

New Jersey Court of Errors and Appeals

MERCHANTS AND TRADERS REALTY
Co. INC.,
Complainant-Respondent,

vs.

MOSES STERN, *et als*,
Defendants.

**BRIEF FOR
CLAIMANT-APPELLANT,
PARAMOUNT INVESTMENT
CORPORATION.**

Statement of Case.

The complainant-respondent instituted a foreclosure suit in the Court of Chancery to foreclose a second mortgage, covering the premises known as 251-261 Main Street, East Orange, N. J. Pending the foreclosure suit, a Receiver was appointed for the collection of rents on the application of the complainant. The Receiver collected the rents and was discharged on July 19th, 1927, and deposited with the Clerk in Chancery, the monies in his hands, less his fees and allowances made by the Court (p. 12). The fund now on deposit with the Clerk in Chancery, amounts to the sum of approximately Twenty-two Hundred and Twenty-one Dollars and Fifty-two Cents (\$2221.52). This fund in court is claimed by the complainant under a deficiency arising under its mortgage foreclosure and by the claimant-appellant, Paramount Investment Corporation under a

tax lien, the Paramount Investment Corporation having purchased the premises during the month of October, 1926, at a Tax Sale held by the City of East Orange, while the Receiver was in possession of the premises. The entire controversy involving the fund in the hands of the Clerk in Chancery, was submitted to the learned Vice Chancellor upon an agreed State of Facts (p. 23). The learned Vice Chancellor awarded the fund in court to the complainant-respondent by order, dated October 3rd, 1927 (p. 14) Opinion, page 16.

This appeal presents for review to this Honorable Court, the legal propriety of the learned Vice Chancellor's Order. The appellant contended in the Court below and now contends in this Honorable Court that by virtue of its tax lien, the fund in court consisting of rents collected by the Receiver should have been awarded to the appellant and not to the complainant-respondent. The appellant does not claim any of the rents that were collected by the Receiver prior to the date of the recording of its tax certificate, viz., November 29th, 1926, amounting to Six Hundred and Eighty-four Dollars and Fifty-three Cents (\$684.53).

POINT I.

The Chancellor should have ordered that the rent monies deposited in the Court of Chancery by the Receiver be awarded to the Claimant, Paramount Investment Corporation.

The appellant basis its claim to the fund in court, consisting of rents collected by the Receiver, during the foreclosure suit, upon Section 34, Chapter 237, of the Laws of 1918 as amended by Chapter 81

of the Laws of 1926 at page 128. Under the plain wording of this Statute, the appellant upon the recording of its Tax Certificate as a mortgage, as provided for in the Statute was entitled to the rents and profits until redemption; the redemption was not made until August 1st, 1927 (p. 26, l. 30). The appellant's Tax Certificate was recorded on November 29th, 1926 (p. 23, l. 33). The Act reads as follows:

"34. The purchaser may record the certificate of sale in the office of the Clerk or Register of the county where the land lies as a mortgage of land, and thereupon shall be entitled to the immediate possession of the property sold and described in the certificate, and *to all the rents and profits thereof from and after the date of record until redemption.* The Register of the county, or the County Clerk, if there is no Register, shall index such certificate in his index of mortgages in the name of the delinquent owner, as set up in the certificate, and shall also index the same in a separate block index, to be kept in said office, under the block and lot number as shown in the certificate, if the property is described by lot and block provided, however, that purchaser at tax sale of a dwelling house occupied by the delinquent owner shall not be entitled to collect rents *for such part of the dwelling house as shall be occupied by the delinquent or his immediate family until after the expiration of two years from the date of record of the certificate of sale.*" (Italics mine.)

It would seem from the clear wording of the Statute that the purchaser at a tax sale after the recording of the certificate, is entitled to collect the rents and profits even though such purchaser *never goes into possession.* The right to the rents and profits is not made *contingent* upon possession. The *right to possession* is separate and distinct from the

right to the rents and profits. One does not depend upon the other.

Anson vs. Elwood, 76 N. J. L. 56;
Baldauf vs. Mann, 86 N. J. L. 460.

In *Baldauf vs. Mann*, *supra*, the tax lienor was permitted to recover a judgment against the landlord for rents collected by the landlord, on the theory of money had and received. Judgment in favor of the tax lienor against the landlord was affirmed. The court said in its opinion (p. 462),

"But it is argued that the act in its spirit contemplates some sort of a notice to the owner when the certificate is recorded as a mortgage, and that this must be governed by the rules of the common law requiring a personal service. We think that no formal notice to the owner is required except in cases where it is intended to cut off the right to redeem. The owner would seem to be charged with notice that he owes his taxes and with notice of sale if they are unpaid, and by virtue of the recording acts he would seem to be also charged with notice of the record of the certificate of sale as a mortgage and the *resulting right of the purchaser thereunder to the rents.*" (Italics mine.)

The court further said (p. 463):

"The acts itself, under section 56, says that under circumstances similar to the present the purchaser is entitled to the rents for the term of the sale or until redemption. Plainly, *it was intended that a tax delinquent in such case should lose both his rents and the twelve per cent. interest on the unpaid taxes, as well as pay the principal thereof.* It is no doubt true that under the terms of the act a tax purchaser may abstain from serving his notice to redeem and collect rents for an indefinite period as well as his twelve per cent. on final redemption. Possibly, it would have been better if the Sta-

tute required the prompt service of a notice to redeem. But this is a matter for the legislature," (Italics mine.)

It should be noted that in this case, *Baldauf vs. Mann*, the holder of the tax certificate was permitted to recover rents, although *not in possession*.

The Statute under which the Paramount Investment Corporation basis its claim was amended by the laws of 1926, at page 128. This Statute went into effect on March 23rd, 1926; the Paramount Investment Corporation acquired its lien by a tax sale held in October 1926 (p. 23, l. 28), so that clearly the rights of the Paramount Investment Corporation depend upon the amendment passed in 1926. The 1926 Act amends the 1918 Act in only one particular, viz, by adding on a proviso, viz:

"Provided, however, that purchaser at tax sale of a dwelling house occupied by the delinquent owner shall not be entitled to collect rents *for such part* of the dwelling house as shall be occupied by the delinquent or his immediate family until after the expiration of two years from the date of record of the certificate of sale." (Italics mine).

This proviso in the 1926 Act manifests a legislative intent that the holder of the tax lien be entitled to the rents even though *out of possession* and the owner *actually in possession*.

If the Legislature intended that the holder of the tax lien must first obtain actual physical possession of the premises before the tax lienor can collect the rents, the Legislature would have undoubtedly said so in so many words, and undoubtedly would have provided a method of procedure for obtaining the said possession.

It is therefore submitted that under the plain wording of the Statute, the appellant was entitled

to the rents without regard to the question of whether the appellant was in possession of the premises or out of possession of the premises, or whether the appellant's status was or was not, that of a mortgagee.

POINT II.

The Chancellor erroneously held that the Claimant, Paramount Investment Corporation as purchaser at the tax sale, had acquired the rights of a mortgagee in possession, subject to the responsibilities of such mortgagee.

To arrive at this conclusion, the learned Vice Chancellor practically overruled the case of *Anson v. Elwood*, 76 N. J. L. page 56, where the court held that the tax purchaser was entitled to the rents and profits, without liability to account to the owner therefor on redemption, and where the court held that the rights of a tax purchaser in possession differ from those of a mortgagee in possession, in that the *latter* is required to account to the owner for the rents collected, while the *former* is not. The learned Vice Chancellor in deciding that the doctrine as laid down in *Anson vs. Elwood, supra*, was no longer the law and that the law had been changed by the 1918 Tax Sale Revision Act, arrived at his conclusion not through the citation of authorities, but through a method of syllogistic reasoning, leading to a conclusion definitely at variance with the express provisions of the 1918 Tax Sale Revision Act. The appellant now contends that *Anson vs. Elwood, supra* is still the law, that it has not been modified or repealed by the 1918

Tax Sale Act, and that under its doctrine the appellant was entitled to the rents collected by the Receiver, without any liability to account therefore, and that its status is not that of a mortgagee in possession, but at the most a Tax Purchaser in possession with no responsibilities to account for the rents collected. The learned Vice Chancellor's reasoning seems to be as follows:

(a) Under that Act (1903 Tax Act), he, (tax purchaser) was not entitled on redemption to reimbursement for subsequent taxes and municipal liens paid by him (p. 21, ll. 8-11).

(b) Under the 1918 Act, however, on redemption he (the tax purchaser) is entitled to a reimbursement for those expenditures (p. 21, ll. 11-13).

(c) A fortiori, then, a purchaser at a tax sale in possession should now pay taxes and other municipal liens accruing during such possession (p. 21, ll. 13-16).

