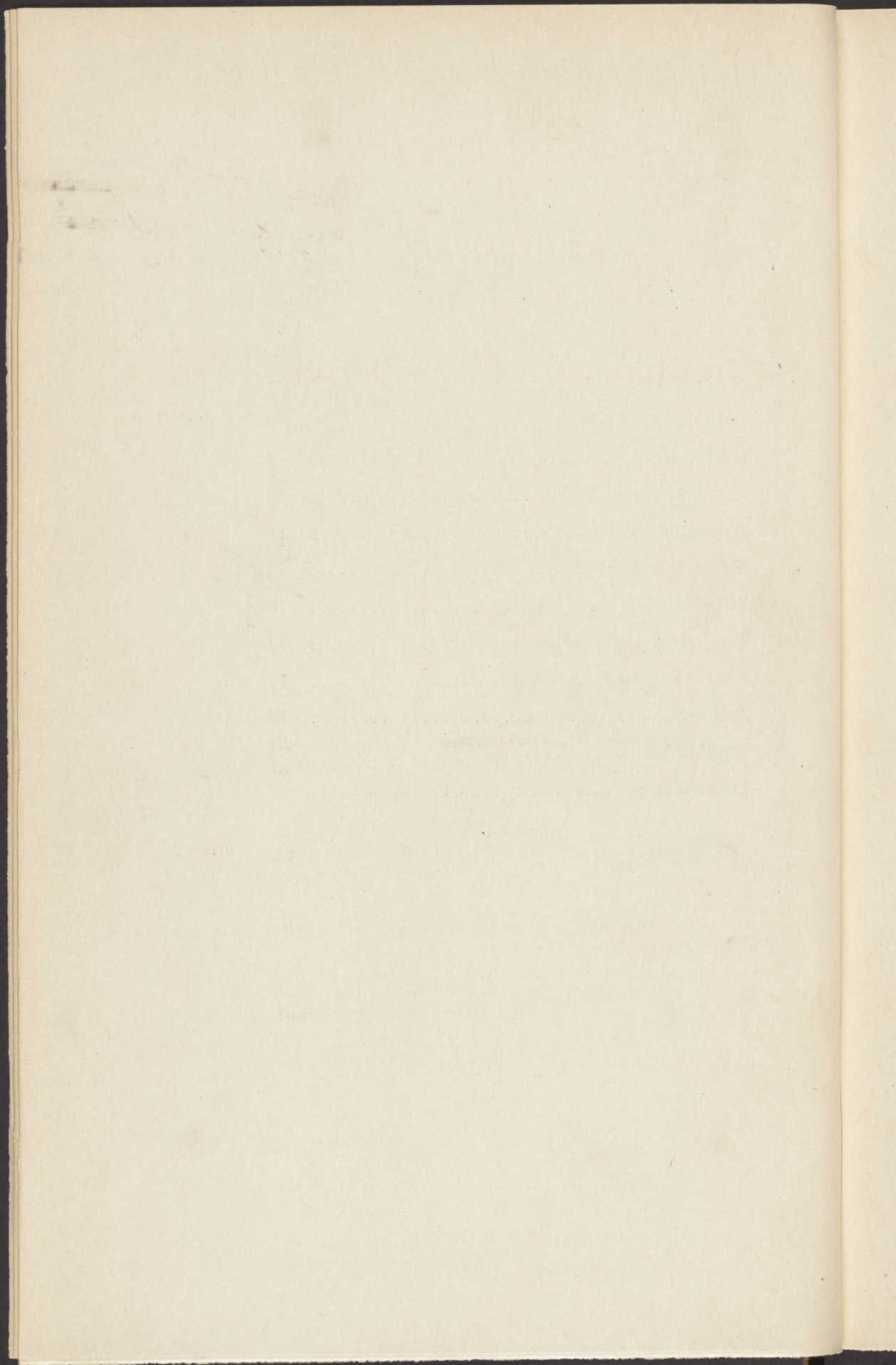


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**Notice of Appeal.**

(Filed January 14, 1935.)

*by the Chancellor  
on the advice  
of Vice Chancellor  
Charles M. Egan*

**In Chancery of New Jersey**

10

Between ROBERT BROADMAN, <i>Complainant,</i> and COLONIAL BUILDING-LOAN ASSO- CIATION, <i>Defendant.</i>	}	102/571. On Bill, &c. Notice of Appeal.	20
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The defendant, Colonial Building-Loan Association, hereby appeals from the final decree made in this Court, in the above stated cause, and each and every part thereof to the Court of Errors and Appeals in the Last Resort in all Causes.

GEORGE G. TENNANT,  
Solicitor for Defendant. 30

Dated January 12, 1935.

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

GEORGE G. TENNANT,  
Of Counsel with Defendant.

(Service acknowledged January 14, 1935.)

40

**Petition of Appeal.**

(Filed January 14, 1935.)

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

10

Between

ROBERT BROADMAN,  
*Complainant-Appellee,*

and

COLONIAL BUILDING-LOAN ASSO-  
CIATION,  
*Defendant-Appellant.*

Petition of  
Appeal.

20

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

30

The Petition of Colonial Building-Loan Associa-  
tion, the appellant in the above stated cause, re-  
spectfully shows that your petitioner finds itself  
aggrieved by a final decree made in the Court of  
Chancery by his Honor, Luther A. Campbell, Chan-  
cellor of the State of New Jersey, bearing date the  
11th day of January, 1935, wherein Robert Broad-  
man was complainant and your petitioner,  
Colonial Building-Loan Association, was defendant  
in these respects, to wit:

40

1. That a report of Thomas R. Armstrong, Spe-  
cial Master, dated December 18, 1934, was in all  
things ratified and confirmed.
2. That exceptions filed by your petitioner to  
said report were dismissed.
3. That by said final decree it was found that  
the value of the premises described in complain-

*Petition of Appeal.*

ant's bill of complaint is in excess of the amount due petitioner on the bond of said Robert Broadman or the amount due defendant on its final decree in the foreclosure proceedings described in said bill of complaint.

10

4. That said final decree credited on account of the bond of said Robert Broadman the sum of Ninety One Hundred Dollars (\$9100.).

