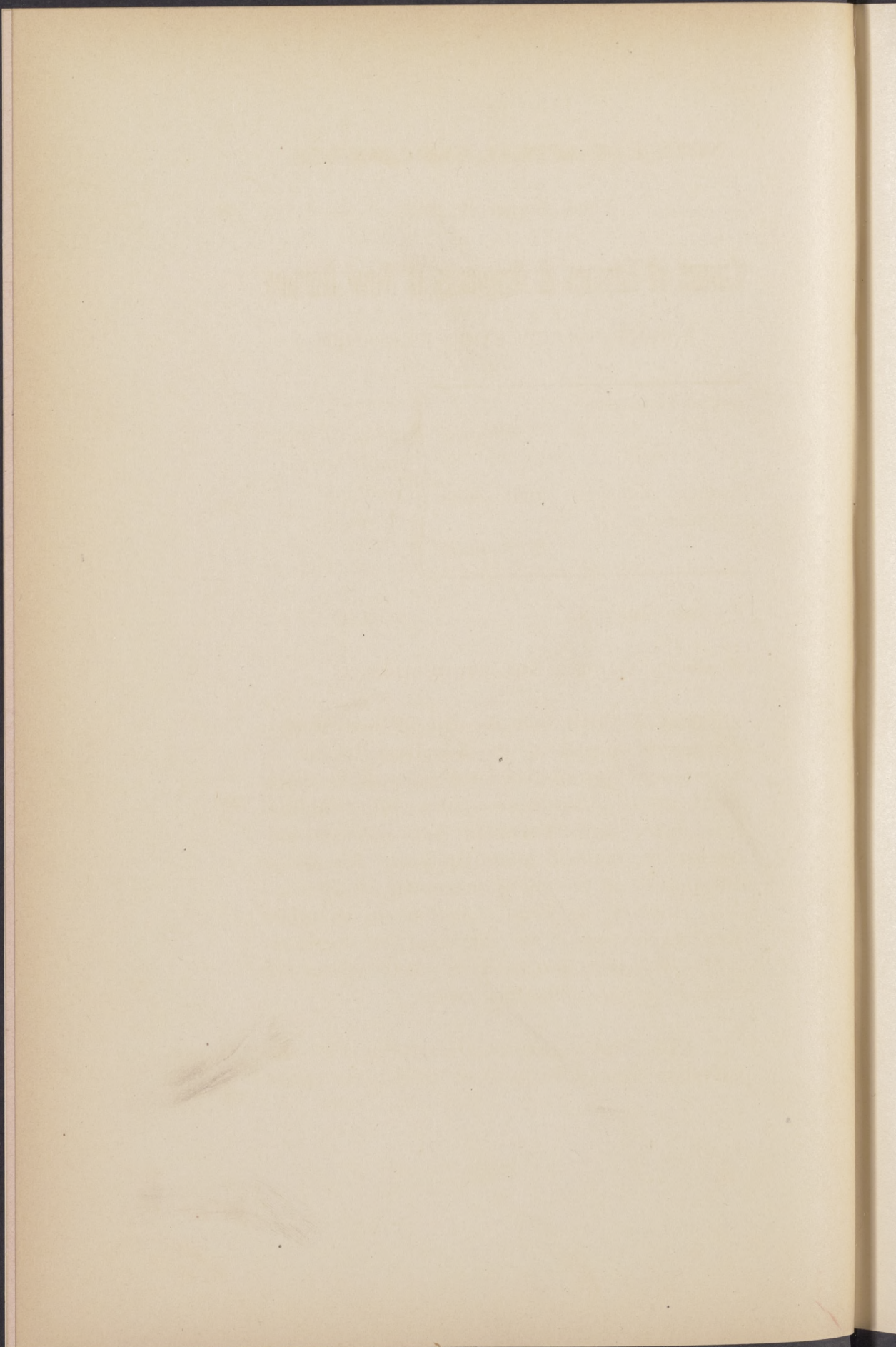


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NOTICE OF APPEAL AND GROUNDS.

Filed August 21, 1929.

10

Court of Errors & Appeals of New Jersey

ESSEX COUNTY CIRCUIT COURT.

LOUIS ECHIKSON,

Plaintiff,

vs.

TEOFIL ZALENSKI and ZOFIA
ZALENSKI,

Defendants.

*Action at Law.
Notice of Ap-
peal and
Grounds.*

20

To Zofia Zalenski,

or

Stephen J. Lorenz, Esq., her attorney.

TAKE NOTICE, that the plaintiff Louis Echikson hereby appeals to the New Jersey Court of Errors and Appeals from that part of the judgment entered in this cause on June 3rd, 1929, that is in favor of the defendant Zofia Zalenski and against the plaintiff Louis Echikson. The plaintiff appeals on the following grounds, to wit:

30

1. Because the Trial Court erred in ruling that the purpose of the signing of the mortgage by the defendant Zofia Zalenski was to release her right of dower and nothing more.

2. The Trial Court erred in ruling that said defendant Zofia Zalenski is not liable to the plain-

40

Notice of Appeal and Grounds.

10 tiff upon the said mortgage and the covenant therein to pay plaintiff.

3. Because the Trial Court erred in holding that plaintiff had no right of action against the defendant Zofia Zalenski.

4. Because the Trial Court erred in giving judgment in favor of the defendant Zofia Zalenski whereas it should have given judgment in favor of the plaintiff against the defendant Zofia
20 Zalenski.

