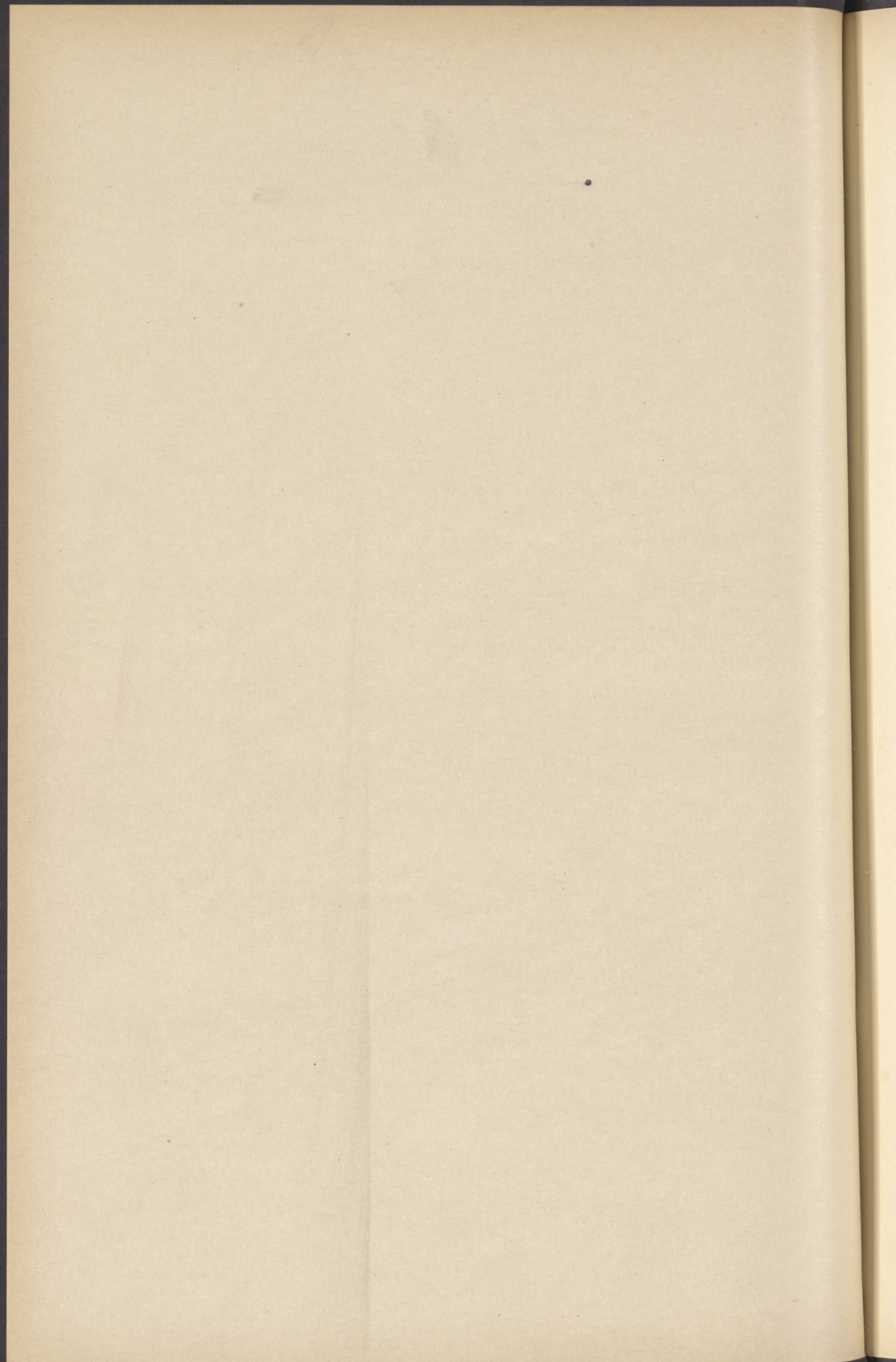


I N D E X

	PAGE
Notice of Appeal.....	1
Summons	3
Complaint	4
Affidavit	9
Notice to Strike Complaint.....	13
Order	16



NOTICE.

(Filed Jan. .)

NEW JERSEY SUPREME COURT.

10

ATLANTIC COUNTY.

WILLIAM BATER, JR.,

Plaintiff,

v.

ELIZABETH C. CLEAVER,
ATLANTIC GUARANTY &
TITLE INSURANCE COM-
PANY and MARGATE TRUST
COMPANY,

Defendants.

Action at Law.
Notice.

