# INDEX

*Memorandum of Vice-Chancellor Backes.*

COURT OF CHANCERY OF NEW JERSEY

JOHN H. BACKES
VICE CHANCELLOR
STATE HOUSE, TRENTON, N. J.

July 30th, 1934

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Dear Mr. Woodbridge:

Re: McMurtry v. Schneider.

I have your form of order overruling objections and confirming sale. I think the order concerning the credit on the Fi. Fa., less taxes, assessments and other prior municipal liens, should be definite as to the net amount to be credited. The amount of the prior liens to be first ascertained.

I have from Mr. Hoffman a letter in which he reminds me that I started during the hearing that Mr. Schneider should have a reasonable opportunity to submit his bid to the government and to await its decision. I will defer confirming the sale until the government makes its award, if it is made within a reasonable time.

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Yours truly,

John H. Backes

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Freeman Woodbridge, Esq.,
Nat. Bank Bldg.,
New Brunswick, N. J.

Copy to Samuel Hoffman, Esq.,
290 George St.,
New Brunswick, N. J.

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## Summons.

The State of New Jersey to Frederick C. Schneider:

(L. S.) YOU ARE SUMMONED to answer the annexed complaint of John E. McMurtry, in an action at law in the New Jersey Supreme Court.

AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, HON. THOMAS J. BROGAN, Chief Justice of the Supreme Court, at Trenton, this 26th day of October, Nineteen Hundred and Thirty-four.

FRED L. BLOODGOOD,
Clerk.

HEINE & LAIRD,
Attorneys for Plaintiff.

**Complaint.**

# New Jersey Supreme Court

MIDDLESEX CIRCUIT.

| | |
|---|---|
| JOHN E. MCMURTRY, *Plaintiff,* *vs.* FREDERICK C. SCHNEIDER, *Defendant.* | *Action at Law.* *Complaint.* |

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Plaintiff, residing in the Borough of Brooklyn, County of Kings and State of New York, complaining of the defendant says that: 20

1. On or about July 15, 1926, defendant, at New Brunswick, Middlesex County, New Jersey, executed a certain purchase money mortgage in the sum of $69,000, bearing interest at six per cent., covering property situated at the corner of George and Morris streets, City of New Brunswick, County of Middlesex and State of New Jersey, consisting of five lots of land, irregular in shape, with an approximate frontage of one hundred and thirty-five feet on George street running along Morris street approximately one hundred and fifty-six feet, the rear of said tract being approximately one hundred and fifteen feet, which said property is generally known as No. 277 George street, New Brunswick, New Jersey; said mortgage having been subsequently reduced to $61,500. 30

2. On the same date the defendant also executed to the plaintiff his certain bond which ac- 40

companied said mortgage and which bond was in the penal sum of $138,000.

3. Plaintiff has heretofore in the month of October, 1933, instituted foreclosure proceedings and said mortgage has been heretofore foreclosed and the property sold by the Sheriff of Middlesex County, wherein said property is located, by virtue of a certain decree of the Court of Chancery, said sale having been thereafter confirmed by said Court of Chancery under date of October 15, 1934, the said Court of Chancery having fixed the fair value of the premises as of the time foreclosure at $52,400 and having confirmed said sale with the provision that said fair value, to wit, $52,400 be credited to the defendants in which sum this plaintiff does hereby credit the defendants in this proceeding.

4. Plaintiff brings this suit upon the bond of defendants as aforesaid and claims judgment in the amount of $18,758.46, with interest from March 7, 1934, which said sum is ascertained as follows:

| | |
|---|---|
| Amount of plaintiff's judgment as shown by statement of decree in Court of Chancery | $66,530.77 |
| Taxes in arrears | 4,441.11 |
| Water rent in arrears | 186.58 |
| | $71,158.46 |
| Credit on decree | 52,400.00 |
| | $18,758.46 |

5. On or about October 23, 1934 and before the institution of this suit, which said date is within three months from the date of the sheriff's sale, said date being likewise within six months of said date of sheriff's sale; the plaintiff filed in the office of the County Clerk of Middlesex County, being the county in which said mortgaged premises are situate, a written notice of this proposed action setting forth the court in which it was proposed to begin such action, the names of the parties to such bond and action, the book and page of the record of said mortgage together with a description of the mortgaged premises, according to the statute in such case made and provided.

6. This action is commenced within three months from the date of the sheriff's sale of the mortgaged premises and likewise within six months of said sale.

WHEREFORE, plaintiff demands judgment of the defendants in the sum of $18,758.46 together with interest and costs.

HEINE & LAIRD,
Attorneys of Plaintiff.

## Notice by Motion to Strike Out Complaint.

NEW JERSEY SUPREME COURT.

MIDDLESEX CIRCUIT.

| | |
|---|---|
| JOHN E. MCMURTRY, *Plaintiff,* *vs.* FREDERICK C. SCHNEIDER, *Defendant.* | *Action at Law.* *Notice by Motion to Strike Out Complaint.* |

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To Heine & Laird, Esquires,
Counsellors at Law,
27 Washington street,
20 Newark, New Jersey.
Attorneys of Plaintiff.

Sirs:

Please take notice that on Friday, the 30th day of November, Nineteen Hundred and Thirty-four, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard I will move before the Honorable Frank L. Cleary, Circuit Court Judge and Supreme Court Commissioner 30 at the Court House in the City of Elizabeth, County of Union, to strike out the complaint filed in the above entitled action, upon the following grounds:

1. The complaint does not disclose any legal cause of action in favor of the plaintiff and against the defendant.
2. The complaint is frivolous.
3. The complaint is sham.

