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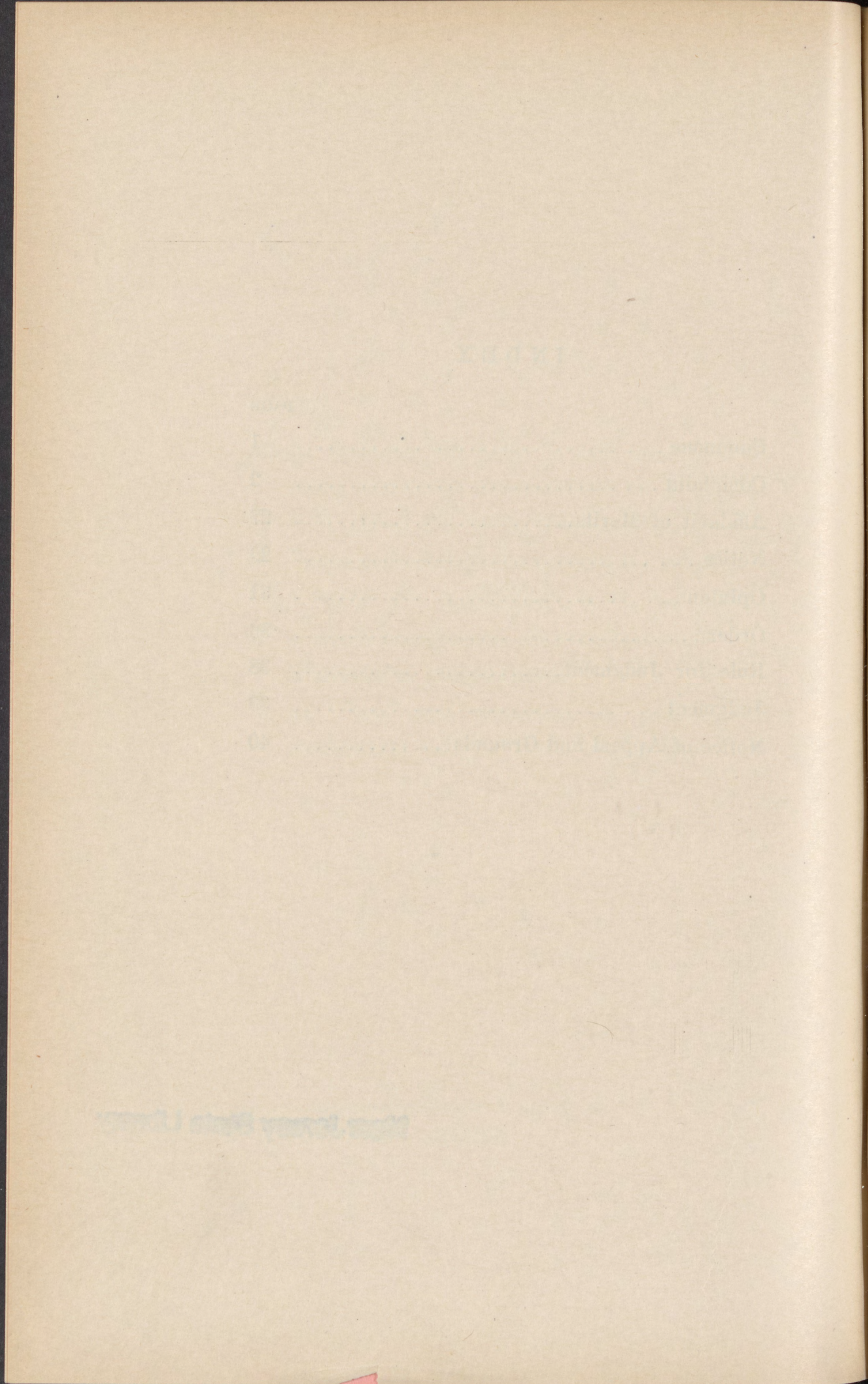

SUMMONS.

THE STATE OF NEW JERSEY TO KENTUCKY SECURITIES COMPANY:

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(Seal) You are summoned to answer the annexed complaint of Ella Conover, in an action at law in the Atlantic County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Atlantic County Circuit Court, at Mays Landing, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

Witness, WILLIAM FRANK SOOY, ESQUIRE, Judge of the Atlantic County Circuit Court, at Mays Landing, New Jersey, this twenty-sixth day of January, 1933.

WILLIAM A. BLAIR,
Clerk.

WM. M. CLEVENGER,
Attorney.

30

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

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10 Ella Conover,
Plaintiff,
v.
Kentucky Securities Company, a corporation of the State of New Jersey,
Defendant.

Action at Law.
Complaint.

20

Atlantic County, ss:

Ella Conover, of the City of Atlantic City, in the County of Atlantic and State of New Jersey, says that:

First Count.

1. On or about the fifth day of February, 1930, the plaintiff and defendant entered into a certain
30 agreement, a copy of which is attached hereto, made a part hereof and designated as Exhibit "A."

2. By paragraph 7 of the said agreement defendant agreed to perform, as modified by said agreement, the stipulations, covenants and agreements

contained in a certain bond executed and delivered by one Henry Betchen to the plaintiff on or about June 9, 1926, a copy of which is attached hereto and designated as Exhibit "B."

3. Accompanying the said bond as security therefor and referred to in the said agreement, was a certain mortgage bearing even date with the said bond executed and delivered by the said Henry Betchen to the plaintiff, and recorded in the office of the Clerk of Atlantic County, in Book No. 406 of Mortgages, at pages 209, etc., covering premises the northwesterly corner of Nashville and Ventnor Avenues, in the City of Ventnor City, N. J., a copy of which is attached hereto and designated as Exhibit "C."

10

4. Because of the failure of the said Henry Betchen and the defendant, or either of them to comply with certain of the stipulations, covenants and provisions in the said bond and mortgage, the plaintiff elected that the whole principal sum of the said bond and mortgage should be due and on the failure of the defendant to pay the same instituted proceeding in the Court of Chancery of New Jersey to foreclose the said mortgage, and in due course the said premises were sold by the Sheriff of the County of Atlantic, on November 10th, 1932, for the sum of $100.00, leaving a deficiency due and owing the plaintiff on her said bond.

20

30

5. On October 1, 1930, there was assessed $511.68 of taxes against the said mortgaged premises for the year 1931.

6. The first half of the said taxes for the year 1931 became due and payable, under the terms of the said agreement, on or before May 20th, 1931, and the second half became due and payable under the terms of the said agreement on or before November 20, 1931.

10 7. On October 1, 1931, there was assessed $427.99 of taxes against the said mortgaged premises for the year 1932.

8. The first half of the year 1932 became due and payable, under the terms of the said agreement, on or before May 20, 1932, and the second half became due and payable, under the terms of the said agreement, on or before November 20, 1932.

20 9. The defendant failed to pay the taxes assessed against the said premises for the years 1931 and 1932 in accordance with the said agreement.

10. By reason of the failure of the defendant to pay the said taxes for the year 1931 and for the year 1932 from January 1, 1932, to November 10, 1932, the said taxes were an encumbrance on the said premises which impaired the value thereof by the sum of $926.14, to the plaintiff's damage in the
30 said sum of $926.14.

Plaintiff demands of the defendant the sum of $926.14 with interest thereon from November 10, 1932, besides costs of suit.

SECOND COUNT.

1. In lieu of repetition, paragraph 1 of the first count of the complaint is hereby made paragraph 1 of the second count.

2. In lieu of repetition, paragraph 2 of the first count of the complaint is hereby made paragraph 2 of the second count. 10

3. In lieu of repetition, paragraph 3 of the first count of the complaint is hereby made paragraph 3 of the second count.

4. In lieu of repetition, paragraph 4 of the first count of the complaint is hereby made paragraph 4 of the second count.

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5. In lieu of repetition, paragraph 5 of the first count of the complaint is hereby made paragraph 5 of the second count.

6. In lieu of repetition, paragraph 6 of the first count of the complaint is hereby made paragraph 6 of the second count.

7. In lieu of repetition, paragraph 7 of the first count of the complaint is hereby made paragraph 7 of the second count. 30

8. In lieu of repetition, paragraph 8 of the first count of the complaint is hereby made paragraph 8 of the second count.

9. In lieu of repetition, paragraph 9 of the first count of the complaint is hereby made paragraph 9 of the second count.

10. By reason of the failure of the defendant to perform the covenants, agreements and stipulations in the said contract, plaintiff was obliged to pay
10 the taxes for the first half of 1931, amounting to $255.84, with interest thereon from the first day of June, 1931; the taxes for the second half of 1931, amounting to $255.84, with interest thereon from the first day of December, 1931; the taxes for the first half of 1932, amounting to $214.00, with interest thereon from the first day of June, 1932, and, taxes for the second half of 1932, from July 1st, 1932, to November 10th, 1932, amounting to $154.55.

20 Plaintiff demands of the defendant the sum of $255.84, with interest from June 1st, 1931; the sum of $255.84, with interest from December 1st, 1931; the sum of $214.00, with interest from June 1st, 1932, and the sum of $154.55, together with costs of suit.