20

*To William Charlton, Esquire, attorney for plain-
tiff.*

Please take notice that on Friday, the 22nd day 30
of January, 1932, at the hour of eleven o'clock in
the forenoon, at 7th floor, Guarantee Trust Build-
ing, Court Room in the City of Atlantic City, New
Jersey, we will move before Honorable W. Frank
Sooy, Judge of the Atlantic County Circuit Court
and Supreme Court Commissioner for an order to

strike out the complaint heretofore filed by you in the above-entitled cause for the following reason in addition to the reasons contained in the notice heretofore served upon you:

For the reason that the complaint heretofore filed in this cause affirmatively shows in its allegations that every obligation of the Atlantic Guaranty and
10 Title Insurance Company under the agreement recited and contained in the complaint has been fully complied with on the part of the Atlantic Guaranty and Title Insurance Company.

Respectfully,

THOMPSON and HANSTEIN,

*Attorneys for Atlantic Guaranty
and Title Insurance Company.*

20

[ENDORSED]

Due and Legal Service hereby acknowledged this 4th day of Jan., 1932.

WILLIAM CHARLTON.

30

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

WILLIAM BATER, JR., Plaintiff-Appellant, v. ELIZABETH C. CLEAVER, et als., Defendant-Respondents.	}	10 On Appeal. Notice of Appeal.
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To Thompson & Hanstein, Esqs., Attorneys for
Guaranty & Title Ins. Co.; Moore & Butler, 20
Esqs., Attorneys for Margate Trust Co., and
Bolte & Tripician, Esqs., Attorneys for Eliza-
beth C. Cleaver:

Please take notice that the plaintiff, William
Bater, Jr., appeals to the New Jersey Court of
Errors and Appeals from the whole of the judg-
ment entered in this cause and for the following
reasons:

30

1. That the complaint sets forth a cause of action.
2. That the Supreme Court erred in its judgment.

WILLIAM CHARLTON,
Attorney for Plaintiff-Appellant.

*

[ENDORSED]

Service of the within notice is duly
acknowledged this 15th day of Feb.,
1932.

10

Bolte & Tripician,
Attorneys for Elizabeth C.
Cleaver.

Thompson & Hanstein,
Attorneys for Defendant-
Respondents, Atlantic
Guaranty & Title Ins. Co.

Moore & Butler,
Attorneys for Margate
Trust Co.

20

30

SUMMONS.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

THE STATE OF NEW JERSEY, TO ELIZABETH C. CLEAVER,
ATLANTIC GUARANTY & TITLE INSURANCE COM-
PANY AND MARGATE TRUST COMPANY:

10

You are summoned to answer the an-
nexed complaint of William Bater, Jr.,
(Seal) in an action at law in the New Jersey
Supreme Court. And take notice that
unless you file your answer to the said
complaint with the Clerk of the New Jersey Supreme 20
Court, at Trenton, New Jersey, within twenty days
after service upon you of this writ and the annexed
complaint, the plaintiff may proceed in the suit and
judgment may be entered against you.

Witness, HONORABLE WILLIAM S. GUMMERE, Judge
of the New Jersey Supreme Court, at Trenton, New
Jersey, this 11th day of December, 1931.

FRED L. BLOODGOOD,

Clerk.

WILLIAM CHARLTON,
Attorney.

30

COMPLAINT.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

10

WILLIAM BATER, JR.,
Plaintiff,

v.

ELIZABETH C. CLEAVER, AT-
 LANTIC GUARANTY & TITLE
 INSURANCE COMPANY and
 MARGATE TRUST COM-
 PANY,

20

Defendants.

Action at Law.
 Complaint.

Plaintiff, William Bater, Jr., a resident of the City of Ventnor City, County of Atlantic and State of New Jersey, says:

- 30 1. On July 22nd, 1930, one Joseph S. Byrne, of the City of Philadelphia, State of Pennsylvania, made an agreement with Morris Elfman and Emma R. Elfman, his wife, both of the City of Atlantic City, County of Atlantic and State of New Jersey, in writing, wherein said Joseph S. Byrne agreed to

purchase certain premises in Atlantic City, New Jersey, more particularly set forth in said agreement.

2. At the time of the making of said agreement of sale, there was an encumbrance upon said premises in the form of a certain mortgage made by Morris Elfman, *et ux.*, to Elizabeth C. Cleaver, of Westville, New Jersey, dated September 28th, 1920, 10 in the sum of \$15,000, which said mortgage had at the time of the making of said agreement of sale, been reduced to the sum of \$10,000, and had been assigned to the Margate Trust Company, a banking corporation of the State of New Jersey, on June 20th, 1928, as security for certain advances obtained by said Elizabeth C. Cleaver from said bank.

3. Shortly after the making of said agreement of sale, said Byrne and Elfman agreed upon the At- 20 lantic Guaranty & Title Insurance Company, a title company operating in Atlantic City, New Jersey, as the place at which they would make settlement under said agreement of sale, and said Atlantic Guaranty & Title Insurance Company undertook to make the searches and settlement thereunder.

