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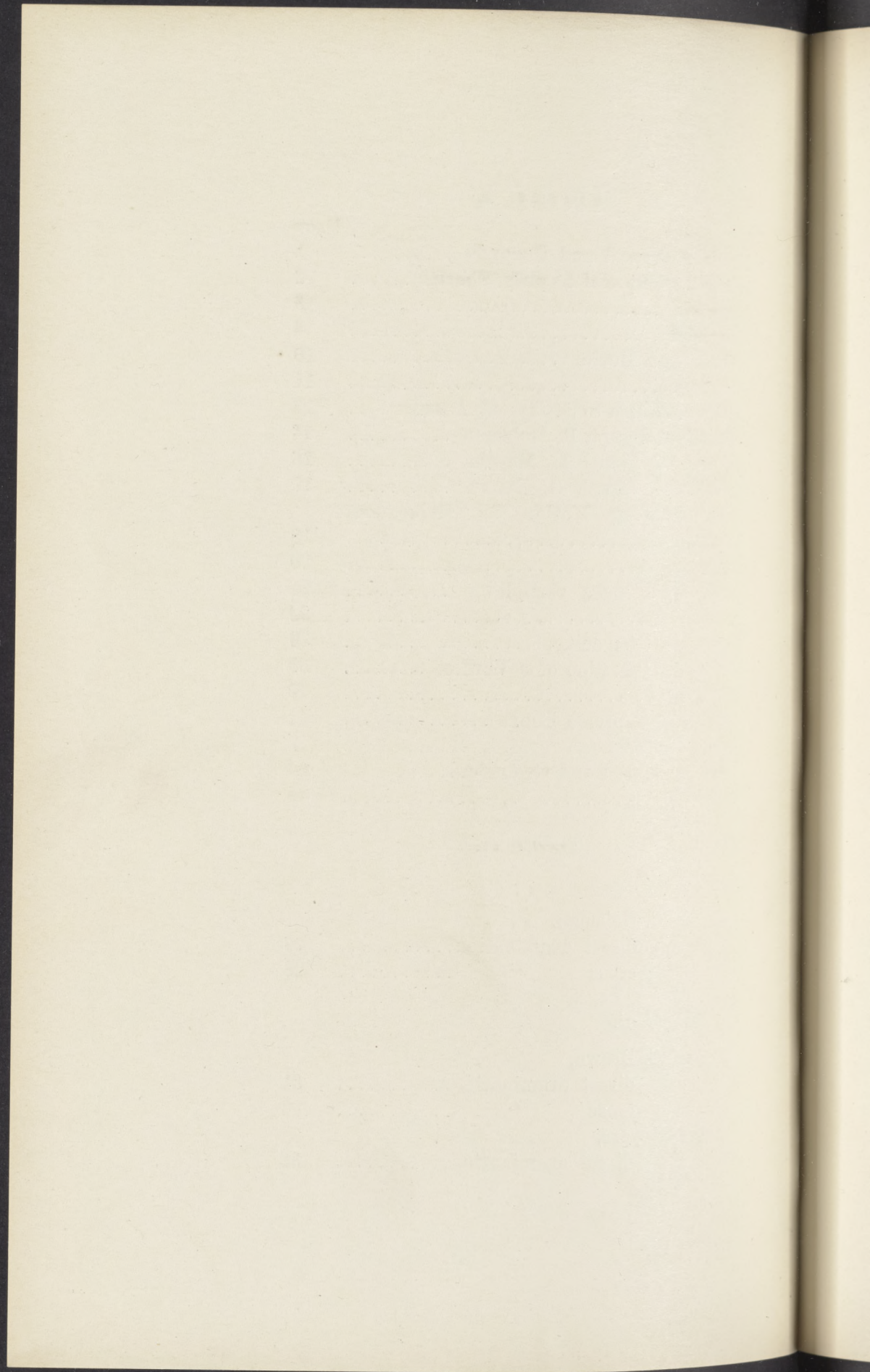
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NOTICE OF APPEAL AND GROUNDS.

**Essex County Circuit Court**

JOSEPH R. HOLZMAN,	} <i>Plaintiff,</i>	<i>Action at Law.</i>	10
<i>vs.</i>			
FRED W. YUENGLING,	} <i>Defendant.</i>	<i>Notice of Appeal and Grounds.</i>	

TAKE NOTICE, that the defendant in the above-entitled cause appeals to the New Jersey Supreme Court from the judgment entered in this cause on the following grounds: 20

1. That the Circuit Court erred in giving judgment to the plaintiff instead of the defendant.

2. That the trial court, at the trial of said cause, erroneously overruled the motion of the defendant's attorney for a non-suit against the plaintiff.

3. That the trial court, at the trial of the said cause, erroneously overruled the motion of the defendant's attorney for a direction of verdict in favor of the defendant. 30

Yours truly,

WILLIAM TYACKE,  
Attorney of Defendant.

To Meyers & Lesser, attorneys of plaintiff.

**AFFIDAVIT OF SPECIAL DEPUTY  
SHERIFF.**

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

10 ALBERT H. FREEMAN, Special Deputy Sheriff of  
the County aforesaid, being duly sworn, on his  
oath deposes and says that on the 5th day of  
March, A. D. 1927, he delivered personally to  
the said defendant Fred W. Yuengling, a true  
copy of the within summons and complaint, with  
a ten days' notice endorsed thereon.

ALBERT H. FREEMAN.

Subscribed and sworn to this  
20 6th day of April, A. D. 1927.

HARVEY W. KEOUGH,  
Notary Public of New Jersey.  
My Commission Expires June 1, 1927.

30

40

## SUMMONS.

The State of New Jersey to Fred  
 (SEAL) W. Yuengling: You Are SUMMONED to  
 answer the annexed complaint of  
 Joseph R. Holzman, in an action at law in the  
 Essex County Circuit Court. AND TAKE NOTICE, 10  
 that unless you file your answer to said com-  
 plaint with the Clerk of the said Circuit Court at  
 Newark within twenty days after the service upon  
 you of this writ, and the annexed complaint, the  
 plaintiffs may proceed in the suit, and judgment  
 may be entered against you.

WITNESS, WORRALL F. MOUNTAIN, Judge of the  
 said Circuit Court at Newark, this 30th day of  
 March, nineteen hundred and twenty-seven.

JOHN H. SCOTT, 20  
 Clerk.

MEYERS & LESSER,  
 Attorneys.

Notice to the within-named defendant. In case  
 the within summons and complaint are served  
 upon you personally, then take notice, that if you  
 intend to make a defense to said action, you  
 must file an affidavit of merits within ten days 30  
 from the date of service thereof upon you, and  
 must file your answer within twenty days from  
 the date of such service, and in default of the  
 filing thereof, judgment will be entered against  
 you.

MEYERS & LESSER,  
 Attorneys of Plaintiff.

## COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

10	JOSEPH R. HOLZMAN, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		
	FRED W. YUENGLING, <div style="text-align: right;"><i>Defendant.</i></div>		

The plaintiff, Joseph R. Holzman, residing in the City of Newark, County of Essex and State of New Jersey, respectfully says:

20 (1) On October 8, 1925, Fred W. Yuengling, single, the defendant herein, executed his bond of that date to Joseph R. Holzman, the plaintiff, in the penal sum of five thousand dollars, conditioned to pay twenty-five hundred dollars with interest at six per cent., a copy of the aforesaid bond is attached hereto and made a part hereof.

## (BOND)

30 KNOW ALL MEN BY THESE PRESENTS: That I, Fred W. Yuengling, single, am held and firmly bound unto Joseph R. Holzman, in the penal sum of five thousand dollars, lawful money of the United States of America, to be paid to the said Joseph R. Holzman, his executors, administrators, and assigns: For which payment well and truly to be made, I bind myself, my heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with my seal. Dated the eighth day of October, one thousand nine hundred and twenty-five.