Wm. M. Clevenger,
Attorney for Plaintiff.

30

EXHIBIT "A."

THIS AGREEMENT, Made this Fifth day of February, Nineteen Hundred and Thirty,

BETWEEN, Ella Conover, of the City of Atlantic City, in the county of Atlantic and State of New Jersey, party of the first part,

AND, Kentucky Securities Company, a corporation of the State of New Jersey, doing business in the City of Atlantic City, in the County and State aforesaid, party of the second part, 10

AND, Henry Betchen, of the City of Ventnor City, in the County and State aforesaid, party of the third part.

WHEREAS, Henry Betchen executed a certain bond and mortgage to Ella Conover, dated June 9th, 1926, to secure the re-payment of the principal sum of $30,000.00, at any time within five years from the date thereof, with the obligation of paying $5,000.00 20 on June 9th, 1929, with interest thereon payable semi-annually at the rate of six percentum per annum, as will more fully appear by the record thereof in the Clerk's Office of the County of Atlantic, at May's Landing, New Jersey, in real estate mortgage book 406, page 209, covering property in the City of Ventnor City, in the County and State aforesaid, at the Northwest Corner of Nashville and Ventnor Avenues, as in the said mortgage is more particularly described; and 30

WHEREAS, the party of the first part is still the owner of the said bond and mortgage and the party of the second part is now the owner of fee of the real estate described therein; and

WHEREAS, $30,000.00 with interest from December 9th, 1929, remains unpaid and owing by the said party of the third part to the party of the first part; and

WHEREAS, the said party of the second part has requested the party of the first part to extend
10 the time for the re-payment of the said principal sum which the said party of the first part has consented to do, and to which the party of the third part hereby consents; and

WHEREAS, it is not the intention of this agreement of extension that the party of the second part shall become liable to the party of the first part beyond the value of the mortgaged premises and it is the intention of this agreement to preserve and pro-
20 tect the liability of the party of the third part to the party of the first part upon his bond secured by the mortgage over and above the value of the mortgaged premises.

NOW THIS AGREEMENT WITNESSETH, that in consideration of the sum of one dollar each to the other paid and of the advantages each to the other moving, the parties hereto do agree as follows:

30
1. The time for the re-payment of the principal sum of the said bond and mortgage is extended until June 9th, 1933, except as to the sum of $300.00 payable on the date of the execution of this agreement; $300.00 payable on June 9th, 1931, and, $300.00 payable on June 9th, 1932.

2. The principal sum of the said mortgage may be paid off at any interest bearing period before said date in full or in installments of one hundred dollars or any multiple thereof.

3. The interest shall be payable semi-annually on the Ninth days of June and December of each and every year at the rate of six per centum per annum. 10

4. Fire insurance to the amount of $15,000.00 shall be carried upon the property with loss payable to the party of the first part and the policies delivered to her.

5. No deduction from the principal or interest shall be claimed or allowed by reason of any taxes of any kind or character levied upon the property described in the mortgage. 20

6. In all other respects the bond and mortgage aforesaid shall remain as written.

7. That the party of the second part will perform the stipulations, covenants and agreements in the said bond and mortgage contained as modified by this agreement, and upon the breach thereof or hereof, the principal sum aforesaid shall become due and payable at once, with interest as aforesaid, and 30 the party of the first part may proceed thereon and hereon as she may be advised.

8. Nothing herein contained shall impair the lien of the said mortgage on the said real estate, or alter

or affect the provisions of the said bond and mortgage except as is noted above.

9. The covenants herein contained shall apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

10 10. The said mortgage being under foreclosure in the Court of Chancery of the State of New Jersey, in a cause wherein Ella Conover is complainant, and Henry Betchen and wife, and others, are defendants, at docket 77, page 186, it is agreed that the party of the second part at the execution of this agreement will immediately pay and satisfy the unpaid taxes, a lien against the mortgaged premises, and produce the receipted tax bill for inspection; the unpaid insurance bill due to Harold L. Sycle
20 amounting to $138.00 and produce the receipted bill for inspection; the taxed costs on discontinuance approximated at $50.80; the interest from June 9th, 1929, to December 9th, 1929, amounting to $900.00 unpaid; the sum of $300.00 on account of the principal of $30,000.00 with interest thereon from December 9th, 1929, to date of payment; the sum of $20.34 paid the Chelsea Title & Guaranty Company for foreclosure search, and the sum of $50.00 due to William M. Clevenger as counsel fee for filing the
30 bill to foreclose, and, upon the payment thereof, the said bill to foreclose will be discontinued.

IN WITNESS WHEREOF, the parties of the first and third part have hereunto set their hands and seals and the party of the second part has

caused its corporate seal to be hereto affixed, these presents to be signed by its president, duly attested by its secretary, the day and year first above written.

Ella Conover (SEAL)

Signed, sealed and delivered :
in the presence of :
Wm. M. Clevenger
as to E. C.

10

John E. Iszard as to Henry Betchen

KENTUCKY SECURITIES COMPANY
by

(SEAL)

Allen B. Endicott
President.

Attest:
Samuel Somers
Assistant Secretary.

20

Henry Betchen (SEAL)

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } ss.

BE IT REMEMBERED, that on this 13 day of February, 1930, before me a Master in Chancery of New Jersey personally appeared Ella Conover, who I am satisfied is one of the persons named in and who executed the within agreement, and I having first made known to her the contents thereof, she acknowledged that she signed, sealed and deliv-

30

ered the same as her voluntary act and deed for the uses and purposes therein expressed.

All of which is hereby certified.

Wm. M. Clevenger
M. C. C.

10

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } ss.

BE IT REMEMBERED, that on this 13th day of February, 1930, before me, the subscriber, a Notary Public of New Jersey, personally appeared Samuel Somers who, being by me duly sworn according to law, did on his oath say that he is the assistant secretary of the Kentucky Securities Company, the
20 corporation mentioned in the foregoing agreement; that he knows the seal of said corporation; that the seal affixed to the said indenture is the common seal of the said corporation; that Allen B. Endicott is the president of said corporation and did by its order sign, seal and deliver the said agreement as his voluntary act and deed in the presence of said deponent, and that the said deponent did, at the execution thereof subscribe his name as a witness thereto.

30 Samuel Somers

Sworn and subscribed before :
me the day and :
year aforesaid. :

John E. Iszard
Notary Public of New Jersey.

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } ss.

BE IT REMEMBERED, that on this 13th day of February, 1930, before me, a Notary Public of New Jersey personally appeared Henry Betchen, who I am satisfied is one of the persons named in and who executed the within agreement, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed. 10

All of which is hereby certified.

John E. Iszard
Notary Public of New Jersey.

20

EXHIBIT "B."

KNOW ALL MEN BY THESE PRESENTS,
THAT I, Henry Betchen, of the City of Ventnor City, County of Atlantic and State of New Jersey, (hereinafter called the Obligor) am held and firmly bound unto Ella Conover, of the City of Atlantic City, County of Atlantic and State of New Jersey, (hereinafter called the Obligee) in the sum of Sixty Thousand Dollars lawful money of the United States of America, to be paid to the said Obligee, her certain Attorney, Executors, Administrators or Assigns: to which payment, well and truly to be made, I do hereby bind and oblige myself, my Heirs, Executors and Administrators and every of them, 30

firmly by these Presents. Sealed with my Seal. Dated the Ninth day of June in the year of our Lord one thousand nine hundred and Twenty-six (1926).

THE CONDITION OF THIS OBLIGATION IS SUCH, That if the above bounden Obligor his Heirs,
10 Executors, Administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above named Obligee her certain Attorney, Executors, Administrators or Assigns, the just sum of Thirty Thousand Dollars like lawful money as aforesaid, payable at any time within five years from the date hereof; provided, however, that the sum of Five Thousand Dollars be paid on or before June 9, 1929 and the balance on or before June 9, 1931, together with interest thereon at and after
20 the rate of six per centum per annum, payable semi-annually in like lawful money as aforesaid, without any fraud or further delay; and shall pay the taxes assessed upon the premises described in an accompanying indenture of mortgage for the first half of every year on or before the twentieth day of May therein, and for the second half of every year on or before the twentieth day of November therein, and shall produce receipts for the taxes for each half of every year on or before the first day of June
30 and the first day of December respectively therein, and shall also pay all other taxes, municipal assessments or charges in the nature thereof which may be laid or assessed upon the said premises immediately upon their assessment; and conditioned further, that said Obligor shall not apply for any de-

duction by reason of the accompanying Mortgage from the taxable value of the lands therein described and embraced; and shall and will keep the buildings erected and to be erected upon the said lands insured against loss or damage by fire and wind-storm in such safe and responsible (non-mutual) Fire Insurance Company or Companies as shall be satisfactory to said Obligee and endorse or assign and deliver all policies and certificates thereof to the said obligee as collateral security for the payment of the principal and interest aforesaid, the aggregate amount of which insurance shall not be less than Fifteen Thousand dollars to be divided as to fire and wind-storm as the Obligee shall direct, without any fraud or further delay; then the above obligation to be void, or else to be and remain in full force and virtue.

