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Notice of Appeal and Reasons.

(Filed May 24th, 1928.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NATIONAL SURETY CO., a corporation, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law.

Sirs:

Please Take Notice that the defendant, Agnes K. Mulligan, hereby appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this case and from the order striking out defendant's answer, upon the following grounds:

I. Because the Supreme Court erred in giving judgment to the plaintiff, in that:

(1) The defendant's answer should not have been stricken out.

(2) The defendant's answer was not false, sham or frivolous.

(3) The defendant's answer was not interposed solely for the purpose of delay.

(4) The defendant's answer was sufficient in law.

(5) The several defenses set forth in defendant's answer were good and sufficient in law.

(6) The complaint did not and does not set forth a cause of action.

(7) The defendant's answer raises issues of law and fact to be decided by the court, with a jury.

(8) The complaint in Paragraph 1 alleges that the Surrogate's Court in and for the County and State of New York is a court of record and of general jurisdiction, and the defendant's answer denies that the Surrogate's Court in and for the County and State of New York is a court of record and of general jurisdiction, and this raises an issue to be tried.

(9) The answer pleads payment, and this is a valid affirmative defense requiring a trial if denied by reply.

(10) The answer alleges satisfaction of plaintiff's claim by application of collateral deposited as security and this raises an issue to be tried, if denied by reply.

(11) The answer alleges that plaintiff perpetrated a fraud in pretending to sell the collateral securities to itself at a price grossly inadequate, and defendant is entitled to a trial of this issue, should the allegations of the answer in this respect be denied by the plaintiff.

(12) The plaintiff having moved to strike

out the defendant's answer, opened the question of the sufficiency of the complaint, and such complaint does not set forth a cause of action because:

(a) There is no allegation that the decree or judgment, as it is variously called in the complaint, is final.

(b) There is no allegation that the said decree or judgment is assignable under the laws of the state where procured.

(c) There is no allegation as to the effect of the decree or judgment under the laws of New York.

(d) It appearing that the decree or judgment was rendered by a court of limited or special jurisdiction, the complaint is defective in that it does not set forth the extent of such jurisdiction, with respect to the said decree or judgment.

(e) In Paragraph 1 of the complaint, it is alleged that Mary K. Hartmann procured a decree against defendant, but the complaint is based upon a judgment, but there is no allegation of any valid judgment which could be sued upon by plaintiff.

(f) There is no allegation of what rights, if any, may have inured to the benefit of the plaintiff, by reason of the alleged assignment referred to in Paragraph 4 of the complaint.

(g) The complaint does not disclose any right of action at law, but at best, indicates a right which might be enforced in equity.

(h) In the absence of allegations in the complaint, as to the law of New York applicable to the case, it must be presumed that the decree or judgment is not assignable, nor the basis for a suit in this State to recover a judgment thereon.

13. The affidavits filed in support of and in opposition to the motion to strike out defendant's answer, disclose facts entitling the defendant to a trial of the issues raised by the pleadings.

14. The defendant is entitled to a trial by jury, and the judgment appealed from is erroneous and contrary to law, because no such trial by jury has been had or afforded to the defendant.

15. The judgment is contrary to the provisions of the Constitution of the United States and of the State of New Jersey, in that defendant has been deprived of a right of trial by jury; such right being guaranteed to the defendant by Article VII of the Amendments to the United States Constitution and Sub-division 7 of Article I of the Constitution of the State of New Jersey, as amended.

Yours respectfully,
WILLIAM F. BURKE,
Attorney for Deft-Appellant.

To:
Messrs. Eichmann & Seiden,
Attorneys for Plff-Appellee.
Clerk of the New Jersey
Supreme Court and To
Whom It May Concern.

Summons.

(Filed September 30th, 1927.)

State of New Jersey to Agnes K. Mulligan.

You Are Summoned to answer the annexed complaint of National Surety Company in an action in law in the New Jersey Supreme Court. And Take Notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed with the suit and judgment may be entered against you.

(LS)

Witness, William S. Gummere, Chief Justice of the said Supreme Court, at Trenton, this 30th day of September, 1927.

EDWARD J. KELLEHER,
Clerk.

Eichmann & Seiden,
Attorneys.

Complaint.

(Filed September 30th, 1927.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NATIONAL SURETY COMPANY, a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law.

Plaintiff, National Surety Company, a corporation of the State of New York, authorized to do business in the State of New Jersey, says that:

1. On November 29, 1913, Mary K. Hartmann procured a decree against defendant, Agnes K. Mulligan, in the Surrogate's Court in and for the County and State of New York, a court of record and of general jurisdiction, directing the said defendant, Mulligan, to pay to said Mary K. Hartmann $18,997.46 in the matter of the judicial settlement of the account of Agnes K. Mulligan as executrix of the last will and testament of John Hartmann, deceased.

2. An appeal from said decree was taken by said Mulligan to the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department, and the said decree was affirmed by order of

said Appellate Court, dated November 27, 1914, and filed in the said Surrogate's Court November 30, 1914. On December 5, 1914, an order was made by and filed in the said Surrogate's Court making the order of affirmance of the Appellate Court the order of said Surrogate's Court and directing said Mulligan to pay to Mary K. Hartmann $246.60 for costs and disbursements on appeal.

3. An appeal from said order of affirmance of the Appellate Division was taken by said Mulligan to the Court of Appeals of the State of New York and said order of affirmance was affirmed by said Court of Appeals on December 8, 1915, a Remittitur being filed in said Surrogate's Court on December 14, 1915. On December 21, 1915, an order was made by and filed in the said Surrogate's Court adjudging that the order and judgment of the Court of Appeals be made the order and judgment of the Surrogate's Court of the County of New York and directing that Mary K. Hartmann recover of said Mulligan $144.68 costs taxed on said appeal.

4. On December 21, 1914, by written assignment duly executed and delivered, the said Mary K. Hartmann, duly assigned, transferred and set over unto the plaintiff, National Surety Company, the said judgment and all sum or sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon and constituted and appointed the said National Surety Company, her true and lawful attorney to take all lawful ways

for the recovery of the money due or to become due on said judgment.

A copy of the exemplification of the records and proceedings aforesaid referred to in paragraphs 1, 2 and 3, including also the assignment aforesaid, is hereto annexed, made a part hereof and marked "Schedule A."

5. The amount now due on said judgment with interest computed to September 20, 1927, is $17,917.50.

6. Plaintiff is still the owner and holder of said judgment and said judgment still remains in full force and effect and not in any way reversed, satisfied, annulled or otherwise vacated.

Plaintiff demands as damages the sum of $17,917.50 with interest from September 20, 1927.

EICHMANN & SEIDEN,
Attorneys for Plaintiff.

Schedule "A."

THE PEOPLE OF THE STATE OF NEW YORK.

By the Grace of God Free and Independent

To all whom these presents shall come or may concern, GREETING:

Know Ye, that we have examined the records and files in the office of the Surrogate of the County of New York, do find there remaining a certain record of Decree, order of affirmance

Complaint

on appeal from Surrogate, Judgment of Affirmance, Assignment, Remittitur and Decree making Judgment of the Court of Appeals Judgment of Surrogates' Court and affirming Order appealed from in the matter of the estate of John Hartmann, deceased, in the words and figures following, to wit:

Decree.

At a Surrogates' Court, held in and for the County of New York, at the Surrogates' Court, in the County of New York, on the 29th day of November, 1913.

Present: Hon. Robert Ludlow Fowler,
Surrogate.

In the Matter
of
The Judicial Settlement of the Account of Agnes K. Mulligan, as Executrix of the Last Will and Testament of John Hartmann, Deceased.

Agnes K. Mulligan, Executrix of the Last Will and Testament of John Hartmann, deceased, having heretofore made application to the Surrogate of the County of New York, for a judicial settlement of her account as such

Executrix, and a citation having been thereupon issued, pursuant to statute, directed to all persons interested in the estate of said deceased, citing and requiring them and each of them personally to be and appear before the said Surrogate, at his office in the County of New York, on the 18th day of July, 1911, at 10:30 o'clock in the forenoon of that day then and thereto attend such judicial settlement, and the said citation having been returned with proof of the due service thereof on Mary K. Hartmann, John R. Hartmann, Charles Hartmann and Emma H. Castor, and the said Executrix having appeared on the return day of said citation, and the said Executrix having rendered her account under oath, before the said Surrogate, and the said account having been filed, together with the vouchers in support thereof. and objections thereto having been filed by Mary K. Hartmann, and the same having been heard, the said Agnes K. Mulligan, as Executrix, having appeared by Leslie J. Tompkins, Esq., and the said Mary K. Hartmann having appeared by Gilbert D. Lamb, Esq., and the said account and the testimony taken thereon, and the objections thereto having been duly considered by the Surrogate, and a decision having been duly signed by the Surrogate, stating the facts found and the conclusions of law, and the said matter having been duly adjourned to this day, and the said Surrogate, after having examined the said account and vouchers, now here finds the state and condition of the said account to be as stated and set forth in the following summary statement thereof, made by

the said Surrogate as judicially settled and adjusted by him to be recorded with and taken to be a part of the decree in this matter, to wit:

A Summary Statement of the account of Agnes K. Mulligan, Executrix of the Last Will and Testament of John Hartmann, deceased, made by the Surrogate as judicially settled and allowed.

The said executrix is charged as follows:

With the sum of $10,000 represented by a bond and mortgage made by Mary A. Fell, dated May 7th, 1908, together with interest thereon from May 7th, 1911, to date hereof	$10,000.00	
Interest at 6%	1,456.66	
		$11,456.66
With the sum of $3,000 collected by said Executrix Agnes K. Mulligan, from John P. Wenninger, together with interest of $153.33, making a total of	3,153.35	
With interest thereon from date of account, viz. Nov. 14, 1912, to date hereof	171.65	
		3,325.18
With amount of promissory note made by Wm. G. Mulligan and Agnes K. Mulligan to the order of John P. Wenninger, assigned to decedent and due Dec. 4, 1911, heretofore paid out by the executrix to said William G. Mulligan, viz.	4,000.00	
With interest thereon at 6% from Sept. 4th, 1911, to date hereof	504.62	
		4,504.62

Cash on deposit in Lincoln National Bank		600.00
Total assets of estate with which Executrix is chargeable as of Oct. 11, 1913		$19,886.46

The said Executrix is credited as follows:

With amount of Schedule C, which includes $250 which is in the hands of William G. Mulligan, applicable to the payment of the transfer tax, if any	$850.00
With amount paid John W. Poole, M. D., professional services to John Hartmann, dec'd.	30.00
Total	$ 880.00
Leaving a cash balance in her hands of	$18,997.46

And it appearing that the said Executrix has fully accounted for all the moneys and property of the estate of said deceased, which have come into her hands as such Executrix, and her account having been adjusted by the said Surrogate, and a summary statement of the same having been made as above and herewith recorded, it is hereby

Ordered, Adjudged and Decreed, that the said account be and the same is hereby judicially settled and allowed as filed and adjusted; and it is further

Ordered, Adjudged and Decreed, that the said Executrix be disallowed any commissions herein, and also any costs and disbursements; and it is further

Ordered, Adjudged And Decreed that out of the balance so found, the said Executrix Agnes K. Mulligan pay forthwith, after the making of this decree, the sum of $18,997.46 to the said Mary K. Hartmann, and upon making such payment, the said Agnes K. Mulligan be and she hereby is discharged from all further liability as Executrix as aforesaid as to all matters embraced in said account and it is further Ordered, Adjudged and Decreed that the said executrix retain the bond and mortgage made by Mary A. Fell, belonging to the estate of decedent, and representing Ten Thousand Dollars of said estate.

ROBERT LUDLOW FOWLER,
Surrogate.

Original Filed Dec. 1st, 1913.

A true copy.

Martin G. M. Cue,
Clerk of the Surrogate's Court.

Complaint

Order of Affirmance on Appeal from Surrogate.

At a term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department in the County of New York, on the 27th day of November, 1914.

Present: Hon. George L. Ingraham,
Presiding Justice.
" Chester B. McLaughlin,
" John Proctor Clarke,
" Victor J. Dowling,
" Henry D. Hotchkiss,
Justices.

In the Matter of The Judicial Settlement of the Account of Agnes K. Mulligan, as Executrix, etc., of John Hartmann, dec'd.	6455.

An appeal having been taken to this court from a decree of the Surrogate's Court of the County of New York, entered in the Surrogate's Court on the 29th day of November, 1913, by the executrix above named and said appeal having been argued by Mr. Ellsworth J. Healy of counsel for the appellant, and by Mr. Gilbert D. Lamb of counsel for the respondent; and due deliberation having been had thereon,

Complaint

It is hereby unanimously ordered and adjudged that the decree so appealed from be and the same is hereby affirmed with costs.

Appellate Division of the
Supreme Court,
First Judicial Department
Clerk's Office, County of
New York.

I, Alfred Wagstaff, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the Appeal in the above entitled action or proceeding, and entered in my office on the 27th day of November, 1914, and that the original case or papers upon which said appeal was heard are hereunto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 28th day of November, 1914.

ALFRED WAGSTAFF,
Clerk.

(Seal of the Court.)

Complaint

Judgment of Affirmance.

At a term of the Surrogates' Court of the County of New York, held at the Hall of Records, in the Borough of Manhattan, City of New York, on the 4th day of Dec., 1914.

Present: Hon. John P. Cohalan, Surrogate.

In the Matter

of

The Judicial Settlement of the Account of Agnes K. Mulligan, as Executrix under the Will of John Hartman, deceased.

An appeal having been taken to the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department from the decree rendered in the above entitled proceeding on the 29th day of November, 1913, in the Surrogates' Court of the County of New York.

And the said appeal having come on for hearing before said Court and due deliberation having been had thereon, and the Court having unanimously decided that the findings of fact herein are supported by the evidence and the Court having thereafter and on the 27th day of November, 1914, by its order made and entered on that date and filed in the office of the Clerk

of the Appellate Division affirmed said decree with $10.00 costs to the respondent, and the said Court having sent hither its remittitur, and the same having been filed in this Court, and

After reading and filing the affidavit of William G. Mulligan, verified December 3, 1914, the costs herein having been taxed, at the sum of $246.60,

Now on motion of Osborne, Lamb & Garvan, attorneys for the respondent, it is

Ordered, Adjudged and Decreed that the order of the said Appellate Division bearing date the 28th day of November, 1914, affirming the decree of this Court bearing date November 29, 1913, and duly filed in the office of the clerk of this court be and the same is hereby made the order of this court and it is

Further Ordered, Adjudged and Decreed that the said Agnes K. Mulligan do pay unto the respondent, Mary K. Hartmann, the sum of $246.60 for her costs and disbursements on said appeal taken herein duly taxed.

Filed December 5, 1914.

JOHN P. COHALAN,
Surrogate.

(U. S. Rev. Stamp 10¢ can.)

This Indenture, made the 21st day of December, one thousand nine hundred and fourteen between Mary K. Hartmann, party of the first part, and National Surety Company, party of the second part.

Whereas, the said party of the first part, did on the 29th day of November in the year one thousand nine hundred and thirteen recover judgment in the Surrogates' Court of New York County against Agnes K. Mulligan for the sum of Eighteen thousand nine hundred ninety-seven and 46/100 dollars as appears by the judgment roll filed in the office of the clerk of the Surrogates' Court of New York County on the 29th day of November, 1913.

Now this Indenture witnesseth, that the said party of the first part in consideration of $20,194.28 to me duly paid, has sold, and by these presents, does assign, transfer, and set over unto the said party of the second part, National Surety Company, its successors and assigns, the said judgment, and all sum or sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon.

And the said party of the first part does hereby constitute and appoint the said party of the second part, and its assigns, her true and lawful attorney irrevocable with power of substitution and revocation, for the use and at the proper cost and charges of the said party of the second part, to ask, demand and receive, and to sue out executions, and take all lawful ways for the recovery of the money due or to become due on the said judgment; and on payment to acknowledge satisfaction; or discharge the same, and attorneys one or more under it for the purpose aforesaid, to make and substitute and at pleasure to revoke; hereby satisfying

and confirming all that my said attorneys or substitute shall lawfully do in the premises.

And the said party of the first part does covenant that there is now due on the said judgment the sum of Eighteen thousand nine hundred ninety-seven and 46/100 dollars ($18,997.46) with legal interest from November 29, 1913, and that she will not collect or receive the same, or any part thereof, nor release or discharge the said judgment, but will own and allow all lawful proceedings therein, the said party of the second part saving the said party of the first part harmless of and from any cost in the premises.

In witness whereof, the party of the first part has hereunto set her hand and seal the day and year first above written.

MARY K. HARTMANN (LS)

Sealed and delivered in
the presence of
John G. Poorez.

State of New York,
City of New York, ss:
County of

On the 21st day of December in the year one thousand nine hundred and fourteen before me personally came Mary K. Hartmann, to me known, and known to me to be the individual described in and who executed the foregoing

instrument, and she acknowledged that she executed the same.

JOHN G. POOREZ,
Commissioner of Deeds,
New York City.

Residing in New York County.
Certificate filed in N. Y. County.
New York County Clerk's No. 42.
New York Reg.'s No. 15074.

Recorded the preceding at request of Wm. R. Page April 9, 1915, at 11 o'clock A. M.

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court,
New York County.

COURT OF APPEALS.

State of New York, ss:

PLEAS in the Court of Appeals, held at the Capitol, in the City of Albany, on the 7th day of December in the year of our Lord one thousand nine hundred and fifteen, before the Judges of said Court.

WITNESS, The Hon. Willard Bartlett, Chief Judge, presiding.

R. M. BARBER,
Clerk.

Complaint

Remittiture December 8th, 1915.

In the Matter

of

The Judicial Settlement of the Account of Agnes K. Mulligan, as Executrix under the Last Will and Testament of John Hartmann, Deceased.

Be It Remembered That on the 25th day of January in the year of our Lord one thousand nine hundred and fifteen, Agnes K. Mulligan, as Executrix, etc., the appellant in this proceeding, came here into the Court of Appeals, by William G. Mulligan, her attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department.

And Mary K. Hartmann, the respondent in said proceeding afterward appeared in said Court of Appeals by Osborne, Lamb & Garvan, her attorneys.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause, argued by Mr. Albert Massey of counsel for the appellant, and by Mr. Gilbert D. Lamb, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the

Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed, with costs against the executrix personally.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the Surrogate's Court of the County of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs against the executrix personally, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Surrogates' Court of the County of New York before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogates' Court before the Surrogates thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, December 9th, 1915.

