

INDEX

	PAGE
Report of Sale of Mortgaged Premises, Etc.....	1
Objections to Report of Sale.....	3
Notice.	4
Affidavit of Franz Voelker.....	6
Affidavit of Myer Saul.....	8
Affidavit of Dorothy A. Davis.....	10
Affidavit of Robert C. Miller.....	14
Affidavit of Ernest A. Lord.....	23
Affidavit of Hugh Riddle.....	26
Affidavit of Lillie Kasten.....	28
Affidavit of Frances Brown David.....	32
Affidavit of Max Melgin.....	34
Affidavit of Joseph L. Soloff.....	36
Affidavit of David E. Gardiner.....	38
Conclusions.	40

	PAGE
Order.	44
Notice of Appeal.	47
Notice of Motion to Settle Form of Order Ap- pointing Receiver and Stay of Proceedings	49
Order.	51
Petition of Appeal of Dorothy A. Davis, Elene D. Loeb and Berthe Rubinstein, Defen- dants-Appellants.	54

REPORT OF SALE OF MORTGAGED
PREMISES, ETC.

IN CHANCERY OF NEW JERSEY.

Between

MARINE TRUST COMPANY,
Complainant,

and

LEVI DAVID, *et als.*,
Defendants.

} Report of Sale of
Mortgaged
Premises,
etc.

10

*To His Honor, Edwin R. Walker, Chancellor of the
State of New Jersey:*

20

I, Daniel D. Conway, Sheriff of the County of Atlantic, do hereby respectfully report that I did on the fourteenth day of May, nineteen hundred and thirty-one by the hands of Robert C. Miller, Under Sheriff, sell at Public Vendue, at Board of Chosen Freeholders Assembly Room, 7th Floor, Guarantee Trust Building, Atlantic City, Atlantic County, 30 N. J. (having first duly advertised the same) the lands and premises described in the writ of execution issued to me in the stated cause, to Lillie Kasten, or assigns, of the City of Baltimore, State of Maryland, subject to the easement of the Atlantic City Electric Company, mentioned in said execution,

2 *Report of Sale of Mortgaged Premises, Etc.*

for the sum of fourteen thousand and fifty dollars (\$14,050.00), she being the highest bidder therefor.

Respectfully submitted this 15th day of May, A. D. nineteen hundred and thirty-one.

DANIEL D. CONWAY,
Sheriff.

10

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

DANIEL D. CONWAY, of full age, being duly sworn according to law, on his oath says, that the mortgaged premises mentioned and referred to in the foregoing report, were duly sold for the highest and
20 best price the same would bring in cash at the time of sale.

DANIEL D. CONWAY,
Sheriff.

Sworn and subscribed before me, this 15th day of May, A. D. 1931.

HENRY HALPERN,
Notary Public of New Jersey.

30

OBJECTIONS TO REPORT OF SALE.

(Filed May 22nd, 1931.)

IN CHANCERY OF NEW JERSEY.

10

Between

MARINE TRUST COMPANY,
a corporation of New
Jersey,

Complainant,

and

LEVI DAVID, *et als.,*

Defendants.

} On Bill to Foreclose.
} Objections to Report
} of Sale.
} D. 80—pg. 66.

20

The defendants, Berthe Rubinstein, Elene D. Loeb, and Dorothy A. Davis, hereby object to the confirmation of the report of sale of the mortgaged premises made in this cause by Daniel D. Conway, Sheriff of Atlantic County, under the hand of Robert C. Miller, Under Sheriff of said County of Atlantic, on the ground that the price obtained at said sale is insufficient. 30

ALEXANDER BERMAN,

*Solicitor for Defendants,
Berthe Rubinstein, Elene
D. Loeb, and Dorothy A.
Davis.*

A true copy.

FERD GARRETSON,
Clerk.

NOTICE.

10

80-66

(Filed May 29, 1931.)

IN CHANCERY OF NEW JERSEY.

Between

20

MARINE TRUST COMPANY,
a corporation of New
Jersey,

Complainant,

and

LEVI DAVID, *et als.*,

Defendants.

} On Bill to Foreclose.
Notice.

30 To Charles C. Babcock, Esq., Solicitor for Marine
Trust Company, a corporation of New Jersey:
To Paul M. Salsburg, Solicitor for Lillie Kasten:

Please take notice that Dorothy A. Davis and
others, defendants, will move before the Chancellor
at the Chancery Chambers in the Atlantic Guaranty

& Title Insurance Company Building, in the City of Atlantic City, N. J., on Tuesday next, June 2, 1931, at ten o'clock in the forenoon daylight saving time or as soon thereafter as may be, to set aside a sheriff sale of the lands and premises made in this cause by the Sheriff of Atlantic County, and also the report of said sale heretofore reported by said Sheriff, on the ground that the price obtained at the sale is insufficient, and for other grounds which may be advanced at the time said motion is made. 10
Dated May 26, 1931.

ALEXANDER BERMAN,
*Solicitor for Dorothy A.
Davis, and others, Defendants.*

A true copy.

FERD GARRETSON,
Clerk.

20

[ENDORSED]

Due and legal service of the within notice acknowledged this 26th day of May, 1931.

Babcock & Champion,
Solicitor for Marine
Trust Co.
Paul M. Salsburg,
Solicitor for Lillie
Kasten.

30

AFFIDAVIT.

80-66

IN CHANCERY OF NEW JERSEY.

10

Between MARINE TRUST COMPANY, a banking corporation of the State of New Jersey, <i>Complainant,</i> and 20 LEVI DAVID, <i>et als.</i> , <i>Defendants.</i>	}	On Bill to Foreclose. Affidavit.
--	---	-------------------------------------

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

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

30 I am a real estate broker duly licensed by the State of New Jersey and pursue my business in the City of Atlantic City, County of Atlantic and State of New Jersey. I am also in the mortgage finance business and as such am continuously making appraisements of properties in Atlantic City, N. J.; as such broker and appraiser during the course of

many years I have had the opportunity to judge the comparative value of properties in Atlantic City, and in my earnest judgment the premises involved in the above-entitled cause and known as "Pitney Hotel" is reasonably worth between \$70,000 and \$75,000.

FRANZ VOELKER.

10

Sworn and subscribed to before me this 29th day of May, 1931.

IRENE GLENN,
Notary Public.

(Seal)

My commission expires November 12, 1934.

20

30

AFFIDAVIT.

80-66

IN CHANCERY OF NEW JERSEY.

10

Between MARINE TRUST COMPANY, a banking corporation of the State of New Jersey, <i>Complainant,</i> and 20 LEVI DAVID, <i>et als.</i>, <i>Defendants.</i>	}	On Bill to Foreclose. Affidavit.
--	---	---

STATE OF NEW JERSEY, COUNTY OF ATLANTIC,	}	ss.
--	---	-----

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

30 I am a real estate broker duly licensed by the State of New Jersey and pursue my business in the City of Atlantic City, County of Atlantic and State of New Jersey; as such broker during the course of many years I have had the opportunity to judge the comparative value of properties in Atlantic City, and in my earnest judgment the premises

involved in the above-entitled cause and known as
"Pitney Hotel" is reasonably worth \$70,000.

MYER SAUL.

Sworn and subscribed to before me this 29th day
of May, A. D. 1931.

EDNA MOORE,

(Seal)

Notary Public State of New Jersey. 10

AFFIDAVIT.

80-66.

IN CHANCERY OF NEW JERSEY.

10

Between	}	On Bill to Foreclose. Affidavit.
MARINE TRUST COMPANY,		
a banking corporation		
of the State of New		
Jersey,		
	<i>Complainant,</i>	
	and	
20	LEVI DAVID, <i>et als.</i> ,	
	<i>Defendants.</i>	

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

30 DOROTHY A. DAVIS, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am one of the defendants named in the above-entitled cause.

2. Levi David, by deed dated April 5, 1930, and recorded in the clerk's office of the County of Atlantic on April 8, 1930, in Book 941 of Deeds, page

418, etc., conveyed his interest in the lands and premises described in the bill of complaint herein, to myself, to Elene D. Loeb, and to Berthe Rubinstein in consideration of the payment of twelve thousand dollars (\$12,000.00) love and affection and other good and valuable consideration, and that said premises were encumbered with a second mortgage in the sum of \$9,500, which said second mortgage is the subject of this foreclosure; and that said premises are also encumbered by a first mortgage of \$9,500. 10

3. That said premises were sold at sheriff sale on Thursday, May 14, 1931, by virtue of a *fi. fa.* issued in this cause.

4. The property in question was exposed by the Sheriff for sale, a bid made therefor by I. Sinderbrand as agent for Jacob Bebro in the sum of \$100, and that thereafter the bidding was confined to three or four persons; and that at least seventy-five bids were made in sums which were but \$25 in excess of the preceding bids; that I. Sinderbrand's last and best bid for said property as agent for Jacob Bebro was the sum of \$19,100. 20

5. Thereafter said I. Sinderbrand stated that his principal was a Philadelphian and had called said Sinderbrand on the telephone about 1 o'clock and asked him (Sinderbrand) to be present and to bid at said sale on his behalf, and further stated that he (Sinderbrand), thereupon made arrangements to meet Mr. Bebro at the Sheriff's salesroom at 1:45 P. M. May 14, 1931; and when he (Sinderbrand) 30

met his principal at that hour he (Sinderbrand) told his principal that a ten per cent cash or certified check deposit would be necessary if the property was struck down to him; and that said principal was not familiar with said terms of sale and had with him a \$3,000 check and instructed Sinderbrand to bid in said property while Jacob Bebrow
10 cashed said check, which he thought he could do; that while his principal was out attempting to cash said check the property herein was brought up for sale and struck down to Mr. Sinderbrand, agent for Mr. Bebrow. Mr. Sinderbrand thereupon notified the Sheriff that his principal was cashing a check in order to pay the necessary deposit.

6. Upon said ten per cent in cash or certified check as deposit not being forthcoming, and principal not
20 returning soon enough, Under Sheriff Robert Miller, who conducted said sale, declared that said sale was void and immediately resold said property, it being purchased by Lillie Kasten, who bid through her agent, Mr. Geier, for the sum of \$14,050.

7. I am a real estate broker, duly licensed to do business in the State of New Jersey, and am familiar with real estate conditions and values in Atlantic City, and have had such experience extending over
30 a period of years. In 1927 I negotiated a sale of said property for \$90,000, but the owner refused to sell for said sum.

8. Said property is today reasonably worth \$75,000, and the bid of Lillie Kasten of \$14,050 is so inadequate as to work injustice upon myself and

the other defendants, notwithstanding the fact that there is still a first mortgage of \$9,500 on said property.

9. Said property, during the year 1930, was assessed by the City of Atlantic City for the purpose of taxing same, at the sum of \$57,800.

10. Had the bid of \$19,100 been accepted, myself and the other defendants would benefit by payment of our proportionate share of the higher bid after the decree in the aforesaid cause had been paid off.

DOROTHY A. DAVIS.

Sworn and subscribed to before me this 28th day of May, 1931.

(Seal)

DORA HIRSCH,
Notary Public. 20

My commission expires Sept. 7, 1932.