AND PROVIDED FURTHER, however, and it is hereby expressly agreed, that if default shall be made in the production in any year of the tax or any other receipts, as herein provided and covenanted as aforesaid, or in payment of said taxes, assessments and charges as herein agreed as aforesaid, or in keeping the buildings erected upon said lands insured, and the policies and certificates thereof assigned or endorsed as aforesaid, or if at any time default shall be made in payment of interest as aforesaid or any installment of the principal upon the maturity thereof; for the space of thirty days after any semi-annual payment thereof shall fall due, then and in every such case, whether it be the first or any subsequent default, the whole principal

debt aforesaid shall, at the option of the said Obligee, her Executors, Administrators or Assigns, become due and payable immediately, and payment of said principal debt, and all interest thereon, may be enforced and recovered at once, anything herein contained to the contrary notwithstanding.

10 AND PROVIDED FURTHER, that in default of insurance or production of tax or any other receipt and payment of taxes, assessments and charges as aforesaid, the said Obligee, her Executors, Administrators or Assigns, shall have the option to effect such insurance, and pay such taxes, assessments and charges and the premium or premiums paid for effecting such insurance and the amount paid for such taxes, assessments and charges as aforesaid, shall be added to the principal moneys hereby
20 secured and payable on demand, with legal interest in like money.

Henry Betchen (SEAL)

SEALED AND DELIVERED
IN THE PRESENCE OF
Page 2, line 12 the words
"or any installment of the
principal upon the maturity
thereof" inserted before
execution.
30 Herbert M. Dowine

TO ESQ.,

Or any other Attorney of any Court of Law in New Jersey or elsewhere:

This is to authorize you to appear for me and in

my name in any Court of competent jurisdiction, in case of the breach of the conditions of the above Bond, and confess judgment for the penalty therein contained, as of the last or any subsequent term, with costs of suit and release of errors; and this shall be your sufficient warrant.

WITNESS my hand and seal this Ninth day of June Anno Domini one thousand nine hundred and twenty-six. 10

Henry Betchen (SEAL)

SEALED AND DELIVERED
IN THE PRESENCE OF
Herbert W. Dowine

IN CHANCERY OF NEW JERSEY.
Between
Ella Conover, 20
Complainant
and on Bill.
Kentucky Securities Company et als.
Defendant
Exhibit C-1
Dated 9-1-32
Robert E. Steedle, Master.

BOND AND WARRANT.

Dated. 19
For $ 30

EXHIBIT "C."

THIS INDENTURE, MADE THE Ninth day of June in the year of our Lord one thousand nine hundred and twenty-six. (1926)

10 BETWEEN Henry Betchen, of the City of Ventnor City, County of Atlantic and State of New Jersey, of the first part, and Ella Conover, of the City of Atlantic City, County of Atlantic and State of New Jersey, of the second part: WHEREAS, the said party of the first part, in and by his certain Obligation or writing obligatory, under his hand and seal duly executed, and bearing even date herewith, stands bound unto the said party of the second part, in the sum of Sixty Thousand Dollars lawful 20 money of the United States of America, conditioned for the payment of the just sum of Thirty Thousand Dollars like lawful money as aforesaid, payable at any time within five years from the date thereof; provided, however, that the sum of Five Thousand Dollars be paid on or before June 9, 1929 and the balance on or before June 9, 1931, together with interest thereon at and after the rate of six per centum per annum, payable semi-annually in like lawful money as aforesaid, without any fraud or further 30 delay; and shall pay the taxes assessed upon the premises hereinafter described for the first half of every year on or before the twentieth day of May therein, and for the second half of every year on or before the twentieth day of November therein, and shall produce receipts for taxes for each half

of every year on or before the first day of June and the first day of December respectively therein, and shall also pay all other taxes, municipal assessments or charges in the nature thereof which may be laid or assessed upon the said premises immediately upon their assessment; and conditioned further, that said party of the first part should not apply for any deduction, by reason of this Mortgage, from the 10 taxable value of the lands therein described and embraced; and should and would keep the buildings erected and to be erected upon the said lands insured against loss or damage by fire and wind storm in such safe and responsible stock (non-mutual) Fire Insurance Company or Companies as should be satisfactory to said party of the second part, and endorse or assign and deliver all policies and certificates thereof to the said party of the second part as collateral security for the payment of the prin- 20 cipal and interest aforesaid the aggregate amount of which insurance shall not be less than Fifteen Thousand Dollars to be divided as to fire and wind storm as the party of the second part shall direct.

AND PROVIDED FURTHER, however, and it was thereby expressly agreed, that if default should be made in the production in any year of the tax or any other receipts, as therein provided and covenanted as aforesaid, or in payment of said taxes, 30 assessments and charges as therein agreed as aforesaid, or in keeping the buildings erected upon said lands insured and the policies and certificates thereof assigned or endorsed as aforesaid, or if at any time default should be made in payment of interest

as aforesaid or any installment of the principal upon the maturity thereof; for the space of thirty days after any semi-annual payment thereof should fall due, then and in every such case, whether it be the first or any subsequent default, the whole principal debt aforesaid should, at the option of the said party of the second part, her Executors, Administrators
10 or Assigns, become due and payable immediately, and payment of said principal debt and all interest thereon, might be enforced and recovered at once, anything therein contained to the contrary notwithstanding.

AND PROVIDED FURTHER, that in default of insurance or production of tax or any other receipts and payment of taxes, assessments and charges as aforesaid, the said party of the second part, her Ex-
20 ecutors, Administrators or Assigns, should have the option to effect such insurance, and pay such taxes, assessments and charges; and the premium or premiums paid for effecting such insurance and the amount paid for such taxes, assessments and charges as aforesaid, should be added to the principal moneys thereby secured and payable on demand, with legal interest, in like money, as in and by the said recited obligation and condition thereof, relation thereunto being had, may more fully and at large
30 appear.

NOW THIS INDENTURE WITNESSETH, that the said party of the first part, as well for and in consideration of the aforesaid debt or principal sum of Thirty Thousand dollars, and for the better secur-

ing the payment thereof unto the said party of the second part, her Executors, Administrators or Assigns, in discharge of the said obligation above recited, as for and in consideration of the further sum of one dollar, in specie, well and truly paid to the said party of the first part by the said party of the second part, at and before the ensealing and delivery hereof, the receipt of which one dollar is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released and confirmed, and by these presents does grant, bargain, sell, alien, enfeoff, release and confirm, unto the said party of the second part, her Heirs and Assigns, all that certain lot, tract or parcel of land and premises, situate, lying and being in the City of Ventnor City, County of Atlantic and State of New Jersey, bounded and described as follows:

BEGINNING at a point formed by the intersection of the Westerly line of Nashville Avenue and the Northerly line of Ventnor Avenue and extending thence (1) Northwardly, along the Westerly line of Nashville Avenue, eighty feet; thence (2) Westwardly, parallel with Ventnor Avenue, thirty-seven and one half feet; thence (3) Southwardly, parallel with Nashville Avenue, eighty feet to the Northerly line of Ventnor Avenue; thence (4) Eastwardly, along the Northerly line of Ventnor Avenue, thirty-seven and one half feet to the place of beginning.

BEING the same premises conveyed unto Henry Betchen, by Ella Conover, et vir., by deed bearing even date herewith and intended to be forthwith re-

corded; this mortgage being given to secure a part of the purchase price in said deed mentioned.

TOGETHER with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances whatsoever to the same belonging, or in anywise appertaining
10 and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD the said hereditaments and premises above described and granted, or intended so to be, with the appurtenances, unto the said party of the second part, her Heirs and Assigns, to and for the only proper use, benefit and behoof of the said party of the second part, her Heirs and Assigns forever.

20 PROVIDED ALWAYS NEVERTHELESS, that if the said party of the first part, his Heirs, Executors, Administrators and Assigns, do and shall well and truly pay, or cause to be paid, unto the said party of the second part, or to her certain Attorney or Attorneys, Executors, Administrators or Assigns, the aforesaid debt or sum of Thirty Thousand Dollars on the day and time hereinbefore mentioned and appointed for the payment thereof, together with interest for the same, in like moneys in way
30 and manner hereinbefore specified therefor, without any fraud or further delay, and without any deduction, defalcation or abatement to be made, for or in respect of any taxes, charges, or assessments whatsoever, together with the taxes, assessments and charges hereinabove mentioned; and shall produce to

the said Obligee, her Executors, Administrators or Assigns, receipts for all taxes, assessments and charges laid or levied upon said premises as hereinbefore provided, and shall have faithfully kept and performed the condition and agreement in said obligation contained and herein recited, as to insuring and keeping insured the said premises; that then and from thenceforth, as well this present Indenture and 10 the estate hereby granted, as the said OBLIGATION above recited, shall cease, determine and become absolutely null and void, to all intents and purposes, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

AND the said party of the first part, for himself, his Heirs, Executors and Administrators does covenant and grant to and with the said party of the second part, her Executors, Administrators and As- 20 signs, that the said party of the first part, his Heirs and Assigns, shall not and will not apply for, or claim any deduction by reason of this Mortgage from the taxable value of said lands and premises; and that the said party of the second part her Executors, Administrators and Assigns, shall and may from time to time, and at all times after default shall be made in the performance of the provisos or conditions herein recited or contained, peaceably and quietly enter into, have, hold, use, occupy, pos- 30 sess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said party of the first part, his Heirs or Assigns, or of any other person or persons whatsoever.

