

NEW JERSEY
Court of Errors and Appeals.

BETWEEN

MICHAEL BRADY,
Respondent,

and

CARTERET REALTY COMPANY,
Appellant.

*On Appeal from
Chancery.*

BRIEF FOR APPELLANT.

On September 23d, 1903, the Carteret Realty Company purchased a judgment recovered in the Supreme Court of this State on May 14th, 1888, by the executors of Abraham O. Zabriskie, Trustee, vs. Michael Brady. Assignments were taken from the surviving executor and from the *cestui que* trust of Mr. Zabriskie (case, pp. 5 and 6). Execution was at once issued, as is now permitted by the Revised Practice Act, and levy was made upon the interest of Brady in certain land in the County of Middlesex, which was advertised to be sold on November 25th, 1903. On that day Brady procured an adjournment of two weeks, and in the interval filed his bill in Chancery under "An Act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same," approved March 2d, 1870, Gen. Stat., 3486.

The bill admits that the complainant has no paper-title to the land, but asserts a twenty years' adverse possession originally taken under an oral contract with the former possessors, from whom it is alleged the Carteret Realty Company claims to have purchased the land. This company and the Sheriff are the only defendants.

The bill seeks to enjoin the sale of the land until the title is settled. A preliminary injunction was ordered on advice of Vice-Chancellor Stevenson (case, p. 19), and from the order therefor the present appeal has been taken. The application to enjoin was based upon allegations in the bill that Mr. Savage, representing the company, in opposing adjournment of sale, had stated "to the Sheriff and those present," that the complainant's "interest in said tract by possession is not worth anything;" had stated "the same thing to other persons;" had stated it "in a letter written to said Sheriff," and had also stated to the complainant that he intended "to give notice of the same thing on the day of sale of said lands under said execution" (case, pp. 6 and 7).

It is difficult to discover from his opinion just how the learned Vice Chancellor vindicates his order for injunction. His conclusion, reached "after some hesitation," is that it is not equitable for any execution creditor to expose to sale under his execution, property which he declares that he and not the judgment debtor owns. He thinks that this doctrine may require modification, and is modified in the case in hand by the fact that the execution-creditor has avoided testing the two inconsistent titles, while the execution-debtor is in Court with a bill filed for that purpose (case, p. 26).

I.

The Carteret Realty Company is entitled to all the rights of the original judgment-creditor.

The Vice Chancellor concedes (case, p. 24) that no injunction could have gone against the assignors of the judgment if they had still held it, because of any notice by the Carteret Realty Company; but he says that there are many situations in which the assignee of a judgment will not occupy as favorable a position as the assignor (p. 27). He gives no illustration and cites no authority. We challenge his proposition. A judgment is salable property. No Court can narrow the range of purchasers.

It is upon this principle that it is uniformly held that one with notice of an outstanding equitable title, though he may not himself purchase from the holder of the legal title charged with notice of the equity, may, nevertheless, do so from a *bona fide* purchaser of the legal title not having such notice, and on such purchase will acquire all the rights of his vendor.

3 Washburn on Real Property, p. 360., 5th Edition.

Holmes v. Stout, 2 Stock., 419, 429.

Henninger v. Heald, 7 Dick., 431, 439; affirmed 8 Dick., 694.

It is alleged in the bill that not more than three hundred dollars was paid for the judgment; but whether this is true or not does not concern Mr. Brady, who admits that the judgment is valid and wholly unpaid. It cannot matter to him who enforces it. Doubtless the price was low because the assignors knew him to be a mere squatter. The

Carteret Realty Company acquired, by double assignment, both the legal and equitable title to the judgment (case, pp. 5 and 6) and is entitled to all its assignors' rights.

We do not agree with the Vice Chancellor's intimation (case, p. 25) that it is "unfair and censurable in the forum of morals" or "oppressive" for the true owner of lands to buy and enforce a judgment against his disseisor. It is always justifiable to fortify one's position. Let Brady pay the judgment if he wants to stop the sale. He, at least, ought to have faith in the title he asserts. If it is his misfortune not to be in funds, he ought to be able to convince a purchaser, or a mortgagee—if he expects to convince a jury—that his title is good.

The Carteret Realty Company should be commended for open dealing. It could have procured some stranger to buy the judgment. Its officers are wholly undeserving of censure.

We submit that as holder of the judgment the company has the right to execute it on any land of which the judgment debtor is in hostile possession, and, as claimant of such land, it has the right, in order to protect its own title, to state its claim at the sale.

Possession of land is a legal right which may be levied on and sold by the Sheriff on execution.

Den v. Winans, 2 Gr., 1.

Leport v. Todd, 3 Vr., 124, 133.

Freeman on Executions, Sect. 175.

II.

What are the rights of a judgment creditor with respect to lands he claims to own but of which the judgment debtor is in hostile possession?

While we combat the idea of the Vice Chancellor (case, p. 24) that the case must be considered as if the Carteret Realty Company had itself recovered the judgment against Brady, we are willing to so consider it.

With deference we suggest that the learned Vice Chancellor has fallen into confusion of thought on this subject. He takes inconsistent positions:

1. He first suggests that a judgment creditor cannot force his debtor to make, for his benefit, an involuntary conveyance under the statute, without thereby conceding the debtor's title (case, pp. 26 and 27). If this be so, any warning to bidders would be of no avail, as the Vice Chancellor himself intimates may be the case (case, p. 30, folio 15); and on that theory the injunction was wholly unwarranted.

2. He next suggests that the judgment creditor *may* force such an involuntary conveyance, saving his own rights, if he gives them notice of them—being estopped from subsequent assertion if he fails to give such notice. On this horn of the dilemma he hangs his injunction. He says (case, p. 27): "The inequity does not consist in the announcement, but in the holding of a sale at which such an announcement is to be made." Later he calls the announcement a necessary protective "slander" of title (case, p. 29, folio 22). We did not contend, as he seems to have been impressed, that notice was necessary—only that it was prudential, and no

more than fair to bidders. There is, however, strong argument that silence would work an estoppel.

This confusion of thought leads to uncertainty in proposed relief from the situation. The Vice Chancellor thinks that the judgment-creditor may offer to have the whole estate sold (case, p. 30, folio 30). But why should he sell his own rights? He is not a delinquent. His rights *under the judgment* he does extinguish, and this is all the risk he ought to assume. Another suggestion is, that he may test title in advance by ejectment; indeed, the Vice Chancellor justifies his action in this particular case by the reflection that the company can get an early trial of a feigned issue framed under the bill to quiet title (case, p. 28), and he provides in his order for injunction that the writ may be dissolved unless such a trial shall be promptly afforded. But why should a claimant be forced to test his title against his will because his judgment-debtor happens to be in possession of the disputed land? Furthermore, there may be cases where neither party to the judgment is in possession. There must be some uniform rule to apply. There is but one safe rule—let the interest of the judgment-debtor in any land the judgment-creditor may designate, be sold and conveyed without regard to adverse claims, no matter by whom put forth; and such is the rule in New Jersey. Possibly it may be well for the Legislature to provide, as is the law in some States, that all judicial sales shall pass good title, or the purchaser be relieved of his bid; but until that is done, it is not just to put judgment-creditors in a class by themselves, and deny them the rights accorded to other claimants of land sold under execution.

The theory of judicial sale in this State is *caveat*

emptor—subject, of course, to relief against fraud or misrepresentation.

Cool vs. Higgins, 8 C. E. G., 308, 813, 10 C. E. G., 117.

Boorum v. Tucker, 6 Dick., 135, 139, affirmed, for the reasons given by the Vice Chancellor, *sub nom.*

Hartshorne v. Boorum, 7 Dick., 587.

Campbell vs. Parker, 14 Dick., 342.

In *Boorum v. Tucker*, *supra*, Vice Chancellor Pitney said: "I understand the rule in New Jersey to be that a purchaser at a judicial sale is bound to take such title as an examination of the proceedings will show that he will get. He is bound to examine for himself beforehand to see what title he will obtain by the sale."

If the judgment-creditor really does "slander" the title he causes to be exposed to sale, he must answer in damages. He takes the risk that any one who gives notice has to take. As we understand the law no notice is necessary. Paramount rights of the judgment-creditor, like those of other persons, are preserved, notwithstanding the sale.

III.

The sale should not have been restrained.

The Court of Chancery has no greater jurisdiction over judicial process than has the Court out of which such process issues. Can it be successfully contended that the Supreme Court would restrain a levy on, or sale of, the land in controversy under this execution against Brady? If it would not, then

Chancery will not. Indeed, it has no jurisdiction at all except for matters *dehors* the record and assignment. Any threatened inequitable conduct of the holder of the execution can be restrained by the Supreme Court, or by Chancery—but not the proposed sale. The sale cannot be enjoined as a punishment of the appellant for what Mr. Savage may have said or written.

To contend that because of an intention to give notice, at the sale, of an adverse claim, the holder of a judgment can *never* sell, is preposterous. The appellant is entitled to a sale. The alternative of a trial of the title is not an equivalent. The appellant may not be in a position to put its title on the hazard of a trial and it cannot justly be compelled to do so.

There is no analogy between the case of a claimant to land who holds a judgment against an adverse possessor, and that of a mortgagee who has recovered judgment on his bond. The reason why a Court of equity will restrain the mortgagee from selling the mortgaged premises under a judgment on the bond is that the property is already devoted to the debt, and the mortgagee needs only foreclosure of the equity of redemption, or the sale—which in most jurisdictions is substituted therefor. See the reasoning of Chancellor Kent in *Tice v. Annin*, 2 Johns. Chy., 125.

To secure an injunction against a sale under a judgment on the bond, the owner of the equity of redemption has to admit the mortgage. To present any analogy in the case in hand, Brady would have to ask injunction because of an admission that the Carteret Realty Company has good title already—a palpable *reductio ad absurdum*.

The Vice Chancellor relies upon the case of *Ha-*

vens v. Thompson, 8 C. E. G., 312, as authority that the Court of Chancery will restrain the enforcement of an undisputed lien pending the determination of a suit to quiet title. He misapprehends that decision. The Chancellor did restrain the prosecution of an attachment against the legal title of the land there in controversy to which the complainant claimed the equitable title. That was entirely proper, as otherwise a *bona fide* purchaser might have cut off the complainant's equity. The propriety of this injunction was vindicated at the final hearing, for it was held that the complainant's equity prevailed over the legal title, and, in disposing of the attaching creditor's claim, the Chancellor said:

"Benjamin's creditors have no better claim to his share than he himself would have. The agreement if good against him is equally so against them." The complainant was adjudged to hold the land free of the lien.

Havens v. Thompson, 11 C. E. Gr., 383.

Chancellor McGill perceived the true bearing of *Havens v. Thompson*, and correctly distinguished it when, in *Swayze v. Hackettstown National Bank*, 17 Stew., 9, where the dispute was as to which party held the *legal title*, he refused to enjoin the execution of a judgment against one of the contending parties pending the determination of a bill to quiet title.

IV.

The statement made, or proposed to be made, in behalf of the Carteret Realty Company constitutes no just grievance.

As alleged in the bill, the statements of fact complained of were strictly true. Brady had no title unless by adverse possession. Mr. Savage

made no assertion contrary to what the bill alleges as to the character of that possession. He simply gave his *opinion* that it was worth nothing, and stated, as is undisputed, that his company has a conveyance from the former possessors of the land. If Brady has in fact had adverse possession for over twenty years, Mr. Savage's opinion that such possession is worth nothing is itself worth as little. No prospective bidder at the sale is shown to have been dissuaded from a purpose to attend on the adjourned day. "Those present" in the Sheriff's office when the adjournment was opposed, for all that appears, were only Mr. Brady and his counsel, and the attaches of the office. It is not alleged or proved that anyone was there with the expectation to bid at the sale. The previous unproved letter to the Sheriff (case, p. 27) calls Brady a "squatter," but no one is alleged or proved to have had knowledge of that letter except the Sheriff and Mr. Brady. Some of the affidavits represent Mr. Savage as having stated in some conversations with Mr. Brady and others that Brady was a "tenant;" but no such claim is made in the bill. The complainant's case rested on the allegation pure and simple that the holder of an execution who claimed paper title from former possessors of the land, had caused it to be stated and proposed at the sale to announce that Brady's title by adverse possession, which it was proposed to offer for sale, was worth nothing—a mere matter of opinion; it not being claimed in the bill that Brady's claim of duration of the possession was in any way challenged.

