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NOTICE OF PROPOSED ENTRY OF JUDG-
MENT BY CONFESSION ON BOND AND
WARRANT WHERE MORTGAGE HAS
BEEN FORECLOSED AND A DE-
FICIENCY HAS ARISEN.

*To David H. Best and Harry Best, or to whom it
may concern:*

10

Take notice that Rosa E. Gerstley, as plaintiff,
intends to commence action in the Atlantic County
Circuit Court to enter a judgment in her favor and
against said David H. Best and Harry Best, as
defendants, for the sum of \$764.13, on a bond of
the said David H. Best and Harry Best, dated the
6th day of August, 1923, in the penal sum of \$30,000
conditioned for the payment of the just sum of \$15,-
000, which bond was accompanied by a mortgage
dated even date with said bond and recorded in the
office of the clerk of Atlantic County, at Mays Land-
ing, New Jersey, on the 14th day of August, 1923,
in Book of Mortgages No. 270, page 473, &c. The
lands and premises described in said mortgage above
referred to are as follows:

20

All that lot, tract or parcel of land and prem-
ises hereinafter particularly described, situate,
lying and being in the City of Atlantic City,
County of Atlantic and State of New Jersey:

BEGINNING at a point in the North line of 30
Oriental Avenue twenty six feet west of the
westerly line of Seaside Avenue and runs thence
(1) westwardly, along the said Northerly line
of Oriental Avenue twenty four feet; thence
(2) northwardly, and parallel with Seaside Ave-
nue seventy five feet; thence (3) eastwardly,

2 *Notice of Proposed Entry of Judgment by
Confession on Bond and Warrant*

and parallel with Oriental Avenue twenty four feet; thence (4) southwardly, and parallel with Seaside Avenue seventy five feet to the place of beginning.

In witness whereof I have hereunto set my hand and seal this 17th day of June, 1929.

ROSA E. GERSTLEY. (Seal)

Signed, sealed and delivered in the presence of

10 SAMUEL GERSTLEY.

HELEN E. BROGAN.

Received, recorded and filed June 24, 1929, at
9 A. M.

WILLIAM A. BLAIR,
Clerk.

Chancery Notice, Book No. 6, page 464.

ORDER OF SUPREME COURT COMMIS-
SIONER FOR THE ENTRY OF
JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

ROSA E. GERSTLEY,
Plaintiff, }
v. } Action at Law.
DAVID H. BEST and HARRY } On Bond and War-
BEST, } rant of Attorney.
Defendants. }

10

20

The defendants' appearance in the above matter is entered and judgment confessed to the plaintiff for the sum mentioned in the annexed obligation, by virtue of a warrant of attorney thereunto annexed, pursuant to the directions of the act entitled, "An Act directing the mode of entering judgments on bonds and warrants of attorney to confess judgment."

Whereupon it is considered that the said Rosa E. Gerstley do recover against the said David H. Best and Harry Best the sum of thirty thousand dollars (\$30,000) debt and \$10.50 costs of suit. 30

Judgment signed this 22nd day of June, 1929.

ANTHONY J. SIRACUSA,
Supreme Court Commissioner.

AFFIDAVIT OF PLAINTIFF.

ATLANTIC COUNTY CIRCUIT COURT.

10	ROSA E. GERSTLEY, <i>Plaintiff,</i> v. DAVID H. BEST and HARRY BEST, <i>Defendants.</i>	}	Action at Law. On Bond and War- rant of Attorney. Affidavit.
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20 STATE OF PENNSYLVANIA, }
 COUNTY OF PHILADELPHIA, } ss.

ROSA E. GERSTLEY, of full age, being duly sworn according to law, on her oath deposes and says:

1. That she is the plaintiff in the above-stated cause; that the sum of \$764.13 is justly and honestly due to her from David H. Best and Harry Best, the above-named defendants, the same being the balance of the principal, interest and costs on a
 30 bond dated the 6th day of August, 1923, and given by the said David H. Best and Harry Best to Rosa E. Gerstley in the penal sum of \$30,000 conditioned for the payment of \$15,000 at the expiration of three years from the date thereof, together with interest thereon at the rate of 6% per annum, a copy of which bond is annexed hereto and made a part hereof.

2. The true consideration of said bond was the sum of \$15,000 lent by the deponent to the said David H. Best and Harry Best.

3. That said bond was accompanied by a mortgage dated even date therewith, made and executed by said David H. Best to deponent, Rosa E. Gerstley, which mortgage was recorded in the office of the Clerk of Atlantic County in Book of Mortgages No. 270, page 473, &c., covering the following described lands and premises: All that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey: 10

BEGINNING at a point in the north line of Oriental Avenue twenty six feet west of the westerly line of Seaside Avenue and runs thence (1) westwardly, along the said northerly line of Oriental Avenue twenty four feet; thence (2) northwardly, and parallel with Seaside Avenue seventy five feet; thence (3) Eastwardly, and parallel with Oriental Avenue twenty four feet; thence (4) Southwardly, and parallel with Seaside Avenue seventy five feet to the place of beginning. 20

4. Deponent further says that such proceedings were had in the New Jersey Court of Chancery of New Jersey, whereby the above-described premises were sold and \$16,000 was bid therefor. This judgment is entered for the sum of \$764.13, being the deficiency arising out of the sale aforesaid, together with interest thereon, after giving the defendants credit for \$16,000 paid at said sale. 30

5. Deponent further says that judgment is not

6 *Bond from David H. Best and Harry
Best to Rosa E. Gerstley*

confessed in favor of said plaintiff and against the said defendants, David H. Best and Harry Best, to answer any fraudulent intent or purpose or to protect the property of the said defendants from the other creditors of said defendants.

ROSA E. GERSTLEY.

Sworn and subscribed before me this 17th day
10 of June, 1929.

(Seal)

MARTHA H. QUINN,
*A Foreign Commissioner of
of Deeds for New Jersey
in Pennsylvania.*

BOND FROM DAVID H. BEST AND HARRY
BEST TO ROSA E. GERSTLEY.

20 KNOW ALL MEN BY THESE PRESENTS that
we, David H. Best and Harry Best, both of the
city of Atlantic City, County of Atlantic and State
of New Jersey (hereinafter called the Obligors) are
held and firmly bound unto Rosa E. Gerstley, of
the city and County of Philadelphia and State of
Pennsylvania, (hereinafter called the obligee) in
the sum of Thirty thousand dollars lawful money of
the United States of America, to be paid to the said
Obligee, her certain attorney, executors, adminis-
30 trators or assigns, to which payment well and truly
to be made we do hereby bind and oblige ourselves,
our heirs, executors and administrators and every
of them, firmly by these presents. Sealed with our
seals dated the sixth day of August, in the year of
our Lord one thousand nine hundred and twenty
three (1923).

The Condition of this Obligation is such that if the above bounden Obligors, their heirs, 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 Fifteen thousand dollars, like lawful money as aforesaid at the expiration of three years from the date hereof, 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 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 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; and shall and will keep the buildings erected and to be erected upon the said lands insured against loss or damage by fire 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, without any fraud or further delay; then the above obligation to be void, or else to be and remain in full force and virtue.

10 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 for the space of thirty days after any semi-annual payment thereof shall fall due, then and
20 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.

30 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 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 affecting such insurance and the amount paid for such taxes, assessments and charges as aforesaid,

9

David H. Best	Seal
Harry Best	Seal

10

Esq.

20

David H. Best seal.
Harry Best seal.

30

William A. Blair, Clerk.

JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.
MAY TERM, 1929.

10	ROSA E. GERSTLEY, <i>Plaintiff,</i> v. DAVID H. BEST and HARRY BEST, <i>Defendants.</i>	}	Action at Law. In Debt on Bond and Warrant of Attorney. Cassman & Gottlieb, Attys.
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20 Judgment in an action in debt on bond and war-
rant was rendered in favor of the plaintiff, Rosa
E. Gerstley, and against the defendants, David H.
Best and Harry Best, for the sum of thirty thou-
sand dollars \$30,000.00
damages and ten dollars and fifty cents 10.50
costs of suit.

Whole amount of debt, damages and
costs, Thirty thousand ten dollars and
fifty cents \$30,010.50

30 Filed and entered June 25, 1929, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

See order filed Sept. 7, 1929, at 9 A. M.
See order filed Sept. 13, 1929, at 9 A. M.
See Judge's opinion filed Nov. 26, 1929.
Order affirming judgment filed Nov. 29, 1929.
Execution issued Nov. 29, 1929.
Circuit Court Judgment Book No. 15, page 470.

PETITION.

ATLANTIC COUNTY CIRCUIT COURT.

ROSA E. GERSTLEY, <i>Plaintiff,</i> v. DAVID H. BEST and HARRY BEST, <i>Defendants.</i>	}	Action at Law. On Bond and War- rant of Attorney. Petition.	10
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To the Honorable Judge of the Circuit Court of At- 20
lantic County, New Jersey:

Your petitioner, Harry Best, of Atlantic City, New Jersey, respectfully shows that:

1. On June 22, 1929, judgment was signed in the above-stated cause by a Supreme Court Commissioner for \$30,000 debt and \$10.50 costs of suit, and said judgment was filed in the Clerk's Office of Atlantic County, New Jersey, on June 25, 1929, at 9 A. M. A copy of said judgment marked Exhibit A 30 is hereto annexed and made a part hereof.

2. The affidavit on which said judgment is founded bears date June 17, 1929, and a copy of said affidavit marked Exhibit B is hereto annexed and made a part hereof.

3. Annexed hereto and made a part hereof is a copy of the bond and warrant to confess judgment referred to in said affidavit. Said copy is marked Exhibit C.

4. On June 24, 1929, at 9 A. M. there was filed in the office of the Clerk of Atlantic County, New Jersey, notice of intention to enter judgment. A copy of the body of said notice is hereto annexed, marked
10 Exhibit D and is made a part hereof.

5. On August 6, 1923, David H. Best executed a bond, copy of which is annexed and marked Exhibit C, to Rosa E. Gerstley for \$15,000 payable at the expiration of three years from said date together with interest thereon at the rate of six per cent per annum, payable semi-annually and in connection with said bond and as security for the payment thereof, the said David H. Best made and executed
20 to the said Rosa E. Gerstley a mortgage bearing even date with said bond and made payable at the expiration of three years from said date, together with interest thereon at the rate of six per cent per annum, payable semi-annually, said mortgage covering premises situate in the City of Atlantic City, in the County of Atlantic and State of New Jersey, and described as follows:

BEGINNING at a point in the Northerly line of Oriental Avenue, 26 feet West of the Westerly line
30 of Seaside Avenue, and extending thence (1) Westwardly, along the said Northerly line of Oriental Avenue, 24 feet; thence (2) Northwardly, parallel with Seaside Avenue, 75 feet; thence (3) Eastwardly, parallel with Oriental Avenue, 24 feet; thence (4) Southwardly, parallel with Seaside Avenue, 75 feet to the place of beginning.

Said mortgage was recorded in the Clerk's Office of Atlantic County, New Jersey, in Book 270 of Mortgages, page 472, and said bond and said mortgage are the same bond and mortgage referred to in the aforesaid affidavit made by Rosa E. Gerstley.

6. The title to the mortgaged premises at the time of the execution of said bond and mortgage was in the said David H. Best and petitioner became a party to said bond and executed the same in the 10 capacity of a surety.

7. On May 1, 1926, by deed of that date and recorded in said Clerk's Office on June 21, 1926, in Book 834 of Deeds, page 6, said David H. Best conveyed the mortgaged premises to Moe Zager.

8. On August 7, 1926, the said Rosa E. Gerstley and Moe Zager, without the knowledge or consent of petitioner, entered into a written agreement extending the time for the payment of the principal of said bond and mortgage for a period of three years from August 6, 1926, and making other changes in the terms and conditions of said instruments. A copy of said agreement marked Exhibit E is hereto annexed and made a part hereof. 20

9. On August 12, 1926, and as a result of the extension agreement set forth in the next preceding paragraph said Moe Zager executed and delivered 30 to said Rosa E. Gerstley, and said Rosa E. Gerstley accepted a bond in the sum of \$30,000. A copy of said bond marked Exhibit F is hereto annexed and made a part hereof.