[ENDORSED]

Due and legal service of the within affidavits acknowledged this 29th day of May, 1931. 30

Babcock & Champion,
Solr. for Marine Trust Co.
Paul M. Salsburg,
Solr. for Lillie Kasten.

AFFIDAVIT.

80-66

IN CHANCERY OF NEW JERSEY.

10

Between

MARINE TRUST COMPANY,
a banking corporation
of the State of New
Jersey,

Complainant,

and

20 LEVI DAVID, *et als.*,
Defendants.

On Bill, etc.
On Objections to Con-
firmation of Sale.
Affidavit.

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

ROBERT C. MILLER, of full age, being duly sworn, according to law, on his oath deposes and says:

30

1. I am one of the under sheriffs of Atlantic County, New Jersey.

2. On February 27, 1931, execution was issued by the clerk of Chancery in the above-stated cause directed to the Sheriff of Atlantic County, directing

him to make sale of the premises therein described. The execution was delivered to the Sheriff of Atlantic County and the property was duly advertised for sale. A copy of said advertisement is hereto annexed and made a part hereof.

3. After the said property had been advertised for sale there was an order restraining the said sale issued in a proceeding in the Court of Chancery of New Jersey, in which Frances David is complainant and Levi David, et als., are defendants, Docket 79, page 319, and pending that restraint the sale of said property under said advertisement was adjourned from week to week. 10

4. On April 24, 1931, Babcock and Champion wrote a letter to the Sheriff of Atlantic County enclosing a copy of the said order made in the case of Frances David v. Levi David, marked by the clerk "a true copy" dissolving the said restraint and expressing their desire that the sale of the property take place April 30, 1931. A copy of said letter is hereto annexed and made a part hereof. 20

5. Requests were made for adjournments and the sale of the property was adjourned from week to week until May 14, 1931.

30

6. On May 14, 1931, a few minutes past 2 o'clock and in the Board of Chosen Freeholders' Assembly Room, 7th Floor, Guarantee Trust Building, in the City of Atlantic City, County of Atlantic and State of New Jersey, the property was put up and offered for sale in accordance with said execution and the

said advertisement and under and subject to conditions of sale which were read following the reading of the advertisement of sale and before any bidding took place, a copy of which conditions of sale are hereto annexed and made a part hereof.

7. It was announced before the bidding that the
10 property would be sold subject to:

1. Second half of municipal taxes for 1929 amounting to \$850.77 besides interest and costs.

2. Municipal taxes for 1930 amounting to \$1669.95 besides interest and costs.

3. Current taxes for 1931.

4. Any other unpaid taxes and/or municipal lines.

5. 1st mortgage of \$9500 plus interest from
December 14, 1929, and any other unpaid interest.
20 Amount paid out by first mortgagee of \$306.85 for fire insurance premiums. The further sum of \$306.85 for fire insurance and any other payments due and to grow due under said first mortgage, including any other sums for insurance.

6. Building and other restrictions, if any.

7. Zoning regulations.
30

I also read a statement as follows:

"The property will first be put and offered for sale subject to the easement of the Atlantic City Electric Company mentioned and referred to in the execution under which this sale is being made, and if there be no bid for the same,

or if the amount bid for the property, shall be less than the total amount due the complainant under the decree, for principal, interest, costs and interest on costs, plus sheriff's execution fees and expenses of sale, then the said premises will be immediately put up, offered and sold free from said easement."

10

8. The sale was held on the day of the week when sheriff's sales are held in Atlantic County and at the usual hour. There was quite a large number of persons present and when the property was put up and offered for sale there was active bidding by a number of persons and the property was finally struck off to Jacob Babrow for \$19,100. It was distinctly stated by me that ten per cent of the purchase price would be required to be put up at the time the property was struck off and sold. The purchaser was not able to make the necessary down payment in cash and offered his uncertified check. The check was on an out of town bank and I refused to accept it. It was stated to me that an effort was being made in behalf of the purchaser to have the check cashed and I held the sale for about half an hour when it was stated that the money could not be raised and the required ten per cent deposit could not be made. I then put the property up again for sale under the same conditions and after similar active bidding the property was struck off and sold to Lillie Kasten for \$14,050. The sale was duly reported to the Court of Chancery by report dated May 15, 1931. It is a fixed and definite and well-known rule that uncertified checks will not be received as down payments in execution sales. In

20

30

the present case I did my best to object the highest price for the property and I gave the said Babrow full opportunity to make payment and comply with the conditions of sale but when he did not comply with them and statement was made that he could not comply then and as I have stated, the property was put up again for sale on exactly the same conditions as before and was sold to the said Lillie Kasten for the best figure I was able to get.

9. In both instances the sale was made subject to the easement of the Atlantic City Electric Company mentioned in the execution.

10. Said Babrow did not appear in person. The bidding for him was done by Isaac D. Sinderbrand a resident of Atlantic City, New Jersey. Not even a check was offered to me for the down payment required but said Sinderbrand said that Babrow, who lived in Philadelphia, had given him, Sinderbrand, a check for \$3000 and Sinderbrand said he would try to get the check cashed so as to make the required payment, but after I had given him full opportunity he said he could not get the check cashed, whereupon the said property was put up again and sold as I have previously stated.

ROBERT C. MILLER.

Sworn and subscribed to before me this 27 day of May, A. D. 1931.

BENJ. M. PERKSTEIN,
Atty.-at-Law of N. J.

April 24, 1931

Daniel D. Conway, Sheriff,
Mays Landing, N. J.

Re: Marine Trust Company v. Levi David, et als.

Dear Sir:

Enclosed is copy of Order made in the case of Frances David vs. Levi David, marked by the Clerk, "a true copy" dissolving the restraint against the 10 Marine Trust Company and the Sheriff of Atlantic County with respect to the sale under the execution of Marine Trust Company vs. Levi David.

We desire to have the sale take place Thursday, the 30th inst.

Very truly yours,
BABCOCK & CHAMPION,
BY:

CCB:CL

Enc.

20

SHERIFF'S SALE

By virtue of a writ of *feri facias*, directed to the Sheriff of Atlantic County, issued out of the New Jersey Court of Chancery, will be sold at public vendue, on

THURSDAY, THE SECOND DAY OF APRIL, 30

NINETEEN HUNDRED AND THIRTY-ONE

at two o'clock in the afternoon of said day, in the Board of Chosen Freeholders Assembly Room, on the Seventh Floor, Guarantee Trust Building, in the City of Atlantic City, County of Atlantic and State of New Jersey.

All that certain tract or parcel of land and premises hereinafter particularly described, situate in the City of Atlantic City, in the County of Atlantic and State of New Jersey:

Beginning at a point in the Southwesterly line of New York Avenue one hundred and seventy (170) feet Southeastwardly from the Southeasterly line of Pacific Avenue, extending thence (1) Southwestwardly, on a line parallel with Pacific Avenue one hundred and thirty-four (134) feet, more or less, to the Northeasterly line of boundary of lands formerly of the late Sarah H. B. Penrose; thence (2) Southeastwardly, along said line fifty-five (55) feet, more or less, to a point where said line is intersected by the Northwesterly line of lands now or late of William Yewdall; thence (3) Northwestwardly, along said last mentioned line and parallel with Pacific Avenue one hundred thirty-two (132) feet, more or less, to the Southwesterly line of New York Avenue; thence (4) Northwestwardly, along the said Southwesterly line of New York Avenue fifty (50) feet to the place of beginning.

Decree approximately \$9,866.76, besides interest, costs and fees.

Seized as the property of Levi David, *et als.* and taken in execution at the suit of Marine Trust Company, a banking corporation of the State of New Jersey, and to be sold by

DANIEL D. CONWAY,
Sheriff.

Dated March 7, 1931.

BABCOCK & CHAMPION, Solicitors.

Pr's fee \$24.36

CONDITIONS OF SALE

1. The property will be sold to the highest bidder (subject to confirmation by the Court).

2. 10 per cent. of the purchase money shall be paid when the property offered is struck off, in default whereof it may be put up again and sold immediately. 10

3. The balance of the purchase money shall be paid on the 28th day of May, 1931, at 2 o'clock in the afternoon, at the Sheriff's Office at Mays Landing, New Jersey.

4. The deed will be delivered at the above time upon compliance by the purchaser with these conditions (provided such sale is confirmed as aforesaid). 20

5. The purchaser will be held bound by the purchase whether he intends to receive the deed and comply with the conditions of sale or not. If he does not so comply with them, the property may be again advertised and sold, or the purchaser may be liable for his bid, at the option of the Sheriff. In case of re-sale at a less price than the former bid, with interest and expenses, the former purchaser will be held liable for the deficiency; to meet which the money paid by him shall be retained and applied by the Sheriff. 30

PROPERTY SOLD SUBJECT TO

First Mortgage Second Mortgage Third Mortgage

STATEMENT

19 Taxes 19 Taxes 19 Taxes 19 Taxes

I have bid off the property described
above for the sum of Dol-
lars and agree to comply with the above
conditions of sale.

Dated this day of 19 .

10 Purchaser.

..... Residence.

Paid on account.....

AFFIDAVIT.

80-66

IN CHANCERY OF NEW JERSEY.

10

Between

MARINE TRUST COMPANY,
a banking corporation
of the State of New
Jersey,

Complainant,
and

LEVI DAVID, *et als.*,

Defendants.

On Bill, etc.
On Objections to Con-
firmation of Sale.
Affidavit.

20

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

ERNEST A. LORD, of full age, being duly sworn, ac-
cording to law, on his oath deposes and says:

30

1. The amount due the complainant is \$9866.76
with interest thereon from December 31, 1930, taxed
court costs of \$431.01 with interest thereon from
February 17, 1931, plus sheriff's execution fees,
commissions, etc.

2. The mortgage of the Marine Trust Company which was foreclosed in said proceeding was a second mortgage and the sale of the mortgaged premises, which was made by the Sheriff of Atlantic County on May 14, 1931, to Lillie Kasten for \$14,050, was subject to a first mortgage held by Ventnor Building and Loan Association, for \$9500, together
 10 with interest thereon from December 14, 1929. There is also due on said association mortgage the sum of \$306.85 which said association paid out for fire insurance premiums on May 8, 1930, and the further sum of \$306.85 on February 12, 1931, plus interest on said sums from said respective dates. Said sale was also subject to second half of municipal taxes for 1929 amounting to \$850.77, plus interest and costs, the municipal taxes for 1930 amounting to \$1669.95, plus interest and costs and current taxes
 20 for 1931, the first half of which amount to \$880.70.

The amount required to pay the second half of 1929 taxes.....	\$998.31
The amount required to pay the 1930 taxes to June 1st, 1931.....	1,769.45
The amount required to pay the first half of 1931 taxes.....	880.70
The total amount due the Ventnor Building & Loan Association June 1st, 1931.	10,969.75
30	
Total amount due 1st mortgagee and taxes June 1st, 1931.....	\$14,618.21
Total amount due Marine Trust Company on notes with interest including June 1st, 1931	10,107.59

Taxes, court costs, plus interest to June 1st, 1931	438.47
--	--------

Total amount due on first and second mortgages and taxes as of June 1st, 1931.	\$25,164.27
---	-------------

ERNEST A. LORD.