*Complaint.*

The Condition of the above obligation is such that if the above bounden Fred W. Yuengling, single, his heirs, executors or administrators, shall well and truly pay or cause to be paid, unto the above-named Joseph R. Holzman, his executors, administrators and assigns, the just and full sum of twenty-five hundred dollars on the eighth day of October, which will be in the year one thousand nine hundred and twenty-six, and the interest thereon to be computed from the date hereof at and after the rate of six per cent. per annum, and to be paid quarter-annually. 10

The principal of the mortgage accompanying this bond is to be reduced by the payment of \$100 and interest every three months, the whole balance falling due within one year from the date hereof together with interest on the unpaid balance, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue. And it is hereby expressly agreed that should any default be made in the performance of the terms, covenants and conditions contained in the mortgage accompanying this bond (the said terms, covenants and conditions and all matters contained in said mortgage being hereby made a part hereof as though particularly incorporated herein) that then and in that event this bond and all sums due thereunder with accrued interest, shall become due and payable at the option of the party of the second part, anything in this bond to the contrary notwithstanding. 20 30

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest, or instalment of principal or any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, 40

*Complaint.*

assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should  
 10 the said interest or instalment of principal remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of sixty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of twenty-five hundred dollars with  
 20 all arrearage of interest thereon, shall, at the option of the said Joseph R. Holzman, or their legal representatives, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinafter contained to the contrary thereof in anywise notwithstanding.

FRED W. YUENGLING (L. S.)

Signed, sealed and delivered in  
 30 the presence of

LIONEL L. MEYERS.

(2) To secure said bond, the said Fred W. Yuengling executed a mortgage of the same date to Joseph R. Holzman upon certain lands and premises, whereof the said Fred W. Yuengling was seized in fee simple in the Town of Montclair, Essex County, New Jersey, and more particularly described as follows:

40 BEGINNING at a point in the easterly line of Orange Road distant northerly three

*Complaint.*

hundred eighty-four and twenty one-hundredths feet from the northerly line of Brooklawn Road as measured along said easterly line of Orange Road; thence south seventy-eight degrees thirty minutes east fifty-one feet; thence south sixty-nine degrees three minutes east ninety-seven and twenty-three one-hundredths feet; thence north two degrees thirty-seven minutes east thirty-three and fifty-eight one-hundredths feet; thence north sixty-six degrees one minute west one hundred fifty and forty-two one-hundredths feet to the easterly line of Orange Road; thence along said easterly line of Orange Road south five degrees thirty-six minutes west fifty feet to the point and place of BEGINNING. Being known as Lot No. 413, Orange Road.

(3) On or about January 8, 1926, the plaintiff received one hundred dollars and interest thereon in part payment of the aforesaid bond and mortgage.

On or about April 8, 1926, the plaintiff received an additional sum of one hundred dollars and interest thereon in part payment of the aforesaid bond and mortgage.

(4) On or about August 9, 1926, a subpoena to answer in a suit to foreclose a prior mortgage on the premises hereinbefore described, brought by John T. Lawrence, the holder of said prior mortgage, was served on the plaintiff herein, and thereupon the plaintiff within the time limited to answer, filed with the Clerk of the Court of Chancery, a notice of his encumbrance.

(5) On October 14, 1926, a final degree for the sale of said lands and premises and the

*Complaint.*

foreclosure of said prior mortgage on those lands and premises, was made in the Court of Chancery, and the said decree adjudged that there was then due on said prior mortgage of John T. Lawrence the sum of sixty-two hundred and sixty-one dol-  
 10 R. Holzman the sum of twenty-three hundred and sixty-nine dollars and directed that a writ of *feri facias* be issued by the Sheriff of Essex County, for the sale of the said mortgaged premises to pay such sums with interest at the rate of six per cent. from October 14, 1926, and complainant's costs in that suit, which amount to two hundred sixteen dollars and seven cents.

The plaintiff's cost were duly taxed at nine dollars and six cents.

20 (6) On January 11, 1927, and within six months of the commencement of this action, the said sheriff by virtue of the said *feri facias*, duly sold the said premises according to law by public vendue to Myles Realty Co., or its assigns, it being the highest bidder at such sale, for the sum of sixty-eight hundred dollars.

30 (7) The sheriff's lawful fees and disbursements on said *feri facias* amount to two hundred twenty-one dollars and two cents, which were thereupon paid by the said Myles Realty Co., to the said sheriff, all of which appear on the said writ of execution which was duly returned to the court.

40 (8) After credition upon said decree and execution the amount of proceeds of said sale, there remains due to the plaintiff on the same, a deficiency of twenty-three hundred seventy-one dollars and ninety-eight cents, together with interest thereon from October 14, 1926, amounting

*Complaint.*

to sixty-three dollars and thirty cents, making a total of twenty-four hundred thirty-five dollars and twenty-eight cents, due this plaintiff from the defendant.

(9) The defendant has not paid the said sum of twenty-four hundred thirty-five dollars and twenty-eight cents or any part thereof. 10

(10) Plaintiff demands the sum of twenty-four hundred thirty-five dollars and twenty-eight cents, together with interest and costs of suit to be taxed.

MEYERS & LESSER,  
Attorneys for Plaintiff.

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## AFFIDAVIT OF MERITS.

ESSEX COUNTY CIRCUIT COURT.

10	JOSEPH R. HOLZMAN, <i>Plaintiff,</i>  <i>vs.</i>  FREDERICK W. YUENGLING, <i>Defendant.</i>	}	<i>Action at Law.  Affidavit.</i>
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STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } *ss.*

20 FREDERICK W. YUENGLING, being duly sworn,  
 does depose and say: that he has a good, just  
 and legal defense to the above-entitled cause of  
 action on the merits of the case.

FRED W. YUENGLING.

Sworn and subscribed to before  
 me this 8th day of April,  
 1927.

REGINALD T. BENNETT,  
 Notary Public of N. J.

30

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## ANSWER.

## ESSEX COUNTY CIRCUIT COURT.

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 JOSEPH R. HOLZMAN,

*Plaintiff,*
*vs.*

FRED W. YUENGLING,

*Defendant.*


---

*Action  
at Law.*

10

*Answer.*

Defendant, residing in Orange, New Jersey, says that:

1. He admits that he executed a bond, but does not know if the copy as set forth in paragraph 1 is a true copy and puts the plaintiff upon his proof. 20

2. He admits he executed a mortgage at the same time that he executed a bond, but does not know if the statements in paragraph 2 are as therein set forth, and puts the plaintiff upon his proof.

3. As to the statements made in paragraphs 4, 5, 6 and 7, defendant has not any knowledge or information sufficient to form a belief. 30

4. Paragraph 8 is denied.

## FIRST DEFENSE.

Defendant had a purchaser for the said premises who was ready, able and willing to pay more for the said premises than the amount for which it was sold. The plaintiff promised that if defendant would refrain from bidding on the property at the sheriff's sale, he, the defendant, 40

*Answer.*

would not be held accountable for any deficiency. Defendant relying on this promise, did not bid on the property or take any other further action towards protecting his rights and the plaintiff purchased the property.

10

WILLIAM TYACKE,  
Attorney of Defendant.

20

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## NOTICE OF MOTION.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH R. HOLZMAN,

*Plaintiff,**vs.*

FRED W. YUENGLING,

*Defendant.**Action  
at Law.*

10

*Notice of  
Motion.*

To William Tyacke, attorney of defendant,

PLEASE TAKE NOTICE, that on May 7, 1927, at ten o'clock in the forenoon or as soon thereafter as counsel may be heard, at the Court House in Newark, New Jersey, before the Honorable William Smith, Judge of the Essex County Circuit Court, I shall move to strike out the answer of the defendant in the above-entitled cause on the following ground:

20

(1) That it is sham and frivolous, and made merely for the purpose of delay.

AND TAKE NOTICE, that the annexed affidavit will be used at that time.

MEYERS &amp; LESSER,

Attorneys for Plaintiff.

30

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**AFFIDAVIT OF JOSEPH R. HOLZMAN.**  
**ESSEX COUNTY CIRCUIT COURT.**

10	JOSEPH R. HOLZMAN, <div style="text-align: right; margin-right: 20px;"><i>Plaintiff,</i></div>	}	<i>Action</i>
	<i>vs.</i>		<i>at Law.</i>
	FRED W. YUENGLING, <div style="text-align: right; margin-right: 20px;"><i>Defendant.</i></div>		<i>Affidavit.</i>

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

JOSEPH R. HOLZMAN, being duly sworn on his oath according to law, deposes and says:

20 1. I am the plaintiff in the above-entitled cause. On October 8, 1925, Fred W. Yuengling, the defendant, executed a bond to me in the penal sum of five thousand dollars, conditioned to pay twenty-five hundred dollars with interest at six per cent. for monies which I advanced to him in that amount.