The difficulty with the conclusion reached by the learned Vice Chancellor in "C" above is, that the 1918 Tax Act nowhere provides that a *Tax purchaser should pay subsequent taxes*; there is no such provision or justification for the conclusion reached by the learned Vice Chancellor in the 1918 Act. What the 1918 Act expressly provides for, is in Section 49:

"But no foreclosure shall be entered unless evidence is produced in the foreclosure suit that all subsequent municipal liens have been paid to the time of the commencement of the suit."

No suit to foreclose can be commenced until after the expiration of two years *after* the date of sale, while the rights to the rents is given to the tax pur-

chaser *after recording of its certificate of sale*. Section 48 of the 1918 Tax Act shows a somewhat similar provision with respect to the payment of the subsequent municipal liens, but only where *title* is acquired by notice. Nowhere in the 1918 Tax Act is the holder of a tax certificate *required* to pay subsequent taxes. Nowhere in the Act is the Tax Sale Purchaser *required* to pay subsequent municipal liens to give him the right to the rents or possession; neither is predicated upon payment of subsequent taxes.

It would seem clear that if the Legislature intended, that a purchaser of a tax certificate in or out of possession, should pay subsequent taxes, it would have so provided expressly in the Act. It seems equally clear that if the Legislature intended that a Tax Lienor in possession should account for the rents collected upon redemption, it would have so provided in the Act. *Anson vs. Elwood*, *supra* was decided in 1908 and the Legislature at the time it passed in 1918 the Tax Sale Revision Act, must have known the doctrine laid down in this case, and could have repudiated the principle in *Anson v. Elwood*, by express provision therefore. Its failure to do so is most significant and evinces a legislative design that the law laid down in *Anson vs. Elwood*, *supra* should continue to be the law. Section 56 of the 1903 Act interpreted in *Anson vs. Elwood* does not differ from Section 34 of the 1918 Act in so far as it concerns the right of the tax purchaser to collect the rents upon recording of the certificate of sale. In both the 1903 Act, and 1918 Act, the purchaser at a tax sale is given the right upon recording of the certificate to immediate possession of the property and to the rents and profits until redemption. Neither the 1903 Act or the 1918 Act say, that upon redemption, the tax holder should account for the rents, nor does it say that

the tax lienor in possession has the status of a mortgagee.

It should be borne in mind that the two claimants to this fund are respectively a *mortgagee* whose mortgage is under foreclosure and the holder of the *tax lien*. The controversy is not between the *owner* of the fee and the *tax lienor*. It is true that a mortgagee in possession is under a liability to accounts for the rents and profits on redemption. *Stewart vs. Fairchild*, 91 N. J. Eq. 86. This rule seems to be for the benefit of the *owner* of the fee, and not for the benefit of the *holder of a mortgage* upon the premises. It should also be borne in mind that the Paramount Investment Corporation under its Tax Certificate had a *paramount lien* on the premises, superior in lien to the complainant's mortgage. (1918 Tax Sale Act, Section 9), *Willat Film Corporation vs. Central Union Trust Co.*, 99 N. J. Eq. 748 at page 755. Is the holder of the paramount lien in possession, required to pay interest accruing on the inferior liens, such as mortgages? Assuming that the Paramount Investment Corporation under its tax lien was in possession, was it required to pay interest on complainant's second mortgage and on the first mortgage, both of which mortgages were inferior in lien to that of the Paramount Investment Corporation? If the rights of the Paramount Investment Corporation under its tax lien is that of a mortgagee in possession, in what category or order of priority is the lien of the Paramount Investment Corporation to be placed? Surely not last, or second or third. The tax lien of the Paramount Investment Corporation must from the clear wording of Section 9, *supra*, be paramount to complainant's second mortgage and to the first mortgage on the premises. To place the tax lien in any other position would tend to defeat the principle of the superiority of the tax

lien. It is difficult, therefore, to understand upon what theory, interest on the mortgages inferior in lien to the lien of the Paramount Investment Corporation, should be paid by or charged against the Paramount Investment Corporation. The most that should be charged against the tax lienor in possession, would be subsequent taxes or liens that accrue. When the Vice Chancellor in his opinion says,

"The Claimant, Paramount Investment Corporation would not be entitled to receive anything, as the amount of unpaid taxes accruing during the period in which it was entitled to possession far exceeds the amount collected by the Receiver" (p. 22, ll. 9-13).

he is clearly in error, as the amount of taxes accruing on the premises from the date of the recording of the certificate held by the Paramount Investment Corporation, viz, November 29th, 1926, down to the date the Receiver ceased to collect rents, viz, June 27th, 1927, would be less than the amount of money deposited by the Receiver in the Court of Chancery (p. 26, ll. 20-23). There would still be a surplus left over. What the learned Vice Chancellor probably meant, was that the gross operating expenses during the period of time the Receiver collected the rents, including interest on two mortgages, accrued taxes, water rents, and insurance, exceeded the amount collected by the Receiver, by approximately Sixteen Hundred (\$1600.00) Dollars (p. 26, ll. 17-29). If, however, such items as interest on mortgages, insurance premiums, etc., were not included, but only a deduction made for taxes accruing, there would still be a surplus left over.

POINT III.

The complainant is guilty of laches.

The complainant instituted its foreclosure suit in June 1926 (p. 23, l. 16). It knew or should have known that taxes were in arrears on the premises being foreclosed. It took no steps whatever to pay the taxes, permitted the premises to be sold at a public tax sale, *and in fact did not redeem from the tax sale until August 1st, 1927* (p. 26, l. 30). The complainant could have redeemed prior to August 1st, 1927, and the amount necessary for redemption could have been added on to the amount of his mortgage debt. In fact, the suit was instituted in June, 1926, but a Receiver was not appointed until September 1926 (p. 23, l. 20), so that the complainant in this case permitted a lapse of three months before it made an application for a Receiver to collect the rents. A Final Decree in the foreclosure suit was not entered until April 6th, 1927 (p. 25, l. 36). Clearly the complainant has not been diligent in the exercise of his rights.

The complainant (second mortgagee) had a right to redeem (section 39, Chapter 237, Laws of 1918). Its failure to redeem until after this controversy arose, clearly shows that it slept on its rights.

A mortgagee out of possession (the complainant in this case), is not entitled to rents. If there had been no deficiency under the complainant's foreclosure, the rents would have been payable to the owner of the fee, where there was no outstanding tax lien. The tax lienor is preferred over the owner, as to the rents. The tax lienor, under the statute, is therefore preferred over the mortgagee, whose right to the rents is inferior to that of the owner.

CONCLUSION.

It is respectfully submitted that the fund now on deposit with the Clerk in Chancery, representing rents collected by the Receiver, during the foreclosure proceedings, should be awarded to the Appellant, Paramount Investment Corporation, under its tax certificate and that the Order entered in the Court of Chancery on October 3rd, 1927 should be reversed, vacated and for nothing holden.

Respectfully submitted,

SAUL NEMSER,
Of Counsel with Claimant-Appellant.

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Notice of Appeal.
(Filed October 10, 1927.)

IN CHANCERY OF NEW JERSEY.

BETWEEN MERCHANTS & TRADERS REALTY Co. INC., a corporation, Complainant, and MOSES STERN, <i>et als</i> , Defendants.	On Bill to Foreclose. On Applica- tion for Order of Distribu- tion of Rents Col- lected by Receiver.	10
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The Paramount Investment Corporation hereby
appeals from the final Order or Decree made in the
above entitled cause on October 3rd, 1927, and from
the whole and every part thereof, to the Court of
Errors and Appeals in the Last Resort in All
Causes. 20

SAUL NEMSER,
Solicitor for and of Counsel
with Paramount Investment
Corporation.

I conceive there is good cause for appeal in the
above entitled cause. 30

SAUL NEMSER,
Of Counsel with Paramount In-
vestment Corporation.

Amended Notice of Appeal.
(Filed October 15, 1927.)

IN CHANCERY OF NEW JERSEY.

10	Between MERCHANTS & TRADERS REALTY Co., INC., a Corporation, Complainant, and MOSES STERN, <i>et als.</i> , Defendants.	}	On Bill to Foreclose. On Applica- tion for Order of Distribution of Rents Collected by Receiver.
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20 The Paramount Investment Corporation hereby
 appeals from the final Order or Decree made in the
 above entitled cause on October 3rd, 1927, made by
 the Chancellor on the advice of Vice Chancellor
 Maja Leon Berry, and from the whole and every
 part thereof, to the Court of Errors and Appeals in
 the Last Resort in All Causes.

SAUL NEMSER,
 Solicitor for and of Counsel with
 Paramount Investment Corporation.

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

SAUL NEMSER,
 Of Counsel with Paramount
 Investment Corporation.

Petition of Appeal.
(Filed October 10, 1927.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	MERCHANTS & TRADERS REALTY Co. INC., Complainant-Respondent, vs. MOSES STERN, <i>et als.</i> , Defendants-Appellants.	}	On Appeal of Claimant, Paramount Investment Corporation, from the Court of Chancery.
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TO THE HONORABLE COURT OF ERRORS AND APPEALS
IN THE LAST RESORT IN ALL CAUSES.