10. At the time of the expiration of the term of said bond and mortgage as originally provided

therein, the mortgaged premises had a valuation considerably in excess of the amount of said mortgage, and the same at public sale at that time or within the time thereafter which would have been needed to foreclose said mortgage, would have brought a sum sufficient to pay the amount due for principal and interest plus foreclosure expenses. During said extended period said premises had depreciated in value because of the condition of the building and by
10 the general decline and state of the real estate market in Atlantic City.

11. Petitioner prays that an order may be made opening said judgment, vacating and setting aside the same as far as this petitioner is concerned and that such other and further order be made and such further relief be granted to the petitioner as shall be proper and just.

BABCOCK & CHAMPION,
Attorneys for Petitioner.

20

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } ss.

HARRY BEST, of full age, being duly sworn according to law, deposes and says:

30 1. I am the petitioner in the foregoing petition. All of the facts set forth in said petition as far as they relate to my own acts, are true, and as far as they relate to the acts of others, I verily believe them to be true.

2. Particularly is it true that on June 22, 1929, judgment was entered in the Atlantic County Cir-

cuit Court for \$30,000 debt and \$10.50 costs against David Best and me as set forth in paragraph 1 of said petition and as disclosed by Exhibit A attached thereto.

3. Copy of said judgment marked Exhibit A, copy of affidavit marked Exhibit B, copy of the bond and warrant marked Exhibit C, copy of notice of intention marked Exhibit D, annexed to said petition are true copies of the respective instruments. 10

4. At the time of the execution of said bond and warrant the title to the premises described in said petition and in the mortgage securing the payment of said bond was in David H. Best and I signed the bond as surety. On May 1, 1926, David Best conveyed the said premises to Moe Zager. On August 7, 1926, Rosa E. Gerstley and Moe Zager without my knowledge or consent entered into a written agreement extending the time for the payment of 20 principal of said bond and mortgage for a period of three years from August 6, 1926, and making other changes in the terms and conditions of said instruments. Exhibit E annexed to said petition is a true copy of said agreement.

5. On August 12, 1926, as a result of said extension agreement, Moe Zager executed and delivered to said Rosa E. Gerstley and said Rosa E. Gerstley accepted a bond of \$30,000 of which Exhibit F an- 30 nexed to the petition is a true copy.

6. At the time of the expiration of the term of said bond and mortgage as provided therein, the mortgaged premises had a valuation in excess of the amount of said bond and mortgage and the same at

public sale at that time or within such time as would have been required to foreclose said mortgage, would have brought a sum sufficient to pay the amount due for principal and interest and foreclosure expenses.

7. During the time of the extended period for the payment of said mortgage, said premises depreciated in value by reason of the condition of the building and by the general decline in the real estate
10 market in Atlantic City.

HARRY BEST.

Sworn and subscribed to before me this 6th day of September, 1929.

CHAS. M. DEULL,
*Attorney-at-Law State
of New Jersey.*

20

NOTE: Exhibits A, B, C and D are printed as a part of the judgment record above and are omitted by consent as exhibits annexed to petition.

EXHIBIT E.

AGREEMENT made this 7th day of August 1926,
30 between Rosa E. Gerstley of the City and County of Philadelphia, State of Pennsylvania, party of the first part, and Moe Zager, of the City of Atlantic City, County of Atlantic, State of New Jersey, party of the second part, in consideration of the premises and the mutual premises hereinafter set forth, as well as and for the sum of One Dollar (\$1.00) by

each party to the other hereto in hand paid, the receipt whereof is hereby acknowledged.

WITNESSETH:

1. The party of the first part is the present holder of a certain Bond to secure the payment of the just sum of \$15,000 made and executed by David H. Best and Harry Best, both of Atlantic City, New Jersey, to Rosa E. Gerstley, dated the 6th day of 10
August, 1923, which is secured by a mortgage bearing like date on premises situate and known as No. 223 Oriental Avenue, Atlantic City, New Jersey, bounded and described as follows:

BEGINNING at a point in the North line of Oriental Avenue, twenty-six feet West of the Westerly line of Seaside Avenue, and runs thence (1) Westwardly, along the said Northerly line of Oriental Avenue, twenty-four feet; thence (2) 20
Northwardly, and parallel with Seaside Avenue, seventy-five feet; thence (3) Eastwardly, and parallel with Oriental Avenue, twenty-four feet; thence (4) Southwardly, and parallel with Seaside Avenue, seventy-five feet to the place of beginning.

BEING the same premises conveyed to David H. Best from Helene Goldman, et vir, by deed dated May 19th, A. D. 1922 and recorded in the Clerk's Office of Atlantic County at May's Landing, New Jersey, in Book No. 677 of Deeds, folio 463, &c.

30

2. The party of the second part is the present owner of the premises so mortgaged and has requested the party of the first part to extend the time for the payment of the said bond and mortgage.

3. The party of the first part has consented to extend the time for the payment of the said bond

and mortgage upon the terms hereinafter set forth, and upon the agreement of the party of the second part to do and perform what is hereinafter specified.

4. The terms, conditions, covenants and stipulations of this agreement of extension are as follows:

10 (a) The interest to be paid on the aforesaid bond from and after the 6th day of August, 1926, until the expiration of the term next hereinafter specified, shall remain at the rate of six per cent. per annum.

(b) The principal of the said bond will not be paid nor tendered to be paid by the Obligor or owner of the mortgaged premises for the term of three years from the 6th day of August, 1926.

20 (c) The party of the first part will not demand payment of the principal of said bond during the said extended term, if interest be paid semi-annually on the 6th day of February and August of each and every year, if receipts for all taxes and water rents assessed on the mortgaged premises shall have been presented on or before the 1st day of June and the 1st day of December of each and every year, and if the said party of the second part will fully comply with all of the other terms and conditions contained in said bond and mortgage.

30

(d) The party of the second part guarantees the prompt payment of the interest and principal of said bond so secured together with all taxes and water rent assessed as aforesaid and the compliance with all the other terms and conditions in said bond and mortgage contained; aforesaid.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

Rosa E. Gerstley (seal)

Moe Zager (seal)

SIGNED SEALED & DELIVERED

IN THE PRESENCE OF

ANNA M. LAST AS TO ROSA E. GERSTLEY

C. J. MITCHELL AS TO MOE ZAGER.

STATE OF PENNSYLVANIA CITY & COUNTY 10

OF PHILADELPHIA, SS.

BE IT REMEMBERED, that on this 7th day of August, in the year of our Lord, one thousand nine hundred and twenty-six, before me the subscriber, a Notary Public personally appeared Rosa E. Gerstley, who, I am satisfied is the person named in and who executed the foregoing instrument, and I having first made known to her the contents thereof, she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the 20
uses and purposes therein expressed. All of which is hereby certified.

ANNA M. LAST (SEAL)

NOTARY PUBLIC.

MY COMMISSION EXPIRES FEBRUARY 3, 1929

IN THE COURTS OF COMMON PLEAS OF
PHILADELPHIA COUNTY.

STATE OF PENNSYLVANIA COUNTY OF
PHILADELPHIA, SS.

30

I, John M. Scott, Prothonotary, of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer au-

thorized by the laws of the State of Pennsylvania, to make the following Certificate, acting by my Principal Deputy, William J. Kerns, or my Second Deputy, Meredith Hanna do certify, that Anna M. Last Esquire, whose name is subscribed to the certificate of the acknowledgment of the annexed instrument and thereon written, was at the time of such acknowledgment a Notary Public for the Commonwealth of Pennsylvania, residing in the County
10 aforesaid, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of Deeds or conveyances for lands, tenements and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts, as such, full faith and credit are and ought to be given as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe the signature thereto is genuine, and I further certify that
20 the said Instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

THE impression of the seal of the Notary Public is not required by law to be filed in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 13th day of September in the year of our Lord one thousand nine hundred and twenty-six (1926).

30 JOHN M. SCOTT PROTHONOTARY (SEAL)
BY WM. J. KERNS PRINCIPAL
DEPUTY PROTHONOTARY.
DURANTE ABSENTIA SECUNDUM LEGEM.

STATE OF NEW JERSEY COUNTY OF ATLANTIC, SS.

BE IT REMEMBERED, that on this Seventh day of August, in the year of our Lord, one thousand nine hundred and twenty-six, before me, the subscriber, a Notary Public in and for New Jersey, personally appeared Moe Zager, who, I am satisfied is the person named in and who executed the foregoing instrument, and I having first made known to him 10 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. All of which is hereby certified.

MARGARET GREENSTEIN (SEAL)

Received and recorded Sept. 14, 1926 at 9 A. M.

William A. Blair, Clerk, M. S.

Mortgage Book #425, page 227 to 229

20

EXHIBIT F.

KNOW ALL MEN BY THESE PRESENTS, that I, MOE ZAGER, of the City of Atlantic City, County of Atlantic and State of New Jersey (hereinafter called the Obligor) am held and firmly bound unto ROSA E. GERSTLEY, of the City of Philadelphia, County of Philadelphia, and State of Pennsylvania (hereinafter called the Obligee), in the sum of Thirty Thousand Dollars (\$30,000.00) lawful 30 money of the United States of America, to be paid to the said obligee, her certain Attorney or Attorneys, heirs, executors, administrators or assigns; to which payment, well and truly to be made, I, the said Obligor do hereby bind and oblige myself, my heirs, executors, administrators and assigns, and every of them, firmly by these presents.

Sealed with my seal dated the 12th day of August, 1926.

WHEREAS, David H. Best and Harry Best, of the City of Atlantic City, County of Atlantic and State of New Jersey made and executed their certain bond in the sum of Fifteen Thousand Dollars (\$15,000.00) dated August 6, 1923 in favor of the Obligee herein, secured by a certain mortgage upon premises 223 Oriental Avenue, Atlantic City, County
10 of Atlantic, State of New Jersey, and recorded in the Atlantic County Clerk's Office at Mays Landing, New Jersey, on August 14, 1923 in Book of Mortgages 270 page 473, etc., and

WHEREAS, the above named Obligee is now the owner of said premises 223 Oriental Avenue, Atlantic City, New Jersey, the Obligor and Obligee herein have agreed to extend the aforesaid mortgage for a period of three (3) years from August 6, 1926 all the remaining terms and conditions in
20 said bond and mortgage contained to be and remain in full force and virtue, and

WHEREAS, the above named Obligor has agreed to execute and deliver his bond to the said Obligee as collateral security for the repayment of the principal sum set forth in said mortgage, together with interest at the rate of six per cent. per annum at the times set forth in said mortgage extended as aforesaid,

NOW THEREFORE, the condition of this obligation is such that if David H. Best and Harry Best
30 of the City of Atlantic City, County of Atlantic, State of New Jersey, their heirs, executors, administrators or assigns, or the above bounden Obligor, his heirs, executors, administrators or assigns, or any of them, shall and do well and truly pay or cause to be paid unto the above bounden Obligee, her certain attorney or attorneys, heirs, executors,

administrators or assigns, the just sum of Fifteen Thousand Dollars (\$15,000.00) like lawful money as aforesaid, on August 6, 1929 as expressed in said mortgage extended as aforesaid, and shall pay all taxes, assessments and charges in the nature thereof which may be laid, levied or assessed upon the lands described in said mortgage, immediately upon their assessment; and produce to the said Obligee, her heirs, executors, administrators or assigns, receipts for all taxes, assessments and charges in the nature thereof, laid, levied or assessed upon the said mortgaged premises, within sixty days after the same shall become due and payable without any fraud or further delay and shall do and perform all the terms and conditions in said bond and mortgage set forth, then the above obligation to be void, otherwise to be and remain in full force and virtue. 10

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 receipts as herein provided and conditioned as aforesaid, or in payment of said taxes, assessments and charges as herein provided as aforesaid, or if at any time default shall be made in payment of interest as aforesaid 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 said obligor shall have the option of either paying such sum or sums of money as may be in default, or he may pay the principal debt remaining due and all interest and charges thereon, and take or cause to be taken an assignment of said mortgage at his own costs and expense, provided, however, that the said obligor is notified in writing of said default within ten days thereof. 20 30

AND PROVIDED FURTHER that in default of the payment of taxes, assessments and charges as

aforesaid, the said obligee, her heirs, executors, administrators or assigns, shall have the option to pay such taxes, assessments and charges, and the amount so paid shall be added to the principal monies hereby secured with legal interest in like money.