JOSEPH ZEMEL,
Attorney for Plaintiff.

Dated: August 16th, 1929.

Service of a true copy of the foregoing Notice of Appeal and Grounds is hereby acknowledged this 16th day of August, 1929.

30

STEPHEN J. LORENZ,
Attorney for Defendants.

40

AGREED STATE OF FACTS.

Filed May 24, 1929.

10

ESSEX COUNTY CIRCUIT COURT.

LOUIS ECHIKSON, <div style="text-align: center;"><i>vs.</i></div> TEOFIL ZALENSKI and ZOFIA ZALENSKI, <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Plaintiff,</i> <i>Action at Law.</i> <i>Agreed State</i> <i>of Facts.</i> <i>Defendants.</i>	20
---	---	---	----

The parties hereto, by their respective attorneys, submit the following case for judgment on the following agreed state of facts in lieu of the pleadings filed herein and waive the right of trial by jury.

1. On or about July 27th, 1927, the defendant Teofil Zalenski requested the plaintiff to loan him twenty-five hundred (\$2500.00) dollars and as consideration for the said loan and to secure the payment thereof, the defendant Teofil Zalenski executed to the plaintiff a bond, a true copy of which is annexed hereto, made part hereof and marked Exhibit "A" and both defendants Teofil Zalenski and Zofia Zalenski executed to the plaintiff a mortgage, a true copy of which is annexed hereto, made part hereof and marked Exhibit "B."

2. Upon the execution and delivery of the said bond and mortgage, plaintiff paid to the defendant the said sum of twenty-five hundred (\$2500.00)

Agreed State of Facts.

10 dollars, which mortgage was thereupon duly recorded. The said defendant Teofil Zalenski thereupon returned to the plaintiff the sum of two hundred and fifty (\$250.00) dollars as a premium or bonus for making the said loan.

3. At the time of executing the said mortgage the premises therein described were encumbered by a prior first mortgage held by the Grant Building & Loan Association of Newark, New Jersey, a corporation, and the said mortgage of the plaintiff
20 was subsequent thereto. There was a default in the performance of the conditions of the mortgage held by the Grant Building & Loan Association aforesaid and thereupon the said Building & Loan Association foreclosed its said first mortgage in the Court of Chancery of New Jersey and made the present plaintiff a party defendant to the said foreclosure. Such proceedings were had that in the month of December, 1928, a final decree was made for the sale of the said lands and
premises.

30

4. Thereupon a writ of *fiery facias* was issued to the sheriff of Essex County and such proceedings were had that on or about January 8th, 1929, and within six months prior to the commencement of this action, the sheriff of Essex County sold the said premises at public sale according to law for a sum which was not sufficient to pay to the Grant Building & Loan Association the full amount of its decree and costs, and as a result thereof no part of the said money
40 was paid to this plaintiff.

Agreed State of Facts.

5. On February 13th, 1929, and within six 10
 months after the sheriff's sale and prior to the
 commencement of this action, plaintiff filed in the
 office of the Register of Deeds and Mortgages for
 this county, wherein the premises are situate, a
 notice of this action as proposed, setting forth
 therein the name of the court wherein such action
 would be brought and names of the parties to the
 bond and action, the record of the mortgage and
 the description of the mortgaged premises in ac-
 cordance with the statute in such case made and
 provided. 20

6. No further part of the money due on the
 plaintiff's bond and mortgage has been paid and
 there is now due the sum of twenty-two hundred
 and fifty (\$2250.00) dollars. This action of the
 plaintiff against the defendants was commenced
 within six months from the date of the sale of the
 said mortgaged premises.

7. Plaintiff claims as a matter of law that by 30
 reason of the following covenant in the mortgage,
 to wit:

"and the said Teofil Zalenski and Zofia Za-
 lenski, his wife, for themselves, their heirs,
 executors and administrators do covenant
 and agree to pay unto the said party of the
 second part, his heirs, executors, administra-
 tors and assigns, the said sum of money and
 interest as mentioned above and expressed
 in the condition of the said bond."

Agreed State of Facts.

10 8. That both defendants Teofil Zalenski and Zofia Zalenski are liable to him for the full amount now due on the said mortgage.

9. Defendants claim as a matter of law that plaintiff is not entitled to recover as against the defendant Zofia Zalenski.

10. The above issues are submitted for trial to the Essex County Circuit Court without a jury and on written brief without oral argument.

20 11. The Honorable Nelson Y. Dungan, Esquire, Judge of the Essex County Circuit Court is agreed upon as the judge who shall determine this case on the foregoing state of facts.

JOSEPH ZEMEL,
Attorney for Plaintiff.

except as to accuracy of copies of bond and mortgage,

STEPHEN J. LORENZ,
Attorney for Defendants.

30

EXHIBIT "A."

(Note: This bond was also exhibit P1, at the trial.)

KNOW ALL MEN BY THESE PRESENTS

That TEOFIL ZALENSKI of the City of Newark, in the County of Essex and State of New Jersey, is held and firmly bound unto LOUIS ECHIKSON of

40

Agreed State of Facts.

the City of Newark, in the County of Essex and 10
 State of New Jersey, in the penal sum of FIVE
 THOUSAND DOLLARS lawful money of the United
 States of America, to be paid to the said LOUIS
 ECHIKSON, his executors, administrators or as-
 signs: FOR WHICH PAYMENT well and truly to
 be made, I bind myself, my heirs, executors, and
 administrators, firmly by these presents. Sealed
 with my seal, Dated the twenty seventh day of
 July One Thousand Nine Hundred and twenty-
 seven.