5. That said final decree adjudged that there was nothing due said petitioner, Colonial Building-Loan Association on the bond of said Robert Broadman.

6. That said final decree restrained and enjoined this petitioner and its attorney from proceeding with or prosecuting or taking any further steps in the suit pending in the New Jersey Supreme Court wherein petitioner is complainant and said Robert Broadman is defendant.

20

7. That said final decree permanently restrained and enjoined this petitioner from prosecuting its said suit for any deficiency on the bond of said Robert Broadman.

8. That said final decree ordered a copy thereof to be certified and filed with the Clerk of the New Jersey Supreme Court.

30

That this appeal is taken upon the ground that said decree and each and every part thereof is erroneous for that the said decree ought not have directed as aforesaid in any respect, but on the contrary said bill of complaint should have been dismissed and this petitioner should have been permitted to prosecute its said suit at law against said Robert Broadman.

40

*Bill of Complaint.*

10 Your petitioner therefore prays that the said decree of the said Chancellor may be in the particulars aforesaid reversed and set aside and for nothing holden; and that your petitioner may have such relief in the premises as this honorable Court shall seem meet.

GEORGE G. TENNANT,  
Solicitor for and of Counsel with  
Appellant.

(Acknowledged January 14, 1935.)

20

**Bill of Complaint.**

(Filed May 28, 1934.)

IN CHANCERY OF NEW JERSEY.

102-571.

To the Honorable LUTHER A. CAMPBELL,  
Chancellor of the State of New Jersey.

30 The complainant, Robert Broadman, of the City of Jersey City, County of Hudson and State of New Jersey, says:

1.—On or about November 15, 1926, your complainant was the owner of certain real estate consisting of a plot of ground with the building thereon known as 76 Brinkerhoff Street, Jersey City, more particularly described as follows:

40 ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey.

*Bill of Complaint.*

BEGINNING at a point on the northerly side of Brinkerhoff Street at a point distant one hundred ninety-four and forty one-hundredths feet (194.40) easterly from the point of intersection of said northerly line of Brinkerhoff Street with the easterly line of Bergen Avenue, and from thence running (1) northeasterly and at right angles to said northerly line of Brinkerhoff Street and along the westerly side of the building erected on the premises hereby conveyed, one hundred feet (100) to a point; thence (2) about easterly and parallel with said northerly line of Brinkerhoff St., eighteen and forty one-hundredths feet (18.40) to a point; thence (3) southwesterly and parallel with the line first run, to, through and beyond the centre line of a party wall standing partly on the premises hereby conveyed and partly on the premises next adjoining easterly thereto, one hundred feet (100) to said northerly line of Brinkerhoff Street; thence (4) about westerly and along said northerly line of Brinkerhoff Street eighteen and forty one-hundredths feet (18.40) more or less to the point or place of beginning; said lot being known and designated as Lot "V" in Block 1929 on the Official Assessment Map of Jersey City, N. J. It being intended to convey the house and lot known as 76 Brinkerhoff Street.

10

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2.—On November 15, 1926, complainant executed a bond and mortgage on the above mentioned property in the sum of \$7,000.00, which mortgage was recorded in Book 1412 of mortgages, page 329.

40

*Bill of Complaint.*

10 3.—On September 15, 1927, complainant, together with his wife, conveyed the premises hereinbefore more particularly described to one James F. McCormack and Mary E. McCormack, his wife, by deed of that date, which deed is recorded in the Register's Office of Hudson County on September 16, 1927 in Book 1651 of deeds page 615 and which deed conveyed the said premises subject to the mortgage hereinabove referred to.

20 4.—On January 12, 1934, foreclosure proceedings were instituted upon the said lands and premises which proceedings resulted in a decree for the complainant of \$7,262.50 besides costs and which decree ordered that the said property be sold to satisfy said decree.

5.—The sale under the writ of fieri facias was duly advertised by the sheriff of Hudson County and sold by him on April 5, 1934 to Colonial Building-Loan Association, of Jersey City, a corporation of the State of New Jersey, for the sum of \$100.00, no other bidders being present.

30 6.—Complainant is informed that on the same day that the mortgaged premises were sold, that out of some seventeen parcels that were sold on the same day, fourteen were sold for a nominal consideration of \$100.00, one for a nominal consideration of \$150.00 and two for a nominal consideration of \$200.00.

40 7.—On May 10, 1934, Colonial Building-Loan Association of Jersey City, a corporation of the State of New Jersey, instituted suit in the New Jersey Supreme Court, Hudson Circuit against your complainant for the deficiency arising at the said sale, and although crediting the sum of \$100.00 received at the said sale, it is holding the said

*Bill of Complaint.*

lands and premises at a value in excess of \$10,000.00 and your complainant says that the actual value of the said property, even though, at the present time there is no market therefor, is more than and exceeds the amount of the foreclosure decree and costs. 10

8.—Complainant further says that by reason of the present financial depression and the inability of any one to refinance the property, he was prevented from bidding at said sale and is further prevented from being ready and able to exercise his right of redemption in said suit at law, and the said right has become nullified by reason of the said general financial depression. 20

9.—Complainant further says that by reason of the foregoing, it is unconscionable that the said defendant should receive further benefits at a time when a condition exists due to a financial emergency. 20

10.—Complainant further says that by reason of the financial depression prevalent generally throughout the country and particularly in the State of New Jersey, that there is not now nor was there at the time of the said sale, namely, April 5, 1934, any market for the sale of the said real estate, and that the amount realized at the said sale was not and is not a fair measure of the value of the said property upon which a deficiency suit should be based. 30

Complainant is without adequate remedy in the Courts of Law and therefore prays:

1.—That the Colonial Building-Loan Association of Jersey City, a corporation of the State of New Jersey, may answer this bill of complaint without oath and each statement therein made. 40

*Bill of Complaint.*

10 2.—That the confirmation of the sale in said foreclosure suit of the Colonial Building-Loan Association, of Jersey City, a corporation of the State of New Jersey against Robert Broadman and others, should be set aside to the end that a new sale may be had.

3.—Or that the said matter should be referred to a master to determine the fair value of the said premises on the date of sale, which said fair value the defendant should be compelled to credit on account of said deficiency.