30 2. To secure the said bond, the said Fred W. Yuengling executed a mortgage to me upon certain lands and premises whereof the said Fred W. Yuengling was seized in fee simple in the Town of Montclair.

3. I have received on account of said mortgage and in reduction of said bond, the sum of two hundred dollars with interest up and until April 8, 1926.

40 4. On August 9, 1926, I was served with a subpoena in a suit to foreclose a prior mortgage on the premises.

*Affidavit of Joseph R. Hoffman.*

5. On January 11, 1927, I appeared at the sheriff's office where the sheriff, by virtue of a writ of *feri facias* duly sold the said premises by public vendue to the Myles Realty Co., or its assigns, it being the highest bidder at said sale, for the sum of sixty-eight hundred dollars.

5. The defendant Fred W. Yuengling sets forth in his answer that he was present at this sale, but I have no knowledge of that fact, especially when the defendant herein says that I had a conversation with him and promised that if he would refrain from bidding on the property, he would not be accountable for any deficiency. I never had any conversation of any kind or nature with the defendant, never having met him, nor did I make any agreement with any agent of the defendant to relinquish him from his obligation on the bond.

6. There is due to him in accordance with the deficiency and the costs of the sheriff, the amount of twenty-four hundred thirty-five dollars and twenty-eight cents, which is the amount of damages I have suffered by reason of this defendant not having bid upon this property to protect himself.

7. I do not believe there is any defense to this action, and that any defenses set up or offered by the defendant are made merely for the purpose of delay and in hopes of discouraging me in my prosecution of this suit.

JOSEPH R. HOLZMAN.

Sworn and subscribed to before  
me this 29th day of April,  
1927.

WALTER GOLDBERG,

An Attorney at Law of New Jersey.

## AFFIDAVIT OF LIONEL L. MEYERS.

ESSEX COUNTY CIRCUIT COURT.

10	JOSEPH R. HOLZMAN, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action</i>
	<i>vs.</i>		<i>at Law.</i>
	FRED W. YUENGLING, <div style="text-align: right;"><i>Defendant.</i></div>		<i>Affidavit.</i>

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

20 LIONEL L. MEYERS, being duly sworn on his oath according to law, deposes and says: I was present at the sale of premises mentioned in the plaintiff's suit; that there was no conversation the defendant and the plaintiff with respect to the refraining on the part of the defendant from bidding on the property, and in fact there was no conversation held between the plaintiff and the defendant in this cause at the sheriff's sale, because we did not even see the defendant.

30 I make these statements because I was with the plaintiff Joseph R. Holzman during the entire course of his business at the sheriff's sale and that I know he had no conversation with the defendant herein, and that his defense set up in his answer is sham and frivolous and merely made for the purpose of delay.

LIONEL L. MEYERS.

Sworn and subscribed to before  
 me this 29th day of April,  
 1927.

40 WALTER GOLDBERG,  
 An Attorney at Law of N. J.

## AFFIDAVIT OF JOSEPH G. BROWN.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH R. HOLZMAN, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>	10
<i>vs.</i>		<i>On Motion to Strike out Answer.</i>	
FRED W. YUENGLING, <div style="text-align: right;"><i>Defendant.</i></div>		<i>Affidavit.</i>	

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

JOSEPH G. BROWN, of full age, being duly sworn, deposes and says:

1. I am a real estate broker in the City of Orange, N. J., and had the charge and management of the property mentioned in the bill of complaint. 20

2. I also was the agent and representative of Fred W. Yuengling the defendant in said suit.

3. Previous to the day of the said sheriff's sale I had a talk with Lionel L. Meyers and notified him that I had a buyer for the property and after several conferences with Mr. Meyers I told him that the buyer would secure the money from his employer and buy the property at the sheriff's sale. 30

4. I attended the sale as the agent of Mr. Yuengling, accompanied by the said buyer who was ready and able to purchase the property at said sale and would pay a much higher price than that at which it was sold. 40

*Affidavit of Joseph G. Brown.*

5. Mr. Meyers and Mr. Lesser informed me that they would buy in the property and then sell it to my buyer. Relying on this statement and also that Mr. Yuengling would not be held liable for any deficiency on the bond, I did not bid on the property.

10

6. If I had known that they would not have done this I would have bid on the property for the said buyer up to the amount of the encumbrances at least, and did not do so as I relied upon the statements made to me by Mr. Meyers and Mr. Lesser.

JOSEPH G. BROWN.

Subscribed and sworn to before  
me this        day of May, 1927.

20

30

40

## ORDER.

## ESSEX COUNTY CIRCUIT COURT.

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 JOSEPH R. HOLZMAN,

*Plaintiff,*
*vs.*

FRED W. YUENGLING,

*Defendant.*


---

*Action  
at Law.*
*On Motion to  
Strike out  
Answer.*
*Order.*

10

This matter coming on to be heard on notice of motion to strike out answer, and the Court having read the affidavits and heard the argument of counsel,

It is ORDERED, that the motion to strike out the answer of the defendant be denied.

20

Dated May 19, 1927.

WILLIAM A. SMITH,  
Judge.

Entered on motion of

WILLIAM TYACKE,  
Attorney of Defendant.

30

40

**REPLY.**

## ESSEX COUNTY CIRCUIT COURT.

10	JOSEPH R. HOLZMAN, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.  Reply.</i>
	<i>vs.</i>		
	FRED W. YUENGLING, <div style="text-align: right;"><i>Defendant.</i></div>		

The plaintiff, residing in the City of Newark, Essex County, New Jersey, says that:

20 (1) He joins issue on all of the paragraphs as set forth in the answer of the defendant.

(2) As to the first separate defense, and especially to that part as to the having of a purchaser, the plaintiff has no knowledge or information in which to form a belief; and as to the rest of the allegations therein contained, the plaintiff denies each and every one.

MEYERS & LESSER,  
Attorneys for Plaintiff.

30

40

## NOTICE.

## ESSEX COUNTY CIRCUIT COURT.

---

 JOSEPH R. HOLZMAN,

*Plaintiff,*
*vs.*

FRED W. YUENGLING,

*Defendant.*


---

*Action  
at Law.*

10

*Notice.*

To Meyers & Lesser, attorneys of plaintiff.

TAKE NOTICE, that on Monday, November 28, 1927, at half-past nine o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall apply to the Honorable William A. Smith, Judge of the Essex County Circuit Court, at the Court House, Newark, New Jersey, for an order to dismiss the complaint filed in this cause and enter judgment of non-suit for the following reason.

20

The said complaint does not set forth any cause of action in that it contains no allegation that a notice of said suit was filed in the Register's office of the County of Essex. Also:

No notice of the said suit was filed in the Register's office of the County of Essex, before starting the said action.

30

WILLIAM TYACKE,  
Attorney of Defendant.

## DECISION.

## ESSEX COUNTY CIRCUIT COURT.

10	JOSEPH R. HOLZMAN, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		
	FRED W. YUENGLING, <div style="text-align: right;"><i>Defendant.</i></div>		

For the plaintiff appear Meyers & Lesser.

For the defendant appears William Tyacke.

SMITH, J.

20 This is a suit to recover a deficiency remaining on the amount due upon a bond secured by mortgage on real estate. The mortgage was second to a mortgage that has been foreclosed and the property covered by the mortgage has been sold under the foreclosure. The plaintiff here was made a party defendant to that foreclosure and had his claim reported on, and it is for the deficiency remaining on the credit received, if any, on that foreclosure that this suit is brought.

30 Motion is now made for a non-suit. Motion for non-suit is based on plaintiff's failure to file a notice of this proposed action in the Register's office before the commencement of this suit in accordance with the supplement passed in 1907 (3 Comp. Stat., p. 3423, Sec. 51) of the act entitled "An Act concerning proceedings on bond and mortgages given for the same indebtedness and the foreclosure and sale of mortgage premises" (3 Comp. Stat. 3420, Sec. 47). The supplement of 1907, by its first section provides,

40

*Decision.*

among other things, that no judgment shall be entered on any bond where a mortgage has been given for the same debt unless prior to the beginning of such action there shall be filed in the Register's office written notice of the proposed action. The wording of this section of the act clearly applies in phraseology to the proposed section. 10

Under the case of *New v. Rogge* (E. & A.), 95 Atl. 632, failure to file this notice is a prerequisite to the suit and a bar to the entry of judgment.

