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Petition of Fred Goldberg

(Filed October 18, 1929)

In Chancery of New Jersey

69-532

Between:

JACOB FUCHS, et als,

Complainants,

AND

SYNDICATE REALTY COMPANY, et
als,

Defendants.

10

On Bill, etc.
Petition of
Fred
Goldberg.

To: HIS HONOR EDWIN ROBERT WALKER, 20
Chancellor of the State of New Jersey.

The Petition of FRED GOLDBERG, of the City
of Union City, in the County of Hudson and State
of New Jersey, respectfully shows:

1. On February 20, 1929, the Sheriff of Bergen
County struck off to petitioner at public vendue
at the Hackensack Court House, the mortgaged
lands and premises involved in this suit, pursuant
to a writ of fieri facias issued to him in this cause,
and petitioner thereupon became the purchaser of 30
said lands and premises, for the sum of Seventy-
nine Hundred Ninety (\$7,990.00) Dollars, peti-
tioner being the highest bidder therefor; and
thereupon petitioner paid to said Sheriff a deposit
of Eight Hundred (\$800.00) Dollars, and sub-
scribed the Sheriff's record of the sale.

2. The sale of said mortgaged lands and prem-
ises was one of a large number held on the same
day by said Sheriff, and several sales of other 40
lands and premises were made prior to the sale

Petition of Fred Goldberg

to petitioner. Before the first sale, the Sheriff read the general conditions of sale governing all sales to be held that day, and a copy of said conditions is hereunto annexed and made a part hereof, marked "Schedule 'A'." The said conditions
10 contain no reference to taxes and assessments. The printed advertisements of said sale contain no indication that the said premises were to be sold subject to taxes and assessments.

3. The only person, other than petitioner, present at said sale, who was interested in the lands and premises involved in this suit, was Henry Klughaupt, who was the mortgagee named in the mortgage upon which the foreclosure proceedings were based, and who petitioner is informed and
20 believes was the real party interested at the time of said sale. Before the premises were offered for sale, petitioner spoke with said Henry Klughaupt and asked him whether there were any taxes or assessments open against the mortgaged premises, and how much would be required to purchase the same. Said Henry Klughaupt replied that there were no taxes and assessments against the premises, and that the total amount which a purchaser would be required to pay to become the
30 owner of the premises would be the amount of the decree as stated by the Sheriff, and the costs of suit. He said that he had paid the taxes and assessments previously because he had pledged the mortgage with a bank in Passaic and the bank required the taxes and assessments to be paid. At said sale petitioner had no knowledge nor means of knowledge concerning any taxes or assessments which might be open against the premises, and relied entirely upon the statement of
40 said Henry Klughaupt that there were no taxes

Petition of Fred Goldberg

or assessments, and that petitioner would be required to pay only the amount of the decree as stated by the Sheriff, and the costs of suit, in order to become the owner of the premises.

4. When the said property was offered for sale, the said Henry Klughaupt made a bid covering the amount of the decree in foreclosure. The officer conducting the sale thereupon stated that this would not cover the costs of the sale and would involve a deficiency. Petitioner thereupon bid the sum of Seventy-nine Hundred Ninety (\$7,990.00) Dollars, which was sufficient to cover all the costs. 10

5. Thereupon, petitioner was required to sign the Sheriff's book containing the memorandum of sale, and signed a page therein upon which a great deal of printed matter appeared, which petitioner did not read because of the stress of business still remaining to be done by the Sheriff. 20

6. Petitioner arranged for a new mortgage in the sum of Seventy-five Hundred (\$7,500.00) Dollars, covering the mortgaged premises, and the mortgagee caused an examination of the title to be made by the Cliffside Park Title Guaranty & Trust Company. Several weeks after the sale, upon the coming in of the report of said company, petitioner was informed that a tax search revealed the existence of tax liens and assessments exceeding Fifteen Hundred (\$1,500.00) Dollars, and that many of the lots had been sold for taxes prior to the foreclosure sale. Annexed hereto and made a part hereof, marked "Schedule 'B'," is a list of the taxes and assessments which said report revealed open against said premises. Before petitioner received this report petitioner did not know of the taxes or assessments, and would not have bid the amount of Seventy-nine Hundred Ninety 30 40

Petition of Fred Goldberg

(\$7,990.00) Dollars had he known that he would also have been required to pay over Fifteen Hundred (\$1,500.00) Dollars in addition to the purchase price.

7. Petitioner therefore notified the said Henry Klughaupt of the existence of said taxes and assessments and asked him what would be done about the same in view of the representations of said Henry Klughaupt prior to the sale. Said Henry Klughaupt stated that he did not know what he could do about it. Thereupon petitioner informed said Henry Klughaupt that he would not pay the balance of the purchase price until the taxes and assessments were taken care of. Several times petitioner spoke to said Henry Klughaupt over the telephone and advised him that petitioner's mortgage had been granted and was ready to close, and that he was prepared to take the title if the taxes and assessments were disposed of. Said conversation took place during the end of March and the beginning of April.

8. Thereafter petitioner heard nothing from said Henry Klughaupt or from any other person in connection with the sale until on or about the twenty-fifth day of September, 1929, when petitioner was served with an Order to Show Cause why he should not be compelled to pay the deficiency, in the sum of Seventy-one Hundred Thirty-eight Dollars and Ten (\$7,138.10) Cents, arising on a re-sale of the premises. By the allegations of the petition annexed to said Order to Show Cause, petitioner learned that said lands and premises were re-advertised for sale, and on July 10, 1929, the Sheriff sold the same at public vendue to Albert Mark and Emily Mark, for the sum of One Hundred (\$100.00) Dollars, they being

Petition of Fred Goldberg

the highest bidders therefor, which sale was confirmed on August 1, 1929.

9. Prior to the service of said petition petitioner did not know, and never received notice that such re-sale would be held, and was totally unaware that the same was held. The price realized on said re-sale was grossly inadequate as, in petitioner's opinion the said premises are worth at least as much as petitioner's original bid of Seventy-nine Hundred Ninety (\$7,990.00) Dollars, and petitioner has always been willing, and still remains willing, to pay said sum for said premises. 10

10. Petitioner is also informed and believes that said Albert Mark and Emily Mark are not the real parties interested in said bid, but that the said Henry Klughaupt is the real party interested therein, and that said Henry Klughaupt has in fact acquired the beneficial interest in said property, and now seeks to acquire the full amount of the purchase price as well. 20

11. Petitioner is informed and believes, and therefore charges it to be true that subsequent to the sale to petitioner an order was made confirming said sale, and that no order was ever made vacating the said order of confirmation and authorizing the said re-sale, and that said re-sale was made to said Albert Mark and Emily Mark, without authority from this Court. 30

Petitioner therefore prays that an order may be made relieving petitioner from the bid of Seventy-nine Hundred Ninety (\$7,990.00) Dollars made by him at the sale held on February 20, 1929, and from any liability for deficiency as a result of said re-sale; or in the alternative, that an order may be made setting aside and vacating the said 40

Petition of Fred Goldberg

re-sale to said Albert Mark and Emily Mark, held on July 10, 1929, and the order confirming the same and authorizing and directing the Sheriff of Bergen County to convey the mortgaged premises to petitioner upon the performance by petitioner of the terms of his bid, and authorizing and directing that out of the proceeds of the sale all the taxes and assessments against the mortgaged premises be paid; or in the alternative, that an order may be made setting aside and vacating the said re-sale to said Albert Mark and Emily Mark, held on July 10, 1929, and the order confirming the same, and also setting aside and vacating the sale made to petitioner on February 20, 1929, and the order confirming the same, and authorizing and directing the Sheriff of Bergen County to re-advertise the mortgaged premises for sale, and to make re-sale of the same in accordance with the statute in such case made and provided.

And petitioner further prays that an order may be made, restraining and enjoining the said Jacob Fuchs and Mary Fuchs, the complainants herein, their solicitors and agents, from taking any further steps upon their application to hold petitioner for said deficiency until a determination has been made upon petitioner's application.

And your petitioner will ever pray, etc.

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors of Petitioner.