4. By agreement between Elizabeth C. Cleaver, Margate Trust Co. and Joseph C. Byrne, it was agreed that Elizabeth C. Cleaver and Margate Trust 30 Company would not foreclose their said mortgage for six months from the date of settlement, provided Joseph S. Byrne would place in escrow with the Atlantic Guaranty & Title Ins. Co. the sum of \$2,131.50 under certain terms and conditions as hereinafter set forth. In accordance with said verbal agreement,

Joseph S. Byrne paid, on September 30, 1930, to the Atlantic Guaranty & Title Ins. Co., the sum of \$2,131.50, and then and there made with said company an agreement, copy of which is as follows:

“RECEIVED from Joseph S. Byrne, a certified check in the sum of \$2131.50, which is to be held by us in escrow for the benefit of mortgagee of premises W/S of Texas Avenue, distant 300 feet south of Pacific Avenue, being 50 feet front and rear by 100 feet deep on each side.

It is understood and agreed that the Atlantic Guaranty & Title Insurance Co. is to hold said sum until the 1st day of December, 1930, and to repay the same to Joseph S. Byrne, if on said day the above mentioned mortgage has been satisfied or all taxes, now a lien on the above mentioned premises, have been paid.

If said mortgage has not been satisfied or said taxes paid, the Atlantic Guaranty & Title Ins. Co. is to continue to hold said money until the above mentioned mortgage has been fully satisfied and if the above mentioned mortgage is foreclosed and the mortgagee does not receive the full amount of the indebtedness, then and in that event so much of said \$2131.50 as is necessary to fully satisfy said indebtedness shall be paid to the above mentioned mortgagee. The balance, if any, to be returned to the said Joseph S. Byrne or his assigns.

Dated, Brooklyn, N. Y. September 30, 1930.”

5. At the time and place fixed for settlement, said Joseph S. Byrne did not make settlement; there-

upon, on or about January 5, 1931, Elizabeth C. Cleaver instituted proceedings in our Court of Chancery to foreclose her said mortgage and such proceedings were had thereon that said Elizabeth C. Cleaver obtained a final decree, issued a *feri facias*, and in accordance therewith the Sheriff of Atlantic County, on or about the 28th day of May, 1931, sold said premises to said Elizabeth C. Cleaver for the sum of \$100, which sale was duly confirmed and a deed therefor delivered to said Elizabeth C. Cleaver. 10

6. Said Elizabeth C. Cleaver or Margate Trust Company, or both of them, after said sale, and in spite of said deficiency remaining upon her said bond and mortgage, failed to enter any judgment for said deficiency against Morris Elfman, although said Elfman was then and is now a responsible person financially and could have answered for said debt, but instead of so doing, for a cash consideration, made and executed a satisfaction and release of any liability of said Elfman for said deficiency upon the bond executed by said Elfman to secure her said premises to some person unknown to your complainant for the sum of \$12,000. 20

7. Thereafter, said Elizabeth C. Cleaver or Margate Trust Co., or both of them, applied to the Atlantic Guaranty & Title Insurance Company for the said sum of \$2,131.50 deposited with said company by said Joseph S. Byrne, claiming said money was the property of said Elizabeth C. Cleaver or Margate Trust Company, and said Atlantic Guaranty & Title Insurance Company, without just reason or excuse, and in violation of its agreement with Joseph 30

S. Byrne, forthwith paid to said Elizabeth C. Cleaver or Margate Trust Company, or both of them, said sum of money.

8. Said Joseph S. Byrne, by assignment in writing dated December 3, 1930, assigned to your complainant all of his right, title and interest in the
10 said sum of \$2,131.50 held by the Atlantic Guaranty & Title Insurance Co., as hereinabove set forth, together with the right to sue for and collect for the same.

9. By the acts of the said Elizabeth C. Cleaver and Margate Trust Company, or both of them, said mortgage was satisfied.

10. The Atlantic Guaranty & Title Insurance Co.
20 breached its agreement with plaintiffs, assignors, by paying said moneys to the said Cleaver or Margate Trust Company, or both of them.

11. Said Elizabeth C. Cleaver or Margate Trust Company, or both of them, obtained said money by fraud from the Atlantic Guaranty & Title Insurance Company, knowing that they were not entitled to the same.

30 Plaintiff demands as damages \$2,131.50, with interest from July 1st, 1931.

WILLIAM CHARLTON,
Attorney for Plaintiff.

AFFIDAVIT.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

10

WILLIAM BATER, JR.,
Plaintiff,
v.
ELIZABETH C. CLEAVER, AT-
LANTIC GUARANTY & TITLE
INSURANCE COMPANY and
MARGATE TRUST COM-
PANY,
Defendants.

Action at Law.
Affidavit.

20

State of New Jersey, }
Atlantic County, } ss.