The original act, by Section 2, provides that suit for a deficiency must be brought within six months, and it has been held by our Supreme Court, and approved by the Court of Errors, in construing that provision, that it did not apply to the case of a second mortgage cut off by a foreclosure, even though the second mortgagee was a defendant and had his claim reported on. *Wheeler v. Ellis*, 56 N. J. L. 28, approved, *Schmidt v. Frey* (E. & A.), 86 N. J. L. 215. It is also held in the case of *Pennsylvania v. Marcus*, ~~99~~ 99 Atl. 125, that the provision as to notice under the supplement of 1907 is a provision governing procedure and not one curtailing a remedy in derogation of the terms of the contract. 20 30

I will hold that the act of 1907 does not apply to the case of a junior mortgage cut off by a foreclosure, following the case of *Wheeler v. Ellis*, *supra*, approved by the Court of Errors and Appeals in the case of *Schmidt v. Frey*, *supra*, which cases were decided under Section 2 of the act of which the act of 1907 is a supplement; the holding in those cases should apply equally to the supplement as they do to the original act. 40

*Decision.*

On the question of the defense that the defendant had a bidder who would pay more than the mortgage, and then entered into an agreement with the plaintiff not to bid in consideration of the plaintiff's releasing him from any claim for deficiency on the bond, I do not think, as a  
10 matter of law, that this is an agreement void and against public policy. The rule is that agreements which in their necessary operation upon the action of the parties tend to restrain their natural rivalry and competition in bidding at a judicial sale, and thus result in disadvantage to the public or third persons, are against the principles of sound public policy, and void. But the Court of Errors and Appeals of this State has,  
20 however, laid down the rule that a person or persons having interest in the property may, for the protection of such interest, agree not to bid at the sale.

It therefore seems to me that it is a question for the jury to determine first, whether such an agreement was ever entered into, and if there was, then it would be void as against public policy and therefore not a defense unless they should find that such an agreement was entered into by  
30 the defendant for the purpose of protecting his interest in the property.

## TESTIMONY.

## ESSEX COUNTY CIRCUIT COURT.

Thursday, December 15, 1927.

JOSEPH R. HOLZMAN

*vs.*

FRED W. YUENGLING.

*Action  
at Law.*

10

Before Hon. William A. Smith, *J.*, and a jury.

For the plaintiff appear Meyers & Lesser (by Samuel B. Lesser).

For the defendant appears William Tyacke.

20

(A jury is called and sworn.)

Mr. Lesser opens for the plaintiff.

(In his opening, counsel for the plaintiff makes the following statement:

“There are one or two circumstances surrounding the action that the jury ought to be apprised of. A gentleman came to our office and told us he was the owner of the property—)

**The Court:** There is nothing in your pleadings that raises this question. You are suing on the bond that was executed. What took place before the execution does not make any difference; what was said at the time does not make any difference. You have to keep the case within the issues.

30

(Counsel continues with his opening.)

40

*Joseph R. Holzman, direct.*

Mr. Tyacke opens for the defendant.

The Court: Is it admitted that this property was foreclosed?

Mr. Tyacke: Yes.

10 The Court: I suppose I can state it: It is admitted that a prior mortgage on the property covered by the mortgage which had secured this bond sued on has been foreclosed and that the defendant's claim was reported on in that foreclosure, and that there was a sale in that foreclosure, and there was no surplus to apply on this second mortgage. I don't think you need to put anything in the record about it.

Mr. Lesser: How about the amounts?

20 The Court: That is admitted on the record, as I understand.

JOSEPH R. HOLZMAN, plaintiff, sworn in his own behalf.

*Direct examination by Mr. Lesser.*

Q Mr. Holzman, you are the plaintiff in this case? A I am.

30 Q Are you the holder of this particular instrument which I show you? A I am.

Q Is that a bond which was given to you at the time a mortgage was given to you? A Yes.

Mr. Lesser: I offer in evidence.

(The same was received in evidence and marked Exhibit P. 1.)

40 Q Is this the mortgage that was given securing that bond? A It is.

*Joseph R. Holzman, direct.*

Mr. Lesser: I offer it in evidence.

(The same was received in evidence and marked Exhibit P. 2.)

Q What is the original amount of this bond?

A \$2,500.

Q Have you received any payments on account of that sum? A I received two payments in accordance with the bond and mortgage: \$100 three months after it was executed, plus interest, and \$100 six months afterwards. 10

Q Have you received any other payments?

A Only \$300 and interest.

The Court: What is the interest?

Mr. Lesser: The amount is \$2,600 and interest from October, 1926. All the interest we are figuring is on the entire mortgage from the time of last payment. 20

The Court: That would be \$369?

Mr. Lesser: Yes, sir.

The Court: That date was what?

Mr. Lesser: October 14, 1926.

The Court: Then you are entitled to interest on \$300 in addition.

Mr. Lesser: The amount was \$2,371.98, so there was \$71.98 interest. Then, there is interest from October 14, 1926. 30

The Court: You can figure it before the case is over.

*By Mr. Lesser.*

Q You have never received any more money on account of this bond? A No, sir.

Q And Mr. Yuengling is indebted to you for the sum of \$2,300 and interest from the date of your second payment? A Yes, sir. 40

*Joseph R. Holzman, cross.*

Q Do you remember when that second payment was made? A It was due April 8, 1926.

Q Did you receive it at that time? A It was not received for about two months thereafter.

10 Q Then, your interest would read from April 8, 1926? A That's correct.

*Cross examination by Mr. Tyacke.*

Q What is your business, Mr. Holzman? A Collection agency.

Q Where? A Federal Trust Building.

Q Is that on the same floor as Mr. Meyer and Mr. Lesser? A It is not in the same building.

20 Q This mortgage was for how much? A It was \$2,500 originally.

Q How much did you lend? A \$2,500.

Q You loaned \$2,500? A I loaned \$2,500.

Q Were you present at the sheriff's sale? A I was.

Q Did you see Mr. Brown there? A I did.

Q Did you see a colored man there? A I did.

30 Q Do you know anything about any arrangement that was made? A No, I never heard of any arrangement except that Mr. Brown said to me, "You look nervous," and I said, "Well, I am somewhat worried." He said, "Well, we will see that you come out of this all right."

Q Do you know what that property was worth? A I didn't at that time; that is, up until the day before the sale.

Q You didn't know what it was worth? A I did not; I didn't look at the property.

Q Did you inspect the house before you loaned the money on it? A I did not.

40 Q How did you come to lend \$2,500 on it?

*Joseph R. Holzman, cross.*

The Court: That is immaterial.

Q You say at the time of the sale you learned of the value? A On the day before the sale I was up to look at the house.

Mr. Lesser: I object to all this on the ground that it is irrelevant at this time. 10

The Court: I will sustain the objection as to the house.

Q On the day of the sale did you see Mr. Brown talking to Mr. Lesser? A I did. I just stated the conversation.

Q Was there a colored man with them? A There was a colored man there. There was no colored man around when the conversation took place, so far as I know. That is, he didn't over-hear it. I was there the entire time—Mr. Brown and Mr. Meyers was there before I got into the court room. 20

Q Were they at this conversation between Mr. Meyers and Brown? A I didn't see them until I got there.

Q You didn't hear Mr. Meyers and Mr. Brown talk over the question of purchasing this property? A I know there was no such discussion while I was in the court room. 30

Mr. Lesser: It wasn't the court room; it was the sheriff's salesroom.

Q Weren't you informed that Mr. Brown was to bring a colored man there to buy the property?

A I was.

Q And are you familiar with property values?

A Not particularly. I am more so at this time than I was then. 40

*Motion for a Non-Suit.*

Q Did you make loans generally? A No, not since I got stuck; I haven't made loans in over a year.

Mr. Tyacke: I ask that that be stricken out.

10

The Court: Strike it out.

Q I see it was sold to the Miles Realty Company. Do you know who they are? A I don't know who they are—

Mr. Lesser: I object to that as irrelevant. Objection sustained.