20 The petition of Paramount Investment Corpora-
 tion, the appellant in the above entitled cause,
 respectfully shows that

1. Petitioner finds itself aggrieved by a Final
 Decree or Order made in the Court of Chancery, by
 his Honor, Edwin Robert Walker, Chancellor of the
 State of New Jersey, bearing date October 3rd,
 1927, in a certain cause in said Court of Chancery,
 wherein the said Merchants and Traders Realty
 Co. Inc., was complainant and Moses Stern, et als,
 were defendants (Paramount Investment Corpora-
 tion, Claimant), in this respect, to wit, that the said
 Decree or Order adjudges:—

“ORDERED, ADJUDGED AND DECREED that the
 complainant herein is entitled to the moneys
 turned into court by the receiver, and it is
 further

Petition of Appeal.

ORDERED that the Clerk of this court pay unto Isidore B. Glucksman, solicitor of complainant, the sum of \$2220.25, being the amount turned into this court by the receiver or such balance thereof as may remain after deducting any and all proper charges, together with the accumulations on the said deposit, if any, according to the rule of this court." 10

2. Petitioner appeals from the whole of said Decree or Order of the Chancellor as aforesaid, on the ground that the same is erroneous, in that

(a) The Chancellor should have ordered and decreed that the rent monies deposited in the Court of Chancery by the Receiver, be awarded to the claimant, Paramount Investment Corporation, instead of to the complainant herein, the Merchants and Traders Realty Co. Inc. 20

(b) The Chancellor erroneously held that the claimant, Paramount Investment Corporation as purchaser at the tax sale, had acquired the rights of a mortgagee in possession, subject to the responsibilities of such mortgagee.

(c) The Chancellor erroneously held that the Paramount Investment Corporation was under a liability to account for the rents and profits upon redemption. The Chancellor should have awarded the rent monies, deposited in the Court by the Receiver, to the said Paramount Investment Corporation, under Section 34 of the 1918 Tax Sale and Revision Act. 30

(d) The Chancellor should have held that under Section 34 of the 1918 Tax Sale and Revision Act, that the Paramount Investment Corporation was entitled to the rents deposited in court by the Re- 40

Petition of Appeal.

ceiver, even though the said Paramount Investment Corporation was not in possession of the land and premises.

(e) The Chancellor should have held that the Paramount Investment Corporation was entitled to the rents, deposited in court by the receiver, without deduction for any of the accrued operating expenses, such as interest on prior mortgages, water rents, insurance, etc. 10

Petitioner, therefore, prays that the said Decree or Order of the Chancellor in the premises aforesaid, be wholly reversed, set aside and for nothing holden, and that petitioner may have such further relief in the premises as to this court shall seem just and proper.

And your petitioner will ever pray, etc. 20

SAUL NEMSER,
Of Counsel with Appellant,
Paramount Investment Corporation.

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Answer to Petition of Appeal.
(Filed October 14, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	Between MERCHANTS AND TRADERS REALTY Co., INC., a Corporation, Complainant-Respondent, and MOSES STERN, <i>et als.</i> , Defendants-Appellants.	} On Appeal from Chancery
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20 The answer of Merchants and Traders Realty Co., Inc., a corporation, the above named respondent, to the petition of appeal of Paramount Investment Corporation, the above named appellant.

30 This respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless, admits that a decree was, on October 3, 1927, made and entered in the Court of Chancery of New Jersey in the above entitled cause, for the purpose in said petition mentioned, and as therein set forth; but as to the substance and form of said decree this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said decree is agreeable to equity; and it prays that the same may be affirmed with costs to be taxed in favor of this respondent.

ISIDOR B. GLUCKSMAN,
Solicitor for Respondent.

Final Account.
(Filed July 8, 1927.)

IN CHANCERY OF NEW JERSEY.

Between MERCHANTS AND TRADERS REALTY COMPANY, INC., Complainant, and MOSES STERN, DORA STERN, his wife, J. JACOB WACKER and EMMA WACKER, his wife, and SAMUEL D. LEWIN, Defendants.	} On Bill, &c.	10
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20 The following is the final account of John A. Bernhard, receiver of the rents, issues and profits in the above stated case:

FIRST.

This accountant charges himself as follows:

1926			
Oct. 15	Frederick Rupp—Rent	\$55.00	
	H. I. Brinn—Rent	50.00	
	Harry Hect—Rent	50.00	30
	A. L. Madel—Rent	65.00	
19	William Mosh—Rent	50.00	
	William Weiss—Rent	100.00	
Nov. 16	Frederick Rupp—Rent	49.53	
29	Harry Hecht—Rent	50.00	
	A. O. Madel—Rent	65.00	
	William Weiss—Rent	100.00	
	H. I. Brinn—Rent	50.00	

Final Account.

	Dec. 27	H. I. Brinn—Rent	50.00
		Harry Hecht—Rent	50.00
		Frederick Rupp—Rent	55.00
		August A. Madel—Rent	65.00
		William Weiss—Rent	100.00
	<i>1927</i>		
	Jan. 22	Harry Hecht—Rent	50.00
10		Frederick Rupp—Rent	50.00
		August O. Madel—Rent	65.00
		William Weiss—Rent	100.00
	Jan. 25	United Advertising Corp.—Rent	78.00
		H. I. Brinn—Rent	50.00
	Feb. 26	Harry Hecht—Rent	50.00
		August O. Madel—Rent	65.00
		Frederick Rupp—Rent	50.00
		H. I. Brinn—Rent	50.00
20	Mar. 18	Frederick Rupp—Rent	50.00
	24	H. I. Brinn—Rent	50.00
	26	A. O. Madel—Rent	65.00
		Harry Hecht—Rent	50.00
	Apr. 23	William Weiss—Rent	100.00
		A. O. Madel—Rent	65.00
		Harry Hecht—Rent	50.00
		Frederick Rupp—Rent	50.00
	26	H. I. Brinn—Rent	50.00
	May 28	William Weiss—Rent	100.00
30		A. O. Madel—Rent	65.00
		H. I. Brinn—Rent	50.00
		Harry Hecht—Rent	50.00
		Frederick Rupp—Rent	50.00
	June 27	William Weiss—Rent	100.00
		Frederick Rupp—Rent	50.00
		Harry Hecht—Rent	50.00
		August O. Madel—Rent	65.00
		H. I. Brinn—Rent	50.00

Final Account.

<i>1927</i>		
Feb. 26	Interest	\$1.91
Mar. 29	Interest	2.26
Apr. 27	Interest	2.68
May 27	Interest	3.00
June 29	Interest	3.33
		<hr/>
		\$2,785.71
		10

SECOND.

This accountant prays allowance as follows:—

<i>1926</i>		
Oct. 27	Berry Bros., Inc.—Bond	\$10.00
<i>1927</i>		
Mar. 4	Water Department East Orange	135.47
25	Water Department East Orange	61.24
May 13	Water Department East Orange	50.15
June 28	Cash for Carfare and expenses	8.60
		<hr/>
	Total	\$265.46

SUMMARY.

Total Receipts	\$2,785.71	
Total disbursements	265.46	30
	<hr/>	
Balance	\$2,520.25	

Rule to Show Cause for Filing Receiver's Final Account.

(Filed July 8, 1927.)

IN CHANCERY OF NEW JERSEY.

10	Between MERCHANTS AND TRADERS REALTY COMPANY, INC., Complainants, and MOSES STERN, DORA STERN, his wife, J. JACOB WACKER and EMMA WACKER, his wife, and SAMUEL D. LEWIN, Defendants.	} On Bill, &c.
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20 The receiver, having filed his final account in the above case, whereby it appears that the balance in his hands from the collection of rents is \$2,520.25, and application now being made for approval thereof. It is on motion of John A. Bernhard, receiver on this 8th day of July, A. D., 1927.

30 ORDERED, that the said account remain on file at the Chancery Chambers in the city of Newark, until the return day of this order and,

40 THAT all of the parties hereto, Merchants and Traders Realty Company, Inc., Moses Stern, Dora Stern, J. Jacob Wacker, Emma Wacker and the Paramount Investment Corporation do show cause before this court at the Chancery Chambers, Industrial Building, Broad Street, Newark, New Jersey, on the 19th day of July, 1927, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why the receiver's account should not

Rule to Show Cause for Filing Receiver's Final Account.

be allowed and approved and an allowance made to the receiver for his services, and the balance of the funds in his hands be paid as the Court shall direct,

ORDERED that a true but uncertified copy of this order be served on Merchants and Traders Realty Company, Inc., Moses Stern, Dora Stern, J. Jacob Wacker, Emma Wacker, and the Paramount Investment Corporation, or their respective solicitors within five days from the date hereof. 10

EDWIN R. WALKER,
C.

Respectfully advised,
MAJA LEON BERRY,
V. C.