Verification

STATE OF NEW JERSEY }
 COUNTY OF HUDSON } ss:

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

1. I am the petitioner in the foregoing petition named. 10

2. On February 20, 1929, the Sheriff of Bergen County struck off to me at public vendue at the Hackensack Court House, the mortgaged lands and premises involved in this suit, pursuant to a writ of fieri facias issued to him in this cause, and I thereupon became the purchaser of said lands and premises, for the sum of Seventy-nine Hundred Ninety (\$7,990.00) Dollars, I being the highest bidder therefor; and thereupon I paid to said Sheriff a deposit of Eight Hundred (\$800.00) Dollars, and subscribed the Sheriff's record of the sale. 20

3. The sale of said mortgaged lands and premises was one of a large number held on the same day by said Sheriff, and several sales of other lands and premises were made prior to the sale to me. Before the first sale, the Sheriff read the general conditions of sale governing all sales to be held that day, and a copy of said conditions is annexed to the petition herein. The said conditions contain no reference to taxes and assessments, the printed advertisements of said sale contain no indication that the said premises were to be sold subject to taxes and assessments. 30

4. The only person other than myself present at said sale, who was interested in the lands and premises involved in this suit, was Henry Klughaupt, who was the mortgagee named in the mortgage upon which the foreclosure proceedings were 40

Verification

based, and who, I am informed and believe, was the real party interested at the time of said sale, as he had received all interest payments up to the sale. Before the premises were offered for sale, I spoke with said Henry Klughaupt and

10 asked him whether there were any taxes or assessments open against the mortgaged premises, and how much would be required to purchase the same. Said Henry Klughaupt replied that there were no taxes or assessments against the premises, and that the total amount which a purchaser would be required to pay to become the owner of the premises would be the amount of the decree as stated by the Sheriff, and the costs of suit. He

20 said that he had paid the taxes and assessments previously because he had pledged the mortgage with a bank in Passaic, and the bank required the taxes and assessments to be paid. At said sale I had no knowledge nor means of knowledge concerning any taxes or assessments which might be open against the premises and relied entirely upon the statement of said Henry Klughaupt that there were no taxes or assessments, and that I would be required to pay only the amount of the decree as stated by the Sheriff, and the costs of suit, in

30 order to become the owner of the premises.

5. When the said property was offered for sale, the said Henry Klughaupt made a bid covering the amount of the decree in foreclosure. The officer conducting the sale thereupon stated that this would not cover the costs of the sale and would involve a deficiency. I thereupon bid the sum of Seventy-nine Hundred Ninety (\$7,990.00) Dollars, which was sufficient to cover all the costs.

40 6. Thereupon I was required to sign the Sheriff's book containing a memorandum of sale, and

Verification

signed a page therein upon which a great deal of printed matter appeared which I did not read because of the stress of business still remaining to be done by the Sheriff.

7. I arranged for a new mortgage in the sum of Seventy-five Hundred (\$7,500.00) Dollars, covering the mortgaged premises, and the mortgagee caused an examination of the title to be made by the Cliffside Park Title Guaranty & Trust Company. Several weeks after the sale, upon the coming in of the report of said company, I was informed that a tax search revealed the existence of tax liens and assessments exceeding Fifteen Hundred (\$1,500.00) Dollars, and that many of the lots had been sold for taxes prior to the foreclosure sale. Annexed to the petition is a list of the taxes and assessments which said report revealed open against said premises. Before I received this report, I did not know of the taxes or assessments, and would not have bid the amount of Seventy-nine Hundred Ninety (\$7,990.00) Dollars for the said premises had I known that I would also have been required to pay over Fifteen Hundred (\$1,500.00) Dollars in addition to the purchase price.

8. I therefore notified the said Henry Klughaupt of the existence of said taxes and assessments, and asked him what would be done about the same in view of the representations of said Henry Klughaupt prior to the sale. Said Henry Klughaupt stated that he did not know what he could do about it. Thereupon I informed said Henry Klughaupt that I would not pay the balance of the purchase price until the taxes and assessments were taken care of. Several times I spoke to said Henry Klughaupt over the telephone and advised him that my mortgage had been

Verification

granted and was ready to close, and that I was ready to take the title if the taxes and assessments were disposed of. Said conversations took place during the end of March and the beginning of April.

10 9. Thereafter I heard nothing from said Henry Klughaupt or from any other person in connection with the sale until on or about the twenty-fifth day of September, 1929, when I was served with an Order to Show Cause why I should not be compelled to pay the deficiency, in the sum of Seventy-one Hundred Thirty-eight Dollars and Ten (20 (\$7,138.10) Cents, arising on a re-sale of the premises. By the allegations of the petition annexed to said Order to Show Cause I learned that said lands and premises were re-advertised for sale, and on July 10, 1929, the Sheriff sold the same at public vendue to Albert Mark and Emily Mark, for the sum of One Hundred (\$100.00) Dollars, they being the highest bidders therefor, which sale was confirmed on August 1, 1929.

30 10. Prior to the service of said petition I did not know, and never received any notice that such re-sale would be held, and was totally unaware that the same was held. The price realized on said re-sale was grossly inadequate, as in my opinion the said premises are worth at least as much as I originally bid for the same, the sum of Seventy-nine Hundred Ninety (\$7,990.00) Dollars, and I have always been willing, and still remain willing, to pay said sum for said premises.

40 11. I have also been informed and believe, that said Albert Mark and Emily Mark are not the real parties interested in said bid, but that the said Henry Klughaupt is the real party interested therein, and that said Henry Klughaupt has in

Verification

fact acquired the beneficial interest in said property and now seeks to acquire the full amount of the purchase price as well.

12. I am informed and believe, and therefore charge it to be true, that subsequent to the sale to me an order was made confirming said sale, 10
and that no order was ever made vacating the said order of confirmation and authorizing the said re-sale, and that said re-sale was made to said Albert Mark and Emily Mark, without authority from this Court.

FRED GOLDBERG.

Sworn and subscribed to before
me this 18th day of October, 1929.

ANNA KATTENHORN,
Notary Public of New Jersey. 20

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Schedule "A"—Annexed to Petition

CONDITIONS OF SALE

1. The highest bidder shall be the purchaser.
2. If any dispute arises as to who may be the highest bidder, the property will be resold.
- 10 3. The purchaser will pay ten per centum of the purchase money in addition to the Sheriff's Execution Fees at the close of the sale, and will sign an acknowledgment of the purchase.
4. The deed will be delivered at the Sheriff's office in two weeks, provided the Chancellor shall at that time have confirmed the sale, or as soon thereafter as said order of confirmation shall be received by the Sheriff, when the balance of the purchase money, with interest from the day of sale
- 20 will be required.
5. The purchaser will pay the cost of drawing and executing the deed.
6. If the purchaser fails to comply with any of the conditions of the sale, the property will be sold a second time, the former purchaser being held responsible for all the losses and expenses, but receiving no benefit from such sale.
7. This sale subject to postponement."

Schedule "B"—Annexed to Petition

Lots 9 to 25 inclusive block 251		
1928 tax—	\$103.19	
Interest	5.41	
<hr/>		
Total	\$108.60	
Sold to Paramount Investment Co. for 1925 and 1926 taxes.		
	10	
Lots 32 to 35 inclusive block 251		
1928 tax—	\$24.28	
Interest	1.31	
<hr/>		
Total	\$25.59	
Sold to Paramount Investment Co. for 1925 and 1926 taxes.		
Lots 7 to 15 inclusive block 75		
Total lien—	\$637.35	20
Tax lien 1922 and prior—	\$132.19	
Interest	55.14	
Tax lien (1923-1928)—	\$247.97	
Interest	52.57	
Sewer—	\$93.89	
Interest	52.64	
Certificate—	\$2.65	
Lots 6 to 15 inclusive block 76		
Total lien—	\$842.41	
Tax lien 1922 and prior—	\$171.81	30
Interest	71.82	
Taxes (1923-1928)—	\$336.74	
Interest	74.21	
Sewer—	\$118.54	
Interest	66.64	
Certificate—	\$2.65	

Note: Tax of 1929 not reported on.

Advertisement

IN CHANCERY OF NEW JERSEY

Between Jacob Fuchs and Mary Fuchs, complainants, and Fred Goldberg and Syndicate Realty Company, defendants. Fi.—fa. Returnable March 21, A. D. 1929.

10

ANNE KLUGHAUPT, Sol'r.

By virtue of the above stated writ to me directed and delivered, I have levied upon and will expose for sale at public vendue at the Sheriff's office in the City of Hackensack, on

Wednesday, February 6, 1929

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at 2 o'clock in the afternoon, all those certain tracts of lands and premises situate in the Borough of Lodi, in the County of Bergen and State of New Jersey.

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Being known and designated as Lots Nos. 7, 8, 9, 10, 11, 12, 13, 14, and 15, both inclusive in Block 75; Lots Nos. 6, 7, 8, 9, 10, 11, 12, 13, and 14, both inclusive in Block 76; Lots Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25, both inclusive, and 32, 33, 34, and 35, both inclusive in Block 251, on Map entitled, Lodi Park, Lodi, New Jersey, property of the New York Suburban Realty Co.

