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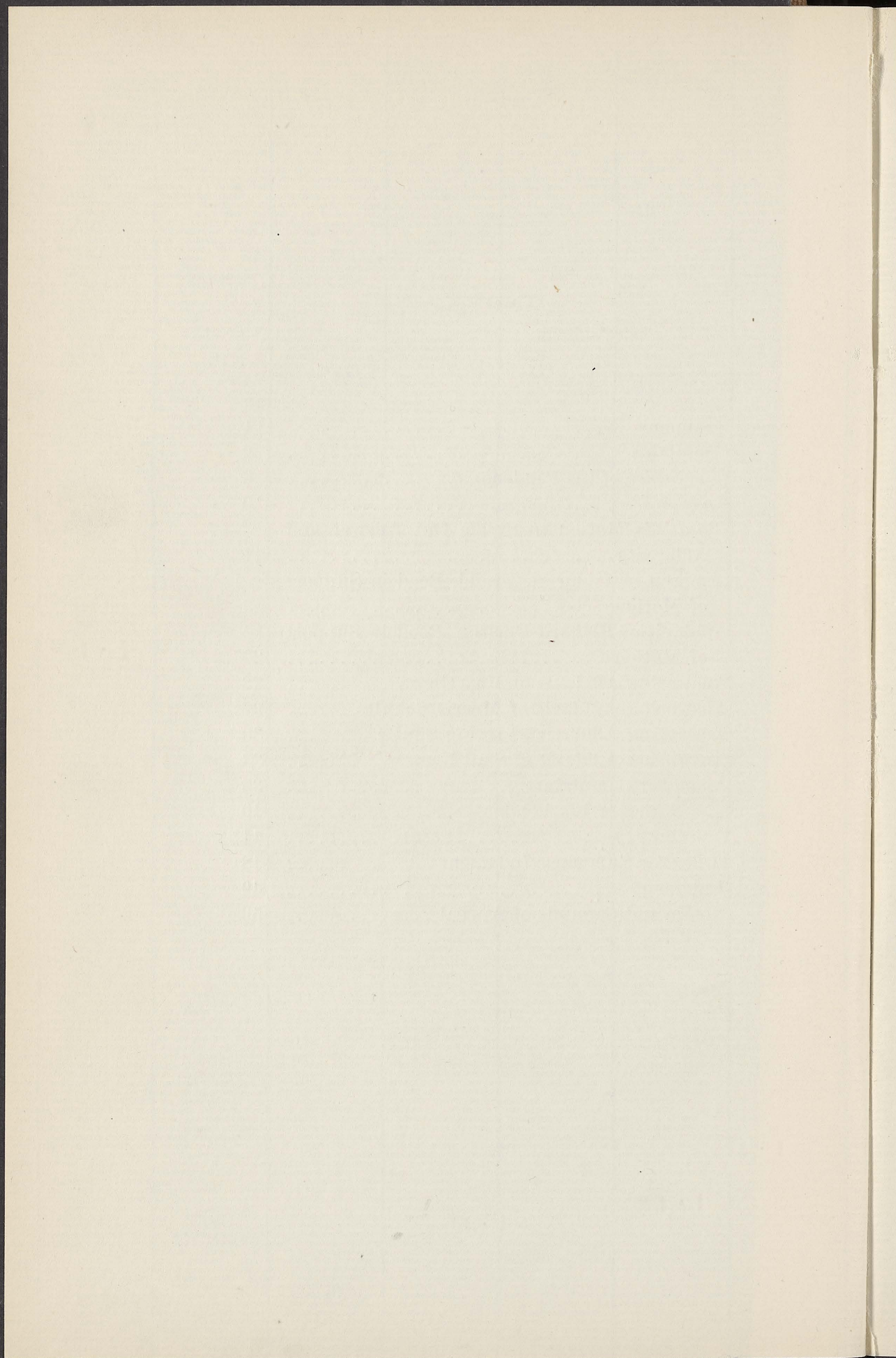

Summons.

(Filed January 19, 1931.)

The State of New Jersey to: Irving Shultz and Bessie Shultz, his wife, Morris Schultz and Clara Schultz, his wife, and Saul Nemser.

(L. S.)

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You are summoned to answer the annexed complaint of Richard Dorison in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

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Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 24th day of October, nineteen hundred and thirty.

Fred S. Bloodgood,
Clerk.

Pierson, Schroeder & Brand,
Attorneys.

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Complaint.

(Filed January 19, 1931.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ and BESSIE SHULTZ, his wife, MORRIS SCHULTZ and CLARA SCHULTZ, his wife, and SAUL NEMSER, Defendants.	Action at Law.

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Plaintiff, Richard Dorison, residing at the City of Jersey City, Hudson County, New Jersey, says that:

1. On December 6, 1928, at Jersey City, in the County of Hudson and State of New Jersey, the defendants Irving Shultz and Bessie Shultz his wife, Morris Schultz and Clara Schultz, his wife, and Saul Nemser, executed to plaintiff their bond of that date in the penal sum of $30,000, conditioned to pay the principal sum of $15,000, with interest at 6%.

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2. To secure said bond, the defendants, on the same date, executed a mortgage to plaintiff upon lands and premises owned by them, bounded and described as follows:

ALL those four certain lots, tracts of land and premises, situate in the Borough of Palisades Park, in the County of Bergen and State of New Jersey, and designated as lots num-

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bered forty-two hundred and four (4204), forty-two hundred and four A (4204A), forty-two hundred and five (4205), forty-two hundred and five A (4205A) in Block numbered 11, according to a map entitled "Map of Broad Avenue Highlands, in Leonia, Bergen Co., N. J., May, 1907", by C. H. Eckerson, E. M. Englewood, N. J., and filed in the Clerk's Office of Bergen County, New Jersey, on the second day of June, 1908, as Map Number 924. 10

Also all those certain lots, tracts, pieces or parcels of land and premises, situate, lying and being in the City of Hackensack, in the County of Bergen and State of New Jersey, more particularly described as follows:

Beginning at a point in the northeasterly side of Clinton Place distant therefrom three hundred nine feet and five tenths of a foot (309.5) northwesterly from the corner formed by the intersection of the said side of Clinton Place with the northwesterly side of Linden Street; said point being the division line between Lots Numbers One hundred ten (110) and one hundred eleven (111) on map hereinafter described and running thence (1) northeasterly and along the division line between Lots Numbers One Hundred ten (110) and One hundred eleven (111) aforesaid one hundred fifty-four feet and five tenths of a foot (154.5) more or less to the center line of a lane sixteen (16) feet in width; thence (2) northwesterly and along the center line of lane aforesaid one hundred nine feet and five tenths of a foot (109.5) to the southeasterly line of Grand Avenue as shown on a map hereinafter described, said point being also in the north- 20 30 40

westerly line of Lot Number One Hundred Nine (109); thence (3) southwesterly and along the northwesterly lien of Lot Number One hundred nine (109) one hundred fifty-four feet and two tenths of a foot (154.2) to the said side of Clinton Place; thence (4) southeasterly along the said side of Clinton Place one hundred (100) feet to the point or place of beginning.

Being further described and designated as Lots Numbered one hundred nine (109) and one hundred ten (110) on a cerain map filed in the Bergen County Clerk's Office on July 20, 1883 and entitled "Map of property of D. Ackerman, Hackensack, N. J." made by William Williams, Engineer, Hackensack, 1870.

3. On June 3, 1930, a final decree for the sale of said land and premises and the foreclosure of said mortgage was made in the Court of Chancery of New Jersey in a suit brought by plaintiff against these defendants, and others in interest.

4. Said decree adjudged that there was then due upon said bond and mortgage the sum of $16,720.00, and ordered a writ of fieri facias to be issued to the Sheriff of Bergen County for the sale of the mortgaged premises to meet the sum so due, together with interest from May 28, 1930, and the taxed costs of suit, amounting to $333.15.

5. On September 10, 1930, and within six months of the commencement of this action, the sheriff of said county, under authority of the said writ, sold said premises at public sale, according to law, to the plaintiff, he being the highest bidder at said sale, for the sum of $100 for the 1st tract here-

inabove described and $100 for the second tract hereinabove described.

6. The fees and disbursements of the sheriff, as lawfully allowed, upon said execution amounted to $114.14, and these fees and disbursements were therewith paid by the said plaintiff to the said Sheriff as appears by the writ of execution, duly returned into court. 10

7. The sum of $200 realized from the said sale, having been duly credited upon said decree and execution, there remained due to the plaintiff the amount of $16,520.

8. The said sum of $16,520, in deficiency, has not, nor has any part thereof, been paid the plaintiff.

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9. On October 23, 1930, and within six months after the said sheriff's sale, and prior to the institution of this action, plaintiff filed in the Clerk's Office of Bergen County, wherein said mortgaged premises were situate, a notice of this action as proposed, setting forth therein the name of the court where such action would be brought, and names of the parties to the bond and action, the record of the mortgage, and description of the mortgaged premises, as provided by statute, a copy of which notice is hereto annexed and made a part hereof. 30

This action of plaintiff's against the defendants was commenced within six months from the date of the sale of said mortgaged premises.

Plaintiff demands the sum of Sixteen thousand five hundred and twenty ($16,520) dollars, with interest from May 28, 1930.

Pierson, Schroeder & Brand,
Attorneys of Plaintiff. 40

Notice of Lis Pendens, Annexed to Complaint.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ and BESSIE SHULTZ, his wife, MORRIS SCHULTZ and CLARA SCHULTZ, his wife, and SAUL NEMSER, Defendants.	Action at Law.

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NOTICE is hereby given that a suit entitled as above set forth is about to be commenced in said Supreme Court.

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The general object of said suit is to recover for the deficiency on a bond made by Irving Shultz and Bessie Shultz his wife, Morris Schultz and Clara Schultz, his wife, and Saul Nemser to Richard Dorison, dated December 6, 1928, and given to secure the sum of $15,000 on the 31st day of December, 1929, with interest at 6% per annum payable quarterly, which bond was secured by a mortgage made by the said Irving Shultz and Bessie Shultz, his wife Morris Schultz and Clara Schultz his wife, and Saul Nemser single to the said Richard Dorison, bearing even date with the said bond and recorded January 4, 1929, in book 1116 of mortgages for Bergen County at page 541, &c. The said mortgage was foreclosed by said plaintiff and the lands described in said mortgage and being the premises hereinafter described, were sold by the Sheriff of Bergen County on September 10, 1930,

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and the sum of $200 realized from said sale, having been duly credited, there remained a deficiency due the plaintiff of $16,520 with interest thereon from May 28, 1930. Suit is brought to recover this amount.

The lands to be affected by said suit are described as follows: 10

All those four certain lots, tracts of land and premises, situate in the Borough of Palisades Park, in the County of Bergen and State of New Jersey, and designated as Lots numbered forty-two hundred and four (4204) forty-two hundred and four A (4204A), forty-two hundred and five (4205), forty-two hundred and five A (4205A) in Block numbered 11, according to a map entitled "Map of Broad Avenue Highlands, in Leonia, Bergen Co., N. J. May, 1907", by C. H. Eckerson, E. M. Englewood, N. J., and filed in the Clerk's Office of Bergen County, New Jersey, on the second day of June, 1908, as Map number 924. 20

Also, all those certain lots, tracts, pieces or parcels of land and premises, situate, lying and being in the City of Hackensack, in the County of Bergen and State of New Jersey, more particularly described as follows: 30

Beginning at a point in the northeasterly side of Clinton Place distant thereon three hundred nine feet and five tenths of a foot (309.5) northwesterly from the corner formed by the intersection of the said side of Clinton Place with the northwesterly side of Linden Street; said point being the division line between Lots Numbers One Hundred Ten

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(110) and One Hundred Eleven (111) on map hereinafter described and running thence (1) northeasterly and along the division line between Lots Numbers One Hundred Ten (110) and One Hundred Eleven (111) aforesaid one hundred fifty-four feet and five tenths of a foot (154.5) more or less to the center line of a lane sixteen (16) feet in
10 width; thence (2) northwesterly and along the center line of lane aforesaid one hundred nine feet and five tenths of a foot (109.5) to the southeasterly line of Grand Avenue as shown on a map hereinafter described, said point being also in the northwesterly line of Lot Number One Hundred Nine (109; thence (3) southwesterly and along the northwesterly line of Lot Number One Hundred Nine (109) one hundred fifty-four feet and two
20 tenths of a foot (154.2) to the said side of Clinton Place; thence (4) southeasterly along the said side of Clinton Place one hundred (100) feet to the point or place of beginning.

Being further described and designated as Lots Numbers One Hundred Nine (109) and One Hundred Ten (110) on a certain map filed in the Bergen County Clerk's Office on July 20, 1883, and entitled "Map of Property of D. Ackerman, Hacken-
30 sack, N. J." Made by William Williams, Engineer, Hackensack, 1870.

Dated: October 22, 1930.

Pierson, Schroeder & Brand,
Attorneys of Plaintiff,
84 Washington Street,
Hoboken, N. J.

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Answer.

(Filed November 13, 1930.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ, *et ux, et als.*,	Action at Law.

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Defendants residing in Jersey City, County of Hudson and State of New Jersey, answering the complaint.

The joint and several answer of these defendants. 20

1. They admit the allegations in Paragraph "1".

2. They admit the allegations in Paragraph "2".

3. They have no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 3, 4, 5, 6, 7, 8 and 9 of the complaint, and therefore leave the plaintiff to his proof thereon. 30

FIRST SEPARATE DEFENSE.

1. It was agreed between the said plaintiff and defendants on or about the 10th day of September, 1930, that if the said defendants would refrain from bidding at the said Sheriff's sale, so that the said plaintiff could buy in the said premises at a nominal bid, that in consideration thereof the plaintiff 40

would not bring the within suit for any deficiency that might arise by reason of said Sheriff's sale.

2. That the said defendants, although present either personally or through their representative at the said Sheriff's Sale in consideration of the said plaintiff's agreement, did refrain from bidding or making any bid whatever for the said premises at the said Sheriff's sale, so that the plaintiff was able to buy in the said premises at a nominal sum of $200.00.