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*Notice by Motion to Strike Out Complaint.*

The basis of the defendant's objections to the complaint relate to the allegations in the complaint setting forth that the action was commenced within three months after the Sheriff's sale and also within six months after the date of the Sheriff's sale, whereas in fact the action was not commenced within three months from the date of the Sheriff's sale, nor within six months of the date of the Sheriff's sale as required by the statutes of the State of New Jersey.

SAMUEL D. HOFFMAN,
Attorney of Defendant.

Dated: November 20, 1934.

## Affidavit of Alan E. Ely.

NEW JERSEY SUPREME COURT.

MIDDLESEX CIRCUIT.

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|---|---|
| JOHN E. MCMURTRY, *Plaintiff,* *vs.* FREDERICK C. SCHNEIDER, *Defendant.* | *Action at Law.* *Affidavit.* |

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

20 ALAN E. ELY, of full age, being duly sworn according to law, upon his oath deposes and says:

1. He is the Sheriff of the County of Middlesex in the State of New Jersey, and has been since November, 1932.

2. On the Sixteenth day of December, 1933, by virtue of a Final Decree in the Court of Chancery, in the foreclosure suit of John E. McMurtry, complainant *v.* Frederick C. Schneider,
30 defendant, he was directed to sell the said premises which were located at the corner of George and Morris streets, in the City of New Brunswick, to the highest bidder. Pursuant to said Final Decree deponent advertised the premises for sale and did on the Fourteenth day of February, 1934, conduct a sale of the said premises and did sell the said premises to George R. Morrison, solicitor, who purchased the same for the complainant, John E. McMurtry, for the sum of
40 One Hundred Dollars ($100.00). Thereafter on

the 14th day of February, 1934, deponent did make a report of said sale to the Chancellor. To the best of deponent's knowledge and belief said sale was never set aside nor disturbed. No suit was instituted against Frederick C. Schneider, the defendant, to recover for any deficiency on the bond until the Twenty-ninth day of October, 1934, at which time the summons and complaint was delivered to the office of deponent for service upon defendant, Frederick C. Schneider. Deponent through one of his Deputies served the said Frederick C. Schneider on the Twenty-ninth day of October, 1934.

ALAN H. ELY.

Sworn and subscribed to before me this Twenty-third day of November,, 1934.

BESSIE S. YARAS,
Notary Public of New Jersey.

## Affidavit of Samuel D. Hoffman.

NEW JERSEY SUPREME COURT.

MIDDLESEX CIRCUIT.

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|---|---|
| JOHN E. MCMURTRY, *Plaintiff,* *vs.* FREDERICK C. SCHNEIDER, *Defendant.* | *Action at Law.* *Affidavit.* |

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

SAMUEL D. HOFFMAN, of full age, being duly sworn, according to law, upon his oath deposes and says:

1. He is the attorney for the defendant in the above entitled action, and was also the solicitor for the defendant in the foreclosure action in the Court of Chancery between John E. McMurtry, complainant and Frederick C. Schneider, defendant, 99-112, which suit was brought to foreclose the mortgage given to secure the bond upon which the above entitled action is brought. Deponent says that pursuant to a Final Decree entered in the said foreclosure proceedings the Sheriff of Middlesex County was directed to sell the said mortgaged premises and did after duly advertising the same for sale, sell the premises on the Fourteenth day of February, 1934, which is the date of the Sheriff's sale. Subsequent thereto and with the consent of deponent and the consent of the solicitor for the complainant, John E. McMurtry, who is the plaintiff in the above

entitled action, an Order was made for the taking of testimony to determine the fair value of the premises. Said Order which was consented to in writing by the solicitor for complainant and deponent definitely fixed the date of the Sheriff's sale as February 14, 1934, and does set forth that the said premises were duly sold by the Sheriff on the said Fourteenth day of February, 1934, and purchased by the complainant at the said sale for the sum of One Hundred Dollars ($100.00). On the Fourteenth day of August, 1934, six months elapsed from the date of the said Sheriff's sale and no suit on the bond was commenced within that period.

Deponent further says that the suit in the above entitled action was commenced on or about the Twenty-ninth day of October, 1934, and that the defendant, Frederick C. Schneider, was served with the Summons and Complaint in the above entitled action on the said Twenty-ninth day of October, 1934.

SAMUEL D. HOFFMAN.

Sworn and subscribed to before me this Twenty-Third day of November, 1934.

EVA J. HOFFMAN,
Notary Public of N. J.

## Affidavit of John A. Laird.

NEW JERSEY SUPREME COURT.

MIDDLESEX CIRCUIT.

| | |
|---|---|
| JOHN E. McMURTRY, *Plaintiff,* *vs.* FREDERICK C. SCHNEIDER, *Defendant.* | *Action at Law.* *Affidavit.* |

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

10 JOHN A. LAIRD, of full age, being duly sworn on his oath according to law deposes and says:

I am a member of the firm of Heine and Laird and the person entrusted with the conduct of this case.

I was not in charge of the matter during the pendency of the foreclosure proceedings but came into the case some time thereafter.

In my file I find a copy of a letter from Vice-
30 Chancellor Backes addressed to Freeman Woodbridge, Esq. (copy to Mr. Samuel Hoffman), in the case of McMurtry *v.* Schneider, in which the Vice-Chancellor says: "I have from Mr. Hoffman a letter in which he reminds me that I stated during the hearing that Mr. Hoffman should have a reasonable opportunity to submit his bid to the government and to await its decision. I will delay confirming the sale until the government makes its award if it is made within
40 a reasonable time." This letter was dated July

20, 1934, in other words, approximately two weeks before the statute of limitations would expire.