I Hereby Certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein attached hereto.

R. M. BARBER,
Clerk.

(Seal of Court)

Complaint

Decree Making Judgment of the Court of Appeals, Judgment of Surrogates' Court and Affirming Order Appealed From.

At a Surrogates' Court, held in and for the County of New York, at the Surrogates' Court in the County of New York on the 20th day of December, 1915.

Present: Hon. John P. Cohalan, Surrogate.

In the Matter

of

The Judicial Settlement of the Account of Agnes K. Mulligan, as Executrix of the Last Will and Testament of John Hartmann, Deceased.

A final decree having been made herein, dated November 29, 1913, and an appeal having been taken therefrom to the Appellate Division of the Supreme Court of the State of New York, First Department, dated December 6, 1913, by Agnes K. Mulligan, as executrix aforesaid and the said Appellate Division having in all respects affirmed the said decree by an order of affirmance dated the 27th day of November, 1914, and duly filed in the office of the Clerk of the Surrogates' Court of the County of New York on the 30th day of November, 1914, and

the said Agnes K. Mulligan as executrix aforesaid having appealed from the said order of affirmance of the Appellate Division of the Court of Appeals of the State of New York, and the said Court of Appeals of the State of New York by its remittitur dated December 8, 1915, and filed in this court the 14th day of December, 1915,

Having ordered and adjudged that the order so appealed from be affirmed with costs against the executrix personally and the said costs and disbursements having been taxed at the sum of $,

Now then, on motion of Osborne, Lamb & Garvan, attorneys for Mary K. Hartmann, it is

Ordered and Adjudged that the said Order and judgment of the Court of Appeals be, and the same hereby are made the order and judgment of the Surrogates' Court of the County of New York, and it is further

Ordered and adjudged that the respondent herein, Mary K. Hartmann, recover of the appellant, Agnes K. Mulligan, personally the sum of $144.68, the costs so taxed.

Filed December 21, 1915.

JOHN P. COHALAN,
Surrogate.

All which we have caused by these presents to be exemplified, and the seal of our said Surrogates' Court to be hereunto affixed.

WITNESS, Honorable John P. O'Brien, a Surrogate of the County of New York, at the City of New York, the 23rd day of September, in

the year of our Lord one thousand nine hundred and twenty-seven and of our independence the one hundred and fifty-second.

MARTIN M. McCUE,
Clerk of the Surrogates' Court.

I, John P. O'Brien, a Surrogate of said county and presiding Magistrate of the Surrogates' Court, do hereby certify that Martin G. McCue, whose name is subscribed to the preceding exemplification, is the clerk of said Surrogates' Court of the County of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogates' Court, and that the attestation thereof is in due form and according to the form of attestation used in this state.

Dated, New York, Sept. 23rd, 1926.

JOHN P. O'BRIEN.

State of New York,
County of New York, ss:

I, Martin G. McCue, Clerk of the Surrogates' Court of the County of New York, do hereby certify that Honorable John P. O'Brien, whose name is subscribed to the preceding certificate, is the presiding Magistrate of the Surrogates' Court of the County of New York, duly elected, sworn and qualified, and that the signature of said Magistrate to said certificate is genuine.

In Testimony Whereof, I have hereto set my hand and affixed the seal of the said court, this 23rd day of September, 1927.

MARTIN G. McCUE,
Clerk of the Surrogates' Court.

(Seal of the Court.)

Amendment to Complaint.

(Filed April 12th, 1928.)

NEW JERSEY SUPREME COURT.

NATIONAL SURETY Co., a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.		Action at Law. Stipulation.

It is stipulated and agreed between the parties hereto, that the complaint herein be amended so as to read as follows:

5. The amount now due on said judgment is Seventeen thousand nine hundred and seventeen Dollars and fifty ($17,917.50) Cents, with interest computed from December 21st, 1914.

Dated: Oct. 11, 1927.

EICHMANN & SEIDEN,
Attorneys for Complainant.
WILLIAM F. BURKE,
Attorney for Defendant.

Demand for Bill of Particulars.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NATIONAL SURETY Co., a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law.

To Eichmann & Seiden, Esqs.,
Attorneys of the Plaintiff:

Please Take Notice, that the defendant in the above entitled cause demands, within ten days from the service hereof, a bill of particulars of the plaintiff's claim, in the following respects:

1. What was the amount due on the judgment assigned by Mary K. Hartmann to the plaintiff in this cause on the date of the assignment, to wit: December 21, 1914, as alleged in paragraph 4 of the complaint?

2. How is the difference between the answer to the first question and the sum of $17,917.50, as alleged in paragraph 5 of the complaint, accounted for?

3. Was the aforementioned difference the proceeds of the sale of collateral assigned to the plaintiff by Catherine A. McGuire as security on an appeal bond made by the defendant and the plaintiff in a cause wherein Agnes K. Mulligan

appealed from the decree of the Surrogate's Court of the County of New York and State of New York, to the appellate division of the Supreme Court of New York, First Department?

4. State in detail what said collateral consisted of.

5. Where was said collateral sold and by whom?

6. Who was the purchaser of said collateral?

7. How much were the proceeds of the sale of said collateral?

8. Was the purchaser of said collateral acting for the plaintiff in this cause either directly or indirectly and did he purchase same with instructions from the plaintiff?

9. Did the purchaser of said collateral foreclose the same and who were his Solicitors in said foreclosure suit?

10. Who was the purchaser at said foreclosure suit and did he purchase for the plaintiff in this cause under his own name?

11. Does the purchaser at said foreclosure sale hold the same in trust, secret or otherwise, for the plaintiff in this cause?

12. If the answer to the preceding question is "yes" what has been the total income of the property foreclosed from the date of the foreclosure to the present date?

13. Was there ever a suit for deficiency after the foreclosure of said collateral and if so, was

a judgment ever entered and if so, in what amount?

14. If the answer to the preceding question is "yes," was said judgment ever paid and satisfied?

15. Was the principal on the bond heretofore mentioned or the aforementioned Catherine A. McGuire ever notified of the sale of the aforementioned collateral?

16. Was the sale of the aforementioned collateral held prior to the time that the aforementioned appeal had been decided by the appellate division of the Supreme Court of the State of New York, First Department?

Dated, October 14, 1927.

WILLIAM F. BURKE,
Attorney of the Defendant.

Bill of Particulars.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NATIONAL SURETY Co., a body corporate,
Plaintiff,
vs.
AGNES K. MULLIGAN,
Defendant.

To: William F. Burke, Esquire,
Attorney for Agnes K. Mulligan.

Please Take Notice that the plaintiff in the above entitled cause sets down as its bill of particulars, the following.

1. The amount due on the judgment was Twenty thousand One Hundred and ninety-four Dollars and twenty-eight Cents ($20,194.28).

2. Amount due on judgment	$20,194.28
Salvage expenses and costs	773.22
Total amount due	20,967.50
Credit on sale of collateral	3,050.00
Net balance due	17,917.50

3. See paragraph two.

4. The said collateral consisted of the following: (a) Bond and mortgage of Carolina Weninger to Catherine A. McGuire, dated September 7, 1898, due September 7, 1901, for $6,500 with interest at 6% per annum, payable semi-annually on the 7th days of March and September in each year; the mortgage covering premises No. 332 East 176th Street, Bronx, N. Y.

(b) Bond and mortgage of Carolina Weninger to Catherine A. McGuire, dated September 7, 1898, due September 7, 1901, for $6,500 with interest at 6% per annum, payable semi-annually on the 7th days of March and September in each year; the mortgage covering premises No. 334 East 176th Street, Bronx, N. Y. (c) Bond and mortgage of Carolina Weninger to Anna L. Moore, dated August 29, 1901, due August 29, 1904, for $7,500.00 with interest at the rate of 6% per annum, payable semi-annually on the 29th days of February and August in each year; the mortgage covering premises No. 336 East 176th Street, Bronx, N. Y.

5. Collateral was sold at public auction on the 31st day of March, 1915, by Adrian H. Mueller & Sons, auctioneers of 55 William Street, New York City, subject to all prior liens.

6. The National Surety Company.

7. $3,050.00.

8. See answer to paragraph six.

9. Yes; William R. Page, Esq., now dead. At the time of the foreclosure at 233 Broadway, New York City.

10. National Surety Co. Yes.

11. No.

12. ——

14. ——

15. Yes.

16. No.

Dated, October 21, 1927.

EICHMANN & SEIDEN,
Attorneys of Plaintiff.

Answer.

(Filed October 28th, 1928.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NATIONAL SURETY CO., a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law.

Defendant, Agnes K. Mulligan, residing in the Borough of Fort Lee, in the County of Bergen and State of New Jersey, says that:

FIRST DEFENSE.

1. She admits that on November 29th, 1913, Mary K. Hartman procured the decree against this defendant as alleged in paragraph 1, but denies that the Surrogates' Court in and for the County of New York is a Court of Record and of general jurisdiction.

2. Paragraphs 3 and 4 are admitted.

3. Paragraph 5 is denied.

4. She has no knowledge or information sufficient to form a belief as to paragraph 6.

SECOND DEFENSE.

1. All of the moneys alleged to be due under

the decree referred to in paragraph 1 of the complaint, have been paid.

THIRD DEFENSE.

1. On or about November 29th, 1913, one, Mary K. Hartman, procured a decree in the Surrogates' Court in and for the County and State of New York directing this defendant to pay to said Mary K. Hartman the sum of $18,997.46.

2. Thereafter and within the time required by the laws of the State of New York, this defendant appealed from the said decree to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, and on such appeal, as required by law, filed a bond or undertaking on appeal, with the plaintiff as surety, and entered into an agreement with plaintiff to indemnify it from loss on said bond and deposited with plaintiff, as collateral security for said indemnity agreement, three certain bonds and mortgages, to wit: (1) a bond and mortgage made by Carolina Weninger to Catherine A. McGuire dated September 7th, 1898, due September 7th, 1901, for $6,500 with interest at 6% payable semiannually, covering premises number 332 East 176th Street, in the Borough of the Bronx, and County and State of New York, which mortgage was recorded in the Register's Office of the County of New York, in Block Series (Mortgages) Sec. 11, Liber 43, page 377; and indexed under Block number 2892 on the Land

Answer

Map of the City of New York; (2) bond and mortgage made by Carolina Weninger to Catherine A. McGuire dated September 7th, 1898, due September 7th, 1901, for $6,500 with interest at 6% per annum payable semiannually, covering premises No. 334 East 176th Street, in said Borough, County and State, which mortgage was recorded in the office of the said Register in Block Series (Mortgages) Section 11, Liber 43, page 375, and indexed under Block No. 2892 on the Land Map of the City of New York; (3) bond and mortgage by Carolina Weninger to Anna L. Moore, dated August 29th, 1901, due August 29th, 1904, for $7,500 covering premises 336 East 176th St., in the said Borough, County and State, which mortgage was recorded in said Register's Office; which mortgages were first liens on said premises and there was due thereon the full amount of principal and accrued interest.

3. On or about March 31st, 1915, plaintiff applied said three mortgages in satisfaction and payment of the amount due on the decree referred to in the complaint.

FOURTH DEFENSE.

1. On or about November 29th, 1913, one, Mary K. Hartman, procured a decree in the Surrogate's Court in and for the County and State of New York directing this defendant to pay to said Mary K. Hartman the sum of $18,997.46.

2. Thereafter and within the time required by

the laws of the State of New York, this defendant appealed from the said decree to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, and on such appeal, as required by law, filed a bond or undertaking on appeal, with the plaintiff as surety, and entered into an agreement with plaintiff to indemnify it from loss on said bond and deposited with plaintiff, as collateral security for said indemnity agreement, three certain bonds and mortgages, to wit: (1) a bond and mortgage made by Carolina Weninger to Catherine A. McGuire dated September 7th, 1898, due September 7th, 1901, for $6,500 with interest at 6% payable semi-annually, covering premises No. 332 East 176th St., in the Borough of the Bronx, and County and State of New York, which mortgage was recorded in the Register's Office of the County of New York, in Block Series (Mortgages) Section 11, Liber 43, page 377; and indexed under Block No. 2892 on the Land Map of the City of New York; (2) bond and mortgage made by Carolina Weninger to Catherine A. McGuire dated September 7th, 1898, due September 7th, 1901, for $6,500 with interest at 6% per annum payable semiannually, covering premises No. 334 East 176th St., in said Borough, County and State, which mortgage was recorded in the office of the said Register, in Block Series (Mortgages) Section 11, Liber 43, page 375, and indexed under Block No. 2892 on the Land Map of the City of New York; (3) bond and mortgage made by Carolina Weninger to Anna L. Moore, dated August 29th, 1901, due August

29th, 1904, for $7,500 covering premises 336 East 176th St., in the said Borough, County and State, which mortgage was recorded in said Register's Office; which mortgages were first liens on said premises, and there was due thereon the full amount of principal and accrued interest.

3. On March 31, 1915, plaintiff pretended to sell the said bonds and mortgages under a pretended auction sale, whereat it pretended to sell the said bonds and mortgages to itself for $3,050, but said pretended sale was held without any notice to this defendant, and while said appeal was still pending, and before any liability of plaintiff on its said undertaking on appeal had been determined.

4. Said pretended sale was held by plaintiff for the purpose of defrauding this defendant.

5. Plaintiff applied the amount of said mortgages in payment and satisfaction of the amount due under the decree alleged in Paragraph 1 of the complaint.

WILLIAM F. BURKE,
Attorney for Defendant.

Notice of Motion to Strike out Answer.

(Filed April 11th, 1928.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NATIONAL SURETY Co., a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law. Notice of Motion.

To:
William F. Burke, Esq.,
Attorney of Defendant.

Please Take Notice that we shall make application before the Supreme Court of New Jersey in the Court House at Jersey City on Friday, November 18th, 1927, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order to strike out the answer filed by you in the above stated cause on the ground that said answer is false, sham and frivolous and interposed solely for the purpose of delay.

And take further notice that the affidavits attached hereto will be used upon the argument of said motion.

Dated, Nov. 4th, 1927.

Respectfully,
EICHMANN & SEIDEN,
Attys. of Plaintiff.

Affidavit of William A. Thompson.

(Filed April 11th, 1928.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NATIONAL SURETY CO., a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law. Affidavit.

State of New York,
County of New York, ss:

William A. Thompson, of full age, being duly sworn, upon his oath deposes and says:

1. I am one of the Vice Presidents of the National Surety Company, a corporation of the State of New York, the plaintiff in the above entitled cause, and personally acquainted with the facts herein contained.

2. On December 1, 1912, the Surrogates' Court of the County and State of New York filed its decree directing Agnes K. Murphy Mulligan, the defendant herein, as executrix of the Last Will and Testament of John Hartmann, dec'd, to pay to Mary K. Hartman $18,997.46, which decree was the result of an accounting

proceedings in the Surrogates' Court of New York. Agnes K. Murphy Mulligan, the defendant herein, appealed from the decree of the Surrogates' Court of New York to the Appellate Division of the Supreme Court of the State of New York and thereupon applied to the National Surety Company for a bond so as to stay execution pending the appeal. A copy of said bond is annexed hereto, made part hereof and marked "Schedule A." On the twenty-seventh day of November, 1914, the decree of the Surrogates' Court aforesaid was affirmed by the Appellate Division of the Supreme Court of the State of New York, a copy of which decree is attached to the complaint filed herein and marked "Schedule A." The defendant in her answer does not deny the entering of such decree and, therefore, it stands admitted.

3. Upon the decree of the Surrogates' Court being affirmed by the Appellate Division of the Supreme Court, it became encumbent upon the defendant, Agnes K. Murphy Mulligan, to pay the amount of the decree or appeal from the decree to the Court of Appeals of the State of New York. The defendant herein made application to the plaintiff for a new bond to stay execution pending appeal to the Court of Appeals, which was refused, but the defendant, nevertheless, proceeded with her appeal to the Court of Appeals without any bond.

4. Because of the fact that the bond given by the plaintiff was an undertaking to pay the amount of the decree of the Surrogate's Court if affirmed by the Appellate Division of the Supreme Court, the right accrued to Mary K.

Affidavit of William A. Thompson

Hartman, the respondent in the appeal, to issue execution against the defendant and to demand of the plaintiff, National Surety Company, the amount of the decree, no bond having been supplied by the defendant to stay execution pending the appeal from the Appellate Division of the Supreme Court to the Court of Appeals.

5. By reason of the aforesaid, the plaintiff, on demand of the attorneys for Mary K. Hartman was compelled to pay to said Mary K. Hartman, and did pay to her on December 21, 1924, $20,441.41 the amount of the decree, interest and costs, in satisfaction of its liability on said bond. Prior to said payment and after demand by said attorneys, the plaintiff herein notified its principal, Agnes K. Murphy Mulligan, of said demand and requested her to pay the amount of the decree which she refused to do.

6. Mary K. Hartman duly assigned to the National Surety Company on December 21, 1914, all her right, title and interest in said decree with full power and authority to collect the amount of said decree. Said decree was docketed as a judgment in the County of Bronx, in which county Agnes K. Murphy Mulligan then resided on January 29, 1917. On January 30, 1917, an execution against said Agnes K. Murphy Mulligan was duly issued out of the said Court to the Sheriff of the County of Bronx and said execution was returned by said Sheriff wholly unsatisfied. No part of the amount required by said decree to be paid by Agnes K. Murphy Mulligan has been paid by her to the

plaintiff although the decree was affirmed by the Court of Appeals on December 7, 1915.

7. In order to induce the plaintiff, the National Surety Company, to enter into the bond aforesaid, which is annexed hereto and marked "Schedule A," the defendant caused one, Catherine A. McGuire, to assign the plaintiff as collateral security for any loss or damages that might be sustained by the plaintiff by reason of entering into the bond aforesaid, three bonds and mortgages as set forth in paragraph 2 of the Answer.

8. After the National Surety Company, the plaintiff herein, paid to Mary K. Hartman the amount due her by reason of the decree aforesaid, on March 16, 1915, the plaintiff caused a letter to be written to Catherine A. McGuire notifying her of its intention to sell the three bonds and mortgages at public auction in the event of her failure to reimburse the plaintiff to the amount it was compelled to pay to Mary K. Hartman.