10

Sworn and subscribed to before me this 1st day
of June, 1931.

(Seal)	S. P. SCHWENDY, JR., Notary Public of N. J.
My commission expires March 30, 1936.	

20

30

AFFIDAVIT.

80-66

IN CHANCERY OF NEW JERSEY.

10

Between MARINE TRUST COMPANY, a banking corporation of the State of New Jersey, <i>Complainant,</i> and 20 LEVI DAVID, <i>et als.</i> , <i>Defendants.</i>	}	On Bill, etc. On Objections to Con- firmation of Sale. Affidavit.
---	---	--

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

HUGH RIDDLE, of full age, being duly sworn according to law, on his oath deposes and says:

30

1. I am chairman of the Board of Directors of the Marine Trust Company, complainant in the above-stated cause, and I am also interested in several financial institutions in the City of Atlantic City, owning real estate in said city and making loans with real estate as security.

2. I have examined the premises known as the Hotel Pitney, being the premises described in the mortgage of Marine Trust Company, foreclosed in the above-stated cause, and I have appraised the property under present-day conditions at \$26,500.

3. The real estate market is very depressed, there is practically no activity in the real estate market 10 and financing is most difficult. Anyone particularly interested might be willing to pay more than the above appraisement but at a public sale of the property at this time for said amount would, in my judgment, represent a sale at the present market value.

HUGH RIDDLE.

Sworn and subscribed to before me this first day of June, 1931.

(Seal)

C. P. SCHWENDY, JR., 20
Notary Public of N. J.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

10

Between

MARINE TRUST COMPANY,
a banking corporation
of the State of New
Jersey,

Complainant,

and

LEVI DAVID, *et als.*,

Defendants.

On Bill to Foreclose.
On Objections to Con-
firmation of Sher-
iff's Sale.
Affidavit.

20

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

LILLIE KASTEN, of full age, being duly sworn ac-
cording to law, upon her oath deposes and says:

1. I am the person who purchased the Hotel Pit-
30 ney at sheriff's sale in Atlantic City on May 14th,
1931, by virtue of a *feri facias* issued to him in the
above-entitled cause.

2. That my bid for said property was \$14,050.

3. That said premises were sold by the Sheriff

subject to a first mortgage held by the Ventnor Building and Loan Association in the sum of \$9500.00 together with interest from December 14th, 1929, amounting to \$831.25 and unpaid fire insurance premiums together with interest thereon amounting to \$638.50; making in all the sum of \$10,969.75 due the holder of said first mortgage.

10

4. That said premises were likewise sold subject to unpaid taxes which are as follows: Due to Paramount Investment Corporation for last half of 1929 taxes, \$997.83; due to the City of Atlantic City for unpaid taxes for the year 1930, \$1,666.95 with interest to be added at the rate of 8% amounting to \$100.07; and the first half of the taxes for the year of 1931 due the City of Atlantic City amounting to \$880.70, making in all the sum of \$3,645.55 due in unpaid taxes.

20

5. That the aggregate amount due upon the first mortgage and unpaid taxes subject to which said premises were sold is \$14,615.30.

6. That I bid for said premises the sum of \$14,050, making the costs thereof to me \$28,665.30, besides expenses which I have incurred as follows: I am a resident of Baltimore, Maryland, and since procuring the property at sheriff's sale I have been informed by the Ventnor Building and Loan Association that it will require the payment of its mortgage in full immediately upon receipt of the Sheriff's deed; that in pursuance thereof I have gone to the expense in procuring the monies necessary to pay off the said first mortgage and the unpaid taxes;

30

that I have arranged for a settlement at the South Jersey Title & Finance Company in Atlantic City.

7. That I have examined the premises known as the Hotel Pitney and find the property to be in a bad state of disrepair; that considerable money will have to be spent to fix the floors, ceilings and walls
10 in many of the rooms; that my purpose for buying the same was to either run the same as a hotel myself or rent the same to a suitable person who would pay a satisfactory rental for said premises; that my greatest desire in the matter is to operate the same as a hotel myself but in either event whether the hotel would be run by me or a tenant the premises would have to be repaired as aforesaid and with the summer season almost at hand I would suffer irreparable damage if I do not procure the premises
20 in the very near future.

8. That at the sale of the premises after the same were struck down to Mr. I. Sinderbrand who did not declare until after the bidding had ceased that he was bidding for Jacob Bobrow, the Sheriff waited a period of one-half hour to enable the said I. Sinderbrand to meet one of the conditions of the sale, to wit, that 10% of the bid be deposited and paid immediately in cash; that at no time did he make
30 such a tender to the Sheriff and after waiting for the period aforesaid the sale was declared void and after again reading the terms of the sale and the prior liens subject to which the property was being sold the second sale was had.

9. At the time the property was offered the sec-

ond time all those that were interested in the bidding at the first sale were present and some of them bid; that the said I. Sinderbrand heard the announcement of the second sale and likewise had an opportunity to bid but did not do so.

10. That the said Dorothy A. Davis who is objecting to the confirmation of said sale was not present in person nor did anyone declare or make it known at least, that they were present representing her interest. 10

11. That the amount realized at the sale was approximately \$3,000 more than the amount necessary to satisfy the second mortgage of the complainant and I am informed by my solicitor that the said surplus amounting to approximately \$3,000 will be paid into the court as a surplus to be distributed among those entitled to receive the same. 20

12. I have been advised by my solicitor that the Ventnor Building and Loan Association, the holder of the first mortgage on the above premises, has through its secretary declared that the building and loan association has purposely withheld the foreclosure of its mortgage pending this foreclosure sale and that unless it receives payment promptly it will be obliged to file foreclosure proceedings. It was for this reason that I have made arrangements to pay off said mortgage upon receiving the deed from the Sheriff. 30

13. That at the time the property was struck down to me for the sum of \$14,050 I immediately paid to

32 *Affidavit of Frances Brown David*

Robert Miller, Under Sheriff, the sum of \$1410 in cash and thereupon signed the bid obligating myself to purchase said property.

LILLIE KASTEN.

Sworn and subscribed to before me this 1st day of June, 1931.

10

BENJAMIN A. RIMKUFISKY,
Atty.-at-Low of N. J.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

20 Between

MARINE TRUST COMPANY,
a banking corporation
of the State of New
Jersey,

Complainant,
and

LEVI DAVID, *et als.*,
Defendants.

} On Bill to Foreclose.
Affidavit.

30

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

FRANCES BROWN DAVID, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am the owner of a one-half interest in the premises sold by the Sheriff in the above-entitled cause on May 14th, 1931, in pursuance of a writ of *feri facias* directed to him.

2. That my interest in said premises was that of a joint tenant and not a tenant in common with the additional stipulation of survivorship.

10

3. That subsequent thereto my husband, Levi David made a deed for his one-half undivided interest, subject to the survivorship provision, to his daughters, Elene Loeb, Dorothy Davis and Bertha Rubinstein although I did not join in said deed.

4. That I was present at the sheriff's sale and believe that the price obtained is a sufficient and adequate price for the property sold and have no complaint nor objection nor fault to find with the price for which the property was sold.

20

5. That I have no agreement or arrangement with the purchaser whereby I am to share in the ownership of the property or any possible profit that might be made on the same in the future in the event that a profit is made. I likewise am not liable in the event of any loss.

6. I am interested, however, in the surplus which I believe to be about \$3,000 above the amount necessary to satisfy the complainant's decree.

30

FRANCES BROWN DAVID.

Sworn and subscribed to before me this 1st day of June, 1931.

HERBERT WERTHEIMER,
Atty.-at-Law of N. J.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

10

Between

MARINE TRUST COMPANY,
a banking corporation
of the State of New
Jersey,

Complainant,

and

LEVI DAVID, *et als.,**Defendants.*

On Bill to Foreclose.
Affidavit.

20

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

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

1. I am a duly licensed real estate broker of the
30 State of New Jersey, maintaining my offices and
transacting my business for many years past in the
City of Atlantic City and have made many appraisals
of property in the City of Atlantic City and
transacted business as a broker in the buying and
selling of real estate in Atlantic City.

2. That I am familiar with property and property values in Atlantic City, and particularly in the vicinity of the premises known as the Hotel Pitney, 118 South New York Avenue, Atlantic City, New Jersey.

3. For the purpose of appraising the said premises I have visited them and in my opinion the fair 10
market value of the same at the present time is \$29,250.00.

MAX MELGIN.

Sworn and subscribed to before me this 1st day
of June, 1931.

JOSEPH L. SOLOFF,
Notary Public of N. J.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

10

Between

MARINE TRUST COMPANY,
a banking corporation
of the State of New
Jersey,

Complainant,

and

LEVI DAVID, *et als.,**Defendants.*

On Bill to Foreclose.
Affidavit.

20

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

JOSEPH L. SOLOFF, of full age, being duly sworn
according to law, upon his oath deposes and says:

1. I am a duly licensed real estate broker of the
30 State of New Jersey, maintaining my offices and
transacting my business for many years past in the
City of Atlantic City.

2. That I am a member of the Atlantic City Real
Estate Board and have made many appraisals of
property in the City of Atlantic City and trans-

acted business as a broker in the buying and selling of real estate in Atlantic City.

3. That I am familiar with property and property values in Atlantic City, and particularly in the vicinity of the premises known as the Hotel Pitney, 118 South New York Avenue, Atlantic City, New Jersey. 10

4. For the purpose of appraising the said premises I have visited them and in my opinion the fair market value of the same at the present time is \$30,250.00.

5. That I was present at the sheriff's sale in the above-entitled cause and was one of the bidders for said property and my last and final bid of the sale of the same subject to \$15,000 in encumbrances was \$12,000. In other words when the property reached 20 in my judgment the price of \$27,000 I concluded to go no further as in my opinion that was a sufficient price for the same.

JOSEPH L. SOLOFF.

Sworn and subscribed to before me this 1st day of June, 1931.

HERBERT WERTHEIMER,
Atty.-at-Law of N. J. 30

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

10

Between

MARINE TRUST COMPANY,
a banking corporation
of the State of New
Jersey,*Complainant,*

and

LEVI DAVID, *et als.,*

20

Defendants.} On Bill to Foreclose.
Affidavit.STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } ss.DAVID E. GARDINER, of full age, being duly sworn
according to law, upon his oath deposes and says:30 1. I am a duly licensed real estate broker of the
State of New Jersey, maintaining my offices and
transacting my business for many years past in the
City of Atlantic City.2. That I am a member of the Atlantic City Real
Estate Board and have made many appraisals of

property in the City of Atlantic City and transacted business as a broker in the buying and selling of real estate in Atlantic City.

3. That I am familiar with property and property values in Atlantic City, and particularly in the vicinity of the premises known as the Hotel Pitney, 118 South New York Avenue, Atlantic City, New 10 Jersey.

4. For the purpose of appraising the said premises I have visited them and in my opinion the fair market value of the same at the present time is \$32,000.00.

DAVID E. GARDINER.

Sworn and subscribed to before me this 1st day of June, 1931.

ELIZABETH I. RIES,
Attorney-at-Law of N. J.