A True Copy. 20

30

40

Order Approving Receiver's Final Account.

(Filed July 19, 1927.)

IN CHANCERY OF NEW JERSEY.

10	Between MERCHANTS AND TRADERS REALTY COMPANY, INC., Complainant, and MOSES STERN, DORA STERN, his wife, J. JACOB WACKER and EMMA WACKER, his wife, and SAMUEL D. LEWIN, Defendants.	} On Bill, &c.
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20 It appearing to the court that John A. Bernhard receiver in the above stated case, has filed his final account which account shows a credit balance of \$2,520.25, after disbursement of the sum of \$265.46 from the sum of \$2,785.71, which amount came into the hands of the said receiver, all of which is set out in said account, and

30 It appearing by the terms of an order of this Court made and filed on the 8th day of July, 1927, notice has been served upon Moses Stern, Dora Stern, J. Jacob Wacker, Emma Wacker, Samuel D. Lewin, and the Paramount Investment Corporation, directing them to show cause before this Court at the Chancery Chambers, Industrial Building, Newark, New Jersey, on Tuesday, July 19th, 1927, at ten o'clock in the forenoon, why the receiver's account could not be allowed and approved; and

Order Approving Receiver's Final Account.

It further appearing that none of the parties objected thereto, it is upon this 19th day of July, 1927, on motion of John A. Bernhard, Esq.,

ORDERED; (a), That the said account be allowed and approved.

(b). That an allowance be made to John A. Bernhard, Receiver, of the sum of \$300.00 Dollars, for his services. 10

(c). And the balance of the funds in his hands to be paid as the Court shall direct.

E. R. WALKER,
C.

Respectfully advised,
MAJA LEON BERRY,
V. C.

Order to Distribute Funds Turned in to Court.

(Filed October 3, 1927.)

IN CHANCERY OF NEW JERSEY.

10	Between MERCHANTS AND TRADERS REALTY Co. INC., a corporation Complainant, and MOSES STERN, <i>et als.</i> , Defendants.	} On Bill Etc.
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20 This cause coming on to be heard in the presence of Isidor B. Glucksman, solicitor for complainant and Saul Nemser, Esq., appearing for claimant, Paramount Investment Corporation, and the court having examined and considered the briefs submitted by counsel herein, and it appearing to the satisfaction of the court that the premises in question were sold for delinquent taxes during proceedings for the foreclosure of a mortgage held by complainant, in which proceedings a receiver, appointed by this court, had collected the rents of the premises, and it further appearing that the purchaser at the said tax sale has entered a claim for a portion of the rents so collected, and the receiver having by order of this court paid the said rents into court pending its disposition of the matter, and the court being of the opinion that the said purchaser at tax sale has acquired the rights of a mortgagee in possession, subject to the responsibilities of such a mortgagee, and is entitled to the rents and profits of the mortgaged premises, but, on redemption, 40 must account therefor to the owner of the fee, and

Order to Distribute Funds Turned in to Court.

it further appearing that the complainant herein has redeemed, it is therefore on this third day of October, 1927,

ORDERED, ADJUDGED AND DECREED that the complainant herein is entitled to the moneys turned into court by the receiver, and it is further

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ORDERED that the clerk of this court pay unto Isidor B. Glucksman, solicitor of complainant, the sum of \$2,220.25, being the amount turned into this court by the receiver or such balance thereof as may remain after deducting any and all proper charges, together with the accumulations on the said deposit, if any, according to the rule of this court, and it is further

ORDERED that a true but uncertified copy of this order be served upon the solicitor of claimant, Paramount Investment Corporation by complainant within two days from the date hereof.

20

E. R. WALKER,
C.

Respectfully advised,
MAJA LEON BERRY,
V. C.

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Opinion.

(Filed September 12, 1927.)

IN CHANCERY OF NEW JERSEY.

10	Between MERCHANTS AND TRADERS REALTY CO. INC., Complainant, and MOSES STERN, <i>et als.</i> , Defendants.	On Bill to Foreclose. On Applica- tion for Order of Dis- tribution of Rents Col- lected by Receiver. 61/209
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ISADORE B. GLUCKSMAN, Esq., for Complainant;

20 SAUL NEMSER, Esq. for Claimant, Paramount Investment Corporation.

SYLLABUS.

1. Where lands covered by a mortgage are sold for delinquent taxes during proceedings for the foreclosure of that mortgage and in which proceedings a receiver to collect the rents has been appointed by this Court, it is sufficient to entitle the purchaser to his rights under Sec. 34 of the Tax Sale Revision of 1918 if he notifies the receiver and the tenants of his claim to such rights and under such circumstances actual physical possession is not necessary.

2. The rights of a person not a defendant in the foreclosure suit are not affected by the decree.

3. Any unauthorized interference with the possession of the receiver of the mortgaged premises

Opinion.

would be a contempt of court and punishable as such.

4. Claims of equitable rights superior to those of the receiver should be passed upon in the cause in which the receiver is appointed and not in an independent action.

5. Under the provisions of Sec. 34 of the Tax Sale Revision of 1918, a purchaser of lands at tax sale for delinquent taxes acquires the right of a mortgagee in possession but is also subject to his responsibilities.

6. A mortgagee in possession is entitled to the rents and profits of the mortgaged premises; but, on redemption, must account therefor to the owner of the fee. The duty of a mortgagee in possession is that of a provident owner.

BERRY, V. C.

This is a bill to foreclose a second mortgage, filed June 26, 1926. A receiver to collect rents, etc. was appointed on September 14, 1926. He took immediate possession of the mortgaged premises, an apartment house, and collected the rents until foreclosure sale on June 7, 1927, amounting to \$2,785.71. The complainant purchased the mortgaged premises at that sale at a sum which left a deficiency of over \$15,000 on his decree. The claimant, Paramount Investment Corporation, on October 28, 1926, purchased the mortgaged premises at a tax sale for delinquent taxes for 1925 in the amount of \$1,341.71. The certificate of tax sale was recorded in the Essex County Register's Office on November 29, 1926, and on that day the receiver was notified of these facts and of the tax purchaser's claim to

Opinion.

the rents from the date of the recording of the certificate until redemption, but that no action would be taken to interfere with the receiver's possession under the order of the Court. The tax purchaser also notified the tenants of its claim to be entitled to receive the rents and directed them to pay the rents to the receiver in order that there might be
10 no confusion.

The receiver immediately acknowledged receipt of the letter addressed to him, stating that the rents collected would be deposited in his account as receiver subject to the Court's order and that when his account was filed the tax purchaser would be notified so that the rights of the various parties in interest could be determined.

Pursuant to this arrangement the receiver collected the rents, as above stated, and made disbursements for water rents amounting to \$246.86 and for incidentals amounting to \$18.60. The balance of the rents collected, less the receiver's fee allowed by the Court, have been paid into Court pending the disposition of the claims of the complainant and the Paramount Investment Corporation. During the period of the receivership, taxes amounting to over \$1500. accrued but were not paid. Interest amounting to \$2600. also accrued
20 on a prior mortgage. There was also some insurance cost during this period but the amount is not stated. The amount paid into court by the receiver would show a deficit of some \$1600. after the taxes and other operating expenses of the apartment house were paid for the period of the receivership. The Paramount Investment Corporation claims a portion of the funds deposited in court, amounting to \$684.53, representing rents collected after November 29, 1926; the complainant claims that this
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Opinion.

balance should be applied first, to the payment of taxed costs amounting to \$460.86, and second, to the deficiency on complainant's decree.

In support of complainant's claim it is alleged that the tax purchaser has no right to the rents collected by the receiver after the recording of the certificate of tax sale because he did not enter into actual possession and cites in support of this claim the unreported cases of Cohn v. Simon, et als, and Cohn v. Schrader, et al., at the November Term of the Supreme Court in 1921 (Docket No. 607) in which a *per curiam* opinion was rendered by Justices Swayze, Black and Katzenbach. 10

On behalf of Paramount Investment Corporation it is claimed that it was impossible for it to take actual possession of the premises without condemning the court's order appointing the receiver and that under the circumstances it did all that it was necessary for it to do to assert its rights. 20

I am convinced that this claim on behalf of the Paramount Investment Corporation is well founded, that it could not interfere with the possession of the receiver without an order of this court, and that what was done was, under the circumstances, the proper practice. The only thing this claimant could have done other than what it did do, was to have applied to this court to dispossess the receiver and put the tax purchaser in possession. This it chose not to do, resting upon the understanding with the receiver as evidenced by the correspondence between them, that the rights of the respective claimants to the fund could be determined by the court upon the filing of the receiver's account. The Paramount Investment Corporation was not a defendant to this foreclosure suit and its rights could not be affected by
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Opinion.

any decree made therein (*Zeiter v. Bowman*, 6 Barbour Ch. (N. Y.) 133); and any interference with the possession of the receiver, who was an officer of the court, would have been a contempt of court and punishable as such. *Noe v. Gibson*, 7 Paige Ch. (N. Y.) 513. Claims of equitable rights superior to those of the receiver should be passed
 10 upon in the cause in which the receiver is appointed and not in an independent action. *Parker v. Parker*, 8 Paige Ch. 388. It was perfectly proper, therefore, for the Paramount Investment Corporation, after giving notice of its rights both to the tenants and to the receiver, to await the determination of those rights by the court upon the filing of the receiver's account.