9. Catherine A. McGuire, having failed to reimburse the plaintiff, it caused to be sold at public auction the bonds and mortgages after the same had been duly advertised for sale by Adrian H. Mueller & Sons, Auctioneers, having their office at No. 55 William Street, New York City, said advertisement, designating Wednesday, March 31, 1915, at 12:30 P. M., as the time and Nos. 14-16 Vesey Street, New York City as the place where said bonds and mortgages would be sold at public auction. Said bonds and mortgages were sold at auction at the time and place

above stated in the presence of William G. Mulligan, who is the husband of the defendant herein, and who was the attorney for Catherine A. McGuire, and there being no other bidder than the National Surety Co. the said bonds and mortgages were bought in by the National Surety Company at $1,000 each, the first bid. At no time during the sale of the said bonds and mortgages did William G. Mulligan protest that the price paid was inadtequate. The fact is that the price of $3,000 for the said bonds and mortgages was an adequate one in that the property was appraised to be of the value of $19,500 and there were existing tax liens on the property amounting to approximately $14,000. Subsequently the mortgages were foreclosed and at the foreclosure sale the property was bought in by the National Surety Company, there being no other bidders. By reason of the aforesaid, Agnes K. Murphy Mulligan, the defendant herein, was entitled to receive as a credit, the sum of $3,000 plus $50 a return of costs, making a total of $3,050.

10. It is untrue that the plaintiff ever intended to apply the three mortgages aforesaid in full satisfaction and payment of the amount paid to Mary K. Hartman by reason of the decree of the Surrogate's Court. It is also untrue that the sale of the bonds and mortgages was a pretended sale. The fact is that the bonds and mortgages were put up for public sale and purchased by the National Surety Company, the plaintiff herein, only because there were no other bidders. It is also untrue that the sale

was held for the purpose of defrauding the defendant, and the fact is that neither the defendant nor Catherine A. McGuire, the alleged owner of the bonds and mortgages, have ever taken any action whatsoever, either before or after the sale, to determine their rights or the conduct of the National Surety Company, the plaintiff herein, in regard to the sale.

11. Deponent further says that there is due to the National Surety Company the sum of $17,391.50 with interest from December 21, 1914, and that the defendant has no legal reasons for the nonpayment of said indebtedness.

12. Deponent further says that the answer of the defendant is false, sham and frivolous and interposed solely for the purpose of hindering and delaying the plaintiff in obtaining judgment to which it is justly entitled; that the defendant herein has no defense or defenses of any kind whatsoever to the plaintiff's cause of action and that the full amount, as aforesaid, is now due and owing to the plaintiff from the defendant.

WM. A. THOMPSON

Sworn to and subscribed before me
this 7th day of November, 1927.
Wm. W. Weaver,
Notary Public,
N. Y. County.

Foreign Commissioner of Deeds for State of New Jersey.

Affidavit of William A. Thompson

"Schedule A."

SURROGATES' COURT,

NEW YORK COUNTY.

IN THE MATTER

of

The Judicial Settlement of the Account of AGNES K. MULLIGAN, as Executrix of the Last Will and Testament of John Hartmann, deceased,

AGNES K. MULLIGAN,
Appellant.

WHEREAS, on the 29th day of November, 1913, in the Surrogates' Court in the County of New York, a decree was rendered in the above entitled proceeding, directing that the Executrix, Agnes K. Mulligan, pay to Mary E. Hartmann, the sum of $18,997.46, which decree was entered in the office of the said Surrogate on the 1st day of December, 1913, and

WHEREAS, the said Agnes K. Mulligan, feeling aggrieved thereby, has appealed therefrom to the Appellate Division of the Supreme Court, First Department.

Now, therefore, the National Surety Company, having an office and principal place of

business at No. 115 Broadway, in the City of New York, does hereby, pursuant to the Statute in such case made and provided, undertake that the appellant will pay all costs and damages which may be awarded against her upon said appeal if said decree or any part thereof is affirmed or the appeal is dismissed, and will also pay the sums directed to be paid by said decree or the part thereof as to which said decree is affirmed, not exceeding, however, the sum of $37,994.62.

NATIONAL SURETY COMPANY,
By Wm. A. Thompson,
Resident Vice President.

Attest:
E. M. McCarthy,
Resident Asst.-Secretary.

Affidavit of Isadore Glauberman.

(Filed April 11th, 1928.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NATIONAL SURETY CO., a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law. Affidavit.

State of New Jersey,
County of Hudson, ss:

Isadore Glauberman, of full age, being duly sworn, upon his oath, deposes and says that:

1. He is an attorney of the State of New York duly licensed to practice in the courts of the State of New York.

2. The following is a true and correct transcript of Section 40 of an act known as "Surrogate's Court Act" (L. 1920, ch. 928 as amended, 438, 1923).

"General jurisdiction of surrogate's court. Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it or upon the surrogate, by special provision of law, jurisdiction, as follows:

To administer justice in all matters relating to the affairs of decedents, and upon the return

of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily appears in such proceeding, or is brought in by supplemental citation, as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.

In addition to and without limitation or restriction on the foregoing powers, each surrogate or surrogate's court shall have power, in the cases and in the manner prescribed by statute:

1. To take the proof of wills; to admit wills to probate; and to take and revoke probate of heirship.

2. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.

3. To direct and control the conduct, and settle the accounts, of executors, administrators, and testamentary trustees; to remove testamentary trustees, and to appoint a successor in place of a testamentary trustee.

4. To enforce the payment of debts and legacies; the distribution of the estates of decedents; and the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate or fund.

5. To direct the disposition of real property, and interests in real property of decedents, and the disposition of the proceeds thereof.

6. To appoint and remove guardians for infants; to compel the payment and delivery by them of money or other property belonging to their wards; to direct and control their conduct, and settle their accounts.

7. To settle the accounts of a father, mother or other relative having the rights, powers and duties of a guardian in socage, and to compel the payment and delivery of money or other property belonging to the ward.

8. To determine the validity, construction or effect of any disposition of property contained in any will proved in his court whenever a special proceeding is brought for that purpose, or whenever it is necessary to make such determination as to any will in a proceeding pending before him, or whenever any party to a proceeding for the probate of any will, who is interested thereunder, demands such determination in such proceeding. (As amended by L. 1921, ch. 439, sec. 1).''

3. The above transcript and recital of law is the law of the State of New York at the present time.

ISADORE GLAUBERMAN.

Sworn and subscribed to before me
this 10th day of November, 1927.
Josephine De Lounzo,
Notary Public of
New Jersey.

Supplemental Affidavit of William A. Thompson.

(Filed April 11th, 1928.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NATIONAL SURETY CO., a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law. Affidavit.

State of New York,
County of New York, ss:

William A. Thompson, of full age, being duly sworn, upon his oath, deposes and says:

1. I am one of the Vice Presidents of the National Surety Company, a corporation of the State of New York, the plaintiff in the above entitled cause, and personally acquainted with the facts contained in the affidavit heretofore made by me in this cause on the 7th day of November, 1927, and make this affidavit supplemental to the said affidavit.

2. The National Surety Company, on or about March 25, 1915, received a letter, a copy of which is hereto annexed and made a part hereof.

3. At the time that the National Surety Company entered into the bond or undertaking as

set forth in my affidavit which this supplemental, the defendant, Agnes K. Mulligan, represented to me that William G. Mulligan was her attorney acting for her and on her behalf, and I am informed and verily believe that since the said bond was executed by the plaintiff, Agnes K. Mulligan, the defendant herein and William G. Mulligan, who are husband and wife, have been living together.

WM. A. THOMPSON.

Sworn and subscribed to before me
this 7th day of December, 1927.
Wm. M. Weaver,
Notary.

Law Offices of
WILLIAM G. MULLIGAN
Attorney and Counsel at Law
461 East Tremont Avenue
Borough of the Bronx.
Telephone 27 Tremont.

New York, March 25, 1915.

National Surety Company,
115 Broadway.

Gentlemen:

My client, Miss Catherine A. McGuire, has placed in my hands, a communication from you, dated March 16th, 1915, but received yesterday.

which appears to be signed by Wm. R. Page, Attorney, threatening to summarily sell at public auction at the Exchange Salesrooms, 14-16 Vesey Street on March 31st, 1915, her three bonds and mortgages in the aggregate principal sum of $20,500, held by you as security and collateral for the performance of an agreement of indemnity.

I hereby notify you that such sale, if held, will be at your peril and that Miss McGuire will hold you strictly liable for any and all loss and damage she may sustain by reason thereof.

I call your attention to these facts:

1. An appeal by Agnes K. Mulligan as Executrix of the Will of John Hartmann, from the order of affirmance of the Appellate Division in the Matter of the Judicial Settlement of her account, has been taken to the Court of Appeals, same has been perfected and is now pending undetermined, and the undertaking heretofore given by you in said proceeding to stay execution is still in force.

2. Your payment of the amount of judgment therein was without the knowledge, consent or authority of or notice to the executrix or the indemnitor, and after notice to you of the executrix's intention to appeal.

3. In no event can bonds and mortgages on real property, held as collateral, be summarily sold lawfully as proposed by you, but in all cases, where the right exists, same must be foreclosed.

If your attorney is not advised as to these matters, I shall be glad to refer him to authorities.

Very truly yours,
WM. G. MULLIGAN.

Affidavit of Edward T. Kelley.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

(Filed April 11th, 1928.)

NATIONAL SURETY COMPANY, a body corporate, Plaintiff, against AGNES K. MULLIGAN, Defendant.	Action at Law. Affidavit.

State of New York,
County of Richmond, ss:

Edward T. Kelley, of full age, being duly sworn on his oath, according to law, deposes and says that he is an attorney and counsellor at law of the State of New York, having an office at No. 42 Richmond Terrace, St. George, Staten Island.

At the request of William F. Burke, the attorney for the defendant, he has examined cases and authorities in the State of New York concerning the right of the plaintiff to sell the bonds and mortgages, at public auction to itself, assigned to it by Catherine A. McGuire, to secure it against loss, should it be required to pay the undertaking on appeal of the defendant to the Appellate Division of the Supreme Court from the decree of the Surrogate's Court of New York City.

Affidavit of Edward T. Kelley

Deponent says that as a result thereof he finds the rule of law to be, in his opinion, in the State of New York, that the equity of redemption in said bonds and mortgages of Catherine A. McGuire, was not effected by said sale, and further that equity of redemption attached to the lands purchased by the plaintiff under the foreclosure of said mortgages, and that the effect of the foreclosure was simply to bar the equity of the mortgagor and his grantees in the land and that it had no operation upon the rights of the plaintiff or, the defendant, the said Catherine A. McGuire, as between themselves.

Deponent has also examined the cases and authorities in said State, respecting the question of the effect of the appeal to the Court of Appeals on the defendant's liability on its bond or undertaking, given as aforesaid on the appeal to the Appellate Division. After such examination he finds, in his opinion, that the said bond or undertaking was a continuing undertaking and continued and remained in force during the pendency of the appeal to the Court of Appeals and acted as a stay of execution, not only during the pendency of the appeal to the Appellate Division but also during the appeal to the Court of Appeals.

Deponent bases his opinion for this rule from the matter of Pye, 21 App. Div. 265, a New York case.

EDWARD T. KELLEY.

Sworn and subscribed to before me
this 8th day of December, 1927.
Nicholas Scaiano,
Notary Public,
Richmond County, N. Y.

Affidavit of Charles W. Tarbox.

(Filed April 11th, 1928.)

SUPREME COURT OF THE STATE OF NEW JERSEY,

County of Hudson.

National Surety Co.,
corporate,
Plaintiff,
against
Agnes K. Mulligan,
Defendant.

State of New York,
County of Bronx, ss:

Charles W. Tarbox, residing at No. 228 East Tremont Avenue in the Borough of the Bronx, New York City, being duly sworn upon his oath deposes and says:

(1) I am engaged in business as a real estate broker and appraiser having an office at No. 1887 Washington Avenue in the Borough and County of Bronx, City and State of New York and have been actively so engaged for more than forty years last past. During that time, I have become well acquainted with the values of property in the Borough of the Bronx, New York City, and particularly that section in the vicinity of my office, where I have lived all my life.

I have sold large amounts of property in that vicinity and have been employed by numerous property owners, by banks and other finan-

cial institutions to appraise property and was specially employed by the City of New York as its expert appraiser for many years in eminent domain proceedings and otherwise.

(2) I am well acquainted with the property situated on the southerly side of East 176th Street beginning Three hundred thirty-six and seventy-seven one-hundredths (336.77) ft. easterly from Anthony Avenue, and was well acquainted with the property during the years 1914, 1915 and 1916, at which time I visited said property for purposes of appraisal and did appraise the value of the same.

The property consisted of three (3) frame apartment houses, three stories and basement, with five rooms and bath on each floor occupied for dwelling purposes. The plot of ground with each house has a frontage of about Twenty-one and eighty one-hundredths (21.80) feet on East 176th Street and a depth of more than One Hundred (100) feet. This property is within about three and one-half blocks of my office.

(3) The said properties were worth in my opinion on the 9th day of April, 1914, and at all times during the years 1914, 1915 and 1916 the sum of $16,500 each, making a total of $49,500 for the three houses and plots of ground on which they are erected, which was a fair market value for said properties in my opinion at all times during said periods.

CHAS. W. TARBOX.

Sworn to before me this
21st November, 1927.
Joseph H. Witherell,
Notary Public,
Bronx County No. 69; Reg.'s No. 2830.
Certificate filed in N. Y. County No. 50.
Reg's No. 8097.
Term expires March 30, 1928.

Affidavit of Agnes K. Mulligan

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NATIONAL SURETY COMPANY, a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law. Affidavit.

State of New Jersey,
County of Bergen, ss:

Agnes K. Mulligan, of full age, being duly sworn on her oath according to law, deposes and says:

I am the defendant in the above entitled cause.

It is true that after the affirmance of the decree of the Surrogate's Court by the Appellate Division, it became incumbent upon me to either pay the amount of the decree or appeal to the Court of Appeals, not from the decree of the Surrogate's Court but from the order of affirmance of the Appellate Division affirming the decree.

I did not pay the judgment but immediately applied to plaintiff for the bond required by law to perfect the appeal, and upon their refusal to enter into the necessary additional bond, I immediately procured such bond from the Illinois Surety Company, and thereupon

immediately gave notice of my appeal and filed the bond required by law.

It is untrue that I proceeded with my appeal to the Court of Appeals without any bond. Under the laws of the State of New York, the bond or undertaking given by plaintiff continued, and in addition to that I furnished the bond or undertaking of the Illinois Surety Company as required by law. No appeal lies to the Court of Appeals from the decree of the Surrogate's Court. An appeal must be taken from the order of affirmance of the Appellate Division.

Plaintiff never notified me of any demand made upon it by Mary K. Hartmann to pay the amount of the decree, nor did they ever request me to pay the amount of the decree. The fact is Mary K. Hartmann had no right to insist upon payment of the amount of the decree until after the determination of my appeal to the Court of Appeals.

On or about April 9th, 1915, the said Mary K. Hartmann served my attorney notice of motion returnable on April 19th, 1915, to dismiss the appeal theretofore taken by me, which motion was, on April 27th, 1915, after having been argued by counsel, denied.

On or about April 13th, 1915, my attorney was served with a notice of motion, made by plaintiff herein, to be substituted for Mary K. Hartmann as respondent in said appeal, which motion was denied.

Deponent denies that the said Mary K. Hartmann had duly assigned to the plaintiff on

December 21st, 1914, the said decree. Deponent states that she has been informed, and verily believes, that said decree could not be assigned until after the same had been docketed as a judgment, and that said decree was not so docketed until January 29th, 1917.

At the time plaintiff entered into the bond or undertaking on appeal, one, Catherine A. McGuire, deposited with the plaintiff for me, at my request, the three bonds and mortgages mentioned in Paragraph 2 of the answer, to secure the plaintiff from any loss it might sustain should it be compelled to pay the decree appealed from. These bonds and mortgages were assigned to plaintiff by said Catherine A. McGuire by absolute assignments. Each of these mortgages covered a lot of land on the southerly side of East 176th Street, in the Borough of the Bronx, City of New York, approximately twenty-one feet in width by over one hundred feet in depth, upon each of which was erected a three family frame dwelling house.

Before the plaintiff accepted said bonds and mortgages and entered into the bond or undertaking on appeal, it caused the premises to be appraised by one, Murphy. I also obtained an appraisal from Charles W. Tarbox, who was then, and still is engaged in business as a real estate broker and appraiser in the Borough of the Bronx in the City of New York, in the neighborhood of the premises in question, and was familiar with the value of properties in that neighborhood.

Both experts appraised the said premises as being then worth $16,500 each.

At that time, although I did not learn of it until afterwards, there were liens for unpaid taxes and assessments on the three properties aggregating approximately $11,000.

After the affirmance by the Court of Appeals of the order of the Appellate Division, in and about the month of February, 1917, the plaintiff obtained from the Surrogates' Court of the County of New York, an order requiring me to show cause why I should not be punished for contempt to obey the said decree.

After the argument of said order to show cause, the application of the plaintiff was denied and the order to show cause discharged.

I was not aware that any judgment was recovered against me by the plaintiff in the Surrogates' Court of the County of New York. No process was ever served on me for any suit or action in said court instituted or brought by Marv K. Hartmann against me, and if any such judgment was recovered by Mary K. Hartmann, it was recovered without my knowledge and without service of any process of any kind on me.

At the time the said three bonds and mortgages were deposited with plaintiff by said Catherine A. McGuire, as hereinabove set forth, it was understood that in the event the plaintiff was required, because of its entry into the said bond or undertaking, to pay, and did pay, the amount directed to be paid in and by said decree, or any part thereof, that it should foreclose said mortgages, all of which were then passed due, and that out of the proceeds of the sale of the properties covered by said mort-

gages, it should reimburse itself for the moneys so paid by it, and render the overplus to said Catherine A. McGuire.

After the said pretended sale of said bonds and mortgages by plaintiff to itself at public auction, and as I am informed, in the month of April, 1915, prior to the time when plaintiff was under any obligation to pay the said decree, or any moneys thereunder, plaintiff commenced three separate suits in the Supreme Court in the State of New York for the foreclosure of said mortgages, and sometime thereafter a foreclosure sale was conducted as the result of the decrees made in these suits, at which sale the plaintiff bought the properties in its own name, and as I am informed and verily believe, still holds such title as it acquired under such sales.