Together with all and singular the rights, liberties, privileges, hereditaments and appurtenances thereunto belonging or in anywise appertaining, be sold to pay and satisfy in the first place unto the said complainant, the sum of \$7,377.08, with lawful interest thereon.

HARRY C. HARPER,
Sheriff.

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Bar Eve Red-Lodi Bull
Jan 9-16-23-30—Fees \$15.96.

Order to Show Cause

(Filed October 18, 1929)

IN CHANCERY OF NEW JERSEY

Between:

JACOB FUCHS, et als,

Complainants,

AND

SYNDICATE REALTY COMPANY, et
als,*Defendants.*On Bill, Etc.
Order to
Show Cause.

10

This matter being opened to the Court by Platoff, Saperstein & Platoff, Esquires, solicitors of petitioner, Fred Goldberg, and the Court having read and considered the duly verified petition of said Fred Goldberg; and good cause appearing therefore:

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It is, on this 18th day of October, 1929, ORDERED that the complainants, Jacob Fuchs and Mary Fuchs, and Albert Mark and Emily Mark, purchasers of the mortgaged premises, show cause before this Court at Chancery Chambers in the City of Jersey City, on the 28th day of October, 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made relieving petitioner from the bid of Seventy-nine Hundred Ninety (\$7,990.00) Dollars made by him at the sale held on February 20, 1929, and from any liability for deficiency as a result of said re-sale; or in the alternative, why an order should not be made setting aside and vacating the said re-sale to said Albert Mark and

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Order to Show Cause

Emily Mark, held on July 10, 1929, and the order confirming the same and authorizing and directing the Sheriff of Bergen County to convey the mortgaged premises to petitioner upon the performance by petitioner of the terms of his bid, and authorizing and directing that out of the proceeds of the sale all the taxes and assessments against the mortgaged premises be paid; and in the alternative, why an order should not be made setting aside and vacating the said re-sale to said Albert Mark and Emily Mark, held on July 10, 1929, and the order confirming the same, and also setting aside and vacating the sale made to petitioner on February 20, 1929, and the order confirming the same, and authorizing and directing the Sheriff of Bergen County to re-advertise the same in accordance with the statute in such case made and provided.

It is further Ordered that a true copy of this Order and of said verified petition, which may be certified by the solicitors of the petitioner, be served upon said Jacob Fuchs and Mary Fuchs, or their solicitor, and upon said Albert Mark and Emily Mark, or their solicitor, within five days from the date of this Order.

Respectfully advised:

JOHN BENTLEY, V. C.

E. R. WALKER, C.

Answering Affidavits

IN CHANCERY OF NEW JERSEY

69-532

Between: JACOB FUCHS, et als, <div style="text-align: right;"><i>Complainants,</i></div> <div style="text-align: center;">AND</div> SYNDICATE REALTY COMPANY, et als, <div style="text-align: right;"><i>Defendants.</i></div>	}	On Bill, etc. On Petition Affidavit.	10
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STATE OF NEW JERSEY COUNTY OF BERGEN	}	ss:	20
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JOHN A. W. DONALDSON, being duly sworn according to law, upon his oath deposes and says that:

1. I am the under-sheriff of the County of Bergen and State of New Jersey.

2. On February 20th, 1929, by virtue of a writ of Fieri Facias directed and delivered to the Sheriff of Bergen County, I levied upon and exposed for sale at public vendue at the Sheriff's office in the City of Hackensack all those certain tracts of land and premises situate in the Borough of Lodi in the County of Bergen and State of New Jersey, as more particularly mentioned and described in the bill of complaint filed herein.

3. Prior to exposing said premises for sale at public vendue, I made a public announcement that the aforesaid sale would be made subject to all unpaid taxes and assessments.

Answering Affidavits

4. When the aforesaid premises were offered for sale, Fred Goldberg of Union City, New Jersey, bid the sum of \$7,990.00 and the premises were struck off to him, according to law; the said Fred Goldberg signing the Sheriff's book, containing a memorandum of sale which included that said sale was subject to all unpaid taxes and assessments, and paid a deposit of \$800.00.

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5. Thereafter said Fred Goldberg neglected and refused to complete his purchase, so that the aforesaid premises were re-advertised according to law, and on July 10th, 1929, I re-sold the premises at public vendue to Albert and Emily Mark for the sum of \$100.00.

JOHN A. W. DONALDSON.

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Sworn and subscribed to before me this 15th day of November, 1929.

WILLIAM H. BRABT,
Notary Public of New Jersey.

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Answering Affidavits

IN CHANCERY OF NEW JERSEY

Between:

JACOB FUCHS, et als,

Complainants,

AND

SYNDICATE REALTY COMPANY, et
als,*Defendants.*On Bill, etc.
On Petition
Affidavit.

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STATE OF NEW JERSEY }
COUNTY OF PASSAIC } ss:

HENRY KLUGHAUPT, being duly sworn according to law, upon his oath deposes and says that:

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1. I am in the real estate business in Passaic, New Jersey.

2. On February 20th, 1929, I was present at the Sheriff's sale at Hackensack, New Jersey.

3. I saw Fred Goldberg there, but had no conversation with him prior to the sale of the premises mentioned and described in the bill of complaint filed herein.

30

4. At no time did I ever inform said Fred Goldberg or represent to him that the taxes on the aforesaid premises were paid, but on the contrary, I had written to him and spoken to him over the telephone numerous times, asking him to clear the taxes on the aforesaid premises.

HENRY KLUGHAUPT.

Sworn and subscribed to before me
this 20th day of November, 1929.

40

E. C. VANNAMAN, JR.,
An Attorney at Law of N. J.

Answering Affidavits

IN CHANCERY OF NEW JERSEY

	Between:	}	
10	JACOB FUCHS, et als, <i>Complainants,</i>		On Bill, etc.
	AND		On Petition
	SYNDICATE REALTY COMPANY, et als,		Affidavit.
	<i>Defendants.</i>		

20 STATE OF NEW JERSEY } ss:
COUNTY OF PASSAIC }

ANNE KLUGHAUPT, being duly sworn according to law, upon her oath deposes and says that:

1. I am an attorney-at-law, practicing in Passaic, New Jersey.
2. I represent the complainants, Jacob and Mary Fuchs, and have had full charge of the proceedings herein instituted.
- 30 3. On numerous occasions, I have personally talked over the telephone to Fred Goldberg, requesting him to pay the accrued taxes on the premises mentioned and described in the bill of complaint filed herein.
- 40 4. On November 18th, 1927, and also on June 12th, 1928, I wrote to said Fred Goldberg, informing him of the unpaid taxes, and also requesting him to clear same, otherwise foreclosure proceedings would be instituted, thereby affecting his second mortgage.

Answering Affidavits

5. On September 13th, 1928, a bill of foreclosure was filed alleging defaults in taxes and interest payments.

6. Said Fred Goldberg was personally served with a subpoena and ticket, but he filed no answer or notice to have his mortgage reported. 10

7. At the Sheriff's sale held on February 20th, 1929, said Fred Goldberg was the highest bidder, and the aforementioned premises were struck off to him; whereupon he signed the Sheriff's book containing a memorandum of the sale and paid a deposit of \$800.00. 10

8. Thereafter, the said Sheriff prepared a deed to said Fred Goldberg and requested him to pay the balance of the purchase price, at which time the deed would be delivered. 20

9. The Sheriff's office informed me that Fred Goldberg neglected and refused to complete his purchase, and on March 22nd, 1929, April 3rd, 1929, and May 27, 1929, I wrote to Fred Goldberg that the property would be re-advertised for sale, unless he completed his purchase. I also spoke to him over the telephone requesting the same thing.

10. Prior to the second sale, I mailed to Fred Goldberg a copy of the Sheriff's advertisement stating that a sale of the same premises would be held on July 10th, 1929. 30

ANNE KLUGHAUPT.

Sworn and subscribed to before me
this 20th day of November, 1929.

ANNIE E. EWART,

Notary Public of New Jersey.

Answering Affidavits

IN CHANCERY OF NEW JERSEY

 Between:

10	JACOB FUCHS, et als, <i>Complainants,</i>	} On Bill, etc. On Petition Affidavit.
	AND	
	SYNDICATE REALTY COMPANY, et als, <i>Defendants.</i>	

20 STATE OF NEW JERSEY }
 COUNTY OF PASSAIC } ss:

EDWARD S. MERCER, being duly sworn according to law, upon his oath deposes and says that:

1. I am the president of the Edward S. Mercer Co., a New Jersey corporation, carrying on a real estate business at 655 Main Avenue, Passaic, N. J.