3. By reason whereof, the said plaintiff under his said agreement with the defendants, is now estopped from bringing the within suit.

NOTICE TO THE PLAINTIFF.

TAKE NOTICE: That at or on the trial of the above entitled cause, the defendants will move to strike out the complaint on the following grounds, viz.,

1. Same does not state a cause of action.

2. Same does not assign any alleged breaches of the condition of the bond, nor does same show that the defendants have in any wise defaulted or breached the condition of said bond, nor does the same show what the condition of said bond is.

SAUL NEMSER,
Attorney of Defendants.

Plaintiff's Motion to Strike Out Answer and Affidavits.

(Filed December 16, 1930.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ, *et ux, et als.*, Defendants.	Action at Law.

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TAKE NOTICE that we shall move before Honorable Charles W. Parker, at the County Court House at Morristown, in the County of Morris, on Saturday, the 13th day of December, 1930, at 10 o'clock in the forenoon or as soon thereafter as we can be heard, for an order striking out portions of the answer filed in behalf of the defendants in the above matter, as follows: Paragraph 3 of the answer and the first separate defense consisting of three paragraphs and determining whether or not the complaint shows a cause of action, on the following grounds:

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FIRST: Motion will be made to strike out paragraph 3 of the answer because it is sham and not true in fact that the defendants have no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 3, 4, 5, 6, 7, 8 and 9 of the complaint and on the further ground that all of the said allegations are true and do not admit of any denial and should not be permitted to require any trial of the facts therein alleged.

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SECOND: Motion will be made to strike out the first separate defense consisting of three paragraphs because the same is sham and untrue in fact.

THIRD: Motion will be made to have it determined whether or not the complaint discloses a cause of action and whether or not the notice of motion contained in the answer should prevail in order that the issues may be properly framed and determined before the case is listed for trial.

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This motion is made pursuant to the authority contained in the rules of law and practice of this court.

TAKE FURTHER NOTICE that affidavits, copies of which are attached hereto, will be used in support of this motion.

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TAKE FURTHER NOTICE that if said motion to strike prevails and it be determined that the complaint discloses a cause of action, motion will also be made for summary judgment in favor of the plaintiff against the defendants.

Judgment will be claimed for $16,520. with interest from May 28, 1930.

Dated: November 29, 1930.

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Yours respectfully,

PIERSON, SCHROEDER & BRAND,
Attorneys of Plaintiff.

To:

Irving Shultz and Bessie Shultz,
his wife, Morris Schultz and
Clara Schultz, his wife, and
Saul Nemser, or Saul Nemser,
their attorney.

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Affidavit of Isidor H. Brand, in Support of Motion.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ, *et ux, et als.*, Defendants.	Action at Law.

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STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } SS.:

ISIDOR H. BRAND, of full age, being duly sworn, according to law on his oath, deposes and says that: 20

1. I am an attorney at law of the State of New Jersey, and a member of the firm of Pierson, Schroeder & Brand, practicing attorneys.

2. The said firm was solicitors of the complainant in a certain suit brought in the Court of Chancery between Richard Dorison, Complainant, and all the defendants in this suit and others, defendants, for the foreclosure of a certain mortgage referred to in the complaint, and I had actual charge of said suit. 30

3. On December 6, 1928, the defendants entered into a bond to Richard Dorison, the plaintiff, in the penal sum of $30,000. conditioned for the payment of $15,000. on the 31st day of December, 1929, and interest at the rate of 6% per annum, to be paid quarterly. 40

4. To secure payment of said bond the said defendants executed the mortgage referred to in paragraph 2 of the complaint; both bond and mortgage being admitted in the said answer.

5. The mortgaged premises are described in said mortgage, as follows:

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All those four certain lots, tracts of land and premises, situate in the Borough of Palisades Park, in the County of Bergen and State of New Jersey, and designated as lots numbered forty-two hundred and four (4204), forty-two hundred and four A (4204 A), forty-two hundred and five (4205), forty-two hundred and five A (4205 A) in Block numbered 11, according to a map entitled "Map of Broad Avenue Highlands, in Leonia, Bergen Co., N.

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J., May, 1907", by C. H. Eckerson, E. M. Englewood, N. J., and filed in the Clerk's Office of Bergen County, New Jersey, on the second day of June, 1908, as Map number 924.

Also all those certain lots, tracts, pieces or parcels of land and premises, situate, lying and being in the City of Hackensack, in the County of Bergen and State of New Jersey, more particularly described as follows:

30

Beginning at a point in the northeasterly side of Clinton Place distant thereon three hundred nine feet and five tenths of a foot (309.5) northwesterly from the corner formed by the intersection of the said side of Clinton Place with the northwesterly side of Linden Street; said point being the division line between lots Numbers One Hundred ten (110) and one hun-

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dred eleven (111) on map hereinafter described and running thence (1) northeasterly and along the division line between Lots Numbers One Hundred ten (110) and One Hundred eleven (111) aforesaid one hundred fifty-four feet and five tenths of a foot (154.5) more or less to the center line of a lane sixteen (16) feet in width; thence (2) northwesterly and along the center line of lane aforesaid one hundred nine feet and five tenths of a foot (109.5) to the southeasterly line of Grand Avenue as shown on a map hereinafter described, said point being also in the northwesterly line of Lot Number One Hundred Nine (109); thence (3) southwesterly and along the northwesterly line of Lot Number One Hundred nine (109) one hundred fifty-four feet and two tenths of a foot (154.2) to the said side of Clinton Place; thence (4) southeasterly along the said side of Clinton Place one hundred (100) feet to the point or place of beginning.

Being further described and designated as Lots Numbered One hundred nine (109) and one hundred ten (110) on a certain map filed in the Bergen County Clerk's Office on July 20, 1883 and entitled "Map of property of D. Ackerman, Hackensack, N. J." made by William Williams, Engineer, Hackensack, 1870.

6. On January 27, 1930, a bill of complaint was filed in the Court of Chancery of this State against the defendants to this suit and others, for the foreclosure of the said mortgage. Such proceedings were had in said suit that on June 3, 1930, a final decree was entered therein, confirming the Master's

report that had been made in said matter and ordering that the mortgaged premises above particularly described be sold to raise and satisfy the money due the complainant, namely $16,720. together with lawful interest thereon from May 28, 1930, being the date of the Master's report; with the complainant's costs to be taxed, which should include a counsel fee of $183. which was allowed to the complainant, and that a writ of fieri facias should issue out of the Court of Chancery to the Sheriff of the County of Bergen commanding him to make sale according to law of the said mortgaged premises and that out of the moneys arising out of said sale he pay to the complainant or his solicitor his said debt, interest and costs.

7. The costs of said complainant were taxed on the 25th day of June, 1930, at $333.15 and the said costs bore interest from that day.

8. A writ of execution was duly issued and on September 10, 1930, within six months of the commencement of this action, the Sheriff of Bergen County, under authority of the said writ of execution and after due advertising, sold the mortgaged premises at public sale to the complainant in the said Chancery suit, and plaintiff in this suit, he being the highest bidder at said sale, for the sum of $100. for the first tract above described and for the sum of $100. for the second tract above described. The said sale was duly confirmed and the Sheriff executed a deed to the complainant.

9. The fees and disbursements of the Sheriff upon the execution amounted to $114.14. These fees were paid by the plaintiff to this suit to the Sheriff.

10. The plaintiff credited the sum of $200. realized from the sale, leaving a balance of $16,520. with interest from May 28, 1930. Complainant, the plaintiff in this suit, would have been entitled also to the amount of his costs and Sheriff's execution fees, but they were not included in this suit. Judgment will be claimed only for the sum of $16,520. with interest from May 28, 1930, and costs. 10

11. No part of said deficiency has been paid.

12. On October 23, 1930, within six months after the said Sheriff's sale and prior to the institution of this suit, plaintiff caused to be filed in the Clerk's office of Bergen County wherein said mortgaged premises were situated, a notice of this proposed suit, setting forth therein the name of the court in which such action would be brought, the names of the parties in connection therewith, record of the mortgage, and description of the mortgaged premises, a true copy of which notice is attached to the bill of complaint. 20

13. I have read the allegations of the first separate defense of the defendants. I never made any such agreement with the defendants or with any of them; no such agreement was authorized to my knowledge by the complainant in said suit and I never knew or heard of any talk about any such agreement and was surprised when I saw it mentioned in the answer. So far as I know of, all the conversation or correspondence had with reference to the suit was had by me and not with the complainant therein. 30

14. I did not agree and there was no agreement made in my presence with any of the de- 40

fendants, that if the defendants would refrain from bidding at the Sheriff's sale, so that the complainant could buy in the premises at a nominal bid, the complainant would not bring any suit for deficiency that might arise by reason of the Sheriff's sale. My client and I attended the sale and none of the defendants were there personally. They did, however, have someone at the sale. If the defendants or any one of them refrained from bidding it was not because of any promise that if they did so refrain there would be no suit for deficiency.

15. At the time of the sale I gave a young man there in behalf of the defendants, a statement of the amount which the defendants would have to bid in order that there might be no deficiency.

16. There were a number of adjournments of the sale at the request of Saul Nemser, representing himself and the other defendants. These were had in order that the defendants might try to settle the matter without a sale. Even after the sale the said Saul Nemser, on behalf of himself and representing the other defendants, had several conferences with me about the suit for deficiency, at which times the plaintiff herein was present. Mr. Nemser asked that suit for deficiency be held off until the time for bringing it had nearly elapsed in the hope that he might make a settlement. He was trying to raise money either to pay off the deficiency or to make a cash settlement. The plaintiff herein did at all times hold himself ready to convey the mortgaged premises to the defendants if the full amount of the deficiency was paid him. He is still willing to do that.

Affidavit of Isidor H. Brand.

17. All of the defendants in this law suit were actually served in the Chancery suit.

18. I believe that there is no defense to this action.

Isidor H. Brand.

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Sworn and Subscribed to before me
this 30th day of November, 1930.

Charles L. von Driele,
Notary Public of New Jersey.

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Affidavit of Richard Dorison, in Support of Motion.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ, *et ux, et als.*, Defendants.	Action at Law.

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STATE OF NEW JERSEY, COUNTY OF HUDSON, } ss.:

20 RICHARD DORISON, of full age, being duly sworn, according to law on his oath, deposes and says that:

1. I am the plaintiff in the above entitled matter.

2. I was represented throughout this suit by Isidor H. Brand, who made the foregoing affidavit. I did not have any communication with the defendants in the suit during its continuation except through or in the presence of my solicitor, Mr.
30 Brand.

3. I have read the first separate defense to the answer of the defendants. I did at no time agree or authorize my solicitor to agree that if the defendants would refrain from bidding at the Sheriff's sale, so that I could buy in the premises at a nominal bid, that in consideration thereof I would not bring any suit for deficiency, which might arise by reason of said Sheriff's sale.

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4. If the defendants or any of them refrained from bidding, it was not in reliance of any agreement made by me or authorized by me.

5. I was present at several conferences, both before and after the sale. These were in the presence of Mr. Brand and Saul Nemser, one of the defendants, who was present at these in his own behalf and in behalf of the other defendants. Several adjournments of the sale were made at the request of Mr. Nemser, as he was trying to effect a settlement of the matter. After the sale there were also conferences about a settlement of the deficiency. In none of these conferences was there any mention about my not bringing suit for the deficiency if the defendants did not bid. All I did say was that if the deficiency was paid or settled I would convey the property.

6. I believe that there is no defense to this action.

RICHARD DORISON.

Sworn and Subscribed to before me this 20th day of November, 1930.

HILMA E. PIERSON,
Notary Public of New Jersey.

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Answering Affidavit of Max Goren.

(Filed March 25, 1931.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ, *et ux*, *et als.*, Defendants.	Action at Law.

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STATE OF NEW JERSEY, } ss.:
COUNTY OF HUDSON, }

20 MAX GOREN, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I reside at No. 25 Gifford Avenue, Jersey City, Hudson County, New Jersey. I am thirty-nine years of age, and I have been engaged in the real estate business for the past fourteen years.

2. Prior to September 10th, 1930, I had been a friend of all the defendants for many years, and have also done business with all the defendants for several years. I have for many years been a client of Saul Nemser.

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3. Before September 10th, 1930, Mr. Nemser had informed me of the fact that foreclosure proceedings had been instituted by Dorison, affecting the Hackensack property and property on Broad Avenue, Palisades Park, New Jersey, mentioned in the complaint. He told me that the sale would take

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place on September 10th, 1930 at the Sheriff's Office, Court House, Hackensack, N. J. He told me that he was one of the obligors on the bond, given in connection with the mortgage and that as such he was particularly interested in the amount that the property brought at the Sheriff's Sale, because of any possible deficiency that might arise which would make him liable on the bond. He advised me that the property had already entailed a cash outlay by him and the other defendants of a sum approximating Seventeen Thousand ($17,000.00) Dollars. Mr. Nemser also told me that he was desirous of protecting the interest of the other defendants and himself in the property, and felt that if he could re-finance the property by obtaining another mortgage, that he and the other defendants would be able to get back the money that they had put into the proposition. He asked me if I would go to the sale to protect his interest and the interests of the other defendants.

4. I went out to the properties around Labor Day, 1930, and made a careful examination of the same. I appraised the Broad Avenue property at a conservative valuation of Twenty-two Thousand ($22,000.00) Dollars, and I appraised the Hackensack property at a conservative valuation of Twenty Thousand ($20,000.00) Dollars. I was perfectly satisfied after my inspection and appraisal of the property to bid in the property up to the full amount of the decree in the foreclosure case, which I was advised was in the neighborhood of Seventeen Thousand ($17,000.00) Dollars, including costs and Sheriff's fees. I intended, if I secured the property at the Sheriff's sale to turn over the propery to the defendants in this case if they could raise the money

to re-imburse me for my bid, but I was perfectly willing to take the property myself if they were unable to do so within a reasonable time.