20

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

10

Between

MARINE TRUST COMPANY,
Complainant,

and

LEVI DAVID,

*Defendant.*On Objection to Con-
firmation of Sher-
iff's Sale.

20

LEAMING, V. C.:

I think it will not be necessary for me to re-read these affidavits. They are within a very small compass, counsel have read them throughout and I am entirely familiar with their contents. The remedy which is afforded under the Court rule, adopted pursuant to our statute, by way of objections to the confirmation of a sales limits the inquiry to the ques-
 30 tion, whether the Sheriff sold the property for the best price that could be obtained for it in cash, as has been suggested by Mr. Babcock, and fully determined in the cases cited by him. If broader grounds are relied upon, fraud, accident, mistake, irregularity in the proceedings, combinations of bidders, and matters that go to the broader equitable

powers of the Court, those questions should be raised by bill or petition. Here the single objection, which has been made is that this property was not sold for the best amount the Sheriff could have obtained for it in cash at that time. Now, the circumstance that it can be sold for more at some subsequent time, or if it is resold, is not, standing alone, or in itself, ground for relief under the rule. 10

I suppose cases are occurring constantly where if the Sheriff should sell again, active parties might procure more liberal bidders and the property could be sold for more than it was first sold for; but the law provides the procedure by which the Sheriff shall in all cases give a certain notice which the statute regards as adequate, and it is essential that anyone interested in the property who is willing to pay any considerable amount for it should be there at that sale prepared to bid and pay, and comply 20

with the conditions of sale, among which is the condition, which existed in this case, that he pay a certain percentage of the purchase price in cash. If he is there and is not prepared to pay his percentage in cash his bid cannot stand and the property must be resold. So standing alone, the mere circumstance that the present objector is willing at the present time to pay \$5,000 more than the amount for which it was sold is not, standing alone, a circumstance which would justify setting this sale aside. 30

The primary question is: Was the sale at the best available price at the time? It may be that if it clearly appears in a proceeding under this rule that a sale has been made at what is classed a gross inadequacy of price, at a price which on its face, imputes fraud, and thereby indicates that the Sheriff

did not procure a purchaser for the best amount that could have been procured at the time, the Court would be justified in refusing to confirm the sale in the absence of a bill or petition, on the ground that the price at which it was sold indicated in itself, standing alone, something wrong, fraud or something of that nature; that I am not now called upon
10 to determine; but a mere difference in opinions as to values, touching the property—one side valuing it as high as \$70,000 or \$75,000, and the other side valuing it at little above what it was sold for—would not in itself indicate that the Sheriff did not obtain the best price available for that property under the method the law has designated for the sale of properties by judicial process. The amount that this property would bring in the market at that time is, of course, the test; that is the value which is to
20 guide us. The affidavits filed in behalf of the defense are to the effect that the amount at which the property was sold was about the market value of the property. It may be that the real estate agents who testified at the \$70,000 or \$75,000 figure had in mind that that amount was the market value at the time of the sale, I am not clear as to that; but even assuming they did, I cannot at this time appropriately determine that this higher valuation which was given by the two or three real estate
30 agents was right and that the lower valuations which are given by the defensive affidavits of the real estate agents are wrong. It is impossible. The real market value may be somewhere between the two. I used to think when I heard cases at Atlantic City that I could pretty nearly tell where every real estate agent in Atlantic City would stand on the

question of values, some constantly high, and others constantly low; I had so many cases in which they valued properties I could nearly speak for them before I read their affidavits. It is a difference of opinion which exists at all times between real estate agents as appraisers of property. I am not sure but that jurors sometimes do a very sensible thing, when they have a series of valuations given to them 10 by a great number of witnesses, to average the lot and make up their minds that the truth is about the average; and it may be here that the property could be said to be worth somewhere between the two sets of valuations, but even if worth more than that, even if its market value might be said to be worth more than that, I don't think there is such a gross inadequacy in the amount at the sale as to require any further investigation on the part of the Court. 20 Gross inadequacy has been defined as that which shocks the conscience of the Court. The definition is perhaps not very satisfactory; different courts are differently constituted; we all look through different eyes, seeing things more or less in different aspects, but if you will examine the cases which state what constitutes gross inadequacy you will find the uniform policy has been that where there is no more discrepancy between the amount of the sale and the amount of accepted valuation than there is 30 here, not to regard it as gross inadequacy. Sheriff's sales have to be protected. If they should be set aside, one after another, for mere inadequacy of price, we will get no bidders at all; and one of the aims of the law is to sustain a bid when once made unless there is some very strong ground to set it aside.

Heard and determined June 8, 1931.

10

80-66

Between
20 MARINE TRUST COMPANY,
a banking corporation
of the State of New
Jersey,
Complainant,
and
LEVI DAVID, *et als.,*
Defendants.

It appearing by a report of sale made by Daniel D. Conway, Sheriff of the County of Atlantic, bearing date the 15th day of May, nineteen hundred and thirty-one, and the affidavit thereto attached, whereby it appears that on the 14th day of May, nineteen hundred and thirty-one he sold at public vendue, at

the Board of Chosen Freeholders' Assembly Room, 7th Floor, Guarantee Trust Building, Atlantic City, New Jersey (having first duly advertised the same), the lands and premises described in the writ of execution issued to him in the above-stated cause, to Lillie Kasten, or assigns, of the City of Baltimore, State of Maryland, subject to the easement of the Atlantic City Electric Company, mentioned in said execution, for the sum of fourteen thousand and fifty dollars (\$14,050) she being the highest bidder therefor, and that the said lands and premises were sold at the highest and best price the sale would bring in cash; and 10

It further appearing that there was filed in this cause on May 22, 1931, written objections by Bertha Rubinstein, Elene D. Loeb and Dorothy A. Davis, to the confirmation of the said report of sale on the ground that the price obtained at the sale was insufficient and, the objections coming on to be heard in the presence of Alexander Berman, Esquire, solicitor for the said objectors, Charles C. Babcock, of Babcock & Champion, solicitors for the complainant, and Paul M. Salsburg, Esquire, solicitor for the purchaser, Lillie Kasten, and the report of sale having been read and considered with the affidavits of the respective parties and the arguments of the respective counsel, and the Court being of the opinion that the objections have not been sustained and the said sale as set forth in said report should be confirmed. 20 30

It is on this 8th day of June, 1931, ordered, that the said objections be and the same are hereby overruled and that the said sale be and it is hereby rati-

fied and confirmed in all respects as valid and effectual in law.

It is further ordered, that the said Sheriff do execute a good and sufficient conveyance in the law to the said purchaser, Lillie Kasten, or her assigns, for the said mortgaged premises so sold.

E. R. WALKER,
C.

10

Respectfully advised.

E. B. LEAMING,
V. C.

20

30

NOTICE OF APPEAL.

(Filed June 11, 1931.)

80-66

10

IN CHANCERY OF NEW JERSEY.

Between

MARINE TRUST COMPANY,
a banking corporation
of the State of New
Jersey,

Complainant,

and

LEVI DAVID, *et als.*,

Defendants.

On Bill.
Notice of Appeal.

20

The defendants, Dorothy A. Davis, Berthe Rubin- 30
stein, and Elene D. Loeb, hereby appeal from the
interlocutory order made by the Chancellor on the
advice of Honorable Edmund B. Leaming, one of
the Vice-Chancellors of this Court, in the above-en-
titled cause on June 8, 1931, and from the whole and

every part thereof, to the Court of Errors and Appeals in the Last Resort in all Causes.

Dated June 10, 1931.

10

ALEXANDER BERMAN,
Solicitor for
HERBERT R. VOORHEES,
And of Counsel with the De-
fendants, Dorothy A.
Davis, Berthe Rubinstein
and Elene Loeb.

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

20

HERBERT R. VOORHEES,
Of Counsel with Defendants,
Dorothy A. Davis, Berthe
Rubinstein and Elene D.
Loeb.

A true copy.

FERD GARRETSON,
Clerk.

[ENDORSED]

30

Due and legal service of the within notice of appeal acknowledged this 10th day of June, A. D. 1931.

Babcock & Champion,
Solicitors for Complainant.
Paul M. Salsburg,
Solicitor for Purchaser.

NOTICE OF MOTION TO SETTLE FORM OF
ORDER APPOINTING RECEIVER AND
STAY OF PROCEEDINGS.

10

80-66

IN CHANCERY OF NEW JERSEY.

Between	
MARINE TRUST COMPANY,	} On Bill to Foreclose. Notice of Motion to Settle Form of Or- 20 der Appointing Re- ceiver and Stay of Proceedings.
a corporation of New	
Jersey,	
Complainant,	
and	
LEVI DAVID, <i>et als.</i> ,	}
Defendants.	

To Babcock & Champion, Esqs., Solicitors for Com-
plainant:

To John Rauffenbart, Esq., Solicitor for the Pur- 30
chaser, Lillie Kasten:

Take notice that on Monday, June 29, 1931, at the
hour of ten o'clock in the forenoon, daylight saving
time, or as soon thereafter as counsel can be heard,

50 *Notice of Motion to Settle Form of Order
Appointing Receiver and Stay of
Proceedings*

I shall apply to the Honorable Edmund B. Leaming, the Vice-Chancellor to whom this cause has been referred, at the Chancery Court Room, at the Court House in Camden, New Jersey, to settle the form of order staying proceedings of the above-entitled
10 cause in the Court of Chancery pending appeal from the order confirming sale; and appointing receiver for the premises involved in said cause.

A copy of the form of order is attached hereto.

ALEXANDER BERMAN,
*Solicitor for Defendants;
Dorothy A. Davis, Elene
B. Loeb and Berthe Ru-
binstein.*

20

[ENDORSED]

Due and legal service of the within
notice of motion, etc., acknowledged
this 24th day of June, A. D. 1931.

30 Babcock & Champion,
Solicitors for Marine
Trust Company.

Affidavit as to service of copy on of-
fice of John Rauffenbart, made by
Alexander Berman.

ORDER.

D-80-66

IN CHANCERY OF NEW JERSEY.

10

Between

MARINE TRUST COMPANY,
a corp. of N. J. &c.,*Complainant,*

and

LEVI DAVID, *et als.*,*Defendants.*On Bill to Foreclose.
On Petition, &c.
Order.

20

It appearing to the Court that an appeal has been taken from an order made in this cause confirming the sale of the premises described in the bill of complaint; and it further appearing that Lillie A. Kasten was the purchaser at a sale had in this matter; and it further appearing that a stay in this matter is imperatively necessary to preserve the subject-matter involved in this controversy and especially during the pendency, argument and decision of the said appeal; and that it is impossible to make application to the Court of Errors and Appeals for such stay; and it further appearing that the income

30

from the said premises should be collected and conserved during the pendency of said appeal.

It is, thereupon, on this 29th day of June, A. D. 1931, ordered that the Sheriff refrain from delivering a deed for said premises, until the said appeal is disposed of in the Court of Errors and Appeals.