The facts are that the order confirming sale was not signed by Vice-Chancellor Backes until October 15th and then only after he had been frequently addressed in connection with the matter and after notice of motion to confirm was served upon the other side. Every step in this cause was taken by me with the utmost expedition and the statutory notice in the Clerk's Office was filed promptly and suit was actually begun within two weeks of the order confirming sale.

JOHN A. LAIRD.

Sworn and subscribed before me
this 30th day of November, 1934.

MARIE SULLIVAN,
Notary Public of New Jersey.

## Opinion.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

| | |
|---|---|
| JOHN E. MCMURTRY, *Plaintiff,* *vs.* FREDERICK C. SCHNEIDER, *Defendant.* | *Action at Law.* *Motion to Strike Complaint.* *Opinion.* |

10 This action is for a deficiency on a bond, after foreclosure of the accompanying mortgage, and defendant moves to strike out the complaint.

20 The only question involved is whether or not the statutory period within which suit must be brought runs from the date of the sheriff's sale, or the date of confirmation by the court.

The venue was held on February 14, 1934, but was not confirmed until October 15, 1934. The delay was occasioned by the defendant's objection to confirmation for inadequacy of price, and the subsequent proceedings which were to ascertain the fair value of the property. Suit for the 30 deficiency was instituted on October 27, 1934. The statute (C. S. 3421, Section 2) requires "that all suits on said bond shall be commenced within six months from the date of the sale of said mortgaged premises."

Section 4 provides, "that no sale of mortgaged premises shall be confirmed by the Court or further proceedings had until the Court, or said Judge is satisfied by evidence, that the property has been sold at the highest and best

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price the same would then bring in cash, and such evidence may be in the form of affidavits."

There are several equity cases cited in support of the motion, and while they appear to support the defendant's contention, they do not touch the precise question involved herein.

The only law case which appears to be in point is Development Building and Loan Association *vs.* Nurock, 157 Atl. page 452, in which Circuit Court Judge Eldredge, sitting as a Supreme Court Commissioner held "that all suits on bonds for deficiency shall be commenced within six months from the date of sale; that the sale referred to in the decree which terminates the right of redemption, as well as in the Act authorizing the decree of sale, is the exposure of the property for sale by the sheriff."

"Thus, the highest bidder as purchaser at a sheriff's sale acquires by the act of purchase, a right of conveyance. The order of confirmation confirms and has relation back to that sale."

As I have been unable to find any law cases in the State directly affecting this question, and as the opinion of Judge Eldredge is exactly in point, I feel constrained to follow the rule laid down in this case, and to adopt the reasons set forth by Judge Eldredge as applicable to the question in point. Adopting Judge Eldredge's opinion in the above-stated case leads to the conclusion that the motion to strike the complaint, for the reason that it was not started within the six months prescribed by the statute should be granted.

An order to this effect will be signed when presented.

FRANK L. CLEARY,
Judge.

## Rule for Judgment.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

10 JOHN E. MCMURTRY,
*Plaintiff,*
*vs.*
FREDERICK C. SCHNEIDER,
*Defendant.*

*Action at Law.*
*Rule for Judgment.*

The complaint in the above entitled matter having been stricken out by Honorable Frank L. Cleary, Circuit Court Judge and Supreme Court
20 Commissioner, and no leave having been given to the plaintiff to amend;

It is on this 12th day of September, 1935 ORDERED that judgment final be entered in favor of the defendant and against the plaintiff.

CLARENCE E. CASE,
*J. S. C.*

On motion of
SAMUEL D. HOFFMAN,
30 Attorney for Defendant.

Rule actually entered September 12, 1935.

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## Notice of Appeal and Grounds.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

| | |
|---|---|
| JOHN E. MCMURTRY, *Plaintiff,* *vs.* FREDERICK C. SCHNEIDER, *Defendant.* | *Action at Law.* *Notice of Appeal and Grounds.* |

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To: Samuel D. Hoffman, Esq.,
Attorney of Defendant.

SIR:

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PLEASE TAKE NOTICE that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. Because the Supreme Court erred in striking out the complaint of John E. McMurtry and entering judgment in favor of the defendant upon the ground that said complaint did not disclose any legal cause of action in favor of the plaintiff and on the further ground that the complaint was frivolous and sham.

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2. The Supreme Court erred in striking out the complaint of John E. McMurtry and in entering judgment in favor of the defendant on the ground that John E. McMurtry's action at law was not commenced within the proper statutory period.

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3. The Supreme Court erred in striking out the complaint of John E. McMurtry and entering judgment in favor of the defendant on the ground that said action was not started within the statutory period of limitations overruling plaintiff's contention that defendant was estopped under the admitted facts from setting up such period of limitation.

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Respectfully,

HEINE, LAIRD & THIELE,
Attorneys of Plaintiff.

Service of the within Notice and Grounds of Appeal is herewith acknowledged this 27th day of August, 1935.

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SAMUEL D. HOFFMAN,
Attorney of Defendant.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| JOHN E. MCMURTRY, *Plaintiff-Appellant,* *vs.* FREDERICK C. SCHNEIDER, *Defendant-Appellee.* | *Action at Law.* |

## BRIEF OF PLAINTIFF-APPELLANT.

### Statement of Facts.

In July, 1926, the defendant purchased from the plaintiff a business property situated in New Brunswick and as part consideration executed a purchase money mortgage in the sum of $69,000. Thereafter, the defendant being in default both as to interest and taxes, foreclosure proceedings were had resulting in a sale held February 14, 1934 by the sheriff at which time Mr. McMurtry purchased the property at the nominal price of $100.