5. On September 10th, 1930, I went out to attend the sale at Hackensack, together with Morris Schultz and Irving Schultz, two of the other de-
10 fendants in the case. Mr. Nemser told me that he could not be there because of the serious illness of his wife, and told me that so long as I was ready to bid in the property, he was perfectly satisfied. When we got to the Sheriff's sales room in Hackensack, Mr. Dorison, the plaintiff and his attorney, Mr. Brand were already there. Mr. Dorison, the plaintiff came over and had a talk with us. There were present at this conversation besides Mr. Dorison, his attorney, Mr. Brand, Mr. Morris Shultz,
20 Irving Shultz and myself. Mr. Dorison asked Morris Schultz "what he was going to do", and Mr. Morris Schultz told him that I was prepared to buy in the property. He then said "how much are you prepared to bid?" I told him I was prepared to bid up to the amount of the decree and asked him if he had the figures. Mr. Brand gave me a statement of the amount of the decree together with the costs. I told Dorison I was a friend of Mr. Nemser
30 and of Mr. Morris Schultz and that I was prepared to buy the property in, and later on turn it over to them if they could re-finance the proposition, and besides that I told him that Mr. Nemser told me he was personally liable on the bond, and that I was there to protect him from any deficiency that might arise. Mr. Dorison said to me that he wanted the property for himself, as he had plans already prepared to build store property on the Broad Avenue property in Palisades Park, and that nobody
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need fear that there would be any deficiency on the bond, because if he brought suit on the bond it would re-open the foreclosure proceedings. Mr. Dorison further said that he did not see any further use in bidding up the property against him as it would mean a lot of additional cost and that if Mr. Nemser's chief concern was the deficiency on the bond, that he need have no fear as to that, be- 10 cause he would not bring any action on the bond as he wanted the property for himself and was already to build. He also said that the search showed that the property had been transferred to a woman over in New York and that if the bid went as high as Twenty Thousand ($20,000.00) Dollars, she would be the beneficiary to the extent of the surplus monies and he could not see any reason for accumulating any surplus monies for the benefit of this 20 woman in New York. I did not know at the time that the title stood in the name of this lady in New York, nor did I care anything about it.

6. My chief reason for going to the sale was to protect the Schultz and Mr. Nemser and while I was willing to take the property, I was not particularly anxious to add to my real estate holdings at that time. I accordingly, after this talk with Mr. Dorison and Mr. Brand, left the Sales Room before 30 the sale took place, relying upon Mr. Dorison's statement to me that he would not bring any deficiency action on the bond. I came to the sale perfectly prepared and ready to bid in the property, up to the full amount of the decree and had with me at that time sufficient monies to cover the necessary deposit required by the Sheriff.

7. In September, 1930, I had available funds sufficient to cover the full amount of Dorison's de- 40

cree. After I left the Sheriff's sales room, relying upon the conversation with Dorison, I placed the money which I had available in different investments—I bought 50 shares of American Telephone & Telegraph Company stock at $202.00 outright, at a cost of a little over $10,000.00. I bought this stock about a week after the sale.

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8. If I had known that Mr. Dorison contemplated any action for a deficiency on the bond, I would have remained at the sale and would have bid up to the full amount of the decree and costs, according to the statement that was handed to me by Mr. Brand.

Max Goren.

20 Sworn and subscribed to before me this 12th day of December, 1930.

Joseph Moritz,
Attorney at Law of New Jersey.

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Answering Affidavit of Morris Schultz.
(Filed March 25, 1931.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON,
Plaintiff,
vs.
IRVING SHULTZ, *et ux, et als.*,
Defendants.
} Action at Law.

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STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

MORRIS SCHULTZ, of full age, being duly sworn, according to law, upon his oath, deposes and says: 20

1. I am one of the defendants named in the above-entitled action.

2. At the time fixed for the Sheriff's sale, September 10th, 1930, I went to Hackensack to the Sheriff's sale, accompanied by Irving Shultz and by Max Goren. When we arrived there, Mr. Brand and Mr. Dorison were already there. They came over to speak to us and Mr. Dorison asked me "what I intended to do". I told Mr. Dorison that Mr. Goren was prepared to buy in the property at the sale, and was prepared to bid up to the full amount of the decree. Mr. Goren asked Mr. Dorison and Mr. Brand if they had a statement of the amount due on the decree, and Mr. Brand gave Mr. Goren a statement which he had already prepared. Mr. Dorison then told Max Goren that he 30 40

would like to get the property for himself, that he had already prepared plans for the erection of stores on the Broad Avenue property, and that he would not bring suit on any deficiency because if he did, it would re-open the foreclosure decree. He said that if Mr. Goren's principal interest in the matter was to protect Mr. Nemser and the other 10 defendants from a suit for deficiency on the bond, that they need not worry about any such suit because he had no intention of bringing such a suit. He further stated to us that he saw no reason why he and Mr. Goren should bid against each other and run up the price and thus increase the costs.

3. Mr. Nemser did not go to the sale with us due to the illness of his wife.

20 4. I absolutely believed Mr. Dorison when he stated to us that he had no intention of suing on any deficiency on the bond and only for that reason, Mr. Goren and I left the Sheriff's Sales Room before the sale.

5. I knew that Mr. Goren had sufficient cash with him at the time to pay the necessary deposit to the Sheriff, based upon a bid of at least Seventeen Thousand ($17,000.00) Dollars. 30

6. I have known Mr. Goren for many years and have engaged in numerous real estate transactions with him and he has on several prior occasions loaned me money on bond and mortgage on various other properties that I owned. In fact, three years ago, he loaned me Forty Thousand ($40,000.00) dollars on bond and mortgage on certain property that I owned in Jersey City. He has also on occa-

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sions discounted mortgages for me. In fact, the buying and placing of mortgages, and the purchasing and selling of real estate have been his business.

MORRIS SCHULTZ.

Sworn and subscribed to before me
this 12th day of December, 1930.

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JOSEPH MORITZ,
Attorney at Law of New Jersey.

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Answering Affidavit of Irving Shultz.

(Filed March 25, 1931.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ, *et ux, et al.*, Defendants.	Action at Law.

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STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

20 IRVING SHULTZ, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am one of the defendants in the above entitled cause. I reside at No. 297 Stegman Parkway, Jersey City, New Jersey.

2. At the time of the Sheriff's sale on September 10th, 1930, I accompanied my uncle, Mr. Morris Schultz, one of the other defendants in this cause, 30 and Mr. Max Goren to the Sheriff's Sales Room in the City of Hackensack. While there, I met Mr. Dorison, the plaintiff in this suit who was present with his attorney, Mr. Brand. I heard the conversation that took place between Mr. Dorison, his attorney, Mr. Brand, Mr. Goren and Mr. Morris Schultz. I heard Mr. Goren state that he was prepared to bid in the property for the full amount of the decree and costs. My best recollection of the 40 conversation that took place at that time was that Mr. Dorison was to be permitted to bid in the prop-

erty at a nominal figure, so as to save additional expenses and Mr. Goren was to refrain from bidding and that by reason of that fact there would be no suit brought against myself or any of the other defendants, by reason of any deficiency that might result on the bond.

3. The room was quite crowded with people and Mr. Dorison bid in both properties for $100.00 each, after the foregoing conversation and after Mr. Goren and Mr. Morris Schultz had left. I took no active part in the conversation myself, but left everything to Mr. Goren and my uncle, Mr. Morris Schultz. Because of the crowded condition of the sales room and the noise prevailing, and the crowded position where I was standing, I cannot say that I heard the entire conversation that took place, but I do recall hearing what was said as I have already described above. It was my impression when I left the Sheriff's Sales Room after hearing the conversation as mentioned above, that neither I nor any of the other defendants would be sued for any deficiency that might result on the bond. I do know that Mr. Goren was present for the express purpose of preventing a deficiency on the bond and bidding up to the full amount of the decree.

4. I do remember that sometime before the sale, I had driven Mr. Goren around to see the properties under foreclosure, so that he could make an appraisal and I do know that at that time he appraised the properties at an amount a great deal more than the plaintiff's mortgage. I also know for a fact that Mr. Goren was present at the sale for the express purpose of bidding up to the full

amount of the decree and costs, so as to prevent any deficiency that might result. The reason Mr. Goren did not bid was because of the understanding that Dorison was permitted to buy in the property in order to save Sheriff's Costs, and would not sue any of the defendants on the bond for any deficiency.

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IRVING SHULTZ.

Sworn and subscribed to before me
this 12th day of December, 1930.

JOSEPH MORITZ,
Attorney at Law
of New Jersey

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Answering Affidavit of Saul Nemser.

(Filed March 25, 1931.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ, *et ux, et al.*, Defendants.	Action at Law.

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STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

SAUL NEMSER, of full age, being duly sworn, according to law, upon his oath deposes and says:

1. I am one of the defendants in the above-entitled cause.

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2. I was not present at the Sheriff's sale held on September 10th, 1930, at Hackensack, N. J. I was unable to be present.

3. I had prior to September 10th, 1930, requested my friend and client, Max Goren, to examine the premises being foreclosed and to be present at the Sheriff's sale in order to bid the same in, so as to avoid any deficiency on the bond.

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4. Mr. Goren made the examination and reported to me that in his opinion, the value of the property was greatly in excess of the mortgage and promised me that he would attend the Sheriff's sale and bid the premises in to the full amount of the decree and costs, and that after acquiring title from the Sheriff he would give me a reasonable time to make arrangements with him to pay him off the amount of his bid and re-convey the premises to me. After Mr. Goren promised to do this

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and pursuant to this arrangement, I understood he actually attended the Sheriff's sale on September 10th, 1930.

5. Mr. Goren has in the past given me loans on bond and mortgage on other premises in which I had been interested.

10 6. The premises being foreclosed represented an investment on my part, together with the other defendants of more than Seventeen Thousand ($17,000.00) Dollars in cash, and the equity over and above the mortgages is a substantial sum. For that reason, I did not desire to lose the property and primarily did not desire to be sued for a deficiency on the bond that might arise by a Sheriff's sale.

20 7. After the Sheriff's sale, I had two or three conferences with Mr. Brand, the plaintiff's attorney, at one of which conferences Mr. Dorison was present, for the purpose of seeking a re-conveyance from Dorison of the title to myself if such a thing were possible, and if satisfactory terms could be arranged as I had no desire to lose the property. Mr. Dorison made me a proposition that if I would pay him Ninety-six Hundred ($9600.00) Dollars cash, he would take back a second mortgage on the
30 premises being foreclosed for a period of fifteen months, for the balance. Before the negotiations had been completed this suit had been instituted.

SAUL NEMSER.

Sworn and subscribed to before me
this 12th day of December, 1930.

JOSEPH MORITZ,
Attorney at Law
40 of New Jersey

Amended Complaint.

(Filed January 19, 1931.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ and BESSIE SHULTZ, his wife, MORRIS SCHULTZ and CLARA SCHULTZ, his wife, and SAUL NEMSER, Defendants.	Action at Law.

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Plaintiff, RICHARD DORISON, residing at the City of Jersey City, Hudson County, New Jersey, says that:

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1. On December 6, 1928, at Jersey City, in the County of Hudson and State of New Jersey, the defendants, Irving Shultz and Bessie Shultz, his wife, Morris Schultz and Clara Schultz, his wife, and Saul Nemser, being indebted to plaintiff in the sum of $15,000., executed to him their bond of that date in the penal sum of $30,000. conditioned to pay the principal sum of $15,000., on the thirty-first day of December which was in the year 1929, with interest thereon from January 1, 1929 at 6% per annum, payable quarterly.

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2. To secure said bond, the defendants, on the same date, executed and delivered a mortgage to plaintiff upon lands and premises owned by them, bounded and described as follows:

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ALL those four certain lots, tracts of land and premises, situate in the Borough of Palisades Park, in the County of Bergen and State of New Jersey, and designated as lots numbered forty-two hundred and four (4204), forty-two hundred and four A (4204A), forty-two hundred and five (4205), forty-two hun- 10 dred and five A (4205A) in Block numbered 11, according to a map entitled "Map of Broad Avenue Highlands, in Leonia, Bergen Co., N. J., May, 1907", by C. H. Eckerson, E. M. Englewood, N. J., and filed in the Clerk's Office of Bergen County, New Jersey, on the second day of June, 1908, as Map number 924.

ALSO ALL those certain lots, tracts, pieces or parcels of land and premises, situate, lying and 20 being in the City of Hackensack, in the County of Bergen and State of New Jersey, more particularly described as follows:

BEGINNING at a point in the northeasterly side of Clinton Place distant thereon three hundred nine feet and five-tenths of a foot (309.5) northwesterly from the corner formed by the intersection of the said side of Clinton Place with the northwesterly side of Linden 30 Street; said point being the division line between lot numbers one hundred ten (110) and one hundred eleven (111) on map hereinafter described and running thence (1) northeasterly and along the division line between lots numbers One Hundred ten (110) and One Hundred eleven (111) aforesaid one hundred fifty-four feet and five-tenths of a foot (154.5) more or less to the center line of a lane sixteen (16) 40 feet in width; thence (2) northwesterly and

along the center line of lane aforesaid one hundred nine feet and five-tenths of a foot (109.5) to the southeasterly line of Grand Avenue as shown on a map hereinafter described, said point being also in the northwesterly line of Lot Number One Hundred Nine (109); thence (3) southwesterly and along the northwesterly line of Lot Number One Hundred nine (109) one hundred fifty-four feet and two-tenths of a foot (154.2) to the said side of Clinton Place; thence (4) southwesterly along the said side of Clinton Place one hundred (100) feet to the point or place of beginning.

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Being further described and designated as Lots Numbered one hundred nine (109) and one hundred ten (110) on a certain map filed in the Bergen County Clerk's Office on July 20, 1883 and entitled "Map of property of D. Ackerman, Hackensack, N. J.; made by William Williams, Engineer, 1870.

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Said mortgage was acknowledged in due form of law and the acknowledgment endorsed thereon, said indenture of mortgage was duly recorded on January 4, 1929, in book 1116 of mortgages for Bergen County at page 541.