The order appealed from should be reversed, with costs, and the Court of Chancery should be directed to dissolve its injunction.

COLLINS & CORBIN,
of Counsel with Appellant.

New Jersey Court of Errors and Appeals.

MICHAEL BRADY,

Respondent,

AND

THE CARTERET REALTY COMPANY,

Appellant.

BRIEF OF WILLARD P. VOORHEES.

Of Counsel with Respondent.

This is an appeal from an order allowing an injunction.

The bill was filed to quiet title, and called upon the defendant "to set forth specifically what title or claim to said tract of land," &c., it made or claimed—"and that by the final decree of this Court the rights of all parties to this suit in and to said tract of land may be fixed," &c., and also that the defendant "be enjoined from interfering with the sheriff's sale by circulating and making statements derogatory to complainant's title," &c., and prays for a preliminary injunction restraining the defendant and the sheriff from selling the land under execution issued upon defendant's judgment against the complainant until final hearing and determination of this case.

The facts are fully set forth in the bill and affidavits. No answer was filed until after the injunction had been granted, nor were any counter affidavits interposed by the defendant on the hearing of the rule to show cause for the injunction. The case stood wholly upon the bill and affidavits.

The situation of the parties.

The Cartaret Realty Company, the defendant (hereafter called for convenience the Company), about Sept. 23, 1903, procured for the consideration of \$300.00 an assignment to it from the executor of the late A. O. Zabriskie, of a judgment entered in the Supreme Court May 14, 1888, for \$1,683.24 debt and costs, and on the same day issued execution and caused the Sheriff of Middlesex to levy upon the lands in question; with interest this judgment at time of its assignment amounted to over \$3,200. The sheriff advertised the lands to be sold under this writ on November 25, 1903.

The lands in question are a tract of 11 721-1000 acres situate in what is now the growing village of Cartaret, valuable as building sites and worth \$1,000 per acre and upwards. Formerly this land was of inconsiderable value and only for farming purposes.

In 1888, April 1st, Brady the complainant, took possession of the tract as owner under a gift thereof from Parsons (who had a bad title to it) under the circumstances set out on pages 2 and 3 of case, and since said date has been in "the full, exclusive, open actual and peaceable possession thereof and has cultivated the same and kept it enclosed by fences and has paid the taxes thereon and is still in the peaceful possession of said lands as aforesaid, and has always claimed and does now claim to be the sole owner thereof." (Case, p. 2.)

On May 11, 1903, the Company brought ejectment against Brady for the lands and were non-suited at September Term, 1903, at Middlesex Circuit, and a judgment thereon was entered November 4, 1903, in the Supreme Court against the Company. (Page 5.)

On the day upon which the lands were advertised by the sheriff to be sold under the execution issued upon the Company's judgment, Brady made application for an adjournment of the sale. At the Sheriff's office where the sale was advertised to take place and at the hour appointed for the sale, one Edward S. Savage, an attorney, acting for the Company and a director thereof, was

in attendance and opposed the adjournment. He stated to the Sheriff and those present (page 6, bottom) that Brady had no title and was not the owner and that an adjournment should not be granted because Brady's interest was not worth anything (page 7), that Brady's interest in said land by adverse possession was not worth anything, and that the Company was the owner of the land (pp. 13 and 16).

The Sheriff granted Brady's request and adjourned the sale for two weeks, to December 9, 1903. On December 4, 1903, Brady and his attorney, Ephraim Cutter, had an interview with Mr. Savage (page 13), when Savage stated that the object of the Company in buying the judgment was to obtain possession of the land, that it was easier to obtain possession by sale under the execution than by bringing a new action of ejectment, and further, that he, Savage, intended on the day to which the sale had been adjourned, to again announce that Brady had no title whatever to the land and did not own it, &c. (Pages 14 and 16.) It appears also from a letter written by Savage to the Sheriff, dated November 5, 1903 (page 17), that the object of the Company was to force Brady out of the possession of the land by this means and thus avoid an ejectment. This letter is referred to in Brady's affidavit, page 14, lines 25, 26 and 27. Savage also stated to various persons that Brady had no title to the land.

To sum it up we have:

The Company unsuccessful in the recovery of the land from Brady in ejectment.

The purchase of an old judgment against Brady for 10 cents on the dollar.

The attempted sale of the lands under the judgment for the purpose of obtaining possession and avoiding ejectment or other appropriate remedy.

And in order to carry out the scheme acting inequitably if not fraudulently in attempting to sell Brady's property to make the amount of the judgment and at the same time slandering his title, by stating that the

land to be sold was not Brady's, so that no one would bid, and the Company might be the purchaser.

The action of the defendant is inequitable.

The Company had a right to sell under its execution the land of Brady and the "state of mind" of the execution creditor is entirely aside from the question. I take it that the "state of mind" or "intention" is quite immaterial, is not manifested by overt acts or words in themselves prejudicial to the defendants or others having rights which the law protects. That is to say, so long as the creditor does not say or do anything working damage to others, the mere intention remains immaterial. *Davis vs. Flagg*, 8 Stew. 491, relied on by the appellant supports this view, but Chief Justice Beasley in delivering the opinion of this Court in that case adds "*provided his conduct induced by it (his intention) is entirely lawful and in a legal sense equitable.*" It is just here that the case under consideration differs from *Davis v. Flagg*. We have the "intention" clearly set forth in this case, of acquiring by means of an execution not the payment of the execution debt, but the acquisition of the land. Not the use of the process of the Court for making the money by a sale of the land to the highest bidder, but a mere form of sale, to acquire possession by it. This intention, unimportant in itself, provided it is not the foundation of unlawful acts, becomes of paramount importance when followed by and connected with a conduct illegal and against the policy of the law, and will be used to interpret those acts and fix upon them their real character as oppressive and unjust. It is the overt acts, the announcements of the execution creditor made publicly at the sale to possible bidders and others, slandering the defendant's title, that constitute the inequitable conduct, which a court of equity will restrain and relieve against. Without burdening the Court with fundamental principles governing judicial sale, it may be enough to refer in passing to the following:

"The policy of the law is that the unfortunate debtor

*if it had not claimed
title thereto*

may realize as much as possible for his property and that as little of it as necessary shall be sold."

Hermann on Executions, sections 204, 205.

The principle is enunciated in *Todd & Rafferty vs. Hoagland*, 7 Vr. 353, affirmed 8 Vr. 544.

In *Cochs v. Izard*, Sup. Ct. U. S. 7 Wall, 559, it is said, "Izard bought the property at a sum hardly equal to its yearly rental value. This he was enabled to do by unfair practices, which operated to prevent persons from bidding. Can it be doubted . . . that the conduct of the defendant deprived the complainant of the advantage which he would have received from a fair sale of his property. The law will not tolerate any influences likely to prevent competition at a judicial sale, and it accords every *debtor the chance for a fair sale and full price*, and if he fails to get these in consequence of wrongful interference . . . equity will step in and afford redress." See also *Staten v. Maxwell*, 6 Wall, 276, cited in this case.

When a sale by an officer is conducted in violation of the spirit and policy of the law or *so as greatly to prejudice the right of the defendant in execution*, the sale will be set aside.

Cummins v. Little, 1 C. E. Gr., 48.

Lennon v. Heindel, 56 N. J. Eq. 8.

Any chilling of the sale will be held fraudulent. A. & E. Enc. Law, 2d Ed. V. 25, page 788.

In judicial sales at auction no practices which will tend to prejudice the sale should be permitted, least of all should he for whose benefit the property is sold, be allowed to reap the advantage of such practices on his part. *Morris v. Woodward*, 10 C. E. Gr., 32.

See *Merritt v. Brown*, 6 C. E. Gr. 401, where property was obtained for inadequate price and to the oppression of defendant. Such is against the policy of the law and chills the bidding. *Brooks vs. Cooper*, 5 Dick. 770.

See *Tatem vs. Powell*, 5 Dick. 316, where the cases are collected.

If a sale when made would be set aside, *a fortiori*, will a court of equity restrain it, when it is the avowed pur-

pose of the execution creditor to perpetuate the practices at the sale and when he has partially set them in motion before the sale.

✓ The ⁱⁿequity of the Company lies in the fact that ~~he~~^{it} is assuming to sell Brady's property to satisfy its debt, and at the same time denies that it is Brady's property and publishes that fact to the world. The effect of this is to discourage bidding, prevent competition and cause the property to fall into the Company's hands.

He goes through the form of sale and denies that anything will pass by it. The Company claims to own the very estate which it has ordered the sheriff to sell as Brady's.

If the Company essays to sell the property of the defendant, its duty is to do all in its power to make it bring as large a price as possible. The use of the process of execution is confined to raising the money. When it is used for another purpose it is an abuse, provided that perverted use is accomplished by overt acts. The Company will not be allowed to sell out Brady for the ostensible purpose of making the money on the judgment and at the same time act in such a way that no bids will be obtained.

It is not the case of a third party standing by seeing that his property is about to be sold under an execution against another and warning purchasers that he may not to be estopped to claim his own. But this is a case of the execution creditor attempting to occupy inconsistent positions and that to the prejudice of the defendant. He says, "I am selling your property under my execution," and in the same breath announces, "It is not your property that I am selling, it is mine." It is urged that the Company in order to protect its rights must take such a position, otherwise if an outside bidder purchased, the Company would be precluded from asserting its antagonistic title. The answer to this is, then the execution creditor should desist from the sale, and try his title, or else sell out the title of Brady for the best possible price and be content with the proceeds of the sale.

"It is a well settled principle that a party cannot either in the course of litigation or in dealings in pais occupy inconsistent positions, and upon that rule election is founded. A man shall not be allowed in the language of the Scotch law to *approve and reprobate*.

In re Scheham, 31 Ch. D 473.

See this subject treated in Bigelow on Estoppel, 5th Ed. page 673, et 8 eq. under title Quasi-Estoppel.

The learned Vice Chancellor puts the proposition in forcible and clear language, page 26, of his opinion where he says, "It is not equitable for any execution creditor to expose real or personal property for sale under his execution when at the time of sale he stands by and openly declares that nothing is being sold; that the execution debtor has no property in the thing offered for sale which can pass by the Sheriff's deed or bill of sale; that on the contrary, he, the execution creditor, holds and will hold after the Sheriff's sale, the entire property in the thing offered for sale."

To hold otherwise would be to deny the doctrine of equitable estoppel applies to execution sales.

Hermann on Executions, Sec. 230.

For if an execution creditor receives the fruits of his sale, he shall not be permitted to deny the title derived under the Sheriff's deed.

After levying upon and advertising the premises as the lands of Brady, the Company had no right to continue the sale and at the same time assume the inconsistent position of stating inhereat that Brady had no estate in the lands and that none would pass by the Sheriff's sale to a purchaser thereat. The Company was put to its election which of the two positions it would persist in.

Daniel v. Tearny, 102 U. S. 415.

Parker v. Seeley, 11 Dick. 110, 124.

Coffey v. Coffey, 16 Ills. 141, is quite in point where the Court says:

"The only question is whether there is unfairness and fraud to warrant setting aside the sale. Of this we have no doubt. The plaintiff with his brothers and sisters

had or pretended to have a claim of title to one of these tracts adverse to petitioners. Under these circumstances if he desired to become a bidder it was essential to fairness toward petitioners that he should conceal or forbear to assert his adverse claim whatever consequence might result therefrom to his interest.

"It is not competent for him to assert his claim to the premises by a public announcement at the biddings, with a threat to litigate it with any purchaser and then enter into competition in the bidding and purchase at an under value occasioned by the depreciation his own conduct had produced. If it were essential for the protection of his claim to give notice and make it known at the sale, he thereby disqualified himself to bid or become a purchaser of his adverse title at such sale. He shall not be allowed to depreciate or destroy the value of the land by denying the title, then buying it at a depreciation thus produced and claim to be a fair purchaser. . . . These facts show such fraud upon and injury to the rights and interests of the defendant as call for correction."

In *Rocksell v. Allen*, 3 McLean, 357 (11983 Federal Cases), it is said a sale of land on execution where the defendant had no interest in the land, will be set aside on motion. Cited also in *Brunner v. Brennan*, 49 Ind. 100.

As the learned Vice Chancellor stated in his opinion, the Company by taking the assignment of the judgment has come into a relation in respect of a sale of the property levied upon, and by claiming to own the very estate of Brady proposed to be sold, whereby the *Company is encumbered with a limitation* which did not rest upon the assignor, and which situation is illustrated by the cases cited in the opinion.