IT IS FURTHER UNDERSTOOD AND AGREED by and between the parties to these presents that any act or agreement to be done or performed by the party of the first part shall be construed as a covenant running with the land and shall be binding upon the heirs and assigns of the party of the first part hereto as fully as if they had
10 personally made such agreement.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal the day and year first above written.

Henry Betchen (SEAL)

.... (SEAL)

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

Page 2, line 6 the words "or any
20 installment of the principal upon the maturity thereof" inserted before execution..

Herbert W. Dowine

STATE OF NEW JERSEY,
ATLANTIC COUNTY, } ss.

BE IT REMEMBERED, That on this Ninth day
30 of June in the year of our Lord one thousand nine hundred and twenty-six before me A Notary Public for New Jersey personally appeared Henry Betchen, who, I am satisfied is the grantor mentioned in the within Mortgage, and I having first made known to him the contents thereof, he acknowledged that he

signed, sealed and delivered the same as his voluntary act and deed. All of which is hereby certified.

Herbert W. Dowine
A Notary Public for New Jersey.

IN CHANCERY OF NEW JERSEY
Between
Ella Conover
Complainant
and on Bill.
Kentucky Securities Company, et als.,
Defendant.
Exhibit C-2.
Dated 9-1-32
Robert E. Steedle,
Master.

10

20

MORTGAGE
Henry Betchen
to
Ella Conover
Premises:
Dated 19 $............
Received June 11, 1926 at 9 A. M. and recorded in the Clerk's Office of Atlantic County at May's Landing, N. J. in Book of Mortgages No. 406, page 209 &c.

William A. Blair, Clerk
M. P.

(SEAL)

30

To the within defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense in this action, you must file an affidavit of merits within ten days from the date of the service hereof upon you, and that
10 unless you file such affidavit, judgment by default will be entered against you at the end of said ten days; and that in case you file said affidavit, unless you file an answer within twenty days from the date of service hereof upon you, judgment by default will in such case be entered against you at the end of said twenty days.

Wm. M. Clevenger,
Attorney for Plaintiff.

Received Jan. 27, 1933.

20
Sheriff.

I hereby deputize and appoint Joseph Mulholland to serve the within writ. Witness my hand and seal this 27th day of Jan., 1933.

Alfred H. Johnson (L. S.),
Sheriff of Atlantic Co.

30

Duly served within summons and complaint January 27th, 1933, on Kentucky Securities Company, by delivering a copy personally to Samuel Somers, 3rd, President of said Kentucky Securities Company at the office of Somers Lumber Company, 209

N. Missouri Avenue, Atlantic City, Atlantic County, N. J.

Alfred H. Johnson,
Sheriff, by
Joseph Mulholland,
Special Deputy Sheriff.

Shffs. fees $5.10.
Filed Feb. 10, 1933, at 9 A. M. 10
William A. Blair,
Clerk.

AFFIDAVIT OF MERITS.

ATLANTIC COUNTY CIRCUIT COURT.

20

Ella Conover, *Plaintiff,* v. Kentucky Securities Company, a corporation of the State of New Jersey, *Defendant.*	Action at Law. Affidavit of Merits.

30

State of New Jersey, County of Atlantic, ss.

M. Milton Singer, of full age, being duly sworn, according to law upon his oath deposes and says he

is associated with the law firm of Endicott & Endicott, Esquires, Attorneys for the Kentucky Securities Company, defendant in the above-entitled cause, and is duly authorized to make this affidavit in this cause for the said defendant; that he believes that said defendant, Kentucky Securities Company, has a just and legal defense to said action on the merits
10 of the case.

M. Milton Singer.

Subscribed and sworn to before me this 30th day of January, A. D. 1933.

Josephine Darnell,
Notary Public of N. J.

Filed February 1, 1933, at 9 A. M.

William A. Blair,
Clerk.

20

30

NOTICE.

ATLANTIC COUNTY CIRCUIT COURT.

10

ELLA CONOVER, *Plaintiff,* v. KENTUCKY SECURITIES COMPANY, a corporation of the State of New Jersey, *Defendant.*	Action at Law. Notice.

20

To William M. Clevenger, Esquire, Attorney of Plaintiff:

Take notice that on Friday, February tenth, 1933, at the court room in the Guarantee Trust Building, Atlantic City, New Jersey, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, we shall move before Honorable William Frank Sooy, Judge of the Atlantic County Circuit 30 Court to strike out the first and second counts of the complaint, and every part thereof filed in this cause, on the ground that the said complaint and the first and second counts respectively do not set up a legal cause of action.

And take further notice that at the said time and place, we shall apply for a judgment in favor of the defendant.

Dated February 2nd, 1933.

Endicott & Endicott,
Attorneys for Defendant.

Filed April 5, 1933, at 9 A. M.

10 William A. Blair,
Clerk.

[Endorsed]

Service of the within notice and copy thereof acknowledged this 3 day of

20 Feby.,. A. D. 1933.

Wm. M. Clevenger,
Attorney.

30

OPINION.

ATLANTIC COUNTY CIRCUIT COURT.

10

ELLA CONOVER, *Plaintiff*, v. KENTUCKY SECURITIES Co., *Defendant*.	On Motion to Strike Complaint. Memo.

ENDICOTT & ENDICOTT, for the motion.
WILLIAM M. CLEVENGER, contra.

20

SOOY, J.:

This is a motion to strike the complaint on the ground that it fails to set forth a cause of action.

Plaintiff says that her "complaint is founded upon a certain agreement," dated Feb. 5, 1930, and annexed to the complaint. The agreement to which plaintiff refers is an instrument commonly called an extension agreement in which plaintiff is named as the party of the first part, defendant, party of the second part and one Betchen, party of the third part.

30

Betchen was the obligor and mortgagor named in

a certain bond and mortgage and plaintiff was the obligee and mortgagee. Betchen had defaulted and foreclosure proceedings had been instituted by plaintiff. Defendant, in order to protect a subsequent incumbrance, bought from Betchen the fee in the mortgaged premises and in order to secure a discontinuance of the foreclosure proceedings, negotiated
10 to that end with plaintiff with the ultimate result that the extension agreement was executed under the terms of which defendant made certain payments to plaintiff on account of principal, costs, &c., in consideration of which payment the foreclosure proceedings were, in fact, discontinued. In this extension agreement defendant agreed, *inter alia,* "to perform the stipulations, covenants and agreements in the said bond and mortgage as modified by said agreement." (Extension agreement.) These modi-
20 fications are of no importance in this matter.

The "stipulations, covenants and agreements" in the bond which defendant undertook to perform were, *inter alia,* the payment of taxes to be thereafter assessed against the mortgaged premises. Defendant did not pay these after-assessed taxes in accordance with the terms of the bond and mortgage and plaintiff foreclosed against defendant with the result of a sale and a deficiency. Plaintiff now sues to recover the amount of these unpaid after-
30 assessed taxes.

It will be observed that this is not a suit on the bond for the deficiency but, as alleged by plaintiff, "on defendant's covenant," as set forth in the extension agreement "taken in conjunction with the bond and mortgage." The construction plaintiff

places "on defendant's covenant" is stated as follows: "The sum total of this covenant is that defendant would pay the taxes assessed against the premises." The damages claimed by plaintiff "are those which plaintiff sustained by reason of the impairment of the value of the mortgaged premises by the failure of the defendant to pay the taxes for the years 1931 and 1932." 10

The second count of the complaint seeks to recover the amount of these unpaid taxes on the theory, not of diminution of the value of the mortgaged premises, but on the theory that defendant covenanted to pay them by the terms of the extension agreement and failed to so *so* with the result that plaintiff was compelled to pay them.

Taking up the first count, under which plaintiff seeks a recovery of the amount of the unpaid taxes because their non-payment lessened the value of the mortgaged premises to that extent. 20

Defendant is not liable unless the extension agreement creates the liability and nowhere in that agreement does the defendant assume the payment of the mortgage debt nor agree to be liable "beyond the value of the mortgaged premises." The intention of the parties clearly appears from the following recital in the agreement:

> "Whereas, it is not the intention of this agreement of extension that the party of the second part (def't.), shall become liable to the party of the first part BEYOND THE VALUE OF THE MORTGAGED PREMISES and it is the intention of this agreement to preserve and protect the liability of the party of the third 30

part (Betchen), upon his bond secured by the mortgage over and above the value of the mortgaged premises."

Of course, when the parties used the expression "value of the mortgaged premises" they gave to it the significance and meaning given by our Courts in cases where such language had been the subject of discussion, to wit, the equity of redemption in the mortgaged premises.

10

The case of Tichnor v. Dodd, 4 N. J. Eq. 454, clearly expresses this as the proper construction to be placed on the language used by the parties:

> "If the counsel means to insist that the purchaser is bound beyond the extent of the VALUE OF THE PREMISES, this proposition is too broad to be mentioned. The purchaser of the mere equity of redemption, purchases a right and does not assume the obligation to redeem. He may at his pleasure give up the mortgaged premises in satisfaction of the incumbrance. If he would retain and enjoy the premises, then he must pay off the incumbrance, and unite the legal title with his equitable interest. He may, therefore, safely said to be liable to the extent of *the value of the premises,* and not beyond it."