20

THE CONDITION of the above obligation is such
 that if the above bounden TEOFIL ZALENSKI, his
 heirs, executors or administrators, shall well and
 truly pay, or cause to be paid unto the above
 named LOUIS ECHIKSON, his executors, administra-
 tors or assigns, the just and full sum of TWENTY
 FIVE HUNDRED DOLLARS on the twenty seventh day
 of July, which will be in the year One Thousand
 Nine Hundred and twenty eight, and the interest
 thereon, to be computed from the day of the date 30
 hereof, at and after the rate of six per cent, per
 annum and to be paid semi-annually, without any
 fraud or other delay then the above obligation to
 be void, otherwise to remain in full force and vir-
 tue. Subject to the further conditions, covenants
 and agreements contained in the mortgage ac-
 companying this bond which are made a part here-
 of.

AND IT IS HEREBY EXPRESSLY AGREED, that 40
 should any default be made in the payment of the

Agreed State of Facts.

- 10 said interest, or of any part thereof, on any day whereon the same is made payable as above expressed; or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; or should the said obligor his heirs, executors, administrators or successors in title to the said mortgaged premises fail to keep the building or buildings now or hereafter located thereon insured against loss or damage by fire and assign the policy or policies for such insurance to the said obligee his executors, administrators or assigns, and such insurance be effected and premium or premiums therefor paid by the said obligee his executors, administrators or assigns, pursuant to the agreement contained in the said mortgage; and should the said interest, or any part thereof, remain unpaid and in arrear for a period of thirty days; or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for a period of sixty days; or said insurance premium or premiums so paid by the said obligee his executors, administrators or assigns remain unpaid for a period of ten days after demand therefor by the said obligee, his executors, administrators or assigns upon the said obligor, his heirs, executors, administrators or successors in title; then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the
- 20
- 30
- 40

Agreed State of Facts.

case may be, the aforesaid principal sum of 10
 money, or so much thereof as may then remain
 unpaid, with all arrearage of interest thereon,
 shall, at the option of the said obligee, his execu-
 tors, administrators or assigns, become and be due
 and payable immediately thereafter, although the
 period first above limited for the payment thereof
 may not then have expired, anything hereinbefore
 contained to the contrary thereof in any wise not-
 withstanding.

AND IT IS FURTHER EXPRESSLY AGREED, that the 20
 said obligor, his heirs, executors, administrators
 or successors in title to said mortgaged premises,
 shall not be entitled to and will not claim any
 credit on the interest payable on the mortgage
 securing this bond for taxes which may be levied
 upon the said mortgaged premises, nor for any
 part of said taxes.

Signed, sealed and delivered

in the presence of

STEPHEN J. LORENZ

30

TEOFIL ZALENSKI (SEAL)

EXHIBIT "B."

(Note: this mortgage was also exhibit P2 at
 the trial.)

THIS INDENTURE, Made the twenty-seventh day
 of July, in the year of our Lord One Thousand
 Nine Hundred and twenty-seven,

40

Agreed State of Facts.

10 BETWEEN, TEOFIL ZALENSKI and ZOFIA ZALENSKI, his wife, of the City of Newark, in the County of Essex and State of New Jersey, party of the First Part,

AND, LOUIS ECHIKSON, of the City of Newark, County of Essex and State of New Jersey, party of the Second Part;

WHEREAS, the said TEOFIL ZALENSKI and ZOFIA ZALENSKI, his wife, are justly indebted to LOUIS
 20 ECHIKSON the said party of the Second Part in the sum of TWENTY FIVE HUNDRED DOLLARS, lawful money of the United States of America, secured to be paid by Teofil Zalenski's certain bond or obligation, bearing even date with these presents, in the penal sum of FIVE THOUSAND DOLLARS, lawful money as aforesaid, to the said party of the Second Part, his executors, administrators or assigns, on the twenty seventh day of July, which will be in the year One Thousand Nine
 30 Hundred and twenty eight and interest thereon, to be computed from the day of the date thereof, after the rate of six per cent. per annum, and to be paid semi-annually.

AND IT IS THEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable as above expressed; or should any tax, assessment, water
 40 rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed

Agreed State of Facts.

or acquired upon the premises described in this 10
 mortgage, and become due and payable; or should
 the said party of the First Part, their heirs, exe-
 cutors, administrators or successors in title to
 said premises fail to keep the building or build-
 ings now or hereafter located thereon insured
 against loss or damage by fire and assign the
 policy or policies for such insurance to the said
 party of the Second Part, his executors, adminis-
 trators or assigns, and such insurance be effected
 and premium or premiums therefor paid by the 20
 said party of the Second Part, his executors, ad-
 ministrators or assigns, pursuant to the agree-
 ment contained in this mortgage; and should the
 said interest or any part thereof, remain unpaid
 and in arrear for a period of thirty days; or said
 tax, assessment, water rent, or other municipal
 or governmental rate, charge, imposition or lien,
 or any or either of them, remain unpaid and in
 arrear for a period of sixty days; or said insur-
 30
 ance premium or premiums so paid by the said
 party of the Second Part, his executors, adminis-
 trators or assigns remain unpaid for a period of
 ten days after demand therefor by the said party
 of the Second Part, his executors, administrators
 or assigns upon the said party of the First Part,
 their heirs, executors, administrators or succes-
 sors in title; and from thence forth that is to say,
 after the lapse or expiration of either of the said
 periods, as the case may be, the aforesaid princi-
 pal sum of TWENTY FIVE HUNDRED DOLLARS or so
 much thereof as may then remain unpaid, with
 all arrearage of interest thereon, shall, at the op- 40

Agreed State of Facts.