30 2. Said corporation was the former owner of the premises mentioned and described in the bill of complaint filed herein, and on June 20th, 1924, conveyed these premises by warranty deed.

3. Subsequently, Fred Goldberg became the owner of these premises, and at the closing of title, I gave him a check for \$750.00 on May 17th, 1927, which was the balance due on the adjustment for taxes and interest, so that he would pay the taxes and thereby clear the tax encumbrance in accordance with our warranty.

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Replying Affidavit of Fred Goldberg

4. Said Fred Goldberg deposited this check, but did not pay the taxes.

EDWARD S. MERCER,

Sworn and subscribed to before me this 18th day of November, 1929.

ANTHONY V. GROSS,
M. C. C. of N. J.

10

Replying Affidavit of Fred Goldberg

IN CHANCERY OF NEW JERSEY

69-532

Between:

JACOB FUCHS, et als,

Complainants,

AND

SYNDICATE REALTY COMPANY, et als,

Defendants.

On Bill, etc.
Replying
Affidavit.

20

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss:

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FRED GOLDBERG, being duly sworn according to law, upon his oath deposes and says:

1. I have read the affidavits filed by the complainants herein and my attention has been particularly called to the allegations of new matter therein contained.

2. With reference to the affidavit of the Under-Sheriff and of Henry Klughaupt, I heard no an-

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Replying Affidavit of Fred Goldberg

nouncement with reference to the taxes and assessments at the foreclosure sale. If such an announcement was made by the Under-Sheriff, my attention at the time was occupied with the conversation I was holding with Mr. Klughaupt.

10 During this conversation I particularly asked him about the taxes and assessments and he specifically stated to me that if I made a bid equivalent to the total amount of the decree, and the costs of suit, I would become the owner without being required to pay anything further. As I have stated in my original affidavit, Mr. Klughaupt told me that there were no taxes or assessments open against the mortgage premises. He emphasized the point by stating that he had pledged the

20 mortgage as collateral security for a loan with a Passaic bank, which had required the payment of taxes.

3. I was formerly the owner of the premises involved in this suit. I contracted to purchase two hundred seven (207) lots, including the premises in question, from Clara Abels and Max Abels, her husband, by contract dated February 17th, 1927. On May 17th, 1927, I received a deed

30 to said two hundred seven (207) lots from said Clara Abels and Max Abels, which was recorded in liber 1498 of Deeds for Bergen County, page 163. By the terms of the contract, I was to convey to Clara Abels, in exchange for said lots, certain premises in Union City and I was to pay two thousand (\$2,000.00) dollars to be applied toward adjustments. When the title was closed, the taxes and interest on the property I conveyed were adjusted, and the taxes and interest on the

40 property Mrs. Abels conveyed were adjusted, and it was found that there was a balance in my favor, for adjustments, which was allowed to me

Replying Affidavit of Fred Goldberg

on the purchase money mortgage which I took back.

4. I only owned the property a few months and then I sold the greater part of it in several parcels to Syndicate Realty Co., one of the defendants herein. I have no connection with said corporation. When I sold to Syndicate Realty Co., it assumed the payment of taxes. I received, at the closing of title, a blanket mortgage covering the premises in question, which include about thirty (30) lots, and other lots aggregating about one hundred seven (107) lots. Thereafter my sole connection with the premises in question was that it formed a part of this blanket mortgage. My recollection is that I had conveyed the premises in question within a few months after I had purchased them, and that in the early part of 1928 I no longer owned any of these lots. Any conversations which Mr. Klughaupt or his daughter may have had with me, regarding the taxes on the premises in question, were had during the year 1927, when I still owned the property. Immediately after I sold it to Syndicate Realty Co., Mr. Klughaupt was informed of the change of ownership and thereafter he had all his dealings with the corporation.

5. I do not recall ever receiving any letters from Ann Klughaupt regarding the taxes. In June, 1928, there was no occasion for her to write to me, as I had no longer any interest in the property, except as above stated. Although I was served with a subpoena and ticket in the foreclosure proceedings, I did not appear or answer and never saw the Bill of Complaint. After the foreclosure sale I never received any letters from Miss Ann Klughaupt and I never received a notice that the property was readvertised for sale.

Replying Affidavit of Fred Goldberg

I have had my office at the same address in Union City for several years past and any letters or notices, that were properly addressed, would have certainly come to my attention.

6. Regarding the affidavit of Edward S. Mercer, I do not recall receiving any check from him at the closing of title. I remember that he was one of the brokers who brought about the deal and received a part of the commission which I paid, amounting to about seven hundred and fifty (\$750.00) dollars. I did not know that said Edward S. Mercer was in any way connected with Clara Abels, the seller, and I do not remember any reason why he should have given anything back, for any purpose. Although I believe the amount of the taxes was allowed to me, at the closing as I have stated, I sold to Syndicate Realty Co., subject to taxes. From the beginning of the year 1928, until the foreclosure sale in February, 1929, I was completely out of touch with the situation and had no means of knowing whether the taxes and assessments were paid and, for this very reason, I spoke with Henry Klughaupt at the foreclosure sale about the same. Since preparing my original affidavit on this affidavit, I have definitely ascertained that Emily Mark is not the real party interested in the bid made at the second sale, but that she is employed in the office of Ann and Henry Klughaupt, and that the said Henry Klughaupt frequently purchases property through said Emily Mark.

FRED GOLDBERG.

Sworn and subscribed to before me this 25th day of November, 1929.

ANNA KATTENHORN,
Notary Public of N. J.

Order

(Filed Dec. 23, 1929)

IN CHANCERY OF NEW JERSEY

Between:

JACOB FUCHS, et als,

Complainants.

AND

SYNDICATE REALTY COMPANY, et
als,*Defendants.*On Bill, Etc.
Order.

This matter being opened to the Court by Platoff, Saperstein and Platoff, solicitors of the petitioner, Fred Goldberg, in the presence of Anne Klughaupt, Solicitor of the Complainants, Jacob Fuchs and Mary Fuchs,

And the said Fred Goldberg, having presented a petition for an order releasing him from the bid of \$7,990.00 made by him at a foreclosure sale of the premises described in the bill of complaint, held on February 20th, 1929, and from any liability for a deficiency, as a result of the re-sale of said premises to Albert Mark and Emily Mark on July 10th, 1929, or in the alternative, for an order setting aside and vacating the said re-sale and the order confirming the same, and authorizing and directing the Sheriff of Bergen County to convey the mortgaged premises to petitioner, upon the performance by petitioner, of the terms of his bid or for such other relief as may be just; and the Court having read and considered the said petition and affidavit thereunto annexed, and

Order

the affidavits presented on behalf of said complainants and said petitioners and good cause appearing therefor;

10 It is on this 23rd day of December, 1929, ORDERED that the re-sale of the premises, described in the bill of complaint herein to Albert Mark and Emily Mark, held on July 10th, 1929, and the order confirming the same dated August 1st, 1929, be and the same are hereby set aside, vacated and for nothing holden; and it is further ORDERED that the deed executed by said Sheriff, conveying the said premises to Albert Mark and Emily Mark, be and the same is hereby declared null, void, and of no effect, and the said
20 Albert Mark and Emily Mark are hereby ordered to surrender the same to said Sheriff for cancellation.

30 It is further ORDERED that the Sheriff of Bergen County, and he is hereby authorized and directed to convey the mortgaged premises to the petitioner, Fred Goldberg, upon the performance by said Fred Goldberg of the terms of the bid made by him on February 20th, 1929, and upon the payment by said Fred Goldberg of the balance of said bid, over and above the amount paid by him as deposit, together with all costs incurred by the complainants in the re-sale of these premises by the Sheriff of Bergen County to Albert and Emily Mark, together with all taxed costs and a counsel fee of \$100 to be included in said taxed costs.

Respectfully advised,

E. R. WALKER, C.

VIVIAN M. LEWIS, V. C.

40 A true copy.

FRED GARRETSON, Clerk.

Notice of Appeal

(Filed January 25, 1930)

IN CHANCERY OF NEW JERSEY

69-522

Between

JACOB FUCHS, et als,

Complainants,

vs.

SYNDICATE REALTY COMPANY, et
als,*Defendants.*

10

On Bill, Etc.
Notice of
Appeal

10

The petitioner, FRED GOLDBERG, hereby appeals to the Court of Errors and Appeals in the Last Resort in All Causes, from so much of the Order made by the Chancellor, on the advice of Vice Chancellor Vivian M. Lewis, in the above entitled cause, on the 23rd day of December, 1929, as directs that the Sheriff of Bergen County be authorized and directed to convey the mortgaged premises to petitioner, Fred Goldberg, upon the performance by him of the terms of the bid made by him on February 20, 1929, and upon the payment by him of the balance of said bid over and above the amount paid by him as deposit, together with all costs incurred by the complainants in the re-sale of the said premises by the Sheriff of Bergen County to Albert Mark and Emily Mark, together with all taxed costs and a counsel fee of one hundred dollars.