It is the intention and purpose of this Bond or obligation to fully protect, indemnify and guarantee the said ROSA E. GERSTLEY, her heirs, executors, administrators or assigns, against any loss by reason
10 of the non-payment of principal and interest as set forth in the mortgage hereinbefore described.

MOE ZAGER (SEAL)

SEALED AND DELIVERED
IN THE PRESENCE OF
MARGARET GREENSTEIN

TO ESQ.

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

20 This is to authorize you to appear for me 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 12th day of August, Anno Domini one thousand nine hundred and twenty-six.

30 MOE ZAGER (SEAL)

SEALED AND DELIVERED
IN THE PRESENCE OF
MARGARET GREENSTEIN

Commission Expires 5/7/29
(SEAL)

Margaret Greenstein
Notary Public
New Jersey"

It is further ordered that an uncertified copy of this order be served upon the said Rosa E. Gerstley or her attorneys within five days from the date hereof, and that the said petitioner have the right to take testimony in support of his said petition to be used upon the return of this order, upon at least two days notice to the said Rosa E. Gerstley or her attorneys and that the said Rosa E. Gerstley likewise have the right to take testimony to be used
10 upon the return of this order upon at least two days notice to the petitioner or his attorneys.

It is further ordered that the execution of said judgment be stayed until the further order of this Court.

W. F. Sooy,
C. C. J.

DEPOSITIONS.

ATLANTIC COUNTY CIRCUIT COURT.

ROSA E. GERSTLEY, <i>Plaintiff,</i>	}	Action at Law. On Petition to Open Judgment. Depositions.	10
v.			
DAVID H. BEST and HARRY BEST,			
<i>Defendants.</i>			

Depositions taken before Claude W. Myrose, Supreme Court Examiner, at his office 45 Real Estate & Law Building, on October 22, 1929, at nine-fifteen o'clock in the forenoon, in the presence of Harry Gottlieb, Esq., of Messrs. Cassman & Gottlieb, attorneys for plaintiff, and Louis D. Champion, Esq., of Messrs. Babcock & Champion, attorneys for defendant Harry Best and Charles Deull, Esq., attorney for defendant David H. Best. 20

It is stipulated and agreed between counsel for the plaintiff and counsel for the defendants that the following papers annexed to the petition of Harry Best filed in the above stated cause are true copies of the respective papers mentioned, may be considered in evidence and may be used upon the argument of the rule to show cause as exhibits in the cause; namely, a copy of the judgment entered in the above cause, being Exhibit A; a copy of the 30

affidavit upon which the judgment was founded, being Exhibit B; and a copy of the bond and warrant to confess judgment, being Exhibit C; and a copy of the notice of intention to enter judgment, filed in the clerk's office of Atlantic County, being Exhibit D; copy of agreement of August seventh, 1926, made between Gerstley and Zager, marked Exhibit E; copy of bond from Zager to Gerstley marked Exhibit F.

10

Mr. Champion: I offer in evidence abstract of South Jersey Title Company of deed from Helene Goldman and Lehman, her husband, to David H. Best, dated May 19, 1922, recorded in Book 677 of Deeds page 463 conveying premises beginning at a point in the north line of Oriental Avenue 26 feet west of the west line of Seaside Avenue; (1) west 24 feet by (2) north, 75 feet, being the same premises as are described in the petition above mentioned.

20

(The paper was marked Exhibit G.)

Mr. Champion: I offer in evidence abstract of the South Jersey Title Company of deed from David H. Best, single man, to Moe Zager, dated May 1, 1926, recorded in Book 834 of Deeds, page 6, conveying premises on Oriental Avenue described in the petition of said Harry Best above referred to.

30

(The paper was marked Exhibit H.)

Mr. Champion: I offer in evidence abstract of the South Jersey Title Company of mortgage made by David H. Best to Rose E. Gerstley for \$15000, dated August 6, 1923, mortgaging premises on Ori-

ental Avenue, being the same premises referred to in the petition of Harry Best, which mortgage was recorded in Book 270 of Mortgages, page 472.

(The paper was marked Exhibit I.)

HARRY BEST, sworn.

10

Direct examination.

By Mr. Champion:

Q. Mr. Best, what is your business?

A. Trucking.

Q. Have you had any experience in the real estate business in Atlantic City?

A. I have.

Q. Over how long a period of years?

20

A. Good many years. 25 years.

Q. During that time have you bought and sold real estate in Atlantic City?

A. I have.

Q. Are you familiar with premises on Oriental Avenue beginning in the north line of Oriental Avenue 26 feet west of Seaside Avenue, thence extending west along Oriental Avenue 24 feet by north parallel with Seaside Avenue 75 feet; thence east, parallel with Oriental Avenue 24 feet; and thence south, parallel with Seaside Avenue 75 feet to the place of beginning?

30

A. Yes, sir.

Q. What is the number of that property?

A. 223.

Q. 223 Oriental Avenue?

A. Yes, sir.

Q. Had you anything to do with the construction of that property?

A. Yes, sir, I built it.

Q. When did you build it?

A. 1923.

Q. What time in 1923?

A. In May.

10 Mr. Gottlieb: We object to the entire line of testimony that may be offered on behalf of the defendant Harry Best as to the value of the property, on the ground that the said line of testimony is irrelevant, immaterial and incompetent.

Q. What was the cost of the building, Mr. Best?

A. Pretty close to \$18,000.

Q. What was the cost of the lot?

20 A. \$8500. It cost more than \$8500. I kept it a year and a half and paid taxes and interest.

Q. There was a mortgage placed upon this property in August of 1923, by Mr. Best to Rosa E. Gerstley for \$15,000. Directing your attention to the value of the property at that time, what do you say was the value?

A. I was offered \$25,000 for it.

30 Mr. Gottlieb: So there will be no doubt about it, we want specifically to object to this line of testimony. We object to that question.

Q. Not what you were offered for it, but what was the value of this property in August, 1923?

A. \$18,000 and \$8500. That is all I know. That is what it cost.

Q. Now, directing your attention to August of 1926, what was the value of the property?

A. About \$19,000.

Q. How do you explain the difference in value of \$25,000 in 1923 and its value of \$19,000 in 1926?

Mr. Gottlieb: That is objected to.

A. Properties had come down.

Q. What was the value of the property in 1929?

Mr. Gottlieb: That is objected to.

10

A. About \$16,000. It was sold at sheriff's sale for fifteen or sixteen thousand dollars, I don't know which.

Q. Now, Mr. Best, on August 7, 1926, there was an agreement made between Rosa E. Gerstley and Moe Zager, extending the time for payment of the mortgage given in August of 1923 for the period of three years. Had you any knowledge of the execution and delivery of that extension agreement?

20

Mr. Gottlieb: We object to that.

A. I didn't know anything about it. Never knew it was sold.

Cross-examination.

By Mr. Gottlieb:

30

Q. Were you present at the sheriff's sale when the property was sold, Mr. Best?

A. Yes.

Q. You had knowledge of the sale?

A. I think it was sold for \$15,200. I don't remember now.

Q. You had knowledge of the sale?

A. Knowledge of the sale? Yes, I was there.

Q. How long before the sale did you know it was going to be sold by the sheriff?

A. I couldn't tell you that.

Q. Well, you were present?

A. Yes, sir.

Q. Did you take part in the bidding?

A. No.

10

MORRIS FINKELSTEIN, SWORN.

Direct examination.

By Mr. Champion:

Q. Mr. Finkelstein, what is your business?

20

A. Real estate and insurance.

Q. Where do you practice your profession?

A. 177 South Virginia Avenue.

Q. In Atlantic City?

A. Yes, sir.

Q. How long have you been in the real estate business?

A. The last ten years.

Q. Are you familiar with the premises 223 Oriental Avenue, Atlantic City?

30

A. I am.

Q. How long have you known that property?

A. Since 1923.

Q. Since the time of its construction?

A. The time it was built, yes.

Q. Have you bought and sold properties in that vicinity?

A. Not on Oriental Avenue, but the uptown section I have.

Q. Are you familiar with the values of properties in that neighborhood?

A. I am. I think so.

Q. Were you familiar with the values of properties there in 1923?

A. Yes.

Q. What do you say was the value of that property in August of 1923? 10

Mr. Gottlieb: I object to the question and I object to any line of testimony by this witness as to the value of that property at any time as incompetent, irrelevant and immaterial.

A. \$25,000.

Q. Do you know what the value of this property was in August of 1926?

A. I should judge it was worth about \$18,500. 20

Q. What would you consider the value in August, 1929?

A. Not over \$16,000 or \$16,500, at the most.

(No cross-examination.)

MORRIS J. SASLAF, SWORN.

30

Direct examination.

By Mr. Champion:

Q. Mr. Saslaf, what is your profession?

A. Real estate and insurance.

Q. How long have you been engaged in the real estate and insurance business?

A. 11 years.

Q. In Atlantic City?

A. In Atlantic City.

Q. Are you familiar with the premises 223 Oriental Avenue, Atlantic City?

A. I am.

Q. How long have you known that property?

10 A. Since it was built. I had charge of it when it was built.

Q. Were you familiar with the values of property in that vicinity in 1923?

A. Yes, sir.

Q. What would you say was the value of that property in August of 1923?

20 Mr. Gottlieb: I make the same objection there as to the testimony of Mr. Finkelstein as to the value of the property. It has no place in this case, it is incompetent, irrelevant and immaterial.

A. I should say around \$23,000.

Q. Were you familiar with the values of property in that vicinity in August, 1926?

A. Yes.

Q. What would you say was the value of this property on August 6, 1926?

30 Mr. Gottlieb: I object to the entire line of testimony as to the value of this property by this witness.

A. I should say around \$18,000 to \$18,500.

Q. Were you familiar with the values of property in 1919?

A. Yes.

Q. What would you say was the value in August, 1919?

A. From \$15,000 to \$15,500.

DAVID H. BEST, sworn.

10

Direct examination.

By Mr. Deull:

Q. Were you the owner in 1923, from 1923 to 1926 of the property at 224 Oriental Avenue?

A. 223 Oriental Avenue. I was.

Q. Did you sell this property?

A. I did.

20

Q. To whom?

A. Mr. Moe Zager.

Q. In what year?

A. 1926.

Q. What was the consideration?

A. \$22,500.

By Mr. Gottlieb:

Q. You were present at the sheriff's sale?

A. Yes.

Q. You took part in the bidding?

30

A. No.

I hereby certify that the foregoing is a full and accurate transcript of the testimony taken before me in the before entitled cause.

CLAUDE W. MYROSE,
Supreme Court Examiner.

10 Filed November 1, 1929, at 9 A. M.

WILLIAM A. BLAIR,
Clerk.

CONCLUSIONS.

ATLANTIC COUNTY CIRCUIT COURT.

20

ROSE E. GERSTLEY,	}	Motion to Set Aside Judgment. Memo.
v.		
DAVID H. BEST and HARRY		
BEST.		

30 BABCOCK & CHAMPION, for the motion.
CASSMAN & GOTTLIEB, *contra.*

Sooy, J.:

This is an application to set aside the judgment heretofore entered in the above cause. The judg-

ment was entered by virtue of a power of attorney annexed to a bond given by defendants to plaintiff.

Point 1. "The extension of time relieved the defendants from liability under the bond."