WILLIAM BATER, JR., of full age, being duly sworn
according to law, on his oath deposes and says:

30

1. He is the plaintiff herein.
2. That the assignment annexed hereto is a true
copy of the assignment made in writing by Joseph
S. Byrne and referred to in paragraph eight of the
complaint.

3. That the money deposited with the Atlantic Guaranty & Title Insurance Co. was deposited by Joseph S. Byrne as attorney for the Atlantic Hotels Corporation, and not for himself, and that in making said deposit he acted as the mere agent for said company, whose money it was at all times, as is well known to the defendants.

10

4. That all of the allegations of the bill of complaint are true and that the defendants', Margate Trust Company and Elizabeth C. Cleaver's, mortgage has been satisfied in full and they have received the entire amount of their indebtedness, and in addition to which they have received from the Atlantic Guaranty & Title Ins. Co. the sum of \$2,131.50.

5. That the Atlantic Guaranty & Title Insurance
20 Company violated its agreement in that it paid said money to Elizabeth C. Cleaver and the Margate Trust Company in violation of the agreement referred to in paragraph four of the complaint, in that it paid said money after said Cleaver and Margate Trust Company had received the full amount of their indebtedness, and, in fact, had received a sum in excess thereof, as set forth in the complaint.

6. Deponent says that the defendants have not
30 fully and completely performed their agreement and that the receipt of said money by said Cleaver and Margate Trust Company and the payment thereof by the Atlantic Guaranty & Title Insurance Co., with knowledge that the indebtedness had been received in full by said Cleaver and Margate Trust

Co., constituted the fraud alleged to have been perpetrated by the defendants.

7. Deponent has not been served with any copy of my taxed bill of costs incurred in the dismissal of his bill in Chancery, nor until the filing of the affidavits of James N. Butler and Walter Hanstein, did he know that the order in Chancery had contained any provision for the payment of costs. He has never yet been informed of the amount of said costs and tenders himself ready to pay the same if payment thereof be necessary upon service upon him of the taxed bill of costs therefor. 10

WILLIAM BATER, JR.

Sworn and subscribed to before me this 20th day of January, 1932.

ROSE E. SASLAFF, 20
Notary Public of N. J.

KNOW ALL MEN, that Joseph S. Byrne of the City of Brooklyn, County of Queens and State of New York, hereinafter called the assignor, in consideration of One (\$1.00) Dollar and other valuable consideration to such assignor in hand paid by William Bater, Jr. of 4403 Atlantic Avenue, Atlantic City, New Jersey, hereinafter called the Assignee, hereby assigns to the said Assignee, his executors, administrators and assigns, to his and their proper use, benefit and behoof forever, all monies now, or which may hereafter become due to the said Assignor and all claims, demands and causes whatso- 30

ever, which the said assignor now has, or may here-
 after have, against Atlantic Guaranty and Title In-
 surance Co., a corporation organized under the law
 of the State of New Jersey, and Elizabeth C. Cleaver
 and Margate Trust Company, a banking corporation
 organized under the laws of the State of New Jer-
 sey, under a certain agreement wherein the Assignor
 10 deposited with the said Atlantic Guaranty & Title
 Ins. Co. certain monies in the sum of Two Thousand
 One Hundred Thirty-one Dollars and Fifty Cents
 (\$2131.50) which was to be held by the said Atlantic
 Guaranty & Title Insurance Company only for and
 in accordance with said agreement.

And the said Assignor hereby appoints the said
 assignee his true and lawful attorney, irrevocable,
 with full power of substitution and revocation for
 the said Assignor, and in his name or otherwise, but
 20 for the sole use and benefit of the said Assignees,
 to ask, demand, sue for, collect, receive, compound
 and give acquittance for the said claim or claims,
 demand or demands and cause or causes of action,
 or any part thereof.

IN WITNESS WHEREOF, the assignor has
 hereunto set hand and seal this 3rd day of December,
 1930.

..... (SEAL)

30 Signed, sealed and delivered
 in the presence of:
 Witness:

.....

NOTICE TO STRIKE COMPLAINT.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

10

WILLIAM BATER, JR.,

Plaintiff,

v.

ELIZABETH C. CLEAVER, *et*

als.,

Defendants.

Action at Law.
Notice to Strike
Complaint.

20

To William Charlton, Attorney for Plaintiff:

Take notice that on Friday, the twenty-second day of January, nineteen hundred and thirty-two, application will be made to the Honorable W. Frank Sooy, Judge of the Atlantic County Circuit Court and Supreme Court Commissioner, at the court room, seventh floor, Guarantee Trust Building, Atlantic City, New Jersey, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order to strike out the complaint filed by you in the above-entitled cause for the following reasons:

1. For the reason that plaintiff heretofore has

filed a bill of complaint in the Court of Chancery of the State of New Jersey for the same cause of action as is alleged in the complaint filed in this court, which bill of complaint has been dismissed with costs and which costs have not been paid.