And it is further ordered, adjudged and decreed
10 that Maurice Saslaff, of the City of Atlantic City, County of Atlantic and State of New Jersey, be and he is hereby appointed receiver to take charge of the mortgaged premises mentioned and described in the bill of complaint filed herein, which mortgaged premises are known as the Pitney Hotel, 118 South New York Avenue, Atlantic City, Atlantic County, New Jersey, and to manage the same with power to sue for, collect and receive the rents, issues and profits thereof; to let the said premises or
20 any part thereof at such time or times as may prove necessary or proper and for that purpose to make agreements or leases for the rental of said premises, or any part thereof; and otherwise to do all things necessary or proper for the due care and proper management of the said mortgaged premises.

It is further ordered, that, before entering upon his duties as such receiver, the said Maurice Saslaff enter into a bond to the Chancellor for the performance of his duties in the sum of eight thousand dollars, with sureties to be approved by this Court, which said bond shall be filed with the clerk of this Court; and before filing shall be approved by William M. Clevenger, one of the Special Masters of this Court.

And it is further ordered, adjudged and decreed

that a bond be executed by Dorothy A. Davis, Elene D. Loeb and Berthe Rubinstein to the Chancellor of the State of New Jersey, in the sum of ten thousand dollars, with sureties to be approved by this Court, which said bond shall be filed with the clerk of this Court; and before filing shall be approved by Wm. M. Clevenger, one of the Special Masters of this Court. The said bond shall be filed within ten days from the date hereof; the condition of said bond being to indemnify Lillie A. Kasten and complainant, for any loss sustained by her or it by reason of said appeal. 10

And it is further ordered, adjudged and decreed that the receiver appointed in this cause is hereby directed, authorized and empowered to pay the carrying charges on said premises out of the rents collected by him during the pendency of the said appeal. 20

Said receiver shall also effect and pay the expenses for fire insurance to protect complainant as mortgagee.

This order to be void unless said bond is filed within the time above limited.

Respectfully advised.

E. B. LEAMING,
V. C.

30

I hereby certify that the above is a true copy of the original order.

ALEXANDER BERMAN.

7/3/31.

54 *Petition of Appeal of Dorothy A. Davis,
Elene D. Loeb and Berthe Rubinstein,
Defendants-Appellants*

PETITION OF APPEAL OF DOROTHY A.
DAVIS, ELENE D. LOEB AND BERTHE
RUBINSTEIN, DEFENDANTS-
APPELLANTS.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between
MARINE TRUST COMPANY,
a banking corporation
of the State of New
Jersey,
*Complainant-
Respondent,*
and
LEVI DAVID, *et als.*, and
DOROTHY A. DAVIS,
ELENE D. LOEB and
BERTHE RUBINSTEIN,
*Defendants-
Appellants.*

30

*To the Honorable, the Court of Errors and Appeals,
in the Last Resort in all Causes:*

The petition of Dorothy A. Davis, Elene D. Loeb and Berthe Rubinstein, defendants-appellants in the above stated cause, respectfully shows that your

Petition of Appeal of Dorothy A. Davis, 55
Elene D. Loeb and Berthe Rubinstein,
Defendants-Appellants

petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 16th day of June, A. D. 1931, in a cause wherein the Marine Trust Company, a banking corporation of the State of New Jersey, was the complainant, and Dorothy A. Davis, Elene D. Loeb, Berthe Rubinstein, and others were the defendants, in this respect, to wit: the defendants-appellants, Dorothy A. Davis, Elene D. Loeb and Berthe Rubinstein hereby appeal from the order confirming the sale of the defendants-appellants' property unto Lillie A. Kasten, as reported by the Sheriff of Atlantic County, and particularly from that part of said order which confirms the sale and orders a conveyance made by the Sheriff of Atlantic County to the said Lillie A. Kasten, upon the ground that the same is erroneous in whole and in part for the reason that the Court should have decreed that the said sale should have been set aside. 10 20

Your petitioners therefore pray that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as this Honorable Court shall deem meet. 30

ALEXANDER BERMAN,
Solicitor for the Defendants-Appellants, Dorothy A. Davis, Elene D. Loeb and Berthe Rubinstein.

JOHN C. REED,
Of Counsel with the Defendants-Appellants, Dorothy A. Davis, Elene D. Loeb and Berthe Rubinstein.

53 53 FEB.T.1932

I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

New Jersey Court of Errors and Appeals

Between

MARINE TRUST COMPANY, a banking corporation of
the State of New Jersey,
Complainant-Respondent,

and

LEVI DAVID, *et als.*,
Defendants.

(DOROTHY A. DAVIS, ELENE D. LOEB and BERTHE
RUBINSTEIN),

Appellants,

and

LILLIE A. KASTEN,
Respondent.

ON BILL, &c.

ON APPEAL, &c.

BRIEF OF THE APPELLANTS-DEFENDANTS.

This is an appeal from an order made by the Chancellor confirming a sale had under foreclosure. The proceedings were the regular foreclosure proceedings up to the time of the sale by the Sheriff of Atlantic County.

The Sheriff of Atlantic County having received a writ of *feri facias* issuing out of the Court of Chancery, advertised the premises described in the bill of complaint to be sold on May 14, 1931, at two o'clock in the afternoon, at the Guarantee Trust Building, Atlantic City, New Jersey, and at the time and place designated in the advertisement, the sheriff put up the property at public auction and struck it off to one Jacob Bebrov for the sum of \$19,100.00, that being the highest bid received for the same.

The property was sold subject to a prior mortgage of approximately \$10,000.00. The bid of \$19,100.00 was subject to other liens and expenses totalling about \$4,000.00, making the cost approximately \$34,100.00. The liens in detail were: a portion of the taxes for 1929, \$997.83; taxes for the year 1930, \$1,666.95, with interest to be added at 8%, and the first half of the taxes for the year 1931, amounting to \$880.70, making a total sum at the time of the sale of more than \$3,645.55 due for unpaid taxes.

The sale to Bebrov was made under conditions of sale, one clause of which is as follows:

“2. 10 per cent of the purchase money shall be paid when the property offered is struck off, in default whereof it may be put up again and sold immediately.”

There were seventy-five or more bids made by Jacob Bebrow and others during the conduct of the sale at which Jacob Bebrow was the successful bidder at \$19,100.00. After the property had been struck off to Bebrow, Mr. I. Sinderbrand, who had made the bids for Bebrow, stated that his principal was from Philadelphia and that he was unfamiliar with the conditions of sale established by the Sheriff of Atlantic County, and that he had with him a \$3,000.00 check drawn on a Philadelphia bank which he would deposit with the sheriff to secure his bid.

The under sheriff, Robert Miller, who had conducted the sale, demanded that Sinderbrand or Bebrow deposit cash or a certified check. Bebrow, upon being informed as to the conditions of sale, left the sale room, leaving Sinderbrand to bid for him, and endeavored to secure the cash on his check for \$3,000.00 drawn on a Philadelphia bank. Apparently Bebrow was unsuccessful in securing the cash. According to the testimony of Under Sheriff Miller, he waited a half hour, and because of the fact that he could not obtain a cash deposit or certified check, he resold the property immediately, and Lillie Kasten, one of the defendants, was the successful bidder for \$14,050.00.

It is established by the affidavits in this case that the sheriff's conditions of sale do not call for cash payment, neither do they call for certified checks; and that the sheriff frequently had accepted uncertified checks in other cases.

The appellants-defendants here, Dorothy A. Davis, Elene D. Loeb and Berthe Rubinstein, are children and heirs-at-law of Levi David, one of the defendants in the foreclosure suit. The title to the

premises described in the bill of complaint originally stood in the name of Levi David and Frances Brown David, his wife, as joint tenants. The purchase price, including all liens, to Lillie Kasten, sister of Frances Brown David, is approximately \$28,000.00.

It appears by the record of the Court of Chancery, and also by the record of an appeal here in this court in the case of David v. David, that Frances Brown, a woman of between thirty-five and thirty-eight years of age, had married secretly Levi David, the father of the appellants-defendants, Dorothy A. Davis, Elene D. Loeb and Berthe Rubinstein, who was at the time of the marriage seventy-nine years of age, and before the marriage had obtained from Levi David a deed, as joint tenants, to Brown from David for a one-half interest in all of David's real estate, which at the time of the making of the deed amounted to more than \$150,000.00, which deed made Levi David and Frances Brown owners as joint tenants of all of Levi David's estate. This created the right of survivorship between Levi David and Frances Brown, one at the age of thirty-nine and the other at the age of seventy-nine, and, as a result of experience, completely stripped these appellants-defendants of their right of inheritance of the entire estate of their father, Levi David.

The Chancellor, in fixing the adequacy or inadequacy of the sale, practically threw out all of the testimony on account of his experience in dealing with proof as to value by Atlantic City appraisers.

Be it observed that Frances Brown David, one of the defendants, expresses in her affidavit, page 32, State of the Case, her satisfaction with the sale of the premises in question to Lillie Kasten, for the

low bid. Although she was interested in a one-half interest in the surplus moneys, she waived it without any reason.

The premises sold by the sheriff under writ of *fieri facias* consists of the Hotel Pitney, a hotel with a capacity of fifty bedrooms and two stores rented independently of the hotel, situate on South New York Avenue, in Atlantic City, an old established hotel of many years' standing; and the affidavits in this case disclose that its value was anywhere from \$30,000.00 to \$75,000.00, and that at one time the property had been sold at private treaty for \$90,000.00 (see S. C., page 12).

Condition of sale No. 5 was as follows:

"5. The purchaser will be held bound by the purchase whether he intends to receive the deed and comply with the conditions of sale or not. If he does not so comply with them, the property may be again advertised and sold, or the purchaser may be liable for his bid, at the option of the sheriff. In case of resale at a less price than the former bid, with interest and expenses, the former purchaser will be held liable for the deficiency; to meet which the money paid by him shall be retained and applied by the sheriff."

The sale was duly reported by the sheriff to the Chancellor.

The confirmation of the sale was opposed by the appellants-defendants, Dorothy A. Davis, Elene D. Loeb and Berthe Rubinstein, who are the heirs-at-law of Levi David. Notwithstanding the opposition

of the appellants-defendants, Dorothy A. Davis, Elene D. Loeb and Berthe Rubinstein, the Court of Chancery confirmed the sale, and from that order of confirmation the present appeal is taken.

ARGUMENT.

The appellants-defendants urge that the order of the Chancellor should be reversed on the following grounds: Mistake, Misapprehension, and Inadequacy of Price coupled with said mistake and misapprehension.

MISTAKE

The sheriff mistakenly refused to accept the check on a Philadelphia bank; refused to have the bidder sign the conditions of sale which made the bidder liable for any deficiency. Our contention is that it was the duty of the sheriff to have accepted the check for \$3,000.00 and to have had the conditions of sale signed by the bidder, so that in the event of the non-compliance with the conditions of sale by the bidder, the bidder would have been liable for any deficiency.

MISAPPREHENSION.

The conditions of sale are misleading and the bidder misapprehended and had a right to misappre-

hend the conditions of sale from their printed text, which was as follows:

“2. 10 per cent of the purchase money shall be paid when the property offered is struck off, in default whereof it may be put up again and sold immediately.”

I say that he had a right to assume that the sheriff would accept a check uncertified, and that if the sheriff intended that the down payment should be in cash, or a certified check, he should have so demanded in his conditions of sale.

INADEQUACY OF PRICE COUPLED WITH MISTAKE AND MISAPPREHENSION.