20 4.—That the said defendant be restrained and enjoined from prosecuting its suit at law for deficiency in the New Jersey Supreme Court until such time as the fair value of the said premises can be ascertained and credited upon the said deficiency.

5.—That this Honorable Court grant such other and further relief as the nature of the matter may require.

30 6.—That a writ of subpoena may issue commanding said defendant to answer this bill of complaint, without oath, and to abide by such decree as this court may make in the premises.

HENN & BURR,  
Solicitors for and of Counsel  
with Complainant.



*Order to Show Cause.*

Jersey, plaintiff and Robert Broadman, defendant,  
until the further order of this court;

10 And it is further ORDERED that in the interim said  
Colonial Building-Loan Association, of Jersey City,  
a corporation of the State of New Jersey, and its  
attorney, George G. Tennant, be and they are here-  
by restrained and enjoined from proceeding with  
or prosecuting or taking any further steps in said  
suit, until the further order of this court; and

20 It is further ORDERED that a true, but uncertified  
copy of this order, and the bill of complaint herein,  
which may be certified by the solicitors of the com-  
plainant, be served upon the said Colonial Build-  
ing-Loan Association, of Jersey, a corporation of  
the State of New Jersey and its attorney, George G.  
Tennant, within 3 days from the date hereof.

Respectfully advised,

CHARLES M. EGAN,  
V. C.

LUTHER A. CAMPBELL,  
C.

30

40



*Master's Report.*

10 strong one of the special masters of this court to take testimony and to inquire into and ascertain and report what, in his opinion, was the fair value of the premises more particularly described in the bill of complaint on the date of sale of said premises by the Sheriff of Hudson County.

Respectfully advised,

CHARLES M. EGAN,  
V. C.

LUTHER A. CAMPBELL,  
C.

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**Master's Report.**

(Filed December 18, 1934.)

IN CHANCERY OF NEW JERSEY.

30

<p>ROBERT BROADMAN, <i>Complainant,</i></p> <p>and</p> <p>COLONIAL BUILDING &amp; LOAN ASSOCIATION of Jersey City, a corporation, <i>Defendant.</i></p>	}	<p>102-571. Foreclosure. Master's Report on Reference to Determine the Fair Value.</p>
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To the Honorable, LUTHER A. CAMPBELL,  
Chancellor of the State of New Jersey.

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In pursuance of an Order of Reference made in the above entitled cause, dated June 18th, 1934, whereby it was referred to me, the undersigned, one of the Special Masters of this Court, to take

*Master's Report.*

testimony and to inquire into and ascertain and report what, in my opinion, was the fair value of the premises more particularly described in the Bill of Complaint on the date of sale of said premises by the Sheriff of Hudson County,

I respectfully report that I have been attended by Messrs. Henn and Burr, Solicitors of the Complainant, and John Milton, Esq., of counsel, and George G. Tennant, Esq., solicitor for the defendant, and in their presence, have taken the depositions hereto annexed, and in addition to taking said depositions, I have personally inspected the mortgaged premises.

I do further report that the premises in question are known as #76 Brinkerhoff Street, which consists of a two story brick house with a two story frame extension on a plot of ground eighteen and seventy five one-hundredths (18.75) feet in width, with a depth of one hundred (100) feet. The house has, on the ground floor, three rooms and a bath, that is, a dining room, kitchen, sun parlor and a bath; on the first floor there are three rooms, a living room, bedroom and library, and a tile bath, and on the third floor there are three bedrooms. The dining room has a parquet floor, and all the rooms on the first floor have parquet floors. The house is in good condition and is in the heart of the Bergen section of Jersey City, accessible to both trolley and bus lines on Monticello Avenue, and but a few minutes to the Bergen Avenue bus, and the Boulevard Bus. It is within walking distance to the Hudson and Manhattan Tubes.

It is in a good locality, being very close to the best residential section in Jersey City.

I have before me the testimony of three very reputable real estate men in Hudson County, Mr. Thomas A. Ryer, Mr. Frank E. Older, and Mr.

10

20

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*Master's Report.*

George J. Wolff, and they have testified to a fair value of \$9,000.00, the lot value being placed on the property at \$2800.00, and the building at \$6200.00.

10

The defendants have produced no testimony as to value but have submitted a stipulation in which it has been agreed that the total charges against the property for taxes for the years 1931-1932-1933 and 1934 amount to \$1,145.08, with interest, and water charges to an amount of \$54.09, without interest and that a decree has been entered in the Court of Chancery on foreclosure for the sum of \$7262.50, and costs of suit amounting to \$253.72.

20

There has been testimony produced that the property is now renting for \$65.00 a month, although there is no testimony before me as to whether or not the property was bringing that rent on the date of the Sheriff's sale.

30

From my examination of the premises, together with the testimony produced before me by Messrs. Ryer, Wolff and Older, I am convinced that the property is worth \$9,000.00 and that the fair value of said premises on the date of the Sheriff's sale, April 5th, 1934, would be \$9,000.00. The property, in 1928, would easily bring from \$11,000.00 to \$12,000.00, if it were in the same condition that it is today, and allowing a thirty or forty per cent. depreciation would bring it above \$9,000.00 as a value today.

40

The stipulation filed herein shows that there was a decree for the defendants in the sum of \$7,252.50 and taxed costs amounting to \$253.72, and Sheriff's fees amounting to \$117.37, and that the defendants have paid, or are liable to pay for taxes the sum of \$1145.80, and with interest thereon amounts to \$1222.33, and water rents amounting to \$54.09, and that the property having been sold

*Stipulation Before Master.*

by the Sheriff of Hudson County for \$100.00 a credit should be allowed on the \$9,000.00, or a total of \$9,100.00 for the complainant.

Therefore, I find that the sum of \$9,100.00 should be credited on the bond of the complainant as against the amount due the defendants of \$8910.01.

All of which is respectfully submitted this eighteenth day of December, A. D., 1934.

THOMAS R. ARMSTRONG,  
Special Master in Chancery.

10

**Stipulation Before Master.**

IN CHANCERY OF NEW JERSEY.

20

Between

ROBERT BROADMAN,  
*Complainant,*

and

COLONIAL BUILDING-LOAN ASSOCIATION, of Jersey City, a corporation of the State of New Jersey,

*Defendant.*

102/571.  
On Bill, &c.  
Stipulation before  
Master.