The defendant Schneider filed objections to confirmation and the matter was referred to a Special Master on May 11, 1934 to take testimony on the question of the actual value of the premises, the Special Master reporting the value to be $52,400. Mr. Schneider filed exceptions to the report, which under date of July 23, 1934, were overruled by the late Vice-Chancellor Backes, who, at the request of the defendant, Mr. Schneider, withheld signing the order confirming the sale until October 15, 1934.

Immediately thereafter notice of lis pendens was filed with the County Clerk of Middlesex County and an action against Schneider on the

bond for the amount of the deficiency, as ascertained from the Chancery proceedings, was started, said deficiency having been determined by the foreclosure proceedings to be the sum of $18,758.46.

This complaint was, on motion, stricken out and judgment in favor of the defendant entered from which judgment the plaintiff appeals.

## ARGUMENT.

### Point I.

The proceedings in this matter were had in accordance with an act entitled: "An Act Concerning Proceedings on Bonds and Mortgages, given for the same Indebtedness and the Foreclosure and Sale of Mortgaged Premises thereunder," as amended by the Laws of 1933, p. 172.

The Act in question was originally passed in 1880 and provides, with its amendments (3 Compiled Statutes, p. 3422, par. ~~50~~ 48 and P. L. 1933, p. 172) that proceedings to collect the debt shall be first to foreclose the mortgage and then to proceed on the bond for the deficiency, which suit for deficiency must be commenced within three months from the date of the sale of said mortgaged premises.

The Act in question in section 4 provides that the sheriff, after conducting a foreclosure sale, shall make a report within five days to the court and that if the court shall approve of the same "they shall confirm the sale as valid and effectual in law" and shall direct the sheriff to execute a deed. The statute then contains this significant proviso:

> "Provided, that no sale of mortgaged premises shall be confirmed by the court

> *or further proceedings had* until the court, or such judge is satisfied by evidence that the property has been sold at the highest and best price that the same would then bring in cash and such evidence may be in the form of affidavits."

The Supreme Court struck out the complaint on the theory that the statute required that suit for deficiency must be instituted within three months following the sheriff's sale. We urge that the word "sale" as used in the statute must of necessity mean the date when the sale is confirmed by the court and we rely, first, upon the language of the statute as above quoted, which provides explicitly and by terms that no further proceedings may be had until the order of confirmation is entered.

Referring again to the title of the act we know that it is "An Act Concerning Proceedings on Bonds and Mortgages" and this embraces not only the foreclosure proceedings but the suits for deficiencies as well. Clearly the act cannot be interpreted to require that suits for deficiency must be instituted within three months of the date of the sheriff's sale when this same statute in terms forbids further proceedings, i. e., the institution of a deficiency suit until the sale has been confirmed by the court.

Furthermore, as above pointed out, the act provides that the mortgagee must first foreclose the mortgage before instituting his deficiency suit. In the instant case, following the sale by the sheriff, objections to confirmation were filed. This was a step in the foreclosure proceedings. The matter was referred to a Special Master who made a report and objections were filed to the Master's report. These objections were overruled by Vice-Chancellor Backes but the

signing of the order of confirmation was further delayed on application of the defendant (Case p. ) and the order confirming sale not signed until October 15, 1934. All of these steps were steps in the foreclosure proceedings and until the mortgage was foreclosed (and it was not foreclosed until the order confirming sale was signed) the statute forbade the plaintiff from instituting his deficiency suit.

The question here involved has never been directly passed upon heretofore by the Supreme Court or the Court of Errors although some of our recent cases contain extremely significant language. For example, the Court of Errors and Appeals in the case of *Vanderbilt* vs. *Brunton Piano Company,* 111 N. J. Law 596, said:

> "It was the right of the mortgagee, *the order in chancery confirming sale having been duly made and still subsisting,* to recover the deficiency in an action upon the bond."

The court in the course of its opinion further says, at page 601:

> "Second, the essence of Vice-Chancellor Berry's opinion in the case, as we understand it, is that equity will not suffer a wrong without a remedy, that a foreclosure sale is not fully a sale until confirmed by court order * * *."
>
> "We do not pass upon the facts of that case, but the reasoning as just reviewed, is, we think, a sound exposition of equitable principles in the light of which, and subject to the application of which the mortgage contract was made."

The Court of Chancery has seemingly accepted the same doctrine in the recently decided case of *Young* vs. *Weber,* 117 N. J. Equity 242 in the

advance reports. The following language was used by Vice-Chancellor Berry:

> "The petition charges that said suit at law is prematurely brought—which, obviously, it is, the sale not having been confirmed."

The opinion states that the conclusions in this case have been considered by the Chancellor and by his Vice-Chancellors in conference so that the underlying thought appears to have been concurred in by the entire Chancery bench.

Counsel for the defendant has stated that he called the attention of Vice-Chancellor Berry to this language and that thereupon the Vice-Chancellor said that the language was *obiter dicta* and unnecessary to the decision and would be eliminated from the opinion as printed in the bound volume. Undoubtedly the language is *obiter dicta* and unnecessary to the decision and perhaps should be, as such, omitted from the opinion, but it nevertheless appears to be the fact that the entire Chancery bench was of the opinion, *obiter dicta* or otherwise, that confirmation of a sale is necessary before a deficiency suit may be properly instituted.