The language of the deed from Best to Zageris, "Subject to a mortgage in the sum of \$15,000."

This agreement merely to take lands subject to a mortgage is not an agreement to assume and pay the mortgage, and the relationship of principal and surety does not, therefore, exist between Best (grantor) and Zager (grantee) and, therefore, Bests are not discharged from their liability by reason of the extension agreement between Gerstley and Zager. (See numerous cases cited in brief of plaintiff.) 10

Even were I to decide otherwise, the case of *Palmer v. White*, 65 L. 69, and *Lute v. Taylor*, 61 L. 256, are ample authority for the proposition that the remedy here sought should be addressed to the Court of Chancery and is not available in a law court. 20

Point 2. "The notice of intention was late."

Judgment signed June 22, 29. Filed June 25, 29.

If the signing of the judgment by the Supreme Court Commissioner was the "entering" thereof, then the point is well taken. That the signing was not the entry is clear. A judgment is entered when it is spread at large on the minutes. The signing by the S. C. C. was a necessary step in the proceedings under the authority of which the clerk "entered" the judgment. 30

Point 3. "The proceedings were not in accordance with the notice."

Counsel for the defendants have failed to take into consideration the notice in its entirety as it was filed. It is true that in the body of the notice the statement appears, "that Rose E. Gerstley as plaintiff intends to commence action," but it is also true that the notice as filed says, "Notice of proposed entry of judgment by confession," and then, in pursuance of the remedy so announced, she says that she is about to commence action.

- 10 The notice was sufficient as a *lis pendens* and sufficient in order for the defendants to avail themselves of their statutory right to redeem.

Point 4. "The record does not show the judgment to have been entered within six months after sale."

- 20 I know of no necessity that such an averment be included in the record. There is no statutory requirement therefor. The statute simply provides a method of procedure and is different, in that respect, from the Death Act where the limitation qualifies the right of action and not the remedy alone. The right of action here existed before the statute and the statute simply reduces the time within which judgment may be entered. The old limitation was 16 years.

Point 5. Affidavit not sufficient.

- 30 The Act requires that the affidavit disclose:
1. The true consideration.

2. That the debt or demand is honestly due.

3. Judgment not confessed in fraud.

The affidavit in this case meets all the statutory requirements and I find no merit in defendants' contention, especially in view of the fact that there is no claim or intimation on the part of the defen-

dants that the amount for which judgment was confessed was not the correct total of the deficiency.

Point 6. Affidavit not taken by authorized officer.

An Act relative to oaths and affidavits, 3 C. S., p. 3774, amplifies Sec. 12 of the "Bond and Warrant" Act, so that a foreign commissioner of deeds was empowered to administer the oath.

Finding no merit in the points raised by the petitioners, the motion to vacate will be denied.

10

ORDER DISMISSING RULE TO SHOW CAUSE.

ATLANTIC COUNTY CIRCUIT COURT.

ROSA E. GERSTLEY,

Plaintiff,

v.

DAVID H. BEST and HARRY

BEST,

Defendants.

Action at Law.
Order Dismissing
Rule to Show Cause.

20

30

Two rules to show cause having been entered in this cause on the sixth day of October, 1929, by Babcock & Champion, attorneys for the defendant, Harry Best, and on the ninth day of October, 1929, by Charles M. Deull, attorney for the defendant, David H. Best, and this cause having been argued

both orally and on brief by Cassman & Gottlieb, attorneys for the plaintiff, Rosa E. Gerstley, and by Babcock & Champion, of counsel for defendant Harry Best, and Charles M. Deull, of counsel for defendant David H. Best, and the Court having considered the same and finding no cause for making the rules absolute, it is thereupon, on this 25th day of November, 1929, on motion of Cassman & Gottlieb, ordered, that the said rules to show cause be
 10 and the same are hereby dismissed with costs and the judgments in the above matter are hereby confirmed.

W. F. Sooy,
Circuit Court Judge.

NOTICE AND GROUNDS OF APPEAL.

20

ATLANTIC COUNTY CIRCUIT COURT.

ROSE E. GERSTLEY, <i>Plaintiff,</i> v. DAVID H. BEST and HARRY BEST, <i>Defendants.</i>	}	Action at Law. Notice and Grounds of Appeal.
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30

To Messrs. Cassman & Gottlieb, Attorneys for Plaintiff:

Take notice that the defendant, Harry Best, appeals to the New Jersey Supreme Court from the

whole of the judgment entered in the above-stated cause on the following grounds:

1. Defendant, Harry Best, was surety upon the bond upon which judgment was entered. Plaintiff, without his consent, extended the time for the payment of the money, secured by said bond.

2. Said defendant and his co-defendant, David Best, were released from liability under said bond, 10 upon which judgment was entered in this cause, for the reason that the plaintiff accepted the bond and agreement of one Moe Zager, to whom the premises described in the mortgage accompanying said bond were conveyed, and who assumed the payment of principal and interest due upon said bond.

3. The notice of intention to enter judgment was filed in the clerk's office subsequent to the entry of judgment, whereas in law, it should have been filed 20 prior to the entry of said judgment.

4. The said notice of intention gave notice that it was intended to commence action on the bond upon which judgment was entered, whereas the proceedings for the entry of judgment were taken and said judgment was entered by confession.

5. The record of the judgment does not show that the judgment was entered within six months after the sale of the premises under foreclosure described 30 in said mortgage accompanying said bond as required by law.

6. The affidavit upon which the judgment was entered does not contain sufficient facts to warrant the entry of judgment under the statute.

7. The affidavit upon which the judgment was entered was not sworn to before an officer authorized by the Statute to take affidavit for the entry of judgment by confession, on bond and warrant of attorney.

8. The affidavit upon which the judgment was entered was illegal in that there was no recital in the jurat or certificate that the person taking the affidavit was a foreign commissioner for New Jersey in Pennsylvania or that he was any officer authorized by the laws of New Jersey to take the affidavit.

9. The affidavit does not show that there was any deficiency.

BABCOCK & CHAMPION,
Attorneys for Deft., Harry Best.

20

[ENDORSED]

Service of a copy of within Notice of Appeal is hereby acknowledged this 7th day of December, 1929.

Cassman & Gottlieb,
Attorneys for Plaintiff.

30

OPINION.

(Filed Aug. 20, 1930.)

NEW JERSEY SUPREME COURT.

No. 37, Jan. T., 1930.

10

ROSA E. GERSTLEY,

v.

DAVID H. BEST and HARRY
BEST.

APPEAL FROM ATLANTIC CIRCUIT COURT.

20

Argued before GUMMERE, Chief Justice, and
JUSTICE CAMPBELL.

For the appellant, BABCOCK & CHAMPION.
For the respondent, CASSMAN & GOTTLIEB.

30

Per Curiam:

This is an appeal from a judgment entered by
confession against the defendants on a bond and

warrant of attorney; the payment of the bond being secured by a mortgage.

The first ground upon which we are asked to reverse the judgment is based upon the assertion that the plaintiff failed to file in the office of the county clerk an intention to enter judgment until after the judgment itself was entered; and the contention is that such entry was in violation of Section 51 of the statute concerning proceedings on bond and mortgages given for the same indebtedness (Comp. Stat. p. 3423), which declares that where a mortgage is given for the same debt, no judgment shall be entered upon the bond by confession unless, prior to the entry of the judgment, there be filed in the clerk's office a written notice of the proposed entry. This ground of reversal would be well taken if it was true that the judgment was entered before the notice was filed. An examination of the record, however, shows that such was not the fact. The notice provided by the statute was filed on the 24th of June, 1929; the judgment was entered on the following day, that is, on June 25th. This being the situation, the contention of the defendants upon this point falls.

The next ground upon which we are asked to reverse the judgment is that the notice of intention was not that provided by the statute because it merely stated that it was intended to commence an action on the bond on which judgment was entered, whereas the proceeding for the entry of the judgment was taken and judgment was entered by confession. It may be conceded that the notice was not skillfully drawn. We think, however, that it was sufficient in view of the fact that it contained the following recital in its beginning: "Notice of the proposed entry of judgment by confession on bond and

warrant where mortgage has been foreclosed and a deficiency has arisen." This is a correct recital of the situation as disclosed by the record; namely, that the bond had been secured by a mortgage; that the mortgage has been foreclosed; that a deficiency had arisen at the foreclosure sale; and that the holder of the bond and mortgage proposed to enter a judgment by confession on the bond. The notice, by containing the information required by the statute, accomplished the purpose intended by the Legislature in its enactment. This being so, we consider the ground of reversal last discussed must fail. 10

It is next contended that the record of the judgment does not show that it was entered within six months of the sale of the premises under the foreclosure. There is nothing, however, in the statute which requires the judgment to contain such a recital, and this being so, we conclude that this contention also is without merit.

The only other ground upon which the judgment is attacked is that the affidavit upon which it was entered was not sworn to before an officer authorized by the statute to take affidavits for the entry of judgment by confession on bond and warrant of attorney. This contention, we think, is based upon a misapprehension of the law. The affidavit was made by the plaintiff in the City of Philadelphia in the State of Pennsylvania before one Martha Quinn, a foreign Commissioner of Deeds for New Jersey appointed to perform the duties of such Commissioner in the State of Pennsylvania. The fifth Section of the Act, entitled "An Act relative to oaths and affidavits" (Comp. Stat., p 3774), provides that any oath, affirmation or affidavit required or authorized to be taken in any suit or legal proceeding in this State, when taken out of the State, may be taken 20 30

before any notary public of the State, territory, nation or country in which the same shall be taken, or before any officer who may be authorized by the laws of this State to take the acknowledgment of deeds in such State, territory, nation or country, and a recital that he is such notary or officer in the jurat or certificate of such oath, affirmation or affidavit, and his official designation annexed to his signature and attested under his official seal, shall be sufficient
10 proof that the person before whom the same is taken is such notary or officer. At the foot of the affidavit in the present case appears the following: "Sworn and subscribed before me this 17th day of June, 1929. Martha H. Quinn, a foreign Commissioner of Deeds for New Jersey in Pennsylvania." The Commissioner's seal is attached to this certificate. In view of the provision of the statute just referred to, we conclude that the affidavit was sworn to before an officer authorized by the statute to take affidavits
20 for the entry of judgments by confession on bond and warrant of attorney, and was properly attested.

These are the only questions argued that have sufficient merit to entitle them to discussion. The judgment under review will be affirmed.

ORDER ON AFFIRMANCE OF JUDGMENT.

NEW JERSEY SUPREME COURT.

January Term, 1930.

10

ROSA E. GERSTLEY, Plaintiff-Respondent, v. DAVID H. BEST and HARRY BEST, Defendants, (HARRY BEST, Appellant.)	}	On Appeal from Atlantic County Circuit Court. Order on Affirmance of Judgment.
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This cause having been duly argued at the January Term, 1930, of this court by Babcock & Champion, of counsel for the appellant, and Cassman & Gottlieb, of counsel for the respondent, and the Court having considered the same, and finding no error in the record or proceedings in the Atlantic County Circuit Court.

It is thereupon, on this 27th day of August, 1930, ordered and adjudged that the judgment of the Atlantic County Circuit Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Atlantic County Circuit Court to be proceeded with in accordance with this judgment and the practice of said Court.

30

48 *Notice and Grounds of Appeal*

On motion of

CASSMAN & GOTTLIEB,
Attorneys of Respondent.

Entered Aug. 27, 1930.

On motion of

CASSMAN & GOTTLIEB.

A true copy

FRED L. BLOODGOOD,
Clerk.

10

NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

20 ROSA E. GERSTLEY,
Plaintiff-Respondent,

v.

DAVID H. BEST and HARRY
BEST,

Defendants,

(HARRY BEST, *Appel-
lant.*)

} On Appeal.
Notice and Grounds
of Appeal.