Dated January 23, 1930.

10

Petition of Appeal

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors for Petitioner, Fred Goldberg.
 DAVID SAPERSTEIN,
Of Counsel.

I conceive there is good cause for appeal in the
 10 above-entitled cause.

DAVID SAPERSTEIN,
Of Counsel for Petitioner, Fred Goldberg.

Petition of Appeal

(Filed Feb. 8, 1930)

NEW JERSEY COURT OF ERRORS AND
 APPEALS

20

Between:

JACOB FUCHS, et als,
Complainants-Appellees,

AND

SYNDICATE REALTY COMPANY, et
 als,

30

Defendants.

On Appeal
 from the
 Court of
 Chancery.
 Petition of
 Appeal of
 Appellant,
 Fred Goldberg

TO THE HONORABLE THE COURT OF
 ERRORS AND APPEALS IN THE LAST RE-
 SORT IN ALL CAUSES:

The petition of Fred Goldberg, the appellant
 in the above entitled cause, respectfully shows
 that:

1. Petitioner finds himself aggrieved by a
 40 Final Order made in the Court of Chancery by his
 Honor Edwin Robert Walker, Chancellor of the

Petition of Appeal

State of New Jersey, bearing date December 23, 1929, in a certain cause in said Court of Chancery, wherein the said Jacob Fuchs, et als, were complainants and Syndicate Realty Company, et als, were defendants, and appellant, Fred Goldberg, was a bidder at the foreclosure sale held in said cause, in this respect, to wit: That the said Order adjudges that the Sheriff of Bergen County be authorized and directed to convey the mortgaged premises to appellant, Fred Goldberg, upon the performance by him of the terms of the bid made by him on February 20, 1929, and upon the payment by him of the balance of said bid over and above the amount paid by him as deposit, together with all costs incurred by the complainants in the re-sale of said premises by the Sheriff of Bergen County to Albert Mark and Emily Mark, together with all taxed costs and a counsel fee of \$100, to complainants.

And appellant appeals from that part of the said Order of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous in that:

1. Appellant was entitled to be relieved from his bid upon the ground that the title to the mortgaged premises was subject to substantial defects or clouds which would render the same unmarketable and was subject to liens and incumbrances and no reasonable description of the estate or interest to be sold and of the defects in title and liens or incumbrances thereon, with the approximate amount of the said liens and incumbrances, was inserted in the notices and advertisements required by law.

2. The existence of outstanding tax titles covering the mortgaged premises of which appellant

Petition of Appeal

received no notice, was sufficient to relieve appellant from his bid.

10 3. Appellant was entitled to have the amount of the outstanding liens or incumbrances deducted from the amount of the bid made by him at said foreclosure sale.

4. The re-sale of said premises was improperly and unlawfully held and appellant was not chargeable with the costs thereof or with the taxed costs and counsel fee in the proceedings instituted by appellant.

20 Petitioner therefore prays that the said Order of the said Chancellor may be, in the particulars aforesaid reversed, set aside and for nothing holden and that appellant may have such other relief in the premises as to this Court shall seem proper.

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors for Appellant.
 DAVID SAPERSTEIN,
Of Counsel.

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Answer to Petition of Appeal

NEW JERSEY COURT OF
ERRORS AND APPEALS

<p>JACOB FUCHS, et als, <i>Complainants-Appellees,</i></p> <p style="text-align: center;">vs.</p> <p>SYNDICATE REALTY COMPANY, et als, <i>Defendants-Appellants.</i></p>	}	<p>On Appeal from the Court of Chancery. Answer to Petition of Appeal.</p>	10
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The Answer of Jacob Fuchs and Mary Fuchs, the above-named appellees, to the petition of appeal of Fred Goldberg, one of the defendants herein and the defendant-appellant, says: 20

1. The appellees, not admitting the truth of all or any of the matters as particularly set forth in the said petition of appeal of Fred Goldberg, one of the defendants-appellants, and for answer thereto, nevertheless admit that an order was made and entered on the 23rd day of December, 1929, in the Court of Chancery of the State of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said order, the appellees beg leave to refer thereto when the same shall be produced. 30

2. The appellees are advised and believe that the said order is agreeable to equity and good conscience; and pray that the same may be affirmed with costs to be taxed in favor of the appellees.

ANNE KLUGHAUPT,
Solicitor for Appellees. 40
JEROME ALPER,
Of Counsel.

New Jersey Court of Errors and Appeals

Between:

JACOB FUCHS, et als,
Complainants-Appellees,

and

SYNDICATE REALTY COMPANY,
Defendant,

and

FRED GOLDBERG,

Appellant.

On Appeal
from the
Court of
Chancery.

Brief for Appellant, Fred Goldberg

Statement of the Case

On February 20, 1929, the Sheriff of Bergen County struck off to the appellant herein at public vendue the lands and premises involved in this foreclosure suit, for the sum of Seventy-nine hundred ninety (\$7,990) Dollars, appellant being the highest bidder therefor, and thereupon appellant paid the said Sheriff a deposit of Eight hundred (\$800) Dollars.

Before the sale the Sheriff read the conditions of sale, a copy of which is annexed to the petition of appellant, marked "Schedule 'A,'" (State of Case, p. 12). The said conditions contain no indication that the premises were to be sold subject to taxes and assessment.

Prior to the sale the advertisements thereof had been published in the Bergen Evening Record, under the direction of the solicitor of complainants. The said advertisements contain no

notice that the premises were to be sold subject to taxes and assessments (State of Case, p. 14).

After the foreclosure sale, appellant arranged for a new mortgage covering the premises and the mortgagee caused an examination of the title to be made by a title company. From the title company's report, appellant learned that a tax search revealed the existence of tax liens and assessments against the property exceeding Fifteen hundred (\$1,500) Dollars, and further revealed that twenty-one of the thirty-nine lots involved in the sale had been previously sold to Paramount Investment Company to satisfy municipal taxes for the years 1925 and 1926. A list of said taxes, assessments and tax sales is annexed to the petition marked "Schedule 'B'" (State of Case, p. 13).

The only person other than appellant present at said foreclosure sale who was interested in the mortgaged lands and premises was one Henry Klughaupt, the mortgagee named in the mortgage upon which the foreclosure proceedings were based, who was the real party interested in the property at the time of said sale. Appellant's affidavits show that said Henry Klughaupt expressly represented to appellant, before the premises were offered for sale, that the same were free and clear of taxes and assessments and that all taxes and assessments had been paid when he, the said Klughaupt, had pledged the mortgage with a bank in Passaic, which bank had required the taxes and assessments to be paid. When appellant discovered the existence of the taxes and assessments, he informed the said Klughaupt that he would not pay the balance of the purchase price until the same were taken care of and that he

was ready to take the title as soon as it was clear of said liens. Thereafter, until September, 1929, the matter remained in status quo.

On September 25, 1929, appellant was served with an order of the Court of Chancery, procured by complainants, requiring him to show cause why he should not be compelled to pay a deficiency of Seventy-one hundred thirty-eight and 10/100 (\$7,138.10) Dollars, arising on a resale of the premises. By the allegations of the petition upon which said order to show cause was made, appellant ascertained that said lands and premises had been re-advertised for sale and that on July 10, 1929, the Sheriff had sold the same at public vendue to Albert Mark and Emily Mark for the sum of One hundred (\$100) Dollars, which sale was confirmed on August 19, 1929.

Appellant never received notice that the said resale was to be held and complainants procured no order vacating the order which had been entered confirming the original sale to appellants or authorizing the said resale, and the said resale was held without authority from the Court of Chancery. On October 18, 1929, appellant procured an order to show cause (State of Case, p. 15), why an order should not be made relieving him from the bid made by him at the sale held in February, 1929, and from any liability for deficiency as a result of the resale; or in the alternative, why an order should not be made setting aside and vacating said resale and the order confirming the same and directing the Sheriff of Bergen County to convey the mortgaged premises to appellant upon the performance by him of the terms of his bid and directing that out of the proceeds of the sale all the taxes and assessments

against the mortgaged premises be paid. Upon the return of said order to show cause both petitions were argued, and the court made an order denying the petition of complainants to hold appellant for the deficiency. Upon appellant's petition an order was made, dated December 23, 1929, vacating the resale to Albert Mark and Emily Mark and directing the Sheriff of Bergen County to convey the premises to appellant upon the performance by him of the terms of the bid made on February 20, 1929, and upon the payment by him of the balance of said bid, over and above the amount paid as deposit, together with all costs incurred by complainants on the resale to Albert and Emily Mark, together with all taxed costs and a counsel fee of \$100 to be included in said taxed costs (State of Case, pp. 27-28).