20

30

It would seem to me to be quite clear that the parties to the extension agreement never expected defendant to be bound beyond its liability to lose the equity of redemption in the mortgaged premises. Plaintiff, in view of that situation, expressly provided, "and it is the intention of this agreement to

preserve and protect the liability of the party of the third part (Betchen) to the party of the first part (plaintiff) upon his bond secured by the mortgage OVER AND ABOVE THE VALUE OF THE MORTGAGED PREMISES."

Under the second count, a recovery may not be had unless the following language in the extension agreement permits it: "That the party of the 10 second part" (defendant), will perform the stipulations, covenants and agreements in the said bond and mortgage" * * * "and upon the breach thereof or hereof, the principal sum aforesaid shall become due and payable at once" * * * "and the party of the first part may proceed thereon and hereon as she may be advised."

As has been hereinbefore decided, the agreement did not bind defendant beyond the value of the mortgaged premises, to wit, equity of redemption. 20

It seems quite evident that the intention of the extension agreement was that defendant agreed to pay the taxes in accordance with the provisions of the bond and mortgage and upon its failure so to do was to suffer the penalty therein provided, and that penalty was that plaintiff might pay the taxes and apply the amount thereof to the increase of the amount of principal or she might foreclose so that defendant would lose its equity of redemption whereupon Betchen would be liable to a deficiency 30 judgment on his bond.

Plaintiff fails to cite any case at law where such a suit as this has ever been maintained but she does cite cases in equity which do not sustain the present action.

The complaint will be stricken.
Filed March 31, 1933, at 9 A. M.

William A. Blair,
Clerk.

10

ORDER.

ATLANTIC COUNTY CIRCUIT COURT.

Ella Conover, *Plaintiff*, v. Kentucky Securities Company, a corporation of the State of New Jersey, *Defendant.*	Action at Law. Order.

20

This matter coming on to be heard on motion of
30 counsel for defendant to strike the complaint and in the presence of counsel for plaintiff; and the Court having read and considered the complaint and heard and considered the argument of respective counsel, and being of the opinion that the complaint should be stricken;

Order

It is on this 31st day of March, 1933, on motion of Endicott & Endicott, Esquires, attorneys for defendant, ordered that the complaint be and the same is hereby stricken because it fails to show a cause of action in favor of plaintiff against the defendant, with costs in favor of defendant.

On motion of
ENDICOTT & ENDICOTT,
Attorneys for Defendant.

10

Let this order be entered on the minutes.

W. F. SOOY,
C. C. J.

Filed and entered April 3, 1933, at 9 A. M.

20

WILLIAM A. BLAIR,
Clerk.

30

RULE FOR JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

10

ELLA CONOVER, *Plaintiff,* v. KENTUCKY SECURITIES COMPANY, *Defendant.*	Action at Law. Rule for Judgment.

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20 The rule striking the complaint in this cause entered on March 31st, 1933, having omitted authority to enter judgment final for the defendant:

It is ordered that judgment final be entered against the plaintiff in favor of the defendant with costs of suit to be taxed.

Rule entered this day of April, 1933.

On motion of

ENDICOTT & ENDICOTT,
Attorneys for Defendant.

30

Let this rule be entered.

W. F. SOOY,
C. C. J.

Filed and entered May 11, 1933, at 9 A. M.

William A. Blair,
Clerk.

JUDGMENT.

10

ATLANTIC COUNTY CIRCUIT COURT.
May Term, 1933.

Ella Conover, *Plaintiff,* v. Kentucky Securities Company, a corporation of the State of New Jersey, *Defendant.*	Action at Law. Judgment. Endicott & Endicott, Attys.

20

Judgment entered May 11, 1933, at 9 A. M.

Costs $38.50

Defendant moved to strike out the complaint on the ground that it disclosed no cause of action, upon which motion argument for plaintiff and defendant, by their respective counsel was duly heard, and the Court being of the opinion the complaint disclosed no cause of action, ordered that the same be stricken.

30

Whereupon it is adjudged that the complaint of the plaintiff be struck out and that the defendant, Kentucky Securities Company, a corporation of the State of New Jersey, recover of the plaintiff, Ella Conover, the sum of thirty-eight dollars and fifty cents costs of suit.

William A. Blair,
10 *Clerk.*

Circuit Court Judgment Book No. 16, page 456.
Notice of appeal filed May 16, 1933.

NOTICE OF APPEAL AND GROUNDS.

ATLANTIC COUNTY CIRCUIT COURT.

20

Ella Conover, *Plaintiff,* v. Kentucky Securities Co., a corporation of the State of New Jersey, *Defendant.*	Action at Law. Notice of Appeal and Grounds.

---

30 *To Messrs. Endicott & Endicott, Attorneys of Defendant, or to whom it may concern:*

Sirs:

Please take notice that the plaintiff in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jer-

sey, from the whole of the judgment entered in this cause, on the following grounds, to wit:

1. Because the Atlantic County Circuit Court erred in striking out the plaintiff's complaint and entering judgment in favor of the defendant and against the plaintiff.

2. Because the Atlantic County Circuit Court erred in striking out the plaintiff's complaint, in this, that the plaintiff alleged a good cause of action for the breach of the contract set out in her bond, mortgage and contract to recover the taxes paid by her. 10

3. Because the Atlantic County Circuit Court erred in striking out the plaintiff's complaint, in this, that she alleged a good cause of action for the recovery of the damages suffered by reason of the impairment of the value of the mortgaged premises therein described caused by the defendant's failure to pay the taxes assessed against the same. 20

Wm. M. Clevenger,
Attorney for Plaintiff.

Filed May 16, 1933, at 9 A. M.

Wm. A. Blair,
Clerk.

30

[Endorsed]

May 15, 1933. Service acknowledged.
Endicott & Endicott,
Solrs. for Kentucky
Securities Co.

55 OCT.1.1955

I. F. Huntzinger Co., *Appellate Printers,* Camden, N. J.

New Jersey Court of Errors and Appeals

ELLA CONOVER,
Plaintiff-Appellant,
v.
KENTUCKY SECURITIES COMPANY,
a corporation of the State of
New Jersey,
Defendant-Respondent.

Action at Law.

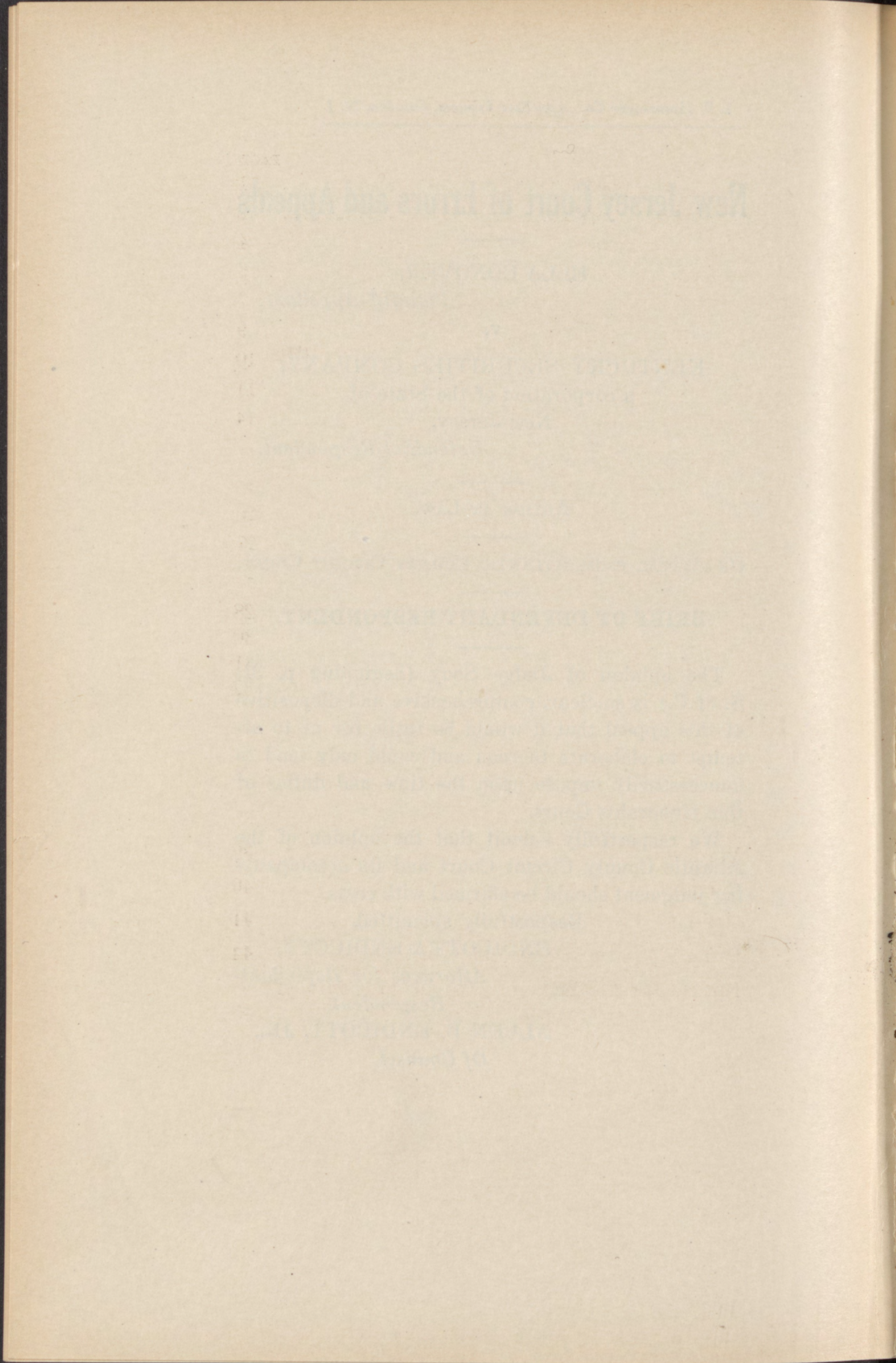
On Appeal from Atlantic County Circuit Court.