In my judgment, therefore, the Paramount Investment Corporation is now entitled to whatever
 20 rights it would have had if actual possession had been taken. It remains to be determined what those rights are in view of the provisions of Section 34 of the Tax Sale Revision Act of 1918 (P. L. 1918, p. 892, Sec. 34).

In *Anson v. Elwood*, 76 N. J. L. 56, the Court held that the tax purchaser in possession was entitled to the rents and profits without liability to account to the owner therefor on redemption. In
 30 that case the Court had under consideration the provisions of Section 56 of the Tax Act of 1903 and it was held that the rights of a tax purchaser in possession differ from those of a mortgagee in possession in that the latter is required to account to the owner for the rents collected and must apply on the mortgage debt the surplus of rents over and above taxes and other expenses, while the former is not. That undoubtedly was the law under
 40 the 1903 tax act. In *Rogers v. Cressman*, 98 N. J.

Opinion.

Eq. 209, in commenting on the rights and liabilities of a tax purchaser in possession under the 1903 act, I suggested that he was obliged to pay subsequent taxes and municipal liens in consideration of his right of occupancy of the premises and his right to the rents and profits. Under that act he was not entitled on redemption, to reimbursement for subsequent taxes and municipal liens paid
 10 by him. Under the 1918 act, however, on redemption he is entitled to a reimbursement for those expenditures. A fortiori, then, a purchaser at a tax sale in possession should now pay taxes and other municipal liens accruing during such possession. His rights under the 1918 act are those of a mortgagee in possession. *Cohn v. Simon and Cohn v. Schrader*, supra. In those cases the Supreme Court, referring to Section 34 of the Tax Sale Revision of 1918, said:
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"We think the intent of the statute was to enable the purchaser of a tax title upon recording his certificate to acquire *the right of a mortgagee in possession*, but in this respect the statute was not self-executory and the purchaser of the tax title might, if he chose, avoid the *responsibility* of the mortgagee in possession (Italics mine).
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This interpretation of Section 34 of the 1918 Tax Act indicates that the rule laid down in *Anson v. Elwood*, supra, is not now applicable. The opinion of the three Justices of the Supreme Court who sat in the *Cohn* cases is entitled to the highest respect and it is in conformity with my idea of equity as it should be applied in the case *sub judice*.

The rights of a mortgagee in possession are to collect the rents and profits; his responsibilities in-
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Opinion.

clude a liability to account for those rents and profits on redemption. *Stewart v. Fairchild*, 91 N. J. Eq. 86 (E. & A.). It has been well said that the duties of a mortgagee in possession are those of a provident owner. *Thomas on Mortgages*, page 79. Applying this rule to the present case, the claimant, Paramount Investment Corporation, would not be entitled to receive anything, as the amount of unpaid taxes accruing during the period in which it was entitled to possession, far exceeds the amount collected by the receiver. I will advise a decree accordingly.

Decided August 24, 1927.

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Agreed State of Facts.

IN CHANCERY OF NEW JERSEY.

Between MERCHANTS & TRADERS REALTY CO., INC., a corporation, Complainant, - and MOSES STERN, <i>et als.</i> , Defendants.	}	61-209	10
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Complainant, second mortgagee, filed a bill to foreclose its mortgage on June 26, 1926, naming as defendants, Moses Stern and J. Jacob Wacker, owners of the property, Dora Stern and Emma Wacker, their respective wives and Samuel D. Lewin, third mortgagee. On September 14, 1926, an order was entered appointing John A. Bernhard, Esq., receiver, "with power to collect the rents, issues and profits of the premises described in the petition and with such other powers as may be required in the premises until the further order of this court". Thereupon the receiver took active charge of the premises and collected the rents.

On October 28, 1926, a tax certificate in the amount of \$1341.71 was issued by the City of East Orange to the Paramount Investment Corporation of Jersey City, the purchaser of the said premises under a sale for the non-payment of taxes for the year 1925. The said certificate was on November 29, 1926, recorded in the office of the Register of Essex County in Book B 59 of mortgages on page 560 et seq. On the same day the purchaser under the tax sale, viz. Paramount Investment Corporation, wrote a letter to John A. Bernhard, Receiver, as follows:

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Agreed State of Facts.

"John A. Bernhard, Esq.,
Prudential Bldg.,
Newark, N. J.

Dear Sir:

10 This corporation is informed that you are
the receiver of rents from premises known as
251 and 261 Main Street, East Orange, N. J.
in a suit of foreclosure wherein Merchants &
Traders Realty Company is complainant and
Moses Stein, et al. are the defendants.

20 Beg to advise you that these premises were
sold to this company on October 20th, 1926 by
the Collector of Taxes of East Orange and that
under the statute we are entitled to the rents
from these premises until redemption has been
made and unless this property is redeemed we
will have to go into court and ask that the
rents be turned over to us.

We have written the tenants already that
the rents be turned over to you as receiver so
as not to confuse the tenants and interfere
with the order of the court.

Trusting to hear from you by return mail,
we remain

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Very truly yours,

PARAMOUNT INVESTMENT CORPORATION,
BY FREDERICK ATANASIO,
President."

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Agreed State of Facts.

On December 1st, 1926, Mr. Bernhard, Receiver,
replied to the foregoing letter as follows:

"Paramount Investment Corporation,
Tube Concourse Building,
Jersey City, New Jersey,

Gentlemen:

10 I thank you for your letter of November
28th, 1926, with reference to the collection of
rents from properties at #251-261 Main
Street, East Orange, New Jersey, which prem-
ises you recently purchased at a tax sale. All
of the rents collected will be deposited in my
account as receiver and a detailed record made
so that when I make my final report to the
Court after the property has been sold under
foreclosure proceedings, and a sheriff's deed ex-
ecuted and delivered to the new owner, you
may put in a claim if you desire to do so. The
foreclosure is now proceeding according to law
and I assume that the matter should be finally
closed within a couple of months.

20 I will notify you just as soon as the accounts
have been filed so that you may appear in court
when it comes up for the determination of the
court.

30 Thanking you for your courtesy in this mat-
ter, I remain,

Yours very truly,

JOHN A. BERNHARD."

On April 6, 1927 a final decree was entered in
the cause. On June 7, 1927 the premises were sold
by the sheriff at public sale at a price of \$10,000,
the complainant buying in the property at that

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Agreed State of Facts.

price. According to the master's report filed in the cause there was due the complainant the sum of \$25,817.19 as of the date of the said report, February 4, 1927. Hence complainant suffered a deficiency under the sale in excess of \$15,000.

10 The Paramount Investment Corporation never applied to this court to be admitted as a party to the within cause, but it was served with a copy of the receiver's rule to show cause for filing receiver's final account and it put in an appearance on the return day of the said rule in order to assert its claim to the funds in the receiver's hands. The receiver filed his accounting and was discharged on July 19, 1927, the money in his hands being turned over to this court. During the period of his stewardship the receiver made disbursements 20 only for water rents amounting to \$246.86 and for incidentals amounting in all to \$18.60. In the interim the following expenses accrued but were not paid by the receiver: taxes for 1926 (3½ months) \$519.75; taxes for 1927 (6½ months) \$1024.83; interest on building and loan mortgages \$2600; and insurance, cost unknown. For the period of the receivership the premises in question ran under a deficit of more than \$1600, exclusive of the cost of insurance and interest charges on unpaid taxes. 30 The premises were redeemed from the tax sale on August 1, 1927.

To the balance of the funds collected by the receiver, after deducting therefrom his allowance and expenses, there are now the following claims: Solicitor for complainant claims complainant's costs, taxed by this court at \$460.68, before any moneys are paid out to any other claimant. The Paramount Investment Corporation claims the bal-

Agreed State of Facts.

ance of the funds turned into court by the receiver. The complainant claims that so much of the said balance, as may be required, be applied first to the payment of tax costs and secondly to its deficiency under the sale. The Paramount Investment Corporation claims the balance of the funds turned into court by the receiver less the rents collected prior to December 1, 1926. 10

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New Jersey Court of Errors and Appeals

Between

MERCHANTS & TRADERS REALTY
Co., INC., a corporation,
Complainant-Respondent,

and

MOSES STERN, *et als.*,
Defendants-Appellants.

On Bill, etc.

*Appeal of
Claimant-
Appellant,
Paramount
Investment
Corporation,
from the
Court of
Chancery.*

BRIEF FOR COMPLAINANT-RESPONDENT.