## PLAINTIFF RESTS.

20

Mr. Tyacke: If your Honor please, I move for a non-suit on the ground that there is no evidence that they filed notice in the office of the Register of Deeds of Essex County as provided for in the statute.

30

The Court: This matter, of course, has been argued before me on a motion to strike out the complaint. I considered the matter then and decided I would not act, but wait until the trial. I have my memorandum of my reasons and I will put them on the record in answer to your motion. The effect of it is that the statute providing for that does not apply to a second mortgage cut off by a foreclosure. That will be my ruling and I will, therefore, deny the motion.

Mr. Tyacke: My idea was to elaborate the argument.

The Court: I don't think it is necessary.

40

*Joseph G. Brown, direct.*

JOSEPH G. BROWN, sworn in behalf of the defendant.

*Direct examination* by Mr. Tyacke.

Q Mr. Brown, what is your business? A Real estate business. 10

Q Where? A In Orange.

Q Are you familiar with this property on Orange Road covered by this mortgage? A Yes, I am.

Q Do you know how that mortgage was placed there? A Yes, I do.

Q How? A The property was sold to Mr. Yuengling and he went down and got the mortgage from Mr. Holzman. 20

Q Do you know what that property was sold for? A To Mr. Yuengling? 20

Q Yes. A Yes, sir.

Mr. Lesser: I object to that.

Objection sustained.

Mr. Tyacke: I think we are entitled to show the value of that property.

The Court: I don't think it makes any difference. 30

Mr. Tyacke: I think it makes a big difference in our defense. It was sold at the sheriff's sale away below its value.

The Court: I think you ought to show what the defense is before you prove the value of the property, because unless you sustain the defense it is immaterial.

Q Were you present when it was due to be sold by the sheriff? A Yes, sir. 40

*Joseph G. Brown, direct.*

Q Whom did you see there? A Mr. Lesser, Mr. Meyers and Mr. Holzman.

Q Did you have any conversation regarding the sale before and after the sale—

10 Mr. Lesser: I object to the question on the ground that if Mr. Brown were there and did have any conversation on this particular case or any other case, it is immaterial in this case because in the pleadings themselves I cannot see any doctrine of agency where this man represented anybody in this case. I can't see how any conversation he had with any supposed people—

The Court: I suppose you would have to prove whom he represented.

20 Q Who is Mr. Yuengling, the defendant in this case? A Mr. Yuengling was at the office. He executed this mortgage. He was employed in my office.

Q As a matter of fact, who was the real owner of that property?

Mr. Lesser: I object.

Objection sustained.

30 Q Did you represent—

Mr. Lesser: I object further on the ground that the first defense sets up that the defendant had a purchaser for the said premises who was ready, able and willing and the defendant promised to refrain—now I am met with the proposition that the defendant was not there but there was an agent—

40 The Court: By the defendant is meant the defendant or his legal representative.

*Joseph G. Brown, direct.*

Mr. Lesser: It was my understanding that the pleadings had to be specific.

The Court: I don't think so.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 10

Q Whom did you represent while you were present at this sale? A Mr. Yuengling.

Q What were your powers? A Why, I was acting as Mr. Yuengling's agent to handle the situation and try to effect this sale so that Mr. Holzman could come out all right.

Q Did you intend to bid on this property? A Absolutely, yes.

Q Did you have a purchaser for it? A Yes, sir. 20

Q At what price? A Why, the purchaser was going to pay enough to take care of the total encumbrances so that Mr. Holzman would come out all right.

Q Did you have any talk with Mr. Meyers regarding it? A Yes, sir, before the sale and at the time of the sale.

Q Did you make any arrangements with him? A Yes, I told him I would bring the man down at the office of the sheriff and he would bid in. 30

Q Did you bid on the sale? A No, sir; we weren't supposed to; Mr. Meyers was going to bid it in and sell it to this man. We would save costs and sheriff's fees.

Mr. Lesser: I think all that is immaterial on the suit on the bond on the question of deficiency.

The Court: He says "was going to." I think he ought to say what was said. 40

*Joseph G. Brown, direct.*

*By the Court.*

10 Q Who was there? A Mr. Meyers said in my presence—this colored man and myself—that he would bid the property in and sell it to the colored man at the price it would be necessary to bring it up to to clean up the total encumbrances and taxes on that property.

*By Mr. Tyacke.*

Q Was there anything said about deficiency?  
A No, sir; that is why we brought the buyer so there wouldn't be any deficiency.

Mr. Tyacke: I assume it is stated on the record that no notice was filed.

20 The Court: They failed to prove it.

Q Who purchased the property? A The Miles Realty Company—Mr. Meyers and Mr. Lesser.

Mr. Lesser: I move that that be stricken out on the general ground that it is not important or relevant.

The Court: I will let it stand.

30 Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q I see that the price was \$6,800? A Yes, sir.

Q How much would you say the property would be worth?

Mr. Lesser: I object to that.

40 Objection sustained.

*Joseph G. Brown, direct.*

Mr. Tyacke: I want to show it was worth more than these two mortgages.

The Court: I have sustained the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 10

Q If you had bid that in for your client would your offer have been above—

Mr. Lesser: I object to the supposititious offer.

The Court: It started in to be a leading question. You had better reframe it.

Q Was Mr. Holzman there during your conversation? A Yes, sir, he was. 20

Q Did he hear any of it? A Yes, sir, he did.

Q And he heard the arrangement you made about—

Mr. Lesser: I object. I know nothing of an arrangement. No arrangement has been brought out.

The Court: He said that Mr. Meyers was going to bid in and sell to this colored man who was produced by the witness. Is that the arrangement you have reference to? 30

Mr. Tyacke: Yes, sir.

The Court: Very well.

Q Was Mr. Holzman present when you made the arrangement with Mr. Meyers? A Mr. Holzman was present at the sheriff's office as I was talking to this colored man. Mr. Meyers stood about the end of the bench and I— 40

*Joseph G. Brown, cross.*

*By the Court.*

Q Was the conversation within his hearing?  
A Yes, sir.

*Cross examination by Mr. Lesser.*

10 Q You have testified that you saw Mr. Meyers  
and Mr. Lesser and Mr. Holzman in the sheriff's  
office on the day of that sale. Are you positive of  
that? A Very positive.

Q Do you know Mr. Lesser? A Very well.

Q Am I he? A Your name is Lesser.

Q Am I the Lesser you saw at the sheriff's  
office on the date of the sale? A Yes, sir.

20 Q You are positive of that? A Quite posi-  
tive, yes.

Q You also know how this mortgage was pro-  
cured? A Yes.

Q Were you the procurer of this mortgage?

The Court: Why do we go into that? I  
have ruled it out.

Mr. Tyacke: I am willing for it to go in.

The Court: I know, but I don't want to  
take any more time than necessary.

30 Q You were present at the sheriff's sale? A  
Yes, sir.

Q You were ready to bid is what you testified  
to? A I was ready to bid, yes.

Q At the sale? A Yes.

40 Q When the property was struck off at such  
a ridiculously low price, why didn't you say  
\$6,900? A Because Mr. Meyers had agreed  
to buy it in and sell it to the man; that's why I  
didn't bid on it.

*Joseph G. Brown, cross.*

Q Would that save you harmless? A It would have saved Mr. Yuengling harmless; he was my client.

Q Why didn't you put up the \$500 deposit that was necessary at the sheriff's sale if it was to be sold to your client? A Mr. Meyers was to take care of that. 10

Q Was there any consideration for any promise on the part of Mr. Meyers? A Other than to keep his client harmless.

Q Did you give him anything for the promise? A No.

Q Was there any agreement whereby your client was to be sold the property? A There was no agreement except a verbal agreement that I was to bring the man down and that was to satisfy you folks. 20

Q By "you folks" what do you mean? A Meyers and Lesser. I talked with you and Mr. Meyers over the phone.

Q Over the phone or at the sheriff's sale? A Both.

Q You spoke to me about the negotiations at the sheriff's sale? A Both you and Mr. Meyers.

Q Did the man buy it in? A He was willing and ready to buy it in. 30

Q Wouldn't it have been representing your clients more judiciously and fairly—

The Court: That is argumentative.

Mr. Tyacke: The defendant is a mere figurehead in this. He was not present at the sale.

*Lionel Meyers, direct.*

LIONEL MEYERS, sworn in behalf of the defendant.