The present appeal is taken from so much of the last mentioned order as requires appellant to pay the balance of his bid without providing for payment of the outstanding liens, and requires him to pay all the costs of the resale and the taxed costs and counsel fee.

Grounds of Appeal

It is the contention of appellant that the order of the court below is erroneous in the respects indicated for the following reasons:

1. Appellant was entitled to be relieved from his bid upon the ground that the title to the mortgaged premises was subject to substantial defects or clouds, which would render the same unmarketable and was subject to liens and incumbrances, and no reasonable description of the estate or interest to be sold and of the defects in the title and liens or incumbrances thereon,

with the approximate amount of said liens and incumbrances, was inserted in the notices and advertisements, or in the conditions of sale.

2. The existence of outstanding tax titles covering the mortgaged premises, of which appellant received no notice, was sufficient to relieve appellant from his bid.

3. Appellant was entitled to have the amount of outstanding liens and incumbrances deducted from the amount of the bid made by him on said foreclosure sale.

4. The resale of said premises was improperly and unlawfully held and appellant was not chargeable with the costs thereof or with the taxed costs and counsel fee in the proceedings instituted by appellant.

Point I.

An undisclosed incumbrance entitles the purchaser at a foreclosure sale to be relieved from his bid unless the amount thereof is directed to be satisfied out of the proceeds of sale.

Section 35 of the Sale of Land Act, 4 C. S. 4686, provides as follows:

“Sec. 1. Any purchaser of real estate at any public sale * * * shall be entitled to be relieved from his bid if, before delivery of the deed, he shall satisfy the court by whose authority such sale was made, of the existence of any substantial defect in or cloud upon the title of the premises sold which would render said title unmarketable, or of the existence of any lien or incumbrance thereon, unless a reasonable

description of the estate or interest to be sold, and of the defects in title and liens or incumbrances thereon with the approximate amount of said liens and incumbrances, if any, be inserted in the notices and advertisements required by law, and in the conditions of sale; provided, however, that if the Court shall direct any lien or incumbrance not described, and which is due and payable, to be paid out of the proceeds of sale, the purchaser shall not then be relieved by reason of such lien or incumbrance (P. L. 1906, p. 269)."

The existence against the property of unpaid taxes, tax liens or deeds, constitutes such a defect in the title as to make it unmarketable (57 A. L. R. 1403), and the bidder is not required to accept a conveyance subject to undisclosed municipal liens unless the same are satisfied out of the proceeds of sale. *Craig vs. Smith*, 84 N. J. E. 593, *Collins vs. Kiederling*, 87 N. J. E. 12.

A description of the outstanding taxes, assessments and tax sales, with the approximate amount of the same, was contained neither in the conditions of sale nor in the advertisements required by law (State of Case, pp. 12 and 14). Nevertheless, the lower court refused to relieve appellant from his bid or to direct that the amount of these outstanding incumbrances be paid out of the proceeds of sale, and thereby increased the purchase price by upwards of Fifteen hundred (\$1,500) Dollars. The decision can be upheld only upon the theory that appellant actually had knowledge of the existence and amount of these incumbrances when he made his bid, de-

spite their omission from the advertisements and conditions of sale. *Oakley vs. Shaw*, 69 Atl. 462 (not officially reported).

Appellant contends: (1) that the facts presented to the lower court do not justify a finding that he had knowledge of the existence of these incumbrances; (2) that even if it could be inferred that he knew of the existence of taxes and assessments, he could not be charged with knowledge of their amount nor, (3) with knowledge that a considerable number of the lots had been sold for taxes.

Point II.

The proofs do not justify a finding that appellant had knowledge of the various incumbrances outstanding or of their amount, when he made his bid.

(1) Appellant's affidavit shows that prior to the making of his bid he was informed by Klughaupt, the original mortgagee, that the premises were free and clear of all taxes and assessments, and that Klughaupt, himself, had caused the same to be paid (State of Case, p. 8). The only credible evidence offered by complainants to establish knowledge on the part of appellant is the affidavit of the Sheriff that he made a public announcement that the sale would be subject to all unpaid taxes and assessments (State of Case, p. 17). Appellant replies that he heard no announcement by the Sheriff with reference to the taxes and assessments and that if such announcement was made, his attention at the time was occupied with the conversation he was holding with Mr. Klughaupt, during which Klughaupt expressly represented that the taxes and assessments had been paid (State of Case, p. 24).

We desire first to discuss the nature of the notice, which will disentitle the bidder to the benefits of Section 35.

Before the enactment of Section 35, a purchaser at a judicial sale in New Jersey took such title as the proceedings showed, and could not claim to be relieved because of the existence of prior incumbrances or of defects in the title. *Armstrong vs. Fischer*, 73 N. J. E. 220. In *Oakley vs. Shaw*, supra, Chancellor Walker (then Vice Chancellor), held that one who has notice of the condition of the title cannot object that he did not obtain that notice in the manner and form prescribed by the statute. But *Oakley vs. Shaw* does not stand for the proposition that actual notice can be dispensed with and that constructive notice is sufficient to deprive the bidder of the benefits of the statute. If such a rule were adopted, the statute would in effect be repealed by judicial decision, since a purchaser would always be chargeable with constructive notice from the title records. The holding in *Murphy vs. Skelly*, 101 N. J. E. 793, that a purchaser, at a sheriff's sale who fails to hear the sheriff's public announcement regarding a defect in the title, is chargeable with the consequences of his own carelessness, must be strictly limited to the facts of that case. Its logical extension would be to charge every bidder with the consequences of his carelessness in not examining the records prior to making his bid.

Hence there must be some showing of knowledge on the part of appellant as distinguished from constructive notice unless he was careless in not attending to the sheriff's announcement. In view of the testimony that he received assur-

ance from the person primarily interested in the sale that there were no taxes and assessments, it is difficult to see in what respects appellant was careless. He had a right to rely upon the representation of the mortgagee, which was calculated to be more nearly correct than a general announcement by the sheriff applicable to all sales held on that day.

“Finally, a purchaser is fully warranted in accepting and acting upon the statements or conduct of the person who holds or asserts a conflicting interest, claim, or right, if he, when interrogated upon the subject, either keeps silence, or denies the existence of any claim, or affirmatively declares it to be of a certain kind and amount; such a person, even if not absolutely estopped from afterwards setting up any claim, or a claim different from his representations, would certainly be debarred from afterwards alleging that the purchaser was put upon an inquiry, and was charged with notice.” (Pomeroy’s Equity Jurisprudence, Sec. 601, p. 1132.)

(2) But if it be conceded for purposes of argument, that appellant should have heard the sheriff’s announcement, the effect of this announcement was merely to put him on notice that there were taxes and assessments outstanding, without revealing the amount thereof. Since Section 35 requires that the advertisements and conditions of sale contain not merely a description of the liens and incumbrances, but also the approximate amount thereof, its requirements cannot be deemed to be adequately fulfilled by an announcement

that taxes and assessments are outstanding without any indication of their amount. Although the notice of outstanding liens and incumbrances need not come to the bidder in the manner prescribed by Section 35, complainants should at least be required to establish that appellant had knowledge of all the matters concerning which the Section gives him protection. It is as vitally important to a prospective bidder that he be made cognizant of the amount of outstanding liens as that he be made aware of their existence. Section 35 has warranted to bidders that their bids shall be made with knowledge of the approximate amount of liens and that in the absence of such knowledge, they shall be entitled to relief. If a simple announcement by the sheriff that tax liens are outstanding is held sufficient to charge prospective bidders with notice of the amount thereof, the duty is cast upon such bidders to search the tax records before making their bids. Thus the purpose of the statute is frustrated and the law existing prior to its passage is reinstated.

Point III.

Notice of the existence of outstanding taxes and assessments is not notice of the existence of outstanding tax sales.

Taking all the testimony of the complainants together, its sum total could by no stretch of the imagination establish anything more than the fact that appellant had notice that taxes and assessments were outstanding. Such notice is not sufficient to charge appellant with notice that twenty-one (21) of the thirty ²¹ (30) lots involved had been sold by the municipality for taxes.