BRIEF OF DEFENDANT-RESPONDENT.

The opinion of Judge Sooy (beginning p. 31, S. of C.) is so clear, comprehensive and dispositive of this appeal that it would be futile for us to attempt to elaborate thereon and could only tend to unnecessarily impose upon the time and duties of this Honorable Court.

We respectfully submit that the opinion of the Atlantic County Circuit Court and its accompanying judgment should be affirmed with costs.

Respectfully submitted,
ENDICOTT & ENDICOTT,
Attorneys for Defendant-Respondent.
ALLEN B. ENDICOTT, JR.,
Of Counsel.



NEW JERSEY COURT OF ERRORS AND APPEALS.

October Term, 1933. No.

ELLA CONOVER,
Plaintiff-Appellant,
v.
KENTUCKY SECURITIES COMPANY, a corporation of the State of New Jersey,
Defendant-Appellee.

ACTION AT LAW.

ON APPEAL FROM ATLANTIC COUNTY CIRCUIT COURT.

BRIEF OF PLAINTIFF-APPELLANT.

This matter is an appeal from an order of the Judge of the Circuit Court of the County of Atlantic striking out plaintiff's complaint and entering up

judgment in favor of the defendant and against the plaintiff.

FACTS.

On or about June 9th, 1926, one, Henry Betchen, executed and delivered to plaintiff his bond, a copy of which is attached to the plaintiff's complaint and marked Exhibit "B" (*Case* 13), conditioned for the payment of $30,000.00 within 5 years, $5,000.00 of which should be paid on or before June 9th, 1929, which bond, among other things, contained the customary provision that the obligor should

> "pay the taxes assessed upon the premises described in an accompanying indenture of mortgage for the first half of every year on or before the twentieth day of May therein, and for the second half of every year on or before the twentieth day of November therein, and shall produce receipts for the taxes for each half of every year on or before the first day of June and the first day of December respectively therein, and shall also pay all other taxes, municipal assessments or charges in the nature thereof which may be laid or assessed upon the said premises immediately upon their assessment; and conditioned further, that said obligor shall not apply for any deduction by reason of the accompanying mortgage from the taxable value of the lands therein described and embraced."

At the time the said bond was executed, and as security for the payment thereof, the said Henry Betchen executed and delivered to the plaintiff a mortgage covering two stores and two apartments, a copy of which is also attached to the complaint herein and marked Exhibit "C" (*Case* 18), whereby the premises described therein were duly conveyed to the plaintiff upon certain conditions.

The mortgage also contained the provision that the mortgagor would

> "pay the taxes assessed upon the premises,"

(*Case* 18, lines 30 and 31), and a provision that the failure of the mortgagor to pay the taxes accelerated the principal of the mortgage and was grounds for foreclosure (*Case* 19 and 20); and also the following:

> "IT IS FURTHER UNDERSTOOD AND AGREED by and between the parties to these presents that any act or agreement to be done or performed by the party of the first part shall be construed as a covenant running with the land and shall be binding upon the heirs and assigns of the party of the first part hereto as fully as if they had personally made such agreement" (*Case* 24).

The said Henry Betchen having failed to pay the interest, taxes and $5,000.00 on account of the principal of said bond and to keep the property insured in accordance with the conditions and covenants of the said bond and mortgage, the plaintiff elected to declare the whole amount of the said bond due and instituted foreclosure proceedings in the Court of

Chancery of New Jersey, by a bill of complaint which was filed on January 20, 1930, Chancery Clerk's Docket 77, page 186.

After instituting the said foreclosure proceedings the plaintiff and the defendant and the said Henry Betchen entered into an agreement, a copy of which was attached to the complaint as Exhibit "A" (*Case* 6 to 12). In this agreement, the defendant recited that it was then owner of the real estate described in plaintiff's said mortgage, and agreed

> "*to perform the stipulations, covenants and agreements in the said bond and mortgage as modified by the said agreement*" (*Case* 9, lines 24 to 29).

The stipulations, covenants and agreements of said bond and mortgage were only modified in said agreement by postponing the time for repayment of the principal sum of the said bond and mortgage until June 9, 1933, except as to the sum of $300.00 payable on the date of the execution of said agreement, $300.00 payable on June 9, 1931, and $300.00 payable on June 9, 1932, with the privilege of paying the principal sum at any interest bearing period in installments of one hundred dollars or any multiple thereof.

In consideration of the defendant agreeing to make the payments on account of principal and the interest as aforesaid and *agreeing to perform the stipulations, covenants and agreements in the said bond and mortgage,* among which were the covenants and agreements *to pay the taxes assessed against the said premises for the first half of every*

year on or before the twentieth day of May therein, and for the second half of every year on or before the twentieth day of November therein, and produce receipts for the taxes for each half of every year on or before the first day of June and first day of December respectively, therein, and the paying of the unpaid taxes and interest at the date of said agreement and the premium for the said fire insurance, and the taxed costs and counsel fee of complainant's solicitor in the said foreclosure, the plaintiff extended the payment of the said bond and mortgage and discontinued her said foreclosure suit.

The plaintiff having discontinued the said foreclosure of the said mortgage and having extended the time for repayment of the said bond and mortgage in accordance with the said agreement, the defendant, being the legal owner of the said premises by a deed of conveyance from the mortgagor, Henry Betchen, went into possession of the premises and collected the rents thereof, but failed and refused to pay six months' interest which fell due on June 9, 1932, and failed and refused to pay the taxes in the sum of $511.68 which were assessed against the property for the year 1931, and the taxes in the sum of $427.99 which were assessed against the property for the year 1932, or the sum of $300.00 on account of the principal of the said bond and mortgage which became due and payable on the ninth day of June, 1932.

By reason of the said failure of the said defendant to pay the items aforesaid, the plaintiff declared

the whole amount of the mortgage due, and foreclosure proceedings were duly instituted in the Court of Chancery of New Jersey, as will appear at Clerk in Chancery's Docket 91, page 360. A final decree was duly entered in these proceedings and the said premises duly sold by the Sheriff of Atlantic County for the sum of $100.00.

To protect her interest in the property the plaintiff was obliged to and did pay the taxes assessed against the mortgaged property for the years 1931 and 1932.

This suit was brought on the agreement of the defendant to pay these taxes to recover the amount paid by the plaintiff for the same.

The defendant moved before the Circuit Court to strike out the plaintiff's complaint on the grounds that it did "not set up a legal cause of action."

The Circuit Court Judge by order dated March 31, 1933, ordered the complaint stricken (*Case* 36 and 37) and by order entered May 11, 1933, ordered that judgment final be entered against plaintiff in favor of defendant (*Case* 38).

It is from these orders that plaintiff appeals.

The complaint is set out in the state of the case from pages 2 to 26 and attached thereto and as a part thereof are:

(a) The agreement between plaintiff and defendant, Exhibit A (*Case* 6 to 13).

(b) The original bond, Exhibit B (*Case* 13 to 17).

(c) The original mortgage, Exhibit C (*Case* 18 to 25).

ARGUMENT.

When we turn to Exhibit "A," which is the fulcrum upon which this case rests, our attention is immediately attracted by the recital:

> "Whereas it is not the intention of this agreement of extension that the party of the second part *shall become liable to the party of the first part beyond the value of the mortgaged premises* and it is the intention of this agreement to preserve and protect the liability of the party of the third part to the party of the first part upon his bond secured by the mortgage *over and above the value of the mortgaged premises.*"

This recital declares the intent of the parties and construes itself. The language is taken word for word from the case of *Tichenor v. Dodd,* 4 N. J. Eq. 454, decided by Chancellor Dickerson in 1844, which has been cited many times by our Judges and not disturbed to this day.