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To avoid the necessity of further formal testimony in the above cause, the following facts are stipulated and agreed:

1.—That by the bill of complaint of Colonial Building-Loan Association (Chancery file 100-357) for the foreclosure of the mortgage set up in the above cause, the above named complainant, Robert

40

*Stipulation Before Master.*

10 Broadman, was made a party and was served with a subpoena and ticket; by said ticket he was notified that he was made a party, because he had executed the bond accompanying the mortgage sought to be foreclosed. That he made no answer or other defense to said proceedings, and on February 9, 1934, a decree pro confesso was entered against all the defendants in said suit, including the said Robert Broadman. That a final decree for the complainant was entered in said suit on February 19, 1934 for \$7262.50, besides costs of suit amounting to \$253.72,—said decree and costs carrying interest from February 15, 1934. On April 5, 1934, the property was sold by the Sheriff of Hudson County and was purchased by Colonial Building-Loan Association for the sum of \$100, subject to taxes due the municipal authorities of Jersey City, as hereinafter set forth. No exceptions were filed to the confirmation of said sale and on April 14, 1934 the sale was confirmed.

20

That the Sheriff's sale of said property was subject to taxes and water charges due the municipal authorities of Jersey City as follows:

30	Taxes 1931 Balance of	\$163.36	and interest
	1932	325.84	“ “
	1933	314.08	“ “
	1934	341.80	“ “
		<hr/>	
		\$1145.08	

Water Charges	54.09
---------------	-------

GEORGE G. TENNANT,  
Solicitor for Defendant.

40 JOHN MILTON,  
Of Counsel with Complainant.

*Exceptions to Master's Report.*

## TESTIMONY BEFORE MASTER.

Testimony before the master was given by complainant and several real estate experts who each valued the property at \$9000.

10

**Exceptions to Master's Report.**

## IN CHANCERY OF NEW JERSEY.

Between

ROBERT BROADMAN,  
*Complainant,*

and

COLONIAL BUILDING-LOAN ASSO-  
CIATION,  
*Defendant.*

102/571.

On Bill, etc.

Exceptions to  
Master's Report.

20

The defendant respectfully excepts to the confirmation of the report made herein by the Honorable Thomas R. Armstrong, Special Master, for the following reasons:

30

FIRST: That, the court was without jurisdiction in this cause to make the order of reference to said Special Master.

SECOND: That the said order of reference was illegal and should not have been made.

THIRD: That the method, adopted by said Master in fixing the amount to be credited on the bond of Robert Broadman was and is contrary to law.

40

*Answer.*

10       FOURTH: That the correct amount to be credited on account of the bond of said Robert Broadman is the difference between the amount of the decree in the proceedings to foreclose his mortgage held by the defendant herein, and the amount realized at the sale under said decree.

  GEORGE G. TENNANT,  
Solicitor for Defendant.

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**Answer.**

(Filed December 15, 1934.)

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IN CHANCERY OF NEW JERSEY.

Between

                  ROBERT BROADMAN,  
  *Complainant,*

                  and

                  COLONIAL BUILDING-LOAN ASSO-  
  CIATION,

*Defendant.*

102/571.  
On Bill, etc.  
Defendant's  
Answer.

30

The answer of the defendant, Colonial Building-Loan Association, to the bill of complaint of Robert Broadman.

This defendant, Colonial Building-Loan Association, answering the bill of complaint says:

40       This defendant by protestation, not confessing or acknowledging the matters and things, in by said bill set forth and alleged to be true, in such manner and form as the same are thereby and

*Answer.*

therein set forth and alleged, for answer to the whole of the said bill says:—that in the foreclosure proceedings set forth in paragraphs 1, 2, 3, 4, 5 & 6 of complainant's bill of complaint, the said Robert Broadman was made a party defendant, was served with due process and ticket, issued out of and under the seal of this court; in and by which ticket the said Robert Broadman was notified that he was made a party defendant to said proceedings because he had executed the bond accompanying his mortgage so sought to be foreclosed. That the said Robert Broadman interposed no defense to said proceedings and filed no exceptions to the confirmation of the sale of said premises under the final decree in said proceedings as set forth in paragraphs 4 & 5 of said bill of complaint.

All of which matters and things this defendant avers to be true and therefore prays the judgment of this honorable court whether it should be compelled to make any other or further answer to the said bill of complaint; and prays to be hence dismissed with its costs and charges in that behalf most wrongfully sustained.

GEORGE G. TENNANT, 30  
Solicitor for Defendant.

**Replication.**

(Filed December 18, 1934.)

**Final Decree.**

(Filed January 11, 1935.)

IN CHANCERY OF NEW JERSEY.

10

20

Between

ROBERT BROADMAN,  
*Complainant,*

and

COLONIAL BUILDING-LOAN ASSO-  
CIATION,*Defendant.*

102/571.

On Bill, &amp;c.

Final Decree.

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This matter coming on to be heard in the presence of Henn & Burr, Esqs., Solicitors, and John Milton, Esq., of Counsel, with the complainant, and George G. Tennant, Esq., Solicitor for defendant, on the coming in of the report of Thomas R. Armstrong, one of the Special Masters of this court, and on the complainant's Notice of Motion for an Order Confirming said report, and the defendant's exceptions thereto, and counsel having agreed in open court that the matter be decided on the pleadings on file in this cause, as on final hearing, without the taking of further proofs in open court, and the court, after having examined the said pleadings, and after hearing the arguments of counsel, being of opinion that the said Special Master's report should be confirmed and the exceptions of the defendant thereto dismissed;

*Final Decree.*

And it appearing from the said Special Master's report, and the Stipulation made part thereof, that the amount of the defendant's decree in the foreclosure suit was \$7,262.50 besides taxed costs of \$253.72, and sheriff's fees of \$117.37, and that the defendant purchased the said premises at a sheriff's sale held on April 5, 1934, for the sum of \$100.00, subject to unpaid taxes of \$1145.08 and water rents of \$54.09;

10

And it further appearing therefrom that the said Special Master determined the fair value of the said premises as of the date of sheriff's sale to be \$9000.00, and that the Special Master found that the sum of \$9100.00 should be credited on the bond of the complainant as against the amount due the defendant of \$8910.01;