30

*To Messrs. Cassman & Gottlieb, Attorneys for Re-
spondent:*

Take notice that the appellant, Harry Best, here-
by appeals from the whole and every part of the
judgment entered by the Supreme Court in the above

matter, and says that the Supreme Court should have vacated and set aside the judgment of respondent, under review, for the following reasons:

1. Defendant, Harry Best, was surety upon the bond upon which judgment was entered. Plaintiff, without his consent, extended the time for the payment of the money, secured by said bond.

2. Said defendant and his co-defendant, David Best, were released from liability under said bond, upon which judgment was entered in this cause, for the reason that the plaintiff accepted the bond and agreement of one Moe Zager, to whom the premises described in the mortgage accompanying said bond were conveyed, and who assumed the payment of principal and interest due upon said bond. 10

3. The notice of intention to enter judgment was filed in the clerk's office subsequent to the entry of judgment, whereas in law, it should have been filed prior to the entry of said judgment. 20

4. The said notice of intention gave notice that it was intended to commence action on the bond upon which judgment was entered, whereas the proceedings for the entry of judgment were taken and said judgment was entered by confession.

5. The record of the judgment does not show that the judgment was entered within six months after the sale of the premises under foreclosure described in said mortgage accompanying said bond as required by law. 30

6. The affidavit upon which the judgment was en

tered does not contain sufficient facts to warrant the entry of judgment under the statute.

7. The affidavit upon which the judgment was entered was not sworn to before an officer authorized by the statute to take affidavit for the entry of judgment by confession, on bond and warrant of attorney.

10 8. The affidavit upon which the judgment was entered was illegal in that there was no recital in the jurat or certificate that the person taking the affidavit was a foreign commissioner for New Jersey in Pennsylvania or that he was any officer authorized by the laws of New Jersey to take the affidavit.

9. The affidavit does not show that there was any deficiency.

20 Dated: September 15, 1930.

BABCOCK & CHAMPION,
Attorneys for Appellant,
Harry West.

[ENDORSED]

30 Due and legal service of within
notice and grounds of appeal hereby,
acknowledged this day of Sep-
tember, 1930.

.....,
Attys. for Respondent.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

ROSA E. GERSTLEY,
Plaintiff-Respondent,

v.

DAVID H. BEST AND HARRY BEST,
Defendants.
(HARRY BEST, *Appellant.*)

ON APPEAL.

BRIEF FOR APPELLANT, HARRY BEST.

This is an appeal from a judgment entered in the Supreme Court. A judgment by confession on bond and warrant of attorney in favor of the plaintiff, Rosa E. Gerstley and against the defendants, David H. Best, and Harry Best, in the sum of \$30,000.00, damages and \$10.50, costs of suit (p. 10), was entered in the Atlantic County Circuit Court. The amount shown to be due by the affidavit of the plaintiff is \$764.13 (p. 4). The judgment was signed by Anthony J. Siracusa, Esq., Supreme Court Commissioner, June 22, 1929 (p. 3). The judgment and affidavit were actually filed in the office of the county clerk June 25, 1929, and judgment was entered by the clerk June 25, 1929, in Circuit Court

Judgment Book #15, p. 470 (p. 10). Notice of intention to commence action for the entry of judgment was filed in the said clerk's office June 24, 1929 (p. 2). There was annexed to the affidavit of plaintiff a copy of the bond and warrant, which appears upon pages 6, 7, 8 and 9.

The bond and warrant in question were given in connection with a mortgage and the judgment is for a deficiency. (See affidavit of plaintiff, p. 4.) The facts are not in dispute. On August 6, 1923, the defendant, David H. Best, was the owner of certain premises in Atlantic City. He procured a loan from the plaintiff for \$15,000.00 and on August 16, 1923, executed to her a mortgage in that sum, covering the premises in question. The bond which accompanied said mortgage was signed by said David H. Best and also by the appellant, Harry Best. While the bond does not, by express language designate David H. Best as principal and Harry Best, as surety, it is the fact that said Harry Best executed it as surety and should be regarded in law as such. During the term of the mortgage and on May 1, 1926, David H. Best conveyed the mortgaged premises to one Moe Zager, who, on August 7, 1926, entered into a written contract with the plaintiff, extending the time for payment of the said bond and mortgage, executed by said David H. Best, for an additional period of three years and by which he guaranteed the payment of all moneys due under said bond (p. 16). On August 12, 1926, the said Moe Zager also entered into bond (p. 21) to said plaintiff for \$30,000.00, guaranteeing the payment of the bond first above mentioned, executed by the defendants. On September 6, 1929, a petition was filed by the appellant, Harry Best, to the Judge of the Circuit Court of the County of Atlantic, making application to vacate and set aside the judg-

ment entered against the defendants at the suit of the plaintiff aforesaid, upon which petition, Hon. W. Frank Sooy, Circuit Court Judge, on said date, allowed a rule to show cause why the judgment should not be vacated and set aside and granting leave to each party to take testimony to be used upon the return of the rule, which petition is found upon page 10 and rule upon page 25. Depositions were taken under said rule by petitioner and are found at page 27. Conclusions were subsequently filed by Judge Sooy (p. 36), wherein he refused to vacate the judgment and an order was entered dismissing the rule to show cause (p. 39) under date of November 25, 1929. Notice and grounds of appeal in the Supreme Court are found at p. 40 and in this Court at page 48.

While this appeal is made to review the judgment entered by confession as above set forth and while perhaps the Court may be of the opinion that the proceedings subsequent to the entry of judgment to vacate the said judgment before the Circuit Court, were no part of the record before the Supreme Court, the proceedings upon said application were printed upon the insistence of counsel for the respondent and are included as a part of the record here.

ARGUMENT.

The law is well settled that an appeal will lie to review a judgment entered by confession upon bond and warrant of attorney.

Burroughs v. Condit, 6 Law, p. 300;

Hunt v. Chamberlin, 8 Law, 336;

Evans v. Adams, 15 Law, p. 373;

Reading v. Reading, 24 Law, p. 359.

It is urged that the Supreme Court should have vacated and set aside the judgment under review for the following reasons:

1. *Defendant, Harry Best, was surety upon the bond upon which judgment was entered. Plaintiff, without his consent, extended the time for the payment of the money, secured by said bond.*

The affidavit of the plaintiff (p. 4) shows that the bond upon which the judgment was entered was made by David H. Best and Harry Best to plaintiff; that the bond was accompanied by mortgage bearing even date therewith made and executed only by the defendant, David H. Best. David H. Best was the owner of the property (p. 35). In this situation, the appellant should be regarded as a surety, as a matter of law. When, therefore, the plaintiff extended the time for the payment of the principal of said bond and mortgage for the additional period of three years (p. 16), without the knowledge or consent of appellant (p. 31), under the well settled law in our State, the appellant, as such surety was thereby relieved from liability upon said bond.

32 Cyc., p. 191.

2. *Said defendant and his co-defendant, David Best, were released from liability under said bond, upon which judgment was entered in this cause, for the reason that the plaintiff accepted the bond and agreement of one Moe Zager, to whom the premises described in the mortgage accompanying said bond were conveyed, and who assumed the payment of principal and interest due upon said bond.*

Upon the sale of said premises from plaintiff to said Zager, said Zager gave his personal bond to plaintiff, guaranteeing the payment of the said bond of David Best and Harry Best (p. 21) and the said plaintiff, by agreement extended the time for payment of the mortgage made by said David H. Best for an additional period of three years (p. 17), all without the knowledge or consent of appellant. By the terms of said agreement, the said Zager guaranteed the prompt payment of principal and interest of the bond of said David H. Best and Harry Best, which extension and guaranty relieved the said David H. Best and Harry Best from liability under their said bond.

27 *Cyc.*, 1356-1357;

41 *Corpus Juris*, 719;

Cubberly v. Yager, 42 Eq., 289; 11 Atl., 113;

Newark Firemen's Insurance Co. v. Wilkin-
son, 35 Eq., 160;

Cromwell v. Hospital, 27 Eq., 650.

Moreover, at the time the mortgage became due and collectible, the mortgaged premises were worth much more than the amount of the mortgage (pp. 31-33-34). During the period of extension, the value of the property declined, with the result that a sale brought less than the amount due. It is, therefore, urged that the extension by the mortgagee, without the knowledge or consent of the appellant, worked harm to the defendant.

3. *The notice of intention to enter judgment was filed in the clerk's office subsequent to the entry of judgment, whereas in law, it should have been filed prior to the entry of said judgment.*

Statutes permitting judgments by warrant of attorney must be strictly complied with.

Modern Security Co. v. Fleming, 142 Atl.,
p. 649;
6 Mis. R., p. 730.

So that, therefore, if the judgment as entered, did not comply with the requirements of our statutes, respecting the entry of judgments, upon bond and warrants (Vol. 1, p. 219). the Court should set the judgment aside.

The statute provides that no judgment shall be entered by confession on any bond where a mortgage is given for the same debt or any action he had on said bond unless, prior to the entry of judgment, if by confession, or prior to the beginning of such action, if the proceedings be by action, there be filed in the clerk's office a written notice of the proposed judgment or action.

Vol. 3, Compiled Statutes, Sec. 51, p. 3423.

The judgment in this case was signed June 22, 1929 (p. 3). The notice was not filed until June 24, 1929 (p. 2). The proceedings were filed June 25th, but it is urged that the judgment takes effect from the time it is signed.

4. *The said notice of intention gave notice that it was intended to commence action on the bond upon which judgment was entered, whereas the proceedings for the entry of judgment were taken and said judgment was entered by confession.*

The language of the notice is, "Take notice that Rosa E. Gerstley as plaintiff intends to commence

action in Atlantic County Circuit Court * * *” (p. 1).

Section 51, *supra*, provides for two separate kinds of proceedings, one by confession and the other by action. By the express language of the statute, notice of one course or the other must be filed and the notice must be “prior to the entry of such judgment, if the same shall be by confession, or prior to the beginning of such action, if the proceedings be by action.”

The notice in this case is that the plaintiff “intends to commence action.” Instead of doing what her notice said she intended doing, she caused judgment to be entered by confession.

A notice of intention to enter judgment by confession could not serve as notice of intention to bring action on the bond and notice of intention to bring action could not possibly serve as notice of intention of entering judgment by confession.

The statute requires that the notice shall be “a written notice of the proposed judgment or action setting forth the court in which it is proposed to enter such judgment or begin such action. * * *”

5. *The record of the judgment does not show that the judgment was entered within six months after the sale of the premises under foreclosure described in said mortgage accompanying said bond as required by law.*

The right to enter judgment on a bond for deficiency where a bond and mortgage are given for the same debt is authorized only and controlled by statute.

Under Section 48 of the statute on mortgages,

Vol. 3, C. S. of N. J., p. 3421, all proceedings are required to be first, for the foreclosure of the mortgage, and if sufficient is not realized to satisfy the debt, interest and costs, then proceedings may be had on the bond for the deficiency and "all suits on said bond shall be commenced within six months from the date of the sale of the mortgaged premises and judgment shall be rendered and execution issue only for the balance of the debt and costs of suit."

The affidavit used on the entry of the judgment (p. 4) does not set forth when the property was sold and shows nothing more than that proceedings were had in the New Jersey Court of Chancery and that the premises were sold and \$16,000 was bid therefor.

It must appear upon the fact of the record of the proceedings that the suit was commenced or judgment entered within the time limited by statute.

6. The affidavit upon which the judgment was entered does not contain sufficient facts to warrant the entry of judgment under the statute.

Section 11 of the Act concerning the mode of entering judgments on bonds with warrants of attorneys to confess judgment (Vol. 1, C. S. of N. J., p. 221) provides "that no judgment shall be entered * * * on a warrant of attorney to confess said judgment * * * unless the plaintiff or his attorney shall produce at the time of confessing said judgment * * * an affidavit of the plaintiff, his attorney or agent of the true consideration of the bill, bond, deed, note or other instrument of writing or demand for which the said judgment shall be confessed * * *,"

Section 48 above mentioned, limits the right to the

recovery of judgment for the deficiency between the amount realized under foreclosure proceedings and the total of principal, interest and costs.