The Chancellor then said if counsel meant to insist that the purchaser of mortgaged premises, without an assumption and agreement to pay clause,

> "*is bound beyond the extent of the value of the premises,* his proposition is too broad to be maintained. The purchaser of a mere equity of redemption, purchases a right and does not assume an obligation to redeem. He may, at his pleasure, give up the *mortgaged premises*

> in satisfaction of *the encumbrance* * * *. He may, therefore, safely said to be liable *to the extent of the value of the premises and not beyond it.* He takes them, it is true, *cum onere,* but he may relinquish them *cum onere.*"

The language of this decision having been adopted in the drafting of the contract, the logical conclusion to have been reached by the Court below, is the defendant should not be responsible for the *mortgage debt* beyond the value of the premises, but should be responsible for those covenants providing for acts and duties other than the payment of that debt. The reconveyance, therefore, whether by act of the defendant or by act of the sheriff, should be subject only to that burden which existed at the time it was acquired.

What was the mortgage debt? The purchase price. Not the interest on the debt. Not the taxes the land had to bear for the upkeep of the community. Not the expenses of foreclosing the mortgage.

The defendant took *cum onere.* This means burdened with the mortgage. There were no taxes, interest or court costs unpaid at the time of purchase. Provisions were made for these items in advance of the purchase as the contract discloses.

The defendant may surrender *cum onere*, but not with the mortgaged premises burdened with unpaid taxes, interest, assessments, insurance and court costs.

The defendant bound itself to perform the covenants in the bond and mortgage contained just the same as if it had signed the original bond and mort-

gage subject only to such changes contained in the agreement as to extension of time for the payment of principal. It was only the liability for the mortgage debt that was limited to the value of the mortgaged premises. The obligation to pay the interest, taxes and other assessments, not only remained the same, but was specifically and positively imposed upon the defendant.

It will thus be seen this case is much stronger than *Tichenor v. Dodd, supra,* as in that case there was nothing binding upon the owner of the mortgaged premises. The owner there had merely taken the premises "subject to" without any other contract.

Having due regard to the facts stated and with this preliminary statement as to the intent of the parties to this suit, we apprehend the remedy of the plaintiff rests upon the implied contract growing out of the obligation to pay the taxes, interest and other charges as well as the express covenants so to do, made by the defendant and its grantor.

For these reasons the statement contains two counts and these will be treated separately.

FIRST COUNT.

By reason of the defendant's failure to pay the taxes assessed against the mortgaged premises for 1931 and 1932 damages are claimed measured by the total of those taxes paid by the plaintiff together with interest thereon from date of payment.

No matter what may be the value of the mort-

gaged premises, whether it be one dollar, the mortgage loan, or more than the mortage loan, if the defendant failed to pay the taxes assessed against the mortgaged premises, it lessened the value of the mortgaged premises and failed in its legal obligation. Whatever amount the plaintiff paid for those taxes impaired the defendant's duty to her by that figure. It, by its failure to pay, prevented plaintiff from obtaining *the value of the mortgaged premises,* just as much as if it had placed a second mortgage thereon and tried to compel plaintiff to take subject thereto. *Cum onere,* if you please.

It is the duty of the mortgagor and his assignee to pay the taxes levied on the mortgaged premises.

The mortgagor has no right to depreciate the security.

Brady v. Waldron, 2 John. Ch. (N. Y.) 148.

As was said by Vice-Chancellor Lane in *Stewart v. Fairchild,* 90 N. J. Eq. 139-145:

> "It is recognized that with respect to taxes there is a fiduciary relation between the mortgagor and those holding under him and the mortgagee, and that they are bound in equity and conscience to do no act, and to suffer none to be done, which will destroy the mortgagee's title or impair his security."

By value is meant the value without any encumbrance against the premises, where the encumbrance results by any act or omission of the defendant.

See

Houf v. Brown, 171 Mo. 207; 71 S. W. 125.

SECOND COUNT.

By reason of the covenant in the mortgage that the acts and agreement of Betchen to be done and performed are to be construed as covenants "running with the land," and binding upon his "assigns," by reason of its express contract with the plaintiff and by reason of the implied contract to be spelled from all the papers there was an obligation upon the defendant to pay the taxes, interest and other charges and its failure so to do resulted in a right of action in favor of the plaintiff to recover the moneys so paid for it. It will be noticed, while there was a deficiency on the bond, after foreclosure, that loss has not been counted upon, feeling bound by *Tichnor v. Dodd, supra,* and in support of her allegation in this count urges it is sustained upon the following grounds:

I.

The Betchen mortgage provides all covenants shall run with the land and bound the heirs and assigns of the covenantor (*Case* 24) and this, under the common law, is binding and enforcible against the defendants.

Judge Blackstone says:

> "No person could at common law take advantage of any covenant or condition, except such as were parties or privies thereto; and, of course, no grantee or assignee of any rever-

sion or rent. To remedy which, and more effectually to secure to the king's grantees the spoils of the monasteries then newly dissolved, the statute 32 Hen. VIII. c. 34 gives the assignee of a reversion (after notice of such assignment) the same remedies against the particular tenant, by entry or action, for waste or other forfeitures, non-payment of rent, and non-performance of conditions, covenants, and agreements, as the assignor himself might have had; and makes him equally liable, on the other hand, for acts agreed to be performed by the assignor, except in the case of warranty."

3 Black. Com. 158.

Mr. Chitty says:

"At common law, upon the death of a lessor seised in fee, his heir might sue for a subsequent breach of a covenant running with the land, although not named in the lease; and the action of debt lay for the assignee of the reversion for rent, at common law; but no persons could formerly support an action of covenant, or take advantage of any covenant or condition, except such as were parties or privies thereto; and, of course, no grantee or assignee of any reversion or rent could maintain this form of action. To remedy this the statute 32 Hen. 8, c. 34, gives the assignee of a reversion the same remedies against the lessee, or his assignee, or their personal representatives, upon covenants running with the land, as the lessor or his heir,

> or their successor, had at common law; and on the other hand, such assignee is liable by the statute to an action for a breach of covenant running with the land, as the lessor, &c., was at common law."
>
> *1 Chitty Pleading,* 130.

Chancellor Green in 1864 in *Conover v. Smith,* 17 N. J. Eq. 51, says:

> "Upon a covenant which runs with the land, an action lies for or against the assignee at the common law, although the assignees be not named in the covenant."

We see no reason why parties may not agree themselves within the law, and the plaintiff and Betchen, by the mortgage, Exhibit "C," so did, when they provided all the agreements in that paper contained should be construed, "as covenants running with the land," and "be binding upon the heirs and assigns of the parties of the first part hereto as fully as if they had personally made such agreement."

Justice Swayze, in 1912, speaking for the Court of Errors and Appeals, in the case of *Peterson v. Reid,* 80 N. J. Eq. 450, at page 454, rather doubted the covenants in a mortgage were binding upon the assignee, and used this language:

> "Even if the case were one where the burden of a covenant could run with the land, the complainant's interest is, in equity, a mere security for her debt. The suggestion that the burden

> of a covenant made by a mortgagee with the mortgagor runs with the mortgage and binds the assignee is novel. Plain language would be necessary. In the present case, the mortgage merely recites that it is given to secure the conditions in the deed. It does not purport to bind assignees. The language is inapt to impose an obligation upon the mortgagee in favor of the mortgagor, since by its terms it 'secures' the conditions by a conveyance of the mortgagor's land to the mortgagee. The complainant could not have been bound to perform the covenant, since she had no right of entry on the land for the purpose, and the owners persistently treated the realty company as the party bound. The case differs from cases of restrictive covenants where equity charges upon subsequent owners the duty to observe the restrictions. The covenant in this case involves labor and expenditure as well as the right of entry on the land. The burden of such covenants does not run with the land even in equity."

This case satisfies the doubt expressed by the Justice inasmuch as Exhibit "C" expressly provides the covenants shall run with the land and be binding upon the defendant.

II.

The agreement of May 5th, 1930, contained the following at Clause 7:

"That the party of the second part will perform the stipulations, covenants and agreements in the said bond and mortgage contained as modified by this agreement, and upon the breach thereof or hereof, the principal sum aforesaid shall become due and payable at once, with interest as aforesaid, *and the party of the first part may proceed thereon and hereon as she may be advised*" (*Case* 9, lines 25 to 32).

and the bond provides the obligor:

"*shall pay the taxes assessed upon the premises described in an accompanying indenture of mortgage for the first half of every year on or before the twentieth day of May therein, and for the second half of every year on or before the twentieth day of November therein,* and shall produce receipts for the taxes for each half of every year on or before the first day of June and the first day of December respectively therein, and *shall also pay all other taxes, municipal assessments or charges in the nature thereof which may be laid or assessed upon the said premises immediately upon their assessment*" (*Case* 14, lines 22 to 34).

The same provisions to pay the taxes and assessments are contained in the mortgage (*Case* 18, line 30, and *Case* 19, line 8).

The mortgage also provides that it ceases and determines only upon the payment of the principal sum, "together with the taxes, assessments and charges herein above mentioned" (*Case* 22, line 34).

A mortgagor in possession is considered as the owner of the land, and it is his duty to pay the taxes and assessments levied thereon.

41 *C. J.,* 636, par. 615.

In 1924 Vice-Chancellor Buchanan in the case of *Ripley v. Schenck,* 96 N. J. Eq. 547, held it was the duty of the mortgagor to pay the taxes on the mortgaged premises, and to preserve the property pledged for the purposes of the original security.