These sales were illegal and void because plaintiff did not make as parties-defendant to said suits, persons who were necessary parties thereto. It did not make Catherine A. McGuire party to such suits. I was not made a party although, according to our understanding at the time of the depositing of said three bonds and mortgages, I should have been made a party. The heirs-at-law and personal representative of the mortgagor were not made parties. The sale also was not properly advertised.

No demand was ever made on Catherine A. McGuire to pay the amount of said decree.

No notice of the pretended sale of the bonds and mortgages was ever given to me, and said sale was not properly advertised, and if William G. Mulligan, my husband, was present at said sale, I was unaware of that fact.

Affidavit of Agnes K. Mulligan

Said sale of said bonds and mortgages was held by plaintiff before there was any liability on the part of the plaintiff to pay the amount of said decree, and before it could be legally required to pay the amount of said decree under its said undertaking under the laws of the State of New York.

I am informed and verily believe it to be true, that the plaintiff did foreclose the said mortgages, and that the foreclosure sale was held in the month of May, 1916. Said premises were bought in by plaintiff and plaintiff still holds title thereto, and said premises have largely increased in value.

AGNES K. MULLIGAN.

Sworn and subscribed to before me this
22nd day of Nov., 1927.
Virginia D. Harmon,
Notary Public of N. J.
Commission expires May 27, 1934.
(Seal.)

Affidavit of John B. Quintin

(Filed April 11th, 1928.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NATIONAL SURETY COMPANY, a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law. Affidavit.

State of New Jersey,
County of Hudson, ss:

John B. Quintin, of full age, being duly sworn on his oath, according to law, deposes and says:

I am an attorney and counsellor-at-law of the State of New York, having an office at 874 Broadway, Borough of Manhattan, City of New York. I have been practicing law in the City, County and State of New York for upwards of thirty-four years last past.

Prior to 1920, the practice and proceedings in the Courts of law in the State of New York were prescribed and regulated by an act entitled "An act relating to Courts, Officers of Justice and Civil Procedure." passed June 2d, 1876, called the Code of Civil Procedure.

From September 1st, 1914, to and including March 31st, 1915, and subsequent thereto, the following sections of said Code were in full force and effect:

Sec. 2551. (Am'd. 1914) Decree For Money; How Docketed; Effect; Assignment And Discharge.

Where a decree directs the payment of a sum of money into court, or to one or more persons therein designated, the surrogate, or the clerk of the surrogate's court, must furnish to any person applying therefor one or more transcripts, duly attested, stating all the particulars with respect to the decree which are required by law to be entered in the clerk's docket-book, where a judgment for a sum of money is rendered in the supreme court, so far as the provisions of law directing such entries are applicable to such a decree. Each county clerk to whom such a transcript is presented must, upon payment of his fees, immediately file it and docket the decree in the appropriate docket-book kept in his office as prescribed by law for docketing a judgment of the supreme court. The docketing of such a decree has the same force and effect, the lien thereof may be suspended or discharged, and the decree may be assigned or satisfied, as if it were such a judgment.

(Former Sec. 2553, amended and re-numbered by L. 1914, ch. 443, in effect Sept. 1, 1914).

Sec. 2553. (Am'd. 1895, 1914) Enforcement Of Decree By Execution.

A decree directing the payment of a sum of money into court, or to one or more parties, may be enforced by an execution against the property of the party directed to make the payment. The execution must be issued by the surrogate, or the clerk of the surrogate's court, under seal of the court, and must be made returnable to the court. In all other respects the provisions of this act relating to an execution against the property of a judgment-debtor issued upon a judgment of the supreme court, and the proceedings to collect it, apply to an execution issued from the surrogate's court, and the collection thereof, the decree being for that purpose, regarded as a judgment; except that the proceedings prescribed in title twelfth of chapter seventeenth of this act, if founded upon such a decree, must be taken as if the decree was a judgment of the county court, or, in the City of New York, of the supreme court.

(Former Sec. 2554, as amended by L. 1895, ch. 946, re-numbered by L. 1914, ch. 443, in effect Sept. 1, 1914).

(Original source.—L. 1837, ch. 460, Sec. 64; L. 1844, ch. 104, Par. 2).

Sec. 2557. (Am'd. 1914) When Execution Of Decree Or Order Is Stayed By Appeal.

An appeal from a decree or an order directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court; or an attorney or counsel employed therein, for disobedience to a direction of the surrogate's court, or for neglect of duty, or directing the com-

mitment of a person refusing to obey a subpoena or to testify when required according to law; does not stay the execution of the decree or order appealed from unless the appellant gives the undertaking required by section 5761 of this chapter.

An appeal from a decree of a surrogate admitting a will to probate, or granting letters testamentary, or letters of administration, or from an order or judgment of the appellate division of the supreme court affirming a decree of the surrogate admitting a will to probate, or granting letters testamentary or letters of administration does not stay the issuing of letters where, in the opinion of the surrogate manifested by an order, the preservation of the estate requires that the letters should issue.

An appeal from a decree revoking letters testamentary, letters of administration, or letters of guardianship; or from a decree or an order, suspending an executor, administrator, or guardian, or removing or suspending a testamentary trustee, or appointing a temporary administrator, or an appraiser of personal property does not stay the execution of the decree or order appealed from.

Except as otherwise expressly prescribed in this chapter a perfected appeal has the effect, as a stay of the proceedings to enforce the decree or order appealed from, prescribed in section 1310 of this act, with respect to a perfected appeal from a judgment.

(Former Secs. 2583 and 2584, amended and re-numbered by L. 1914, ch. 443, in effect Sept. 1, 1914).

(Original source of Sec. 2583—R. S. pt. 3, ch. 9, tit. 3, Sec. 116, and part of Sec. 110. Sec. 2584, new).

Sec. 2760 (Am'd. 1882, 1914) Id: Where Decree Is For Money Or Delivery Of Property, Etc.

In every case except one in which the letters of an executor, administrator or guardian have been revoked, or a trustee has been removed, a notice of appeal by an executor, administrator, testamentary trustee, guardian or other person appointed by the surrogate's court, from a decree, directing him to pay or distribute money, or to deposit money in a bank or trust company, or to deliver property; or by an executor or administrator from an order granting leave to issue an execution against him, as prescribed in section 1825 of this act, does not stay the execution of the decree appealed from unless the appellant gives an undertaking, with at least two sureties, in a sum therein specified, to the effect that if the decree or order, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay all costs and damages, which may be awarded against him upon the appeal, and will pay the sum so directed to be paid or collected, or, as the case requires will deposit or distribute the money, or deliver the property, so directed to be deposited, distributed, or delivered, or the part thereof as to which the decree or order is affirmed.

(Former Sec. 2578, as amended by L. 1882, ch. 399, amended and renumbered by L. 1914, ch. 443, in effect Sept. 1, 1914).

Affidavit of John B. Quintin

(Original Source—R. S. pt. 2. ch. 6, tit. 5, Sec. 21, last clause; and L. 1870, ch. 359, Sec. 2).

Sec. 2761. (Am'd. 1914) Security To Stay Proceedings In Case Of Commitment.

An appeal from a decree of an order, directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court, or an attorney or counsel employed therein, for disobedience to a direction of the surrogate, or for neglect of duty; or directing the commitment of a person refusing to obey a subpoena, or to testify, when required according to law; does not stay the execution of the decree or order appealed from, unless the appellant gives an undertaking with at least two sureties, in a sum therein specified, to the effect that if the decree or order appealed from or any part thereof, is affirmed, or the appeal is dismissed, the appellant will within twenty days after the affirmance or dismissal, surrender himself in obedience to the decree or order, to the custody of the sheriff of the county, wherein he was directed to be committed.

(Former Sec. 2579, amended and renumbered by L. 1914, ch. 443, in effect Sept. 1, 1914).

(Original Source—R. S. pt. 3, ch. 9, tit. 3, Secs. 111-115).

Sec. 1310. (Am'd. 1895, 1898) When Appeal Stays Proceedings, Effect Thereof.

Where an appeal to the general term of any court or to the appellate division of the Supreme Court or to the court of appeals or otherwise

has been heretofore or shall hereafter be perfected, as prescribed in this chapter, and the other acts, if any, required to be done, to stay the execution of the judgment or order appealed from, have been done, the appeal stays all proceedings to enforce the judgment or order appealed from; except that the court or judgment, from whose determination the appeal is taken, may proceed in any matter included in the action or special proceeding, and not affected by the judgment or order appealed from or not embraced within the appeal; or may cause perishable property to be sold, pursuant to the judgment or order appealed from. The proceeds of such a sale must be paid, to abide the result of the appeal, into the court from or in which the appeal is taken, or, if it was taken as prescribed in title fifth of this chapter, into the supreme court. When an appeal from a judgment for rent has been perfected and execution stayed as herein provided, the appeal stays all summary proceedings, pending or otherwise, to recover the possession of real property or dispossess tenants therefrom, based on the failure to pay the rent included in the judgment appealed from. In a case, specified in subdivision two of section one hundred and ninety-one, of this act, a party aggrieved, upon presenting to the court proof by affidavit that he intends to apply to the appellate division, rendering such decision, for leave to appeal to the court of appeals, and in case such appellate division shall refuse such leave, then that such party intends to apply to a judge of the court of appeals to be allowed to appeal to

said court of appeals, and proof that an undertaking, given as prescribed in this chapter, has been filed with the clerk with whom the judgment appealed from is entered, shall be entitled to an order staying all proceedings to enforce such judgment, until the granting or refusal of such leave to appeal by such appellate division or a judge of the court of appeals. The party desiring to make such application must do so at the same term or at the term of said appellate division, next succeeding that at which judgment of affirmance was rendered and notice of entry thereof served upon the party aggrieved, and in case said appellate division refuses such application, then such party shall have thirty days, from and after service of a copy of the order of said appellate division denying such application, with notice of entry, in which to apply to a judge of the court of appeals, to be allowed to so appeal. (See Pars. 2087, 2101, 2584).

(L. 1895, ch. 946; L. 1898, ch. 292. In effect April 19, 1898).

Sec. 1326. Security To Perfect Appeal.

To render a notice of appeal, to the court of appeals, effectual, for any purpose, except in a case where it is especially prescribed by law, that security is not necessary, to perfect the appeal, the appellant must give a written undertaking, to the effect, that he will pay all costs and damages, which may be awarded against him on the appeal, not exceeding five hundred dollars. The appeal is perfected, when such an undertaking is given and a copy

thereof, with notice of the filing thereof, is served, as prescribed in this title.

(Co. Proc. part of Sec. 334, am'd.)

Prior to September 1st, 1914, and during the month of November, 1913, the foregoing sections 1310 and 1326 were in full force and effect.

The foregoing sections 2760 and 2761 are substantially the same as sections 2578 and 2579 then in effect with some immaterial variances.

During said time the last paragraph of the foregoing section 2557, then reading,

"Except as otherwise expressly prescribed in this article a perfected appeal has the effect, as a stay of the proceedings to enforce the decree or order appealed from, prescribed in section 1310 of this act, with respect to a perfected appeal from a judgment."

was in force and effect and was known as 2584.

JOHN B. QUINTIN.

Sworn and subscribed to before me this
23rd day of November, 1927.
Edmund B. Hourigan,
Attorney At Law of New Jersey.

Opinion.

(Filed April 11th, 1928.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NATIONAL SURETY COMPANY, a a corporation, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Memorandum.

ACKERSON, S. C. C.:

This matter comes before me upon a motion by the plaintiff, National Surety Company, to strike out the answer filed herein by the defendant, Agnes K. Mulligan, as being "false, sham and frivolous and interposed solely for the purpose of delay."

The plaintiff seeks to recover the amount alleged to be due upon a decree or judgment obtained by Mary K. Hartman against the said Agnes K. Mulligan, for the sum of $18,997.46 in the Surrogate's Court in and for the County and State of New York, which decree or judgment it is alleged was assigned in writing by the said Mary K. Hartman to the National Surety Company, the party plaintiff in the present suit.

The answer filed by the defendant herein admits the recovery of the decree above men-

tioned by the said Mary K. Hartman and also admits that it was duly assigned to the plaintiff, National Surety Company, but sets up these alleged defenses: First—that the moneys alleged to be due under said decree have been paid. Second—that the plaintiff herein became surety on an appeal bond of the defendant, Agnes K. Mulligan, whereby she appealed the above mentioned decree to the Appellate Division of the Supreme Court of the State of New York. That at the time said appeal bond was executed by the plaintiff herein as surety for the defendant, the latter entered into an agreement with the plaintiff herein, to indemnify it from loss on said appeal bond and deposited with the plaintiff as collateral security for said indemnity agreement, three bonds and mortgages on property in the Borough of Bronx, City, County and State of New York, two of which were made by Caroline Wenunger to Catherine A. McGuire and one by Catherine A. McGuire to Anna L. Moore. These mortgages, it is alleged, were on or about March 31, 1915, applied by the plaintiff in satisfaction and payment of the amount due on the above-mentioned decree against the defendant, Agnes K. Mulligan. In the third place, the defendant alleges by way of defense that on March 31, 1915, the plaintiff, National Surety Company, pretended to sell the above-mentioned three bonds and mortgages under a pretended auction sale to itself for $3,050, but that said pretended sale was held without notice to the defendant herein and while the appeal for which the National Surety Company had become surety was still

pending, and before any liability of the plaintiff herein on its said undertaking on appeal had been determined, and that said pretended sale was for the purpose of defrauding the defendant, Agnes K. Mulligan, and further that the plaintiff applied the amount of said mortgages in payment and satisfaction of the amount due under the aforesaid decree.

A careful reading of the affidavits submitted with the motion leads to the conclusion that the parties are in substantial accord upon the following facts:

That on or before November 29th, 1913, Agnes K. Mulligan, the defendant herein, was executrix of the Last Will and Testament of John Hartmann, deceased, and on November 29, 1913, one Mary K. Hartmann, procured a decree against said Agnes K. Mulligan in the Surrogates' Court for the County and State of New York, directing the defendant herein, Agnes K. Mulligan, to pay said Mary K. Hartmann eighteen thousand nine hundred and ninety-seven dollars and forty-six cents ($18,997.46). A certified copy of the decree is annexed to the complaint. An appeal from said decree was taken by Agnes K. Mulligan to the Appellate Division of the Supreme Court of New York, and at the same time the plaintiff, National Surety Company, entered into an appeal bond with said Agnes K. Mulligan on her appeal to the Appellate Division, whereby the plaintiff undertook that said Agnes K. Mulligan,

"will pay all costs and damages which may be awarded against her upon said appeal if said

decree or any part thereof is affirmed or the appeal dismissed, and will also pay the sums directed to be paid by said decree or the part thereof as to which said decree is affirmed, not exceeding however, the sum of $37,994.62."

At the same time, one Catherine A. McGuire, by absolute assignment, assigned to the National Surety Company, the three bonds and mortgages hereinbefore mentioned as indemnity against loss for having entered into said appeal bond for the defendant, Agnes K. Mulligan.

The aforesaid decree was affirmed by the Appellate Division on November 27, 1914, and an order of affirmance was filed in the Surrogates' Court November 30, 1914.

On December 5, 1914, an order was made by and filed in the said Surrogates' Court making the order of the affirmance of the Appellate Court, the order of the Surrogates' Court. Copies of these orders are annexed to the complaint.

On the 21st day of December, 1914, by reason of the plaintiff, National Surety Company, paying to Mary K. Hartmann the amount of the decree, a written assignment of said decree (designated therein as a judgment) was made by her to the plaintiff, a copy of which is appended to the complaint.

On March 31, 1915, the aforesaid three bonds and mortgages were sold at public auction to the plaintiff, National Surety Company, for $1,000 each or a total of $3,000, plus $50, a return of costs, there being no other bidders, which sum was applied in reduction of the amount due on the aforesaid decree and subse-

quently the National Surety Company foreclosed said mortgages and bought in the property covered thereby, there being no other bidders therefor.

It further appears to be uncontradicted that since the sale of the aforesaid three bonds and mortgages at auction on March 31, 1915, neither the defendant herein, nor the said Catherine A. McGuire, the owner of the alleged bonds and mortgages, have ever taken any action whatsoever, either before or after said sale, to determine any rights they might claim to have therein, or to question the conduct of the National Surety Company, the plaintiff herein, in regard to the aforesaid sale and foreclosure of the said mortgages.

The plaintiff herein claims that there is now due to it on account of the aforesaid decree, the sum of $17,391.50 with interest from December 21, 1914.

It will be seen that in the answer filed by the defendant, she attempts to raise these defenses, viz: That the decree has been paid; that the bonds and mortgages have been applied in payment of the decree; that the alleged sale of the bonds and mortgages for $3,000 was illegal and void because the sale was made before the appeal was finally determined, and was not bona fide, but for the purpose of defrauding the defendant; that the plaintiff's handling of these securities was not done in a proper manner so as to realize the greatest possible amount on the sale thereof.

In addition to the above propositions which may be considered fairly within the scope of

the answer, the defendant in her brief insists that the plaintiff never had a proper assignment or title to the decree against the defendant, and that the payment to Mary K. Hartmann at the time of the alleged assignment thereof to plaintiff, was a voluntary payment, and put the plaintiff in the position of a mere volunteer.

Proceeding to consider these last questions first, although they do not seem to be raised directly by the answer, it is sufficient to say that the defendant's answer in Paragraph 3 of the first defense, clearly admits that the plaintiff became possessed of the aforesaid decree by virtue of a written assignment duly executed and delivered on December 21, 1914, and the defendant is therefore precluded from questioning the validity of the assignment or of plaintiff's title to the decree or judgment at this time.

This being true, it would seem that the plaintiff would be entitled to recover the amount due upon the decree unless it has been in some way paid or satisfied, or unless the defendant can claim something by way of setoff against the fact of the decree. Even if the plaintiff had not taken an assignment of the aforesaid decree, and was obliged to rest its claim for reimbursement against the defendant, entirely upon the contract implied by law, in favor of a surety who has paid a debt of his principal, nevertheless, it is questionable under the circumstances of this case, whether the defendant could claim any benefit under the doctrine of voluntary payment. The decree has been confirmed by the highest court of the State of New

York and the obligations of the parties conclusively fixed, and it is conceded that the defendant has not paid one dollar on account thereof. It cannot be said, therefore, that the defendant is relieved of all responsibility for the payment of the decree, because of the fact, if it is a fact, that the plaintiff herein paid the decree before the final appeal was concluded.