10 2. By the complaint heretofore filed in this cause, it appears the suit is improperly instituted, in that any right to collect any damages by reason of the facts recited in the complaint remains in Joseph S. Byrne, referred to therein, and that this suit must be instituted and remain in the said Joseph S. Byrne, or for his use.

20 3. That the complaint fails to show that the conditions on which Joseph S. Byrne would be entitled to the return of the said sum of \$2,131.50 have been complied with by him.

4. That the said complaint discloses on its face that the agreement set up in said complaint, and upon which plaintiff bases his right to recover, has been fully and completely performed by all of the defendants.

30 5. The reason of the fact that no copy of the assignment referred to in paragraph 8 of the complaint is annexed to the complaint or proffered.

6. As additional ground for dismissing said complaint by the defendants, Elizabeth C. Cleaver and Margate Trust Company, said complaint does not plead the fact constituting the fraud or frauds alleged to have been perpetrated by these defendants.

7. As additional ground for the defendants, Elizabeth C. Cleaver and Margate Trust Company, said complaint does not show that there was any privity of contract between these defendants and the said Joseph S. Byrne in relation to the agreement set forth in paragraph 4 of the complaint.

8. As further ground for the defendant, Atlantic Guaranty and Title Insurance Company, the complaint does not show in what particulars this defendant violated its agreement with said Joseph S. Byrne.

BOLTE & TRIPICIAN,
Attorneys for Defendant,
Elizabeth C. Cleaver.

THOMPSON & HANSTEIN,
Attorneys for Defendant,
Atlantic Guaranty and 20
Title Insurance Co.

MOORE & BUTLER,
Attorneys for Defendant,
Margate Trust Com-
pany.

ORDER.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

10

WILLIAM BATER, JR.,	}	Action at Law. Order.
<i>Plaintiff,</i>		
v.		
ELIZABETH C. CLEAVER, <i>et</i>		
<i>als.,</i>	}	
<i>Defendants.</i>		

20

This matter coming on to be heard before Honorable W. Frank Sooy, Judge of the Atlantic County Circuit Court and Supreme Court Commissioner, in accordance with the Rules of the Supreme Court, and pursuant to due notice in the presence of William Charlton, Esquire, attorney for the plaintiff, and Wilbur C. Bishop, Esquire, of the firm of Thompson & Hanstein, attorneys for the defendant,

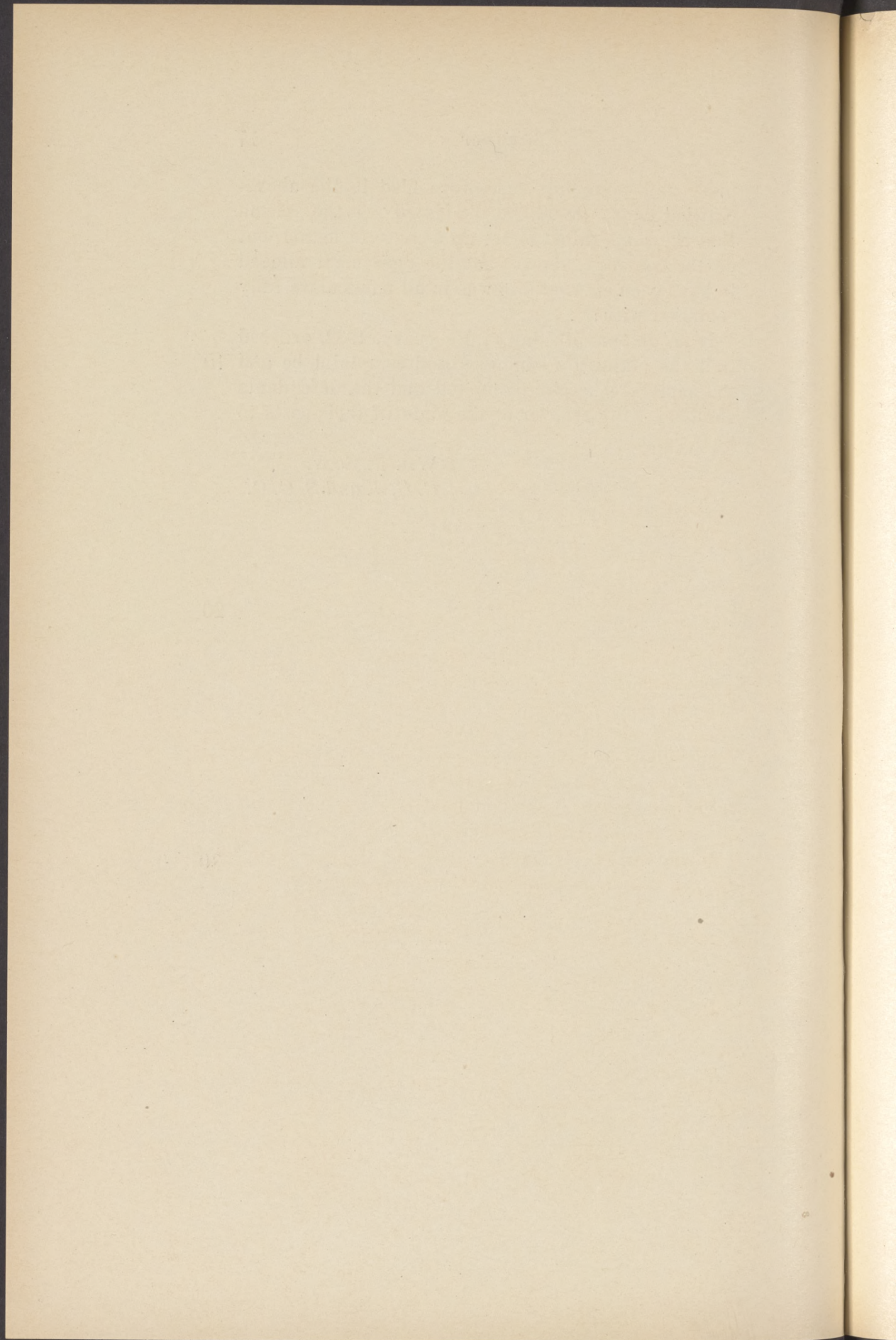
30 Atlantic Guaranty and Title Insurance Company, a corporation of the State of New Jersey, and the other defendants for the purpose of argument being likewise represented by Wilbur C. Bishop, Esquire; and