## Point II.

Next let us inquire as to the purpose and intent of the legislature in connection with the mortgage foreclosure and deficiency suits, first bearing in mind that this legislation being in derogation of the rights of the mortgagee must be strictly construed in his favor. The statute, as previously indicated, makes it the duty of the mortgagee first to foreclose the mortgage; next to file a notice akin to a lis pendens in the County Clerk's Office and, last to institute his

suit for deficiency. What is the purpose of filing the notice in the County Clerk's Office? Obviously, it is to warn any one contemplating a purchase of the property from the party who has bought in at the sheriff's sale that the mortgagor's right to redeem following foreclosure has come into existence. Suppose one X has purchased at the sheriff's sale, but that the sale has not been confirmed and consequently no deed been given. A search of the records would disclose no title in X and, accordingly, the prospective purchaser would require no other warning. X has no legal title that he can sell. He has only an equitable right and that right is subject to be defeated by failure of the court to confirm. When, however, the sale is confirmed X has legal title (the giving of the deed by the sheriff being a mere ministerial act) and from that time the notice of the contemplated suit is of value to the prospective purchaser. Surely, we cannot assume that the legislature would do a vain thing, and to require the filing of this notice before X had any legal title which he could convey would be vain. It is reasonable to assume that the orderly procedure contemplated by the statute as a whole was substantially as follows: (1) Foreclosure proceedings which would terminate in an order of confirmation by the Court of Chancery. (2) The filing of a lis pendens in the County Clerk's Office as a warning to prospective purchasers of a possible cloud on the title by reason of the mortgagor's right to redeem. (3) The entry of a judgment in the deficiency suit. (4) Lapse of the six months' period at the termination of which the mortgagor's right to redeem would expire.

It seems absurd to suggest that a mortgagee, in order to protect his rights under a statute which must be strictly construed in his favor, must start suit (which the entire Chancery bench seems to think would have been premature) at a time when the statute expressly forbids any further proceedings, and when such suit, even were it permitted to stand, would be undoubtedly stayed and which both parties agree would have to be amended as to amount.

## Point III.

The defendant's conduct estops him from setting up the limitation period as a defense. In the instant case the sale was conducted by the sheriff on February 14, 1934, and in the normal course of things, would have been confirmed within five days thereafter. The defendant within that time filed objections to confirmation, and the matter was referred to a Special Master who took testimony, the purpose of which was to ascertain, at the defendant's request what set-off in his favor should be allowed on the plaintiff's mortgage deficiency suit. It was not until May 11, 1934 or within three days of the statutory period of limitations that the matter was referred to a Special Master for the taking of this testimony and it was not until June that the Master's report was filed. By this time the statute had run. Thereafter the matter was further delayed by exceptions filed by Mr. Schneider to the Master's report so that not until July 23, 1934 were these exceptions overruled. Thereafter, at the request of Schneider (Case p. 1) the Court of Chancery postponed the signing of its decree confirming sale in order that Schneider might continue his negotiations

to sell the plot to the United States Government so that the order confirming sale was never actually entered until October 15, 1934.

In view of the fact that the sale was not confirmed in the regular course within five days after sale by the sheriff, due solely and entirely to action taken by the defendant and that these steps resulted in decreasing the defendant's liability by the sum of $52,400, and that the amount of the deficiency for which suit could be brought as a result of the defendant's own actions was never determined until months after the so-called statutory period had expired, we would respectfully urge that the defendant, by his conduct has estopped himself from relying upon the statute as a defense.

**Criticism directed to the case of *Development Building and Loan Association vs. Nurock,* 157 Atlantic 452.**

In this case the late Judge Eldridge passed directly upon the proposition herein raised, and adversely to our contentions, his view apparently being in conflict with that of the Supreme Court Justice before whom the matter also came. From the facts as they appear in the opinion, it seems that three days after the sheriff's sale the plaintiff took judgment in the Circuit Court for a deficiency (presumably by confession and power of attorney) and application was made to the Supreme Court to vacate this judgment and after argument the judgment was vacated and permission given to file answer. It was this answer setting up that the suit was premature that was stricken out by Judge Eldridge. We say, and say it advisedly, that this decision would appear to fly in the face of the previous adjudi-

cations of the Supreme Court in vacating the original judgment and permitting the filing of answer, for it is obvious that the defendant in securing this relief from the Supreme Court on the judgment entered against him would have been obliged to show two things: (1) surprise and (2) a meritorious defense, so that the defense which the Supreme Court held to be meritorious, the Supreme Court Commissioner held to be no defense at all.

The decision is even more remarkable when we consider the fact that, as appears in the body of the case, the Court of Chancery not only had refused to confirm the sale but had ordered a re-sale, with the result that the mortgagee had a final judgment upon which he could issue execution and levy against the general property of the debtor, collect, pocket and dissipate the funds before the re-sale, which re-sale might well have resulted in the complete elimination of any deficiency. On the face of it, this would seem to be unsound law, and it may well be the reason that the Court of Errors and Appeals in commenting upon the decision, remarks that it might have given effect "*if* it were correct" (*Mutual Savings* vs. *Gunne,* 164 Atl. 43).

## SUMMARY OF ARGUMENT.

The points we raise may, we think, be conveniently summarized as follows:

1. The statute provides in terms that no further proceedings may be had in connection with the foreclosure or the deficiency suit until confirmation.