- 10 tion of the said party of the Second Part, his executors, administrators or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in any-wise notwithstanding; as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

- 20 Now, THIS INDENTURE WITNESSETH: That the said party of the First Part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to them in hand paid by the said party of the Second Part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these
30 presents do grant, bargain, sell, alien, release, convey and confirm, unto the said party of the Second Part, and to his heirs and assigns forever, ALL those certain tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

FIRST TRACT:

- 40 BEGINNING in the northerly line of Ferry Street at a point therein distant easterly twenty six feet and fifty one-hundredths of a foot from the north-

Agreed State of Facts.

easterly corner of the same and Lexington Street; 10
 thence along Ferry Street north eight degrees
 fifty six minutes east thirty seven feet and seven-
 ty-seven one hundredths of a foot; thence north
 seventeen degrees thirty minutes west seventy feet
 and fifty five one hundredths of a foot; thence
 south seventy two degrees thirty minutes west
 thirty seven feet and thirty six one hundredths
 of a foot and thence south seventeen degrees
 thirty minutes east sixty five feet and one one
 hundredth of a foot to the northerly line of Ferry
 Street and place of BEGINNING. 20

SECOND TRACT:

BEGINNING in the northerly line of Ferry Street
 at a point therein distant easterly sixty four feet
 and twenty-seven one hundredths of a foot from
 the northeasterly corner of the same and Lexing-
 ton Street; thence along Ferry Street north eighty
 degrees fifty six (56) minutes east thirty six feet
 and eighty two one hundredths of a foot; thence
 north seventeen degrees thirty minutes west 30
 seventy five feet and ninety five one hundredths
 of a foot; thence south seventy two degrees thirty
 minutes west thirty six feet and fourty two one
 hundredths of a foot and thence south seventeen
 degrees thirty minutes east seventy feet and fifty
 five one hundredths of a foot to the northerly line
 of Lexington Street and place of BEGINNING.

Being the same premises conveyed to Teofil
 Zalenski by deed dated June 1st, 1927, and re-
 corded in the Essex County Register's Office on 40
 July 1st, 1927, having not yet been given a book

Agreed State of Facts.

- 10 and page number, not being designated Viz: July 1st—#112 and July 1st—#113.

The within mortgage is second and subsequent only to two certain mortgages held by the Grant Building and Loan Association, dated April 29th, 1927, each in the amount of \$10,000 and recorded in Book U 60, page 339 and U 60, page 341.

- 20 In the event that any policy or policies of fire insurance in effect on the above described premises shall be cancelled or threatened to be cancelled by the company issuing the same, the parties of the first part shall immediately thereafter procure an appropriate policy or policies of insurance on said property and in the amounts herein set forth, and in such event, if the parties of the first part fail to procure an appropriate policy of fire insurance covering said premises forthwith, that then and in such event, at the option of the party of the second part, his executors, administrators and assigns, the within mortgage
- 30 shall immediately become due and payable.

It is understood and agreed by and between the parties hereto that the terms, covenants and conditions herein set forth shall be binding upon and enure to the benefit of the parties hereto, their heirs, executors, administrators, successors and assigns.

- 40 TOGETHER with all and singular the tenements, hereditaments, and appurtenances thereunto be

Agreed State of Facts.

longing, or in anywise appertaining and the rever- 10
sion and reversions, remainder and remainders,
rents, issues and profits thereof. AND ALSO, all
the estate, right, title interest, property, posses-
sion, claim and demand whatsoever, as well in law
as in equity of the said party of the First Part,
of, in and to the same, and every part and parcel
thereof, with the appurtenances: TO HAVE AND
To HOLD, the above granted and described prem-
ises with the appurtenances, unto the said party
of the Second Part, his heirs, and assigns, to his
and their own proper use, benefit and behoof for- 20
ever. PROVIDED ALWAYS, and these presents are
upon this express condition that if the said party
of the First Part their heirs, executors, or ad-
ministrators shall well and truly paid unto the
said party of the Second Part, his executors, ad-
ministrators or assigns, the said sum of money
mentioned in the condition of said bond or obliga-
tion, and the interest thereon, at the time and
times, and in the manner mentioned in the said
condition, according to the true intent and mean- 30
ing thereof, that then these presents, and the
estate hereby granted, shall cease, determine and
be void.

AND the said Teofil Zalenski and Zofia Zalen-
ski, his wife, for themselves, their heirs, execu-
tors, and administrators, do covenant and agree
to pay unto the said party of the Second Part his
heirs, executors, administrators or assigns the
said sum of money and interest, as mentioned
above and expressed in the condition of the said
bond. 40

Agreed State of Facts.

10 AND IT IS AGREED, that neither the mortgagors nor the heirs, executors, administrators or successors in title of the mortgagors shall be entitled to any credit on the interest payable on this mortgage for the taxes which may be levied on the mortgaged premises or for any part of such taxes.

