff vs. Holmes*, 88 Atl., p. 832. Here the guarantor is really an original debtor, and by the terms of his mortgage agrees to pay, upon a certain day, the money, only to be relieved by the original mortgage being paid. And there can be no doubt that if demand had been made in the *Wyckoff* case, by mortgagee, on the day the same was due, and payment refused, there would have been no necessity, as held by the vice-chancellor to foreclose that mortgage or sue on the bond, but would have the right to take the additional security and dispose of it by foreclosure or otherwise; so that the act regarding the bond would not apply, as was properly held in the *Wyckoff* case.

But in the case under consideration, there is no doubt but that the act applied and is intended for just such cases, because if it were not so, and the mortgagee foreclosed his mortgage which was guaranteed by the defendant in this case, and even though the original mortgagor was perfectly solvent and responsible on her bond, by the act of the mortgagee he would relieve the original debtor by merely foreclosing the mortgage and not suing the bond for the deficiency.

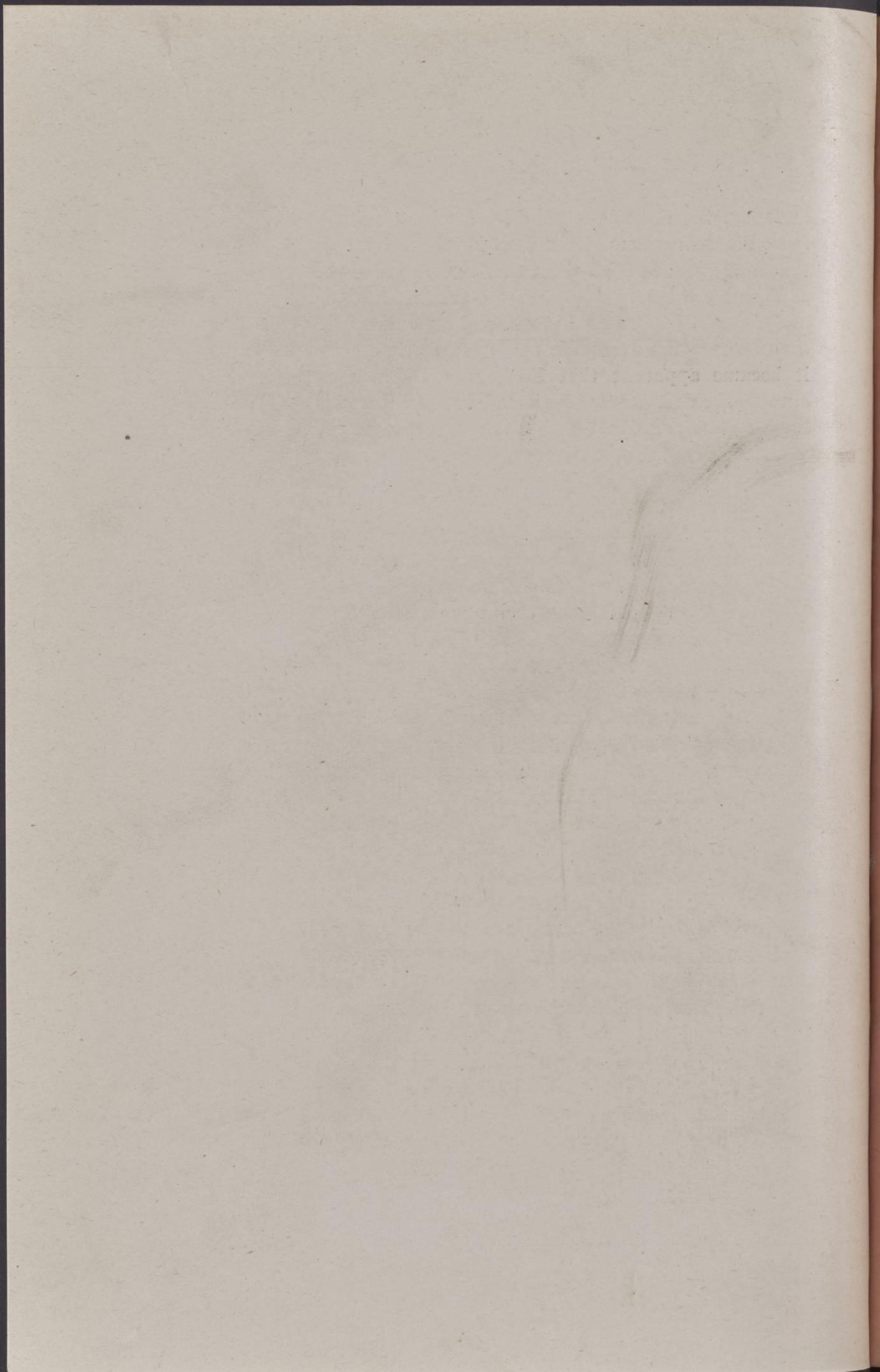
The case of *Wyckoff vs. Holmes* is not analogous to the one at issue, because in that case the collateral mortgagor was made primarily liable for the full amount of the mortgage when the mortgage shall become due, and he would not have been under any necessity of foreclosing his first mortgage but could have demanded the payment of the first mortgage, and upon failure of payment, foreclosed his collateral mortgage for the whole amount. He may have foreclosed on the collateral mortgage for the deficiency, or sued on the bond of the principal mortgagor. In this case the guarantor merely guarantees the face of the mortgage, and is a simple mortgagor, and is entitled to the protection of his rights by the obligee, exhausting all the remedy that she had against the original debtor, by suit on her bond for deficiency. It is entirely different from the case of *Wyckoff vs. Holmes*, but is in keeping with the opinion of Chief Justice Beasley, in *Hoey vs. Jarman*, because in that case, as I have already stated, the guaranty was to pay the amount of the mortgage at the time specified, and as the Chief Justice said, they would not have needed to foreclose the mortgage, but he could have immediately sued upon the guaranty.

We must take for granted in this case that if the mortgagee had pursued her remedy for the collection of the bond from the original obligor, Mr.

Crossley, the defendant, might have been relieved from his guaranty; and another significant fact in this case appears from what the learned judge presiding at the trial certifies to the court. That the complainant did not within the six months after the confirmation of sale, or at any other time, when it became apparent that there was a deficiency, offer to the defendant, Crossley, to re-assign to him the bond accompanying the mortgage, the payment of which had been guaranteed by Crossley, which if it had been done, would have enabled Crossley to bring suit on the bond for deficiency against the original obligor, and thus save himself under his guaranty, but having failed to do so, Crossley was not in any position to protect himself by suing upon the bond so assigned by him to the complainant; and the complainant, not only having failed in suing upon the bond, herself, for deficiency, within the time limited by the statute, but prevented Crossley from doing so by her conduct in not offering or assigning the bond to the defendant, within the time limited by statute or at any other time, and thus preventing the defendant from bringing suit for the deficiency and she being in laches, and not protecting the surety as she should have done, there seems to be no reason why she should not, under these circumstances, bear the loss, which she by her own conduct has occasioned, and therefore is not in any position to complain of any hardship, but must bear the loss, if any, it being the result of her own negligent conduct.

Respectfully submitted,

For Defendant-Appellant,
ABNER KALISCH,
HARRY KALISCH.



Bond



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John R.