*Direct examination by Mr. Tyacke.*

10 Q You are a member of the firm of Meyers and Lesser, the plaintiff's attorneys? A I am.

Q In the pleadings it says that the Miles Realty Company bought it in? A Yes, sir.

Q Who are the Miles Realty Company? A Mr. Lesser and myself.

Q Do you still own the property? A We assigned it immediately after the sale.

Q To whom? A To Sophie Lorsch.

Mr. Lesser: I object to that.

20 The Court: I will let it stand.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Were negotiations made to refinance this property? A When?

Q Before this sale? A Yes.

Q Those were made with Mr. Brown? A Yes.

30 Q Why didn't you bid in the property for Mr. Holzman?

Mr. Lesser: I object to that.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40 Q Did you see this house before you made the loan? A Yes.

*Motion for Direction of a Verdict.*

Mr. Lesser: I object to that.

The Court: Objection sustained. Strike out the answer.

Cross examination waived.

## DEFENDANT RESTS.

10

The Court: There was an agreement that this bid would be made. All you have proved is a possible cause of action for not doing what they said they would do, but you have not proved that they agreed to give up their right to hold him for the deficiency.

Mr. Lesser: I move for the direction of a verdict—

Mr. Tyacke: I also move for the direction of a verdict on the same grounds as in my motion for a non-suit. 20

The Court: I will deny your application and hear you on the plaintiff's application.

The Court: (After argument.) It seems to me that while there is evidence here to the effect that the plaintiff, through his attorney, was going to bid on the property and was going to sell to a customer that Mr. Brown had, there isn't any evidence that he agreed that any deficiency that there might be he would release the defendant from. Under those circumstances I will direct a verdict in favor of the plaintiff and against the defendant for the sum of \$2,533.07. I figured the interest at \$233.07. 30

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40

**JUDGMENT.**

ESSEX COUNTY CIRCUIT COURT.

10	66-42766 JOSEPH R. HOLZMAN,  <i>vs.</i> FRED W. YUENGLING,  	<i>Plaintiff,</i>   <i>Defendant.</i>	} <i>Action</i> } <i>at Law.</i> } <i>By Order of</i> } <i>Court.</i> } <i>After</i> } <i>Verdict.</i>
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Judgment entered December 15, 1927.  
 Meyers & Lesser, attorneys of plaintiff.

20	Costs. Damage .....\$2,533.07 Costs ..... 91.96  Total .....\$2,625.03
----	--

30 Judgment after verdict by order of Court in the above-entitled action was rendered on the Fifteenth day of December, A. D. Nineteen Hundred and Twenty-seven, in favor of the plaintiff Joseph R. Holzman, and against the defendant Fred W. Yuengling, for the sum of Twenty-five hundred Thirty-three dollars and seven cents damage and Ninety-one dollars and ninety-six cents costs of suit.

Judgment entered and signed December 15, 1927.

WILLIAM S. GUMMERE,  
 Judge.

JOHN H. SCOTT,  
 Clerk.

40 Recorded December 15, 1927.

OPINION OF SUPREME COURT.

NEW JERSEY SUPREME COURT.

No. 20, May Term, 1928.

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JOSEPH R. HOLZMAN,  
*Plaintiff-Respondent,*

*vs.*

FRED W. YUENGLING,  
*Defendant-Appellant.*

---

On appeal from Essex County Circuit Court.

Before Justices Trenchard, Kalisch and Lloyd.

For the appellant, William Tyacke.

For the respondent, Meyers and Lesser.

Per Curiam: There was a directed verdict in the Essex County Circuit Court, in favor of the plaintiff below and against the defendant below. The action was brought on a bond in the penal sum of five thousand dollars, and which bond was given in connection with the mortgage of twenty-five hundred dollars, to recover a deficiency remaining due on the bond after the sale of the premises upon which the said mortgage rested.

The facts of the case are briefly these: A prior mortgage was foreclosed and the plaintiff was made a party defendant: A final decree was entered, followed by execution and sale of the premises thereunder, by the Sheriff of Essex County on January 11, 1927, to the Myles Realty Co. The property was bid in at a price sufficient to cover the first mortgage, and this left a deficiency of the entire amount due plaintiff on his

junior bond and mortgage. On March 30, 1927, the plaintiff brought his action in the Essex County Circuit Court upon his bond, but did not, prior to commencing said action, file any notice in the office of the Register of Essex County of the proposed action or of an action pending. The case came on for trial, and it appearing that no such notice of the commencement of plaintiff's action was filed by him, either prior to or afterwards, counsel of defendant, after plaintiff had rested his case, moved for a non-suit on the ground that there was no evidence that the plaintiff had filed the required notice in the Register's Office of the County of Essex, prior to the commencement of his action. The motion was also denied.

At the conclusion of the entire case, attorney for defendant moved for a direction of a verdict on the same ground upon which his motion for non-suit was based, and this motion was denied.

It is the overruling of these motions which constitutes the two grounds of appeal. They may be considered together. The question, growing out of the facts as detailed, is, whether a statutory notice, such as is required by the Act of 1907, page 563, C. S. Vol. 3, page 3423, applies to a bond secured by a junior mortgage, where the mortgaged premises have been sold under foreclosure of a prior mortgage.

We do not think that this can be any longer an open question, since the decision of *Schmidt v. Frey*, 86, N. J. L. 215, (Court of E. & A.), where, under circumstances analogous to those present in the case *sub judice*, it was held, that the provision of the statute relating to notice before commencing an action was not applicable. The cited case is controlling here.

The judgment is affirmed, with costs.

**RULE ON AFFIRMANCE.**

NEW JERSEY SUPREME COURT.

September Term, 1928.

JOSEPH R. HOLZMAN,

*Plaintiff-Appellee,*

*vs.*

FRED W. YUENGLING,

*Defendant-Appellant.*

*In Error  
to Circuit  
Court.*

This cause having been duly argued at the present term of this court by Meyers & Lesser, of counsel for the plaintiff-appellee, and William Tyacke, of counsel for the defendant-appellant, and the Court having considered the same, and finding no error in the record or proceedings in the Circuit Court;

It is thereupon ORDERED AND ADJUDGED that the judgment of the Circuit Court, removed by appeal in this cause, be affirmed with costs; and that the record be remitted to the Circuit Court to be proceeded with in accordance with this judgment and the practice of said Court.

On motion of

MEYERS & LESSER,  
Attorneys of Plaintiff-Appellee.

## NOTICE OF APPEAL AND GROUNDS.

## NEW JERSEY SUPREME COURT.

JOSEPH R. HOLZMAN, <i>Plaintiff-Appellee,</i>  <i>vs.</i> FRED W. YUENGLING, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i>  <i>Notice of Appeal.</i>
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TAKE NOTICE: That the defendant appeals to the Court of Errors and Appeals in the last resort of all causes in New Jersey from the order entered in this cause on December 14, 1928, affirming the judgment in the Essex County Circuit Court on the following grounds: The New Jersey Supreme Court erred in affirming the judgment of the Essex County Circuit Court.

That as a matter of law the judgment of the Essex County Circuit Court should have been reversed.

That under the facts and circumstances the New Jersey Supreme Court should have reversed the Essex County Circuit Court.

Yours truly,

WILLIAM TYACKE,  
 Attorney for Defendant-Appellant.

Dated December 19, 1928.

To Meyers & Lesser, attorneys for plaintiff-Appellee.

## STIPULATION.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

JOSEPH R. HOLZMAN,

*Plaintiff-Respondent,*

*vs.*

FRED W. YUENGLING,

*Defendant-Appellant.*

*Action  
at Law.*

*Stipulation.*

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the above case is not to be listed for argument at the February Term, 1929.