Coupled with the sheriff's mistake and the misapprehension brought about by the failure to state in the conditions of sale the exact demands of the sheriff, the sale of the property immediately for a figure five thousand dollars less than the first bid should result in a reversal of the order from which this appeal is taken.

It's the duty of the sheriff under all circumstances, it seems to the appellants-defendants, to act uniformly and in the interest of all persons concerned at judicial sale. It's his duty to obtain as much for the property sold as can possibly be obtained. It was the sheriff's duty to protect Bebrow, the bidder, who had an equity in the property after his bid had been accepted and the property knocked down to him. It was the sheriff's duty to take time enough

to exhaust all effort and every effort to get for these appellants-defendants the full amount of the high bid of \$19,100.00.

The consideration or the price at which the successful bidder obtained this property under the resale is inadequate, as the affidavits disclose that the property sold had a value of more than twice the amount of the cost to Lillie Kasten.

The sale in this case is a great oppression on the appellants-defendants. They are the heirs-at-law of Levi David, the owner of the property, who prior to his secret marriage to one of the interested parties in this litigation, Frances Brown, deeded to said Frances Brown all of his estate, which amounted to more than \$150,000.00, as tenant by the entirety, creating a right of survivorship. Frances Brown David is thirty-eight or 'nine years of age and Levi David is eighty. If this sale is confirmed, their entire inheritance is wiped out; and it is urged that the affidavit of Frances Brown David, asking that this sale be confirmed, amounts to almost a fraud on these appellants-defendants, as the purchaser in this case is the sister of Frances Brown David, and the natural inference is that she is interested in this purchase.

LAW.

In the case of *Guarantee Trust Company v. Fitzgerald Hotel and Development Corporation*, 97 N. J. Eq., p. 277, the case of *Kloepping v. Stellmacher*, 21 N. J. Eq., p. 328, is cited with approval by the

learned Chief Justice Gummere, who wrote the opinion in the first-named case.

In *Kloepping v. Stellmacher*, Chancellor Zabriskie said:

“The conduct of the sheriff was free from all blame; he adjourned the sale to allow the complainants to get notice, attend, and protect themselves. He requested one of his deputies, and a respectable attorney who was present, to give the complainants notice of the intended sale; each of these persons testify that he gave them such notice. There is nothing on which to found any charge of fraud upon anyone concerned in the sale.”

See *Kloepping v. Stellmacher*, *ubi supra*.

From the opinion of Chancellor Zabriskie in the cited case, the sheriff or selling officer's conduct must, like Caesar's wife, be above all suspicion; and he must not make a mistake, or mislead, or make unreasonable demands or demands that are not set forth in the written conditions of sale.

Now, following the above statement, the Chancellor continued:

“But a court of equity will set aside a sheriff's sale, even if there has been no fraud, when there is a gross inadequacy of price, and the parties, by reason of mistake or misapprehension, * * * and the sacrifice was caused by such mistake or misapprehension. *Seman v. Riggin*, 16 N. J. Eq., p. 214; *Howell v. Hester*, 18 N. J. Eq., p. 266.”

The sheriff's demands were a mistake and the misapprehension brought about by the failure to set forth fully in the conditions of sale that he would require the down payment to be in cash or certified check is such an error and mistake and caused such misapprehension on the part of the bidders as to justify a reversal of the order.

It seems to the appellants-defendants that the consequences brought about by the sheriff's mistake are so important to them that in view of the fact that the complainant is fully protected, and the close association of Brown and Kasten, that this sale should be set aside upon the authority of *Kloepping v. Stellmacher, ubi supra*.

Another authority cited by the Chief Justice in *Guarantee Trust Company v. Fitzgerald Hotel and Development Corporation*, is the case of *Eberhart v. Gilchrist*, 11 N. J. Eq., p. 167, opinion by Chancellor Williamson. In that case Chancellor Williamson says at page 170, as follows:

"But where, in addition to the inadequacy of price, there has been some mistake or accident beyond the control of the party injured, which has caused the property to be sacrificed, there the Court will, in some cases, interfere."

We urge that it was a mistake made by the sheriff when he refused to accept the \$3,000.00 check, and a further mistake on the sheriff's part when he did not have Bebrow sign the conditions of sale, which would have compelled Bebrow to make good any deficiency if he failed to comply with the conditions of sale. Bebrow was misled by the conditions of

sale, as they did not set forth that the sheriff would require the deposit to be made in cash or in a certified check.

The next important case in the Court of Errors and Appeals is *Morrisse v. Inglis*, 46 N. J. Eq., p. 306, opinion by Mr. Justice Magie, afterwards Chancellor, in which he holds that "mere inadequacy of price is no ground for setting aside a sale made where no accident or mistake has intervened to prevent fair competition." The policy of our law respecting official sales does not permit the opening of a sale because a greater sum can be obtained for the property. In this particular case it was held that the bidder should not lose the advantage of his bid because another person is willing to give a larger price. In *Morrisse v. Inglis*, it is stated: "But here there was no gross inadequacy of price. The later offer for the land exceeded the amount produced by the sales by only ten and twenty-five hundredths per cent thereof." The learned Judge says as follows: "It has long been the settled doctrine and practice of the Courts of this State, that judicial sales, made without irregularity or fraud, and not affected by accident or mistake, will not be set aside for mere inadequacy of price." *President, &c., v. Hassert*, Sax 1; *Eberhart v. Gilchrist*, 3 Stock. 167; *Marlatt v. Warwick*, 3 C. E. Gr. 108; *Kloepping v. Stellmacher*, 6 C. E. Gr. 328; *Whit v. Zust*, 1 Stew. Eq. 107.

This case deals with the acts of the selling officer, who is a Special Master, and it approves his official conduct notwithstanding that it is criticised by the appellant.

The inference of the law as laid down in this case

is that if there had been any mistake or irregularity, or misapprehension or accident which had been injurious to the parties, then in that event, coupled with inadequate price, the sale could and should be set aside; and it is our insistment that this case is authority for the reversal of the order of confirmation in this cause.

Finally, we assert and maintain that in the instant case the sheriff's error and mistake, and the misapprehension under which the bidders might act and bid for the reason that the conditions of sale did not fully state the demands afterwards made by the sheriff for cash or a certified check, that these two reasons, coupled with inadequacy of consideration, and the failure of the sheriff to protect the original bidder, Bebrow, would warrant and do warrant the reversal of the order appealed from in this case.

The next leading case in which an order of the Court of Chancery made setting aside the sale was reversed was in the case of *Hoffman v. Godfrey*, 79 N. J. Eq., p. 617, opinion by Mr. Justice Bergen, and in that case the Court divided and the case of *Morrisse v. Inglis*, 46 N. J. Eq., p. 306, was cited with approval: "In the absence of fraud, irregularity, accident or mistake, judicial sales will not be set aside for inadequacy of price, unless the inadequacy is so gross as to justify an inference of fraud." In this case it was held that if the sheriff or the selling officer did make a mistake or there was any misapprehension, that, coupled with inadequacy of price, the sale should be set aside; and we insist that this case is authority for our position asking for reversal in the instant case.

The next case in the Court of Errors and Appeals is the case of *Hurley v. Potash*, 93 N. J. Eq., p. 167, and in that case the Court held that: "A judicial sale made without irregularity or fraud, not affected by accident or mistake, will not be set aside for mere inadequacy of price," and cites *Morrisse v. Inglis*, *ubi supra*, and *Hoffman v. Godfrey*, *ubi supra*.

The case of *Guarantee Trust Company v. Fitzgerald Hotel and Development Corporation*, 97 N. J. Eq., p. 277, is but a reaffirmance of the law laid down in *Morrisse v. Inglis*, *ubi supra*, and *Hurley v. Potash*, *ubi supra*, which is authority for this Court to reverse the order of the Chancellor confirming the sale in this cause.

The reasons advanced by the appellants-defendants are: Mistake, Misapprehension, and Inadequacy of Price coupled with said mistake and misapprehension.

It is respectfully submitted that the order of confirmation should be reversed.

JOHN C. REED,
*Solicitor for and of Counsel
with the Appellants-Defen-
dants, Dorothy A. Davis,
Elene D. Loeb and Berthe
Rubinstein.*

63
53 FEB.T.1932

New Jersey Court of Errors and Appeals

Between

MARINE TRUST COMPANY, a
banking corporation of the
State of New Jersey,
Complainant-Respondent.

and

LEVI DAVID, et als,

Defendants.

(DOROTHY A. DAVIS, ELENE
LOEB and BERTHE RUBIN-
STEIN),

Appellants.

LILLIE A. KASTEN,

Respondent.

On Appeal

BRIEF OF RE-
SPONDENT

LILLIE KASTEN

Statement of Facts

A mortgage held by the Marine Trust Com-
pany on property known as the Pitney Hotel,

118 South New York Avenue, Atlantic City, was foreclosed and sale of same advertised.

After several adjournments, sale was held and property struck off to Jacob Babrow for \$19,100. (Case P 17).

The purchaser offered an uncertified check drawn on an out of town bank, which the Under-Sheriff refused to accept (Case P 17). Such refusal was predicated as stated by the Under-Sheriff upon the well known rule that uncertified checks will not be received as down payments in execution sales (Case P 17).

The conditions of sale and particularly condition 2 (Case P 21) required payment of 10% of the purchase money when property is struck off, or in default of such payment it should immediately be resold.

Babrow did not appear in person, but he was represented by one, Sinderbrand. The Under-Sheriff says that the check mentioned was not offered or exhibited to him, but that Sinderbrand said that he had a check for \$3,000. which he would attempt to have cashed. Sinderbrand was permitted the opportunity to cash the check, the Under-Sheriff waiting for him, but upon the report by Sinderbrand that he could not procure the cash, immediate resale was made in compliance with the condition previously mentioned, and the property sold to Lillie Kasten for \$14,050. after spirited bidding (Case P 17-18).

Objection was made to confirmation (Case P 3). Such objection was heard by the Honorable Vice Chancellor Leaming, who filed conclusions (Case P 40-44) overruling objection and confirming sale.

Order was entered thereon (Case P 44-46). From such order appeal was taken, appellant urging.

- (1) Inadequacy of price.
- (2) Mistake and Surprise.

ARGUMENT

POINT I

Filing objection to confirmation limits the court to the determination of question of inadequacy of price.

The procedure to be followed is outlined by Statute and Rules. The Statute provides 3 C. S. Page 3422, Par. 50, Sec. 4:-

“REPORT AND CONFIRMATION OF SALE—That in all foreclosure proceedings hereafter commenced, the Sheriff or other officer who may be directed to sell any mortgaged premises, shall after making such sale, report the same within five days thereafter to the Court out of which an execution or order to sell is issued, stating the name of the purchaser or purchasers and

the price obtained, and if the said Court, or a judge thereof, shall approve of such sale, they shall confirm the same as valid, effectual in law, and shall, by rule of court allowed in open court, or by a judge thereof at chambers, direct the said Sheriff or other officer to execute good and sufficient conveyance in law to the purchaser or purchasers for the mortgaged premises so sold; provided that no sale of mortgaged premises shall be confirmed by the Court of further proceedings had until the Court or such Judge, is satisfied by evidence that the property has been sold at the highest and best price the same would then bring in cash, and such evidence may be in the form of affidavits. (P. L. 1880 p 256)."