The proposition scarcely needs citation that from the purchaser's point of view, an outstanding tax sale is considerably more serious than an outstanding tax. Merely putting a bidder on notice that the premises are sold subject to taxes is not sufficient to put him on notice that the premises have been previously sold for taxes.

While the existence against the property of unpaid taxes does not constitute a valid objection to the title, since the vendee may reserve the amount thereof from the purchase price (57 A. L. R. 1405), generally a tax sale of the property, even though the portion of the lands sold is infinitesimal, so that it is scarcely susceptible of computation is, nevertheless, a cloud on the title which may affect its market value, and hence the vendee will not be required to accept it (57 A. L. R. 1406). Tax liens, some of which have ripened into a title, are incumbrances which will excuse the vendee from performing an executory contract for the purchase of the land incumbered thereby. *Penfield vs. Clarke*, 62 Barb. (N. Y.) 584; 57 A. L. R. 1404.

Under our own Tax Act, the purchaser of a tax title, upon recording his certificate, acquires the rights of a mortgagee in possession. *Merchants & Traders Realty Co., Inc., vs. Stern*, 101 N. J. E. 629, aff'd. 140 Atl. 390. He is entitled to immediate possession of the property after recording his certificate and to all the rents and profits thereof. *Van Horn vs. Huegel*, 104 N. J. L. 106. Thus a bidder at a foreclosure sale, who relies upon the sheriff's announcement that taxes are outstanding, may find that he is not entitled to possession or to the rents and profits of the property by reason of the fact that the holder of a tax certificate is in possession, and

yet, if complainants' contention is correct, such bidder must complete his purchase.

Moreover, after a tax sale the amount required to clear the land of the incumbrance is increased by the interest upon the sum paid at the sale, by the expenses incurred by the tax sale purchaser, by sums paid for recording fees, by fees for service of notices, by fees and expenses of ascertaining persons interested in the property, and, where the taxes exceed \$200, by an additional 2 per cent. on the amount paid. Tax Sale Revision, 1918, Sec. 44, P. L. 1918, p. 83, as amended P. L. 1919, p. 284, and P. L. 1928, p. 248. The sum payable in redemption of lands sold at tax sale is not "taxes." *Ketcham vs. Fitch*, 13 OH. ST. 201; 35 C. J. 80.

Thus appellant, having been held by the lower court chargeable with knowledge that taxes and assessments are outstanding, is also being charged with knowledge that portions of the premises have been sold and that he may not be entitled to possession or to rents and profits until he has redeemed from such tax sales, even though the amount required to redeem is greatly in excess of the amount of the taxes concerning which he is charged with notice. It is submitted that this is a most inequitable extension of the doctrine of *Oakley vs. Shaw* and *Murphy vs. Skelly*, supra. If it is adopted, it might well be held that a sheriff's announcement that the premises are sold subject to taxes and assessments would be sufficient to require the purchaser to accept a conveyance even where the right to redeem from the tax sale had previously been foreclosed.

Point IV.

Appellant was not chargeable with the cost of the abortive resale or the costs and counsel fees involved in the proceedings below.

The proofs show that several months after the sale to appellant had been confirmed by the Court of Chancery, the complainants, without any order authorizing them to do so, proceeded to re-advertise the property for sale and caused a resale to be made to Albert Mark and Emily Mark, who acted as the agents of Henry Klughaupt.

By Section 27 of the Sale of Land Act, 4 C. S. 4685, it is provided that when any purchaser at any commissioners, executors, administrators or guardians sale shall, after confirmation, refuse to comply with any of the conditions of such sale, it shall be lawful for any such commissioner, etc., to apply to the court making the order of sale or the order of confirmation, by petition, and the court may thereupon set aside such confirmation of sale and order the officer to make resale of the real estate; provided nevertheless that such order or orders of resale shall not, in any way, relieve the first purchaser from liability to make good and pay any deficiency or reduction of price resulting from a resale.

While this statute does not expressly apply to foreclosure sales, it was held in *Townshend vs. Simon*, 38 N. J. L. 239, 245, that there is no difference between a sale by a sheriff under an execution out of Chancery on a foreclosure and that of an officer or individual selling under any power or authority not coupled with an interest such as commissioners in partition, guardians, executors or administrators. Proper practice would, therefore, seem to require that an order

for resale be procured, as provided in Section 27.

It also appears vitally necessary that before a resale is held, the order confirming the original sale be set aside, as provided in Section 27 supra, for the reason that otherwise there are two sales of record, ratified and confirmed in all respects as valid and effectual in law, and two orders directing conveyance to different persons.

In *Winantz vs. Traphagen*, 66 N. J. E. 455, and in *Dodd vs. Fischer*, 57 N. J. L. 407, the proper procedure was indicated. In both cases after the property had been struck off by the sheriff and the purchaser had defaulted, an order for resale was obtained.

The failure of the complainants to procure an order authorizing the resale rendered the same unlawful and unwarranted. This being so, any and all costs and expenses incurred by complainants on such resale should be defrayed by them, and since the order of the court below imposes such costs upon appellant, it was erroneous in that respect.

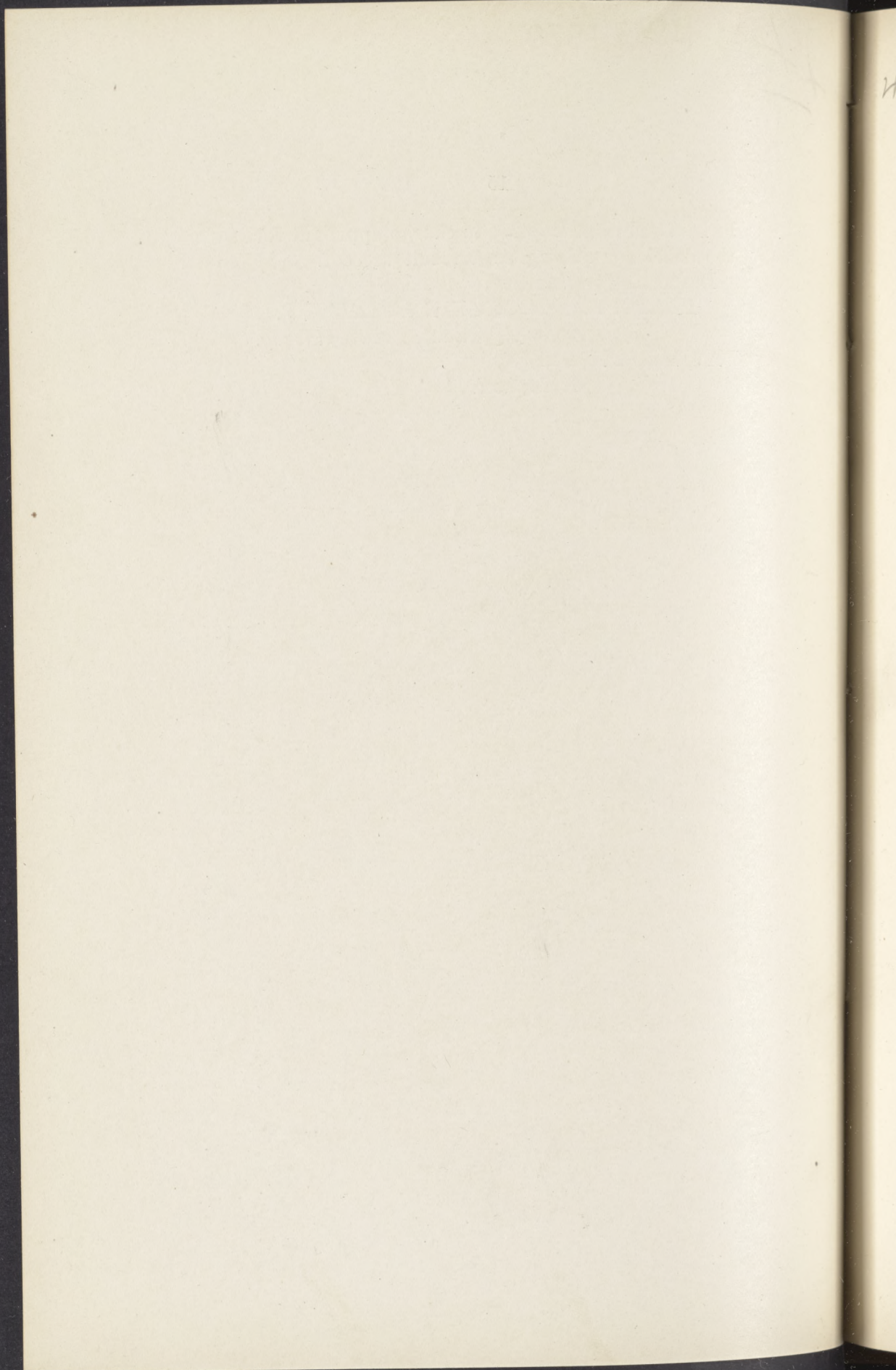
In addition, the proofs show that the resale was made for a grossly inadequate consideration. Since the court below has ordered the resale to be set aside and the deed executed by the sheriff pursuant thereto to be cancelled (State of Case, p. 28), the sale must be deemed to have been unlawfully conducted and the costs thereof should be paid by complainants.