The bond and mortgage in the present case were for \$15,000. The affidavit, paragraph 4 (p. 5), shows that the sale was for \$16,000, and that the judgment "is entered for the sum of \$764.13, being the deficiency arising out of the sale aforesaid together with interest thereon after giving the defendants credit for \$16,000." If the indebtedness was \$15,000 and the proceeds of the sale were \$16,000 the opposite of a deficiency is shown. The judgment is entered for an alleged deficiency, which, with interest on the deficiency, totals \$764.13. There is nothing to show how the deficiency, the amount of which is not disclosed, is made up or for what length of time interest has been computed, nor, is there anything to show how the excess of \$1,000.00, which the property brought above the face of the bond and mortgage was converted into a deficiency, nor does the affidavit show that the mortgage was foreclosed.

7. *The affidavit upon which the judgment was entered was not sworn to before an officer authorized by the statute to take affidavits for the entry of judgment by confession, on bond and warrant of attorney.*

8. *The affidavit upon which the judgment was entered was illegal in that there was no recital in the jurat or certificate that the person taking the affidavit was a foreign commissioner for New Jersey in Pennsylvania or that he was any officer authorized by the laws of New Jersey to take the affidavit.*

The above reasons will be discussed together.

The affidavit of plaintiff was made by Rosa E. Gerstley, the plaintiff and was sworn and subscribed to on June 17, 1929, in the County of Philadelphia and State of Pennsylvania, before Martha H. Quinn, foreign commissioner of deeds, for New Jersey, in Pennsylvania.

Section 12 of an Act entitled, "An Act directing the mode of entering judgments on bonds with warrants of attorney to confess judgment," Vol. 1, C. S. of N. J., page 222, provides as follows:

"That the affidavit required by this Act may be made before any Justice of the Supreme Court, Judge of any Circuit Court or Court of Common Pleas, Supreme Court Commissioner, Master in Chancery or justice of the peace of this State, or, if the plaintiff be out of this State, before any court of judicature or notary public of the State, kingdom or nation in which the said plaintiff resides or which shall happen to be; which affidavit shall be filed with the other papers in the cause. (Rev. 1877, p.83.)"

It is clear from a reading of the affidavit that at the time of the execution thereof by plaintiff she was out of the State of New Jersey and that in such event the cited section of the statute requires the affidavit to be executed before "any Court of judicature or notary public of the State, kingdom or nation in which the said plaintiff resides or shall happen to be." The affidavit in question was not executed before a Court of judicature or a notary public of the State of Pennsylvania and the judgment should therefore be set aside.

Diligent search of the statutes has been made and no authority found which would authorize the execu-

tion of the said affidavit before a foreign commissioner of deeds for New Jersey, residing in Pennsylvania.

In this connection, careful examination has been made of the provisions of Section 5 of an Act entitled, "An Act relative to oaths, and affidavits," Vol. 3, C. S. of N. J., page 3774, which is as follows:

"Taking oath, affirmation or affidavit out of State; by whom taken; certificate to jurat; knowingly using false oath, etc., punishment.

Sec. 5. That any oath, affirmation or affidavit required or authorized to be taken in any suit or legal proceedings in this State, or for any lawful purpose whatever (except official oaths and depositions required to be taken upon notice) when taken out of this State, may be taken before any notary public of the State, territory, nation, kingdom or country in which the same shall be taken, or before any officer who may be authorized by the laws of this State to take the acknowledgment of deeds in such State, territory, nation, kingdom or country, *and a recital that he is such notary or officer in the jurat or certificate of such oath, affirmation or affidavit, and his official designation annexed to his signature, and attested under his official seal*, shall be sufficient proof that the person before whom the same is taken is such notary or officer; provided that when any other certificate is required by law to be annexed to the certificate of such officer, other than a notary public, for the recording of a deed acknowledged before him, a like certificate shall be annexed to his certificate of the taking of such oath; and if any such oath, affirmation or affidavit, or any material part thereof, shall be untrue, any per-

son who shall use or offer the same for any purpose whatever, knowing the same to be untrue, shall be guilty of a high misdemeanor, and shall upon conviction thereof suffer the same punishment as if convicted of subornation of perjury, and shall be subject to the same disabilities. (Rev. 1877, p. 740.)”

It is manifest from a reading of the last cited statute that affidavits taken out of this State may be taken before any notary public of the foreign State or before any officer of such foreign State, who may be authorized under the laws of New Jersey, to take acknowledgment of deeds in such foreign State and it is urged that said statute should not be held to mean an officer commissioned by the laws of New Jersey to take acknowledgment of deeds in such foreign State. But, assuming, however, for the sake of argument, that the statute means that out of the State an affidavit might be taken before an officer commissioned by New Jersey to take acknowledgment to deeds in a foreign State, the affidavit in question is defective for the reason that a recital in the jurat of the affidavit is required of the official designation of the officer or a certificate of his authority to be annexed, and in either case, his official designation annexed to his signature. The jurat is that portion of the attesting clause which precedes the signature and official designation of the officer taking the affidavit. In the case in hand there is no recital in the jurat that Miss Quinn is a foreign commissioner of deeds of New Jersey. Her official designation, however, is annexed to her signature. Moreover, said Section 5 of said Act is incorporated in Revision of 1877, Compiled Statutes at page 740. Section 12 of the bond and warrant Act above cited

is also in the Revision of 1877, Compiled Statutes, at page 83. Neither Section 12 of the bond and warrant Act, nor Section 5 of the Act relating to oaths has ever been amended, with the exception that Section 5 was amended in 1912 (P. L. 1812, page 805), by authorizing oaths and affidavits to be taken before the Chief Justice of the United States or any associate Justice of the Supreme Court of the United States. It is insisted that Section 12 of the bond and warrant Act above cited, providing for the execution of proof in a special statutory proceeding is controlling and that the provisions of Section 5 of the "oaths and affidavits" Act do not affect in any way the provisions of Section 12. The Legislature having provided a strict statutory procedure in the said bond and warrant Act, it must be strictly followed and complied with.

9. *The affidavit does not show that there was any deficiency.*

This reason has been sufficiently discussed under reason No. 6.

It is respectfully submitted that the judgment under review should be vacated and set aside for the reasons above submitted.

BABCOCK & CHAMPION,
Attorneys for Appellant,
Harry Best.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

ROSA E. GERSTLEY,
Plaintiff-Respondent,

v.

DAVID H. BEST and HARRY BEST,
Defendants.
(HARRY BEST, *Appellant.*)

ON APPEAL.

BRIEF OF RESPONDENT.

PRELIMINARY STATEMENT.

This case is before this Court on appeal from an order of the New Jersey Supreme Court affirming a judgment of the Atlantic County Circuit Court refusing to open a judgment which had been entered by confession on a bond and warrant of attorney for a deficiency arising on a foreclosure sale of mortgaged premises.

STATEMENT OF FACTS.

On August 6, 1923, Harry Best and David H. Best executed a bond to Rosa E. Gerstley in the penal sum of \$30,000, conditioned for the payment of \$15,000 at the expiration of three years from the date thereof, together with interest thereon at the rate of 6% per annum (page 6, line 20, State of Case). The said bond was accompanied by a mortgage dated even date therewith, made and executed by said David H. Best to the said Rosa E. Gerstley.

On August 7, 1926, Rosa E. Gerstley, still the holder of the bond and mortgage, entered into a written agreement with one Moe Zager, to whom David H. Best had conveyed the mortgaged premises "subject to a mortgage in the sum of \$15,000 now on said premises," whereby it was agreed that the time for the payment of the bond and mortgage be extended for three years from August 6, 1926, and by which Zager guaranteed to the mortgagee the prompt payment of the principal and interest of the aforesaid bond (page 16, line 29, State of Case). On August 12, 1926, said Moe Zager executed a bond as collateral security for the payment of the principal and interest of said mortgage (page 21, line 23, State of Case).

Because of several defaults in said mortgage, such proceedings were had in the Court of Chancery of New Jersey whereby the premises upon which the mortgage was placed were sold and \$16,000 was paid therefor. After allowing credit for the \$16,000 paid at said sale, there arose a deficiency which, together with interest thereon, amounted to \$764.13.

On June 24, 1929, at 9.00 A. M., there was filed

in the office of the clerk of Atlantic County a notice of a proposed entry of judgment by confession for the above amount (page 1, line 1, State of Case).

On June 25, 1929, there was entered in the office of the clerk of Atlantic County confessed judgment on the bond and warrant, which had been signed on June 22, 1929, by a Supreme Court Commissioner (page 3, line 1, State of Case).

The affidavit on which said judgment was based was sworn to by Rosa E. Gerstley, the holder of the bond and mortgage (page 4, line 1, State of Case).

On September 6, 1929, an order to show cause was allowed Harry Best, the appellant herein, by the Atlantic County Circuit Court, why the aforesaid judgment should not be opened, vacated and set aside (page 25, line 1, State of Case).

On the return of the said rule to show cause, an oral argument was had, which was later supplemented by written briefs, and upon said argument and briefs the Atlantic County Circuit Court filed its conclusions, in which it rejected, point by point, the contentions of the present appellant, and denied his motion to vacate the judgment (page 36, line 18, State of Case).

In accordance with the conclusions of the Court, there was signed, on November 25, 1929, an order dismissing said rule to show cause with costs and confirming the said judgment (page 39, line 14, State of Case).

From the aforesaid order, an appeal was taken to the New Jersey Supreme Court, and in the opinion of the Court, filed August 20, 1930, it was held that the judgment under review should be affirmed (page 43, line 1, State of Case). In accordance with the aforesaid opinion, the New Jersey

Supreme Court, on August 27, 1930, ordered and adjudged that the judgment of the Atlantic County Circuit Court be affirmed with costs (page 47, line 1, State of Case). From that order, this appeal is taken.

QUESTION OF LAW.

Aside from the several formal defects which the appellant claims to exist in the proceedings to enter judgment on the bond and warrant, the important question is whether an extension of time to a grantee of mortgaged premises who takes "subject to a mortgage in the sum of \$15,000 now on said premises" discharges the original obligor on the bond.

ARGUMENT OF LAW.

In the brief for the appellant, some question was raised as to whether the proceedings after the confessed judgment were properly a part of the strict record. The statement was made that such proceedings were printed in the State of the Case solely upon the insistence of counsel for the respondent.

That such proceedings are properly made a part of the Record, see *Knight v. Cape May Sand Co.*, 83 N. J. L. 597, 598, which was on error to the Supreme Court on their refusal to open two confessed judgments. The Court stated that the defendant sued out a writ of error on each judgment, which brings under review the action of the Supreme Court in discharging a rule to show cause granted by it

in each case. It can thus be seen that, while the appeal may be from the confessed judgment, such appeal brings up for review not only the judgment but all proceedings subsequent thereto, such as the petition and rule to show cause, judgment of the Court below, etc.

I.

THE REFUSAL OF THE COURT TO OPEN THE JUDGMENT IS NOT THE SUBJECT OF REVIEW.

It is well settled in New Jersey that an application to open a judgment regularly entered is addressed wholly to the discretion of the Court in which it is rendered, and an appeal will not lie to review the determination of that Court.

Assets Development Co. v. Wall, 97 N. J. L. 468;

Smith v. Livesey, 67 N. J. L. 269.

II.

WHERE ONE SIGNS A BOND AS A CO-OBLIGOR, THE BURDEN OF PROOF IS UPON HIM TO ESTABLISH THE FACT THAT HE IS A SURETY ONLY AND THAT SUCH FACT WAS COMMUNICATED TO THE CREDITOR, BUT EVEN IN THAT CASE HE MUST RESORT TO A COURT OF EQUITY AND IS PRECLUDED IN A LAW COURT.

The appellant contends that, although he signed the bond as a principal, he was in fact a surety be-

cause he had no interest in the property on which the mortgage was placed, and was discharged by the extension of time. Aside from the fact that sufficient consideration existed for his obligation as principal by reason of the detriment to the creditor in advancing the amount of the bond, the law is well settled that the burden of proof is on him to establish the fact that he was a surety and that the creditor knew it. In the present instance, there is no allegation that any knowledge of the alleged suretyship was ever brought to the present creditor.