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3. The said defendants did not pay the said bond and the moneys secured by said mortgage when the same became due and made default in the condition of the said bond, and on the 27th day of January, 1930, a bill of complaint was filed in the Court of Chancery of this State by the plaintiff herein for the foreclosure of said mortgage, against the defendants, in this suit and others. Such proceedings were had in said suit that on June 3, 1930, a final

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decree for the sale of said land and premises and the foreclosure of said mortgage was made in the Court of Chancery of New Jersey in a suit brought by plaintiff against these defendants and others in interest.

4. Said decree adjudged that there was then due upon said bond and mortgage the sum of $16,720.00, and ordered a writ of fieri facias to be issued to the Sheriff of Bergen County for the sale of the mortgaged premises to meet the sum so due, together with interest from May 28, 1930, and the taxed costs of suit, amounting to $333.15.

5. On September 10, 1930, and within six months of the commencement of this action, the Sheriff of said county, under authority of the said writ, sold premises at public sale, according to law, to the plaintiff, he being the highest bidder at said sale, for the sum of $100. for the first tract hereinabove described and $100. for the second tract hereinabove described.

6. The fees and disbursements of the Sheriff, as lawfully allowed, upon said execution amunted to $114.14, and these fees and disbursements were therewith paid by the said plaintiff to the said Sheriff as appears by the writ of execution, duly returned into court.

7. The sum of $200. realized from the said sale, having been duly credited upon said decree and execution, there remained due to the plaintiff the amount of $16,520.

8. The said sum of $16,520, in deficiency, has not, nor has any part thereof, been paid the plaintiff.

Amended Complaint.

9. On October 23, 1930, and within six months after the said sheriff's sale, and prior to the institution of this action, plaintiff filed in the Clerk's Office of Bergen County, wherein said mortgaged premises were situate, a notice of this action as proposed, setting forth therein the name of the court where such action would be brought, and names of the parties to the bond and action, the record of the mortgage, and description of the mortgaged premises, as provided by statute, a copy of which notice is hereto annexed and made a part hereof.

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This action of plaintiff's against the defendants was commenced within six months from the date of the sale of said mortgaged premises.

Plaintiff demands the sum of Sixteen thousand five hundred and twenty ($16,520) Dollars, with interest from May 28, 1930.

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PIERSON, SCHROEDER & BRAND,
Attorneys for Plaintiff.

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Notice of Lis Pendens, Annexed to Amended Complaint.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ and BESSIE SHULTZ, his wife, MORRIS SCHULTZ and CLARA SCHULTZ, his wife, and SAUL NEMSER, Defendants.	Action at Law.

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20 NOTICE is hereby given that a suit entitled as above set forth is about to be commenced in said Supreme Court.

The general object of said suit is to recover for the deficiency on a bond made by Irving Shultz and Bessie Shultz, his wife, Morris Schultz and Clara Schultz, his wife, and Saul Nemser to Richard Dorison, dated December 6, 1928, and given to secure the sum of $15,000 on the 31st day of December, 1929, with interest at 6% per annum, payable
30 quarterly, which bond was secured by a mortgage made by the said Irving Shultz and Bessie Shultz, his wife, Morris Schultz and Clara Schultz, his wife, and Saul Nemser, single, to the said Richard Dorison, bearing even date with the said bond and recorded January 4, 1929, in book 1116 of mortgages for Bergen County at page 541 &c. The said mortgage was foreclosed by said plaintiff and the lands described in said mortgage and being the premises
40 hereinafter described, were sold by the Sheriff of Bergen County on September 10, 1930, and the sum

of $200. realized from said sale, having been duly credited, there remained a deficiency due the plaintiff of $16,520. with interest thereon from May 28, 1930. Suit is brought to recover this amount.

The lands to be affected by said suit are described as follows:

ALL those four certain lots, tracts of land and premises, situate in the Borough of Palisades Park, in the County of Bergen and State of New Jersey, and designated as Lots numbered forty-two hundred and four (4204), forty-two hundred and four A (4204A), forty-two hundred and five (4205), forty-two hundred and five A (4205A) in Block numbered 11, according to a map entitled "Map of Broad Avenue Highlands, in Leonia, Bergen Co., N. J., May, 1907", by C. H. Eckerson, E. M. Englewood, N. J., and filed in the Clerk's Office of Bergen County, New Jersey, on the second day of June, 1908 as Map number 924. 10 20

ALSO, ALL those certain lots, tracts, pieces or parcels of land and premises, situate, lying and being in the City of Hackensack, in the County of Bergen and State of New Jersey, more particularly described as follows:

BEGINNING at a point in the northeasterly side of Clinton Place distant thereon three hundred nine feet and five-tenths of a foot (309.5) northwesterly from the corner formed by the intersection of the said side of Clinton Place with the northwesterly side of Linden Street; said point being the division line between Lots Numbers One Hundred Ten (110) and One Hundred Eleven (111) on map hereinafter described and running thence (1) 30 40

northeasterly and along the division line between Lots Numbers One Hundred Ten (110) and One Hundred Eleven (111) aforesaid one hundred fifty-four feet and five-tenths of a foot (154.5) more or less to the center line of a lane sixteen (16) feet in width; thence (2) northwesterly and along the center line of lane aforesaid one hundred nine feet and five-tenths of a foot (109.5) to the southeasterly line of Grand Avenue as shown on a map hereinafter described, said point being also in the northwesterly line of Lot Number One Hundred Nine (109) ; thence (3) southwesterly and along the northwesterly line of Lot Number One Hundred Nine (109) one hundred fifty-four feet and two-tenths of a foot (154.2) to the said side of Clinton Place; thence (4) southeasterly along the said side of Clinton Place one hundred (100) feet to the point or place of beginning.

Being further described and designated as lots numbers One Hundred Nine (109) and one hundred ten (110) on a certain map filed in the Bergen County Clerk's Office on July 20, 1883 and entitled "Map of Property of D. Ackerman, Hackensack, N. J." made by William Williams, Engineer, Hackensack, 1870.

Dated: October 22, 1930.

Pierson, Schroeder & Brand,
Attorneys of Plaintiff,
84 Washington Street,
Hoboken, N. J.

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Notice of Lis Pendens.

I hereby consent that the within Amended Complaint be filed and that the answer to original complaint stand as an answer to the amended complaint.

PIERSON, SCHROEDER & BRAND,
Attorneys for Plaintiff.

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SAUL NEMSER,
Attorney for Defendants.

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Opinion.

(Filed March 26, 1931.)

NEW JERSEY SUPREME COURT.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ and BESSIE SHULTZ, his wife, MORRIS SCHULTZ and CLARA SCHULTZ, his wife, and SAUL NEMSER, Defendants.	

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On motion to strike out answer and for summary judgment, and on counter motion challenging sufficiency of the complaint.

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Argued before Justice PARKER at Chambers.

For the plaintiff, PIERSON, SCHROEDER & BRAND.

For the defendants, SAUL NEMSER.

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PARKER, *J.*

The suit is for a deficiency over a sale in foreclosure. The complaint sets up a bond and mortgage made by the defendants to the plaintiff, default in the payment of the bond, the institution and completion of a suit to foreclose, sale by the sheriff within the statutory period before beginning of the suit, which sale was to the plaintiff who bid \$100. for the first tract, and \$100. for the second tract, leaving a deficiency of some sixteen thousand

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odd dollars. The answer admits the making of the bond and mortgage and pleads ignorance of the other matters set up in the complaint. However, it is perfectly clear from the affidavits of the defendants themselves that they knew all about the progress of the foreclosure and that they, or some of them attended at the sale. Consequently there is no question of fact so far as the allegations of the complaint are concerned. It is set up by way of special defence in the first place, that the complaint does not state the cause of action; and secondly, that it does not allege any breach of the bond, or default, or plead the condition of the bond. The complaint does all of these things and I see nothing wrong about it as a legal pleading. Probably these attacks were directed at the original complaint which was withdrawn and an amended complaint substituted. However, this may be the complaint as now before me is good.

As to matters of fact, the answer sets up that on the day of sale it was agreed between the parties that the defendants should not bid at the sale and that the plaintiff should be allowed to buy in at a nominal bid, and that in consideration thereof the plaintiff would not sue for deficiency; that accordingly, the defendants refrained from bidding and the plaintiff did buy in at a nominal bid, and consequently is now estopped from bringing this present action. The affidavits show that none of the defendants was prepared to bid at the sale, but that they had gone to see a man named Max Goren, a real estate operator, whose affidavit is before me and who says that he agreed to help the defendants by bidding at the sale, as he had examined the property and concluded that it was good value for $17,000 so that he was prepared to take it over

for that price, or if defendants could finance the matter later on, he was ready to give them the benefit of his purchase; that accordingly he went to the sale with the two Schultz defendants and had a talk with the plaintiff and plaintiff's attorney, got a statement of the amount due on the decree, and that the plaintiff said that he wanted the property
10 and that no one need fear a deficiency suit because it would open the foreclosure, which he did not wish to do. I need not go further into the details of the matter. So far as relates to the sufficiency of the affidavits for the defendants, they raise questions of fact which if valid in law would clearly take the case to a jury and prevent an award of summary judgment at this time.

The case, therefore, comes down to the question whether the fact that plaintiff agreed, in considera-
20 tion of Goren refraining from bidding, not to sue for a deficiency, made a legal contract or estoppel. Goren while interested on his own account was brought in by defendants and I hold for present purposes that any lawful agreement with him by plaintiff relating to the sale and bidding, enured to the benefit of defendants.

The question is then whether there was any lawful agreement; and this I answer in the negative.
30 The law does not tolerate any influence likely to prevent competition at a sale such as this particularly an agreement to stifle bidding, 35 C. J. 39, 40. National Bank v. Sprague, 20 N. J. Eq. 159. And where the transaction has been carried through pursuant to an unlawful agreement, the law will not aid either party as against the other but will leave both where it finds them. Gregory ads. Wilson, 36 N. J. L. 314.

Hence the agreement, if there was one, was un-
40 enforceable by either party against the other, and

the fact that one party performed it gives no right of action or defence against the other party. As to estoppel, I cannot see that it features in the case. The claim is that the defendants' friend was induced to forego his right to bid by an agreement not to press for deficiency. That was a contract, and an illegal one.

I conclude that the answer should be struck out and summary judgment entered. The statute gives defendants all the relief to which they are entitled by opening the foreclosure and preserving the right to redeem until six months after final judgment herein. C. S. 3420-3423; P. L. 1915, page 339.

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Order for Summary Judgment.

(Filed April 2, 1931.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ and BESSIE SHULTZ, his wife, MORRIS SCHULTZ and CLARA SCHULTZ, his wife, and SAUL NEMSER, Defendants.	Action at Law.

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20 It appearing by affidavits filed in this cause that the defense made by the defendants' answer is sham; and it further appearing that the complaint disclosed a cause of action and the defendants after due notice having failed to show such facts as entitle them to defend;

It is on this 28th day of March, 1931, ORDERED that the defense be struck out and that final judgment be entered for plaintiff for the sum of Seven-
30 teen thousand three hundred forty-six ($17,346) Dollars, and costs.

Let this rule be entered.

C. W. PARKER,
Justice.

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Judgment.

(Filed April 2, 1931.)

NEW JERSEY SUPREME COURT.

RICHARD DORISON, Plaintiff, vs. IRVING SHULTZ and BESSIE SHULTZ, his wife, MORRIS SCHULTZ and CLARA SCHULTZ, his wife, and SAUL NEMSER, Defendants.	Judgment Record. Action at Law. Summary Judgment.

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PIERSON, SCHROEDER & BRAND,
Attorneys.

Afterwards upon proceedings duly had according to the Statute the Court ruled that the defense made by the defendant's answer is sham and that the complaint disclosed a cause of action and ordered that the defense be struck out and that final judgment be entered for plaintiff for the sum of seventeen thousand, three hundred and forty-six dollars, besides costs.

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Whereupon it is adjudged that the plaintiff, Richard Dorison do recover of the said defendants, Irving Shultz and Bessie Shultz, his wife, Morris Schultz and Clara Schultz, his wife, and Saul Nemser the sum of seventeen thousand three hundred and forty six dollars damages, together with his costs which have been taxed at the sum of fifty-eight dollars, making in the whole the sum of seventeen thousand, four hundred and four dollars.

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$17,346.00
58.00

$17,404.00

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Judgment signed and entered April 2, 1931.

Notice and Grounds of Appeal.

(Filed April 13, 1931.)

NEW JERSEY SUPREME COURT.

RICHARD DORISON,
Plaintiff,

vs.

IRVING SHULTZ and BESSIE SHULTZ, his wife, MORRIS SCHULTZ and CLARA SCHULTZ, his wife, and SAUL NEMSER,
Defendants.

Action at Law.

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To: RICHARD DORISON, plaintiff, and/or Messrs. PIERSON, SCHROEDER & BRAND, Attorneys of Plaintiff.

TAKE NOTICE: That the defendants' appeal from the whole of the judgment entered in this cause, to the Court of Errors & Appeals, as the last resort in all causes, on the following grounds:

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1. The Court erroneously entered the Order for Summary Judgment dated March 28th, 1931.

2. The court erroneously struck out the defendants' answer and ordered summary judgment for the plaintiff, whereas the court should have permitted the defendants' answer to stand and should have denied plaintiff's motion for summary judgment.

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Notice and Grounds of Appeal.

3. The court should have stricken out the plaintiff's complaint on the ground that the same did not disclose a legal cause of action.

Dated, April 8th, 1931.

Yours respectfully,

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SAUL NEMSER,
Attorney for Defendants-Appellants.

Service of the within Notice of Appeal is hereby acknowledged this 9th day of April, 1931.

PIERSON, SCHROEDER & BRAND,
Attorneys of Plaintiff.