3 Pom. Eq. Sec. 1204, 21.

2 Jones Mtges, 4th Ed. Sec. 1229.

Lydecker v. Bogert, 38 N. J. Eq. 136.

Lanahan v. Lawton, 50 N. J. Eq. 276, 281.

And as further stated so forcibly in the opinion (pp. 26 and 27), the Sheriff acts as the involuntary agent of

Brady in effecting a conveyance of the lands, and the execution creditor forces this conveyance to be made for the creditor's benefit. Equity ought not to recognize a right of the creditor to compel his debtor thus to make conveyance, while the creditor warns all persons not to bid, because the estate to be conveyed already belongs to the creditor and the debtor has no interest in it.

It has been insisted by the appellant that the Company was bound to disclose its hostile title, otherwise it would be estopped. It is not conceded that this is true. But let us assume that it is so. Then the argument, makes against the Company and in favor of Brady, rather than for the Company, for it cannot be doubted that the expressed intention of the Company to get possession by means of the sale, thus avoiding a trial of the title, coupled with the announcement made and threatened to be made at the sale, would produce the effect of having the property struck off to the Company at a nominal bid. The Company ought then in equity to stand in no better position than any outside bidder; yet it will be in a better position, for the effect of the announcement will not operate against the Company as upon an outsider, and the Company will thus destroy Brady's title and at the same time sacrifice Brady's rights by holding under the Sheriff's deed what they declared in warning to other bidders, they already owned and had no right to sell. They thus make use of something that could not be sold because not belonging to Brady. They hold against him a paper title which he cannot controvert and which they say no one could purchase because nothing would pass by the sale.

Can a greater wrong to a judgment debtor be imagined. If the Company sell, it must take the consequences of a legal sale, or else it must desist from the sale. If an outside bidder is to be bound by the notice given at the sale, then the Company as bidder should be likewise bound by such notice, but in effect the Company will not be so bound. *It will reap the advantage of its own wrongful act, in selling what it asserts it cannot and does not sell.* It will not allow the Sheriff to sell any

interest in the land which it does not claim to own already. Nor is it an answer to say, "Then let Brady pay the judgment." Perhaps he cannot. If he cannot then the law will not permit the creditor to take his property except by sale according to law. This must be done in a fair way so that the debtor's interest may not be sacrificed.

The defendant's acts constituted an abuse of process.

The defendant's preconceived intention to use the writ of execution not for the purpose of collecting the money due upon it, but for the purpose of obtaining the possession of the land thereby, coupled with the act of the defendant in statements derogatory to the estate of the defendant in the land proposed to be sold, thus chilling the bidding at the sale, the result of which would be to enable the defendant to purchase at a small figure, constituted an *illegal use of legal process* for an unlawful object, not the purpose intended by the law, a perversion of legal process for an ulterior purpose. *Mayer v. Walter*, 64 P. A. St. 283; *Nix v. Goodhill*, 95 Iowa, 282, 63 N. W., 701. In *Bartlett v. Christhilf*, 69 Md., 219, 14 Atl. 518, the Court says: "A malicious abuse of legal process consists in the malicious misuse or misapplication of that process to accomplish some purpose not warranted or commanded by the writ. In brief, it is the malicious perversion of a regularly issued process whereby a result not lawfully or properly attainable under it is secured."

When process is wilfully made use of for a purpose not justified by law, this is an abuse of process for which an action will lie. *Antcliffs v. June*, 81 Mich. 477, 21 Am. St. Rep. 533.

By the *malicious abuse* of process is not meant the *malicious use* of process. There is a marked difference between the two.

In *Mayer v. Walter*, *supra*, the distinction is drawn between the two classes of actions. It is there stated somewhat as follows:

"To use legal process in the prosecution of his claims in Court, every man has the right, no matter what motives of malice may actuate him; so that in the *use* of such process no action lies without proof of malice and no probable cause. Such is not true in an action for the *abuse* of process. Actual malice is there unimportant if the process is wilfully used to accomplish the purpose intended. Unlawful acts wilfully done are malicious as to those injured thereby, and it is therefore unnecessary to allege or prove that the process was sued out without probable cause. *Page v. Cushing*, 38 Me., 523. Chief Justice Gibson makes the same distinction in *Herman v. Brookerhoff*, 8 Watts, 240, saying that the gist of the act for malicious prosecution was in the origination of a groundless prosecution, while in an action for the abuse of process, it was not the origination of an action, but the abuse of process consequent upon it. While in an action for malicious prosecution it is necessary that the action should have been terminated, in an action for abuse of process, such termination is not necessary. *Page v. Cushing, supra*. *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207.

Perhaps the requisites for an action for abuse of legal process have been most clearly stated by Justice Sears in *Jeffery v. Robbins*, 73 Ill., App. 353, where he says: "There is no little confusion in the reported cases of actions for malicious prosecution and actions for abuse of process. The cases based upon an abuse of process are comparatively few, and a considerable proportion of those reported and cited as such are found, upon examination, to have been in fact actions for malicious prosecution."

"It would seem to be only where the prosecution is perverted, *i. e.*, directed outside of its lawful course to the accomplishment of some object other than fixing the charge upon the accused, that one, acting upon probable and reasonable cause, may yet become liable for so perverting the process as to be guilty of an abuse thereof. And to constitute such improper direction of

process, the mere existence of an ulterior motive in doing an act proper in itself would not suffice, but there must be such a use of it as is in itself without the scope of the process and improper, from which motive may perhaps be inferred. It would seem both from authority and reason that to sustain the action these two elements are essential: 1. The existence of an ulterior motive; and 2. An act in the use of process other than such as would be proper in the regular prosecution of the charge. From the latter the former may perhaps be inferred, but the existence of the former could not, in reason, dispense with proof of the latter, for if the act of the prosecutor be in itself regular, the motive, ulterior or otherwise, is immaterial."

The above case also holds that an ulterior motive may be inferred from the improper use. This is undoubtedly the rule. In *Barrett v. White*, 3 N. H. 201, 14 Am. Dec. 352, the Court says the presumption of law is that one who abuses process assumed the exercise of it in the first place for the purpose of abusing it, and held that the conduct of the defendants was such as to raise a presumption that they intended from the beginning to use the authority of law as a mere pretense for destroying the plaintiff's property.

The case under consideration is much stronger than any of those cited. Here we have the avowed intention to get possession of the property by means of this execution in order to avoid a suit in ejectment, followed by an *illegal and inequitable use thereof* effected by the statements made slandering the title of the lands, as a means of acquiring them without competitive bids at a low figure by the plaintiff in execution. Even the levying of an execution in violation of an agreement not to issue it without notice may be an abuse for which an action will lie. *Sommer v. Witt*, 4 Serg. & R. 19. The seizure and retention of exempt property will also constitute an abuse—*Coleman v. Ryan*, 58 Ga. 132, *Bradshaw v. Frazier*, 113 Iowa, 579; and generally it may be summed up that where process is employed by a party to accomplish some ulterior object or is oppress-

ively and unlawfully used by him, he is held liable for such abuse. Now the facts in this case constitute an actionable wrong. Where it clearly appears that an attempt to perpetrate such wrong will be made, as in the present case, the party threatening to make such attempt will be restrained by a Court of Equity on familiar principles.

The facts in this case call for the preventive powers of a Court of Equity. A sale made under such conditions would not stand. It would at once be set aside. If so, then it will be prevented by preliminary injunction.

It is in line with cases of which the following are types.

Where it would be against conscience to enforce a judgment at law because the defense was merely equitable and could not be offered in a court of law or where equitable rights have been asserted as a ground of action, it is well settled in this State that a preliminary injunction will issue to prevent the enforcement of such legal remedy. *Cairo & Fulton R. R. Co. v. Titus*, 12 C. E. Gr. 102, same case in error, 1 Stew. 270; *Smalley v. Line*, 1 Stew. 348; *Hughes v. Nelson*, 2 Stew. 547; *Isham v. Cooper*, 11 Dick. 405. In the case of *Cairo & Fulton R. R. Co. supra*, the opinion of Chief Justice Marshall in *Marine Insurance Co. v. Hodgson*, 7 Cranch, 335, was quoted approvingly, where it is said, "Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agent, will justify an application to a Court of Chancery."

**The injunction should be retained
until final hearing.**

The complainant has come promptly into court to litigate the title. He says to the defendant: "You have no rights in this land, if you have submit them to the Court. If you succeed then the land is yours. If you do not succeed then your judgment will be made by a fair sale of the land."

This is equitable. It affords the complainant the chance of satisfying the defendant's judgment by a sale of the land freed from the defendant's claim if it be decided that no such claim exists, or it secures to the defendant the very land without sale, if Brady's title is without foundation.

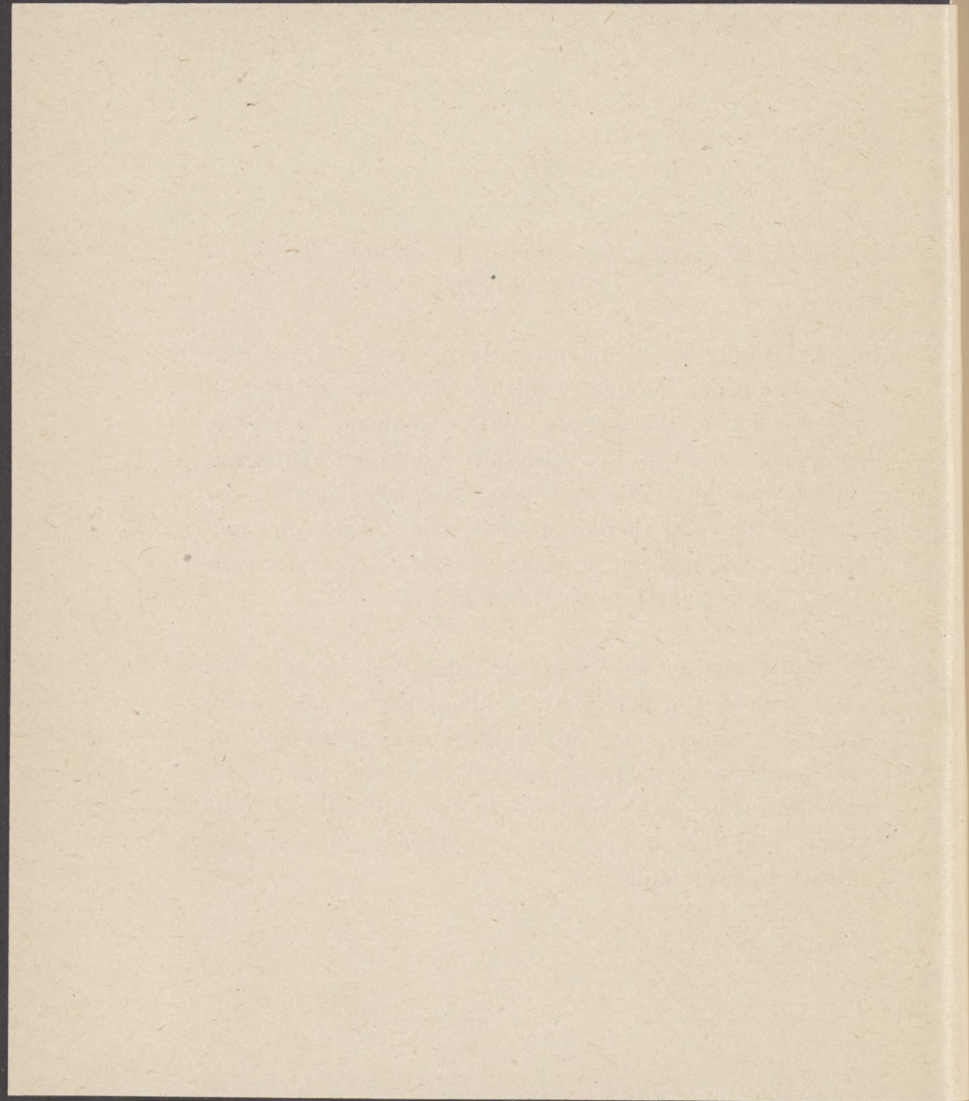
Havens v. Thompson, 8 C. E. Gr. 321, is a case in point. There as here the bill was to quiet title. Two of the defendants had attacked the interest of a third defendant in the lands. The title so attacked the complainant sought to have declared void, and a preliminary injunction issued to restrain the attacking creditors from selling this title until the determination of the suit to quiet title. The Chancellor said: "In the meantime as a sale under the attachment *with this question unsettled* cannot be fairly had, and may occasion a great sacrifice, and as a delay cannot be of serious injury to the defendants, I will in the exercise of the discretion incumbent on the Court in such cases, retain the injunction until the hearing."