The law is well established that:

“When one of two obligors in a bond claims relief against the holder of the bond on the ground that he is surety for his co-obligor and that the creditor has given time to the principal debtor without the consent of the surety, and there is nothing on the face of the bond to show the existence of the suretyship, the surety, to enable himself to exemption from liability, must show that the fact of suretyship was communicated to the creditor.

The privilege of the surety is a mere equity and can only be binding on those who have notice of its existence.”

Kaighn v. Fuller, 14 N. J. Eq. 419;
32 Cyc. 31, Note 51, and cases cited.

Even if this were not so, the appellant is attempting to take advantage of a purely equitable principle in a court of law.

The Court of Errors and Appeals, in *Shute v. Taylor*, 61 N. J. L. 256, held that such changed relationship is not binding on the creditor in a court of law, and the extension of time will not discharge

one who contracts as the principal debtor, even though as between himself and the person to whom time is extended there existed a relationship of principal and surety. That case held as follows:

"The rule 'that when two or more persons contract as principal debtors but by arrangement *inter sese* one of them is or subsequently becomes surety for the other, the creditor, if informed of this relationship, is bound to treat the surety with regard to that contract in the same manner as though he contracted as surety,' is not enforceable against the creditor when suing on the contract in the courts of law in this State; the surety's remedy is in Chancery."

Justice Dixon, who rendered the opinion, states on page 257:

"The refusal of the Court, therefore, requires us to decide whether it is the duty of the courts of law to enforce the rule, 'that when two persons contract as principals but by arrangement *inter sese* one of them is or subsequently becomes surety for the other, the creditor, if informed of that relationship, is bound to treat the surety with regard to that contract in the same manner as though he had contracted as surety.' All courts of equity in this country and most courts of law, I think, maintain this principle. (See *Payne v. Packard* and subsequent cases and notes; 2 Am. Lead. Cas. 362.)

But in New Jersey, our legal tribunals have uniformly declined to sanction the doctrine holding that at law the rights of the creditor as defined by the contract cannot be altered without his consent, and one of those rights is to treat each of the debtors as a principal."

The Court cites the following cases:

Manning v. Shotwell, 5 N. J. L. *584;

Pentard v. Davis, 30 N. J. L. 205;

Paulin v. Kaign, 27 N. J. L. 503-508;

Anthony v. Fritts, 45 N. J. L. 1.

The concluding paragraph of the opinion is:

“In view of these indications of judicial opinion so long prevailing, and inasmuch as the matter concerns not rights but only remedies, we think it should be considered settled that in an action on the contract, the creditor will not be held at law bound to treat as sureties those who contracted as principals merely because they were in fact or became sureties to his knowledge.”

In *Grier v. Flitcraft*, 57 N. J. Eq. 556, it is held:

“It must be considered as settled in this State that a creditor holding a contract of two or more persons who have on its fact stipulated as principals, will not in an action at law be held bound to treat as sureties any of those defendants who have contracted as principals, even though they are in fact sureties and the creditor knows it. If such a contract is in fact a surety and, because of the relation and the creditor's knowledge of it and his action having that knowledge, the surety claims any remedy, it must be held to be merely an equity, not cognizable at law, and the surety's relief must be in the Court of Chancery.”

III.

THE EXTENSION OF TIME BY ROSA E. GERSTLEY TO MOE ZAGER DID NOT DISCHARGE HARRY BEST AND DAVID H. BEST FROM THEIR OBLIGATION ON THE BOND.

The first and most important reason is that where a purchaser of mortgaged premises buys subject to incumbrances, he assumes no personal liability for the payment of the mortgage and there does not arise the relationship of principal and surety between the purchaser and grantor. Secondly, even if this rule did not obtain, the appellant has mistaken the court in which any remedy he thinks he may be entitled to can be granted.

It may well be that a conveyance of mortgaged premises to one who "assumes and agrees to pay the mortgage debt" places the original mortgagor in the position of surety as between himself and his grantee.

41 C. J. 737, Note 77, and cases cited;
*Holland Reform School Society v. De-
Lazier*, 84 N. J. Eq. 442;
Cubberly v. Yager, 42 N. J. Eq. 289;
Newark Firemen's Ins. Co. v. Wilkinson,
35 N. J. Eq. 160;
Huyler v. Atwood, 28 N. J. Eq. 275;
Cromwell v. St. Barnabas Hospital, 27 N.
J. Eq. 650;
Klapworth v. Dressler, 13 N. J. Eq. 62;
Tichenor v. Dodd, 4 N. J. Eq. 454.

But the facts in the present case do not bring it within the rule above stated. The premises in this

case were conveyed by David H. Best to Zager "subject to a mortgage in the sum of \$15,000 now on said premises." The question to be decided, therefore, is whether a conveyance of this character makes the grantee personally liable and creates a relationship of principal and surety between the purchaser and the original mortgagor.

In *Tichenor v. Dodd*, 4 N. J. Eq. 454, the premises were conveyed by the plaintiff to the defendant subject to the payment of a certain mortgage thereon in the sum of \$525.30, which said mortgage, or the amount thereof, is computed as so much of the consideration to be paid. The holder of the mortgage foreclosed it and compelled the original owner of the property to pay the deficiency that arose on the foreclosure. Complainant, who was the original owner of the property, sought to hold his grantee personally liable because of the language of the deed. The Chancellor, after holding that the words, "subject to the payment of a certain mortgage," created no personal liability in the purchaser but made him liable only to the extent of the value of the premises and not beyond it, says in the opinion:

"The first proposition of the counsel of the complainant is that the purchaser of the equity of redemption takes it subject to the encumbrance and is bound to indemnify the mortgagor; that he takes it upon his personal responsibility to pay the encumbrance.

If counsel means to insist that the purchaser 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. If he would retain and enjoy the premises, then he must pay off the encumbrance and unite the legal title with his equitable interest. He may, therefore, safely be 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 may relinquish them *cum onere*.

To make him personally liable for the amount of the encumbrances would greatly embarrass and frequently prevent the sale of an equity of redemption. It would be contrary to the general understanding and practice upon the subject and greatly prejudice the interest of the tenant in the equity of redemption."

In *Klapworth v. Dressler*, 13 N. J. Eq. 162, the Chancellor distinguishes between the liability of a purchaser who takes subject to the mortgage debt, and one who assumes and agrees to pay the mortgage debt. In the opinion, it is stated that:

"The premises are not merely conveyed to the plaintiff subject to the mortgage. When that is done, the grantee takes the premises subject to the encumbrance but incurs no personal liability, but the grant is here made upon the specified condition that the grantee agrees and assumes to pay the debt. By the acceptance of the title, the clause becomes his covenant, and he thereby becomes bound to the grantor to pay the mortgage debt and liable to him for any deficiency which may exist upon a sale of the mortgaged premises.

Where a grantee in a deed covenants with the grantor to pay off an encumbrance subsisting upon the premises, if the grantor is personally

liable for the payment of the encumbrance, the grantee, by virtue of the agreement, is regarded in equity as the principal debtor and the grantor as a surety only."

In *Hoy v. Bramhall*, 19 N. J. Eq. 563, at page 569, Justice Depue, speaking for the Court of Errors and Appeals, held that under circumstances such as exist in our case, there arises no personal liability in the purchaser. The deed in that case contained the following clause: "This conveyance is made subject, nevertheless, to the payment by the said party of the second part of all existing liens on said premises." It can easily be seen that the language in that clause is much stronger than that in the present case, and yet the opinion of the Court is as follows:

"It may be that the language of the stipulations in these deeds with reference to the complainant's mortgage is not sufficient to create a covenant on which a strictly personal liability may be based; but the effect is clearly that stated by the Chancellor, to make the property conveyed subject to its proper proportion of the encumbrances so as to relieve to that extent that part of the mortgaged premises retained by the mortgagor, by force of which the lots conveyed and those retained must contribute towards discharging the common burden according to their relative values.

The principle upon which *Klapworth v. Dressler* was decided is applicable to this case. The effect of the charge in the deeds to Kinne is to make the lands conveyed to him the principal debtor for a proportionate part of the mortgage debt, and *Bramhall* as surety only."

The case of *Shepherd v. May*, 115 U. S. 505-512, 29 L. Ed. 456, is on point with the present case and is illustrative of the many cases holding that under the exact circumstances such as existed in this case, the original mortgagor is not discharged by an extension of time to his grantee. The Court held:

“1. The agreement merely to take lands subject to specific encumbrances is not an agreement to assume and pay the encumbrances. There must be words importing a promise to pay the debt to render the grantee personally liable.

2. In the absence of a mutual agreement of the grantor, grantee and holder of the encumbrance to that effect, the relationship of principal and surety does not exist between the grantee and grantor, and the latter is not discharged from his liability by an agreement between the other parties to extend the time of payment.”

See to the same effect *Elliott v. Sackett*, 108 U. S. 132, 27 L. Ed. 678.

From these authorities, it can readily be seen that while he who assumes and agrees to pay a mortgage debt becomes the principal debtor as between himself and his grantor, who as surety may be discharged by an extension of time to the purchaser, a conveyance subject to a mortgage debt creates no such relationship and the original mortgagor is not discharged by the extension of time.

Secondly, even though the foregoing citations were not conclusive in themselves, the appellant is precluded in a court of law and must resort to the Court of Chancery for the remedy which he is seeking to obtain.

In *Palmer v. White*, 65 N. J. L. 69, the facts were as follows:

Mr. White gave his bond to Robert J. Brown for the sum of \$8,000, and executed a mortgage on certain lands to secure it. White conveyed the mortgaged premises to Elizabeth Moffett, who, by the terms of the deed, assumed the payment of the mortgage. She died, and her husband, John B. Moffett, became tenant by the curtesy. The bond and mortgage, by various assignments, came to the ownership of the plaintiff. This suit is brought against the heirs and devisees of Mr. White, obligor on the bond, to recover the amount due thereon. The defendants set up the defense that the extension of time of payment by the agreement of the plaintiff with the person who assumed the payment thereof and without the consent of said White discharged him from liability. The Court held that after the assumption of the mortgage debt by the grantee in the conveyance of the mortgaged premises, the obligor on the bond continues to be regarded as the principal debtor in an action at law against him on the bond, and the extension of time of payment to his grantee does not discharge him from personal liability.

The Court of Errors and Appeals, in *Shute v. Taylor*, 61 N. J. L. 256, held that such changed relationship is not binding on the creditor in a court of law, and the extension of time will not discharge one who contracts as the principal debtor, even though as between himself and the person to whom time is extended, there existed a relationship of principal and surety. That case held as follows:

“The rule, ‘that when two or more persons contract as principal debtors but by arrangement *inter sese* one of them is or subsequently

becomes surety for the other, the creditor, if informed of this relationship, is bound to treat the surety with regard to that contract in the same manner as though he contracted as surety,' is not enforceable against the creditor when suing on the contract in the courts of law in this State; the surety's remedy is in Chancery."

Justice Dixon, who rendered the opinion, states on page 257:

"The refusal of the Court, therefore, requires us to decide whether it is the duty of the courts of law to enforce the rule, 'that when two persons contract as principals but by arrangement *inter sese* one of them is or subsequently becomes surety for the other, the creditor, if informed of that relationship, is bound to treat the surety with regard to that contract in the same manner as though he had contracted as surety.' All courts of equity in this country and most courts of law, I think, maintain this principle. (See *Payne v. Packard* and subsequent cases and notes; 2 Am. Lead. Cas. 362.)

But in New Jersey, our legal tribunals have uniformly declined to sanction the doctrine holding that at law the rights of the creditor as defined by the contract cannot be altered without his consent, and one of those rights is to treat each of the debtors as a principal."