20 AND IT IS ALSO AGREED, that the said party of the First Part their heirs, executors, administrators or successors in title to said mortgaged premises, shall and will keep the building or buildings now or hereafter located thereon insured against loss or damage by fire in some safe and responsible insurance company or companies, for a sum not less than TWENTY FIVE HUNDRED dollars, and assign the policy or policies therefor to the said party of the Second Part, his executors, administrators or assigns as collateral security for the payment of the principal and interest aforesaid; and in default thereof, it shall be lawful for the said party of the Second Part his executors, administrators or assigns, to effect such insurance, and the premium or premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation and secured by these presents, and payable by the said party of the First Part, their heirs, executors, administrators or successors in title on demand of the said party of the Second Part, his executors, administrators or assigns, with legal interest.

30

40

Agreed State of Facts.

IN WITNESS WHEREOF, the said party of the 10
 First Part, have hereunto set their hands and
 seals the day and year first above written.

Signed, sealed and delivered

in the presence of

STEPHEN J. LORENZ.

TEOFIL ZALENSKI (SEAL)

ZOFIA ZALENSKI (SEAL)

State of New Jersey, }
 County of Essex. } ss.: 20

BE IT REMEMBERED, That on this 27th day of
 July, in the year of our Lord, one thousand nine
 hundred and twenty-seven, before me, the sub-
 scriber, an Attorney-at-Law of New Jersey, per-
 sonally appeared

TEOFIL ZALENSKI and ZOFIA ZALENSKI, his wife,
 who, I am satisfied, are the grantors mentioned
 in the within Indenture, and to whom I first made
 known the contents thereof, and thereupon they
 acknowledged that they signed, sealed and de- 30
 livered the same as their voluntary act and deed
 for the uses and purposes therein expressed.

AND the said Zofia Zalenski, wife as aforesaid,
 being by me privately examined, separate and
 apart from her husband, further acknowledged
 that she signed, sealed and delivered the same as
 her voluntary act and deed, FREELY, without any
 fear, threats or compulsion of her said husband.

STEPHEN J. LORENZ, 40
An Attorney at Law of N. J.

OPINION.

10

ESSEX CIRCUIT COURT.

Monday, June 3, 1929.

 LOUIS ECHIKSON,

vs.

TEOFIL ZALENSKI and ZOFIA

ZALENSKI,

} *Action at Law.*} *Opinion.*

20 Before: HON. NELSON Y. DUNGAN, J.,
 For plaintiff appears JOSEPH ZEMEL, Esq.,
 For defendants appears STEPHEN J. LORENZ,
 Esq.

DUNGAN, J., (After argument.)

30 This case is submitted on an agreed state of facts from which it appears that on or about July 27, 1927, the defendant Teofil Zalenski executed a bond to the plaintiff in the sum of \$5000, and that to secure the payment of the bond the defendant Teofil Zalenski and his wife, the other defendant, Zofia Zalenski, executed a mortgage upon the premises therein described which was second to a prior mortgage on the same premises. Subsequently the premises were sold under foreclosure of the first mortgage and realized upon the sale less than sufficient to pay the first mortgage. Thereupon the plaintiff in this suit brings an action against both Teofil Zalenski, the husband, and Zofia Zalenski, the wife, upon the bond and mortgage, seeking to recover from them

40

Opinion.

the deficiency, which would be the entire debt, 10
represented by this bond and mortgage.

Under the laws of this State a wife is entitled
to a right of dower in real estate, and the usual
purpose of signing a mortgage is to release that
right of dower and nothing more. The insistent
that because the wife executed the mortgage and
agreed to the payment of the debt, represented
the bond, I have never understood to render her
liable in this State upon an action for the debt 20
for the amount of the bond or for any deficiency
upon the bond. It will be observed, of course,
from what has been said, that the wife was not a
party to the bond at all, but only to the mortgage.
Therefore, in a suit brought for such deficiency,
my view is that there is no right of action against
the wife, and therefore judgment will be entered
in favor of the plaintiff and against the defend-
ant Teofil Zalenski, the husband, for the sum of
\$2250, and as to the defendant Zofia Zalenski,
judgment will be given in favor of the defendant 30
and against the plaintiff.

JUDGMENT.

10 ESSEX COUNTY CIRCUIT COURT.

LOUIS ECHIKSON,	<i>Plaintiff,</i>	} <i>Action at Law,</i>
TEOFIL ZALENSKI and ZOFIA ZALENSKI,		
	<i>Defendants.</i>	

JOSEPH ZEMEL, Atty. of Plaintiff.

STEPHEN J. LORENZ, Atty. for Defts.

20 After Verdict. Judgment Entered June 3, 1929.

Damage \$2,250.00

Costs \$ 84.88

Total \$2,334.88

Judgment after Verdict in the above entitled Action was rendered on the Third day of June A. D., Nineteen Hundred and Twenty-nine in favor of the plaintiff Louis Echikson and against the defendant Teofil Zalenski for the sum of Two Thousand Two Hundred Fifty dollars (\$2,250.00) damage and Eighty-four Dollars and eighty-eight cents Costs of Suit; the court also order judgment in favor of the defendant Zofia Zalenski and against the plaintiff Louis Zalenski.

30

Judgment entered and signed June 3, 1929.

WILLIAM S. GUMMERE,
*Judge.*JOHN H. SCOTT,
Clerk.

40 Book 108 page 6.

CLERK'S CERTIFICATE.

ESSEX COUNTY CLERK'S OFFICE.