It is unnecessary, however, to go that far to sustain the plaintiff's rights under the point now made by the defendant, because it is now established by the great weight of authority, that the assignment of a decree or judgment to a surety, will not satisfy or extinguish it, where the assignee, though liable for the debt evidenced by it, is not a party of the judgment and occupies with respect thereto, the position of a surety only. 34 C. J. 690, Sec. 1065 (b); see also 34 C. J., p. 638, Sec. 980. If the plaintiff herein had been a party to the decree, a question might have arisen as to the intention of the plaintiff in taking an assignment of the decree, as to whether it intended a satisfaction of the decree or to keep it alive for its own protection, but not being a party to the decree, the assignment thereof to the plaintiff, who was merely a surety for its payment in the event that its principal did not pay the decree upon affirmance, could leave no question whatever as to the fact that the decree is now a valid and subsisting one in the hands of the plaintiff. It makes no difference, therefore, whether the plaintiff took an assignment of the decree before it was in any way obligated to pay the same or not, because, if the plaintiff had waited

until an affirmance of the decree by the Court of Appeals of the State of New York, being the court of last resort, before taking an assignment thereof, and such an assignment would have enabled the plaintiff to proceed upon the decree as against the defendant herein, according to the established rule above cited, then surely the plaintiff would have the right to pay the amount of the decree to the holder thereof and take an assignment thereof, before such appeal was determined, because no right of the defendant would be thereby invaded.

We must next consider whether or not the defendant's affidavits raise any question as to the payment of the decree, either by a payment in money or by an application of the securities in specie to the satisfaction of the debt.

At the argument, the defendant did not dispute nor does she raise any question in her affidavits as to the truthfulness of the plaintiff's assertion that it received $3,000 at the auction sale of the bonds and mortgages on March 31, 1915, and that said sum, together with $50 returned for costs, was credited on account of the amount due under the decree. And there is not a scintilla of evidence produced by the defendant to show that the bonds and mortgages were appropriated in specie to the payment of the decree. The defendant's contention is based entirely upon the assertion that the sale of March 31, 1915, was not a valid sale of the securities, that the foreclosure of the bonds and mortgages was invalid as to the defendant and as to the owner thereof, Catherine A. McGuire, because they were not made parties to the fore-

closure suit, and that both the sale of March 31, 1915, as well as the foreclosure sale, were not *bona fide* and were in fraud of the rights of the defendant, and were not properly advertised, and that the plaintiff did not handle the securities in a manner to realize the most from them.

It will be noticed at once, that unless the defendant had some rights in the securities to protect, none of the above contentions would be available to her in resisting payment of the decree against her.

It becomes necessary, therefore, to determine just who the parties to the indemnity agreement were and just what its terms were, since the terms rest entirely in parole.

The defendant claims that under the indemnity agreement, whereby the three mortgages were put up as security, the plaintiff herein, the National Surety Company, undertook to look solely to the securities and the properties covered thereby for its reimbursement, in the event that it was called upon to pay the decree and that the plaintiff, therefore, has no right of reimbursement against the defendant, except only in the event of a deficiency in the foreclosure sales, and then only, upon the implied agreement to reimburse, arising under the common law. The defendant contends, therefore, that if this is so, she had a right to have the securities properly disposed of for her benefit and that therefore, the right arises to question the plaintiff's handling of such securities in the present suit. In other words, the defendant insists that

the indemnity agreement was for her benefit, and if the collateral was pledged in order to establish a fund for the payment of the decree, it might be said to have been made for the defendant's benefit. Turning to the affidavits we find that William A. Thompson, the vice president of the National Surety Company, in Paragraph 7 of his affidavit says:

"In order to induce the plaintiff to enter into the bond aforesaid, the defendant caused one Catherine A. McGuire to assign to the plaintiff as collateral security for any loss or damage that might be sustained by the plaintiff by reason of entering into the bond aforesaid, three bonds and mortgages as set forth in Paragraph 2 of the answer."

The defendant, on the other hand, in her affidavit says:

"At the time plaintiff entered into the bond or undertaking on appeal, one Catherine A. McGuire deposited with the plaintiff for me, at my request, the three bonds and mortgages mentioned in Paragraph 2 of the answer, to secure the plaintiff from any loss it might sustain should it be compelled to pay the decree appealed from."

And further on says:

"At the time the said three bonds and mortgages were deposited with plaintiff by said Catherine A. McGuire, as hereinabove set forth, it was understood that in the event the plaintiff was required, because of its entry into the said bond or undertaking, to pay and did pay, the

amount directed to be paid in and by said decree, or any part thereof, that it should foreclose said mortgages, all of which were then passed due, and that out of the proceeds of the sale of the properties covered by said mortgages, it should reimburse itself for the moneys so paid by it, and render the overplus to said Catherine A. McGuire."

These are the only statements found in the affidavits relating to the so-called indemnity agreement. I am unable to discover that these two statements conflict in any way. But taking the statement of the defendant as true, which I must do for the purpose of this motion, there is nothing therein contained which would in any way restrict the plaintiff to seeking reimbursement from the security only, and it is undoubtedly the rule that the rights of a surety are not affected by taking security from his principal or from a third person, unless there is an express agreement that the surety shall look to such security only. 32 Cyc., p. 251, Section 4.

Furthermore, when the defendant says:

"It was understood that in the event that the plaintiff was required, because of the said undertaking to pay, and did pay, the amount directed to be paid in and by the decree, or any part thereof, that it should foreclose said mortgages * * * and out of the proceeds of the sale * * * should reimburse itself for the moneys so paid by it, and render the overplus to the said Catherine A. McGuire,"

she is stating a pure conclusion unwarranted by

the facts which she does properly state in the first statement above quoted, and of course, it is elementary that in dealing with this motion, I can only receive and consider such facts as are alleged in a manner to constitute competent evidence in a Court of Law. But taking the language just quoted as a positive statement of fact and not as a conclusion, the statement amounts to nothing more than giving to the plaintiff herein, the right to realize on the securities, after paying the amount of the decree, and reimbursing itself therefrom, rendering the over-plus to the owner of the securities, and that is just exactly what was contemplated according to plaintiff's statement of the agreement. There is not a word to establish the securities as a special fund for the payment of the decree, but the plain reading of the statement shows that the securities were given as collateral to save the surety harmless from any payment it might be called upon to make under the decree. The pledge of the securities was made for the benefit of the surety and not for the benefit of the defendant in this suit. In this connection it is to be noted that on page 9 of her brief, the defendant expressly admits that in the event of a deficiency on the foreclosure of the mortgages, that the plaintiff would have a right to reimburse from the defendant for the deficiency. Clearly, therefore, the securities were not to be the sole fund from which the plaintiff was to be reimbursed, nor on the other hand was the plaintiff limited under the defendant's version of the indemnity agreement, to proceed first upon the securities before

calling upon her to reimburse the plaintiff in full for moneys advanced by it, in payment of the decree. In order to have the benefit which the defendant seeks to draw from the indemnity agreement as stated by her, it would have to clearly appear that the bonds and mortgages were to constitute the primary fund from which the plaintiff should seek reimbursement; because at common law, where a party becomes a surety for another, an implied agreement arises that the principal will reimburse the surety, and in order to overcome such an implied agreement, where indemnity is given by a third party for the benefit of the principal, it must clearly appear that such indemnity is to constitute the primary fund out of which reimbursement is to be obtained. It is apparent, therefore, that the defendant must fail in this contention.

Inasmuch as the bonds and mortgages in question were not pledged in order to establish a fund for the absolute payment of the decree against the defendant, it is evident that the defendant is not in a position to criticise the plaintiff's handling of these securities unless she had some interest therein, or some right to protect therein. There can be no doubt that the transaction between Catherine A. McGuire and the National Surety Company was one whereby Catherine A. McGuire pledged by absolute assignment with the plaintiff, three bonds and mortgages to indemnify the plaintiff against loss. The contract, therefore, was one of indemnity and a contract of indemnity must be distinguished from a contract made for the

benefit of a third person. A contract of indemnity is defined as follows:

"The promise in an indemnity contract is an original and not a collateral undertaking and in this particular, differs from a contract of guarantee. If the contract of indemnity refers to and is founded upon another contract either existing or anticipated, it covenants to protect the premises from some accrued or anticipated liability arising upon such other contract; it is not a contract to answer for the contractual debt, default or miscarriage of another than the premises, but a contract to indemnify the premises from loss owing to his contractual liability. It is given to a person against his sustaining loss or damage and cannot be properly called one that insures the thing."

31 *Corpus Juris* 419, Section 2.

Catherine A. McGuire did not make the contract of indemnity for the benefit of this defendant but assigned her mortgages to the plaintiff for its benefit alone to indemnify it against loss. The transaction in regard to the appeal bond and mortgages was consummated by having the plaintiff say to Catherine McGuire, "If you will give us security, we will go on the appeal bond of Agnes K. Mulligan." Catherine McGuire having assigned the security over to the plaintiff, if the plaintiff had refused to enter into the appeal bond with the defendant, then this defendant might have had a legal remedy against the plaintiff, but the plaintiff having executed that bond, the contract became an

executed one and the defendant's interest therein was terminated, and the collateral security placed with the plaintiff by Catherine A. McGuire was a contract of indemnity in which the plaintiff and Catherine A. McGuire alone were interested.

The question then arises as to whether or not rights accrued to the defendant in regard to the property pledged by Catherine A. McGuire to the plaintiff to indemnify it against any loss on the appeal bond, which the plaintiff executed for the benefit of the defendant herein.

In *McCrea v. Yule,* 68 N. J. Law, p. 465, at 467, the Court said:

"A pledgee of personal property assigned as collateral security has the right to collect the interest, dividends and income accruing on the collateral assigned, accounting to the pledgor upon the redemption of the pledge. In making such collections, the pledgee is a trustee of the pledgor to see to the proper application of the funds collected or to refund the same to the pledgor if the debt be otherwise paid."

In order to further demonstrate that the contract of indemnity was for the benefit of the National Surety Company and not for the benefit of the defendant and that the latter had no rights to protect in the securities, we will suppose by way of illustration, that the plaintiff, National Surety Company, had turned the bonds and mortgages back to Catherine A. McGuire before it paid anything on account of the above-mentioned decree, under such circumstances

could it be said that the defendant herein could have protested, if the plaintiff was content to realize only upon the contract implied by law for reimbursement from the defendant?

It must be perceived that the defendant here has no interest in the transactions between the plaintiff and the owner of the bonds and mortgages, except to see that she, the defendant, is not called upon to pay the decree, or any part of it, twice. If the plaintiff in this case, upon selling the securities, had realized the full amount of the decree, and had applied the amount so realized in satisfaction of the decree, the pledgor of the securities, Catherine A. McGuire, would undoubtedly have the right to sue the defendant, Agnes K. Mulligan, for the exact amount which had been applied in satisfaction of the decree. This obligation would be implied by law. But it is equally true that the defendant could never be called upon to pay to Catherine A. McGuire any money except that which was actually applied in satisfaction of the decree. If the securities had been converted by the National Surety Company, or they had been handled in such a way as to realize only a part of their real worth, this defendant could not be called upon to answer for the conversion or wrongdoing of the National Surety Company, because her implied contract with the owner of the securities was only to reimburse such owner in the event that any part of the securities were used in actual satisfaction of the defendant's debt, and of course unless such satisfaction or part satisfaction was actually accomplished, there could be no reimbursement from the de-

fendant, because the National Surety Company, the plaintiff here, was in no sense the agent of the defendant, nor could she be held responsible except in so far as the securities of Catherine A. McGuire were actually applied in satisfaction of defendant's debt.

From the affidavits presented it undoubtedly appears that the defendant has not paid the decree and she is obligated to pay it to someone, either to the plaintiff here or to Catherine A. McGuire, and there is no proof, nor is it claimed, that Catherine A. McGuire has made any move in the situation since March 31, 1915. She has not criticised the auction sale of the bonds and mortgages had on the last named date, nor the foreclosure proceedings subsequently brought thereon. It is probably true that the auction sale of the bonds and mortgages on March 31, 1915, was invalid, so far as Catherine A. McGuire is concerned. But upon the auction sale, the plaintiff bid in the securities and actually appropriated $3,000, the amount of the bid, plus $50, return of costs, in reduction of the amount due on the decree. If this sale was invalid, the plaintiff, by bidding in the bonds and mortgages and claiming ownership thereunder, would undoubtedly be guilty of a conversion thereof, and Catherine A. McGuire could have demanded a return of the securities upon paying the amount of the decree to this plaintiff. This she has failed to do for over thirteen years, and since she has not criticised the sale, and since the proceeds thereof were actually applied towards the amount due on the decree against the defendant, the latter is not in a position to criticise it.

The fact that the plaintiff bid in these securities at the auction sale and subsequently foreclosed them, as the absolute owner thereof, and has now brought this suit against the defendant, affords ample proof that the plaintiff never applied the securities in specie to the satisfaction of the decree.

Even if we disregard the auction sale of these securities on March 31, 1915, and consider the subsequent foreclosure thereof, as the only step taken by the plaintiff to realize on these securities, the defendant's situation is not helped even under her own statement of the indemnity contract as hereinbefore discussed, because it is not disputed that the sum of $3,050, has actually been credited on account of the decree, and the defendant, although having the burden of proving that the securities have been in some way used in satisfaction of the decree, has failed to show that anything was realized on the foreclosure sale in excess of the aforesaid sum of $3,050, or in fact to show that any sum was realized thereon. Both parties admit that the plaintiff bid in the properties on the foreclosure sale, but there is absolute silence as to the amount bid by the plaintiff for the property. Of course, the defendant cannot criticise the validity of the foreclosure proceedings, and could not be concerned with the amount realized therefrom, and the defendant has failed to offer any proof upon this subject, and apparently does not dispute that the sum bid did not exceed the credit of $3,050, already applied towards the amount due upon the decree.

It is unnecessary to go into the question of

the foreclosure sale, however, because the plaintiff by selling the bonds and mortgages at public auction on March 31, 1915, if we consider that sale invalid, undoubtedly converted these securities to its own use, and claimed absolute ownership thereof, and this being so, the subsequent foreclosure thereof, was not in any sense in accordance with any indemnity agreement, but in exercise of the plaintiff's claim of absolute property therein and therefore, neither the amount bid on the foreclosure, whatever it may have been, nor the properties themselves, when bid in by the plaintiff, could be considered as having in any way been applied in satisfaction of the decree against the defendant.

Assuming for the purpose of argument, that the auction sale of these bonds and mortgages and the subsequent foreclosure thereof, were invalid, this would only be so as to Catherine A. McGuire the pledgor thereof, and under such circumstances she would have the right to demand a return of the securities upon depositing with this plaintiff the amount due upon the decree. If she had done this, under such circumstances, the plaintiff would have been obligated to either return the securities (which it could not do after foreclosure) or pay to her the value thereof. If this had been done prior to the institution of the case *sub judice,* undoubtedly the defendant here would be obliged to pay to Catherine A. McGuire the amount deposited by her on account of the decree. But inasmuch as Catherine A. McGuire has not yet demanded a return of the securities or the value thereof, then if the defendant is

required to pay the balance claimed to be due upon this decree, Catherine A. McGuire, unless barred by the Statute of Limitation or laches, could recover from the plaintiff the value of the securities, so that no injustice would be done to anyone concerned. But whether Catherine A. McGuire will attempt to do this or not, is no concern of this defendant, because if this defendant pays the balance of the decree as the result of this suit, Catherine A. McGuire could have no recourse over against her. Catherine A. McGuire would have to demand from the plaintiff here, the securities, and then upon failure to return them, might bring a suit against the plaintiff as for a conversion, and if the sale of the securities by the plaintiff was invalid, she could recover, unless barred by the lapse of time in asserting her right. On the other hand, if the sale of the securities was valid, Catherine A. McGuire could not of course, recover from the plaintiff under any consideration, but to the extent that the proceeds of the sale had been applied on account of the decree, Catherine A. McGuire could recover from the defendant in the present suit and that would be the sum of $3,050, and of course, that is the sum for which the plaintiff here gives the defendant credit.

Under such circumstances, the defendant would only be paying the full face of the decree against her with the interest thereon, the sum of $3,050, with interest to Catherine A. McGuire, if ever demanded, and the balance of the decree to the plaintiff in this suit, which is the sum demanded in this suit. So it is

difficult to see how the defendant is in a position to withhold payment of the balance of the decree from this plaintiff, because she cannot be held responsible in any way for plaintiff's alleged conversion of the securities or the improper handling thereof, because as already stated, the National Surety Company was not an agent or representative of the defendant and there was no contractual relationship or other relationship between the defendant and the National Surety Company, which would make this defendant in any way responsible for the negligence or wrongdoing of the plaintiff here in connection with the pledged securities. If the defendant should offer the proof set forth in her affidavits, at a trial of this case before a jury, the Court would most certainly have to direct a verdict in favor of the plaintiff and against the defendant for the reasons hereinbefore set forth, and that being so, it follows that the Court must strike out the defendant's answer upon this motion and an order may be presented in accordance with the views thus expressed.

HENRY E. ACKERSON, JR.,
Supreme Court Commissioner.

Order Striking Out Answer.

(Filed April 12th, 1928.)

NEW JERSEY SUPREME COURT.

NATIONAL SURETY CO., a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law. Order.

This matter coming on to be heard before me, Henry E. Ackerson, Jr., as Supreme Court Commissioner, upon motion made by the plaintiiff, National Surety Company, to strike out the answer filed herein by the defendant, Agnes K. Mulligan, as being false, sham and frivolous and interposed solely for the purpose of delay;

And it appearing by the affidavits filed by the respective parties that the defense made by the defendant's answer is sham and frivolous and interposed solely for thep urpose of delay and fails to show such facts as entitle her to defend;

It is, on this twelfth day of April, 1928, on motion of Eichman & Seiden, attorneys for plaintiff,

Ordered that the answer filed by the defendant herein be struck out.

HENRY E. ACKERSON, JR.,
Supreme Court Commissioner.

Assessment of Damages.

Filed April 21, 1928.

NEW JERSEY SUPREME COURT.

NATIONAL SURETY Co., a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law. Assessment of Damages.

This action is founded on a decree or judgment obtained by Mary K. Hartmann against the defendant, Agnes K. Mulligan, for the sum of $18,997.46 in the Surrogates' Court in and for the County of and State of New York, which decree or judgment was assigned, in writing, by the said Mary K. Hartmann to the National Surety Company, the plaintiff herein.