Chancery Rule No. 218 provides as follows:-

"The Sheriff or other officer by whom mortgaged premises shall be sold on proceedings for foreclosure, shall, within five days after the sale, report it to this court in writing, stating the name of the purchaser and the price obtained; and he shall accompany the report with his affidavit that the price was the best that the property would, at the time of sale, bring in cash, and unless written objection to the confirmation of the sale to be filed within five days from the expiration of the time limited for filing the report, if the report be duly filed within the time limited by law and this rule (and if the

report be not so filed, then within five days from the filing thereof) an order, which shall be an order of course, confirming the sale as valid and effectual in law, and directing the officer by whom the sale was made to execute a good and sufficient conveyance in law to the purchaser for the mortgaged premises, may be entered after the expiration of the time limited for making objections. If objections shall be filed, the question whether the property was sold for the best price that could be obtained for it in cash shall be disposed of summarily by the Court, on affidavits or depositions."

The filed objection limits the inquiry to one of sufficiency of price, the only ground therein stated being,

"On the ground that the price obtained at said sale is insufficient." (Case P 3).

By filing objection instead of initiating the proceedings by bill or petition, permits only an inquiry concerning the sufficiency of price.

Oakley vs. Shaw 69 Atl 462.

Cropper vs. Brown 76 N.J.E. 406;74 Atl 987.

Koegel vs. Koegel 83 N.J.E. 179;89 Atl 861.

Dunlop vs. Chenoweth 90 N.J.E. 85;

105 Atl 592. Affirmed 90 N.J.E. 601; 106 Atl 890.

Bankers Trust Co. vs. Maxon 100 N.J.E. 1; 134 Atl 875.

POINT II

The Price Was Not Inadequate

The successful bidder Lillie Kasten purchased for the sum of \$14,050 (Case P 28). The sale to her was made, however, subject to a paramount mortgage, taxes and accrued interest thereon, which would bring the actual purchase price of the property to the sum of \$28,665.30. (Case P 29).

There is a diversity of opinion as to the value of the property in question.

Appellants' Proof

Franz Volker says that the property is reasonably worth between \$70,000. and \$75,000. He does not state what it should bring at forced sale (Case P 6-7).

Meyer Saul claimed that it is worth \$70,000. likewise fixing no forced sale value (Case P 8-9).

Dorothy Davis interested in the proceedings as one of the appellants, values the property at \$75,000. (Case P 10-13).

Respondent's Proof

Hugh Riddle appraises the property under present day conditions \$26,500 (Case P 26-27).

Max Melgin gives the fair market value \$29,-250. (Case P 34-35).

Joseph L. Soloff, who actually bid at the sale would not go beyond \$27,000 as he believed that figure the extent of the value (Case P 36-37).

David E. Gardiner judges the fair value at \$32,000. (Case P 38-39).

A factual question is, therefore, involved with the testimony of the experts for the respondents preponderating.

Based upon this preponderance of evidence the learned Vice Chancellor arrived at his conclusion that there was no such insufficiency of price as to shock the conscience.

Seeking the intervention of this Court in an attempt to have it determine the valuation of the property in question is tantamount to a request that the Court set itself up as an appraising board.

The Court should also be mindful of the fact that no evidence is submitted by affidavit or otherwise that a resale would bring forth a larger bid.

Neither Sinderbrand nor Babrow are heard from in the proceeding and there is no guarantee that either would attend a resale.

The only affidavit coming from the appellants is that of Dorothy Davis. This affidavit will be searched in vain for any offer on the part of herself or the other appellants to purchase the property, and there is no suggestion that a purchaser can be procured by the appellants at an enlarged figure. The Court is, therefore, without a guarantee from any source that a resale would bring about a hoped for result.

POINT III

Inadequacy of price is not sufficient to justify a resale. It must be accompanied by fraud, misrepresentation or mistake.

A judicial sale will not be set aside because of inadequacy of price, unless accompanied by fraud or mistake, unless the inadequacy is such as to justify an inference of fraud or improper conduct in making sale. In the language of the cases the inadequacy must be such as to shock the conscience of the Court.

Morrissey vs. Inglis 46 N.J.E. 306; 19 Atl 16.

Hoffman vs. Quigly 82 N.J.L. 530; 82 Atl 900.

Guarantee Trust Co. vs. Fitzgerald Hotel Corp. 97 N.J.E. 277; 127 Atl 672.

Fraud or misrepresentation are neither averred nor proven.

Mistake or surprise is alleged, but not established.

The only claim made is that Babrow evidently believed that the Sheriff would accept an uncertified check.

The Sheriff as an officer of the Court is obliged to observe its rules. Rule No. 218 setting forth the procedure requires the Sheriff to sell at the best price for cash, the language being - - -

“And he shall accompany the report with his affidavit that the price was the best that the property would at the time of sale bring in cash - - -”.

Neither a check or note is cash.

Freeholders vs. Martin 20 N.J.E. 39.

Kuhl vs. J.C. 23 N.J.E. 84.

Fry vs. Patterson 49 N.J.L. 612.

The Sheriff had no alternative, except upon his own responsibility, to do otherwise than was required by the rule of Court. Ignorance of this rule, like ignorance of the law upon the part of a prospective purchaser is no justification for finding a mistake or surprise.

The dictates of common sense would have suggested to any prospective purchaser that an

officer would not accept an uncertified check given by a stranger and drawn on the bank of another State.

Ordinary prudence would require an inquiry of the Sheriff by a purchaser and sufficient time was afforded for such inquiry to have been made. The Court will not interfere when surprise is alleged, if such surprise is not occasioned by misconduct or inadvertence of a third party, but to the contrary by the neglect and inattention of the party complaining.

Parkhurst vs. Cory 11 N.J.E. 233.

What was said in Hayes vs. Stiger 29 N.J.E. 196 is applicable to the instant case.

"The sale was fairly and regularly conducted and no imputation is made against the officer who made it, nor against any other person. If the petitioner acted under a mistake, he alone was responsible for it. He neither sought information by examination, nor inquiry. His misapprehension was entirely the result of his own carelessness and inattention to his interests."

See also Morris vs. Woodward 25 N.J.E. 32.

POINT IV

Extraneous matters in appellants' brief.

Woven through the brief of the appellants

are suggestions and statements concerning the relationship of some of the parties, which have no bearing upon the issue in controversy. Respondent does not desire to have it considered that the failure to make answer thereto is an admission of the veracity thereof. To the contrary, respondent is advised that as these matters are not now before this Court, it is her duty to ignore any reference thereto and she accordingly is so acting.

For the reasons set forth, it is urged that the appeal should be dismissed with costs.

Respectfully submitted,

BRENNER AND KRESCH,
Solicitors of Respondent Lillie Kasten.

ALFRED BRENNER,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

MARINE TRUST COMPANY, a banking corporation of
the State of New Jersey,

Complainant-Respondent,

and

LEVI DAVID, *et als.,*

Defendants.

(DOROTHY A. DAVIS, ELENE LOEB and BERTHE
RUBINSTEIN),

Appellants,

and

LILLIE A. KASTEN,

Respondent.

ON BILL, ETC.

ON APPEAL.

BRIEF OF MARINE TRUST COMPANY,
RESPONDENT.

The bill of complaint filed in the above stated cause was for the foreclosure of a mortgage held by the Marine Trust Company covering premises known as 118 South New York Avenue, in Atlantic City, New Jersey.

The property was lawfully advertised by the sheriff of Atlantic County for sale under execution which had been issued and directed to him and after several adjournments, from week to week, it was put up for sale at the time and place to which the sale had been adjourned.

There were a number of persons present at the sale and there was active bidding by several persons. The property was struck off and sold by the sheriff to Jacob Babrow for \$19,100, he being the highest bidder. The conditions of the sale were read before any bidding took place and announcement was made by the sheriff of the prior liens and encumbrances to which the sale would be subject (p. 16).

The conditions of the sale appear in the State of the Case at page 21. One of the conditions of the sale was "10 per cent of the purchase money shall be paid when the property offered is struck off, in default whereof it may be put up again and sold immediately." The purchaser did not make the necessary payment of 10 per cent, and was unable to make such payment, whereupon the property was put up again and sold to Lillie Kasten for \$14,050 who complied with the conditions of sale and made the necessary payment of 10 per cent of the purchase money.

The sale was reported (p. 1) and to the report was attached the usual affidavit by the sheriff, who

said the premises "were duly sold for the highest and best price the same would bring in cash at the time of the sale," which report and affidavit were in accordance with the requirements of the statute (C. S., Vol. 3, p. 3422, Sec. 50).

Written objection was made by defendants, Berthe Rubinstein, Elene D. Loeb and Dorothy A. Davis, some of the owners of the mortgaged premises, objecting to the confirmation of the sale "on the ground that the price obtained at said sale is insufficient" (p. 3).

The objectors, the appellants, did not set up their objections and claim for relief by petition or independent bill but merely filed objections (p. 3) under Chancery Rule 218 and the above cited section of our statute, which action limited the inquiry as to whether the property had brought the highest and best price that could be obtained for it in cash. An attack upon a sale upon any other ground must be made by independent action, either by bill or by petition.

According to the affidavit of the Under Sheriff, who made the sale (p. 17) the sale was held on the day of the week when sheriff sales were held in Atlantic County and at the usual hour and he says:

"There was quite a large number of persons present and when the property was put up and offered for sale there was active bidding by a number of persons and the property was finally struck off to Jacob Babrow for \$19,100. It was distinctly stated by me that ten per cent of the purchase price would be required to be put up at the time the property was struck off and sold.

The purchaser was not able to make the necessary down payment in cash and offered his uncertified check. The check was on an out of town bank and I refused to accept it. It was stated to me that an effort was being made in behalf of the purchaser to have the check cashed and I held the sale for about half an hour when it was stated that the money could not be raised and the required ten per cent deposit could not be made. I then put the property up again for sale under the same conditions and after similar active bidding the property was struck off and sold to Lillie Kasten for \$14,050. The sale was duly reported to the Clerk of Chancery by report dated May 15, 1931. It is a fixed and definite and well-known rule that uncertified checks will not be received as down payments in execution sales. In the present case I did my best to obtain the highest price for the property and I gave the said Babrow full opportunity to make payment and comply with the conditions of sale but when he did not comply with them and statement was made that he could not comply then and as I have stated, the property was put up again for sale on exactly the same conditions as before and was sold to the said Lillie Kasten for the best figure I was able to get."

By the affidavit of the Under Sheriff it also appears (p. 18):

"Said Babrow did not appear in person. The bidding for him was done by Isaac D. Sinderbrand a resident of Atlantic City, New Jersey.

Not even a check was offered to me for the down payment required but said Sinderbrand said that Babrow, who lived in Philadelphia, had given him, Sinderbrand, a check for \$3,000 and Sinderbrand said he would try to get the check cashed so as to make the required payment, but after I had given him full opportunity he said he could not get the check cashed, whereupon the said property was put up again and sold as I have previously stated."