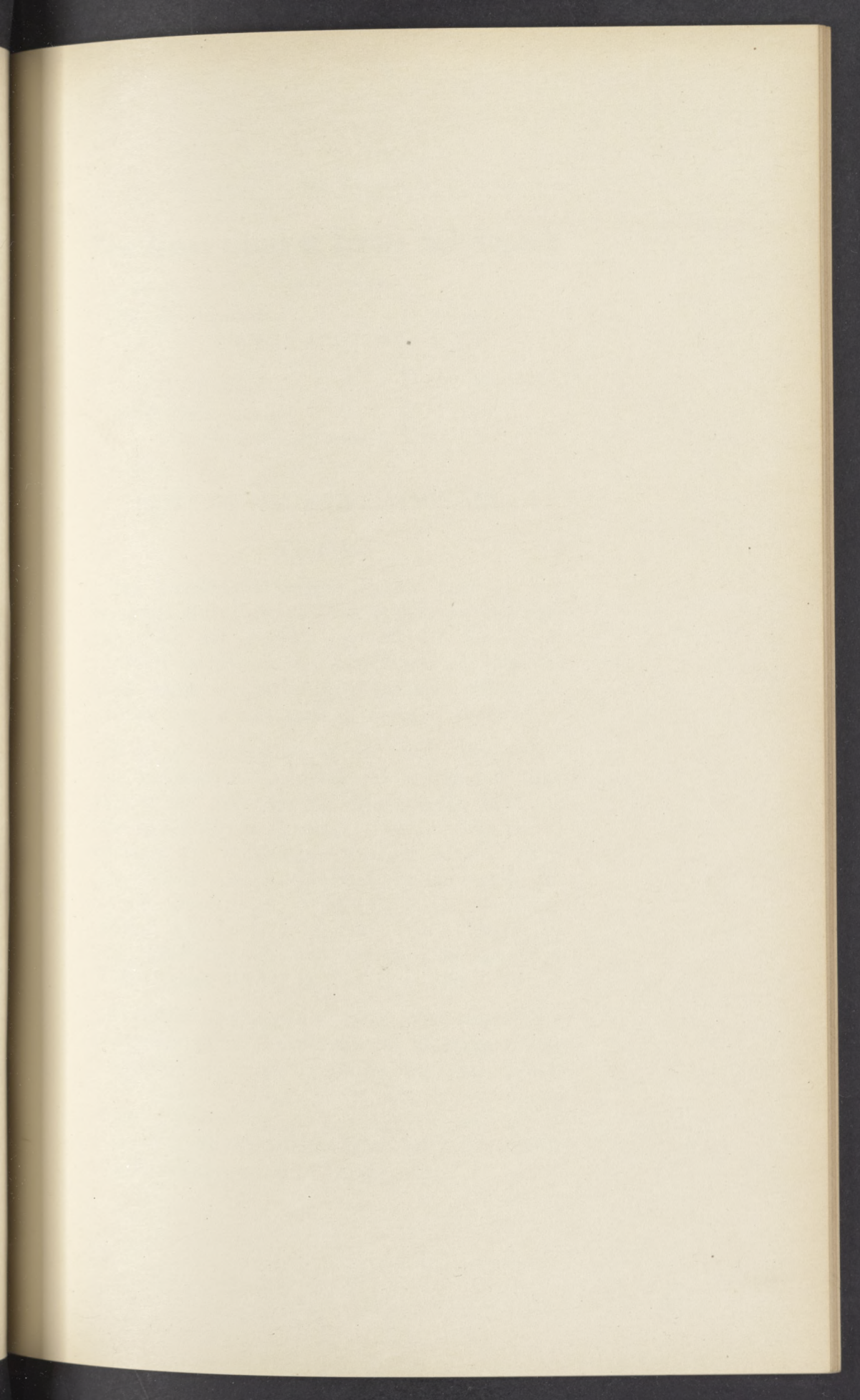
SAMUEL B. LESSER,  
Attorneys for Plaintiff-Respondent.

WILLIAM TYACKE,  
Attorney for Defendant-Appellant.

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ATTORNEY AT LAW  
WILLIAM D. BROWN  
ATTORNEY AT LAW





## New Jersey Court of Errors and Appeals

JOSEPH R. HOLZMAN,

*Plaintiff-Appellee,*

*vs.*

FRED W. YEUNGLING,

*Defendant-Appellant.*

*Action  
at Law.*

*On Appeal  
from Su-  
preme Court.*

### BRIEF OF PLAINTIFF-APPELLEE.

#### Point I.

The defendant-appellant in the case at bar bases his entire ground for appeal on one section of the Act of 1907, page 563 (C. S., Vol. 3, p. 3423), relative to the institution of suits on bonds which are given as a primary obligation together with a mortgage as security therefor.

It is the contention of the plaintiff-appellee that the defendant-appellant is urging only that part of the Act and its supplements, that relates specifically to the state of facts as set forth, whereas, the defendant-appellant should have submitted to your honorable body the Act in its entirety, known as "Acts Relative to Foreclosure" (P. L. 1880, p. 255; Comp. Stats., p. 2421) which law was supplemented by the "Act of 1907" page 563 (C. S., Vol. 3, p. 3423).

The plaintiff-appellee contends that since these acts relate to the foreclosure of mortgages and the institution of suit on the accompanying bond, the courts below held correctly that the provisions of the aforesaid acts do not apply to the case of a JUNIOR MORTGAGE which has been cut off by a foreclosure as in the case at bar.

The courts below based its decision on the case of *Wheeler v. Ellis*, 56 N. J. L., p. 28; and subsequently *Schmidt v. Frey*, 85 N. J. L. 215, where, under circumstances analogous to the facts present in the case at bar, it was held that that portion of the statute relating to notice before commencing an action was NOT applicable.

### Point II.

The Brief of the defendant-appellant in Points I, II, III, IV and V urges inherently the same point as that contended in Point I of the Brief, but the plaintiff-appellee, however, contends that the Act as passed and supplemented was for the purpose of protecting innocent purchasers for value at the foreclosure sale, if the foreclosing party were to subsequently sue on his bond and thereby give the mortgagor-debtor the right to redeem within the six months' period.

The case at issue, however, is a suit on a bond and the decisions in the cases above cited hold that suits on bonds may be instituted at any time after the six months' period mentioned in the statute, where the foreclosure was instituted under a prior mortgage. The case of *Seigman v. Streeter*, 54 N. J. L., p. 215, is offered in support of this contention.

The question as to notice, set up by the defendant-appellant, does not, following the line of cases herein offered, apply in the case of JUNIOR ENCUMBRANCES which have been cut off by foreclosure of prior mortgages; because it appears that the purpose of the notice mentioned in the Act was to charge subsequent purchasers with a notice of the possibility of redemption after foreclosure sale. If the notice mentioned in the statute were necessary in the case such as this junior mortgage, subsequent

purchasers after the foreclosure sale, would always, for a period of sixteen years, suffer the possibility of losing the property on redemption because a suit under the "Speciality" can be started during a period of sixteen years.

The plaintiff-appellee contends that in the construction of this statute it seems that it only applies when a suit on the bond is instituted after the foreclosure of the ACCOMPANYING mortgage. The name of the Act distinctly supports the contention of the plaintiff-appellee, which requires that the party who holds the bond, payment of which is secured by a mortgage, shall first foreclose the mortgage before bringing suit upon the former, and that this cannot apply where the existence of a junior mortgage has been terminated before the institution of the suit upon the bond. In the case at issue the mortgage that accompanied the bond was no longer a lien upon the land; and the only obligation was the bond; and the only remedy that the holder of the bond had was to institute a suit on his "Speciality."

The plaintiff-appellee, therefore, relies upon the judgment of the court below and the case of *Schmidt v. Frey*, 86 N. J. L. 215.

It is, therefore, respectfully submitted upon the part of the plaintiff-appellee that:

1. Because of the facts submitted and the cases above cited; the appeal should be dismissed with costs and counsel fee to abide the order of the Court.

Respectfully submitted,

MEYERS & LESSER,  
Solicitors for Plaintiff-Appellee.

JACOB FISCHER,  
Of Counsel with Plaintiff-Appellee.



## New Jersey Court of Errors and Appeals

JOSEPH R. HOLZMAN,  
*Plaintiff-Respondent,*

*v.*

FRED W. YUENGLING,  
*Defendant-Appellant.*

Action at Law.

On Appeal from  
Supreme Court.

### BRIEF FOR DEFENDANT-APPELLANT.

#### Statement of Facts.

The plaintiff-respondent brought suit in the Essex County Circuit Court on a bond given to secure a mortgage. The prior mortgage had been foreclosed and at the sheriff's sale the premises were bought in by the attorneys of the plaintiff-respondent leaving a deficiency on the bond of defendant-appellant. No notice was filed in the Essex County Register's office before the beginning of the suit as required by the Act of 1907, page 563 (C. S., Vol. 3, p. 3423).