2. The statute further provides that before a deficiency suit can be started that the property

must be first foreclosed. While chancery proceedings are pending, while testimony is being taken as to the fair value of the premises and while the sale has not as yet been confirmed the foreclosure is not complete and, accordingly, a deficiency suit by the terms of the statute cannot be started.

3. The Court of Errors and Appeals and the entire Chancery bench have approved the doctrine that a foreclosure sale is not fully a sale until confirmation by court order and that, inferentially, a suit for a deficiency commenced before confirmation is premature.

4. That the statute viewed as a whole contemplates a course of action involving progressive steps, to wit: (1) completion of the foreclosure proceedings; (2) the filing of a notice as a warning to prospective purchasers from the holder of the legal title; (3) the institution of the deficiency suit and (4) expiration of the mortgagor's right to redeem within six months after judgment.

5. That the defendant by his conduct in preventing confirmation and obtaining an off-set as against the deficiency judgment to be obtained against him is estopped from relying upon the statutory period of limitations.

HEINE, LAIRD & THIELE,
Attorneys of Plaintiff-Appellant.

John A. Laird,
Of Counsel.

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| JOHN E. MCMURTRY, Plaintiff-Appellant, *vs.* FREDERICK C. SCHNEIDER, Defendant-Appellee. | Action at Law. |

## BRIEF FOR DEFENDANT-APPELLEE.

### Facts.

The facts are undisputed. The statement made by the plaintiff-appellant may be amplified to include the fact that the Chancery proceedings to determine the value of the premises were had by consent of both of the parties hereto.

**The sole question to be determined, however, is whether the required statutory period of six months runs from the date of the Sheriff's sale or the date of confirmation of said sale by the Court.**

In view of the fact that the brief of the appellant discusses a number of unrelated matters under each of the points, the argument may be simplified by first discussing the affirmative contentions of the appellee and then considering the arguments advanced by the appellant.

# ARGUMENT.

## POINT ONE.

**The words "Date of Sale" as used in the statute mean date of Sheriff's Sale.**

This suit was brought under Section 48—3 Compiled Statutes, page 3421, and not under Section 50 as alleged by the appellant. It may also be well to state at this time that the references to the 1933 amendment, P. L. 1933, page 172, requiring suit to be instituted within *three* months is extraneous to the issue. Likewise, the ground for striking the complaint was that the suit was not instituted within six months from the sale and not three months as alleged in the brief.

Section 48 reads as follows:

> "That in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be, first, to foreclose the mortgage, *and if at the sale* of the mortgaged premises under said foreclosure proceedings the said premises should not sell for a sum sufficient to satisfy said debt, interest and costs, then and in such case it shall be lawful to proceed on the bond for the deficiency and that all suits *on said bond shall be commenced within six months from the date of the sale of said mortgaged premises, etc.*" (Italics ours.)

No mention is made of the date of the confirmation anywhere, and it is reasonable to assume that if the Legislature intended to start the time from the date of confirmation it would have so specified, because, the question of confirmation was contemplated by the Legislature and is prescribed in Section 50 of the same Statute, which section refers to the "Sale" as the sale by the Sheriff.

The word "Sale" as used in the Statute in question in this suit has been very definitely construed by Vice-Chancellor Leaming in the case of the *Union Building and Loan Association* vs. *Childrey,* 127 Atl. 253.

The Court said:

> "On the contrary, I am convinced that the *'Sale' which the statute contemplates,* and which the decree specifically refers to as the time when the equity of redemption shall be deemed foreclosed, *is the public sale made by the officer* as distinguished from the deed of conveyance which is to be executed after the sale shall have been confirmed." (Italics ours.)

The Court goes on to say:

> "It is thus clear that the writ, the return, and the order of confirmation by their terms contemplate the act of procurement of a purchaser at a public vendue as the sale which the decree has ordered made under the writ, the issuance of which writ the decree directs. And it appears to me equally clear that the sale referred to in the decree as the termination of the right of redemption as well as in the act authorizing the decree of sale is the public exposure of the property for sale and the procurement of a purchaser by that means. *Not only is that 'public sale' of the property a sale in the common acceptation of that term, but at that time the equitable title to the property passes to the purchaser."* (Italics ours.)

The very principle involved in this case was definitely determined by Circuit Court Judge Eldredge, sitting as Supreme Court Commissioner in the case of *Development Building and Loan Association* vs. *Nurock,* 157 Atl. 452, who held that a suit for a deficiency on a bond under section 48 may be commenced prior to the confirmation of the sale.

Quoting Judge Eldredge:

> "And it is to be noted that Section 48 *nowhere makes any reference to a confirmation of the sale.* All suits on bonds for deficiency shall be commenced within six months from the date of the sale. That the sale referred to, in the decree which terminates the right of redemption *as well as in the act authorizing the decree of sale, is the exposure of the property for sale by the Sheriff, has already been decided in Union Building & Loan Association* vs. *Childrey,* 97 N. J. Eq. 20, 127 At. 253, 254, in which Vice-Chancellor Leaming held that such sale meant, 'The public exposure of the property for sale and the procurement of a purchaser by that mean.' Not only is that 'public sale' of the property a sale in the common acceptation of that term, but at that time the equitable title to the property passes to the purchaser. * * * Thus the highest bidder, as purchaser at a sheriff's sale, acquires by the act of purchase a right to a conveyance. The order of confirmation confirms and has relation back to that sale." (Italics ours.)