20

And it further appearing from the said Special Master's report that the defendant offered no testimony as to the fair value of the premises as of the date of Sheriff's sale, and the court being satisfied that the defendant purchased the property at the sheriff's sale at an unconscionable figure and that there was an absence of competitive bidding at the said sale due to the financial depression and the absence of a market for sale of real estate and that by reason of the said financial depression the complainant herein was unable to protect himself at the said sheriff's sale by refinancing or otherwise, and that such inability to so protect himself was due to lack of complainant's financial resources,

30

IT IS on this 11th day of January, 1935,

ORDERED, ADJUDGED and DECREED that the report of Thomas R. Armstrong, one of the Special Masters of this court, dated December 18, 1934, be and the

40

*Final Decree.*

same hereby is in all things ratified and confirmed; and it is further

10 ORDERED, ADJUDGED and DECREED that the defendant's exceptions to the said report be and the same hereby are dismissed; and it is further

20 ORDERED, ADJUDGED and DECREED that the fair value of the premises more particularly described in the bill of complaint, as of date of sheriff's sale, as determined by the Special Master in his said report of December 18, 1934, is in excess of the amount due defendant Colonial Building-Loan Association, either on the bond of the complainant Robert Broadman, or the amount due the said defendant on its final decree in the foreclosure proceedings described in the bill of complaint herein filed; and it is further

ORDERED, ADJUDGED and DECREED that the fair value of the said premises as of the date of sheriff's sale, namely \$9100.00, as determined by the said Special Master's report, be applied on the bond of the complainant as against the amount due the defendant of \$8910.01; and it is further

30 ORDERED, ADJUDGED and DECREED that after crediting the amount of the fair value as aforesaid, that there is nothing due said defendant on the bond of the said complainant; and it is further

40 ORDERED, ADJUDGED and DECREED that the ad interim restraint contained in the Order of this court of May 28, 1934, restraining and enjoining the defendant Colonial Building-Loan Association, and its attorney, George G. Tennant, from proceeding with or prosecuting, or taking any further steps in the suit now pending in the New Jersey Supreme Court, Hudson Circuit, wherein Colonial Building-Loan Association of Jersey City is plain-

*Final Decree.*

tiff and Robert Broadman is defendant, be and the same hereby is made permanent; and it is further

ORDERED, ADJUDGED and DECREED that the said defendant Colonial Building-Loan Association be and it hereby is permanently restrained and enjoined from prosecuting its said suit at law in the New Jersey Supreme Court or any other suit for any deficiency on the bond of the complainant herein; and it is further 10

ORDERED, ADJUDGED and DECREED that a copy of this Decree, which may be certified by the Solicitors of the Complainant, be filed with the Clerk of the Supreme Court. 20