10

State of New Jersey, }
 County of Essex. } ss.:

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 Judgment Record in the case
 of Louis Echikson vs. Teofil Zalenski and Zofia 20
 Zalenski entered and signed June 3rd, 1929 and
 recorded in Book 108 page 6 of Circuit Court
 Judgments.
 and the same is taken from and compared with
 Book 108 page 6 of Circuit Court Judgments and
 as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have here-
 unto set my hand and affixed the of-
 (SEAL) ficial seal of said Court and County at 30
 Newark, N. J., this 20th day of July,
 A. D., 1929.

JOHN H. SCOTT,
Clerk.

40

THE HISTORY OF THE

STATE OF NEW YORK

FROM THE FIRST SETTLEMENT TO THE PRESENT TIME

BY JOHN BRANT, ESQ.

IN TWO VOLUMES. VOL. I.

NEW-YORK: PRINTED AND SOLD BY G. B. KEENE, AT THE SIGN OF THE ANCHOR, IN NASSAU-STREET, NEAR THE CITY-HALL.

1807.

THE HISTORY OF THE STATE OF NEW YORK

FROM THE FIRST SETTLEMENT TO THE PRESENT TIME

BY JOHN BRANT, ESQ.

IN TWO VOLUMES. VOL. I.

130

New Jersey Court of Errors & Appeals

10

LOUIS ECHIKSON, <i>Plaintiff-Appellant,</i>	}	<i>Action at Law On Appeal from the Essex County Circuit Court.</i>
vs.		
TEOFIL ZALENSKI, <i>Defendant,</i>		
and		
ZOFIA ZALENSKI, <i>Defendant-Respondent.</i>		

20

BRIEF OF JOSEPH ZEMEL, Attorney for Plaintiff-Appellant.

This is an appeal by the plaintiff from so much of a judgment in the Essex County Circuit Court as is in favor of the defendant-respondent, Zofia Zalenski. The matter was submitted to the trial court on an agreed state of facts and a jury was waived.

Facts.

30

Plaintiff brought this action against Teofil Zalenski (hereinafter referred to as the husband) and Zofia Zalenski, his wife (hereinafter referred to as the wife) to recover money loaned by plaintiff. The facts material for the presentation of the question of law involved are as follows:

On or about July 27th, 1927, the husband requested the plaintiff to loan him twenty-five hun-

40

dred dollars and as consideration for the loan, and to secure the payment thereof, the husband
 10 executed a bond to the plaintiff, (case, page 3 line 30) and both husband and wife executed a mortgage to the plaintiff (case, page 3, line 33). Upon execution and delivery of the bond and mortgage, plaintiff paid to the defendant twenty-five hundred dollars and the mortgage was recorded; thereupon the husband returned to the plaintiff two hundred and fifty dollars.

At the time of executing the mortgage the premises mortgaged were encumbered by a prior
 20 mortgage which was subsequently foreclosed, the present plaintiff being made a party defendant thereto, and a sale held. The premises did not bring enough to pay the first mortgagee, so that plaintiff received no money from the sale. Subsequently and within six months after the said sale, plaintiff filed a notice in the Essex County Register's Office (case, page 5, line 10) and this suit was started.

The mortgage executed by the husband and wife
 30 to the plaintiff contains, among others, the following covenant:

“And the said Teofil Zalenski and Zofia Zalenski his wife, for themselves, their heirs, executors and administrators do covenant and agree to pay unto the said party of the second part, his heirs, executors, administrators and assigns, the said sum of money and interest as mentioned above and expressed in the condition of the said bond.”

and this suit was brought claiming that both husband and wife are personally liable to plaintiff
 40 on the mortgage and said covenant. The trial

court held that only the husband was liable and entered judgment in favor of the defendant wife.

THE LAW.

10

POINT I.

Under this point will be considered.

Ground two. "That the trial court erred in ruling that said defendant Zofia Zalenski is not liable to the plaintiff upon the said mortgage and the covenant therein to pay plaintiff."

20

I. Under the agreed state of facts, both defendants are liable to the plaintiff for the amount due.

1. The mortgage, by its express terms, sets forth that both husband and wife are justly indebted to the plaintiff in the sum of twenty-five hundred dollars secured by the husband's bond, (case, page 15, line 33). This acknowledgment of indebtedness implies a promise to pay.

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(a) In the case of *Elder vs. Rouse*, 15 Wend. (N. Y.) page 218 (1836). The defendant had executed to plaintiff a mortgage in which the defendant acknowledged his indebtedness to the plaintiff and declared that for the purpose of securing the payment thereof he transferred the property, etc. Justice Nelson, speaking for the New York Supreme Court, on page 220, says:

"Where one person acknowledges by deed or otherwise a certain sum to be due to

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10 another, an action of debt or assumpsit, as the case may be, will lie to recover it. 2 Bac. Abr. 279, Vin. Abr. Debt. K. pl. 12; G. pl. 16, 17. 2 Cowen 536. 10 Wendell 675. The language is equivalent to a general covenant or promise, and the appropriate action would lie without the allegation of either; that being implied the acknowledgment of the indebtedness itself creates a legal liability sufficient to sustain the action. 1 Chitty 101, 2, 299, 346, and the admission in this case is as broad as that contained in a single bond.”

20 2. The mortgage expressly sets forth that it is made for the better securing payment of the said money, (case, page 12, line 19), and even if we assume that the wife received none of the money she would still be liable as a surety; since the passage of the amendment to the Married Woman's Act of 1927, a married woman may become a guarantor or surety without any benefit to her separate estate; and a contract of surety is binding upon her. The mortgage in question was executed after the passage of the 1927 Act.