The Court having heard and considered the arguments of counsel and being convinced that the sum-

mons and complaint heretofore filed in the above-entitled cause should be dismissed for the reason that the same failed to set up a cause of action, but on the contrary, shows that the agreement alleged to have been entered into was in all particulars fully complied with;

It is, on this 5th day of February, 1932, ordered that the plaintiff's summons and complaint be and the same are hereby dismissed and the defendants shall severally recover of the plaintiff their costs to be taxed.

Wm. F. Sooy,
C. C. J. and S. C. C.



RULE FOR JUDGMENT FINAL.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

10

WILLIAM BATER, JR.,

Plaintiff,

v.

ELIZABETH C. CLEAVER, *et*

als.,

Defendants.

Action at Law.
Rule for Judgment
Final.

20

It appearing to the Court that heretofore an order was made dismissing the summons and complaint in this cause on the ground that the same failed to set forth a cause of action, and it appearing that judgment final should be entered herein, now, therefore, it is, on this 18th day of February, A. D. 1932,

Ordered, that judgment final be entered in favor of the defendants, Elizabeth C. Cleaver, Atlantic Guaranty & Title Insurance Co., and Margate Trust Co., and against the plainaiff, William Bater, Jr.

RALPH W. E. DONGES,
Justice Supreme Court.

IN THE CITY OF NEW YORK

IN SENATE

JANUARY 18, 1891

19

—

WILLIAM B. EATON

Librarian

New York City

New York City

New York City

New York City

New York City

New York City

20

—

The following is a list of the books in the collection of the New York Public Library, which are now in the possession of the City of New York, and are available for the use of the public. The books are arranged in alphabetical order of the author's name, and are numbered in the margin. The books are as follows:

1. The History of the City of New York, from its first settlement to the present time, by John Smith. New York: J. B. E. & Co. 1890. 2 vols. 8vo.

2. The History of the City of New York, from its first settlement to the present time, by John Smith. New York: J. B. E. & Co. 1890. 2 vols. 8vo.

3. The History of the City of New York, from its first settlement to the present time, by John Smith. New York: J. B. E. & Co. 1890. 2 vols. 8vo.

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5. The History of the City of New York, from its first settlement to the present time, by John Smith. New York: J. B. E. & Co. 1890. 2 vols. 8vo.

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9. The History of the City of New York, from its first settlement to the present time, by John Smith. New York: J. B. E. & Co. 1890. 2 vols. 8vo.

10. The History of the City of New York, from its first settlement to the present time, by John Smith. New York: J. B. E. & Co. 1890. 2 vols. 8vo.

New Jersey Court of Errors and Appeals

WILLIAM BATER, JR.,
Plaintiff-Appellant.

v.

ELIZABETH C. CLEAVER, *et als*,
Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT.

FACTS.