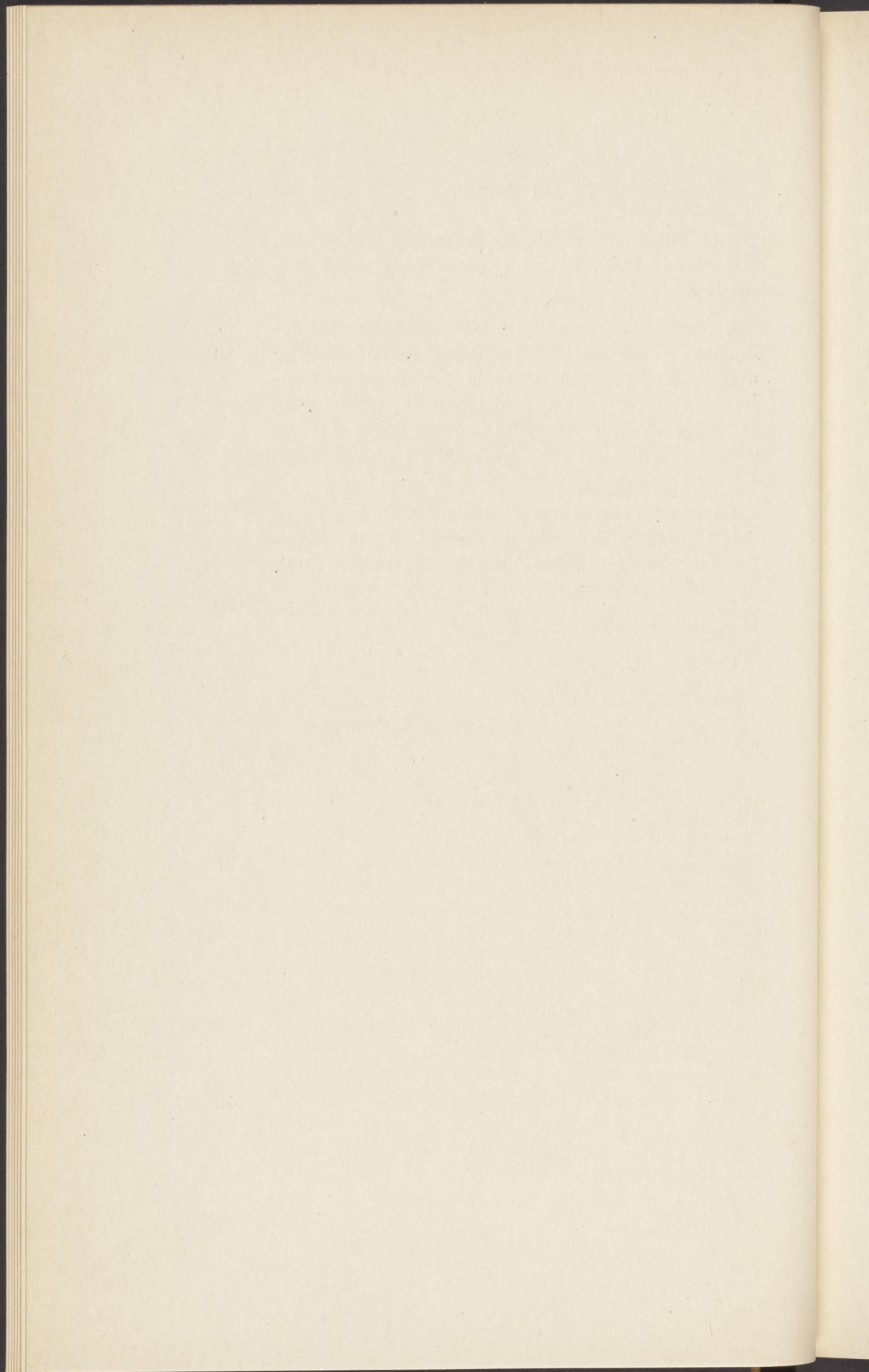
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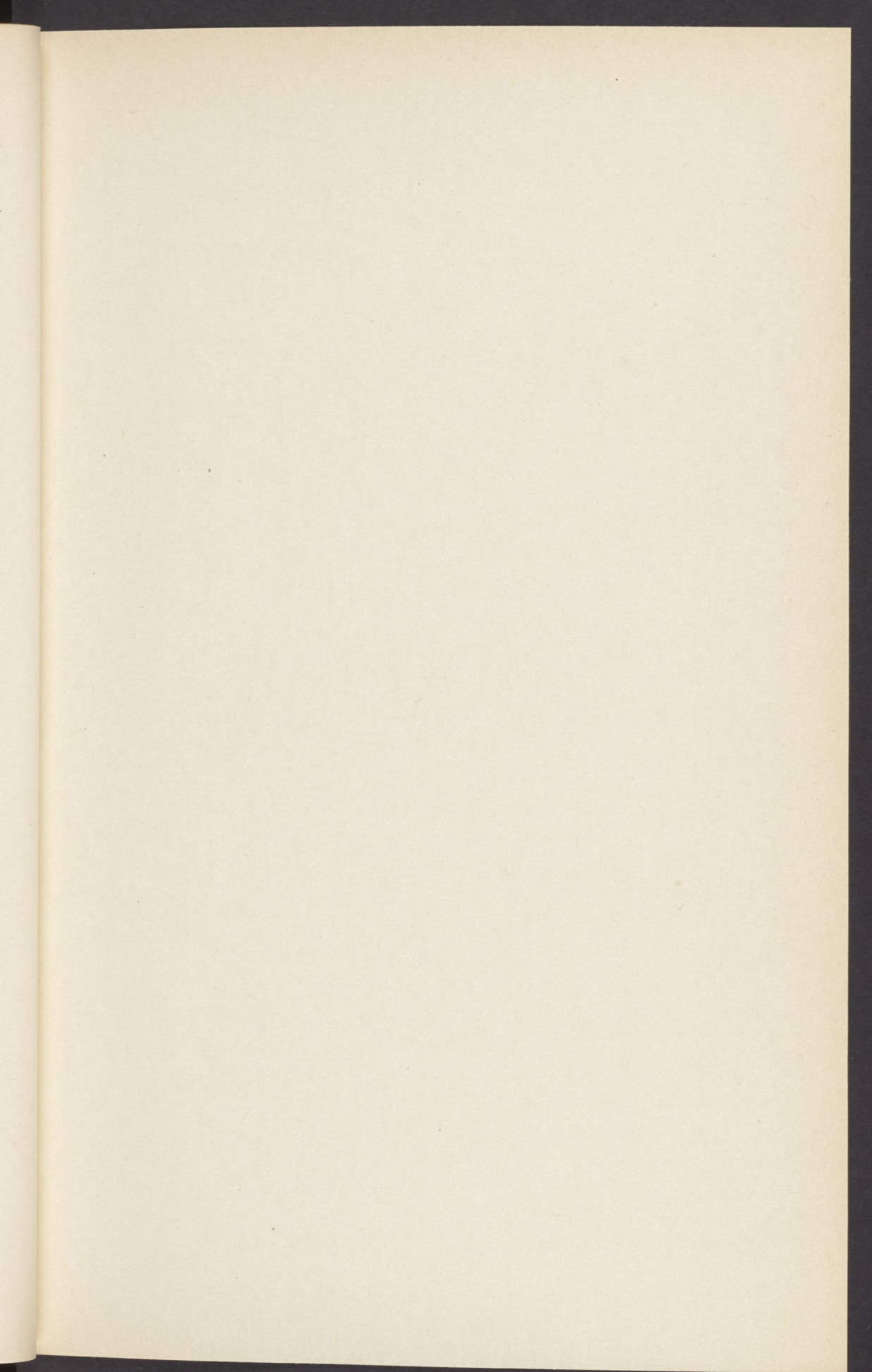
CHARLES M. EGAN,  
V. C.

LUTHER A. CAMPBELL,  
C.

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40







## New Jersey Court of Errors and Appeals

Between ROBERT BROADMAN, Complainant-Respondent,  and  COLONIAL BUILDING-LOAN ASSOCIATION, Defendant-Appellant.		On Bill, &c.  On Appeal from Court of Chancery.  Sat Below: EGAN, V. C.

### BRIEF ON BEHALF OF COMPLAINANT-RESPONDENT.

#### Statement of Facts.

A final decree was entered in a foreclosure suit wherein the defendant in this suit was the complainant and the complainant in this suit, and others, were defendants, by which it was adjudged that there was due to the complainant therein the sum of \$7,262.50, on its bond and mortgage, and costs, and directing a sale of the mortgaged premises. At the sale the mortgagee defendant purchased the property for the nominal sum of \$100.00. On the day of the sale there were no bidders other than the defendant and in many instances the Sheriff's sales conducted on that day resulted in the purchase of the mortgaged premises by the mortgagees upon nominal bids irrespective of the value of the property and irrespective of the amount of the decree (S. C. p. 6, ll. 28-35). This condition was due to the economic depression because of

which there were no bids, and would-be purchasers, including the complainant herein, could not raise funds through the customary channels to put them in a position to bid at all on the property sold. This condition was general and affected all judicial sales. As a result of the decree and sale there remained due to the defendant-mortgagee, upon the bond which was secured by the mortgage foreclosed, the sum of \$7,633.59. Shortly thereafter, the defendant herein brought suit in the New Jersey Supreme Court against the complainant herein for the amount of said deficiency. Thereupon, the complainant filed his verified bill (S. C. p. 4) in the Court of Chancery, and obtained an order (S. C. p. 9) containing an *ad interim* restraint, which order also directed the defendant to show cause why it should not be permanently restrained and enjoined from proceeding with, or prosecuting, or taking any further steps in the suit at law against the complainant. On the return day of the order the court, after considering the affidavits filed in the cause, and arguments of counsel, referred the matter to a special master (S. C. p. 11) to take further testimony and inquire into, ascertain, and report the fair value of the property. The defendant filed an answer (S. C. p. 18) to the bill in which it set up *only the following matter by way of defense*: that in the foreclosure proceedings, the complainant herein was made a party defendant, was served with due process and ticket, that he interposed no defense and filed no exceptions to the confirmation of the sale.