30 3. The mortgage contains an express covenant on the part of both husband and wife to pay the plaintiff. A search of the New Jersey cases has failed to disclose any case directly in point. In several of the other States, however, there are cases in point; and the final decision on the question in all those states is that the wife is liable.

(a) In the case of *Brown vs. Cascaden*, 43 Iowa, page 103, at page 105 (1876), Justice Beck, speaking for the Supreme Court of Iowa says:

40 “The covenant found in the mortgage is for the payment of the money mentioned

therein. It is no part of the conditions of the instrument, and in no way pertains to the conveyance of the land. It is not a covenant securing the mortgagee against the failure of the title or warranting possession and enjoyment of the land. It is simply an obligation binding the mortgagor to pay the money. We know of no rule of law which will invalidate such a covenant, when found in a mortgage." 10

"If valid and binding upon defendant, no reason can be given why an action cannot be maintained upon it."

(b) In the case of *Ellis vs. Abbott*, 138 Pac. 488, the defendant husband had purchased land and gave therefor his note, which note was secured by a mortgage of the purchaser and wife on other land owned by the husband. The Supreme Court of Oregon, (1914) says: 20

"It is argued that as the title to the land in Klickitat County, Washington, was in the name of H. M. Abbott, his wife joined in executing the deed to the plaintiff only to bar her inchoate right of dower. That such being the case she is not bound by any of the covenants contained in the deed and hence an error was committed in rendering a judgment against her." 30

"In construing these provisions in the case of *First National Bank vs. Leonard*, 59 Pacific, 873, it was held that a wife who joined her husband in encumbering his property to secure his debt, the mortgage containing a covenant on the part of both that they would pay the obligation, was bound thereby and that a personal decree rendered against her was proper and enforceable out of her separate property."

(c) The case of *Morgan vs. Niswonger*, 260 Pacific, 1010, is very much like the case at Bar. 40

That was an action on a covenant in a mortgage to pay the mortgage debt. Two of the defendants, Elmer and Jessie Niswonger, executed their note in the sum of \$5300.00. For the purpose of securing the payment of said note the makers thereof, together with the defendants C. P. and Sadie Niswonger, executed a mortgage on the real estate. The mortgage contained the following covenant:

“But in case default shall be made in the payment of the principal or interest * * * * and the said parties of the first part for their heirs, executors, and administrators doth covenant and agree to pay unto the said party of the second part, his heirs, executors, administrators or assigns the said sum of money and interest as above mentioned.”

The complaint contained usual allegations setting out the note in full and attaching thereto the mortgage. The defendants C. P. Niswonger and Sadie Niswonger (these were the defendants who had signed the mortgage only, and not the note), demurred. The trial court sustained the demurrer.

On appeal the Supreme Court of Oregon reversed the trial court, saying:

“We believe the law to be well settled in this state that a mortgagor who signs a mortgage containing a covenant to pay the debt secured by the mortgage is personally liable for that debt.”

(d) In the case of Noble County Bank vs. Waterhouse, 163 Northeastern 119, (1928) in the Appellate Court of Indiana, the husband borrowed from the mortgagee \$8,000.00 and executed his

note for that sum, falling due five years after date. To secure payment of the note, the husband and wife executed a mortgage on certain farm land. The mortgage contained the following covenant: "and the mortgagors expressly agree to pay the sum of money above secured." The wife claimed that the entire debt secured by the mortgage was the individual debt of the husband; that she received no part of the consideration for the said note or the debt secured by the mortgage; that she did not in any way become liable for said debt except that she as wife executed the mortgage for the purpose of releasing her inchoate interest in the real estate for the debt of her husband; that she received no consideration whatever for the execution of the promise contained in the above quoted covenant, and that if any liability on her part arose it was simply as surety for her husband and not as principal for the payment of debt. The mortgagee demurred and the trial court overruled the demurrer and rendered judgment against the mortgagee.

Chief Justice Nichols, in delivering the opinion of the Appellate Court, reversing the decision of the trial court, says:

"That a joint promise to pay the mortgage debt is just as valid and binding; though found only in the mortgage itself, as it would have been had it been expressed in the note to secure which the mortgage was given, is well settled in the Indiana authorities. (citing cases). And appellee could not be heard to say, in view of such express written joint promise to pay the debt secured, that she did not become liable therefor, except that, as the wife of Waterhouse she executed the mortgages for the purpose only of releasing her

10 inchoate interest in the real estate mortgaged for the debt of her husband. The written promise is unambiguous and absolute, and cannot be contradicted or modified by parol evidence of intention.”

The appellant therefore submits that the wife Zofia Zalenski is liable to him under and by the terms of the mortgage.

POINT II.

Under this point will be considered.

20 Ground one. “That the trial court erred in ruling that the purpose of the signing of the mortgage by the defendant Zofia Zalenski was to release her right of dower and nothing more.”

1. There was no evidence or proof of any kind before the court that the purpose of the wife in signing the mortgage was to release her right of dower and nothing more. The mortgage expressly sets forth an indebtedness on the part of the husband and wife (case, page 10, line 18). The mortgage is under seal (case, page 17, line 17) and there is no claim on the part of the respondent, nor did the court find, a failure of consideration. There was ample consideration for this covenant on the part of the wife. Even if we were to assume that the wife received no part of the money advanced by the plaintiff, or that she received no other benefit therefor the lending of the money by the plaintiff to the defendant husband would amount to such a legal detriment as would constitute a good and valuable considera-

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tion for the promise on the part of the defendant wife.