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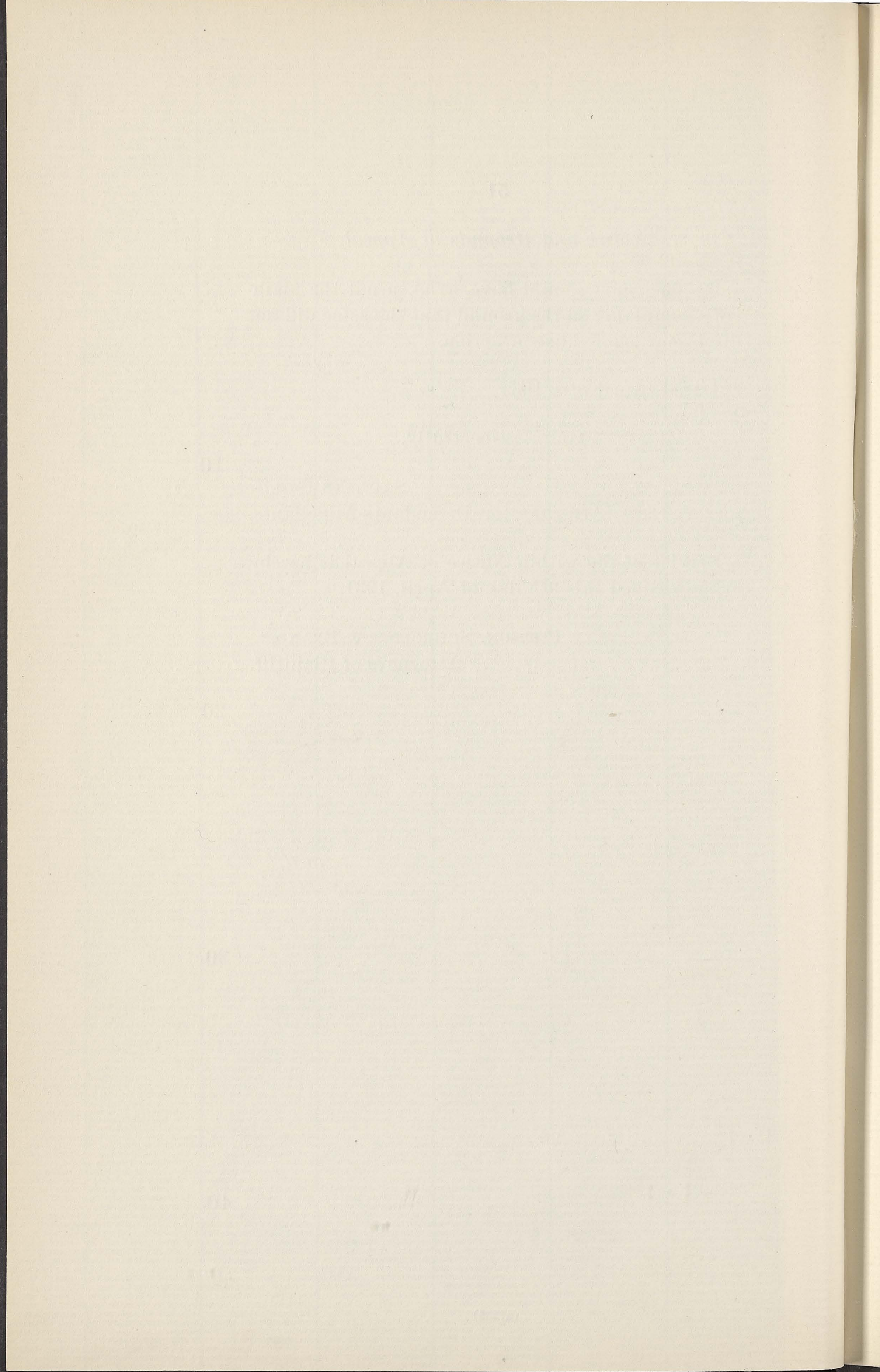

82 OCT.T.1931

New Jersey Court of Errors and Appeals

RICHARD DORISON, Plaintiff-Respondent, vs. IRVING SHULTZ, and BESSIE SHULTZ, his wife, MORRIS SCHULTZ and CLARA SCHULTZ, his wife, and SAUL NEMSER, Defendants-Appellants.	On Appeal From New Jersey Supreme Court

BRIEF FOR APPELLANTS.

Statement of Facts.

This is an appeal from a summary judgment entered in the above-entitled action, after an Order had been made striking out the answer of the defendants.

The plaintiff below brought an action for a deficiency after a sale in foreclosure. The answer set up that on the day of the sale it was agreed between the parties that the defendants, or their representative, Max Goren, should not bid at the sale, and that the plaintiff should be allowed to buy in the property at a nominal bid, and that in consideration thereof, the plaintiff would not bring any suit for the deficiency. Accordingly, the defendants refrained from bidding, and the plaintiff did buy in the property at a nominal figure, and was consequently estopped from bringing a suit for the deficiency.

tice. 35 Corpus Juris, page 41, in defining the extent and limits of the general rule, says:

> "Where all the parties in interest enter into an agreement to restrict the bidding, the reason for the general rule does not apply, and such agreement is not against public policy and does not invalidate the sale."

The case of *National Bank* vs. *Sprague, supra,* is merely authority for the general proposition that it is illegal for persons intending to purchase at an auction to combine not to bid against each other.

The case of *Gregory ads. Wilson, supra,* held that where a broker procured a customer for another broker, with the understanding that the latter should charge for the procuring a loan of money at a rate prohibited by the statute, and that such commissions should be divided; held, that a suit would not lie in behalf of the former broker for his share of such commissions against the latter broker, and has obviously very little to do with the subject matter of this appeal.

Our Court of Errors and Appeals has definitely passed upon this proposition in the case of *DeBaun* vs. *Brand,* 61 N. J. L. 624. Justice Garrison, writing the opinion of the Court, says:

> "The facts in evidence at the close of the plaintiff's case were there: The defendant and the plaintiff were brother and sister. The property to be sold was a farm of which their father had died seized. By the father's will, legacies to the plaintiff and to Edward, another brother, were charged on the land, as also was an annuity to the testator's widow. Of this will the defendant and Edward were the executors. They were also residuary legatees. The sale in question was made under a decree obtained by the widow to satisfy the arrearages of her annuity. Under these

circumstances the plaintiff agreed to let the defendant buy at the sale upon his agreement that he would pay off all the legacies.

The Supreme Court regarded these facts as showing 'An Agreement having for its object the suppression of competition in bidding at a public sale', and, under the general rule of public policy, held that the Circuit Court should not lend itself to the enforcement of an agreement of this nature; hence it advised that the plaintiff be nonsuited.

The certified case undoubtedly showed an agreement that restricted competition at a public sale, but it likewise showed that the plaintiff, when she made the agreement, had an existing interesting in the property which it was her right to look after and protect at the sale. Her agreement, therefore, may have had for its object the protection of her interest and not the suppression of competition. A jury might so have found. It was assumed by the Supreme Court that the agreement was for the illicit object, but a motion to nonsuit must deal with that inference from the facts that is most favorable to the plaintiff. For the purposes of the case before us the agreement must be regarded as one made by the plaintiff with the object of protecting her interest in the land, but with the effect of restricting competition at the sale. The question that then arises is whether such an agreement is within the rule of public policy applied to it below. As this phase of the case is not discussed at all in the advisory opinion and is not dealt with in a satisfactory way in any of the cases cited, it can be best placed on its proper footing by a brief consideration of the spirit and reason of the general rule of public policy that has been invoked.

The class of sales to which the rule of public policy in question attaches includes execution sales and judicial sales generally as well as tax sales and all others in which, in the administration of the law or of government, the prop-

erty of a private owner is sold in *invitum*. In every sale of this sort there is a creditor and a debtor element, each of which is deemed to be beneficially served by the rule of public policy under consideration. That the tendency of such a rule is to secure to the creditor class the satisfaction of its claims is obvious. To the debtor or owner it is but common fairness that the power that compels the sale of his property shall view with disfavor whatsoever tends to lessen normal competition. By the policy of the law the property is offered to the public; hence it is part of the same policy that the public shall, with respect to the sale, remain what the word implies, 'open', free from bargains that contract it as a body or normal competitors. Of such a policy neither the public nor any individual can justly complain, since it affects no one in his rights or property, but merely prescribes how the rights and property of others shall be observed and protected.

There is, however, a class of persons who cannot, within the spirit and reason of this rule, be regarded merely as part of the general public. Persons who, by virtue of lien or ownership, or otherwise, have an existing interest in the property to be sold, do not stand on the same footing as the general public. Incidental to their interest in the property is the right to employ all fair means for the protection of such interest, and to this end to make such honest bargains as their interests seem to require. It is no part of the public policy in question to rob one person of his rights in order to secure those of another. Upon the other hand, the mere possession of a right to protect one's own interest will not be permitted to cloak a violation of the rule under color of such right. Between these two exhibitions of the law lies its true application, which in the nature of things must often turn upon a question of fact.

The failure to recognize this distinction in most of the decided cases renders them of no

value, and even in the face of decisions to the contrary, we are, in this state, at liberty to adopt that rule that seems to us to be most consonant with justice and with the true purpose of the policy of the law, which is not that persons specially interested are excepted, as a class, from the operation of the general rule that forbids bargains that restrict bidding, *but that the general rule, when judged by its own spirit and reason, does not extend to the case of a party with an existing right to be protected at the sale whose agreement was for the protection of such right and not for the purpose of cheapening the sale.* This I conceive to be the correct rule, *even where the arrangement entered into for the protection of the right may incidentally lessen competition at the sale, or even if such be its inevitable result.*

The application of these views to the record and bill of exceptions before us leads to the reversal of the judgment that was directed by the Circuit Court under the advisory opinion of the Supreme Court. Upon the facts certified as constituting the plaintiff's case it could not be assumed that her agreement with her brother was not made with the object of protecting her interest in the land. Hence, she should not have been nonsuited.

I have examined the cases cited by the court below, as well as those collected by the industry of the counsel in their briefs in this court, but find no reason for making any extended remarks upon them. It would be, by comparison, an easy task to overrule those cases that fail to see a distinction that seems to us to be so clear, but to justify those decisions that are in apparent harmony with our own is not so easy. In many instances stress is laid upon the fact that all parties in interest had agreed to the restriction of competition, a circumstance that evidently is entitled to no weight upon a question of public policy. If the protection of an existing interest did not authorize the agreement, it was a mere combination to

violate the policy of the law. Other cases go upon the notion that, in point of fact, the bidding was not diminished. This assumes that the rule of public policy is based not upon the tendency of the illicit bargain, but rather upon the result of such bargain in the given case.

Upon the whole the New York Cases are the most instructive. The latest of these (Hopkins v. Ensign, 122 N. Y. 144) gathers up much of the case law upon the subject. Still more copious citations are to be found in the American and English Encyclopedia of Law, under the titles, "Judicial Sales", and "Auctions".

The views I have expressed lead to a reversale and was therefore void as against public that the record be remitted to the Bergen Circuit, there to be proceeded with as if the advisory opinion of the Supreme Court had been that the nonsuit should not be granted."

The New York case of *Hopkins* vs. *Ensign,* 122 N. Y. 144, referred to by Justice Garrison in the *DeBaun* case, is extremely applicable. There it was held that an agreement between parties interested in a foreclosure sale that all but one shall refrain from bidding and permitting that one to become the purchaser is not necessarily void as against public policy. If the primary purpose be not to suppress competition but to protect the rights of the parties and there be no fraudulent purpose to injure or defraud others interested in the result of the sale, the agreement may be upheld.

The Court said:

"The lack of a valid consideration to support the contract, is said to result from the agreement on the part of the mortgagee not to bid at the foreclosure sale under the Potter mortgage, and it is contended that the agreement was one to prevent or suppress competition at a public sale and was therefor void as against public policy.

> There is authority for this contention in many of the older cases.
>
> But the rule applied in these cases has been very materially modified by the later decisions of the courts and it is now settled that agreements between two or more persons that all but one shall refrain from bidding and permitting that one to become the purchaser are not necessarily and under all circumstances void. They may be entered into for a lawful purpose and from honest motives and in such cases will be upheld and then will not vitiate the purchaser or necessarily destroy completed contracts to which they refer and in respect to which they are made.
>
> The courts will now look to the intention of the parties and if that be fair and honest, and the primary purpose be not to suppress competition but to protect their own rights and there be no fraudulent purpose to injure or defraud others interested in the result of the sale the agreement may be upheld. The question is one of fact to be determined by the trial court upon the evidence before it."

In the case of *Fairly* vs. *Kennedy,* 47 Southeastern 138, a case before the Supreme Court of South Carolina, the facts were as follows:

> "Before the sale was made the mortgagee agreed with an heir of the mortgaged premises (mortgagor having died), and a representative of the other heirs that he would bid off the land and allow the heirs two years to redeem The mortgagee then bought in for about one-third the value of the property, the heirs putting up no opposition. The mortgagee now denies this arrangement and says that such agreement contravenes public policy.
>
> Court held: An agreement intended to chill bidding at a judicial sale is denounced by the law as contrary to public policy for the reason that it operates as a fraud upon those interested in the sale of the property. When all

> parties interested unite in the contract or subsequently sanction it in the promotion of their interests, the rule has no application for the obvious reason that there is nobody left to be defrauded."

In this case the decree was confirmed in favor of the heirs and against the mortgagee.

In the case of *Nelly, Administrator,* vs. *McClure, Executor,* 1 Atl. Rep. 719, a Pennsylvania case, a lien creditor agreed to bid for and purchase his debtor's property at a sale by order of the Orphans' Court, at a sum sufficient to cover prior liens, in satisfaction of his claim. The debtor entered into a stipulation not to compete in the bidding and it was held that the stipulation was not contrary to the rule of public policy which avoids agreements to abstain from bidding at a public sale. The Court said:

> "We see nothing in the arrangement contrary to public policy. It was not made for the purpose of injuring other creditors, nor to deter them from bidding. Such was not its effect. There was neither actual nor legal fraud in the transaction. The end to be accomplished was lawful."