Counsel stipulated in open court that the case should be decided on the pleadings and without taking further proofs in open court (S. C. p. 20, ll. 32-5). The Master reported that the fair value of the premises as of the date of the Sheriff's sale was \$9,000.00 and that the sum of \$9,100.00 should be

credited on the bond of the complainant as against the amount due the defendant of \$8,910.01 (S. C. p. 14, ll. 22-34). The defendant presented no testimony to the Master as to the fair value of the premises (S. C. p. 14, ll. 10-11).

Upon the filing of the Master's Report, the defendant filed exceptions to the same (S. C. p. 17), holding that the court was without jurisdiction, that the order of reference to the Special Master was illegal, that the method adopted by the Master in fixing the amount to be credited on the bond is contrary to law, and that the correct amount to be credited on account of the bond is the difference between the amount of the figure in the proceedings to foreclose the mortgage and the amount realized at the sale under the decree.

The court overruled the exceptions, and made the injunction permanent (S. C. p. 20).

The court further ordered that the fair value of the premises, as determined by the report of the Special Master, be applied on the bond of the complainant as against the amount due to the defendant.

From the decree so adjudging, the defendant appeals and in its brief contends that the decree should be reversed for the reason that the court below had no jurisdiction to entertain the complainant's bill, which, in the opinion of the defendant, was a collateral attack on the foreclosure proceedings.

Before undertaking to answer the defendant's brief, we wish to direct the court's attention to the following facts:

That both parties stipulated that the matters in the case were to be determined only on the pleadings (S. C. p. 20, ll. 32-5);

That the Chancellor was satisfied that there was an absence of competitive bidding at the

sale due to the financial depression, and the absence of a market for the sale of real estate; (S. C. p. 21, ll. 21-35);

That the Chancellor was satisfied that by reason of the financial depression the complainant was unable to protect himself at the Sheriff's sale (S. C. p. 21, ll. 21-35);

That the Chancellor was satisfied that the complainant's inability to protect himself at the sale was due to the lack of complainant's financial resources (S. C. p. 21, ll. 21-35).

### LAW AND ARGUMENT.

**Complainant's bill was not a collateral attack on the foreclosure decree, but was filed to restrain an inequitable use of that decree by the defendant.**

Defendant cites a number of old cases which seem to hold that the sale price under the foreclosure decree is conclusive as to the value of the mortgaged premises, and that the defendant cannot be permitted to contest that price or value in this suit; that this suit is in fact and legal contemplation a collateral attack on the decree in the proceedings; that so long as that decree has been unchanged, the parties are bound by it, and the complainant is entitled to no relief.

This contention has been disposed of by Buchanan, V. C., in the case of *Better Plan B. & L. Ass'n v. Holden*, 114 N. J. Eq. 537, 169 Atl. 289, in which he said:

“There is no doubt but that this contention is essentially supported by the determination of this court in *Snyder v. Blair*, 33 N. J. Eq.

208, approved and affirmed by the appellate court in *Currie v. Sisson*, 34 N. J. Eq. 578. Those cases, however, were decided over fifty years ago, at a time when in one and the same suit the mortgagee was permitted to sell the mortgaged premises and enter decree for any deficiency resulting from such sale. Present-day conditions necessitate change in the application of old principles and development of the principles \* \* \* The principle laid down in the Snyder and Currie Cases, *supra*, was later overruled or modified by the appellate court in *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394, 45 Atl. 611, as pointed out in *Baader v. Mascellino*, 113 N. J. Eq. 189."

The defendant doubtlessly misconceives the nature of the proceeding. The complainant does not question the validity of the decree in the foreclosure suit, nor the order confirming the sale made thereunder. The defendant was entitled to the relief granted to it in that proceeding. The complainant filed no answer in that action and does not now intend to attack any of the steps therein. What the complainant asked the Court of Chancery, was to restrain the defendant from an inequitable use of the decree in the foreclosure proceedings. This is altogether something different, and it is a remedy that has always been available in equity. In the *Holden* case, *supra*, the court said:

"Equity has steadfastly endeavored to disregard form and look only to the substance, and has not hesitated to restrain defendants from relying upon judgments and matters of record, where it would be inequitable to permit them so to rely. \* \* \* It is indeed true that at law the record of such sale is conclusive upon collateral attack and can only be avoided by a direct proceeding to set aside the sale. \* \* \* But assuredly it is the province of this court to prevent inequity and relieve against injustice, where such would be the

result of the strict enforcement of technical legal rights. Such relief may be afforded through the power of this court to control its own sales. \* \* \* *It is deemed that it may also be afforded through the power of this court to restrain a party from enforcing a legal position which he has acquired, where it would be inequitable and unconscionable to permit such enforcement.* A complainant may maintain a bill in equity to restrain the holder of a judgment at law from proceeding to enforce that judgment, where the judgment has been obtained by fraud or other inequity. The complainant is not required to go to the law court and ask to have the judgment opened and a new trial had. Equally well, it would seem, may a party to a suit in equity ask this court to restrain, or to refuse to permit, his adversary from enforcing a position which he holds upon the strict legal record—where such enforcement would be against equity and good conscience.” (All italics supplied.)