Statement of the Case.

Complainant, second mortgagee, filed a bill to foreclose its mortgage on June 26, 1926, naming as defendants Moses Stern and J. Jacob Wacker, owners of the property; Dora Stern and Emma Wacker, their respective wives, and Samuel D. Lewin, third mortgagee. On September 14, 1926, an order was entered appointing John A. Bernhard, Esq., Receiver, "with power to collect the rents, issues and profits of the premises described in the petition and with such other powers as may be required in the premises until the further order of this Court." Thereupon the receiver took active charge of the premises and collected the rents.

On October 28, 1926, a tax certificate in the amount of \$1,341.71 was issued by the City of East Orange to the Paramount Investment Corporation of Jersey City, the purchaser of the said premises under a sale for the non-payment of taxes for the year 1925. The said certificate was on November 29, 1926, recorded in the office

of the Register of Essex County in Book B 59 of Mortgages on page 560, *et seq.* On the same day the purchaser under the tax sale, viz., Paramount Investment Corporation, wrote a letter to John A. Bernhard, Receiver, as follows:

John A. Bernhard, Esq.,
Prudential Bldg.,
Newark, N. J.

Dear Sir:

This corporation is informed that you are the receiver of rents from premises known as 251 and 261 Main Street, East Orange, N. J. in a suit of foreclosure wherein Merchants & Traders Realty Company is complainant and Moses Stein *et al* are the defendants.

Beg to advise you that these premises were sold to this company on October 20th, 1926 by the Collector of Taxes of East Orange and that under the statute we are entitled to the rents from these premises until redemption has been made and unless this property is redeemed we will have to go into court and ask that the rents be turned over to us.

We have written the tenants already that the rents be turned over to you as receiver so as not to confuse the tenants and interfere with the order of the court.

Trusting to hear from you by return mail, we remain

Very truly yours,
PARAMOUNT INVESTMENT
CORPORATION
By FREDERICK ATANASIO
President.

On December 1, 1926, Mr. Bernhard, Receiver, replied to the foregoing letter as follows:

Paramount Investment Corporation,
Tube Concourse Building,
Jersey City, New Jersey.

Gentlemen:

I thank you for your letter of November 28th, 1926, with reference to the collection of rents from properties at #251-261 Main Street, East Orange, New Jersey, which premises you recently purchased at a tax sale. All of the rents collected will be deposited in my account as receiver and a detailed record made so that when I make my final report to the Court after the property has been sold under foreclosure proceedings, and a sheriff's deed executed and delivered to the new owner, you may put in a claim if you desire to do so. The foreclosure is now proceeding according to law and I assume that the matter should be finally closed within a couple of months.

I will notify you just as soon as the accounts have been filed so that you may appear in court when it comes up for the determination of the court.

Thanking you for your courtesy in this matter, I remain,

Yours very truly,

JOHN A. BERNHARD.

On April 6, 1927, a final decree was entered in the cause. On June 7, 1927, the premises were sold by the sheriff at public sale at a price of \$10,000, the complainant buying in the property at that price. According to the master's report filed in the cause there was due the complainant the sum of \$25,817.19 as of the date of the said report, February 4, 1927. Hence complainant suffered a deficiency under the sale in excess of \$15,000.

The Paramount Investment Corporation never applied to this Court to be admitted as a party

to the within cause, but it was served with a copy of the receiver's rule to show cause for filing receiver's final account and it put in an appearance on the return day of the said rule in order to assert its claim to the funds in the receiver's hands. The receiver filed his accounting and was discharged on July 19, 1927, the money in his hands being turned over to this Court. During the period of his stewardship the receiver made disbursements only for water rents amounting to \$246.86 and for incidentals amounting in all to \$18.60. In the interim the following expenses accrued but were not paid by the receiver: Taxes for 1926 (3½ months), \$519.75; taxes for 1927 (6½ months), \$1,024.83; interest on building and loan mortgage, \$2,600; and insurance, cost unknown. For the period of the receivership the premises in question ran under a deficit of more than \$1,600, exclusive of the cost of insurance and interest charges on unpaid taxes. The tax certificate issued to Paramount Investment Corporation was redeemed by the holder of the fee on August 1, 1927.

To the balance of the funds collected by the receiver, after deducting therefrom his allowance and expenses, there are now the following claims: Solicitor for complainant claims complainant's costs, taxed by this Court at \$460.68, before any moneys are paid out to any other claimant. The Paramount Investment Corporation claims the balance of the funds turned into court by the receiver less the rents collected prior to December 1, 1926, amounting to \$684.53. The complainant claims that so much of the said balance as may be required should be applied first to the payment of tax costs and the balance to complainant.

POINT I.

Under the present statute the status of a tax sale purchaser in possession is that of a mortgagee in possession; as such he must, on redemption, account to the true owner for all rents and profits over and above proper charges and expenses.

For the purpose of this argument let us take the case of a tax sale purchaser who, on recording his certificate as provided by the statute, had taken actual possession of the property and had himself collected the rents from the tenants. Can such a person then retain those rents after redemption, as contended by the claimant herein, or must he, as asserted by complainant, turn same over to the holder of the fee?

Under the 1903 statute the right of the tax purchaser in possession to the rents and profits was absolute and it was so decided in the case of *Anson v. Elwood*, 76 N. J. Law 56. Mr. Justice Swayze, delivering the opinion of the Supreme Court, said:

“The question to be decided, then, is whether the purchaser of land at a tax sale is chargeable with the rents and profits as if he were a mortgagee in possession.”

According to the Court's construction of the Tax Act, the rights of the tax purchaser in possession were held to be different from those of the mortgagee, in that the former did not have to account to the owner for the mesne rents on redemption. As to the liability of a mortgagee in possession the Court of Errors and Appeals in the case of *Stewart v. Fairchild-Baldwin Co.*, 91 N. J. Eq. 86, reiterated the rule obtaining in this State in the following lucid exposition:

“At common law, he could not be compelled to account to the mortgagor for the

value of the profits taken by him. This was a hardship upon the mortgagor and so a court of equity will compel the mortgagee to credit to the debt the profits received by him. This was done upon the theory, always obtaining in the Court of Chancery, that until the mortgagor has been foreclosed by decree of and from the right to redeem, the mortgage, even after default, was a security."

The tax sale revision of 1918 effected a marked change in the procedure for redemption. Under the 1903 act an owner or mortgagee could redeem by paying to the purchaser or his legal representative or assigns "the amount of purchase-money shown on the certificate with twelve per cent. interest thereon, together with such other fees and expenses as may be incurred by the purchaser under this act * * *" (Comp. St., p. 5136). Under the 1918 act, redemption was conditioned upon the payment of the sum paid at the sale, with interest, together with expenses incurred by the purchaser "*and subsequent municipal liens and interest and costs thereon * * **" Chapter 237, Laws of 1918, Sec. 43 (italics ours). Under the 1903 act, therefore, the tax sale purchaser was required to pay subsequent municipal liens and could not be reimbursed for such payment on redemption. In return for this "unjust enrichment" to the holder of the fee the tax purchaser was, however, entitled under the 1903 act to retain the rents and profits from the land, *Anson v. Elwood, supra*.

"This would seem to indicate that it was the idea of the legislature when the 1903 act was adopted, that the purchaser was obliged to pay the subsequent taxes while he had possession of the land in consideration of his right to occupy the same or to collect the rents." *Rodgers v. Cressman*, 98 N. J. Eq. 209.

E converso when the Legislature in 1918 revised the act and made redemption contingent upon the further payment by the redemptioner to the tax sale purchaser of the subsequent municipal liens paid by the latter during the term of his holding, did it not thereby intend that the purchaser should in return account to the redemptioner for the rents and profits collected by the purchaser during his term of holding? Such was the view entertained by the learned Vice-Chancellor upon the hearing.

The 1918 statute is silent as to the liability of the tax sale purchaser to account to the holder of the fee for the rents and profits on redemption and in view of this fact claimant contends that it was the intent of the Legislature that no such liability should attach to the purchaser, as it would otherwise have expressly included such a liability in the act. The error of such ratio-cination is evident, for it presumes a legislative omniscience such as would make our entire judicial system unnecessary. It is, of course, such omissions as these that make judicial interpretation of legislative intent essential. And courts in construing legislative enactments have always gone behind the wording of statutes in order to probe the true meaning and intent of the legislators and have given laws a liberal interpretation in order to give effect to the spirit of those laws. If now it be asked what the spirit of the tax sale act is, it must be answered in the light that the Legislature could not have intended to give a tax sale purchaser all the rents and profits of the property during his term of holding as a reward for his stewardship. Any other conclusion would deprive the holder of the fee of all the benefits of the property and at the same time would saddle him with the extra burden of paying taxes during the period for which he was so

deprived. That the Legislature should intend such a posture of affairs is too preposterous to merit credibility. We think that it is far more probable that the Legislature intended to give the tax purchaser nothing more than the right to hold the rents as security for the repayment of what was due him upon redemption.