The order granting the injunction was made upon terms, "that unless the complainant forthwith prepares a feigned issue to try the title to said premises, in the Supreme Court of this State, and causes the same to be placed upon the list for trial at the April Term, A. D. 1904, of the Middlesex Circuit," the injunction may be dissolved on five days' notice. (P. 20.) This was done at once upon the filing of the Company's answer in this cause, and the issue was so placed upon the list for trial and hence no motion to dissolve was made.

Insert after word "foundation" and before "Havens v. Thompson," etc.

The Court should have clearly in mind the fact that the statements derogatory to the defendant's title which were made in the interest of the Company when the property came up for sale, have had their damaging effect upon that title and have, to a large degree, destroyed the value thereof at public sale. *This injury will continue and will not be removed until a decree has been made settling the title vested in Brady.*

The Court should, moreover, also keep in mind the fact that on the bill Brady's title is perfect; no denial has been made of any of the allegations of the bill, for no answer or answering affidavits have been interposed, and the statements contained in the bill and affidavits show that the title to the said premises is vested in Brady in fee simple.



The cause it will be thus seen is at issue ready for trial and that by jury.

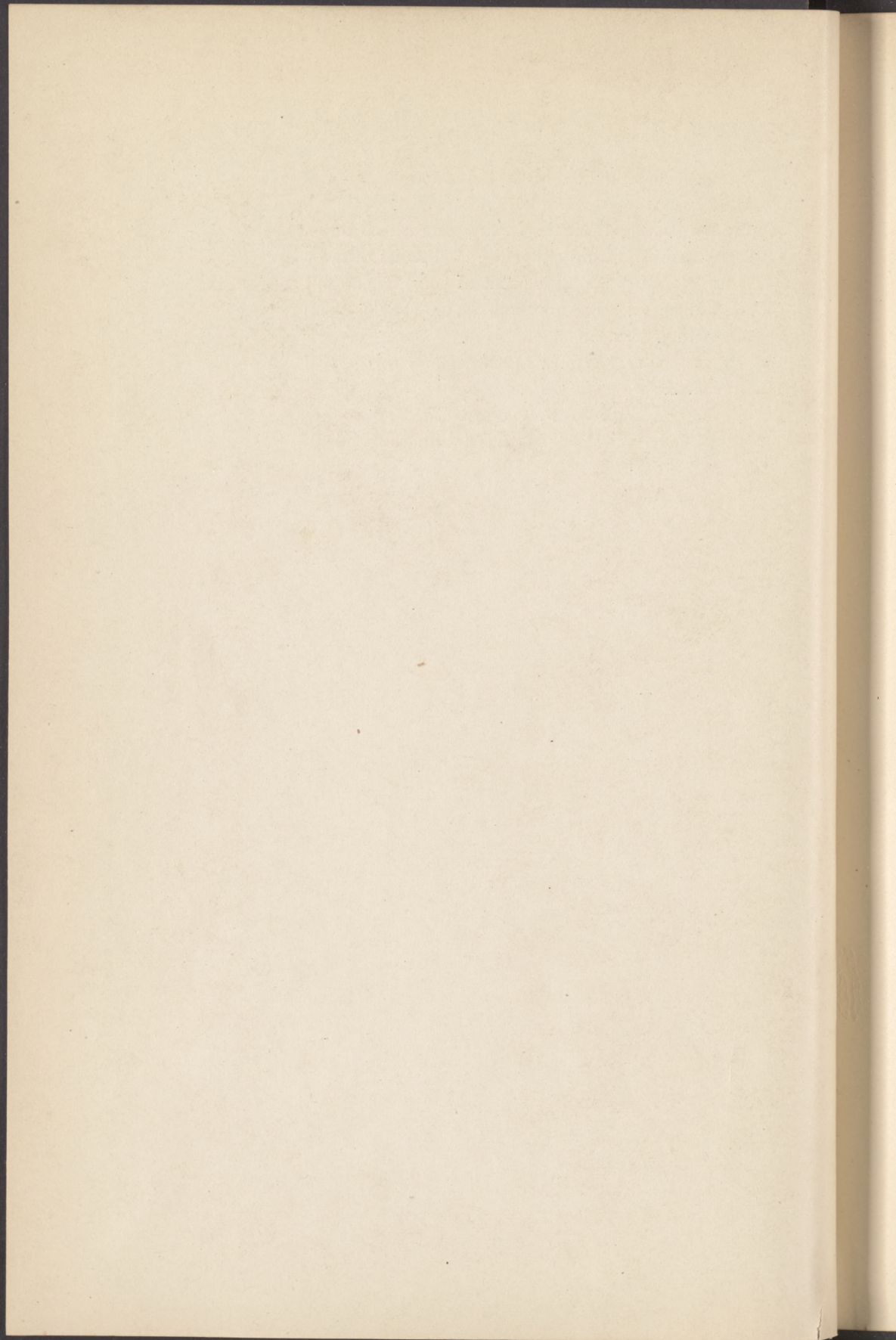
Equitably and legally the Company can ask no more.

It is assured of getting either the land as its own, or failing in that, of realizing a profit of some \$3,000 out of an investment of \$300, for about \$3,300 are due upon the judgment.

It is therefore respectfully submitted that this appeal should be dismissed with costs.

WILLARD P. VOORHEES,

Of Counsel with Respondent.



MacCrellish & Quigley, Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals

MICHAEL BRADY,	} On Appeal.
<i>Respondent,</i>	
<i>and</i>	
THE CARTERET REALTY COMPANY,	
<i>Appellant.</i>	

Brief of Ephraim Cutter, of Counsel with Respondent.

STATEMENT OF FACTS.

The appeal in this cause is from an order of the Chancellor, made on the thirtieth day of March, 1904, allowing a preliminary injunction restraining the sheriff of Middlesex county from offering for sale certain lands under an execution until the cause had been heard and finally determined.

The said order appealed from was advised by his Honor Vice-Chancellor Stevenson.

The bill in the cause was filed by Michael Brady, the respondent, against The Carteret Realty Company, and William Carman, sheriff of Middlesex county, under the

act of March 2d, 1870, entitled "An act to compel the determination of claims to real estate in certain cases, and to quiet title to the same."

The bill alleges that some time in the year 1880 one Jabez R. Parsons, on behalf of himself and brother, offered to give to the complainant the lands in question in case he would aid in selling a certain farm in the same township, adjoining said lands, on which farm the complainant resided, and would do the best he could in trying to sell said farm and praising it up, also informing complainant that the title of said Parsons and his brother to said tract was not good, but that it was in their possession and had been used by them, and in case the farm was sold they would give it to him for his trouble; that the complainant assented to this proposition, and aided as far as he could in selling the said farm, which was sold in November, 1880; and that accordingly, in pursuance of the said agreement, on or about the first day of April, 1881, the complainant took possession of the said tract as owner, believing that he had a right to do so, and has since that time been in the actual and peaceable possession thereof, and has cultivated it and paid the taxes on it.

That no demand was ever made on the complainant by said Parsons or his brother, or any other person, for the said tract, until the latter part of the year 1902, when one Charles E. Heald, and afterwards The Carteret Realty Company, claimed to own the said tract, or some part thereof.

That the said tract consists of 11 721/1,000 acres, situated near the growing village of Carteret, in Middlesex county, and while formerly, when given to complainant, of only small value, is now much more valuable.

That complainant claims, by reason of his adverse and uninterrupted possession, to now have a perfect and indefeasible title to said tract of land.

That in May, 1903, The Carteret Realty Company began an action of ejectment in the Supreme Court to

recover possession of said tract, but a nonsuit was directed in the action, and on November 4th, 1903, judgment of nonsuit was entered in the Supreme Court.

That in September, 1903, the Carteret Realty Company obtained an assignment to itself in consideration of \$300 of a certain judgment entered in the Supreme Court against the complainant on the fourteenth day of May, 1888, for \$1,500 debt, and \$183.24 damages and costs, in an action upon contract, and at once caused an execution to be issued and a levy to be made thereunder on the said tract of land, and caused the same to be advertised for sale by the sheriff on the twenty-fifth day of November, 1903, at the sheriff's office in the city of New Brunswick.

That at the time and place at which said sale was advertised, Edward S. Savage, a director of said company, and the attorney acting for said company in selling said lands under said execution, stated to the sheriff and those present, in opposing an adjournment, that the complainant had no title to said tract of land, and was not the owner thereof, and that his interest in said tract by possession was not worth anything, and that said tract belonged to said company; that the sale was adjourned for four weeks, and that said attorney has stated that he intends to give notice of the same thing on the day to which said sale was adjourned, and that no one will give anything for the said tract of land, and that the object of said company in advertising the said tract for sale under said execution is not to collect the money due thereon, but to obtain possession of said tract for a small amount, and that it is endeavoring to deter all persons from bidding on or buying the same.

It appears, also, by the affidavits attached to the bill (Case, pp. 11, 16) that said attorney intends, when the property is offered for sale, to again make similar statements derogatory to the complainant's title, and that the object of the said company, by its proceedings aforesaid, was to obtain possession thereby of said tract, instead of bringing a new action of ejectment.

By a letter of said attorney to the sheriff (page 17), verified as a true copy by the affidavit attached to the bill (page 14), it also appears that the object of the company was to obtain possession of the land by means of the sale, and not to raise the money due on the judgment.

The bill further alleges that by reason of the said claims and statements made by or on behalf of said company, the property of the complainant in said lands is greatly affected, and the same could not now be sold under said execution without great loss and injury.

No answer or affidavits were filed by the defendants at the hearing of the order to show cause, so that the facts stated in the bill and affidavits were, for the purpose of the application for an injunction, admitted to be true.

The only ground of appeal mentioned in the petition of appeal is that the order is erroneous "for that your petitioner is entitled by the law of the land to a sale of said land and premises under said execution" (page 32).

It is claimed on behalf of the respondent:

I.

That the facts set up by the complainant, which are not disputed, show that the complainant is entitled to the said tract of land under a perfect and indefeasible title, and that there was no ground whatever for the statements made on behalf of the said company, that the complainant was not the owner of said tract and that his title was not worth anything.

II.

That it was illegal for the said company to attempt to slander the complainant's title at the sheriff's sale for the following reasons: 1. Because a person giving notice of an adverse claim at a sheriff's sale cannot afterwards

become a bidder on the property. *Coffey v. Coffey*, 16 Ill. 141; *Rorer on Judicial Sales* (2d Edit.), Sect. 919; *Hermann on Executions*, Sect. 252; *Miller v. Colville*, 21 Iowa 135.

If it was essential for the protection of his claim to give notice and make it known at the sale, he thereby disqualified himself to bid or become a purchaser of this adverse title at such sale. He shall not be allowed to depreciate or destroy the value of the land by denying the title, then buy it at a depreciation thus produced, and claim to be a fair purchaser. *Coffey v. Coffey*, *supra*.

2. Because it is the duty of the plaintiff in execution, for whose benefit the sale is made, to endeavor to have the property sold for the best price possible. *Hermann on Ex.*, Sect. 253; *Hoppock v. Conklin*, 4 Sand. Chy. 582; *Rorer on Judicial Sales*, Sect. 1101, 1111; *Morris v. Woodward*, 10 C. E. Gr. 32.

In judicial sales at auction no practice which will tend to prejudice the sale should be permitted, least of all should he for whose benefit the property is sold be allowed to reap the advantage of such practice on his part. *Morris v. Woodward*, *supra*.

It would, therefore, have been clearly illegal for the attorney of said company to state at the sale that Mr. Brady did not own the land, and that his title was not worth anything, and it would have been an abuse of the process of the court. See *Van Dyke v. Van Dyke*, 4 Stew. 176; *Creeve v. Charlotte 1st Nat. Bank*, 77 N. Car. 110.

When false representations as to the title are intentionally made, as it must be assumed was done under the facts in this case, the conduct of the plaintiff is more clearly fraudulent.

"Chilling and puffing of the bidding at a sheriff's sale are regarded as fraudulent, and it is well settled that upon a timely application, by a suit in equity, the sale will be set aside where such fraudulent practices have been resorted to." *Conley v. Redwine* (Ga.), 77 A. S.