So in the present case. We can see nothing illegal in the agreement between Goren, acting as the *alter ego* of the defendants below, and Dorison and his attorney at the Sheriff's sale. The agreement was certainly not made for the purpose of injuring other creditors, for there were none. The agreement was betwen the parties primarily interested in the foreclosure sale for a lawful purpose and from honest motives, and was in effect a settlement between the parties themselves. The obvious reason for the rule prohibiting agreements to suppress bidding at a public sale is that such an agree-

ment causes the property owner damage by not affording to him the best price that the property might bring, were it not for the agreement, and also it tends ordinarily to injure the holder of the judgment for mortgage or other lien, by reasn of which the sale is held. Where both the property owner and holder of the mortgage both agree to let one do the bidding, it can hardly be fairly said that either is injured.

The defendants contended at the hearing on the motion to strike out the answer that the facts presented in the affidavits filed on behalf of the defendants, clearly raised a jury question as to whether or not the plaintiff was not estopped from bringing this suit for the deficiency.

In 10 Ruling Case Law, page 675, an estoppel has been defined as follows:

> "An estoppel may be said to arise when a person executes some deed, or is concerned in or does some act either of record or in pais which will preclude him from averring anything to the contrary. Or, as Lord Coke defined it: 'It is called an estoppel or conclusion because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.' There are three kinds of estoppels, namely (1) by record, (2) by deed, and (3) by matter in pais. The first two are sometimes referred to as technical estoppels as distinguished from equitable estoppels, or estoppels in pais. It has been said that an estoppel is odious and not favored in law. This declaration, however, has usually referred to technical estoppels at common law and is largely confined to the earlier cases and how estoppels, especially those known as equitable or in pais, are not deemed odious, but on the contrary are said to be found conducive to honesty and fair dealing and promotive of justice and to stand on the broad grounds of public policy and good faith."

Further in 10 Ruling Case Law, at page 697, the principle is laid down:

> "The final element of an equitable estoppel is that the person claiming it must have been misled into such action that he will suffer injury if the estoppel is not declared. That is, the person setting up the estoppel must have been induced to alter his position, in such a way that he will be injured if the other person is not held to the representation or attitude on which the estoppel is predicated. Furthermore, an equitable estoppel cannot arise except when justice to the rights of others demands. It was never intended to work a positive gain to a party. Its whole office is to protect him from a loss which but for the estoppel he could not escape. Consequently the estoppel should be limited to what may be necessary to put the parties in the same relative position, which they would have occupied if the predicate of the estoppel had never existed."

Counsel for the plaintiff argued on the motion that the change of position must be personal to the person who sets it up, which is true as an academic proposition. Counsel argued that Goren was a stranger and a mere volunteer, but the affidavits clearly show that Goren was acting as the agent and privy of the defendants, and the learned Justice in his opinion held on this point that

> "Goren, while interested in his own account was brought in by defendants and I hold for present purposes that any lawful agreement with him by plaintiff relating to the sale and bidding, enured to the benefit of defendants."

The case of *Witherell* vs. *Kelly,* 187 N. Y. Supp. 43, is on all fours with the present case in dealing with the subject of equitable estoppel. In that case, the mortgagee told the mortgagor that there would be no deficiency judgment against them, be-

cause they were satisfied that they would get their money out of the property. The Court held that this was a positive statement on which the mortgagor had a right to rely, and to estop the mortgagee from proceeding with any deficiency.

In the *Witherell* case, the statement was made by the agent of the mortgagee, while in the instant case the statement was made to the agent of the mortgagors, as well as to two of the mortgagors themselves. The Court held:

> "If the defendant, in reliance upon the assurance of Shedd, admitted agent of mortgagee, that there would be no deficiency against him, had just grounds to remain inert and gaze without securing himself or without protecting himself against a deficiency, it seems to me that the doctrine of equitable estoppel by representation applies, in that the plaintiff made statements that indicated her abandonment of an existing right of a plaintiff in a foreclosure by sale."

The Court further said, on page 47:

> "The doctrine of estoppel in pais is applicable in law as in equity." Williamsburg Bank vs. Solar, 136 N. Y. 465.
>
> "It is not essential that there should have existed in Shedd, the intention to mislead. Continental National Bank vs. National Bank of Commerce. 50 N. Y. 483."
>
> "Equitable estoppel need not rest upon consideration or agreement or legal obligation."
>
> *Rothschild* vs. *Title Guaranty & Trust Company*, 204 N. Y. 464.

Further, the Court said:

> "There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on. The rule does not rest upon the assump-

> tion that he has obtained any personal gain or advantage but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.
>
> The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right and is made to influence others and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. The doctrine of estoppel is applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. Insurance Company vs. Mowry, 96 U. S. 547."

The Court below, in its opinion, said, as to estoppel, "I cannot see that it features in the case. The claim is that the defendants' friend was induced to forego his right to bid by an agreement not to press for deficiency. That was a contract, and an illegal one."

It seems to us that an estoppel in pais must be always predicated upon an agreement to either do a thing or abstain from doing it, and where a person promises to do a thing and as a result another relying upon that promise suffers injury, a clear case of equitable estoppel has been made out, whether or not the agreement amounts to a legal contract. See *Witherell* vs. *Kelly, supra.*

In the case of *Dun* vs. *Cutley,* 151 Atl. 367, there was evidence justifying a finding that an accommodation maker paid money reserved to pay note to accommodated party, relying on payee's statement that he need not hold the money, and hence payee was estopped from suing accommodation maker.

The Court said, in its charge to the jury:

"The Court instructed the members thereof that, if they believed the testimony of Cutley that he was induced to pay over this reserve fund of $5,000.00 to Arthur L'Hommedieu by reason of the statement made by the president of the bank, the bank was estopped thereafter from enforcing against Cutley his obligation under the note, and the question involved in the present rule is whether the court was right in leaving this matter to the jury as the determining factor in the case."

The Court then quotes 10 Ruling Case Law 697, already set out in this brief.

Further the Court said:

"We consider that this is a sound legal principle and that it is applicable to the present case. The jury resolved this crucial fact in favor of the defendant, and their finding was justified by the evidence. The present plaintiff, as the proofs show, accepted the assignment of the note from the Stroudsburg Bank long after the note fell due, and merely for the purpose of representing the bank in this suit. In this situation the estoppel applies, not only to the bank, but to the plaintiff as its assignee."

In conclusion, it is very respectfully submitted that the facts in this case as developed from the defendants' affidavits, clearly raise an equitable estoppel as against the plaintiff, and the answer of the defendants should not have been stricken out, but the question of fact should be submitted to a Jury.

Respectfully submitted,

SAUL NEMSER,
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WILLIAM L. RAE,
Of Counsel.

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New Jersey Court of Errors and Appeals

RICHARD DORISON, Plaintiff-Respondent, *vs.* IRVING SHULTZ, *et ux., et als.*, Defendants-Appellants.	Action at Law. On Appeal from New Jersey Supreme Court.

BRIEF FOR RESPONDENT.

Statement of Facts.

This is an appeal from a summary judgment entered in the Supreme Court, based upon an order striking out the answer of the defendants. The suit was brought to recover a deficiency after foreclosure on a bond secured by a mortgage. The answer discloses two matters of affirmative defense. One of these is set up as the first separate defense, printed on page 9 of the case, and is, in short, that the plaintiff and defendants agreed on the day of the sale that if the defendants would not bid at the sale plaintiff would not sue the defendants on the bond for any deficiency; that in accordance therewith the representatives of the defendants did not bid and plaintiff was able to buy at a nominal bid, and that by reason thereof plaintiff is now estopped from bringing the suit.

The other defense consisted of a notice that the defendants at the trial would move to strike out the complaint because it did not state a cause of action, and because it did not assign any alleged breaches of the bond (see p. 10 of Case, l. 20).

Motion was made to strike out the answer and the first separate defense as sham and untrue and to have the sufficiency of the complaint determined before trial. In order to avoid any question as to the sufficiency of the complaint an amended complaint was filed (see p. 35 of Case). It was consented that this amended complaint be filed and that the answer to the original complaint stand as an answer to the amended complaint (see p. 43 of Case). We think that the original complaint was good after a foreclosure of the mortgage, but there can be no doubt about the amended complaint. The Court found that it was good (see Opinion, p. 45 of Case, l. 20). One of the grounds for reversal is directed to the insufficiency of the complaint (Case, p. 51). This is, however, not argued anywhere in the brief and must, therefore, be accepted as abandoned and is not a subject for consideration by this Court.

Grounds for reversal not discussed in either argument or brief will not be considered.

> *Marten* v. *Brown,* 81 N. J. L. 599;
> *Aschenberg* v. *Mundy,* 76 N. J. L. 352;
> *Lavin* v. *Public Service R. R. Co.,* 77 N. J. L. 217.

There was no attempt in the answer to deny the allegations of the complaint and no portion of the affidavits was directed to any lack of accuracy in the statements of the complaint, and no objection is made to the fact that the answer was struck out, except so far as it is based on the first separate defense. This, therefore, brings us to a consideration of the first separate defense and the affidavits in support thereof.

POINT I.

The Court properly struck out the first separate defense on the grounds stated by him.

It will be noted that this defense (State of Case, p. 9, l. 37) sets up a contract or agreement made between the plaintiff and the defendants, that if the defendants would refrain from bidding so that the plaintiff could buy at a nominal bid, the plaintiff would not bring a suit for deficiency and that the defendants carried out their part of the contract. This defense as pleaded, however, seems to be based on the ground of estoppel and not upon a contract.

The Court below filed a memorandum marked "not to be officially reported", but there is no specific finding of facts. The Court said (Case, p. 46, l. 12), after reciting some of the facts:

> "I need go no further into the details of the matter. So far as relates to the sufficiency of the affidavits for the defendants, they raise questions of fact which if valid in law would clearly take the case to a jury and prevent a summary judgment at this time."

The Court then, without discussing further the facts contained in the affidavits in behalf of defendants, proceeded to discuss whether there was a legal contract or estoppel. He said (p. 46, l. 28):

> "I hold for present purposes that any lawful agreement with him (the real estate agent Goren) by plaintiff relating to the sale and bidding, enured to the benefit of defendants.
>
> "The question is then whether there was any lawful agreement, and this I answer in the negative. The law does not tolerate any influence likely to prevent competition at a sale such as this, particularly an agreement to stifle bidding."

The Court cited in support of his contention (p. 46, l. 32) 35 C. J. 30, 40, and *National Bank* v. *Sprague,* 21 N. J. E. 159. The general principle upon which the Court's decision was based is well established by the cases quoted in the Corpus Juris citation. To the same effect see 16 R. C. L., page 68, and the authorities and notes there referred to, where it is said among other things:

> "A judicial sale, since it has as its main object the securing of the best price that can be fairly had for the property sold, should be so conducted as to produce as much as possible for the parties in interest, and to that end full, free and fair competition should be secured. It may be laid down as a general principle of law, therefore, applicable to public judicial sales, that any act on the part of the auctioneer, or of the party selling, or of third parties as purchasers, which prevents a free, fair and open sale, or stifles or 'chills' the sale, in that it diminishes or prevents free competition among the bidders, is contrary to public policy, vitiates the sale, and constitutes ground for setting it aside upon the complaint of the party injured. This rule finds application in a great variety of circumstances, and causes the condemnation of any device whatsoever whereby the sale has been chilled."

The Court then concluded that neither party to such agreement could set it up as a defense, referring to the case of *Gregory ads. Wilson,* 36 N. J. L. 314. This bears out the conclusion which finds ample support in 16 R. C. L., page 69, section 50, supported by cases there cited, that

> "any contract or agreement that is made for the purpose of chilling, or whose necessary tendency is to chill the sale, lessen competition or restrain bidding at judicial sales is illegal because opposed to public policy, and no party to such agreement can enforce the same or derive any benefit therefrom."

Counsel for the defendants, apparently not disputing the rule, seek to bring the case at bar within one of the exceptions. They first refer to that portion of the paragraph on the subject contained in Corpus Juris, wherein it is said that:

> "Where all the parties in interest enter into an agreement to restrict bidding, the reason for the general rule does not apply and such agreement is not against public policy and does not invalidate the sale."

Manifestly this exception cannot avail the defendants. It may be that there were no other lienors, but we shall argue later that there is no proof offered that two of the defendants to this suit knew anything about the arrangements set up. It further appears also from the affidavits relied upon by the defendants that an owner of the property, who was vitally interested, was no party whatever to the arrangement (see p. 25, ll. 12 to 23). As this has an additional bearing on the case it will be quoted:

> "He (Dorison) also said that the search showed that the property had been transferred to a woman over in New York and that if the bid went as high as Twenty Thousand ($20,000.00) Dollars, she would be the beneficiary to the extent of the surplus monies and he could not see any reason for accumulating any surplus monies for the benefit of this woman in New York. I did not know at the time that the title stood in the name of this lady in New York, nor did I care anything about it."

It will be seen, therefore, that this exception to the rule entirely fails.

Reliance, however, is further had upon the case of *DeBaun* v. *Brand,* 61 N. J. L. 624, and other similar cases. This case does not make the fact that it involves all the parties in interest the test.

Of course, all of the parties in interest, of full age, of sound mind and acting for themselves, can do in general as they please with their own property even to the extent of making a whole or partial gift of it. The rule as formulated in the DeBaun case, which is quite as favorable for the defendants as any rule that can be cited, is contained in 61 N. J. L., page 624 at p. 627, wherein the Court says that the rule that seems to us to be most consonant with justice and with the true purpose of the policy of the law, is:

> "Not that persons specially interested are excepted, *as a class,* from the operation of the general rule that forbids bargains that restrict bidding, but that the general rule, when judged by its own spirit and reason, does not extend to the case of a party with an existing right to be protected at the sale whose agreement was for the protection of such right and not for the purpose of cheapening the sale."