Hearing was had on the objections (p. 3) before Vice-Chancellor Leaming (p. 40) on affidavits submitted by both sides.

The objectors relied upon affidavit made by Franz Voelker that the property "is reasonably worth between \$70,000 and \$75,000" (p. 7); affidavit by Myer Saul that the property "is reasonably worth \$70,000" (p. 9); affidavit of the objector, Dorothy Davis, in which she said the property was "reasonably worth \$75,000" (p. 12). Nothing in any of said affidavits indicated the market value of the property at the time of sale, or what it should have brought at a sale for cash.

The property was sold, subject to various prior liens and encumbrances (p. 16) which, on the date of sale, amounted to \$14,618.21 (p. 24). The amount for which the Sheriff sold the property was \$14,050 (p. 1), thereby making the actual sale price and cost of the property to the purchaser \$28,668.21.

On the part of the respondents there were presented affidavits made by several competent real estate experts, one by Hugh Riddle (p. 27):

"I have examined the premises known as the Hotel Pitney, being the premises described in the mortgage of Marine Trust Company, foreclosed in the above-stated cause, and I have appraised the property under present-day conditions at \$26,500.

The real estate market is very depressed, there is practically no activity in the real estate market and financing is most difficult. Anyone particularly interested might be willing to pay more than the above appraisal but at a public sale of the property at this time for said amount would, in my judgment, represent a sale at the present market value."

By Max Melgin (p. 34), who said, "The market value of the property was \$29,250;" by Joseph L. Soloff (p. 36) who said the fair market value was \$30,250 but who also said that he was a bidder at the sale and when the bid reached a sum which meant the property would cost \$27,000 he concluded to go no further as, in his opinion, that was a sufficient price for the property; by David Gardiner (p. 38), who said that in his opinion the fair market value of the property was \$32,000.

The objections were overruled by the Court and an order was made confirming the sale (p. 44). The conclusions of the Vice-Chancellor appear on page 40. This appeal is from said order.

Most of the appellants' brief is devoted to arguments on subject-matter outside of the record and of objections not included in the written objections to confirmation (3) and which could not have been

heard or considered except by independent action on petition or bill of complaint.

ARGUMENT.

THE OBJECTORS ARE LIMITED TO
INADEQUACY OF PRICE.

The brief of the appellants presents three reasons for setting aside the order from which the appeal in this case has been taken: Mistake, misapprehension and inadequacy of price coupled with said mistake and said misapprehension, and their entire brief is devoted to the argument of those reasons.

Our statute (C. S. Vol. 3, p. 3422, Sec. 50) requires that in all foreclosure proceedings, the Sheriff shall make report to the Court stating the name of the purchaser and the price obtained, and if the Court, or a Judge thereof, shall approve, the sale shall be confirmed as valid and effectual in law, provided that no sale shall be confirmed until the Court, or the Judge, is satisfied by evidence that the property has been sold at the highest and best price the same would then bring in cash, which evidence may be in the form of affidavits.

The Sheriff reported the sale and annexed his affidavit to the report showing that the property had been sold "for the highest and best price the same would bring in cash at the time of sale" (p. 2).

Rule 218 of the Court of Chancery requires that the Sheriff, in foreclosure proceedings, make report within five days, stating the name of the purchaser

and the price obtained and shall accompany his report with his affidavit that the price was the best that the property would, at the time of the sale, bring in cash, and provides that unless written objections are made within five days from the expiration of the time limited for filing the report, an order shall be made confirming the sale, and the rule concludes with

“if objections shall be filed, the question whether the property was sold for the best price that could be obtained for it in cash shall be disposed of summarily by the Court, on affidavits or depositions.”

The appellants filed objections to the report of sale on the single ground “that the price obtained at said sale is insufficient” (p. 3).

In *Oakley v. Shaw*, 69 Atl. 462, his Honor, Chancellor Walker, held:

“Now, I take it that the only office of a written objection to the confirmation of a sheriff’s sale in foreclosure under the Act of March 12, 1880, and Rule 205 of this Court, is to urge the overthrow of a sale upon the sole ground that the property did not bring the highest and best price that could be obtained for it in cash; and that an attack upon the sale on any other ground must be made the basis of independent action, either by bill or petition.”

The construction of such statute and rule has been passed upon by the Court of Chancery in several later cases and it has been uniformly held that any

objections to a confirmation of sale other than that the price obtained was not the best price which could be obtained in cash, must be by separate and independent action, either by bill or by petition.

Cropper v. Brown, 74 Atl. p. 987, 76 N. J. Eq. p. 406;

Koegel v. Koegel, 89 Atl. p. 861, 83 N. J. Eq. p. 179;

Dunlop v. Chenoweth, 105 Atl. p. 592, 90 N. J. Eq. 85; affirmed 106 Atl. p. 890, 90 N. J. Eq. p. 601;

Bankers' Trust Co. v. Maxson, 134 Atl. p. 875, 100 N. J. Eq. p. 1.

There is nothing in the State of the Case to show that there was any mistake or misapprehension on the part of anybody.

Babrow did not appear in person at the sheriff's sale, according to Dorothy Davis (p. 11), he met Sinderbrand, who was acting for him, before the sale, and he was informed by Sinderbrand that "a ten per cent cash or certified check deposit would be necessary if the property was struck down to him."

According to the affidavit of the sheriff (p. 17), the advertisement, announcement of the fact that the property would be offered for sale and the conditions of sale (p. 21), were read before bids were requested. Babrow did not appear and the bidding was done by Isaac D. Sinderbrand. After the property had been struck off, Sinderbrand said that Babrow had given him, Sinderbrand, a check for \$3,000, and Sinderbrand said he would try to get the check cashed so as to make the required payment

(p. 18). The check was on an out of town bank and the sheriff refused to accept it (p. 17). The sheriff also states in his affidavit (p. 17), "It is a fixed and definite and well-known rule that uncertified checks will not be received as down payments in execution sales."

Sinderbrand went outside in an effort to have the check cashed. He and Babrow were unsuccessful and Sinderbrand went back to the sheriff and informed the sheriff he could not comply with the conditions of sale. Certainly, the sheriff was not required to accept a check which the parties could not get anyone else to receive or cash. The sheriff gave full opportunity for the bidder to comply with the terms of sale and when it was conceded that the bidder was not able to comply, the property was put up again and sold to Lillie Kasten.

At the time the property was offered the second time all those who were interested in the bidding at the first sale were present and some of them bid (pp. 31-32).

No objection or affidavit has been made by Babrow nor is there anything in the record to show whose check it was which Babrow or Sinderbrand had, or, if such check was good. It is significant that the check was not exhibited to the sheriff or, as far as the record shows, to any one else. The sheriff, in his deposition said:

"Not even a check was offered to me for the down payment required but said Sinderbrand said that Babrow, who lived in Philadelphia, had given him, Sinderbrand, a check for \$3,000 and Sinderbrand said he would try to get the check

cashed so as to make the required payment
* * *” (p. 18).

There is no uncertainty of meaning of the conditions of sale. The requirement, “10 per cent of the purchase money shall be paid when the property is struck off,” is clear and explicit. Checks are not “money” and certainly a stranger should not expect that under such a condition he would be permitted to substitute for money his check on an out of town bank, particularly, when it is the settled and well-known rule in Atlantic County that uncertified checks will not be received and when the party is told before the sale by his own agent that it will be necessary for him to get his check cashed.

PRICE NOT INADEQUATE.

Two affidavits stated the premises were reasonably worth \$70,000 (pp. 6-8), but gave no indication as to the market value of the property at time of sale.

Four affidavits made by disinterested real estate experts show the premises to have a market value at the time of sale from \$26,500 to \$32,000, one placing the value at \$26,500 (p. 27), one at \$29,250 (p. 35), one at \$30,250 (p. 37), and one at \$32,000 (p. 38).

Prior encumbrances to which the property was sold amounted to \$14,618.21. The bid of Babrow of \$19,100 meant an actual sale price of \$33,718.21. The bid of the defendant, Kasten, of \$14,050 meant

a sale price of \$28,668.23. The difference between said sums is \$5,050.01.

Counsel for the appellants argues that the sheriff should have accepted the check of Babrow and should have had him sign the conditions of sale and thereby concedes that the sum of \$33,718.21 was not an inadequate one. Hence, the situation is present with the appellants admitting \$33,718.21 being a sufficient valuation of the property and the several witnesses produced by the respondents showing the property to be worth between \$26,500 and \$32,000.00, the average of which would be \$29,500, and which is very little in excess of the sale price to Kasten of \$28,668.23. The best test of the value was the test made by the sheriff after having duly advertised the property and by his affidavit the price for which the property was sold was the highest price which could then be obtained in cash.

This Court has held that a sale will not be set aside on the ground of inadequacy of price unless the inadequacy is such as to warrant an inference of fraud or unconscionable conduct in conducting the sale and that such inadequacy must be such as to be shocking to the conscience of the Court.

Morrisse v. Inglis, 46 N. J. Eq., p. 306; 19 Atl., p. 16;

Hoffman v. Quigley, 82 N. J. Law, p. 530; 82 Atl., p. 900;

Guarantee Trust Company v. Fitzgerald Hotel and Development Corp., 97 N. J. Eq., p. 277; 127 Atl., p. 672.

In the case of *Hoffman v. Quigley*, *supra*, the property was sold for \$78,000, subject to \$20,000, making

the cost of the property to the purchaser of \$98,000. The sum of \$115,000 was offered should there be a re-sale. The Court held the sale price was not grossly inadequate. The increased offer in that case was .173 over the sale price. Applying the appellants' valuation in the present case of \$33,718.21, the percentage of increase is .178 or less than one-half of one per cent above the percentage approved in *Hoffman v. Quigley*.

Mr. Riddle swore (p. 26), that in view of the market conditions existing at the time of the sale, a public sale for \$26,500 would represent the market value of the property and another witness, who was present, and who bid on the property, stopped bidding when the last bid made by him meant the property would cost him \$27,000, as, in his judgment, that sum represented a sufficient price for the property.

The proofs show that the first mortgage was in default and subject to foreclosure and that the prior liens consisting of taxes, etc., required immediate payment so that the sale by the sheriff meant not only that the amount which was bid for the property would have to be paid in cash but that all of the prior encumbrances would have to be likewise paid.

Rogers v. Rogers Locomotive Co., 62 Eq., p. 118, 50 Atl., p. 10, cited with approval by this Court, in *Guarantee Trust Company v. Fitzgerald Hotel & Development Corporation*, *supra*, contains recital of percentages in previous cases and shows that as high as twenty-one per cent has not been considered sufficient to set aside a sale.

His Honor, Vice-Chancellor Leaming, very ably discusses the evidence and the principles of law

14 *Brief of the Complainant-Respondent*

in his conclusions (p. 40), and we respectfully submit that not only is there no evidence in the case to show gross inadequacy of price under the well-established doctrine in this State, but that the facts justify that the price for which the property was sold was reasonable and fair and, as the sheriff has testified, the highest and best which could be obtained in cash and that the order confirming the sale should be affirmed.

BABCOCK & CHAMPION,
*Solicitors for Complainant-
Respondent, Marine Trust
Company.*