Rep. 398; *Flaherty v. Cramer*, 41 *At.* 482 (N. J.); *Lennon v. Heindel*, 56 N. J. Eq. 8; *Vineland Bank v. Shinn*, 55 N. J. Eq. 455, affirmed 55 N. J. Eq. 825; *Raphael v. Zehrer*, 56 N. J. Eq. 836; *Kloepping v. Stillmacker*, 21 N. J. Eq. 328; *Wetzler v. Schaumann*, 24 N. J. Eq. 60.

"The sale may be set aside, even though no actual fraud was intended, if there was that which in law amounts to fraud." *Suttler v. Sewell*, 109 *Ga.* 707; *Conroy v. Wetmore*, 101 *Ia.* 202.

"When a sale by a public officer is conducted in violation of the spirit and policy of the law, and so as in part to defeat the just claims of incumbrancers, or greatly to prejudice the rights of the defendant in execution, the sale will be set aside, though the formal requirements of the statute have been complied with." *Cummins v. Little*, 1 *C. E. G.* 48.

It has also been held that the sheriff in conducting a sale is the legally constituted agent of both the plaintiff and defendant. *Sparling v. Todd*, 27 *Ohio* 521; *A. & E. Enc. of Law* (2d Edit.), Vol. 25, p. 770, Title, *Sheriff's Sales*.

And, as the Vice-Chancellor says in the opinion in this case, "What right in equity ought to be recognized in any creditor to compel his debtor to make a conveyance of property for the payment of his debt, while he (the creditor) warns all persons not to buy, by declaring that the property offered to be conveyed does not belong to the debtor, but belongs to him."

3. Because a plaintiff cannot cause property to be sold for his benefit and afterwards claim that the title was vested in himself. If he does not want the property sold he should not cause it to be levied upon.

"If one receives the purchase money for land sold he affirms the sale, and he cannot claim against it, whether it was void or voidable."

Maple v. Kussert, 53 *Penn. State* 348; *Penn v. Husig*, 19 *Ill.* 295; *Duff v. Wynkoop*, 74 *Pa. St.* 300; *Parleton v. Kennedy*, 21 *La. Ann.* 300; *Rorer on Judicial Sales* (2d Edit.), Sect. 462.

In the present case by levying upon the land, without qualification, the entire title or estate in fee simple was levied upon. No attempt was made to levy upon anything else. *Carrington v. Richardson*, 79 Ala. 101; *Hanna v. Steele*, 84 Ala. 305; *Laughlan v. Shields*, 12 Pa. St. 283; *Sheppard v. Simpson*, 1 Du. (Law.) 237.

III.

It is claimed that the preliminary injunction was properly allowed upon two grounds:

1. When a sale has been improperly or fraudulently conducted, it may be set aside by a court of equity, upon the ground that the process of the court of law has been improperly used. *Johnson v. Garret*, 1 C. E. G. 31; *Bellows v. Wilson*, 2 Stew. 124; *Herbert v. Herbert*, 49 N. J. Eq. 565.

And in like manner a proposed wrongful sale may be restrained before the sale has taken place. *Colt v. Cornwall*, 2 Root 109; *Green v. Harkell*, 5 R. I. 447.

A party is not compelled to wait until the injury has been completed.

2. A preliminary injunction will be granted to prevent an alienation of real estate, *pendente lite*. *Story's Equity Juris.* (12 Edit.) Sect. 908, title "Injunctions"; *Havens v. Thompson*, 8 C. E. G. 321.

In the case of *Havens v. Thompson*, *supra*, which was a suit to quiet title, the court said: "In the meantime, as a sale under the attachment, with this question unsettled, cannot be fairly had, and may occasion a great sacrifice, and as a delay cannot be of serious injury to the defendants, I will, in the exercise of the discretion incumbent on the court in such cases, retain the injunction until the hearing."

And in the present case, on account of the claims of adverse title that have been made, the property of the

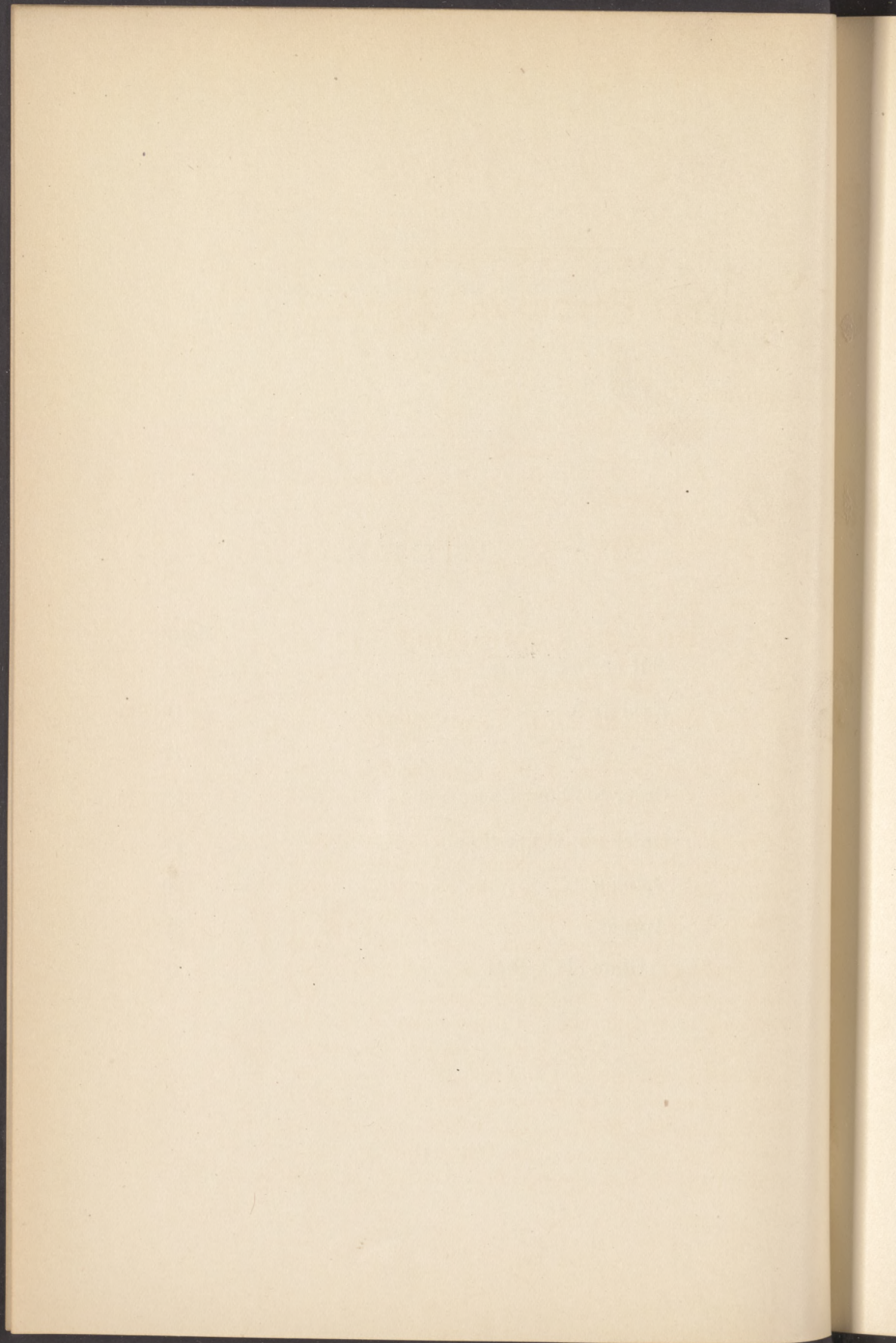
complainant cannot be sold for anything like its value until the question of title has been settled.

It is therefore respectfully submitted that the order appealed from should be affirmed.

EPHRAIM CUTTER,
Of Counsel with Respondent.

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NEW JERSEY
Court of Errors and Appeals.

BETWEEN

MICHAEL BRADY,
Respondent,

and

CARTERET REALTY COMPANY,
Appellant.

10

*On Appeal from
Chancery.*

BILL OF COMPLAINT.

20

(Filed December 8, 1903.)

IN CHANCERY OF NEW JERSEY.

*To His Honor William J. Magie, Chancellor of the
State of New Jersey:*

Complaining, show unto your Honor, your orator,
Michael Brady, of the township of Woodbridge, in
the County of Middlesex, and State of New Jersey,
that on or about the first day of April, eighteen 30
hundred and eighty-one, your orator entered into
the possession, as owner, of the following described
tract or parcel of land and premises, situate in the
township of Woodbridge, in the County of Middle-
sex and State of New Jersey, containing eleven
acres and seven hundred and twenty-one one thous-
andths of an acre, beginning on the easterly side of
the Blazing Star Road, at the most northerly cor-
ner of land now owned by the Carteret Realty Com-
pany; from thence running along the line of land 40

of the said Carteret Realty Company south fifty-nine degrees and thirty-seven minutes east seven hundred and thirty-seven feet and sixty-two one hundredths of a foot to a point in line of lands now in possession of one Krothie; thence along the line of said Krothie's land and land of William C. Merrill, north thirty-two degrees and forty-eight minutes east
 10 four hundred and eighty-nine feet and thirty-four one hundredths of a foot to the southerly side of Rahway avenue; thence along the southerly line of Rahway avenue north fifty-nine degrees and seventeen minutes west twenty feet and thirty-one hundredths of a foot; thence still along the said southerly line of said Rahway avenue north forty-nine degrees and fifteen minutes west fifty feet; thence still along said southerly side of said avenue north forty-four degrees and thirty-seven minutes
 20 west nine hundred and thirty-nine feet and forty-one one hundredths of a foot to the intersection of said southerly side of said avenue with the easterly side of Blazing Star Road; thence along said easterly side of Blazing Star Road south thirteen degrees and fifty-seven minutes west seven hundred and seventy-two and seventy-four one hundredths feet to the place of beginning; and that since the said first day of April, eighteen hundred and eighty-one, or about that date, your orator has
 30 been in the full, exclusive, open, actual and peaceable possession thereof, and has cultivated the same and kept it enclosed by fences and has paid the taxes thereon; that he is still in the peaceable possession thereof, and that since entering into the possession of said lands as aforesaid, he has always claimed and does now claim to be the sole owner thereof.

And your orator further shows, that some time in the year eighteen hundred and eighty, one Jabez
 40 R. Parsons told your orator that if your orator

would show a certain farm belonging to said Jabez R. Parsons and his brother, Charles H. Parsons, to people whom said Jabez R. Parsons sent to look at it, and would do the best he could in trying to sell it, and in praising it up, they, said Jabez R. Parsons and his said brother, would give the tract of land above mentioned and described, to your orator, in case of the sale of said farm; that said Jabez R. 10 Parsons also said that he and his brother had no title to the said tract above mentioned and described, and that their title was bad, but that said tract had been used by them in connection with the said farm, and was in their possession, and that in case of the sale of said farm, they would give the said tract to your orator for his trouble, and that if they attempted to sell it, the title being bad, it might injure the sale of the said farm, to which the title was good; that the said farm was 20 located adjoining the said tract, the two being separated by the public road; that in November, 1880, said Jabez R. Parsons and his said brother did make sale of the farm above mentioned, as your orator was informed, and accordingly on or about the first day of April, eighteen hundred and eighty-one, your orator took possession of the said tract of land above mentioned and described, as owner as aforesaid.

And your orator further shows, that he showed 30 the said farm to a number of persons whom said Jabez R. Parsons sent to Carteret to look at it, and did the best he could in trying to sell it and in praising it up, in accordance with the aforesaid offer of said Parsons, to which your orator assented and agreed, and that it was largely through the efforts of your orator that the said farm was sold, and that at the time he entered into possession of said tract of land as aforesaid, he believed and still believes, he had a right to do so, and the said Jabez 40

R. Parsons and his said brother were bound in law as well as in equity, to carry out the terms of the agreement made with them as aforesaid.

And your orator further shows, that after he entered into possession of said lands as aforesaid, neither the said Jabez R. Parsons or Charles H. Parsons, or any other person, made any demand
 10 for the possession of the said tract of land, or for the payment of rent therefor, until some time in October, nineteen hundred and two, when one Charles E. Heald met your orator, and said that he had bought the said tract, and wanted your orator to remove his crops therefrom, and that on or about the thirtieth day of December, nineteen hundred and two, the Carteret Realty Company caused a written notice to be served on your orator,
 20 demanding possession of said tract on the first day of April then next ensuing.