It seems to us that the agreement in question, if made, falls within the rule and is not within the exception stated by the Court. Dorison, the complainant, was foreclosing a mortgage in which he was seeking to obtain, through legal means by sale, the amount due him. It was not a strict foreclosure. The policy of the law as expressed in all the authorities on judicial sale has as its main object the securing of the best price that can be fairly had for the property sold. It is not to get it for someone at a nominal bid, at the expense of someone else. Any agreement made by Dorison not to get the amount due him, would not be to secure the best price for the property and thus get his money, which, if the affidavits are true, he could have done, but in violation of the spirit of his suit to get the property at a nominal bid. The other party to this agreement, as we will show later, was a mere volunteer. There, as a bidder,

without being the representative or agent of anyone bound by any contract, but really a part of the general public, secured, it is true, by one of the defendants personally, who did in that way, just what the public advertisements were supposed to do. What was the object of this agreement expressed in the language of the affidavit? It was to keep from accumulating any surplus moneys for the benefit of the woman in New York, who was the owner of the whole or part interest in the mortgaged premises.

The Court in the DeBaun case sent it back to a jury on the ground that it was on a motion to non-suit and that such a motion must deal with the inference from the facts that is most favorable to the plaintiff. In this case the defendants, in support of their answer, have supported their case by all of the available testimony without its even being subjected to cross-examination. It seems to us, therefore, that the case presents a situation which falls within the rule and not within the exception.

POINT II.

The affidavits do not disclose a contract as alleged in the first separate defense.

If this Court finds that there was error in striking out the answer on the ground that such a contract as that alleged in the answer was void, we still maintain that the result arrived at was proper.

1. There is no such contract disclosed by the affidavits.

2. Neither is there any ground of estoppel.

> "Question on appeal is not whether reasons assigned by court below are sound, but whether action taken is correct."
>
> *Simon* v. *Globe Indemnity* Co., 154 Atl. 238.

The case at bar was briefed before the Court below by both parties on the question of estoppel. It was not assumed by either that there was a contract, a meeting of the minds. Goren himself says in paragraph of his affidavit (State of Case, p. 25, l. 29):

> "I accordingly, after this talk with Mr. Dorison and Mr. Brand, left the Sales Room before the sale took place, relying upon Mr. Dorison's statement to me that he would not bring any deficiency action on the bond."

There is no pretense that he communicated to Mr. Dorison this fact or that there was any acceptance of Mr. Dorison's offer, of which Dorison knew. What Goren did was based upon his reliance upon a representation.

The affiant, Morris Schultz, says in his affidavit (p. 28, l. 20, par. 4):

> "I absolutely believed Mr. Dorison when he stated to us that he had no intention of suing on any deficiency on the bond and only for that reason Mr. Goren and I left the Sheriff's Sales Room before the sale."

Because of these statements, the question of the illegality of the contract was not discussed below, because it was not considered that there was a contract. This is borne out by appellants contention on page 30 of the brief in their behalf to the extent that the illegality of the contract was not considered.

The Court, it seems to us, assumed a contract as an easy method of solution, and then said in effect,

if there was a contract, you had no defense, therefore without one, you would surely have no defense.

It will be necessary, therefore, to consider the allegations of defendants' affidavits. These will be found on pages 22 to 34, inclusive. The rule that the Court on a motion to strike an answer out as sham does not try disputed questions of fact, is fully recognized.

As the affidavits must be read, it will serve no good purpose to quote them in full herein, but attention is called to the following: Nemser, one of the defendants, merely requested the witness Goren to attend the sale and bid:

> "He (Nemser) asked me if I would go to the sale to protect his interest and the interests of the other defendants" (Case, p. 23, l. 20).

The affiant then says that he examined the properties and was perfectly satisfied to bid the property up to the full amount of the decree. The defendant Nemser says, paragraph 4 of affidavit (p. 33, l. 30):

> "Mr. Goren made the examination and reported to me that in his opinion, the value of the property was greatly in excess of the mortgage and promised me that he would attend the Sheriff's sale and bid the premises in to the full amount of the decree and costs, and that after acquiring title from the Sheriff he would give me a reasonable time to make arrangements with him to pay him off the amount of his bid and re-convey the premises to me. After Mr. Goren promised to do this and pursuant to this arrangement, I understood he actually attended the Sheriff's sale on September 10th, 1930."

It is clear that this is merely a promise to do something in the future based on no considera-

tion— a mere *nudum pactum*. Goren was a mere volunteer.

He was no more obliged to carry out this promise than he would have been to have completed a promised gift of the amount of the decree to the defendants.

Mutuality of obligation is an essential element of every enforceable agreement. *13 C. J. 331, section 179 and cases.*

> "Where a husband held a life insurance policy upon his own life, in which his wife was named as beneficiary, he reserving, however, a power of substitution, a promise made by a local agent of the insurer to the father of the wife to notify him if the insured should make default in payment of premiums, so that the father could keep the policy alive for the benefit of his daughter, was not binding upon the insurer, so as to entitle the wife to hold the company liable for the amount of the policy on her husband's death, where he had in fact allowed the policy to lapse by non-payment of premiums.
>
> "Such promise made by the agent to a person having no connection with the policy was without legal consideration, and also lacked mutuality, for it is the essence of estoppel, of waiver and of contract that there should be reciprocal obligations or considerations, and these between the parties to the agreement."
>
> *Barbour* v. *The Equitable Life Assurance Society of the United States,* 174 App. Div. (N. Y.) 759, 161 N. Y. S. 469.

An agreement to notify plaintiff when defendant will be ready to let bids for the sale of fixtures, where plaintiff did not agree to bid lacks mutuality.

Woonton v. *S. R. Biggs Drug Co.,* 169 N. C. 64, 85 S. E. 140.

An offer to give a brick company the dirt on certain land, coupled with an acceptance by the brick company which was to remove the soil, does not constitute an enforceable contract, for, as the company could not enforce the gift, the donor cannot require performance.

> *Denver Pressed Brick Co.* vs. *Le Fevre,* 25 Colo. A. 304, 138 P. 434.

Where insurance agents wrote an insured that they would renew his policy when it expired unless notified to the contrary, and the insured, relying thereon, did not reply, and they neglected to do so, they are not liable on his suffering a loss, since their agreement wanted mutuality, and does not bind him or them without a communication of his acceptance, and was furthermore, without consideration, and was the expression of their present uncertain intention, reliance on which could not create a liability by way of estoppel.

> *Prescott* v. *Jones,* 41 Atl. 352, 69 N. H. 305.

In the next place, a careful examination of the affidavits will disclose:

1. That there was no contract on the part of Dorison not to bring a suit for a deficiency, if Goren refrained from bidding; and

2. That while the defendant Nemser purported to be solicitous for all of the defendants, there is not a word that the defendants Bessie Schultz and Clara Schultz ever knew of the arrangements with Goren, that he attended the sale, that he might have bid, that he left the sale without having bid, or what is more, that any agreement that would have had a tendency to prohibit the property from producing a surplus to which they might

have been entitled would have been satisfactory to them.

The conversation is set out in the greatest detail in the affidavit of Mr. Goren, the prospective bidder himself. The conversation gleaned from his affidavit boils down to the following (p. 24, l. 23):

> "Mr. Dorison asked 'How much are you prepared to bid?' I told him I was prepared to bid up to the amount of the decree and asked him if he had the figures. Mr. Brand gave me a statement of the amount of the decree together with the costs. I told Dorison I was a friend of Mr. Nemser and of Mr. Morris Schultz and that I was prepared to buy the property in, and later on turn it over to them if they could refinance the proposition, and besides that I told him that Mr. Nemser told me he was personally liable on the bond, and that I was there to protect him from any deficiency that might arise. Mr. Dorison said to me that he wanted the property for himself, as he had plans already prepared to build store property on the Broad Avenue property in Palisades Park, and that nobody need fear that there would be any deficiency on the bond, because if he brought suit on the bond it would re-open the foreclosure proceedings. Mr. Dorison further said that he did not see any further use in bidding up the property against him as it would mean a lot of additional cost and that if Mr. Nemser's chief concern was the deficiency on the bond, that he need have no fear as to that, because he would not bring any action on the bond as he wanted the property for himself and was all ready to build."

The affidavit then continues in paragraph 6:

> "I accordingly, after this talk with Mr. Dorison and Mr. Brand, left the Sales Room before the sale took place, relying upon Mr. Dorison's statement to me that he would not bring any deficiency action on the bond."

The last paragraph of Mr. Goren's affidavit is as follows:

> "If I had known that Mr. Dorison contemplated any action for a deficiency on the bond, I would have remained at the sale and would have bid up to the full amount of the decree and costs, according to the statement that was handed to me by Mr. Brand."

It will be noted that there is not a word in the foregoing affidavit that there was communicated either to Mr. Brand or to the plaintiff any mention of any of the defendants other than Mr. Nemser and possibly Morris Schultz. What the affiant particularly said was that he was there to protect Nemser. It is perfectly clear also that the affiant does not seek to set up any contract by which Mr. Dorison promised and agreed that if Goren would not bid, the plaintiff in consideration thereof, would not bring any suit on the bond. The affidavit clearly is to the effect that Mr. Dorison said he would not bring suit and that relying upon that he, Goren, withdrew from the sale.

The affidavit of Morris Schultz is to the same effect, except that Dorison said:

> "If Mr. Goren's principal interest in the matter was to protect Mr. Nemser and the other defendants from a suit for deficiency on the bond, that they need not worry about any such suit because he had no intention of bringing such a suit. He further stated to us that he saw no reason why he and Mr. Goren should bid against each other and run up the price and thus increase the costs."

In paragraph 4 of his affidavit Morris Schultz says:

> "I absolutely believed Mr. Dorison when he stated to us that he had no intention of suing on any deficiency on the bond and only for that reason, Mr. Goren and I left the Sheriff's Sales Room before the sale."

It can be seen from these excerpts from the evidence that there was no evidence on the part of the affiants that the intention of Goren to withdraw from the sale was ever communicated to Dorison. There is further lacking one of the essential elements of a contract.

> "To constitute an agreement the intention of the parties must in some way or form be communicated, for a person's intention can be ascertained by another only by means of outward expressions, such as words and acts. An intention not expressed, not communicated, or withdrawn before communicated, is in general inoperative and immaterial to the question of agreement."
>
> 13 C. J. 265, section 50.

Before an offer can become a binding promise and result in a contract it must be accepted, either by word or act, for without this there cannot be agreement. Nor is a promise binding on its maker unless the promisee has assented to it.

> 13 C. J. 272, section 68.

> "A contract is an agreement to do or not to do a particular thing. It must be by consent, which is free, mutual, and communicated by each to the other. The consent is not mutual unless the parties all agree upon the same thing in the same sense, and unless they do so agree, there is no contract."
>
> *American Can Co.* vs. *Agricultural Insurance Co.,* 12 Cal. A. 133, 106 Pac. 720, 722.

> "The unexpressed or uncommunicated intention of one party to a contract is not binding upon the other party to the contract. In order to be binding the intention must be common to both."
>
> *Farnum* v. *Whitman,* 187 Mass. 381, 73 N. E. 473. Citing cases.

It is clear that if a party relies upon some act as a communication of his assent, that act must be unequivocal and such that it clearly results in an actual meeting of the minds of the parties.

There was no contract entered into.

This leaves only the question of a possible estoppel to be considered.

There are some other facts set out in these affidavits which are very important. Two of the defendants, Morris Schultz and Irving Schultz, make affidavit that they were present before the sale. Neither one makes the slightest attempt to show that he had intended to bid or would have bid under any circumstances. Defendants do not dispute the allegations in the affidavits filed in behalf of the plaintiff that there had been continued negotiations for adjustments of the matter both before and after the sale. See paragraph 16 of affidavit of I. H. Brand (p. 18, l. 20) and paragraph 5 of affidavit of plaintiff (p. 21, l. 5). It is clear that the defendants were unable to refinance the mortgage and had no hopes of being able to bid at the sale. It is also clear that Goren's conduct at the sale in no way influenced any of the defendants. The affidavit of Nemser, one of the defendants, said that he was not present at the sale. His affidavit contains the significant statement, "I understand he (Goren) actually attended the Sheriff's sale on September 10th, 1930." On that day he did not know whether Goren was there or not, and cannot testify of his own knowledge that he was there. The other two defendants, the wives of Irving and Morris Schultz, are not connected with these transactions in any way.

A careful reading of the affidavits can lead to no other conclusion than that some of the defendants, and not more than three at the most, being unable to finance the mortgage and being anxious

not to be sued for deficiency, sought the good offices of a friend to bid up the property. He was under no contract or obligation to do this, and could have gone to the sale or not and bid or not as he pleased, and could have bid as much or little as he pleased. He was a volunteer. His failure to bid created no liability. If anything that was said influenced anybody's conduct it influenced his alone. None of the other defendants changed their position in any way. Three of the defendants knew nothing at all about what took place there and the other two did nothing to their disadvantage, relying on any possible statement of the complainant or his solicitor.

POINT III.

No facts are shown which create an equitable estoppel enforceable in the suit at bar.

A.

None of the defendants relied upon the statements of the plaintiff or his attorney or changed their position because thereof.

It can be seen from the affidavits that none of the defendants changed his position or acted in any way upon the representations alleged to have been made. For this reason the affidavits filed do not show the necessary and essential elements of an estoppel.

Corpus Juris contains the following on this subject, in Volume 21, page 1126, section 130:

> "It is an essential element of equitable estoppel that the person invoking it has been influenced by and has relied on the representation or conduct of the person sought to be estopped."

This is supported by seven and a half columns of closely printed cases of practically every state in the Union, including the United States, Canada and England.

> "The fault of the party against whom an estoppel is sought to be worked must not only have existed, but it must have been the occasion of the injury to the party who sets it up."
>
> *Mott* vs. *Newark German Hospital,* 55 N. J. E. 722, 734.

> "Here, then, we have the duty to speak, the failure to speak, and the conduct of Ruckelshaus induced by her silence. This embodies all the elements of an *estoppel in pais.*"
>
> *Ruckelshaus* vs. *Borcherling,* 54 N. J. E. 344, 351; affirmed 55 N. J. E. 589 on opinion below.