At the trial of the case the Judge of the Essex County Circuit Court held that the Act of 1907 did not apply to a junior mortgage cut off by the foreclosure of a prior mortgage, citing the case of *Schmidt v. Frey*, 86 N. J. L. 215; and directed a verdict for the full amount in favor of the plaintiff-respondent (p. 23, line 32).

On appeal, the Supreme Court affirmed the judgment of the Essex County Circuit Court (p. 41, State of Case), and from that Court the defendant-appellant appeals to this Court.

## POINT I.

### **The notice must be filed before beginning the action.**

The Act of 1907, page 563, C. S., Volume 3, page 3423, applies to all suits on bonds secured by mortgage. Section One of the statute provides:

“No judgment shall be entered by confession on ANY bond where a mortgage has or may hereafter be given for the same debt OR IN ANY ACTION ON SAID BOND unless prior to the entry of such judgment, if the same shall be by confession, or PRIOR TO THE BEGINNING OF SUCH ACTION, if the proceeding be by action, there shall be filed in the office of the clerk of Common Pleas, except in counties where there is a register of deeds and mortgages of the county in which the lands described in the mortgage given with such bonds are situate, a written notice of the proposed judgment, or action, setting forth the court in which it is proposed to enter such judgment or begin such action, the names of the parties to such bond and to such judgment or action, the book and page of the record of the said mortgage, together with a description of the lands or real estate described therein.”

This Act of 1907 was construed by the Court of Errors and Appeals in the case of *Neu v. Rogge*, 88 N. J. L. 335, where it was held that:

“A notice MUST be filed before any judgment can be entered or action started. And it will be noticed that the language of the Act says that: ‘ON ANY BOND.’ Unless this notice is filed a prospective purchaser might find nothing on record affecting the property in the County where it was situate, and thus

such purchaser though he exercised the greatest diligence and caution, might be led into the purchase of a defeasible title. AND THIS IS THE MAIN EVIL WHICH THE ACT OF 1907 INTENDED TO REMEDY."

## POINT II.

**The act applies to every bond given with a mortgage.**

In *Pennsylvania Co. v. Marcus*, 95 Atlantic 766, the Supreme Court held the notice was necessary but that it did not apply to Bonds made prior to its enactment, but this Court in reversing the Supreme Court, 99 Atlantic 405, stated "We are of the opinion that the required notice is a matter of procedure, imposing no new burdens or restrictions which materially impair the value and benefit of the bond; for it does not modify the nature or extent of the remedy any more than would a statute requiring suit to be commenced by serving a complaint containing a copy of the bond, instead of by summons without such a copy, or the filing of a *lis pendens* before commencing an action.

The right to enter a judgment is not taken away or postponed, and the due day of the bond is not extended nor the value of any security given by the contract affected, as was the situation in *Baldwin v. Flagg*. The obligee has all the remedies he was entitled to when the bond was executed, and there is no new limitation or curtailment of his remedy. All the Act of 1907 does is to introduce a new method of procedure *requiring* the filing of what is said in *Neu v. Rogge*, 88 N. J. Law 335, 95 Atl. 632, to be a *lis pendens*. Legislation which merely requires the filing of a preliminary notice

of this character in a remedial proceeding for the enforcement of a contract existing when the statute was passed does not impose a burden or restriction or benefit the value or benefit of such a contract. It will be seen that this Court held it to be necessary to file this notice in a suit brought on any bond after the Act was passed, and if the Legislature intended to exempt a junior mortgage cut off by the foreclosure of a prior mortgage it would be so stated in the Act. But the Act reads "No judgment shall be entered on ANY bond, etc.

In the case of *Grothenhen v. Duffield*, 5 N. J. Mis. Rep. 677, the Supreme Court set aside a judgment for failure to comply with this statute. It will be noticed that this case of *Neu v. Rogge*, *supra*, it is the first one in which this question is raised and that this decision has been followed since that time.

### POINT III.

**The case of *Schmidt v. Frey*, 86 N. J. L. 215, is not the controlling case.**

In the opinion filed in this case affirming the Essex County Circuit Court, the Supreme Court stated:

"We do not think that this can be any longer an open question, since the decision of *Schmidt v. Frey*, 86 N. J. L. 215 (Court of E. & A.), where under circumstances analogous to those present in the case of *sub judice*, it was held, that the provision of the statute relating to notice before commencing an action was not applicable. The cited case is controlling" (see bottom of page 42, State of Case).

It will be found upon reading the above case that this question of notice was not raised nor was it

a deciding factor in that case. As it was not raised nor passed upon, it is respectfully urged that it could not be the controlling case.

This case, *Schmidt v. Frey, supra*, was decided June 15, 1914, and it was not until October 21, 1915, that the Act of 1907 was construed. This was in the case of *Neu v. Rogge, supra*, and since that time this has been the controlling case and the one followed.

#### POINT IV.

**The question of filing a notice was not raised in *Schmidt v. Frey*, 86 N. J. L. 215.**

The point in that case was the right to bring action on a bond secured by a mortgage after the lapse of six months and the attention of the Court was not brought to the Act of 1907 and as it was not raised by the attorneys in the case the Court took no notice of it and as a matter of fact nobody seems to have been aware of the Act of 1907 until it was raised in the case of *Neu v. Rogge, supra*. Therefore it is most respectfully urged that the decision of this Court in the case of *Schmidt v. Frey, supra*, is not the controlling case and the ruling in that case is superseded in the case of *Neu v. Rogge, supra*.

#### POINT V.

**The filing of the notice as required by the Act of 1907 is necessary for the protection of the buyers of property sold under foreclosure.**

As was stated in *Neu v. Rogge, supra*, at the bottom of the second column on page 633:

“By section 3 of the act of 1880 (P. L. 1880, p. 256; Comp. Stats., Vol. 3, p. 3422, Paragraph

49), to which the act under consideration is a supplement, it is provided:

“That if after the foreclosure and sale of any mortgaged premises the person who is entitled to the debt shall recover a judgment in a suit on said bond for any balance of debt, such recovery shall open the foreclosure, and sale of said premises, and the person against whom the judgment has been recovered may redeem the property by paying the full amount of money for which the decree was rendered, with interest to be computed, etc., provided, that a suit for redemption is brought within six months after the entry of such judgment for the balance of the debt.’”

Thus it appears that upon the entry of judgment for the deficiency on the bond such judgment automatically voids the foreclosure and sale, and gives the judgment-debtor the opportunity to redeem by paying in full the amount for which the decree was rendered, etc., provided he brings suit for redemption within six months after the entry of such judgment against him. Such a situation made the titles to mortgaged lands purchased under foreclosure sales uncertain and precarious; for, under the Act of 1880, there was nothing to prevent an action from being commenced and a judgment entered in any one of the counties of this State or in a foreign jurisdiction, and hence a prospective purchaser might find nothing on record affecting the property in the county where it is situate, and thus such purchaser, though he exercised the greatest diligence and caution might be led into the purchase of a defeasible title. **“AND THIS IS THE MAIN EVIL WHICH THE ACT OF 1907 INTENDED TO REMEDY.”**

And further down on page 634 it states that:

“The Legislature expressly forbids the entry of a judgment, in a case like the present, un-

less a *lis pendens* was filed prior to the bringing of the action. The statute is mandatory in this respect. As has been pointed out, it declares a public policy for the conservation and protection of the public records relating to the title to lands. It is obvious that any departure from the requirement of the statute that a *lis pendens* shall be filed prior to the beginning of an action will tend to defeat the very object of the act."

It will therefore seem that this Act of 1907 must be followed and that a notice must be filed before beginning action on the bond as otherwise the title to any premises purchased at the sale under foreclosure of mortgaged lands would be very doubtful because if a junior mortgagee cut off by the foreclosure of the prior mortgage could bring suit at any time up to sixteen years and recover judgment and as it would automatically open up the sale the title to such premises would always be in doubt and this Act would be against public policy.

### CONCLUSION.

Therefore as no notice was filed before commencing the action or at any other time and as the Act of 1907 is mandatory in regard to this being done, and as it is very clear that the Act applies to a suit on any bond secured by mortgage, it is respectfully urged that the action of the Supreme Court in sustaining the Essex County Circuit Court be reversed.

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