And your orator further shows, that by reason of his possession of the said tract of land in the manner aforesaid, and during all the time aforesaid, he now claims to have a good, perfect and indefeasible title to the said tract of land.

And your orator further shows, that the Carteret Realty Company, a corporation of this State and a defendant in this suit, denies and disputes your orator's title to the said tract of land, and claims to own the said tract of land or some part thereof, or some interest therein; and no suit or action of any kind whatever is pending to enforce or test the validity of such title or claim; and your orator charges that such claims so made by said company are utterly without foundation, unjust and vexatious.
 30

And your orator further shows, that on or about the eleventh day of May, nineteen hundred and
 40 three, said Carteret Realty Company began an ac-

tion of ejectment in the Supreme Court of this State, against your orator, for the recovery of the possession of the said tract of land, but at the September term following, of the Middlesex Circuit Court, a non-suit was directed to be entered in said action on the trial thereof, at said Circuit Court, and judgment of non-suit was accordingly entered in said action in the said Supreme Court, on the fourth 10 day of November last; that on or about the twenty-third day of September, nineteen hundred and three, said Carteret Realty Company obtained an assignment to itself from Augustus Zabriskie, executor of A. O. Zabriskie, deceased, of a certain judgment obtained against your orator in said Supreme Court, by Lansing Zabriskie and Augustus Zabriskie, executors of A. O. Zabriskie, surviving trustee, &c., of John Tonnelle, deceased, on the 20 fourteenth day of May, eighteen hundred and eighty-eight, for the sum of fifteen hundred dollars, real debt, and one hundred and eighty-three dollars and twenty-four cents, damages and costs, in an action upon contract, and on the same day caused an execution to be issued to the Sheriff of the County of Middlesex, on the said judgment, under which in the same day said Sheriff levied upon the said tract of land in the possession of your orator as aforesaid.

And your orator further shows, that the bond on 30 which said judgment was obtained, was made by your orator to Catherine Eckerson on the twentieth day of May, eighteen hundred and sixty-seven, in the penal sum of three thousand dollars, and was secured by a mortgage executed by your orator and his wife to said Catherine Eckerson on lands in the City of Bayonne, in the County of Hudson, to secure the payment of fifteen hundred dollars, with interest at seven per cent., which said mortgage is 40

registered in the office of the Register of the County of Hudson, in Book 44 of Mortgages, on page 394, and that said bond and mortgage were held by the said Abraham C. Zabriskie, executor, at the time of his death, and that after his death, they were delivered, as deponent is informed, by the executor of the said Abraham O. Zabriskie, to one Ida V. Van Nuyse, and are still held by her, having been delivered to her after the recovery of said judgment, but no written assignment thereof was made to her; that the whole of said judgment is due, and unpaid, with interest from the date thereof, but that said Carteret Realty Company paid therefor, as your orator is informed, only about the sum of three hundred dollars, to the said Ida V. Van Nuyse, and that she also executed an assignment of said judgment to said company, although no assignment thereof to her, is on record.

And your orator further shows, that by virtue of the said execution and levy, William Carman, Sheriff of the County of Middlesex, advertised the said tract of land to be sold by him at public vendue, at the Sheriff's office in the City of New Brunswick, on Wednesday, the twenty-fifth day of November, nineteen hundred and three, at the hour of two o'clock in the afternoon, and that on that day, on the application of your orator, said sale was adjourned by said Sheriff for two weeks, at the same hour and place.

And your orator further shows, that at the time and place at which said sale was advertised, Edward S. Savage, an attorney at law of the State, who is a director of said Carteret Realty Company, and the attorney acting for said company, in selling said lands under said execution, although his name does not appear as attorney of record, stated to the Sheriff and those present, in opposing an adjourn-

ment, that your orator had no title to said tract of land, and was not the owner thereof, and that an adjournment should not be granted because his interest in said tract by possession was not worth anything, and that the said Edward S. Savage has stated the same thing to other persons, and has stated it in a letter written to said sheriff, and has also stated to your orator that he intends to give 10 notice of the same thing on the day of sale of said lands under said execution, and that no one will give anything for the said tract of land at such sale; and your orator shows that the object of said Carteret Realty Company in advertising the said tract for sale under said execution, is not to collect the money due thereon, but to obtain possession of said tract for a small amount, instead of bringing an action at law to prove its right, if any, to said tract, and that said company through its at- 20 torney and agents is endeavoring to deter all persons from bidding on or buying the same at said sale.

And your orator further shows, that said tract of land is located near the growing village of Carteret, and which was formerly valuable only for farming land, is now valuable for building purposes, and the sale of lots therefrom, and is worth, as your orator is informed and believes, one thousand dollars an acre, and would produce much more 30 than sufficient to satisfy the said execution at a fair sale thereof, but on account of the false statements made by said company through its agents and attorney, it cannot now be sold under said execution without great loss and injury to your orator, and that its sale should not be permitted by this Court, until it shall be determined by this Court whether your orator is not entitled to the ownership and possession thereof, or until it has been es- 40

tablished by an action at law whether or not the said company has any right or title thereto.

And your orator further shows, that said Carteret Realty Company claims in some way to have purchased the interest of said Jabez R. Parsons and Charles H. Parsons in said tract of land, but your
 10 orator charges that any such purchase, if made, was made with full knowledge and notice of your orator's claim of title to said lands, and that if the said Parsons ever had any title thereto, the same has been lost by the adverse possession thereof by your orator for over twenty years; and your orator further shows that he is informed that said company and its officers well know that your orator's title to said land is good, and that the above mentioned
 20 statements are made as aforesaid by its agents maliciously, well knowing the same to be false, and for the purpose of injuring your orator.

And your orator further shows, that by reason of the said claims and statements, your orator's property in said lands is greatly affected, and the same cannot be sold as they otherwise could, and that your orator has been unable to borrow money thereon to pay the said judgment.

And your orator further shows, that he has
 30 applied to said company to relieve and relinquish their said claim, or to bring in some Court of law a suit which would test the validity thereof, and the said company refused to do either, and he has also asked said company to cease interfering with the said sale and from making statements calculated to injure the sale of said lands, but it has refused to comply with such request. And your orator hoped that said defendant would have complied with such reasonable request, as in justice
 40 and equity it ought to have done.

In tender consideration whereof, and for as much as your orator is relievable only in a Court of Equity, where matters of this sort are properly and according to the statutes of this State in such case made and provided, cognizable and relievable.

To the end, therefore, that the said the Carteret Realty Company, and William Carman, Sheriff of 10
the County of Middlesex, and their confederates when discovered, may, but without oath, to the best of their respective knowledge, information and belief, full, true, direct and perfect answer make, to all and singular the matters aforesaid; and more particularly that they, and every of them, may, in manner aforesaid, answer and set forth specifically what title or claim to said tract of land above described, or any part thereof, or any interest therein, 20
they, or either of them, make or claim, and to what part or what interest, and further, how and by what instrument such title or claim is derived, or was created; and that by the determination and final decree of this Court, the rights of all the parties to this suit in and to the said tract of land, and every part thereof, may be fixed and settled; and that your orator may be decreed to have a perfect title thereto, and the defendants to have no estate, right or interest in said lands, or any part thereof, 30
and that their claims to the same are unjust, vexatious and void; and that your orator may be permitted to pay and satisfy the said judgment, by paying to said company the amount it paid therefor, with interest and costs, and then only when the said bond and mortgage are cancelled and given up; or that the sale of said lands under said execution may be stayed until by the determination of this Court the rights of all the parties to this suit in and to the said tract of land are fixed and 40
settled; and that the said company and its agents

may be forbidden and enjoined from interfering with the said sale by circulating and making the aforesaid statements derogatory to your orator's title to said tract of land, in case your orator is found to have a perfect title thereto, or that it may be permanently enjoined from causing any sale under the said execution; and that your orator may
 10 have such other or further relief in the premises as the nature of the case may require, and as he shall be entitled to, pursuant to the statutes in such case made and provided;

May it please your Honor, the premises considered, to grant unto your orator, not only the State's writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said Carteret Realty Company, and William Carman, Sheriff of the County of Middlesex, restraining
 20 ing them, and each of them, from selling or causing to be sold the said tract of land above described, until the final hearing and determination of this cause, and the further order of this Court, but also the State's writ of subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said Carteret Realty Company, and William Carman, Sheriff of the County of Middlesex, commanding them and each of them, at a certain day and under a certain penalty therein to be
 30 specified, personally to be and appear before your Honor in this Honorable Court, then and there, full, true and perfect answer to make to all and singular the premises, and further to stand to, abide by and perform such order, direction and decree as to your Honor shall seem meet, and as shall be agreeable to equity and good conscience.

And your orator will every pray, &c.

WILLARD P. VOORHEES,
 Sol'r and of Counsel with Complainant.

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

MICHAEL BRADY, of full age, being duly sworn, on his oath saith, that he is the complainant in the above bill of complaint mentioned, and that the matters and things therein contained are true of his own knowledge, except as to the matters that are therein stated to be on his information or belief, and as to those matters he believes it to be true; that sometime in the year eighteen hundred and eighty, Jabez R. Parsons stated to this deponent that if he would show a certain farm belonging to said Parsons and his brother, Charles H. Parsons, to a person whom the said Jabez R. Parsons should send to look at it, and would do the best he could in trying to sell it, and in praising it up, they, the said Jabez R. Parsons and his said brother would give the tract of land described in said bill to this deponent, in case of the sale of said farm; that said Jabez R. Parsons also said that he and his brother had no title to the said tract above mentioned, and that their title was bad, but that said tract had been owned by them in connection with the said farm, and was in their possession, and that in case of the sale of said farm, they would give the said tract to deponent for his trouble, and that if they attempted to sell it, the title being bad, it might injure the sale of the said farm, to which this title was good; that deponent accordingly showed the said farm to a number of persons sent to Carteret by said Parsons to look at it, and did the best he could in trying to sell it and in praising it up in accordance with the aforesaid offer of said Parsons, to which this deponent assented and agreed; that in November, eighteen hundred and eighty, said Jabez R. Parsons and his said brother did make sale of the said farm as this deponent was informed,

and accordingly, on or about the first day of April, eighteen hundred and eighty-one, this deponent took possession of the said tract of land as owner, believing that he had a right to do so and has since been in the full, exclusive, open, actual, adverse, continuous and peaceable possession thereof, claiming to be the sole owner thereof; that after he entered into
10 possession of said lands as aforesaid, neither the said Jabez R. Parsons, or Charles H. Parsons, or any person whatever, made any demand for the possession of said tract, or for the payment of rent therefor, until sometime in October, nineteen hundred and two, when one Charles E. Heald met deponent on the public road, and said that he had bought the said tract, and wanted this deponent to remove his crops therefrom, and that on about the thirtieth day of December following, the Car-
20 teret Realty Company caused a written notice to be served on this deponent, demanding possession of said tract on the first day of April then next ensuing; that said company have since continued to deny and dispute deponent's title thereto, and claims to own the said tract, or some interest therein; that on or about the eleventh day of May, nineteen hundred and three, said company began an action of ejectment in the Supreme Court for the recovery of the possession of the said tract of land, but that
30 judgment of non-suit has been entered in said action as stated in said bill, and that no suit or action of any kind whatever is now pending to enforce or test the validity of the claim or title of said company to said tract of land; that said Carteret Realty Company have purchased a certain judgment as stated in said bill, and have caused the said tract of land to be advertised for sale by the Sheriff of Middlesex County, under an execution issued on said judgment, as stated in said bill; that the bond
40 on which said judgment was obtained was secured