Plaintiff filed his complaint and service was made upon the defendants. Before answer, defendants served a notice (page 13, State of the Case) to strike the answer upon eight grounds. A hearing was had before Judge Sooy, Circuit Court Judge, who entered an order dismissing the complaint without specifying upon which ground it was dismissed. The complaint appears upon page 4 of the State of the Case, and the grounds of appeal are: (1) That the complaint sets forth a cause of action, and (2) That the Supreme Court of New Jersey erred in its judgment. No affidavits were filed by the defen-

dants in support of their motion and the argument was purely upon matters of law.

DISCUSSION.

The complaint, being attacked solely upon its sufficiency, its allegations are taken to be true. The only point at issue is found in the second part of the third paragraph of the escrow agreement as set forth on page six of the State of the Case. It is admitted that paragraph two of the escrow agreement was not performed, and it was further admitted that the first part of the third paragraph, to wit, "If said mortgage has not been satisfied or said taxes paid, the Atlantic Guaranty & Title Insurance Co. is to continue to hold said money until the above mentioned mortgage has been fully paid and satisfied," was likewise not performed.

The only question is, what is the meaning of the agreement in relation to the acts of the parties in respect to the language continuing the third paragraph as set forth in paragraph six, to wit,"—and if the above mentioned mortgage is foreclosed and the mortgagee does not receive the full amount of the indebtedness, then and in that event, so much of the said \$2131.50 as is necessary to fully satisfy said indebtedness shall be paid to the above mentioned mortgagee, the balance, if any, to be returned to the said Joseph S. Byrne, or his assigns.

The plaintiff is the assignee of Byrne and therefore entitled to recovery, if his contention is correct.

Brief for Plaintiff-Appellant

The question at issue, therefore, is, did the mortgagee receive the full amount of her indebtedness? It may be noted that there is nothing said as to what the indebtedness shall be, but presumably it is the amount of the mortgage with interest and costs.

The mortgage was foreclosed and the property purchased at the sheriff's sale by the mortgagee, or her assign, Margate Trust Company, one of the other defendants, for the sum of \$100. The defendants argued and the Court found that this was a full determination of the question of whether the mortgage indebtedness was satisfied in full and that regardless of the subsequent conduct of the mortgagee, this satisfied the agreement and entitled her or her assign to receive from the Title Company the money at issue, and the Title Company to stand exonerated for having made the payment.

The appellant disagrees with the lower Court in this regard. Appellant contends that the bid of \$100 at the sheriff's sale was a mere preliminary step and that before the mortgagee or her assign could say that the indebtedness had not been satisfied in full, and the Title Company be empowered to pay over the money, the mortgagee had to enter a deficiency judgment against the maker of the bond and endeavor to enforce collection thereof, and that by her subsequent conduct in failing to enter that deficiency judgment and by her affirmative act in selling the property for a sum in excess of the amount of the mortgage with interest and costs, and additionally releasing the maker of the bond and mortgage, admittedly a responsible man, she received full payment of her indebtedness.

Brief for Plaintiff-Appellant

Appellant argues that when the mortgagee forecloses and purchases the property for a nominal sum and fails to enter a deficiency judgment within six months, the mortgagee has satisfied the mortgage indebtedness by the acceptance of the property, because the mortgagee has said in effect that the mortgagor shall have no right of redemption of the property and that the mortgagee is content with the bargain and will not attempt to collect the deficiency, and considers the mortgage indebtedness satisfied. This mortgagee went further, as the complaint shows, and sold the property at a profit and released the mortgagor.

Appellant argues that the bid at the sheriff's sale was not conclusive of the question, but that the subsequent conduct of the defendant Cleaver and her assign, Margate Trust Company, gave to these two defendants the full amount of the mortgage indebtedness and that therefore when they accepted from the Title Company the deposit of the appellant's assignor, they acted in fraud; that the Title Company in paying over said sum to them violated the escrow agreement and likewise perpetrated a fraud upon the appellant and his assignor.

For these reasons it is respectfully prayed that the judgment of the Supreme Court be reversed.

WILLIAM CHARLTON,
Attorney of Plaintiff-Appellant.

NEW JERSEY COURT OF ERRORS and APPEALS

WILLIAM BATER, JR., <i>Plaintiff-Appellant,</i>	}	On Appeal.
vs.		BRIEF OF ATLANTIC
ELIZABETH C. CLEAVER, et als.,		GUARANTY and TITLE
<i>Defendants-Respondents.</i>		INSURANCE COM- PANY, <i>Defendant-Respondent.</i>

The complaint in this cause shows, we believe, the following facts which are important:

(1) The plaintiff's assignor entered into an agreement with one Elfman to purchase certain premises.