As a matter of fact, the same judge (Swayze), who rendered the decision in *Anson v. Elwood*, *supra*, in which the interpretation of the 1903 act gave the tax sale purchaser an absolute right to the rents, sat in with Justices Black and Katzenbach in the cases of *Cohn v. Shrader, et al.*, and *Cohn v. Simon, et als.*, at the November term of the Supreme Court in 1921 (docket No. 607), when the following opinion was delivered:

"In other words, we think the intent of the statute (1918 Tax Sale Revision) was to enable the purchaser of the tax title upon recording his certificate to acquire the right of a mortgagee in possession, but in this respect the statute was not self executory and the purchaser of the tax title might, if he chose, avoid the responsibility of a mortgagee in possession." (The above cases were tried together and were not reported, but a certified copy of the opinion was sent by complainant's solicitor to Vice-Chancellor Berry and is among the records in this case).

Now it is evident from the above that the Court, being familiar with the case of *Anson v. Elwood, supra*, desired to draw a clear line of demarcation between the 1903 Tax Sale Act and the 1918 Tax Sale Revision, insofar as the status of the tax sale purchaser was concerned. According to their interpretation of the (1918) statute the intent of the Legislature was to give the purchaser the status of a mortgagee in possession.

In commenting upon the foregoing opinion, Vice-Chancellor Berry remarked:

"This interpretation of section 34 of the 1918 Tax Act indicates that the rule laid down in *Anson v. Elwood, supra*, is not now applicable. The opinion of the three justices of the Supreme Court who sat in the *Cohn* cases is entitled to the highest respect, and it is in conformity with my idea of equity as it should be applied in the case *sub judice*" (S. C., p. 21, ll. 31-38).

If now we accept the conclusion that a tax sale purchaser in possession acquires the rights of a mortgagee in possession, it follows that the claimant, having been, on redemption, reimbursed for all his outlays together with the statutory allowance for interest and charges, is not now entitled to any part of the rents collected by the Receiver. As Vice-Chancellor Berry points out, "the duties of a mortgagee in possession are those of a provident owner, Thom. Mort. 79" (S. C., p. 22, ll. 6-7).

The Court of Errors and Appeals in the very recent case of *Van Horn v. Huegel*, 5 Adv. Rep. 1434, adopted the interpretation of the present statute as formulated by the Supreme Court in the *Cohn* cases, in the following language:

"As was said by the Supreme Court, in the case of *Cohn v. Simon*, an unreported opinion, at the November term, 1921, the intent of the statute was to enable the purchaser of the tax title, upon recording his certificate, to acquire the right of a mortgagee in possession."

POINT II.

The right to the rents and profits of property purchased under a sale for delinquent taxes is contingent on possession, and such possession, as is contemplated under the law, was not taken by the claimant, Paramount Investment Corporation.

This point was urged by complainant upon the hearing of the within cause and while the learned Vice-Chancellor accepted that part of it which asserts that the right is contingent upon possession, he, however, held that under the facts in the case the claimant was, in the eyes of the law, in possession. Since the appellant now urges that the right to the rents is not contingent upon possession, but at the same time argues that it was in possession, we feel that it is our duty to restate here our former position, which we do with all due deference to the findings of Vice-Chancellor Berry.

And first as to whether claimant actually was in possession. It appears that claimant, after buying in the property and recording its certificate, learned that a receiver was collecting rents under a decree of the Court of Chancery. Thereupon the claimant wrote to the receiver a letter, a copy of which appears in the State of the Case on page 24. This letter, it appears, does not contain any demand that the receiver step aside and permit the claimant to collect rents, nor does it demand that the receiver turn over the rents to the Paramount Investment Corporation after collection. The letter is merely informative in nature and contains no demands whatsoever. It does make the statement "that under the statute we are entitled to the rents from these premises until redemption has been made and unless this property is redeemed we will have to go into

court and ask that the rents be turned over to us." To this letter the receiver responded that the rents would later be turned into court, whereupon the claimant could submit its claim.

Do these letters give the tax sale purchaser that possession which the statute contemplates? It is undeniable that the possession of the receiver was legal and plenary. The letters, as we understand them, do not contest the right of that possession, nor do they set up any right in the claimant in derogation of the right of possession of the receiver. In fact, it seems to us, the letter of the claimant recognizes the possession of the receiver and acquiesces in the full and undisturbed right of his possession. The claimant contends that "it was impossible for it to take actual possession of the premises without contemning the Court's order appointing the receiver, and that under the circumstances it did all that it was necessary for it to do to assert its rights." And the learned Vice-Chancellor approved this claim on the theory that the only alternative was an application to dispossess the receiver and put the tax purchaser in possession, which procedure was unnecessary in view of the understanding with the receiver as evidenced by the correspondence above referred to. We hesitate to accept the conclusions of the Vice-Chancellor on this score and we suggest that two courses were open to the claimant. It could have applied to be admitted as a party to the foreclosure suit on the basis of its interest in the rents of the premises and in order that the benefits of the receivership might be extended in its behalf. Such a procedure required little time and effort and the failure of the claimant to adopt it may be deemed as a waiver of any rights under the receivership. Or the claimant

could have adopted the course suggested by the Vice-Chancellor, viz. to apply to the Court to dispossess the receiver and put the tax purchaser in possession, if it desired to set up its right, not under the receiver, but in derogation to him. The Vice-Chancellor held that the latter course was not necessary, but that it was proper for the claimant to follow the procedure which it did, as its rights could not be affected by any decree made in the foreclosure suit to which it was not a party and in view of the further fact that it set up equitable rights superior to those of the receiver. We maintain, however, that if claimant desired to set up superior rights to the receiver it was its duty to contest the right of the receiver to possession at once and to apply for an order to dispossess the receiver. If the claimant had done this it would have put the complainant on notice that rights superior to its own were asserted and complainant would have then been in a position to redeem at once. But since the claimant failed to exercise its right to possession, the complainant was warranted in assuming that the claimant was waiving such right. Having been lulled into inaction by the failure of claimant to assert its right, complainant would now be prejudiced if such right could be asserted at this late date. Under these circumstances we reiterate that the claimant has not established its claim that it was in possession.

The following dicta of the Court of Errors and Appeals from the case of *Van Horn v. Huegel*, *supra*, sheds some light on the question of how far the tax sale purchaser must go to establish the fact of possession:

“In the case of an apartment house, such as is involved in this case, this can be easily done by asserting a right to the possession on the premises and giving the tenants no-

“... tice of that fact, with a statement that he has bought the property at a tax sale, and recorded the certificate in compliance with the statute, and that he demands the rents of the premises, thus laying a foundation for a right to recover the rents in an appropriate action under the statute.”

Claimant contends, however, that its right to the rents is not contingent upon possession, but exists independently of actual possession. To this contention we answer by way of quoting from the decision of the Supreme Court in the *Cohn* cases, *supra*:

“This case involves the construction of the Tax Act of 1918, Chapter 237, Section 34. Cohn had bought two tracts of land at a sale for taxes and had recorded his certificate as the statute provides, but did not take possession * * * Thereupon Cohn, the purchaser of the tax title, brought these suits to recover the rents and profits and the question is whether the statute enables him to recover them. We think it does not * * * The right the purchaser has under the tax title is to immediate possession, and evidently it is required that he should take this possession in order to have the right which the statute thereupon would give him.”

Claimant, in support of its contention that the right to rents is not contingent upon possession, cites in his brief as authorities the cases of *Anson v. Elwood*, *supra*, and *Baldauf v. Mann*, 86 N. J. Law 406. In the *Anson* case this question did not arise, as the tax purchaser went into actual physical possession and collected the rent, which the holder of the fee thereafter sued to recover. In the *Baldauf* case, Mr. Justice Parker pointed out that the tax sale purchaser had served upon the delinquent owner a letter demanding the rent and had also served upon the tenant a warning not to attorn to the delinquent

owner. In the Court's opinion these facts constituted an actual possession by the tax sale purchaser such as entitled him to a recovery of the rents under the statute. The facts in that case, far from supporting the claimant's contention herein, directly rebut that contention, for in the instant case not only was there no demand upon the receiver for the rents, but the tenants were even advised by the claimant to turn over their rents to the receiver. An estoppel, or at least an acquiescence, is the only interpretation which is inferable from the claimant's course of action.

Lastly, the claimant contends in its brief that the "proviso in the 1926 Act manifests a legislative intent that the holder of a tax lien be entitled to the rents even though out of possession and the owner actually in possession." The amendment of 1926 is as follows:

"Provided, however, that the purchaser at tax sale of a *dwelling house occupied by the delinquent owner* shall not be entitled to collect rents for such part of the dwelling house as shall be occupied by the delinquent or his immediate family until after the expiration of two years from the date of record of the certificate of sale." (Italics ours.)