The Court goes on to say:

> *"It has been held that such a judgment must be entered within six months from the date of the actual sale by the sheriff; no allowance being made for the necessary lapse of time before the confirmation can take place, under the rules of the court. Taylor* vs. *Minwagen,* 86 N. J. Law 80, 91 A. 595; and *Crater* vs. *Smith,* 42 N. J. Eq. 348, 7 A. 575." (Italics ours.)

By indirection the Court of Errors and Appeals in the case of *Mutual Savings Fund Harmonia* vs. *Gunne,* 164 Atl. 43, gives approval to this view.

The fifth syllabus states:

> "That mortgage foreclosure sale was allegedly not properly confirmed held not to

> preclude maintenance of suit for deficiency against mortgagor who conveyed premises (3 Compiled Statute 1910, page 3420, *et seq.*)"

The Court in this case, after disposing of the issue involved, overruled the Fourth Defense, which was that the sale was not confirmed in a legal manner with the following comment:

> "Proposition Four seems to be wholly without factual support and is wholly irrelevant if it was correctly held in Development Building and Loan Association *vs.* Nurock, 157 Atl. page 452, that suit for deficiency would lie before confirmation of sale."

While the Court does not definitely state that the decision in the *Nurock* case is correct because it had already disposed of the issue on other grounds it is obvious that it would not have referred to the *Nurock* case in such terms if the *Nurock* case was clearly erroneous, and it is therefore contended that by such reference the Court of Errors and Appeals indirectly give its approval to Judge Eldredge's opinion.

And now to examine more closely some of the contentions raised by the appellant under point one of his brief.

Much is made of the words "or further proceedings had" contained in section 50 of the act. Not a single citation is given in support of the argument and it is obvious that counsel overlooks the fact that the rights of the appellant are based on section 48 of the act and not on section 50. A reading of the latter section clearly indicates that the report and confirmation required thereby was entirely for the protection of the mortgagor and to give those interested in having the property sold at an adequate price an opportunity to object.

*Railroad Co.* vs. *Scranton,* 34 Equity 429.

Section 48 on the other hand under which this suit is brought is clearly a mandatory prescription how debts secured by bond shall be collected and fixes a definite method of procedure and in so doing, I respectfully submit, excludes all other methods.

Notwithstanding the language of the statute and the reported decisions as cited herein, the appellant relies in support of his contention upon certain language used by the Court in the cases of *Vanderbilt* vs. *Brunton Piano Co.,* 111 N. J. Law page 596, and *Young* vs. *Weber,* 175 Atl. 273. I have read both cases very carefully and to decide the issue herein on the strength of that language and thereby ignore the decisions set forth in this brief would be not only far fetched but an injustice to the opinions in those cases because in each case the question of the interpretation of this particular statute obviously never entered into the mind of the Court.

In the case of *Vanderbilt* vs. *Brunton Piano Co.,* the issue was the constitutionality of Chapter 82 of the Laws of 1933 and the present issue was in no way involved in that case. It is true that the Court stated that it was the right of the mortgagee, the order of Chancery confirming the sale having been duly made and still subsisting to recover the deficiency, but the Court was merely stating what happened to be the facts in that particular case. The Court did not say that the mortgagee did not have the same right had the order of confirmation not been duly made. Furthermore the opinion in discussing the effect of confirmation upon a sale merely sought to indicate that the Court of Chancery has control of its own proceedings and may refuse to confirm where equitable principles are violated. This case discusses the situation from a primarily equitable standpoint, whereas, here we are dealing with primarily a

legal question entirely predicated upon the construction of the act of the Legislature.

In so far as the case of *Young* vs. *Weber* is concerned, it seems to me that counsel's argument is somewhat misleading and a careful examination of what occurred will if anything conclusively support the contention that a suit to recover for a deficiency on a bond may be brought prior to confirmation.

In the first place, neither the original opinion on file nor the official opinion appearing in 175 Atl. 273 contains the language cited, which could have very readily been ascertained at the time of the writing of the appellant's brief.

In the second place no issue involved in this case was there involved. In fact the petition was dismissed and the sole and primary purpose of the opinion is to reconcile the views of the Court of Errors and Appeals as expressed in *Fruzynski* vs. *Jablonski,* 175 Atl. 112, with the opinion of the Court of Chancery in the case of *Federal Title & Mortgage Guaranty Co.* vs. *Lowenstein,* 166 Atl. 538. It had absolutely no bearing in the issue herein involved.

In the third place, it is apparent that the decision of Vice Chancellor Berry to eliminate the phrase from the opinion did not come suddenly, but that the matter had been given serious thought and the decision reached prior to his receipt of my letter. It is also fair to assume that the original opinion having been concurred in by the entire Chancery bench that the decision to exclude the particular expression in question was also submitted to all of the members of the Court of Chancery and received their approval. It, therefore, follows that all of the support placed upon this case by counsel falls of its own weight and it would appear that the Court of Chancery having deliberately and seriously considered the effect

of the expression in the light of Judge Eldredge's opinion above cited came to the conclusion that Judge Eldredge was correct and therefore determined to omit from the opinion that which was inconsistent with the ruling of Judge Eldredge.

## POINT TWO.

Point Two of appellant's brief deals academically with the purpose of the Legislature in requiring the filing of a notice in the County Clerk's Office prior to instituting suit on the bond. No cases are cited.

It is respectfully submitted that the matters therein discussed have no bearing on the issue before the Court and that there is no legal argument directed to said issue which requires a reply.