(2) At the time of said agreement there was an encumbrance upon the premises in the form of a mortgage which was made by Elfman to one Elizabeth C. Cleaver and by her assigned to the Margate Trust Company as security for her loan. Later by an agreement made between Cleaver, the Margate and the plaintiff's assignor, it was agreed that said mortgage though in default would not be foreclosed for a period of six months from the date

of that agreement. In accordance with some arrangement made between the plaintiff's assignor and Cleaver, and/or the Margate Trust Company, the plaintiff's assignor delivered to this defendant, Atlantic Guaranty and Title Insurance Company, the sum of \$2131.50 under the agreement which is set forth in paragraph 4 of the complaint. That agreement briefly provides that the Atlantic Guaranty and Title Insurance Company is to hold the money until December 1, 1930 and to repay it to the plaintiff's assignor on said date if the above mentioned mortgage has been paid or all taxes now a lien on the above mentioned premises have been paid and further if the mortgage has not been satisfied or the taxes paid, the title company is to continue to hold the money until the mortgage has been fully satisfied "and if the above mentioned mortgage is foreclosed and the mortgagee does not receive the full amount of the indebtedness, then and in that event so much of the said \$2131.50 as is necessary to fully satisfy said indebtedness shall be paid to the above mentioned mortgagee. The balance, if any, to be returned" to the plaintiff's assignor.

(3) Settlement was never completed and after the six months' period provided for in the agreement, foreclosure proceedings were instituted, the mortgaged premises were sold for \$100. to Elizabeth C. Cleaver and the sale confirmed and the deed delivered.

(4) Thereafter the Title Company paid the \$2131.50 delivered to it under its agreement with the plaintiff's assignor to Elizabeth C. Cleaver on account of the balance due on the mortgage.

(5) By paragraph 6 of the complaint the plaintiff pleads that no deficiency judgment was entered against the bondsman for the deficiency due under the foreclosure but that instead an agreement was made to release the bondsman for cash consideration paid.

The only point involved as we view it in the original motion to strike and on this appeal is does the complaint on its face show that the Title Company fully complied with its agreement made with the plaintiff's assignor.

ARGUMENT.

It is our contention that by the agreement made between the plaintiff's assignor, Byrne, and the Title Company, the Title Company was to hold this money for a period of six months and in the event that the mortgage should be paid within that time or all taxes should be paid, it should deliver the money back to Byrne. Neither of those events happened and the alternative of foreclosure happened. The mortgage was foreclosed and the proceedings are a matter of record. The Sheriff sold the property for \$100., the sale was confirmed and the Sheriff's deed delivered to the purchaser. The amount of the deficiency was in excess of the amount deposited with the Title Company. On that showing the Title Company paid the money to Cleaver or the Margate.

It is our contention that the foreclosure at that time was completed. No other step was necessary by the terms of the company's agreement. It was entitled to pay the money on account of the deficiency, and was no longer accountable to the plaintiffs' assignor therefor. It did everything which it agreed to do under its agreement and the proceedings for deficiency on the bond were not compelled by the agreement nor were they a necessary part of the foreclosure. The deficiency arose at the time of the sale or at the latest, at the confirmation of the sale and once the deficiency is fixed no agreement made between the bondsman for his release or any other person changes the amount or fact thereof.

It is further contended that the action of the lower court was proper in striking the complaint if for no other reason that the fact that the complaint as filed did not specify the fraud alleged to have been committed by the defendants.

The defendants Margate Trust Company and Elizabeth C. Cleaver each contend that the argument set forth above although its language relates solely to the defendant Atlantic Guaranty and Title Insurance Company, it is equally applicable to them and that the striking of the complaint was proper also as to them for the same reason, to wit, that the complaint did not dispose of a cause of action but on the other hand affirmatively showed that everything that the plaintiff's assignor contracted for had been fully performed.

It is respectfully contended that the order striking the complaint heretofore filed in this cause should be confirmed and that the appeal should be dismissed with costs as to all defendants.

THOMPSON & HANSTEIN,
*Attorneys for Atlantic Guaranty
and Title Insurance Company*

MOORE & BUTLER,
Attorneys for Margate Trust Co.

BOLTE & TRIPICIAN
Attorneys for Elizabeth C. Cleaver

INDEX

	Page
Summons	1
State of Demand	2
Transcript of Clerk's Docket	3
Judge's Decision	20
Specification of Determinations	22
Opinion of Supreme Court	24
Remittitur	27
Notice of and Ground of Appeal	28

Testimony

Plaintiff's Evidence	5
Defendant's Witnesses	

Alexander J. Milne, Sr.	
direct examination	7
cross	8
re-direct	10
Alexander J. Milne, Jr.	
direct examination	10
cross	11

Certificates of Stenographer and District Court Judge	12
---	----

Exhibits

	Exhibit	Page
E. 1. Lease	5	13
E. 2. Order Appointing Receiver	9	14
E. 3. Order Confirming Sale	7	16
E. 4. Assignment of Lease by Receiver to Alexander J. Milne, Sr.	7	18
E. 5. Assignment of Lease to Alexander J. Milne, Jr.	8	19