Complainant's interpretation of this amendment is that it merely creates an exemption in favor of a delinquent owner who makes his home in the premises in question. At any rate the amendment in nowise affects the issue *sub judice* as it applies only to dwelling houses, whereas the premises in question consist only of three one-story brick buildings containing ten stores and no apartments. Finally the question of possession as it affects the right to retain rents is in no way involved in the amendment.

POINT III.

A receiver having been appointed to protect the interests of the parties to the suit and claimant having knowledge of the receivership, it was charged with the duty of applying to the Court either to be admitted as a party, in order to have the receivership extended in its behalf, or to dispossess the receiver and put the claimant in possession; claimant's failure to do either of these things now estops it from proving its claim to the rents.

This point has been touched on previously in this brief, but some additional comment may be necessary to elucidate complainant's position. It is a well-established rule in this state, that

"When a receiver is appointed in a suit he is appointed for the benefit of such of the parties in that suit as it shall afterwards appear were entitled to the fund in controversy, but not for the benefit of strangers to the suit."

The above principle was propounded by Vice-Chancellor Pitney, in the case of *N. J. Title Guarantee & Trust Co. v. Cone & Co.*, 64 N. J. Eq. 45. Now, then, if it was the intention of claimant to assert its claim under the receivership, it was charged with knowledge of its rights under the law and it was under a duty to apply to the Court to have the receivership extended in its behalf. Failing in this, claimant cannot now claim under the receiver because of its status as a stranger to the suit in which the receiver was appointed.

On the other hand if claimant purposely neglected to have the receivership extended in its behalf, because it relied on the claim that it had equitable rights which were superior to those of the receiver and because it intended to assert

such superior rights, it was under a duty to apply to the Court to dispossess the receiver and to place the claimant in possession. It became the duty of claimant in such an event to assert its right at once. The claimant was not warranted in merely apprizing the receiver of its claim nor in contenting itself with the reply of the receiver that the rents would be turned into court, at which time the Paramount Investment Corporation could enter its claim. The receiver had no authority to adjudicate the claim of the Paramount Investment Corporation. Neither did he owe claimant any duty to explain to it what its rights in the premises were. And under the order of the Court the receiver was not vested with any power to deal with claimants asserting rights superior to his, nor did he have any authority to speak for the Court as to alleged superior rights. If, therefore, it was the duty of the claimant to apply to the Court at once for an order to dispossess the receiver and to place it in possession and if, instead of so doing, it chose to follow the suggestion of the receiver, it did so at its peril. And if, in so doing, the claimant lost any rights that it might have had, it alone is responsible and must suffer the loss therefor.

That it was the duty of the claimant to apply to the Court at once for an order of dispossession, if it intended to set up superior equitable rights, instead of waiting until the receiver turned over the rents and was discharged, seems clear from the position of the parties. If the claimant had adopted such a procedure *ab initio* it would have served as notice to the complainant that conflicting rights were being asserted. Complainant would then have been in a position to redeem the property in order to avoid the possibility of a great loss of rents, which it had

reason to believe might redound to its own loss. But claimant, having failed to set up its claim, thereby lulled complainant into a frame of mind where the latter had no reason to apprehend that the former intended to contest the rights of those who would benefit under the receivership. In this posture of affairs the delay of claimant would seriously prejudice the rights of complainant, unless the Court stepped in and ruled that claimant was estopped from asserting its claim at this late date because of its laches in the premises.

POINT IV.

Complainant prosecuted its suit with proper diligence and is not guilty of laches.

Claimant charges that complainant has been guilty of laches and seeks to support this charge by citing the facts that the foreclosure suit was instituted in June, 1926, that complainant should have known that taxes were in arrears, but nevertheless it permitted the premises to be sold at public tax sale and that it did not redeem until August 1, 1927. A resume of complainant's actions in this cause will, we believe, be a sufficient refutation of claimant's charge.

Complainant instituted its foreclosure suit on June 26, 1926, and thereafter filed its petition for the appointment of a receiver. On September 7, 1926, it applied for and had entered an order to show cause why a receiver should not be appointed. On September 14, 1926, an order was entered by the Court appointing the receiver. On October 15, 1926, a decree *pro confesso* and order of reference were entered. On November 4, 1926, the solicitor of complainant filed his affidavit in compliance with Rule 144 of the Court of Chan-

cery. On December 14, 1926, an order was entered to admit additional parties defendant. On February 4, 1927, the Master's report was filed. On April 5, 1927, a final decree was entered. Thereafter the property was duly advertised for public sale and on June 7, 1927, the sheriff's sale took place.

As to the charge that complainant took no steps to avert the tax sale or to redeem more promptly, complainant denies that it was under any obligation to do either of these things. The receiver was on duty more than a month prior to the time of the tax sale and was collecting rents. Why should complainant have been obliged to make the necessary outlay of cash to pay the delinquent taxes or to buy in under the tax sale? There were other parties in interest in the suit, whose liens were junior to that of complainant, and the latter had a right to expect that they would protect their interests by subsequently taking over the property. Complainant's only interest during this period was to protect its lien and neither the requirements of the law nor considerations of personal aggrandizement made it incumbent upon complainant to avoid the tax sale or to buy in under it. As to the failure of complainant to make earlier redemption, two considerations were present which rendered such action unnecessary and inadvisable. In the first place complainant did not know that it would be compelled to buy in the property in order to protect its mortgage until June 7, 1927, the date of the sheriff's sale, and in the absence of such knowledge there was no motive for redeeming, as the complainant's interests could in nowise be served thereby. In the second place, as has been pointed out above, complainant was not chargeable with notice that the Paramount Investment Corporation had any

claim to the rents that it intended, or was able to assert in court, as the complainant relied, and had a right to rely, on the inaction of said claimant as a waiver or estoppel of any rights, that it might have had in the premises.

POINT V.

A comparison of the equities of the parties reveals that complainant was obliged to buy in the property at foreclosure sale, suffering a loss of approximately \$16,000 thereunder, and was also obliged to shoulder a deficit of some \$1,900 under the receivership, whereas claimant has been reimbursed for all his outlays and has come out whole.

According to the Master's report filed in the cause, there was due the complainant the sum of \$25,817.19, as of the date of the said report, February 4, 1927. The premises in question were sold at the foreclosure sale by the sheriff for \$10,000, the complainant buying in the property at that price in order to protect its lien. Complainant therefore suffered a deficiency under the sale of approximately \$16,000.

The anxiety of our courts to protect a mortgagee, who suffers a deficiency under a foreclosure sale, is illustrated in the case of *N. J. Title Guarantee & Trust Co. v. Cone & Co., supra.*

"The premises were purchased by the senior mortgagee for less than enough to satisfy his mortgage. HELD—that he was entitled, as against the junior mortgagee, to have funds derived from the receivership applied to the deficiency, and the junior mortgagee was not entitled to any priority as to such fund by securing the appointment." (Syllabus.)

It is complainant's contention that it is in the same preferred position as regards the claimant, even if claimant's rights had not been otherwise forfeited. Claimant cannot be entitled in this suit to any of the rents that may be required to make up complainant's deficiency under the sale.

Claimant calls attention to that part of Vice-Chancellor Berry's opinion, which says:

"The claimant, Paramount Investment Corporation, would not be entitled to receive anything, as the amount of unpaid taxes, accruing during the period in which it was entitled to possession, far exceeds the amount collected by the receiver."

Claimant points out that there is error in this comment, in that the state of facts discloses that the amount of unpaid taxes during this period was in fact less than the amount collected by the receiver. An analysis of the Vice-Chancellor's opinion, however, makes clear the fact that the Vice-Chancellor did not intend to confine his remark to taxes alone, but intended to refer to all those charges of maintenance which are set up in the statement of facts (S. C., p. 26, ll. 18-26).

We have seen that a tax purchaser in possession collects the rents as security for his lien, under the present statute. He may charge against those rents not only moneys expended by him in payment of taxes, but also any other sums that may have been expended to properly maintain the property. If there is any balance left, over and above these proper charges, the tax sale purchaser must turn over such balance to the owner upon redemption. That is what the learned Vice-Chancellor meant when he referred to a mortgagee in possession as a provident owner. From the statement of facts it appears

that the charges in question which accrued, but were not paid by the receiver, aggregated approximately \$4,150, whereas the rents turned into court, less the receiver's allowance, amounted to only \$2,220, leaving a deficit of more than \$1,900. This deficit will in the course of things be shouldered by the complainant, who has redeemed. The claimant, who upon redemption was reimbursed for all his outlays including the statutory interest and charges, asks that a large portion of these rents be turned over to it. If this were done complainant would not only suffer the deficit of \$1,900 which has already accrued, but also the further deficit represented by such amount as would be turned over to the claimant. It is inconceivable that the legislature should have intended such a state of affairs.

We therefore submit that for the reasons herein stated the judgment of the Court below should be affirmed, with costs.

Respectfully submitted,

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