There is due on said decree as follows:

Amount of decree with interect paid to Mary K. Hartmann for assignment	$20,194.28
Amount received by plaintiff applied on account	3,050.00
Balance due	$17,144.28

Order Striking out Answer

Interest from December 21, 1914 to April 21, 1928 (13 yrs. 4 months) 13,715.33

Total due $30,859.61

I, Fred L. Bloodgood, Clerk of the New Jersey Supreme Court, having examined plaintiff's complaint, and being satisfied that the above statement and calculations are correct, do hereby assess the damages of the plaintiff against the defendant in the above stated cause at the sum of $30,859.61 besides costs of suit to be taxed.

Dated, April 21, 1928.

FRED L. BLOODGOOD,
Clerk.

Judgment Appealed From.

NEW JERSEY SUPREME COURT.

Filed April 21, 1928.

NATIONAL SURETY Co., a body corporate, Plaintiff, vs. AGNES K. MULLIGAN, Defendant.	Action at Law. Judgment.

Whereupon, it is adjudged that the plaintiff, National Surety Company, a corporation, do recover of the said defendant, Agnes K. Mulligan, the sum of Thirty thousand eight hundred and fifty-nine Dollars and Sixty-one cents damages, together with its costs which have been taxed at the sum of Sixty-four dollars and Twenty-two cents, making in the whole the sum of Thirty thousand nine hundred and twenty-three Dollars and Eighty-three cents.

Judgment entered April 21, 1928.

WILLIAM S. GUMMERE,
C. J.

New Jersey Court of Errors and Appeals

BRIEF IN BEHALF OF DEFENDANT-APPELLANT

NATIONAL SURETY CO.,
Plaintiff-Appellee,

vs.

AGNES K. MULLIGAN,
Defendant-Appellant.

Brief in Behalf of Defendant-Appellant.

This is an appeal from a judgment of the Supreme Court entered upon striking out defendant's answer. The question presented is the correctness of the order striking out the answer.

The plaintiff moved to strike out the defendant's answer.

> "On the ground that said answer is false, sham and frivolous and interposed solely for the purpose of delay." (Case page 37).

Defendant contends that the answer was neither sham nor frivolous; raised issues to be tried and not only presented good defenses but most certainly entitled the defendant to go to trial regardless of the ultimate outcome of such trial. Defendant contends that plaintiff has received full payment and satisfaction of its debt and should not be allowed to collect twice.

Facts

Plaintiff claims to be the holder by assignment of a decree of the New York Surrogate's Court, and seeks to recover a judgment for the amount of this decree plus interest.

The defendant, Agnes K. Mulligan, was the executrix of the Estate of one, John Hartmann. Upon the settlement of her account as executrix, the Court determined that there was a balance in her hands of $18,997.46, and thereupon

> "Ordered, Adjudged and Decreed that out of the balance so found, the said Executrix, Agnes K. Mulligan pay forthwith, after the making of this Decree, the sum of Eighteen thousand nine hundred ninety-seven and 46/100 Dollars ($18,997.46) to the said Mary K. Hartmann, * * *" (Case page 13).

From this adjudication, the executrix appealed to the Appellate Division of the Supreme Court and entered into an undertaking with the National Surety Co. as surety to secure the said Mary K. Hartmann payment of the amount allowed. The purpose of ths undertaking was to secure a stay pending appeal.

The decree was affirmed, (Case page 15). There was a further appeal to the New York Court of Appeals, and an affirmance in that court. (Case, page 22.)

Upon payment by the Surety Company, Mary K. Hartmann assigned the Decree which she had obtained in the Surrogate's Court to the plaintiff and this suit is brought thereon. (Case, pages 17, 18, 19, 40.)

When the plaintiff became surety upon the ap-

peal bond, Mrs. Mulligan secured the company by an indemnity agreement by one Catharine A. McGuire, (Case page 58) and collateral security was deposited with the Surety Company. This consisted of real estate bonds and mortgages of the value of twenty thousand five hundred ($20,500.00) Dollars. These were assigned to the Surety Company and an indemnity agreement entered into whereby the Surety Company was given the right to use such collateral in the event that it be called upon to make payment under its obligation as Surety on the appeal bond. (Case page 58).

The Surety Company paid the decree (before it was called upon or compelled to do so) and appropriated all of the collateral without notice, and as this brings us to the argument, the further and more particular facts relating to this phase of the transaction will be referred to in the Points which follow:

Point I.

The Defendant's answer was neither sham nor frivolous.

Rule 80 of the Supreme Court states the condition under which an answer may be struck out and a summary judgment rendered, which is,

> "Unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the Judge hearing the motion, sufficient to entitle him to defend."

The motion made by the plaintiff in this case was not for a summary judgment. Such a motion must be made to a Supreme Court Justice and not to a Supreme Court Commissioner.

Milberg v. *Kuthe,* 98 N. J. L. 779.

The motion was to strike out on the ground that the answer was false, sham and frivolous. Upon such a motion, the defendant is not called upon to show by affidavit or other proof such facts as entitled him reasonably to defend, but the burden is upon the plaintiff to show that the answer is palpably false in fact or wholly insufficient in law. Striking out an answer as sham and thereby depriving the party of the right to trial by jury, is a drastic step and should not be taken in case of doubt.

Walter v. *Walker*, 35 N. J. L. 262.
Coykendall v. *Robinson*, 39 N. J. L. 98.

In

Muhlenbeck v. *West Hoboken*, 2 N. J. Micc. 7,

the Court said:

> "When to decide the question it becomes necessary to take testimony to enable the Court to determine the relative merits of the controversy, or the justice or injustice of the defense, the defendant's constitutional right to a jury trial requires that the motion to deprive him of his defense be denied."

In denying a motion to strike out an answer, and for summary judgment, the Court in,

Perloff v. *Island Development Co.*

said:

> "These are all matters involving serious and important questions of fact, requiring

solution by a jury under proper instructions as to the law applicable.''

In a case decided shortly after the enactment of the 1912 Practice Act,

Meyer v. *Nickelsburg Brothers Co.*, 37 N. J. L. J. 36

the Court said:

''In order to apply these rules (80-81 s. c.) intelligently, it is necessary, first, to inquire as to their intent. Under what circumstance and to what extent may trial by jury be supplanted by the more expeditious process of trial by affidavit? One of the briefs submitted on behalf of the plaintiff deals largely with decisions of the English Courts construing and applying rules which must resemble ours. The gist of these decisions is stated to be that unless the defendant shows by affidavit that he has a probable, though not necessarily, good defense, the motion should be granted and the plaintiff permitted to take judgment. The English Judges have said that what the defendant must show is that he has a bonafide defense, one which he may be able to establish, a plausible ground of defense, something fairly arguable and of substantial character. On the other hand what a plaintiff must show in order to entitle him to a summary judgment is that he has a clear case against the defendant.''

Nowhere has it been held, and we submit that it never should be held that a defendant must es-

tablish by affidavits a case which would be good against a plaintiff's motion for a direction of a verdict at the end of a case. (See opinion case page 91).

Although the motion was not for a summary judgment, defendant did, however, submit affidavits supporting her answer which brought her well within the Rule, entitling her to defend, particularly in view of the total lack of a clear case on the plaintiff's side. We also say that the complaint is insufficient on its face and deficient even with its supporting affidavits. The defendant's answer and proofs indicate a probable direction of verdict for the defendant.

Point II.

The complaint does not set forth a cause of action nor do Plaintiff's affidavits disclose a cause of action.

In Paragraph 1 of its complaint, plaintiff alleges that the Surrogate's Court in New York by a decree, directed defendant pay Mary K. Hartmann, $18,997.46 in the matter of the judicial settlement of the account of the defendant, as executrix. A copy of the Decree is attached to the Complaint which shows that it is a decree of determination upon an account. The Complaint then alleges an assignment, a copy of which is made a part thereof. Taking the Complaint, either with or without the supporting affidavits, it clearly appears that the decree is not such a decree as may be sued upon here, for the reason that it is not a definite, final and unconditional judgment capable of enforcement by final process, which is the only kind of a foreign judgment that can be the basis of suit in the Courts of another state.

Lynde v. *Lynde,* 181 U. S. 183.
Tilt v. *Kelsey,* 207 U. S. 43.

A judicial settlement of an executor's account is not a final determination of anything except the matters embraced within the account.

In re *Beach,* 208 N. Y. App. Div. 831 affirming 122 N. Y. Misc. 261.

A decree upon an accounting does not revoke the letters or absolve the executor from performing future duties.

Rosen v. *Ward,* 96 N. Y. App. Div. 262.
In re *Williams,* 165 N. Y. Supp. 716.
N. Y. Surrogate's Court Act, Sec. 274.
Jandorf v. *Smith,* 217 N. Y. App. Div. 150, 155.

The New York Surrogate's Court is a Court of limited jurisdiction and the Surrogate's powers purely statutory.

In re *Martin,* 211 N. Y. 328.
In re *Starbuck,* 221 N. Y. App. Div. 702.
St. John v. *Putnam,* 128 N. Y. Misc. 714.

The determination of the effect of the decree in the State wherein granted, is to be made by examination of the decisions of the Courts of that State.

Hancock National Bank v. *Farnum,* 176 U. S. 640, 643.

A decree of the kind set forth in the complaint, is as a matter of fact, nothing more or less than a similar decree of our Orphans' Court.

The Executrix filed her account, and upon the passing of the same, a determination was had as to the amount with which she was chargeable. There is no allegation in the complaint or in the affidavits, nor could there be any, showing a finality in effect in New York of the Decree. Both sides quote sections of the New York Surrogate's Court Act which do show the limited jurisdiction of the Surrogate's Court and the limited effect of the Decree.

The full faith and credit which is to be given the Decrees of the Courts of other States is the same

> "as they have by law and usage in the Courts of the States from which they are taken."
>
> *Tilt* v. *Kelsey,* 207 U. S. 43, 57.

Nor is such a decree assignable.

At the commonlaw judgments and decrees were not assignable.

Baker v. *Woods,* 157 U. S. 212.

By Statute in New York, a Decree of the Surrogate's Court is not made assignable, although such a decree after it is docketed in the New York Supreme Court may be assigned.

> New York Surrogate's Court Act, Sec. 81, formerly Sec. 2551, code of Civil Procedure taken from Sec. 2553 of the previous Revision of the Code of Civil Procedure.

The Section is set forth in full, on page 63 of the Case.

In New York, the assignment to the National Surety Co., by Mary K. Hartmann would be null

and void as against Mrs. Mulligan. It should be given no greater value here. The Surrogate's Decree is limited in its effect and its enforcement is specific and not general.

Bennett v. *Crain,* 41 Hun. 183.
Bingham v. *Burlingame,* 33 Hun. 211.
Disoway v. *Hayward,* 1 Dem. (N. Y. Sur.) 175.

The section of the Code in force at the time in question, and now a part of the Surrogate's Court Act will be found on page 64 of the Case. The Decree set forth in the complaint is not only limited in its effect and unassignable as a matter of law, but a reading of the decree itself shows that it is in no sense a general judgment such as is required to support an action in this State upon it. Can it be said that the plaintiff here should be allowed to recover a general judgment upon a decree which has no such effect in the place where rendered? The Surrogate's Decree in New York, for example, does not create a lien upon real estate, (*Bennett* v. *Crain,* supra) whereas, a judgment here if rendered upon such a decree would give such a lien. There is no allegation in the Complaint that the Decree was docketed in the New York Supreme Court, nor does the plaintiff sue as assignee of a judgment created by the docketing of such Decree. The allegation in the Complaint that the New York Surrogate's Court is one of general jurisdiction is palpably untrue. A copy of the decree annexed to the complaint and the affidavits show this, and furthermore, the allegation is specifically denied by the answer. (Case page 32.)

Point III.

Plaintiff received satisfaction of its claim by taking the collateral securities.

Defendant in her answer sets forth the facts with respect to the use by the plaintiff of the collateral security given to it in connection with an indemnity agreement, and the allegations in the answer are supported and elaborated by the affidavits submitted in defendant's behalf.

It is to be noted that the bonds and mortgages were assigned to the Surety Company by Catharine A. McGuire who was also a party to the indemnity agreement with defendant. The Surety Company took and held these bonds and mortgages *by such assignment and not by reason of purchasing the same at the sale alleged* to have taken place as set forth in the affidavit of William A. Thompson. (Case, page 41.) Subsequently, the Surety Company foreclosed the mortgages and bought in the property *and there is no allegation that there was any deficiency in the foreclosure suit*. It is true that the plaintiff claims that the mortgages were put up on auction and bought in by the plaintiff, but nothing was ever done at or after said sale to make any transfer, and the fact is that the National Surety Company had the mortgages under their original assignments and foreclosed them pursuant to such assignments. The so-called sale in no wise affected the legal title to the bonds and mortgages. This could only be done by an assignment, and there was no assignment at or after the so-called sale. Furthermore, a pledgee is a trustee with respect to the thing pledged.

McCrae v. *Yule*, 68 N. J. L. 465.

The pledgee therefore had no right to purchase at its own sale.

Hartman v. *Hartle,* 95 N. J. E. 123.
Bassett v. *Shoemaker,* 46 N. J. E. 538.
Case v. *Carroll,* 35 N. Y. 385.
Hoyt v. *Martense,* 16 N. Y. 231.

The plaintiff is, therefore, in the situation of having taken these securities, in the absence of proof to the contrary, at their face value. Defendant goes beyond this and shows by affidavit that the mortgages were, in fact, worth their face values. The plaintiff having resorted to the collateral and showing no deficiency is not entitled to recover against this defendant upon the decree. It is apparent that the assignment of the decree was taken only because of plaintiff's rights as Surety. The plaintiff could have sued without any assignment, either at law upon the express or implied promise to reimburse or as the owner of the debt by subrogation. The taking of an assignment was merely the act of a surety. Should the Surety Company having received satisfaction by resort to the collateral, be again allowed reimbursement? It is not pretended that the Surety Company took the assignment of the decree in any other way than for the purpose of securing to itself, rights which it had as a Surety.

A surety is never allowed to recover more than he has been compelled to pay out. A surety is not allowed to make a speculation of the transaction.

Apgar's Administrators v. *Hiler,* 24 N. J. L. 812.

From the pleadings and the affidavits, it appears that the Surety is not out of pocket at all,

and on the other hand, it also appears that if this judgment is allowed to stand, the defendant will have to pay twice, and will be decidedly out of pocket. A trial of the issues raised by the pleadings would reveal, among others, two important facts:

(a) How much money did the National Surety Company actually pay to discharge its obligations? Did it really pay the full amount of the decree, or did it settle with Mary K. Hartmann for a lesser sum? The defendant is entitled to the best evidence as to this because it is the actual amount paid that determines the amount of a Surety's reimbursement.

(b) *What was the actual deficiency, if any, upon the foreclosure of the mortgages held by the Surety Company as collateral?* This also, defendant is entitled to know, because this determines the amount of the credit to be applied against the amount which the Surety Company was called upon to pay out. The Courts look at the substance and not at mere forms.

Mugler v. *Kansas,* 123 U. S. 623.

The plaintiff was required to apply all the benefit received from the collateral in reduction of the amount of the judgment.

Plaintiff received collateral of the face value of $20,500 in the form of bonds and first mortgages on real property.

It first put them up at auction and summarily knocked them down to itself, for $3,050. (Bill of particulars, p. 31, fol. 20.) Then it foreclosed the mortgages and at the foreclosure sale bought the mortgaged property itself, but at what price does

not appear. William A. Thompson, a vice president of plaintiff, says:

> "Subsequently, the mortgages were foreclosed, and at the foreclosure sale the property was bought in by the National Surety Company, there being no other bidders. By reason of the aforesaid, Agnes K. Murphy Mulligan, the defendant herein, was entitled to receive as a credit, the sum of $3,000, plus $50, return of costs, making a total of $3,050." (State of Case, p. 42, fol. 20.)

Why was Agnes K. Murphy Mulligan, the defendant herein, credited with the sum of $3,000, plus $50, a return of costs? Why was the sum with which she was credited fixed arbitrarily by the plaintiff? And why the return of $50 costs, which the defendant had never paid? Why should not the defendant be credited with the actual amount received by plaintiff, or the actual benefit derived by plaintiff from said collateral? Was not plaintiff a trustee of the collateral and consequently a trustee of the property purchased at the foreclosure sale, and bound to apply the proceeds of any subsequent sale in reduction of the judgment? These are questions which can only be determined upon a trial of the action.

It does not appear by the papers whether plaintiff has since sold the property or is still the owner thereof, but it does appear from the affidavit of Charles W. Tarbox, a real estate broker and appraiser, that the property was of the value of $49,500 at the time of said foreclosure sale. (State of Case, p. 55, fol. 30.) If plaintiff has sold said property at its actual market value, it

has received sufficient money to apply in the full discharge of the judgment in question, and if it has not sold the property, it now has in hand property amply sufficient to discharge the judgment.

Defendant is entitled to a trial upon her plea of payment.

The question also arises as to the rights of Catharine A. McGuire, and as this deals with a somewhat different aspect of the case, we will discuss it under a separate point.

Point IV.

Defendant is obligated to Catharine A. McGuire in the amount of the value of her securities, and should not be required to pay twice.

The National Surety Company becoming a surety upon defendant's appeal bond required indemnity. Catharine A. McGuire became the Indemnitor and furnished the security. As soon as this security was used, either in whole or in part, Catharine A. McGuire became entitled to receive back from this defendant, reimbursement to the extent of her contribution. There is nothing at all to indicate that Catharine A. McGuire was a volunteer or that she was making a gift. The presumption is, and the fact is, that Catharine A. McGuire indemnified the surety, and as such indemnitor, her rights were the same as exist between several sureties and in this situation the rule is that, as between several sureties, the last are the principal obligators, and the first are the sureties for them.

Wronkow v. *Oakley*, 135 N. Y. 505.
Polhemus v. *Prudential*, 74 N. J. L. 570.

The liability to repay is implied in law, and no express agreement is required, because the law implies a promise by the principal to pay the Surety who discharges the debt.

Konitsky v. *Meyer,* 49 N. Y. 571.
Young v. *Vough,* 23 N. J. E. 325, 328.

The law of bailment is of only secondary importance, but it does have a bearing upon the case. *The bonds and mortgages were pledges and their value in the absence of proof to the contrary is their face value.* Their actual value is not the amount for which they can be sold, but the amount collected upon them.

First National Bank v. *Felker,* 185 Fed. 678.

A pledgee is bound to a high degree of care in preserving collateral security and in realizing from it the greatest possible amount.