The Court cites the following cases:

Manning v. Shotwell, 5 N. J. L. *584;

Pentard v. Davis, 20 N. J. L. 205;

Paulin v. Kaign, 27 N. J. L. 503-508;

Anthony v. Fritts, 45 N. J. L. 1.

The concluding paragraph of the opinion is:

"In view of these indications of judicial opinion so long prevailing, and inasmuch as the matter concerns not rights but only remedies, we think it should be considered settled that in an action on the contract, the creditor will not be held at law bound to treat as sureties those who contracted as principals merely because they were in fact or became sureties to his knowledge."

In *Grier v. Flitcraft*, 57 N. J. Eq. 556, it is held:

"It must be considered as settled in this State that a creditor holding a contract of two or more persons who have on its face stipulated as principals, will not in an action at law be held bound to treat as sureties any of those defendants who have contracted as principals, even though they are in fact sureties and the creditor knows it. If such a contractor is in fact a surety and because of the relation and the creditor's knowledge of it and his action having that knowledge, the surety claims any remedy, it must be held to be merely an equity, not cognizable at law, and the surety's relief must be in the Court of Chancery."

IV.

THE NOTICE OF INTENTION WAS FILED BEFORE THE JUDGMENT WAS ENTERED IN THE RECORDS OF THE COURT.

The notice of intention was filed in this case after judgment was signed by the Supreme Court Com-

missioner, but before the judgment was entered in the records of the court. The question to be decided, therefore, is, when is a judgment deemed to be entered—when signed by the officer of the court who is authorized to sign judgments, or when actually entered on the records of the court?

Section 51 of the Act Concerning Mortgages, 3 C. S., p. 3423, provides as follows:

“No judgment shall be *entered* by confession on any bond where a mortgage has or may hereafter be given for the same debt or in any action on said bond unless prior to the *entry* of said judgment, if the same shall be by confession, or prior to the beginning of such action, if the proceeding be by action, there shall be filed in the office of the clerk of Common Pleas * * * of the county in which the lands described in the mortgage given with such bond are situate, a written notice of the proposed judgment or action, setting forth the court in which it is proposed to enter such judgment or begin such action, the names of the parties to such bond, and to such judgment or action, the book and page of the record of said mortgage, together with a description of the lands or real estate described therein.

“Entry of judgment is a ministerial or clerical act required to be done by the clerk of the court, and consists in placing a judgment, previously rendered, upon the record.”

34 C. J., p. 55, and cases cited.

“A judgment is entered when it is spread at large upon the record.”

34 C. J., p. 55, and cases cited.

“Until judgment forms signed by the Judge and filed with the clerk are recorded, they are nothing more than directions to the clerk to enter judgment in a form specified; until such direction is obeyed, the judgment is not entered.”

34 C. J., p. 55, and cases cited.

“The rendition of a judgment is the judicial act of the Court in pronouncing a sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict or findings, as distinguished from the entry of the judgment, which is the ministerial act of spreading it at large upon the record.”

34 C. J., pp. 44 and 45, and cases cited.

“There is a clear distinction between rendering a judgment, which is purely a judicial act and which can be performed by the Court alone, and entering a judgment, which is ministerial, and is usually performed by the clerk.”

Meade v. Scribner, 10 Ariz. 33, 36.

“The words ‘rendered’ and ‘entered’ are plainly used antithetically, and each in its distinctive correct legal sense—rendered being used to indicate the giving of judgment, and entered to indicate the act of placing the judgment rendered on record—in other words, enrolling or recording it.”

Blatchford v. Newberry, 100 Ill. 484, 489.

“The rendition and entry of a judgment are entirely different acts—one is to be performed by the Court and must be first in order of time,

and the other by the clerk. Often in practice a long period of time elapses between these two events."

Peck v. Courtis, 31 Cal. 207-209.

"As a general rule, in order that judgment upon a confession may have the validity and effect of a judgment at law as against other creditors, it must be entered by the clerk in the proper book or record of the Court, as it is the record entry and not the confession that constitutes the judgment."

34 C. J. 124, and cases cited, including *Eakin v. Smith*, 21 N. J. L. 97.

V.

THE NOTICE OF INTENTION SATISFIED
IN ALL PARTICULARS THE STATUTORY
REQUIREMENTS.

The notice of intention was headed: "Notice of proposed entry of judgment by confession on bond and warrant, where mortgage has been foreclosed and a deficiency has arisen," and in the body thereof, it is stated: "Take notice that Rosa E. Gerstley, as plaintiff, intends to commence action in the Atlantic County Circuit Court to enter a judgment in her favor and against said David H. Best and Harry Best * * *."

It is difficult to conceive how anyone could fail to comprehend just what course the plaintiff intended pursuing, or what further could have been contained in the notice. It embodied every requirement of the statute, and was amply sufficient for the purpose for which it was intended.

In *Neu v. Rogge*, 88 N. J. L. 335, at page 339, the Court of Errors and Appeal stated as follows regarding the notice of intention when a judgment is about to be entered for a deficiency on the foreclosure of a mortgage:

“The clear legislative intent was, by a public record, to make secure the title to a purchaser of mortgaged lands which had been foreclosed and failed to realize on sale thereof the amount secured by the bond and mortgage, and which were subject to redemption by the person within six months after the entry of judgment against him for the deficiency on the bond.”

Since, therefore, the present notice stated that an action was about to be commenced to enter a judgment by confession on bond and warrant where the mortgage had been foreclosed and a deficiency had arisen, which had the effect of subjecting the premises in question to redemption, it was sufficient to put any prospective purchaser on notice that proceedings were pending which might affect the title to the property, and served the purpose which the Legislature intended.

VI.

THERE WAS NO NECESSITY THAT THE PROCEEDINGS SHOULD SHOW THAT THE ACTION FOR THE DEFICIENCY WAS BROUGHT WITHIN SIX MONTHS AFTER SALE.

The requirement that all suits for any deficiency that may arise on the foreclosure of a mortgage must be commenced within six months from the

date of sale of mortgaged premises is a provision similar to others limiting the time within which an action may be brought. It is quite clear that it is not necessary to allege in any case that the proceedings or suit has been instituted within the time required by statute.

“In the absence of statute providing otherwise, ordinarily it is not necessary in an action at law for plaintiff in his declaration or complaint to anticipate and attempt to avoid a plea of the statute of limitations by alleging facts to show that his cause of action is not barred by the statute.”

37 C. J. 1200 and cases.

“In some jurisdictions it is held that such allegations are not only not necessary but also improper, and that plaintiff cannot avail himself of matter in avoidance of the statute by pleading such matter in his complaint before the statute has been set up as a bar by his plea, and that if he does allege such matter, the declaration or complaint may be subject to demurrer; the proper practice being to aver these matters by way of replication to the plea.”

37 C. J. 1200 and cases.

VII.

THE AFFIDAVIT COMPLIED IN ALL RESPECTS WITH THE STATUTORY REQUIREMENTS.

(a) The first objection which the appellant raises

to the affidavit is that it failed to show how the amount of the deficiency was computed.

The Act concerning bonds and warrants, 1 C. S. 219, Section 11, requires three things to be contained in the affidavit: (1) The true consideration; (2) that the debt or demand is justly and honestly due and owing; (3) that the judgment is not confessed to answer any fraudulent intent or purpose or to protect the property of the defendant from his other creditors.

All three requisites are fully set forth in the affidavit, but the appellant complains that it does not show how the deficiency arose, which is not required by the statute. He does not contend that the amount set forth in the affidavit is not correct.

In *Smith v. Weaver*, 75 N. J. L. 31, at page 34, the Supreme Court held as follows:

“If the affidavit states the consideration by giving truthfully the substance of the transaction, a judgment entered for an honest demand for an actual indebtedness and without fraudulent purpose, will not be open to the attack of other creditors merely because the affidavit is inartificially drawn. The word ‘true’ in this connection means that which is frank and actual rather than that which is precise and technical.”

(b) The second objection which the appellant raises to the affidavit is that it was not taken before a duly authorized officer. The procedure followed in the present case was amply justified by our Act relating to Oaths and Affidavits, 3 S. C. 3774, Section 5, which is as follows:

“That any oath, affirmation or affidavit required or authorized to be taken *in any suit or legal proceeding* in this State, or for any

lawful purpose whatever (except official oaths and depositions required to be taken upon oaths), when taken out of this State may be taken before * * * any officer who may be authorized by the laws of this State to take the acknowledgment of deeds in such State, territory, nation, kingdom or country, and a recital that he is such notary or officer in the jurat or certificate to such oath, affirmation or affidavit and his official designation annexed to his signature and attested under his official seal shall be sufficient proof that the person before whom the same is taken is such notary or officer

* * * ”

By our Act Concerning Conveyances, 2 C. S. 1532, Section 23, a foreign commissioner of deeds for New Jersey is authorized to take acknowledgments to deeds, and is thus brought within the purview of the above Act.

That Section 12 of the Act Concerning Bonds and Warrants, 1 C. S. 219, providing before whom the affidavit required in proceedings to confess judgment on a bond and warrant should be taken, is amplified by our Act Concerning Oaths and Affidavits, is borne out by the case of *Brandt v. Tarter*, 145 Atl. Rep. 225.

(c) The third objection that the appellant raises to the affidavit is that the officer who took it failed to recite in the jurat thereto that he was such officer.

“The jurat is that clause written at the foot of an affidavit stating when, where and before whom such affidavit was sworn.”

Black's Law Dictionary, 2nd Ed.

The part complained of in the present affidavit reads as follows:

"Sworn and subscribed before me this 17th day of June, 1929.

(SEAL)

MARTHA H. QUINN,
A Foreign Commissioner
of Deeds for New Jersey
in Pennsylvania."

That such clause was a sufficient compliance with Section 34 of the Oaths and Affidavits Act, 3 Comp. Stat., p. 3774, is well settled.

"Where a foreign notary public affixed his official seal, and signed his name (but without adding his official designation, though it was contained in the jurat) to the jurat of the affidavit taken out of this State, to an answer in Chancery, held to be sufficient as a compliance with Rule 163, Chancery, and motion to take answer from files refused, although the section requires his official designation to be affixed to his signature."

Feuchtwanger v. McCool, 29 E. 151.

"A chattel mortgage had annexed thereto an affidavit made in Pennsylvania, before a notary public of that State, but the jurat did not contain a recital that the officer taking the affidavit was a notary public, as provided for in this section. Held, that the mortgage had annexed thereto an affidavit within the meaning of Section 4 of the Chattel Mortgage Act, and was not void as to the creditors of the mortgagor for lack of such recital in the jurat.

Magowan v. Baird, 53 E. 656, 32 A. 1054,
affirming 53 E. 454, 32 A. 377.

“An affidavit signed ‘Richard T. Greene, Notary Public, N. Y. Co.,’ sufficiently showed, *prima facie*, that it was executed before a notary public.”

Earle v. Metallurgic Co., 77 E. 17, 76 A. 555.

VIII.

EVERY PRESUMPTION OF LAW IS IN FAVOR OF THE VALIDITY OF A JUDGMENT THAT HAS BEEN DULY RENDERED.

“In the case of a collateral attack upon a domestic judgment of a Court of general jurisdiction by a party thereto, every reasonable presumption is indulged to support the judgment, and the burden is upon the party collaterally attacking a judgment to establish its invalidity.”

34 *C. J.*, pp. 537, 538, and cases cited;

Palmer v. Essex County Board of Chosen Freeholders, 77 N. J. L. 143;

Miller v. Dungan, 35 N. J. L. 389;

McDevitt v. Connell, 71 N. J. Eq. 119;

National Docks, &c., Connecting R. Co. v. Pennsylvania R. Co., 52 N. J. Eq. 58, affirmed 52 N. J. E. 590;

McCahill v. Equitable L. Assur. Society, 26 N. J. Eq. 531.

CONCLUSION.

It is respectfully submitted that the order of the Supreme Court affirming the judgment of the Atlantic County Circuit Court be affirmed.

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Attorneys of Respondent.

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CONCLUSION.

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