In 1919 Vice-Chancellor Lane, in the case of *Stewart v. Fairchild-Baldwin,* 90 N. J. Eq. 139, held likewise and stated:

> "It is recognized that with respect to taxes there is a fiduciary relation between the mortgagor and those holding under him and the mortgagee, and that they are bound in equity and conscience to do no act, and to suffer none to be done, which will destroy the mortgagee's title or impair his security."

In 1925 Vice-Chancellor Ingersoll, in *Schaffer v. Hurd,* 98 N. J. Eq. 143, held the same.

The maker of a bond and mortgage is usually not solely and only obligated to pay the sum therein secured at a given time. In this particular case there were other things than the debt to be liquidated, and by this we mean:

(a) To pay all the taxes;

(b) To pay all assessments for improvements, water rents and other municipal requirements;

(c) To carry insurance;

(d) To pay the interest on the loan.

The mortgage debt and these incidental obligations are separate and independent responsibilities, and while the defendant might contract to be relieved of one of them, as was done in this case, it might, at the same time, contract to be liable for the others, as was likewise done in this case.

The undertaking on the part of the defendant was a perfectly reasonable and just arrangement, and was so considered by it at the time, otherwise it would not have sought to protect its own mortgage on the premises by paying the plaintiff the amount of the Betchen default. Not only was it bound by the contract, but the law had already bound it when it took title.

The Court of Chancery has already acknowledged the distinction between the obligation relating to taxes and the obligation to discharge the mortgage debt, and this clearly appears in the case of *Farmer v. Ward,* 75 N. J. Eq. 33, decided by Vice-Chancellor Stevenson in 1908.

In the court below both the counsel for the defense and the trial Judge seemed to think that the equitable obligation resting upon the owner of the real estate was insufficient to rest an action at law thereon, but this we think unsound. It seems to us fundamental that where there is an obligation on the part of one to do or not to do a given thing, that failure to comply with the contract entitles the one benefited to maintain his action. The whole sub-

ject is discussed by Mr. Keener in his book on quasi-contracts.

There can be no doubt that the parties to the transaction involved in this litigation had a perfect right to contract as they did upon the subject-matter and once that contract was consummated, a privity was established between the plaintiff and defendant which involved the contract between the plaintiff and Betchen, the original mortgagor and obligor. As has been stated, there can be no question that by the execution of Exhibit "A" the defendant became fully bound to the plaintiff, not only for the payment of the principal of the mortgage, but the interest, taxes and other charges.

All that was accomplished in favor of the defendant, was that he limited his liability so far as the debt was concerned, to the value of the mortgaged premises.

The opinion of Chancellor Green, in 1840, in the case of *Hartshorne v. Hartshorne,* 2 N. J. Eq. 349-357, is helpful:

> "There is no privity between the mortgagee and the purchaser, and I cannot see upon what principle he can be reached, except it be through the land which he has purchased. I speak not now of a case where the purchaser enters into special obligation to pay antecedent incumbrances; all such cases will be governed by the terms and character of the contract; but of the ordinary purchaser without special agreement, depending on the obligation which the law in such cases imposes. Indeed it is

> matter of doubt whether it is intended, from the cases, to go farther than the principle as I have stated it. The doctrine proceeds upon the idea that a court of equity, independent of any express contract, will raise upon the conscience of the purchaser an obligation to indemnify the mortgagor against his liability on the mortgage; but to what extent? Certainly not beyond the land purchased."

It will be observed from this case that the whole theory of the principle governing such matters rests entirely upon antecedent liens. The personal obligations of the purchaser of the equity of redemption, created after the purchase, are in no wise involved. That is the situation in this case and that is the point which the Court below overlooked.

III.

If the Court shall find there is no express contract to pay the taxes, or the principal of the mortgage, there is clearly an implied agreement on the part of the owner of the equity of redemption so to do. Where a mortgage contains the provision for foreclosure for non-payment of taxes, there is an implied agreement on the part of the mortgagor to pay them.

Bonner Springs Co. v. McClelland, 59 Kan. 778; 53 Pac. 866.

In *Hogg v. Longstreth,* 97 Pa. 255, a mortgage was given to the plaintiff covering certain premises.

By various conveyances each of which recited that the property was conveyed subject to the mortgage, the premises were finally transferred to the defendant. While the defendant held title he paid none of the taxes assessed against the property. The mortgage being in default, a *scire facias* was issued by the mortgagee, the premises sold and bought in by him. The plaintiff then paid the taxes and brought an action of assumpsit against defendant to recover the amount of the said taxes. The Court decided that the mortgagee was entitled to recover and said in its opinion:

> "There is no evidence that defendant agreed to pay the mortgage debt. Hence he was not personally liable therefor, and was under no obligation to plaintiff arising out of a contract * * *. Being in possession, he was not only legally liable, but had no equity for the attempt to impose payment of the taxes on another person * * *.
>
> Therefore, the plaintiff had no alternative but to pay the taxes owing by defendant, or lose the land. Had the taxes been prosecuted to collection before the foreclosure of the mortgage the plaintiff must have paid them or have lost his security. A mortgagee in possession, holding a living pledge may pay the taxes on the land, and treat the sum so paid as part of his debt, which he is entitled to receive out of the profits. When the mortgagor is in possession, and neglects to pay taxes which are a lien on the land, the mortgagee may pay them not

only in reliance on the personal liability of the owner, but in reliance that the land is liable, and the lien will be deemed as transferred by the State to him in favor of the mortgage debt * * *.

There was a strict legal liability on defendant to pay the taxes. And it was his duty. Prompt payment of taxes is to the public advantage. Attempts by him who owes and ought to pay them, to evade payment, or shift the burden upon another, ought not to be encouraged. The defendant has shown nothing which in good conscience should relieve him. He wittingly became owner and held possession of the lots subject to the mortgages and had as little right to create or suffer an encumbrance which would take preference of the mortgage as the mortgagor would have had, had he remained owner and in possession. The mortgagee was compelled to pay the taxes in relief of the land purchased for his debt, the land not raising a fund sufficient to pay both liens. We are of the opinion this is a clear case for the application of the principle, that he who is compelled to pay another's debt, because of his omission to do so, may recover on the ground that the law infers that the debtor requested such payment."

Keener says:

"So in Graham v. Dunnigan it was held that a life tenant, who had been compelled, in order

to protect her interest, to pay taxes which should have been paid by the defendant, could recover from him the money so paid.''

2 Bosw. 516;

Keener on Quasi-Contracts, 390.

Fidelity Insurance Trust and Safe Deposit Co., Trustee, v. Second Phoenix B. & L. Assn., 17 Pa. Super. 270, expressly holds there is a liability to pay these taxes either upon the relationship of mortgagor and mortgagee or upon the contract existing between them and counted upon in this suit.

In conclusion, if the property was permitted to become encumbered, by an act of the defendant, whether that act be one of omission or commission, then the defendant may be compelled to pay such sum as will reimburse the plaintiff for her loss. The measure of that loss in this case is the amount of unpaid taxes, up to the date of the sale under the foreclosure proceedings, with interest. These taxes became an encumbrance, and hence decreased the value of the said premises by the failure of the defendant to pay same in accordance with its express and implied covenants in said three papers.

The plaintiff is not asking that defendant should pay the deficiency in the foreclosure proceeding nor to recover beyond the value of the mortgaged premises. The agreement restricts the liability of the defendant to the value of the premises, but does not disturb the obligation to pay, nor provide for the return of the premises. Immediately upon the failure of the defendant to pay the taxes the value

was impaired so that when the premises were sold under the execution in foreclosure, plaintiff did not receive the value of the mortgaged premises, but that value was diminished by the amount of the unpaid taxes which defendant had agreed to pay. If the liability of the defendant under the contract was limited to the return of the mortgaged premises, the contract would have so stated, but the return of the mortgaged premises and the value of the mortgaged premises are different things.

In this time of depression much is said about the hardship attached to those who have to make good on contracts made by them in payment of purchases at high figures, but one listens in vain for the voice which suggests those who have taken enormous profits should now disgorge to the poor misled mortal who paid when payment was easy.

This case, however, is not one to compel the performance of a contract of those days of easy money so much as it is to compel one to be ordinarily honest. One should not be permitted to "milk" a property in the time of plenty and pocket the upkeep to the disadvantage of the mortgagee, and if the law is such that some protection cannot be given, then indeed has the spirit of the common law fallen before these days of constitutional regardlessness and special privileges.

The statement does disclose a cause of action upon both counts and if established would have entitled the plaintiff to judgment, and this case having been decided on a motion to strike, which takes the place of the old demurrer, the facts shown are such that

there should have been a judgment for the plaintiff instead of for the defendant, and that should now be the order if the cause of action is sustained. See *Allen v. Allen,* 76 N. J. Eq. 245-249.

Respectfully submitted,

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there should have been a judgment for the plaintiff instead of for the defendant, and that should also be the order if the cause of action is sustained. See *Allen v. Allen*, 76 N. J. Eq. 245-249.

Respectfully submitted,

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