7 C. J. 644.

A pledgee is liable for any loss due to its own act.

Onderkirk v. *Central Bank,* 119 N. Y. 263.

The terms of the indemnity agreement entered into between the National Surety Company and the defendant and Catharine A. McGuire are not disclosed by the record, but it is not to be supposed that even this agreement gave the National Surety Company any right to make a profit upon the transaction. Here, too, a trial of the case would bring to light the terms of the agreement and of the surrounding facts and circumstances.

In the absence of these proofs and of evidence as to the other matters, grave doubts appear as to the right of the plaintiff in this case to recover any amount from the defendant in its present cause of action. It may very well be assumed that the Surety Company bound itself to pay the Decree, and that its only cause of action is upon its agreement. It bound itself to pay the decree and not take an assignment of it. It will also be noted from the record, that it paid the decree before the determination of the case by the Court of Appeals.

The rule is that only a final affirmance fixes the liability upon all of the appeal bonds both intermediate and final.

Church v. *Simmons,* 83 N. Y. 261.
Chester v. *Broderick,* 131 N. Y. 549.
Babbitt v. *Finn,* 101 U. S. 7.

Plaintiff says (Case page 40) that it was compelled to pay to Mary K. Hartmann the amount of the decree because there was no stay of execution pending the appeal from the Appellate Division of the Supreme Court to the Court of Appeals. This contention is fully answered by the affidavits of Edward T. Kelly, a New York Attorney, (Case pp. 52 and 53) and John B. Quintin (Case, pp. 67 to 70) also a New York Attorney.

In re *Pye,* 21 N. Y. App. Div. 265.

and Code sections set forth in full in Mr. Quintin's affidavit.

Point V.

The judgment is contrary to law and should be reversed.

At the common law the plea of the general issue required the plaintiff to prove its claim. Generally speaking there was much wisdom in this rule. At the present time a defendant is not necessarily entitled to this proof as a matter of right. In simple cases of money loaned or goods sold it is probably a wise modification of the law to require defendant to make something more than a mere denial.

But the constitutional right to a trial by jury still remains and should not be summarily taken away. The interests of justice are usually better served by the exercise of care rather than speed.

A serious wrong would be done to defendant to permit this judgment to stand upon a record completely silent upon the important fact of the result of the foreclosure sale.

Plaintiff's Vice-President in his affidavit (Case page 42) says:

> "Subsequently the mortgages were foreclosed and at the foreclosure sale the property was bought in by the National Surety Company, there being no other bidders."

But this establishes no deficiency. There is no presumption of a deficiency judgment. Primarily mortgaged lands not only pay the mortgage debt but must be resorted to for this purpose.

Unless there was in fact actually a deficiency plaintiff should not be allowed to recover. Plaintiff should have established the fact and should not be allowed to retain a judgment upon a record so lacking in proof of real damage.

Plaintiff would not be prejudiced by a reversal followed a trial whereas defendant will suffer great and irreparable harm if precluded from presenting proof on this question of damages.

Not only is this meritorious question presented but on the more technical side doubts and difficulties exist which take away from plaintiff that clearness and certainty which is required as a condition of summary judgment and also show a reasonable and plausible defense.

We also say that defendant has shown not only a possible chance of success but a very probable success in her defense.

Defendant upon this appeal asks for her day in Court and that the judgment be reversed to that end.

Respectfully submitted,

WM. F. BURKE,
Attorney for Defendant-Appellant.

John N. Ackyord
of counsel

New Jersey Court of Errors and Appeals

NATIONAL SURETY COMPANY, a corporation,
Plaintiff-Appellee,

vs.

AGNES K. MULLIGAN,
Defendant-Appellant,

BRIEF IN BEHALF OF PLAINTIFF-APPELLEE.

This is an appeal taken by the defendant from a judgment of the Supreme Court entered upon striking out defendant's answer. The question presented to the Court is whether or not the Court was correct in summarily striking out the answer of the defendant on motion of the plaintiff.

The contention of the plaintiff upon the argument of the motion was that the answer filed by the defendant was both sham and frivolous and there was submitted to the Court affidavits on behalf of the plaintiff in support thereof. The defendant filed answering affidavits and upon the reading of the affidavits and the arguments, the court ordered that the defendant's answer be struck out and judgment thereupon was entered in favor of the plaintiff for the amount of Thirty thousand eight hundred and fifty-nine dollars and sixty-one cents ($30,859.61).

Facts.

On or before November 29th, 1913, Agnes K. Mulligan, the defendant-appellant herein, was execu-

trix of the last will and testament of John Hartmann, deceased.

On November 29, 1913, Mary K. Hartmann, procured a decree against Agnes K. Mulligan in the Surrogate's Court for the County and State of New York directing the defendant-appellant herein, Agnes K. Mulligan, to pay said Mary K. Hartmann Eighteen thousand nine hundred and ninety-seven dollars and forty-six cents ($18,997.46). A certified copy of the decree is annexed to the complaint (State of Case, p. 9).

An appeal from said decree was taken by Agnes K. Mulligan to the Appellate Division of the Supreme Court of New York and said decree was affirmed November 27, 1914 and the order of affirmance was filed in the Surrogate's Court November 28, 1914 (State of Case, p. 14).

On December 5, 1914, an order was filed in the said Surrogate's Court making the order of the affirmance of the Appellate Court, the order of the Surrogate's Court. Copies of these orders are annexed to the complaint (State of Case, p. 16).

On the 21st day of December, 1914, by reason of the plaintiff-appellee paying to Mary K. Hartmann, the amount of the decree, an assignment of said decree and order was made by her to the plaintiff-appellee (State of Case, p. 17, etc.)

Agnes K. Mulligan took a further appeal from the order of the Appellate Division to the Court of Appeals of the State of New York which affirmed the order of the Appellate Division on the 8th day of December 1915 and said order was remitted to the Surrogate's Court of the County of New York (State of Case, p. 21).

On the 20th day of December, 1915, a decree making the judgment of the Court of Appeals, a judgment of the Surrogate's Court and an affirming order appealed from, was filed in the Surrogate's Court (State of Case, p. 23).

The plaintiff-appellee, National Surety Company entered into an appeal bond with Agnes K. Mulligan on her appeal from the decree of the Surrogate's Court to the Appellate Division but did not enter into a further bond upon her appeal from the Appellate Division to the Court of Appeals.

One Catherine McGuire by absolute assignment assigned to the National Surety Company, three mortgages as security to indemnify the National Surety Company upon having entered into the appeal bond with Agnes K. Mulligan (State of Case, p. 58).

On March 16th, 1915, the plaintiff-appellee, caused a letter to be written to Catherine McGuire notifying her of its intention to sell the three bonds and mortgages at public auction in the event of her failure to reimburse the plaintiff-appellee to the amount it was compelled to pay to Mary K. Hartmann. Catherine A. McGuire having failed to reimburse the plaintiff-appellee, it caused to be sold at public auction the bonds and mortgages after the same had been duly advertised for sale and there being no other purchasers, the plaintiff-appellee purchased the said mortgages.

The plaintiff-appellee subsequently was forced to foreclose the mortgages and the net result of this transaction was that the plaintiff-appellee obtained Three thousand and fifty dollars (($3050.00) which it applied in reduction of the money which it was compelled to pay to Mary K. Hartmann.

The plaintiff-appellee sued on the decree of the Surrogate's Court for the balance due, to wit, Seventeen thousand three hundred and ninety-one dollars and fifty cents ($17,391.50) with interest from December 21, 1914.

The defendant-appellant has filed an answer which the plaintiff-appellee contends is false, sham and frivolous and should be stricken from the record.

POINT I.

The defense interposed impugning the right to sue upon the decree of the Surrogate's Court in and for the County of New York is frivolous.

By referring to the complaint filed by the plaintiff and the answer filed by the defendant, we find as follows:

The plaintiff sued the defendant on a decree obtained in the Surrogate's Court in and for the County of New York by which decree it was ordered that the defendant pay to Mary K. Hartmann, the plaintiff's assignor of the decree, the sum of $18,997.46. This decree was appealed from by the defendant to the Appellate Division of the Supreme Court of the State of New York and upon affirmance of the decree by that court, it was appealed further to the Court of Appeals of the State of New York which court affirmed the order of the Appellate Division of the Supreme Court. The complaint filed by the plaintiff has annexed to it an exemplified copy of all the proceedings and the defendant in her answer admits the obtaining of the decree and the several appeals therefrom taken by her. It is not denied by the defendant's answer that the decree was in no way reversed, satisfied, annulled or otherwise vacated but in the first paragraph of the defense of the defendant's answer it is denied that the Surrogate's Court in and for the County of New York is a Court of record and of general jurisdiction. This is the only allegation by which the defendant attempts to impugn the decree of the Surrogate's Court in and for the County of New York and the right to sue thereon in this State.

The answer of the defendant is frivolous in this regard in that by virtue of the decisions of the State of New Jersey, it is no defense (and it is the only defense raised in regard to the decree) that the judgment in the foreign court was not obtained in a court of record or general jurisdiction.

In the case of *Walters* vs. *Kuethe,* 98 N. J. 823, at page 828, Justice Kalisch writing the opinion for the Court of Errors and Appeals, among other things, stated as follows:

> "The constitutional provision requires full faith and credit to be given in each state to the public acts, records and judicial proceedings of every other state.
>
> The only two defenses of which the defendant could have availed herself, if they existed, were, firstly, that the court was without jurisdiction of the person or of the subject matter (Jardine v. Reichert, 39 N. J. L. 165); secondly, that the judgment was procured by fraud (Supreme Council of Royal Arcanum v. Carley, 52 N. J. Eq. 612; Fairchild v. Fairchild, 53 Id. 678).
>
> It is also well settled that the validity of a judgment of another state cannot be impeached for any supposed defect or irregularity in the transaction on which it was founded; and no defense can be interposed in an action upon such judgment upon matters existing before its recovery, National Bank v. Wallis, 95 N. J. L. 46."

And again in the case of *Smith, et al* vs. *Swart,* 134 Atl. 755, Justice Lloyd giving the opinion of the Court of Errors and Appeals says as follows:

> "Generally speaking, the only defenses the defendant can make to a judgment obtained in another state when sued upon here are that the court of our sister state did not have jurisdiction of the person or of the subject matter, that it was fraudulently procured (Doughty

> v. Doughty, 28 N. J. Eq. 581) or that it has been paid. All defenses existing anterior to the judgment are conclusively determined in the court where the judgment is obtained."

In the case last cited the judgment sued upon was obtained in the Municipal Court of Chicago, Ill.

It must be remembered that it appears by the exemplified copy of the judgment, and this is not denied by the defendant but admitted, that the defendant made her appearance in the proceedings in the Surrogate's Court in and for the County of New York and also appeared in the several appeals taken from the decree made, so that the question of jurisdiction was not raised in the motion before the court on the motion for the summary judgment. Nor was the question of want of jurisdiction as to the subject matter raised by the defendant so that for all intents and purposes, the judgment or decree by the Surrogate's Court in and for the County of New York was a valid and subsisting judgment upon which suit could be brought in the Courts of the State of New Jersey.

A specific instance in which the Courts of the State of New Jersey have recognized a decree of the Surrogate's Court of the State of New York is to be found in the case of *Bennett* v. *Piatt,* 85 N. J. E., page 346 at page 448; the opinion of the Court in recognizing the decree of the Surrogate's Court of the State of New York is as follows:

> "As to the 5th and 6th objects, viz., to reopen and examine into the accounts of the ancillary executors in the States of New York and Pennsylvania:
>
> * * * * * * *
>
> Touching the accounts in New York: Piatt, as sole surviving ancillary executor, filed his final account in the Surrogate's Court of New

York on January 13, 1908. About August 17th, 1908, Laura filed numerous exceptions to the account. On April 12th, 1910, the Surrogate of that County, by decree, settled and stated the account, ascertaining that Piatt had in his hands $27,974.97 and ordered that he pay the same to himself as executor in New Jersey, and upon so doing he should be discharged. The account of Piatt, filed in New Jersey, charges himself as surviving executors with the sum of $27,974.97, under date of May 19th, 1910, in full compliance with the above decree. This decree is a finality, and likewise res judicata."

From the above, it is readily ascertained that the Courts of the State of New Jersey have given the decree of the Surrogate's Court of New York full faith and credit. Although the decision is one in the Court of Chancery of our State, it received the approbation of our Courts of Errors and Appeals, which court in a *per curiam* opinion affirmed the opinion of the Court of Chancery. See 85 N. J. Eq. 602.

The defendant in her brief under Point II, page 9, raised the question as to the propriety of an assignment of the decree of Mary K. Hartmann to the plaintiff for the reason that the decree was not docketed in the New York Supreme Court. The plaintiff contends that even if there was a failure to docket the decree of the Surrogate's Court, it in no wise affected the assignability of the decree and in support of its contention, the opinion in *Townsend* vs. *Whitney,* 75 N. Y. 426 at 428, is given:

"The defendant and Solomon A. Ferris were appointed by the Surrogate of Ulster County, administrators of the estate of John J. Ferris, deceased, and upon such appointment they gave the bond required by law, signed by them and by William H. Townsend and another who is now dead, as sureties. Subsequently the ad-

ministrators accounted before the surrogate and he made a decree by which he ordered them to pay certain sums to Mrs. Love, Mrs. Ferris and Mrs. Elting respectively as their distributive shares of the estate. These sums not having been paid, subsequently a certificate of the decree was obtained from the surrogate and the decree was docketed in the clerk's office of Ulster County, under the provisions of Chapter 400 of the laws of 1837 as amended by Chapter 104 of the laws of 1844. The decree did not become merged by docketing the same. The docket did not make it a judgment, but simply made it a lien upon real estate for the amounts shown in the certificate; and executions could thereafter be issued to enforce the same as upon judgments recovered in the County Court. After the decree was thus docketed, the persons in whose favor it was docketed, had two remedies to enforce payment of the money due them; one by attachment against the administrators in the Surrogate's Court and another by executions based upon the docket. The two remedies are not inconsistent but concurrent or cumulative; and they may both be pursued until the decree has been complied with".

And by reference to the Statute, state of case, page 63, a reading thereof together with a reading of the opinion of the New York case immediately hereinabove recited, it will readily disclose to the Court that the purposes of the docketing of the decree is very similar to the purpose of the docketing of a judgment of our District Court of Common Pleas Court in the Supreme Court and the provision therein dealing with the assignment or satisfaction of such a decree is not to be construed to mean or intend that a Surrogate's decree cannot be assigned but that after if it is docketed in the Supreme Court, it can then also be assigned or satisfied as if it were a judgment of the Supreme Court of the State of New York.

POINT II.

The allegation of payment in the answer is sham.

By referring to the affidavit of William A. Thompson (p. 38, state of case), we find that he, as vice-president of the plaintiff, makes an affidavit which was used on the motion to strike out the answer to the effect that the decree in favor of Mary K. Hartmann was assigned to the National Surety Company and that except for the allowance of $3,050. made to the defendant by reason of the sale of securities placed in the hands of the National Surety Company by one Catherine McGuire, all of the decree remains unpaid and unsatisfied and that there was due to the National Surety Company at the time of the making of the affidavit $17,391.50 with interest from December 21, 1914.

This affidavit having been submitted to the Court on the motion to strike out the answer, it became incumbent under the rules of practice in this State, for the defendant to submit an affidavit controverting the statements contained in the affidavit of counsel. Nowhere in the affidavit of Agnes K. Mulligan (state of case, pp. 52 to 61, incl.), is there any allegation by her that she ever paid the decree but there are certain allegations in the affidavit of which she purports to spell out a satisfaction of the decree by reason of certain acts done by the plaintiff in regard to securities held by it which were obtained from Catherine McGuire to secure the plaintiff from any loss by reason of it having gone on the bond of the defendant. This latter question will be discussed in a following point but there is nothing in the affidavit of Agnes K. Mulligan, the

defendant, which shows affirmatively any actual payments made to the plaintiff. For this reason, the defense of payment in the answer must be construed to have been sham.

POINT III.

The defenses of misapplication of securities received by the plaintiff from Catherine McGuire and the improper foreclosure of said securities, are frivolous.

The defendant, by her affidavit in support of the third and fourth defenses contained in the answer, alleges in effect that the plaintiff went on the bond of the defendant, who was executrix of the last will and testament of John Hartmann, deceased. That the plaintiff received from one Catherine McGuire an absolute assignment of three mortgages to indemnify the plaintiff of any loss which it might suffer by reason of having gone on the bond of the defendant. That the plaintiff dealt with these mortgages in such a way as to make their actions improper and unlawful and that by reason thereof in the suit on the decree, the defendant is entitled to show such improper action on the part of the plaintiff in order to prove a satisfaction of the decree. The plaintiff, on the other hand, by the affidavit of William A. Thompson, (state of case, p. 38, etc.) sets out the course of action pursued by the plaintiff in dealing with the mortgages to the effect that upon notice to Catherine McGuire, the mortgages were sold and there being no other bidders, the plaintiff bought in the mortgages for its own account and then was compelled to foreclose the mort-

gages, from which proceeds it obtained the sum of $3050.00 and that credit therefor was given to the defendant on the amount of the decree. The question is whether the defendant can, in her answer, set up as defense the acts of the plaintiff in the use or misuse of the mortgages, so as to have the Court hold that the defenses interposed are of such a nature as to make a defense against the complaint filed by the plaintiff.

It is conceded and admitted by all that Catherine McGuire assigned the mortgage in question by absolute assignment and without any further agreement except that it was understood between the parties that it was to indemnify the plaintiff as hereinabove set forth. The only other light as to the circumstances under which the mortgages were assigned to the plaintiff is obtained from the affidavit of William A. Thompson, the vice-president of the plaintiff (state of case, p. 41, which reads as follows):

> "In order to induce the plaintiff to enter into the bond aforesaid, the defendant caused one Catherine A. McGuire to assign to plaintiff, as collateral security, for any loss or indemnity that might be sustained by the plaintiff by reason of entering into the bond aforesaid, the three bonds and mortgages as set forth in paragraph 27 of the answer."

Defendant, on the other hand in her affidavit says (state of case, p. 58):

> "At the time plaintiff entered into the bond or undertaking on appeal, one Catherine A. McGuire deposited with the plaintiff for me, at my request, three bonds and mortgages mentioned in paragraph 27 of the answer, to secure the plaintiff from any loss it might sustain should it be compelled to pay the decree appealed from."