By the same token appellant should not be charged with the taxed costs and counsel fee on the proceedings below, since the proceedings were rendered necessary by the unlawful conduct of complainants in procuring an abortive resale to

be held and in attempting to charge appellant for the deficiency arising as a result thereof.

Respectfully submitted,

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors for Appellant, Fred Goldberg.
DAVID SAPERSTEIN,
Of Counsel.



a. title search disclosed unpaid taxes of about \$1,500; that he had no notice of the resale, and consequently was unable to protect himself, at the resale; and further, that the price realized at the resale was grossly inadequate. The petitioner offered to pay \$7,990 for the property, less the tax liens, and prayed that he be relieved of his bid, and the deficiency, or that the resale be set aside and that the Sheriff be directed to consummate the first sale, with an abatement of \$1,500 to pay for said taxes, or that a resale be ordered.

The petition was verified by appellant's own affidavit only. Complainant submitted replying affidavits. The Under-Sheriff in charge of the first sale states in his affidavit that he made a public announcement that the sale was *subject to all unpaid taxes and assessments*. Mr. Klughaupt's affidavit not only categorically denies making any representations with respect to the taxes, but on the contrary it states that he, Klughaupt, had written to the appellant on numerous occasions asking the latter to pay up the taxes. Other affidavits submitted on behalf of complainant, further show that appellant had actual knowledge of the unpaid taxes and of the resale.

Upon the return of the order to show cause (the complainant consenting), Vice-Chancellor Lewis set aside the resale and confirmed the original sale without abatement—obviously for the reason that the appellant had actual knowledge.

ARGUMENT.

The appellant argues four points in his brief. These will be taken up in order.

Answer to Points I and II.

Appellant's brief admits that "*The decision can be upheld * * * upon the theory that appellant actually had knowledge of the existence and amount of these encumbrances when he made his bid.*" It was the finding of fact that appellant had such knowledge which influenced the Vice-Chancellor to decide adversely to him.

There was the following evidence before the Vice-Chancellor to show that appellant had actual knowledge of the outstanding liens:

(a) The affidavit of the Under-Sheriff in charge of the first sale, which stated that he had made a public announcement prior to the sale, that the property would be sold *subject to all unpaid taxes and assessments*, and that appellant signed a memorandum of sale which provided that the sale was *subject to all unpaid taxes and assessments* (Case, p. 17).

(b) The affidavit of Henry Klughaupt stating that he had written to and spoken to appellant on numerous occasions asking him to pay the taxes on the premises, and denying that he had ever told or represented to appellant that the taxes had been paid (Case, p. 19).

(c) The affidavit of Anne Klughaupt, solicitor of complainant, which recited that on several occasions she informed the appellant as to the unpaid taxes and requested him to pay them (Case, p. 20).

(d) The affidavit of Edward S. Mercer, appellant's predecessor in title, to the effect that at the time of the conveyance to appellant deponent gave appellant a check in adjustment of the unpaid taxes; that appellant deposited this check, but did not pay the taxes (Case, p. 22).

It is important to note the studiously guarded and evasive allegations of appellant's affidavit. He says that though he signed a memorandum of sale, which included the statement that the sale was subject to all unpaid taxes, he did not read it because of the stress of business still remaining to be done by the Sheriff (Case, p. 8, ll. 38 to p. 9, l. 4). Further he does not deny that the Under-Sheriff made an announcement with reference to taxes and assessments at the foreclosure sale, but says, "If such an announcement was made by the Under-Sheriff, my attention at the time was occupied with the conversation I was holding with Mr. Klughaupt" (Case, p. 23, l. 40, to p. 24, l. 5). His negligence in these respects is no ground for relieving him of his bid. *Murphy v. Skelly*, 101 N. J. E. 793, 138 Atl. 882.

The affidavits further show that the appellant was the second mortgagee; that he formerly owned the property; that he delayed seeking relief from his bid until complainant instituted proceedings to compel him to pay the deficiency, a period of about seven months, during which time he admits having knowledge of the taxes. All these facts persuasively influenced the Vice-Chancellor in finding that the appellant had actual knowledge of the taxes at the time of the sale, and that the application to be relieved of his bid was an after-thought.

"To rescind, one must act promptly. Failure to rescind within a reasonable time is plenary evidence of the defendant's election not

to do so. *Reed v. Benzine-ated Soap Co.*, 81 N. J. E. 182, 185, 86 Atl. 263. The defendant's claim for rescission must therefore be regarded as untenable."

All that is required by the statute is notice of the condition of the title—however, that notice may be acquired. *Oakley v. Shaw*, 69 Atl. 462 (not officially reported).

Answer to Point III.

The third point urged by the appellant is that, included in the unpaid taxes were several tax sales, which were liens against the premises. A complete answer to this point is that the appellant knew of the taxes, and was, therefore, put on notice as to tax sales.

He was put on inquiry, which, if pursued, would have acquainted him with the facts. Under these circumstances he is deemed chargeable as though he actually knew. *Commercial Credit Corp. v. Coover*, 101 N. J. L. 530, 129 A. 187.

"Whatever puts a party upon an inquiry amounts in the judgment of law to notice, provided the inquiry becomes a duty as in the case of a purchaser and would lead to the knowledge of the requisite facts by the exercise of ordinary diligence and understanding. *Hoy v. Bramhall*, 19 N. J. E. 563, 572, 97 Am. Dec. 687; *Vredenburgh v. Burnett*, 31 N. J. E. 229, affirmed 34 N. J. E. 252; *Moore v. Kraemer*, 50 N. J. E. 776, 26 Atl. 961; *Wahl v. Story*, 72 N. J. E. 607, 616, 60 A. 176."

Bergenfield Printing Co. v. Intertype Corp., 144 Atl. 730, 7 A. R. 366.

See also *Todd v. Exeter Land Co.*, 146 Atl. 303, 7 A. R. 702.

In any event, the tax sales were redeemable. There's nothing in the record to show that the tax sales had ripened into titles.

Answer to Point IV.

The appellant's objection to the counsel fee and costs rests on the proposition that the resale was improper because it was not ordered by the Court. This argument is untenable. While it is true that ordinarily where the first sale has so far progressed towards completion that rights have been acquired thereunder it must be set aside before a second sale can be ordered, such rules do not apply in a case of a resale on default of the first purchaser. 35 C. J. 119, sec. 210. If the purchaser wrongfully refuses to comply with the terms of sale, the Sheriff may offer the property for sale again, without an order for resale. 35 C. J. 119, sec. 211 and cases cited. That is particularly true where the conditions of sale provide for a resale in the event of the purchaser's default.

In *Chancellor v. Gummere*, 40 N. J. E. 279 (see the Vice-Chancellor's opinion in 39 N. J. E. 582), the conditions at the Sheriff's sale were similar to those in the present case, and the Sheriff readvertised and resold the property without a court order. Reed, J., speaking for the Court of Errors and Appeals, said (40 N. J. E. 280):

"It is observed that the terms of the conditions reserve to the officer the right to treat the first sale as a nullity, and expose the property for sale again in the event of a failure on the part of the purchaser to complete such sale by a payment of his bid."

See also *Woodhull v. Neafie*, 2 N. J. E. 409, 411.

We, therefore, submit that under the express conditions of sale, it was not necessary to obtain an order for a resale. The resale having been induced by the defendant's default, he is liable for the expense thereof, both as a matter of equity and under the conditions of sale.

Furthermore, under the statute, the matter of costs and counsel fees rest in the sound discretion of the Court. Counsel fees and costs may be awarded to *either* party. Section 91 of the Chancery Act (C. S. p. 445, P. L. 1910, p. 427); Chapter 116, Laws of 1915, p. 184, par. 6; *Ex parte Welsh*, 93 N. J. Eq. 303, 116 Atl. 23. The reasonableness of the counsel fee and costs is not questioned.

Conclusion.

For the foregoing reasons the decree appealed from should be affirmed, with costs and a reasonable counsel fee.

ANNE KLUGHAUPT,
Solicitor of Respondent.

JEROME ALPER and
ISRAEL B. GREENE,
Of Counsel with Respondent.