by the mortgage in said bill mentioned, and the said bond and mortgage are still held by Ida V. Van Nuyse, having been delivered to her after the death of Abraham O. Zabriskie, executor of John Tonnelle, by his executor, and after the recovery of said judgment, as deponent was informed by Augustus Zabriskie, Esquire, by whom the said judgment was assigned to said company, as one of the 10 executors of said Abraham O. Zabriskie, deceased; that deponent was also informed by said Augustus Zabriskie, that said company paid for an assignment of said judgment to said Ida V. Nuyse, about the sum of three hundred dollars; that the whole amount of said judgment is unpaid, with interest, no part thereof having been paid or satisfied; that on Wednesday, the twenty-fifth day of November, 1903, the sale under said execution was adjourned by said Sheriff for two weeks, as stated in said bill; 20 that at the Sheriff's office in New Brunswick, on the day on which said tract was advertised for sale by said Sheriff, Edward S. Savage, an attorney at law of this State, who is a Director of the Carteret Realty Company, and the attorney acting for said company in selling said lands, under said execution, although his name does not appear as attorney of record, stated to the Sheriff and those present, in opposing the granting of an adjournment, that deponent had no title to said tract of land, and was 30 not the owner thereof, and that no adjournment should be granted, because his interest in said tract by adverse possession was not worth anything, and that the Carteret Realty Company was the owner of said tract; that on the fourth day of December, instant, deponent had an interview with said Edward S. Savage, at his office in the city of New York; that deponent's attorney, Ephraim Cutter, was also present at said interview; that at the said interview said Savage stated to deponent and his 40

said attorney, that the object of said company in taking an assignment of said judgment was to obtain possession of the said tract of land, and that the officers of said company thought that it would be easier to obtain possession by a sale under execution issued on said judgment than by bringing a new action of ejectment, and that they took such
10 assignment after the non-suit had been granted in the action of ejectment at the Middlesex Circuit; that at said interview said Savage stated that he intended on the day to which the sale of said tract had been adjourned, to again announce that deponent had no title whatever to said tract, and did not own it, but was a mere tenant, and that the Carteret Realty Company was the true owner of said tract, and when asked whether he had said to one Slobodien, of Carteret, that deponent had no
20 title to said tract, did not deny that he had so stated, and said that he had informed various persons of the same thing, and when told that Mr. Zabriskie had said that said company gave about three hundred dollars for said judgment, said Savage did not deny such was the case; that in a letter to the Sheriff, dated November fifth, nineteen hundred and three, a copy of which is hereto annexed, said Savage also alleges deponent has no interest in the land advertised and that unless the property
30 was sold on the day advertised, it would compel the bringing of an action of ejectment; that at the said interview said Savage also said that he did not think any one would give very much for the sort of title this deponent had; that said tract of land is located near the growing village of Carteret, and has recently increased greatly in value, and which formerly was valuable only for farming purposes, it is now valuable for building sites, and the sale of lots therefrom, and is worth, as deponent has
40 been informed by good judges of real estate, one

thousand dollars an acre, if not more; that deponent is acquainted with the value of land at Carteret, and believes the said tract to be worth the sum above mentioned, and that it would produce much more than sufficient to satisfy the said execution, at a fair sale thereof; that on account of the statements made as aforesaid by said company, through its agents and attorney, as aforesaid, said tract in 10 the judgment of deponent cannot now be sold under said execution without great loss and injury to this deponent, and that owing to the false and slanderous statements that have been circulated as stated in said bill, the value of the title of this deponent to said tract has been greatly depreciated, and that it cannot be sold at anything like its true value, until the title of this deponent has been shown to be perfect, either by the decree of this Court or by the the judgment of a Court of 20 law; that after deponent entered into possession of said tract, on or about the first day of April, eighteen hundred and eighty-one, down to the present time, he cultivated the land and raised crops thereon, and kept it enclosed by fences, and paid the taxes thereon, and that his possession has been continuous and adverse, and that he has also erected a barn thereon; that because of the said claim of said company, and the false statements circulated as aforesaid, deponent is unable to sell lots out of the said 30 tract, or to borrow money thereon to pay the said judgment.

MICHAEL BRADY.

Sworn and subscribed the 8th }
 day of December, A. D. }
 1903, before me, }

FREDERICK E. BAKER,

Notary Public of the State of New Jersey.

A.

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

EPHRAIM CUTTER, of full age, being duly sworn on his oath saith, that on the twenty-fifth day of November last, deponent was present at the Sheriff's office in New Brunswick, when the sale of certain lands of Michael Brady was adjourned by the Sheriff; that deponent heard Edward S. Savage state to the Sheriff and then present in ^{deponent's} approving the granting of an adjournment, that said Brady had not title to the lands advertised for sale, and was not the owner thereof, and that the interest of said Brady in said lands was only by possession, and was not worth anything, and that the Carteret Realty Company was the true owner of said lands; that on the fourth day of December instant, deponent was present at an interview in the office of said Edward S. Savage in the city of New York, between said Savage and said Brady and deponent; that at said interview said Savage stated to said Brady and deponent that the object of said company in taking an assignment of said judgment and advertising said lands for sale, was to obtain possession of said lands, and that the directors of said company thought that it would be easier to obtain possession by a sale under execution on said judgment, than by bringing a new action of ejectment, and that they took such assignment after the non-suit had been granted in this action of ejectment at the Middlesex Circuit; that at said interview said Savage stated that he intended on the day to which the sale of said tract had been adjourned, to again announce that deponent had no title whatever to said tract, and did not own it, but was a mere tenant,

and to state that the Carteret Realty Company was the true owner thereof.

EPHRAIM CUTTER.

Sworn and subscribed the 8th }
day of December, A. D. 1903, }
before me,

FREDERICK E. BAKER,
Notary Public of the State of New Jersey. 10

B.

EDWARD S. SAVAGE,

Counselor-at-Law,

31 Nassau St., New York.

20

Nov. 5, 1903.

WILLIAM CARMAN, Esq.,

Sheriff of Middlesex County,

New Brunswick, N. J.

DEAR SIR:

The execution which you hold against Michael Brady, under which you have advertised certain real estate for sale, I want to ask you as a special favor to me, that under no circumstances you will grant an adjournment of that sale. 30

In the first place Brady has no interest in the property. We are the owners of that property by virtue of a conveyance, having bought and paid for it, and Brady is holding possession as a squatter. The land is vacant land and there are no crops on it, and there is no reason why he should have the courtesy of an extension, and there is every reason why no extension should be made. 40

I write you this personally, because I know that you will treat it confidentially. Unless the property is sold on this day, it will necessitate us bringing an action of ejectment, and we want to avoid that if possible. I will be present on the sale day and I will rely upon your friendship to see that the sale takes place, as advertised.

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Yours very truly,

E. S. SAVAGE.

ORDER TO SHOW CAUSE.

(Filed December 8, 1903.)

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Upon reading and filing the bill and affidavits thereto annexed in this cause, it is, on this eighth day of December, nineteen hundred and three, on motion of Willard P. Voorhees, of counsel with the complainant, ordered, that the defendants, the Carteret Realty Company and William Carman, Sheriff, do show cause before the Chancellor, at the Chancery Chambers in Jersey City, on Monday, the twenty-first day of December, instant, at the hour of ten o'clock in the forenoon, why an injunction should not issue, according to the prayer of the said bill.

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And it is further ordered, that in the meantime and until the further order of this Court, the defendants aforesaid, the Carteret Realty Company, and William Carman, Sheriff of Middlesex County, do desist and refrain from making sale of the premises mentioned in the bill under the writ of execution, in said bill mentioned, until the further order of this Court; and that a copy of said bill and affidavits, which need not be certified, be served upon
40 said defendants within two days from the date hereof.

Service on said Carteret Realty Company may be made on its President, or in his absence, upon any director.

W. J. MAGIE,
C.

Respectfully advised,

EUGENE STEVENSON,

V. C.

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ORDER FOR INJUNCTION.

(Filed March 30, 1904.)

The order to show cause heretofore on the eighth day of December, in the year nineteen hundred and three, granted in the above case, why an injunction 20 should not issue according to the prayer of the bill, coming on to be heard upon the bill of complaint in this cause, and the affidavits and exhibit thereto annexed, and the matter having been argued before the Court by William P. Voorhees and Ephraim Cutter, of counsel with the complainant, and by Gilbert Collins, of counsel with the defendant, and the Court having duly considered the said bill and affidavits, and the argument of counsel.

It is, on this thirtieth day of March, nineteen 30 hundred and four, ordered, that an injunction do issue restraining the defendants, the Carteret Realty Company and William Carman, Sheriff of Middlesex County, their servants and agents, from making sale of, or offering for sale the premises mentioned in the said bill, under the writ of execution therein mentioned.

And it is further ordered, with the consent of the complainant, that such injunction may be dis- 40

solved on five days' notice unless the complainant forthwith prepares a feigned issue to try the title to said premises in the Supreme Court of this State, and causes the same to be placed upon the list for trial at the April Term, A. D. 1904, of the Middlesex Circuit.

10 And it is further ordered, that said injunction may be served upon the defendant, the Carteret Realty Company, by serving the same upon the President of said company, or, in his absence from the State, upon any of the directors of said company.

W. J. MAGIE,
C.

Respectfully advised.

EUGENE STEVENSON,

20

V. C.

OPINION.

Motion for injunction on bill and affidavits.

Mr. Ephraim Cutter and Mr. William P. Voorhees for the motion. Gilbert Collins contra.

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STEVENSON, V. C.

The bill is filed under the statute to quiet the title of the complainant against the adverse claims of the defendant, the Carteret Realty Company. Pending the litigation to determine the question of title an injunction is prayed for to restrain the defendant, the Sheriff of Middlesex County, from selling the land in dispute under an execution upon
40 a judgment owned by the Carteret Realty Company.

The only question on this motion is whether such an injunction should be issued.

The leading facts which must be gathered from the bill which is sworn to and the annexed affidavits, there being no answer or answering affidavits on behalf of the defendants, are as follows:

In April, 1881, the complainant took possession 10 as owner of the land in question, being a tract of eleven acres near the growing village of Carteret in Middlesex County. The tract is now worth about \$11,000. Prior to April, 1881, the tract had been occupied by one Parsons who, however admitted that his title was defective, or that he had no good title to the same. Parsons made a bargain with the complainant to give him the tract in consideration of certain services that complainant was to render with reference to the sale of other prop- 20 erty. Complainant rendered the services and took possession and ever since has remained in open, continuous possession, adverse to all other parties including Parsons, and his heirs and assigns.

The defendant, the Carteret Realty Company, recently "claims in some way to have purchased the interest" of Parsons, but the complainant charges that such purchase was with full knowledge of his claim of title. The first assertion of title on be- 30 half of the Carteret Realty Company or those under whom the said company makes its claim, was made after the expiration of twenty years from April, 1881, at a time when the complainant's title had become an absolute fee by adverse possession.

In May, 1903, the Carteret Realty Company commenced an action of ejectment in the Supreme Court against the complainant for the recovery of the possession of the land. In September, 1903, the Carteret Realty Company made default at the Middlesex 40

Circuit Court "and judgment of non-suit was entered in said action in said Supreme Court on the fourth day of November, last." On or about September 23, 1903, the Carteret Realty Company took an assignment of a judgment which had been recovered against the complainant May 14th, 1888, for \$1,500 debt, and \$183.24 damages and costs. On the same day (September 23d, 1903) the Carteret Realty Com-
 10 pany "caused an execution to be issued to the Sheriff of the County of Middlesex on the said judgment" under which a levy was made on the land and the same was advertised for sale. The complainant admits that "the whole of said judgment is due and unpaid with interest from the date thereof" but alleges that the Carteret Realty Com-
 pany paid only about \$300 for the same.

The Sheriff's sale came on according to the ad-
 20 vertisement on November 25th, 1903, and then on application of the complainant was adjourned, and subsequently was further stayed by order of this Court in this cause. At the above mentioned appointed time for the sale, the attorney of the Carteret Realty Company who was also a director thereof, "stated to the Sheriff and those present, in opposing an adjournment, that the complainant had no title to said tract of land and was not the owner thereof, and that an adjournment should
 30 not be granted because his interest in said tract by possession was not worth anything." This attorney and director has also declared to the complainant that he intended "to give notice of the same thing on the day of sale of said lands under said execution, and that no one would give anything for the said tract of land at such sale."

The complainant in his affidavit attached to the bill, states that the attorney of the Carteret Realty
 40 Company in opposing the adjournment stated that

the complainant "had no title to said tract of land and was not the owner thereof * * * and that the Carteret Realty Company was the owner of said tract." An affidavit of the complainant's attorney states that the attorney of the Carteret Realty Company above referred to stated in his presence "that the object of said company in taking an assignment of said judgment and advertising said lands for 10 sale, was to obtain possession of said lands, and that the directors of said company thought that it would be easier to obtain possession by a sale under execution on said judgment than by bringing a new action of ejectment, * * * and that he intended on the day to which the sale of said tract had been adjourned to again announce that the complainant had no title whatever to said tract and did not own it, but was a mere tenant, and to state that the Carteret Realty Company was the true owner 20 thereof."