And further on she says (state of case, p. 59):

> "At the time the said three bonds and mortgages were deposited with plaintiff by said Catherine A. McGuire, as hereinabove set forth, it was understood that in the event the plaintiff was required, because of its entry into the said bond or undertaking, to pay, and did pay, the amount directed to be paid in and by said decree, or any part thereof, that it should foreclose said mortgages, all of which were then past due, and that out of the proceeds of the sale of the properties covered by said mortgages, it should reimburse itself for the moneys so paid by it, and render the overplus to said Catherine A. McGuire."

The aforesaid amounts from the affidavit of the defendant can be readily determined to be hearsay and incompetent to be used for the purpose of the motion, but even if used, the statements in no wise make a defense to the complaint filed by the plaintiff.

The transaction between Catherine McGuire and the National Surety Company was one whereby Catherine McGuire pledged by absolute assignment with the plaintiff three mortgages to indemnify the plaintiff against loss.

We will first discuss whether the act of Catherine McGuire indemnifying the plaintiff gives to this defendant any rights which can be considered by way of defense.

A contract of indemnity must be distinguished from a contract made for the benefit of a third person. A contract of indemnity is defined as follows:

> The promise in an indemnity contract is an *original and not a collateral undertaking* and in this particular, differs from a contract of guarantee. If the contract of indemnity refers to and is founded upon another contract either existing or anticipated, it covenants to protect

> the promisee from some accrued or anticipated liability arising upon such other contract; it is not a contract to answer for the contractual debt, default or miscarriage of another then the promisee but a contract to indemnify the promisee from loss owing to his contractual liability. *It is given to a person against his sustaining loss or damage and cannot be properly called one that insures the thing.*
>
> 31 Corpus Juris 419, section 2.

Catherine McGuire did not make the contract of indemnity for the benefit of this defendant but assigned her mortgages to the plaintiff for its benefit alone to indemnify it against loss. The transaction in regard to the appeal bond and mortgages was consummated by having the plaintiff say to Catherine McGuire, "If you will give us security, we will go on the appeal bond of Agnes K. Mulligan." Catherine McGuire having assigned the security over to the plaintiff, if the plaintiff had refused to enter into the appeal bond with the defendant, then this defendant would have had her legal remedies against the plaintiff but the plaintiff having executed that bond, the contract became an executed one, and the collateral security placed with the plaintiff by Catherine McGuire was a contract of indemnity in which the plaintiff and Catherine McGuire alone, were interested.

By Catherine McGuire assigning the mortgages to the plaintiff as indemnity, she became the pledgor and the plaintiff became the pledgee, Catherine McGuire having a general property in the mortgages pledged and the plaintiff having a special property.

The question then arises as to whether or not rights accrue to the defendant in regard to the property pledged by Catherine McGuire to the plaintiff to indemnify it against any loss.

In *McCrea* vs. *Yule,* 68 N. J. L. 485, at 467, it was held as follows:

"A pledgee of personal property, assigned as collateral security, has the right to collect the interest, dividends and income accruing on the collateral assigned, *accounting to the pledgor* upon the redemption of the pledges. *In making such collections, the pledgee is a trustee of the pledgor to see to the proper application of the funds collected or to refund the same to the pledgor if the debt be otherwise paid.*"

Marwell v. *Importer's and Traders' National Bank,* 90 N. Y. 483;
Garlick v. *James,* 12 Johns 146;
Stron v. *National Mechanics Banking Association,* 45 N. Y. 718;
Donnell v. *Wyckoff,* 20 Vroom, 48;
Ware v. *Russell,* 29 Am. Rep. 710;
Story Bailm, (6th ed.) sec. 303;
Am. & Eng. Encyl. L. (2nd ed.) 894.

In 31 Corpus Juris, page 445, Section 43, the following is quoted:

"Where a deposit of money or valuables is made for the purpose of protecting the person with whom they are deposited against a certain loss or liability, he is entitled to hold such deposit until it is ascertained that he will be subjected to no such los or liability, or until he receives some other indemnity. *But on the fulfillment of the contract whereby the indemnitee is relieved or discharged from liability or loss, the indemnitor is entitled to a return of any money or securities deposited by him as indemnity,* at least to the extent that it is not used in discharging liability or loss under the principal contract."

In the case of *Security Trust Company* vs. *Edwards,* 90 N. J. L., page 558, the following extracts of law touching upon this point are as follows:

At page 561, etc.:

"A pawn never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debtor by the pawnor is, not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus, which power, if he neglected to use the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it.

Another leading case is Donald v. Suckling, L. R. I. Q. B. 585; 35 L. J. Q. B. 232.

Another famous case is Sewell v. Burdick (1884) 10 App. Cas. 74; 54 L. J. Q. B. 156, where Lord Fitzgerald says that the pledgees 'Acquired a special property in the goods, with a right to take actual possession should it be necessary to do so for their protection or for the realization of their security. They acquired no more, and, subject thereto, the general property remained in the pledgor.'

A very recent opinion by the privy council in a prize case is The Odess, 1 A. C. (1916) 143, affirming A. C. (1915) 52. Prior to the outbreak of the European war, German owners of the cargo had by assignment of the bills of Lading pledged the cargo to British bankers for advances made prior to the outbreak of the war. After the war began, and while the vessel was on the high seas, the cargo was seized and condemned as prize. The contest was between the British pledgees and the crown. Lord Mersey, speaking for the court, says: 'All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned.'

Our own decisions are uniformly to the same effect, In Donnell v. Wyckoff (Supreme Court, 1886) 49 N. J. L. 48, wherein the subject matter of the pledge was corporate stock, Mr. Justice Depue said (at p. 49):

'Upon a pledge of property as security for a debt, the pledgee has only a special property. The general property is in the pledgor, subject to the rights of the pledgee.'

In Broadway Bank v. McElrath (Chancellor Green, 1860) 13 N. J. Eq. 24, the conflicting rights of a pledgee of stock and the attaching creditors of the pledgor were dealt with. It would appear from the opinion that the court entertained no doubt that the interest of a non-resident pledgor in stock of a New Jersey Corporation pledged to a non-resident was subject to attachment, under the New Jersey statute and the court (on p. 26) says that the rights of the creditors were unquestioned, except so far as they conflict with the rights of the pledgee. And, speaking of the effect of a pledge, says:

'The absolute ownership of the stock, it is true, was not transferred, nor was it intended it should be.'

In Meisel v. Merchants National Bank (Court of Errors and Appeals 1913) 85 N. J. L. 233, it was said, in effect, that the pledgor has the right to bring a possessory action against the pledgee to recover the stock itself, providing only he makes and keeps good a tender of the debt.

In McCrea v. Yule, 68 N. J. L. 465, the Supreme Court, in 1902, in a case of an assignment of a chose in action as collateral security said (at p. 467):

'A pledgee of personal property, assigned as collateral security, has the right to collect the interest, dividends and income accruing on the collateral assigned, accounting to the pledgor upon the redemption of the pledge. In making such collections, the pledgee is a trustee of the pledgor to see to the proper applications of the funds collected or to refund the same to the pledgor if the debt be otherwise paid.'

In Mechanics' Building and Loan Association v. Conover, 14 N. J. Eq. 219 (reversed on

other grounds, Herbert v. Mechanics' Building and Loan Association, 17 Id. 497) the court said that when shares of stock are pledged, they *'remain the property of the shareholder for every purpose excepting that of defeating the lien' of the pledgee.*

In the United States Supreme Court, drawing the familiar distinction between a chattel mortgage and a pledge, Mr. Justice Pitney says, in Dale v. Pattison, 234 U. S. 339, 405:

'On the other hand, where title to the property is not presently transferred, but possession only is given, with power to sell upon default in the performance of a condition, the transaction is a pledge, and not a mortgage.'

The law of Connecticut appears to be to the same effect. In Robertson v. Wilcox, (1870, 36 Conn. 428, the highest court of that state (at p. 430) said:

'A pledge of property does not carry with it the title to the thing pledged. The title remains as before. All that passes to the pledgee is the right of possession coupled with a special interest in the property, in order to protect the right.' "

And in 31 Cyc., page 825, (3) we find the following:

> "The pledgee must account to the pledgor for all the income, profits and advantages derived by him from the pledged property. Such profits or income should be applied first to the payment of the interest on the debt, then to the principal, *and any surplus remaining from such profits, income or advantages so derived by the pledgee from the pledged property is held for the pledgor."*

By reason of the law above recited, it is the plaintiff's contention that the third and fourth defenses contained in the defendant's answer are frivolous in that the property pledged with the plaintiff right-

fully belongs to Catherine McGuire and that if the plaintiff improperly disposed of the mortgages, then Catherine McGuire would have her remedy against the plaintiff by way of trover or conversion or an accounting in equity. This defendant cannot for her own benefit interpose a defense urging the right of Catherine McGuire, and it is to be noted that although the mortgages were sold more than twelve years ago, Catherine McGuire has taken no steps to remedy the wrong which this defendant claims was perpetrated by the plaintiff upon Catherine McGuire.

The position of the plaintiff in the contention that any dealings with Catherine McGuire cannot enure to the defendant's benefit is strengthened by the fact that in the defendant's affidavit, (state of case, p. 81) there is set forth a supposed agreement in which the plaintiff was to pay any surplus over and above the amount due to the plaintiff to the said Catherine McGuire. This very distinctly and plainly demonstrates that the contract between Catherine McGuire and the plaintiff was one of indemnity to protect the plaintiff against loss and that Catherine McGuire has her redress against the plaintiff for any wrongful act of the plaintiff which, we insist, cannot enure to the benefit of the defendant, so as to enable her to interpose the defense she she set up in her answer.

POINT IV.

The complaint filed in the cause by the plaintiff sets forth a cause of action.

The defendant in Point II of her brief raises the question as to whether or not the complaint sets form a cause of action.

By referring to the complaint, we find annexed to the complaint and made a part thereof, Schedule A, which is an exemplified copy of the decree of the Surrogate's Court and the proceedings taken on appeal (state of cases, pp. 8 to 25 inclusive).

On page 9 of the state of the case, decree of the Surrogates' Court recites that *application was made to the Surrogate by the defendnt* for a judicial settlement of her account and upon page 10 of the state of the case, it recites that *the defendant appeared on the return day mentioned in the citations issued and that she was represented by Leslie J. Tompkins, Esquire.* Of course, this record shows that the Surrogate's Court of New York at the time of the making of the decree had jurisdiction of the person of the defendant and this fact is not disputed either in the answer filed nor in any of the affidavits.

Pertinent law on the subject is found in the case of *Barlow* vs. *Morrone*, 88 N. J. L. 187, in which the Court of Errors and Appeals laid down the following rule:

"The novel contention that the plaintiff in such an action (referring to an action on a judgment of a foreign state) should be nonsuited if he does not affirmatively prove that such judgment would be evidence in the state in which it was rendered, loses sight of the presumption that the common law obtains in such state until the contrary is shown to be the fact. This presumption, like the others, may be rebutted, but that duty is on the defendant. There was no proof upon this point on either side, but in the case of Vail v. Smith, 4 Cow. 71, Mr. Justice Woodworth, speaking of such rule of domestic evidence, said, 'I believe that we have always considered an exemplification sufficient.'

And in Shumway v. Stillman, 4 Cow. 292, Mr. Justice Sutherland, speaking of the judgment of a sister state, said: 'Every presumption is in favor of the jurisdiction of the court.

The record is prima facie evidence of it and will be held conclusive until clearly and explicitly disproved.' This negatives the notion that is advanced by counsel in the present case.

The defence that was the equivalent of the plea of *nil debet* was properly struck out; it is hornbook law that in an action upon a debt of record a general denial of indebtedness goes for nothing.

The defendant having offered no testimony to meet the prima facie case made by the plaintiff the direction of a verdict was proper."

And so in the case at bar, an exemplified copy of the record is offered as a part of the plaintiff's case and stands unrefuted by the defendant, and in this situation, it must be resolved that the complaint filed sets forth a good cause of action.

And in the same point of the defendant's brief in regard to the assignability of the decree, the assignment forms a part of the record of the court as shown in the exemplification of the record of the court (state of case, pp. 17 to 19 inclusive).

As to the other points raised in the brief of the defendant, the discusion of the law in other points of the brief of the plaintiff fully deal with the situation and fully answer the arguments of the defendant.

POINT V.

The order striking out the answer should be affirmed.

The above points dispose of the question as to whether or not the answer interposed sets up legal defenses and the law cited and submitted to this court demonstrates that each and every one of the defenses interposed by the defendant are either

sham or frivolous and that the order striking out the answer was proper in law.

The order striking out the answer of the defendant should be affirmed.

EICHMAN & SEIDEN,
Attorneys of and of counsel
with Plaintiff-Appellee.

JULIUS J. SEIDEN,
Of Counsel.

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Reply Brief in Behalf of Defendant-Appellant

New Jersey Court of Errors and Appeals

NATIONAL SURETY COMPANY, a Corporation, *Plaintiff-Appellee,* vs. AGNES K. MULLIGAN, *Defendant-Appellant.*	Reply Brief in Behalf of Defendant-Appellant.

Counsel for Plaintiff-Appellee in their Brief say (page 3):

> "The plaintiff-appellee subsequently was forced to foreclose the mortgages and the net result of this transaction was that the plaintiff-appellee obtained Three thousand and fifty dollars ($3,050) which it applied in reduction of the money which it was compelled to pay to Mary K. Hartmann."

They also say (bottom of page 10, top of page 11):

> "The plaintiff, on the other hand, by the affidavit of William A. Thompson (state of case, p. 38, etc.), sets out the course of action pursued by the plaintiff in dealing with the mortgages to the effect that upon notice to Catherine McGuire, the mortgages

were sold and there being no other bidders, the plaintiff bought in the mortgages for its own account and then was compelled to foreclose the mortgages, from which proceeds it obtained the sum of $3,050 and that credit therefor was given to the defendant on the amount of the decree.''

These statements are misleading. The credit of $3,000 had nothing at all to do with the foreclosure of the mortgages. This was not received as proceeds of foreclosure. There is not in the entire case, the slightest proof or even suggestion that there was any deficiency upon the foreclosure sale. Plaintiff bought in at the foreclosure, but at what price does not appear.

The National Surety Company owned the mortgages by assignment made at the time the mortgages were pledged. The Company pretended to sell the mortgages to itself. Such a sale was invalid both at law and in equity. It was invalid at law because no new assignment was made, or any act of transfer concluded. It was invalid in equity because the pledgee being a trustee, could not become the purchaser of the pledged securities. There was no special agreement permitting such a purchase. This question is discussed in appellant's main brief, at pages 10 and 11.

The $50 item, representing a return of costs, could not be said to be the proceeds of a foreclosure sale. (See appellant's main brief, p. 13.)

With respect to the right to sue upon the New York Surrogate's decree, appellee cites *Walters* vs. *Kuethe,* 98 N. J. L. 823 (appellee's brief, p. 5). In the case cited, plaintiffs sued upon:

"A judgment obtained by the plaintiffs against the defendant in the Supreme Court of the State of New York."

(98 N. J. L. 823, at 824.)

In *Smith* vs. *Swart,* cited by appellee, the suit was upon a judgment obtained in the Municipal Court of Chicago upon a written confession of judgment. The only defense interposed was lack of jurisdiction, because the defendant in the Chicago action had not been served with process. There was a judgment of non-suit which was reversed and venire de novo awarded. The final disposition of the case does not appear.

Bennett vs. *Piatt* (85 N. J. E. 346)

does not at all decide that a right of action exists upon a Surrogate's decree. What it does hold is that the executor's account having been settled, the Court here will not again inquire into the items of such account.

Counsel for plaintiff-appellee at page 7 in their brief refer to the opinion of the New York Court of Appeals in *Townsend* vs. *Whitney* (75 N. Y. 426).

All that this case decides is that the sureties were subrogated to the rights given by the Surrogate's decree, and had the same remedies pursuant thereto that the persons had in whose favor the decree was rendered and who had been paid by the sureties.

This appears to support our contention that the assignment of the decree of Mary K. Hartmann to the Surety Company gave it no greater rights than it would have had without such assignment. It also appears to support our contention that the Surrogate's decree in itself created no

lien upon real estate, and was therefore not the kind of a judgment that can be sued upon here in such a way as to give it greater effect here than it has in its State.

It also shows the special nature of proceedings in the Surrogate's Court in New York. In fact, the plaintiff's affidavits and the entire record show that proceedings in the Surrogate's Court in New York are special and not general and do not result in general judgments. A decree settling an executor's account is not a general judgment, but is merely a final order in a special proceeding. (See also *Libbey* vs. *Mason,* 112 N. Y. 525.)

Counsel for plaintiff-appellee also seem to concede that the pledgee is a trustee. In their brief (p. 14), they cite *McCrea* vs. *Yule,* 68 N. J. L. 485, and quote from the opinion in that case the reference to the well settled rule, that with respect to the pledged property the pledgee is a trustee.

They argue that if the plaintiff improperly disposed of the mortgages that Catherine McGuire would have her remedy against the plaintiff by way of trover or conversion or an accounting in equity.

We are, however, not concerned with the rights of Catherine McGuire, nor do we say that the plaintiff improperly disposed of the mortgages. What we do say is that the plaintiff received satisfaction by the appropriation and foreclosure of the mortgages. We say that the plaintiff having taken assignments of the mortgages, and having foreclosed the mortgages, and having itself bought in the property at the foreclosure sale, it has been fully satisfied because there is no proof of any deficiency at the foreclosure sale and in the ab-

sence of such proof, it is to be presumed that the land was sufficient to discharge the mortgage debt.

The face amount of the mortgages was in excess of the plaintiff's claim. The plaintiff has collected the mortgages and so far as we know has not only received full payment, but may very well have been overpaid. The foreclosure sale was apparently had in 1915 or 1916. The plaintiff bought in the property. So far as the record shows it still has the property and we think that the rise in real property values in New York City and elsewhere between 1916 and the present time can well be judicially noticed.

We again ask what we believe to be the highly pertinent question.

What was the actual deficiency, if any, upon the foreclosure of the mortgages held by the Surety Company as collateral?

This question is not answered by the record, nor by the plaintiff-appellee in its brief, and until it is answered we again say that there is no proof that the plaintiff is entitled to judgment in any amount whatsoever.

Respectfully submitted,

WM. F. BURKE,

Attorney for Defendant-Appellant.

John M. Ackerman

Of counsel