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2. Further, even if the defendant wife had attempted to prove that her purpose in signing the mortgage was merely to release her right of dower in the property mortgaged, such evidence under the parol evidence rule would not constitute a defense; nor would it even be admissible.

(a) In the case of *Wright vs. Remington*, 41 N. J. L., 48, a married woman sued upon a promissory note attempted to set up that when she signed the note it was represented to her that the signing was a mere matter of form and that she would not be held liable. Justice Reed, speaking for the Supreme Court, page 54, says:

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“The third ground of defence was, that at the time of the execution of the notes, it was represented to Mrs. Remington that the signing was a mere matter of form, and that she would not be held liable. There is no rule better settled than that evidence of contemporaneous parol declarations is inadmissible to vary the terms of a written contract.

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“The rule is recognized as a wholesome doctrine by which men are enabled to place their agreements in a shape undisturbable by the uncertainty of oral testimony. The weight of authority is overwhelming in favor of holding, in the language of the American Editors of the *Duchess of Kingston's* case, that “a person who is so ill-advised as to execute a written contract in reliance upon an assurance that it shall not be literally enforced, must submit to the loss if he is deceived, and cannot ask that a principle of great moment to the community shall be made

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to yield for the sake of relieving him from the consequences of his indiscretion."

10 The case was appealed to this Court, 43 N. J. L., 451 where Chancellor Runyon very tersely disposes of the defense as follows:

"As to the other defense, it is enough to say, that to admit proof of a parol contemporaneous promise, on the part of the payees, that the wife should not be called upon to pay the notes, would be in violation of the familiar rule of evidence which excludes parol evidence to contradict the terms of written instruments."

20 **POINT III.**

Under this point will be considered.

Ground three. "That the trial court erred in giving judgment in favor of the defendant Zofia Zalenski whereas it should have given judgment in favor of the plaintiff against the defendant Zofia Zalenski."

30 The liability of the wife having been established, the trial court ought to have entered a judgment against her.

1. The judgment in favor of the wife cannot be sustained on the authority of Section 48 of an Act concerning Mortgages, Compiled Statutes 1910, Vol. 3, page 3421. That section provides as follows:

40 "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 debt and costs of suit. (P. L. 1880, p. 255, as amended P. L. 1881, page 184.)” 10

2. It may be argued by the respondent that by virtue of this section, since the prior mortgage was foreclosed and the present plaintiff was made a party defendant to the foreclosure, that the plaintiff's only action would be on the bond and the wife not being a party to the bond, there would be no liability on her part. 20

This argument is unsound and ignores the real meaning and purpose of the statute.

3. Corpus Juris, in discussing the effect of a statute of this nature, says, 41 Corpus Juris, page 657: 30

“A suit may be brought notwithstanding the statute where there is no lien by reason of the non existence of the property described in the mortgage or the mortgage is ineffective as security or has become valueless or its lien has been destroyed by the enforcement of prior encumbrances, or where the existence of the mortgage has been terminated.”

In the case of Bower vs. Bower, 78 N. J. L., 387, at page 389, Justice Garrison, speaking for this court quotes from the case of Seigman vs. Street- 40

er, 64 N. J. L. 169, where Justice Gummere of the Supreme Court held: (Italics are mine.)

10 “The act of March 23rd, 1881, which requires that a party who holds a bond the payment of which is secured by a mortgage, shall foreclose the latter instrument before bringing a suit upon the former *has no application where the existence of the mortgage has been terminated* before the institution of the suit upon the bond.”

In the case of Seigman vs. Streeter, *supra*, Justice Gummere says: (Italics are mine.)

20 “*It appears from the proofs before us that the mortgaged premises, subsequent to their pledge for the payment of the plaintiff’s debt, were partitioned among the owners thereof by proceedings had in the Court of Chancery for that purpose, and that Streeter, the then holder of the bond and mortgage, was made a party to those proceedings, and the premises sold free and clear from the lien of his mortgage. The effect of those proceedings was to wipe out the mortgage, and leave the payment of the bond unsecured by that collateral. Consequently our statute requiring the holder of a bond and mortgage to first exhaust his remedy on the mortgage, before proceeding upon the bond, had no application at the time the judgment in this case was entered.*”

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The only purpose of this statute is to provide that the mortgagee shall first look to the mortgaged premises for satisfaction of his debt, and it was not intended to provide an exclusive procedure after the termination of the lien of the mortgagee.

4. In the case of Green vs. Stone, 54 N. J. E., 387, this court held that the statute did not prevent a suit in Chancery against a grantee who had assumed a mortgage.

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In the case at Bar, the lien of the plaintiff's mortgage having been terminated before the institution of the suit at law, the statute no longer applies and the plaintiff had a right to pursue his other remedies, including an action on the bond and the action on the covenant in the mortgage. 10

CONCLUSION.

The appellant therefore respectfully submits that the said covenant is supported by legal consideration and that the defendant respondent is liable thereon to the plaintiff and that the learned trial court erred in the findings complained of by the appellant and that therefore so much of the judgment as is in favor of the respondent should be reversed and judgment rendered in this court in favor of the appellant and against the respondent. 20

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