Although there is some discrepancy in these various statements, the meaning, I think, is plain. The Carteret Realty Company proposes at the Sheriff's sale of this tract of land to deny that its execution debtor has any estate whatever in the land; that a purchaser therefor will get nothing of value by the Sheriff's deed, and that it, the Carteret Realty Company, in fact owns the very estate 30 which it has caused the Sheriff to offer for sale under the execution.

I do not think that under the allegations of the bill and affidavits it can be properly inferred that the Carteret Realty Company proposes to stand by and allow the Sheriff to offer for sale any legal interest or estate in this tract of land which it, the Carteret Realty Company, will not at such sale openly claim to own. In brief, this company proposes to have the Sheriff under this execution 40

against the complainant offer in form an estate of the complainant for sale, the existence of which it will deny, while it claims to be the owner of this very estate itself. The question is whether equity will permit a judgment creditor to hold this sort of an execution sale.

10 In order to deal intelligently with the situation I think we must regard the Carteret Realty Company as occupying precisely the same position as if it had recovered the judgment against the complainant in its own name and had issued the execution thereon. It owns the judgment; it is to receive all that may be collected upon it, and it has caused the writ of execution to be issued and the sale of this tract of land to be brought on thereunder.

20 In solving the problem which the case presents, the motives of the Carteret Realty Company and any hardship or misfortune from which the complainant may suffer, must be excluded from consideration, provided all that the Carteret Realty Company is doing is to enforce its legal and equitable rights, *Davis v. Flagg*, 35 N. J. Eq., 491.

30 It may also be conceded that if the original owners of the judgment who recovered the same for the purpose of collecting the amount thereof levied upon the estate of the complainant in this tract of land, he (the complainant) would not have been able to stay the execution sale by an injunction out of this Court upon the plea that by such stay his title could be made good and thus a more advantageous execution sale could be held, which would fully pay the judgment creditors' claim and leave a substantial balance for himself. It may be questioned whether any equitable principle has so far been evolved under which this Court could step in and stay such an execution sale in order that it
40 might be held subsequently to greater advantage.

The execution creditor generally has a right to sell what the execution debtor claims he holds. Delay may improve the value of the thing so held and levied upon, but on the contrary delay may destroy its value. The execution creditor often desires to take advantage of the willingness of some one to purchase perhaps a doubtful title before such doubt can be solved against such title. It is easy to imagine cases where an execution debtor whose lands are apparently incumbered with a large mortgage would be greatly the gainer if he could hold off the execution sale until the cloud of the encumbrance might be removed. By staying the sale, however, the result might be that the encumbrance would be declared valid and purchasers who would have paid something for the benefit of the execution creditor would be no longer willing to come forward as bidders.

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We must assume that the motives of the Carteret Realty Company in acquiring this judgment and forcing on this execution sale, although perhaps unfair and censurable in the forum of morals, and even oppressive toward the complainant, can not be inquired into unless it is threatening to violate some equitable right of the complainant by holding this Sheriff's sale under the conditions which have been described. *Davis v. Flagg (supra)*.

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It may be that such Sheriff's sale as the Carteret Realty Company proposes to hold, will not in fact be held for the purpose of accomplishing any of the objects which our law has in view in subjecting the lands of a man to public sale for the payment of his debts, but if this company has a legal and equitable right to bring on such a Sheriff's sale the only remedy of the execution debtor is to pay the amount which he admits is due and thus defeat the actual purpose of his pursuing creditor.

40

After some hesitation I have reached the conclusion, in the absence of any satisfactory authorities which have been cited, or which I have been able to find, that it is not equitable for any execution creditor to expose real or personal property for sale under his execution when at the time of sale he stands by and openly declares that
 10 nothing is being sold; that the execution debtor has no property in the thing offered for sale which can pass by the Sheriff's deed or bill of sale; that on the contrary, he, the execution creditor, holds and will hold after the Sheriff's sale, the entire property in the thing so offered for sale. This proposition may require modification and its application in this particular case is modified by the fact that the execution creditor has expressly avoided testing the two inconsistent titles, while the execution debtor
 20 is standing in Court with a bill filed for that purpose.

If the complainant's title as the result of this suit should prevail against the title of the Carteret Realty Company, then the entire judgment which the company now holds will be readily collected. If, however, the title of the Carteret Realty Company finally prevails, then it will have lost the opportunity of securing a possible payment or partial payment of its judgment by sale of something, the existence
 30 of which it denies at the sale, and the existence of which is subsequently and finally disproved.

In a sale of real estate the Sheriff acts as the involuntary agent of the execution debtor in effecting a conveyance of the debtor's land. The Sheriff's deed passes the same title which a deed of bargain and sale executed by the judgment debtor would pass.
3 Gen. Stat. p. 2980, § 7, Laws 1799, p. 386, § 12. (Pat. p. 371). 1 Nevill p 280 § 6. Hackensack Savgs. Bank v. Morse, 46 N. J. Eq. 161. S. C. (on appeal), 47 N. J. Eq. 279. Voorhis v. Westervelt, 43 N. J. Eq., 642, 646.
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The execution creditor by his proceedings at law forces this sort of an involuntary conveyance to be made by the debtor for his (the creditor's) benefit. What right in equity ought to be recognized in any creditor to compel his debtor to make a conveyance of property for the payment of his debt while he, the creditor, warns all persons not to buy by declaring that the property offered to be conveyed 10 does not belong to the debtor but belongs to him? Such conduct seems to exhibit an instance of blowing hot and cold which ought not to be tolerated if it can be safely avoided.

If the creditor in such case stands by and by his silence conceals his own hostile title, then under the familiar principle of law of estoppel his own title as well as that of the debtor may pass by the Sheriff's deed. It was urged in this case that there 20 was nothing inequitable in the announcement which the Carteret Realty Company made and proposes to make at the Sheriff's sale because if they concealed their title they would be estopped. This may be conceded to be entirely true. The inequity does not consist in the announcement but in the holding of a sale at which such an announcement is to be made.

This is a case I think where the relation of the party acquiring a judgment by assignment to the 30 property levied upon under it is such that in respect of the sale of that property the assignee is encumbered with a limitation which did not rest upon the assignor. There are many situations in which if a man sees fit to purchase a judgment he cannot enforce it against the judgment debtor or against particular property of the judgment debtor while the original holder of the judgment in respect of

those matters would have been entirely free to act as he saw fit.

10 A somewhat analogous situation where a judgment creditor is subject to equitable control in the sale of a particular piece of property for the satisfaction of his judgment is presented in the case of a holder of a bond and mortgage who recovers a judgment upon his bond and then undertakes to levy upon the mortgaged land and sell the same for the satisfaction of the judgment. The limitations upon the mortgagee in respect of the collection of his judgment by sale of the mortgaged premises have been the subject of considerable variance of judicial opinion. 3 *Pom. Eq.*, § 1204n. 2 *Jones on Mtgs.*, 4th ed., § 1223. *Lydecker v. Bogert*, 38 *N. J. Eq.*, 136. *Lanahan v. Lawton*, 50 *N. J. Eq.*, 276, 281.

20 There is a general consensus of opinion that this situation is one which calls for equitable control wherever the judgment debtor—the mortgagor and obligor of the bond—comes into a Court of Equity and asks for relief.

30 The case of *Havens vs. Thompson*, 23 *N. J. Eq.*, 321, is in some respects similar to the one now before this Court. The bill was filed under the statute to quiet title. Two of the defendants as creditors of a third defendant had attached the title of the latter in certain lands, which title the complainant sought by his bill to have declared void and an injunction restraining these attaching creditors from selling the disputed title pending the suit was applied for. The Chancellor retained the preliminary injunction until the final hearing, stating that the delay could not be “of serious injury to the defendant.” On final hearing, however, it
40 turned out that the interest which the attaching

creditors desired to sell was non-existent. 26 N. J. Eq., 383. The result was that the attaching creditors were deprived of the opportunity of finding a purchaser who might be willing to bid something for the possible interest of the defendant in attachment which subsequently was proved to be of no value. If the injunction was properly held in that case it seems to me that it should be held in this 10 case. The attaching creditors were not attempting to hold a sale of an interest in lands the existence of which they denied; they were seeking in good faith to sell the interest of the defendant in attachment—such interest as he apparently had or claimed to have, and they stood in a position to commend that interest. In the present case the execution creditor, the Carteret Realty Company, not only is not in a position to commend the sale, or at least let the thing which they 20 offer for sale commend itself while they remain silent, but they slander for their own protection, are obliged to slander, the very title which in form they are procuring to be sold for their benefit. To restrain such a sale, it seems to me, cannot deprive a creditor of any advantage which an honest man ought to claim. Such a sale would, I think, be a perversion of the objects of the statute which subjects land to the payment of the owner's debts, not because of any bad motives or ulterior purposes of 30 the judgment creditor in pursuing his strict legal rights, but because the sale itself is held under conditions which make it not a *bona fide* proceeding to convert the judgment debtor's property into as much money as possible for the payment of the judgment. It is hard to see how a creditor can in good faith, in accordance with the meaning and spirit of the statute force a sale of his debtor's property for the purpose of collecting his debt, when he proposes to endeavor to persuade all possible purchasers that 40

the sale is a mere form and that in fact nothing will be sold. Even if the Carteret Realty Company had not intentionally placed itself in the position which it occupies, it seems to me that the situation is one which justifies equitable intervention.

10 It is no answer to say that the remedy of the judgment debtor is to pay his debt; his complaint is that the legal proceedings for the collection of the debts are being conducted in violation of his equitable rights.

20 I have not inquired whether if this sale should go on the Carteret Realty Company in spite of their announcement would be estopped to set up a title in themselves inconsistent with the title which they caused to be sold under execution for their benefit. If the Carteret Realty Company are willing to bind themselves to have the whole estate in fee which they have caused to be levied upon as a thing belonging to the complainant sold at this Sheriff's sale, the complainant of course would have no well founded objection to make. The Carteret Realty Company do not offer to hold such a sale, nor is it reasonable to suppose that they would make such offer.

30 On the other hand the complainant is in a position to make and to be compelled to make every possible concession necessary to preserve the legal and equitable rights of the Carteret Realty Company. This suit now pending in this Court can be forced to a speedy trial. The Carteret Realty Company has the right under the statute to a trial by jury. The complainant may be compelled to consent to a reinstatement of the action of ejectment if the Carteret Realty Company so desire or may be obliged to accept service of process in a new action of ejectment and take all reasonable steps to speed
40 the trial of the same.

The terms under which the injunction restraining the Sheriff's sale will be issued may be determined upon the settlement of the order.

APPEAL.

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(Filed April 14, 1904).

The defendant, Carteret Realty Company, hereby appeals from the order of this Court, made on the thirtieth day of March, A. D. 1904, directing an injunction to issue according to the prayer of the bill of complaint in above stated cause, to the Court of Errors and Appeals in the last resort in all causes.

Dated April 13, 1904.

COLLINS & CORBIN,

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Solicitors of said Defendant.

GILBERT COLLINS,

Of Counsel.

I conceive there is good cause for appeal in the above stated cause.

GILBERT COLLINS,

Of Counsel with said Defendant.

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PETITION OF APPEAL.

(Filed April 14, 1904).

*To the Honorable, the Court of Errors and Appeals,
in the last resort in all causes:*

The petition of Carteret Realty Company, the appellant in the above cause, respectfully shows, 40

that your petitioner finds itself aggrieved, by an order made in the Court of Chancery by his Honor, William J. Magie, Chancellor of New Jersey, bearing date the thirtieth day of March, in the year of our Lord one thousand nine hundred and four, in a cause wherein the said Michael Brady was complainant, and the said Carteret Realty Company and
 10 another were defendants, in this respect, to wit, that the said order directs that an injunction do issue in said cause restraining the defendants therein, to wit, your petitioner and William Carman, Sheriff of Middlesex County, their servants and agents, from making sale of or offering for sale certain land and premises mentioned in the said bill under the writ of execution therein mentioned, with provision for dissolving such injunction on a certain contingency.

20 And your petitioner humbly appeals from that part of said order which orders such an injunction, upon the ground that the same is erroneous for that your petitioner is entitled by the law of the land to a sale of said land and premises under said execution.

And your petitioner therefore prays that the said order may be reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court
 30 shall seem meet.

COLLINS & CORBIN,
 Solicitors for and of Counsel with Appellant.

[COMMON ANSWER.]