The case of *Magie* v. *Reynolds,* 51 N. J. E. 113, is interesting and much in point. In this case the assignee of a mortgage sought to foreclose, and the mortgagors defended on the ground of fraud in the procurement of the mortgage. The complainant relied on the doctrine of estoppel. The mortgage had been assigned to one Bloss who subsequently assigned it to the complainant. The Court said:

> "A mortgagor and obligor may, however, so conduct himself as to mislead a proposed assignee, and estop himself from setting up his defense; and I have looked with care into this case to see if I could find anything in the conduct of Mr. and Mrs. Reynolds which would estop them as against Mrs. Magie."

He then finds that the affidavit of Bloss if true would show that if he had advanced money on

statements that were made by the mortgagors, the mortgage would have been a valid security in his hands but as there was no proof as to any representations to Mrs. Magie, Bloss's assignee, there would be no estoppel as against her. The mortgagors had also made statements that treated the mortgage as existing, but these had not come to the knowledge of Mrs. Magie. The bill of complaint was dismissed on the ground that the mortgage was fraudulent.

It follows, therefore, that even if there was an estoppel upon which the agent Goren could rely, it would not only not be available to one who was his assignee, but much less to those who were strangers and were not influenced by his conduct.

> "It is also quite clear that in order to enable the assignee to take advantage of such estoppel he must be what is called a *bona fide* purchaser without notice; that is, he must have advanced his money or other thing of value upon the strength of the conduct out of which the estoppel arises. It is also well settled that he is only protected by the estoppel to the extent to which he has actually parted with his money or other valuable thing."
>
> *Robeson* vs. *Robeson,* 50 N. J. E. 464, 466, citing other cases.

See also *Central R. R.* vs. *MacCartney,* 68 N. J. L. 165, 175 and 176, where there will be found a collection of cases and a statement of the requirements for an estoppel.

10 R. C. L., page 697, section 25, is in part as follows:

> "The final element of an equitable estoppel is that the person claiming it must have been misled into such action that he will suffer injury if the estoppel is not declared. That is, the person setting up the estoppel must have

> been induced to alter his position, in such a way that he will be injured if the other person is not held to the representation or attitude on which the estoppel is predicated.''

This is also supported by a large number of cases. See to the same effect 2 Pom. Eq. Jur. (4th Ed.), Secs. 805 and 712, and cases.

Authorities could be multiplied almost without limit, but it would seem unnecessary.

B.

The change of position must be personal to the person who sets it up.

A stranger, who is not a party nor a privy, can neither be bound nor aided.

> *Pom. Eq. Jur.* (4th ed.), Sec. 813, and cases.

> ''Estoppels must be mutual and can only operate upon the parties to the issue, and those who stand in privity of estate or descent.''

> *Wright* v. *Hazen,* 24 Vt. 143, 145.

In *Simpson* vs. *Pearson Admr.,* 31 Ind. 1, the Court said on page 5, after stating the requirements of an estoppel:

> ''But one who insists upon the acts of another as working an estoppel must show that he acted upon the same, and was influenced thereby to do some act which would not result in any injury if that other is permitted to gainsay or deny the truth of what he did. For it is a well settled rule in such cases, that no man can set up another's act or declaration as the ground of an estoppel, unless he has himself been misled or deceived by such

act or declaration. Washb. Real Prop., b. 3, Ch. 2, Sec. 6, 9, a.

"It follows from the very principle on which the whole doctrine of estoppel rests, that they operate neither in favor of nor against strangers but affect only the parties thereto and their privies either in blood, in estate, or in law; and hence a stranger can neither take advantage of, nor be bound by an estoppel. This principle applies equally to estoppels by deed by record, and *in pais.*"

In *Murray* v. *Sells,* 53 Ga. 257, one headnote is:

"That one has been guilty of a fraud as to a particular parcel of land in his dealings with one person, so that, as to this person, he is estopped, does not estop him as to another person who is not a privy in estate with the first."

Lands were sold by an administrator under a void decree and proceeds distributed among the heirs. Held, heirs were estopped from asserting their legal title from the purchaser; but that this estoppel did not enure to the benefit of a third person, who seeks to enforce a trust in the land under contract with the decedent.

Wilsons' admr. vs. *Holt,* 91 Ala. 204.

"Estoppel is available only to him who has been misled to his hurt and to those who are in privity."

Certain streets of a city had been dedicated to the public. It had permitted persons to make valuable improvements on some of these. Held not to estop city from claiming such land from one who had erected no improvements.

City of Hardin v. *Cunningham,* 226 S. W. 872, 285 Mo. 457.

As only those to whom the representation is made or their privies can take advantage of an estoppel by conduct representation by a depositor in a bank to a national bank examiner cannot avail the bank which he was examining.

Carlon v. *First National Bank,* 80 Or. 539, 157 Pac. 809.

See also

Inland Finance Co. vs. *Inland Motor Car Co.,* 125 Wash. 301; 216 Pac. 14;
D'Elissa v. *D'Amato,* 85 N. J. E. 466, 97 Atl. 41, aff'd, 86 N. J. E. 924, 98 Atl. 1085;
10 Rul. Case Law, p. 839, Sec. 145;
21 C. J. 1179, *et seq.*

Privies are those who are in privity. The word privity is variously defined. For various extended definitions, see 50 C. J. 403; 15 R. C. L. 1015, section 488.

Numerous definitions are given in Corpus Juris such as Greenleaf's "Mutual or successive relationship to the same rights of property." (Greenleaf's Evid., Sec. 189.)

Privity is partially defined as follows in 50 C. J. at 403:

> "Although it has been said that there is no definition of the term that can be applied to all cases, 'privity' as most generally defined, and, as it has been said, in its broadest sense, denotes mutual or successive relationship to the same right of property. Also, 'privity' has been defined as a derivative kind of interest, founded upon, or growing out of, the contract of another; a successive relationship to, or ownership of, the same property from a common source; a succession of relationships by deed or other act or by operation of law. Thus it has been said that privity im-

> plies succession; that privies occupy that relation to others because of derivative rights of property; that a privy must come after him to whom he is privy, and never precedes; that 'privies' must mean nothing more than claiming under; that, except to the extent to which one person has succeeded to an estate or interest formerly held by another, there can be no privity between them, no matter what were or are their relations to each other, or to the same piece of property."

It is clear that the defendants have no remedy because the volunteer Goren failed to bid any more than they have because any other person then present failed to bid.

Our opponents will doubtless rely on the case of *Witherell* vs. *Kelly,* 187 N. Y. S. 43; 195 App. Div. 227.

This case holds, among other things, that "a statement by a mortgagee that there will be no deficiency judgment against you, we won't bother you any, because we think we will get our money out of it. Held not a mere expression of opinion, but a statement upon which the mortgagor could rely as estopping the mortgagee from obtaining a deficiency judgment." It will be noted in this case that the statements were made to the mortgagor and acted upon by him so that the very element was present which is lacking in the case at bar. The Court further on said: "If the defendant, in reliance upon the assurance of Shedd, admitted agent of mortgagee, that there would be no deficiency against him, had just grounds to remain inert and at gaze without further securing himself or without protecting himself against a deficiency, it seems to me that the doctrine of equitable estoppel by representation applies, in that the plaintiff made statements that indicated her abandonment of an existing right of a plaintiff

in a foreclosure by sale.'' In that case, in reliance upon these representations, the defendant consented to a foreclosure by sale in a jurisdiction which required strict foreclosure without such consent. Its doctrines have no application to the facts involved in the case at issue.

Counsel for the defendants, in commenting on the Witherell case, say that the statement in that case was made by the agent of the mortgagee, while in the instant case the statement was made to the agent of the mortgagors as well as to two of the mortgagors themselves. It may be said, however, that it was conceded in the Witherell case that the agent was the agent of the mortgagee while in the present case it is quite clear that the agent Goren was a mere volunteer. He was not to act in the name of the defendants. They were not to be bound by his bid, if he made one. *If it could be conceded that he was an agent, his agency was to bid and not to refuse to bid and enter into some other arrangements, about which they knew nothing.* While the alleged statements were made to two of the defendants, it is absolutely clear that neither of the defendants relied in any way thereon. They did not claim to have done so, and the alleged statements upon which reliance was claimed were not communicated to any of the others in time to have been influenced thereby.

C.

If equitable estoppel was enforced in this case, it should be enforced on equitable terms. A person who claims an estoppel cannot profit by it but only be put in *statu quo*.

See cases

Hill v. *Hill,* 79 N. J. E. 521, 526 and cases;
Robeson v. *Robeson,* 50 N. J. E. 465, 466;
Ruckelschaus v. *Oehme,* 48 N. J. E. 436, 442, affd. 49 N. J. E. 340;
Campbell v. *Nichols,* 33 N. J. L. 81, 88;
Phillipsburg Bk. vs. *Fulmer,* 31 N. J. L. 52, 55.

All the defendants claim to have lost was the fact that Goren was induced not to bid to the full value of the property so as to save a possible deficiency suit. This he was prepared to do according to their affidavits. This, defendants may still do under our statute permitting them to redeem. In order that redemption might be made easy, plaintiff in his brief below, made the following stipulation good for two weeks after the service of that brief on defendants' attorney.

> "He will permit either the defendants to redeem or the agent to purchase, with the consent of all of the defendants, for the full amount of what would be due under the decree at the date of the sale less costs and less an additional $1,000 and will take a three year mortgage for all the purchase price, with legal interest, payable quarterly, containing the usual tax clause, requiring the mortgagor to pay the taxes without deduction and the usual 30 days' interest default clause and 60 days' tax and assessment default clause, provided there be deposited as collateral security either with the plaintiff or

> some trust company under proper conditions the 50 shares of American Telegraph and Telephone Co. stock which the agent claims to have purchased with a part of the money he intended to use for this sale, such stock to be held as collateral until the mortgage principal shall have been reduced by the payment of $5,000, or, if $5,000 in cash is paid, all of the balance may remain on mortgage."

Had that offer been accepted neither the defendants nor the agent could have suffered because of the alleged estoppel, but would have benefitted by it. Of course, the right to redeem still continues under the statute.

The judgment should be affirmed.

Respectfully submitted,

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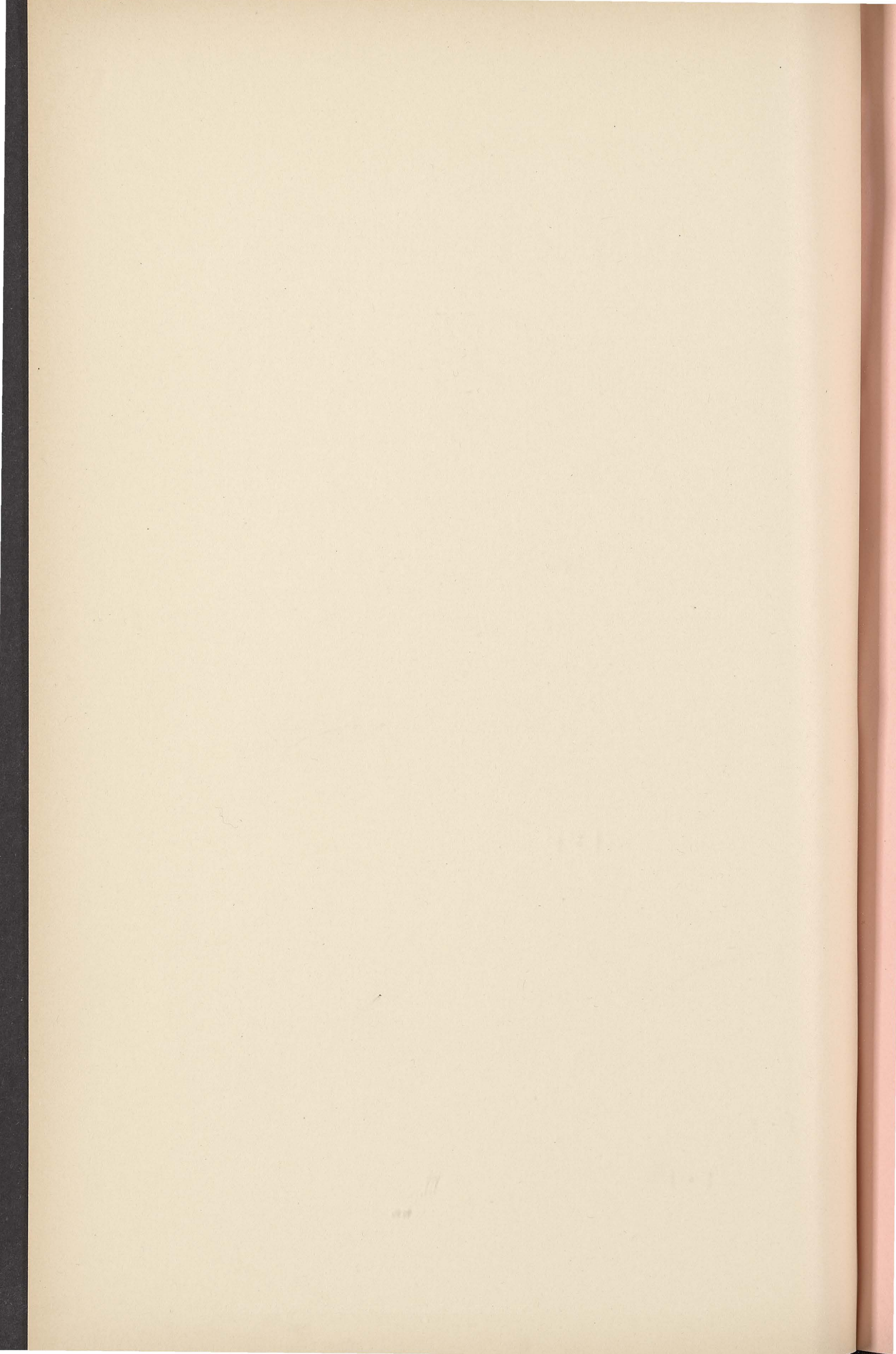

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