## POINT THREE.

**The action of the defendant-appellee in having the fair value of the property determined does not estop him from setting up the limitation period as a defense.**

Counsel for appellant urges the fact the defendant's objections to confirmation and subsequent application to determine the fair value of the premises estops him from setting up the limitation as a bar to plaintiff's recovery. It is respectfully submitted that this argument is without merit for the following reasons:

(a) The rights of the appellant were determined entirely by the statute which prescribed in a mandatory manner the mode of procedure as well as the conditions under which he might enjoy his cause of action. Having failed to comply with either the mode or the conditions he lost his right

of action and whatever defendant did in the Chancery proceedings is entirely immaterial.

(b) The plaintiff through his solicitor consented to the proceedings to determine the fair value and therefore by his act conferred authority upon the Court of Chancery to determine the fair value before confirmation.

(c) Notwithstanding the Chancery proceedings the appellant could and should have commenced his suit within six months from the date of the Sheriff's sale. The said suit could upon application of defendant have been restrained until confirmation but that would not have in any way affected the commencement of the action.

(d) The proceedings in the Court of Chancery in no way disturbed the sale but merely substituted for the purchase price of $100 the purchase price of $52,500.00. Up until the time such substitution was made by the Court the sale price was $100 and plaintiff had a right as well as a duty to institute his suit using as the price for which the property was sold the sum of $100. The sale which was finally confirmed was the sale which was held by the Sheriff on February 14, 1934. That was the one and only sale in the proceedings and everything relates back to that sale.

## POINT FOUR.

With respect to the criticism directed to the case of *Development Building & Loan Association* vs. *Nurock,* 157 Atl. 452, this case and the case of *Mutual Savings* vs. *Gunne,* 164 Atl. 43, have been discussed under Point One and need no further comment. The fact remains that no cases have been produced to alter the reasoning nor the conclusions arrived at. Appellant here reaches conclusions not justified by the opinion and overlooks

the power of the Court of Chancery to hold everything in *status quo* until the rights of all parties were determined.

## POINT FIVE.

**The date of confirmation as well as the date of the Sheriff's deed are matters of no importance in determining rights of parties.**

It seems very significant to note from an examination of the cases that whenever the courts have referred to the date of the sale it has been the date of the Sheriff's sale and not the date of confirmation.

> *Smith* vs. *Crater,* 12 Atl. 530;
> *Tayler* vs. *Van Nimwegen,* 91 Atl. 595;
> *Hurley* vs. *Pottash,* 115 Atl. 375.

In the case of *Surety Building & Loan Association of Newark* vs. *Risack,* Vice Chancellor Berry struck out an amended bill of complaint because

> "the complainant wants a new Sheriff's sale so that it may have three additional months under the Statute within which to sue again on the bond. The ends of justice will not be made by vacating the Final Decree for that purpose."

Obviously in the mind of Vice Chancellor Berry the time ran from the date of the Sheriff's sale.

In the case of *Mecray* vs. *Church,* 179 Atl. 305, decided by a *per curiam* opinion of the Supreme Court, the Court set aside a judgment entered on a deficiency on the ground that notice of intention was not filed in the County Clerk's Office. The court said:

> "The Sheriff of Cape May county sold the property in foreclosure on February 6, 1933.

It does not appear when or if the sale was confirmed."

Obviously the court not only referred to the Sheriff's sale as the date of sale, but by implication indicates that if the notice of intention was filed the judgment might stand, notwithstanding the fact that it does not appear that the sale was confirmed.

It may very well be that the reason for not making reference to the date of confirmation is the fact that the order of confirmation as well as the Sheriff's deed relate back to the date of the Sheriff's sale.

In the case of the *Union Building and Loan Association* vs. *Childrey,* 127 Atl. 253, Vice Chancellor Leaming says:

> "Thus the highest bidder, as purchaser at a sheriff's sale, acquires by the act of purchase a right to a conveyance. *The order of confirmation confirms and has relation back to that sale,* and the delivery of the sheriff's deed is a mere ministerial act which the officer is required to perform to consummate the sale and vest in the purchaser the legal title in compliance with the law under which the sale is made. *The Sheriff's deed when delivered, also has relation back to the time of the public sale. The date of the sheriff's deed and the date of its delivery are declared to be circumstances of no importance so far as the sale is concerned.*" (Italics ours.)

The Court of Errors and Appeals in the case of *Morse* vs. *Hackensack Savings Bank,* 20 Atl. 961, said:

> "The date of the delivery of the sheriff's deed is a circumstance of no importance. A purchaser at a sheriff's sale acquires, by the act of purchase, a right to conveyance of the premises in pursuance of the sale. The delivery by the officer of a deed is a mere ministe-

> rial act which the officer is required to perform to consummate the sale and vest in the purchaser a title in compliance with the law under which the sale was made. The Sheriff's deed, when delivered, has relation back to the time of the sale of which it is the consummation."

This view is also upheld in the case of *Wimpfheimer* vs. *Prudential Insurance Co., etc.,* 39 Atl. 916; also *Cropper* vs. *Brown.*

It necessarily follows that if the order of confirmation and the delivery of the sheriff's deed when made relate back to the date of the sheriff's sale, to wit: February 14, 1934, that the rights of the plaintiff, who was the purchaser at the sale, were definitely determined on that date and that his right as well as his duty to sue on the bond in accordance with the provision of the statute began to run from that date also.

## CONCLUSION.

**It is respectfully submitted, therefore, that in the light of the language of the statute as well as the only reported opinions which seem to definitely dispose of the issue involved, that the judgment of the lower court should be affirmed.**

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