But our position should be clear. Whatever form the remedy may take in equity is immaterial; what is important is the effect thereof. The effect of the decree made in the case *sub judice* is to make it impossible for the defendant to prosecute an action at law on the bond against the complainant. The defendant could not sue on the bond without first having procured the foreclosure decree. Having procured that decree, the defendant can be restrained by the court that made that decree from using it as a sword against the complainant. Not to have granted the relief prayed for by the complainant, would have meant a yielding to the defendant double the amount of the debt due to it. As was said by the court in *Bourgeois v. Risley Real Estate Co.*, 82 N. J. Eq. 211, it would be giving the spoils as well as the fruits of the litigation; it would be to create a situation iniquitous, oppressive and

obnoxious to a court of conscience. "*Satisfaction of the debt and not pillage of the debtor's estate is equity's relief.*"

This is the central fact, the salient truth, that is the result of the decree made by the court in this case: *That the defendant cannot have a double satisfaction of his debt.*

From the time that Lord Chancellor Ellsmere had his dispute with Chief Justice Coke in 1616, it has been settled that the Court of Chancery may restrain an action at law. Stripped of all non-essentials and superficialities, this is what the court below has done, and nothing more. It is easy enough to becloud the issue and to so wrap it in superficialities that its inner kernel might become invisible; and the defendant's brief is an instance of an attempt in this direction, and it is against this that we earnestly object. The issues are too significant that they should be lost sight of by deviation to non-essentials.

The case *sub judice* is not one of novel impression. The case of *Meranus v. Lawyers & Home-Makers B. & L. Ass'n*, 116 N. J. Eq. 402, 174 Atl. 150, is on all-fours with this case. They can be distinguished by no important feature. In the *Meranus* case, the defendant moved to strike the bill on the ground that the Court of Chancery was without jurisdiction, that the bill did not set forth an equitable cause of action, that it was a collateral attack on the decree of the Court entered in the foreclosure suit, and of the order of confirmation. The court said:

"But so far as this court is concerned, the question of jurisdiction and that touching the right of complainant to relief in this court on the facts stated, are entirely settled. The bill in *Lurie v. Hockenjos* was similar in purpose to the present bill and was considered by the Court of Errors and Appeals as one not

collaterally attacking a decree of this court. \* \* \* *Had this complainant applied to this court for relief before confirmation of the sale, or even after confirmation on proceedings to reopen the decree, it would have been granted. What the court then could have done it still can do. \* \* \* The defendant's judgment arises from an inequitable use of a decree of this court. Equity will not suffer a wrong without a remedy. \* \* \* This court is not so impotent as not to be able to right a wrong resulting from the misuse of its own decree. That its decree has been used as the basis of an unjust judgment, and the enforcement of that judgment would result in the defendant Building & Loan Association obtaining a double satisfaction of its debt, is apparent from the face of the bill. An ancient equitable maxim is that 'equity will not suffer a double satisfaction to be taken.'*"

Another case directly in point is *Maher v. Usbe Bldg. & Loan Association*, 116 N. J. Eq. 398, 174 Atl. 159.

In *Lurie v. Hockenjos Co.*, 113 N. J. Eq. 504, affirmed 115 N. J. Eq. 304, this court passed upon a similar situation and held that the complainant's remedy was well conceived. The case was decided by this court on February 2, 1934.

In *Fifth Avenue Bank of New York v. Composon*, 113 N. J. Eq. 152, 166 Atl. 86, the court quoted the following passage from an opinion by Chief Judge Cardozo, in *Graf v. Hope Building Corporation*, 254 N. Y. 1: "Let the hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path."

See also, *Cameron v. Penn Mutual Life Ins. Co.*, 116 N. J. Eq. 311, 173 Atl. 344; *Morris v. Glaser*, 106 N. J. Eq. 585, affirmed 110 N. J. Eq. 661.

As was pointed out by the Court of Chancery in *Young v. Weber*, 117 N. J. Eq. 242, 175 Alt. 273,

the doctrine in the case of *Federal Title & Mortgage Guaranty Co. v. Lowenstein*, 113 N. J. Eq. 200, 166 Atl. 538, was recognized as sound by this court in *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, and in *Lurie v. Hockenjos Co.*, *supra*, and it is respectfully submitted that the *Lowenstein* case is sufficient authority to uphold the decree made in the case *sub judice*.

As to the case of *Fruzynski v. Jablonski*, 117 N. J. Eq. 117, it seems to us that it has no bearing on this case for the reason that in the *Fruzynski* case, there were special equities existing in favor of the mortgagee-purchaser which made the decree of the Court of Chancery inequitable. Upon the purchase of the property, the mortgagee in the *Fruzynski* case assumed heavy encumbrances, and this was undoubtedly a very material circumstance in the case. In the case at bar, no such equities appear to exist in favor of the defendant. Its only defense was that there had been a foreclosure, a sale of the property and an order confirming the sale, and that these proceedings were unaffected. That this defense is a tenuous one, we have, we believe, sufficiently demonstrated.

In *Young v. Weber*, *supra*, the court has said:

"The Lowenstein Case is not referred to in the opinion of the appellate court in the *Fruzynski* Case, and it would hardly be supposed that the court intended to overrule the doctrine of that case without referring to it by name, especially in view of the fact that in two previous opinions of the Court of Errors and Appeals \* \* \* the doctrine is inferentially approved. \* \* \* In our judgment the *Fruzynski* case does not detract in the least from the rules to be deduced from the *Lowenstein* Case and other kindred decisions of this court \* \* \* It does not inhibit the allowance by this court in a proper case of a credit of the 'fair value'

of the mortgaged premises on a deficiency claim.”

Suppose that instead of having ordered the defendant to credit the fair value of the premises on the amount due on the bond, the court below had ordered a resale, what, then, would have happened? The whole basis for the relief granted is the universal depression coupled with the fact that the mortgagor is impecunious and unable to protect himself; that there is no market for real estate and that a sale results in a sacrifice of the property for a sum of money so out of proportion to the value of the property as to be shocking to the conscience. A resale is ordered, and again there are no bidders. Shall there be a dozen resales, or a score?

In the *Holden* case, *supra*, the court said:

“To compel the defendants to institute another proceeding in this court (in the former foreclosure suit) against the present complainant, in order to bring that issue before this court, would result in no benefit to anyone; the sole result would be the delay, trouble and expense of the additional formal, useless, legal proceeding. Everyone, and everything, necessary to a proper determination and a proper decree, are already before the court. Defendants should not be compelled to go out and around and enter again by another door.”

In *Young v. Weber*, *supra*, the court has said:

“If possible to accomplish by direct action that which is just if attained indirectly, it has always been the policy of this court to do so, because equity regards the substance rather than the form and the result rather than the method by which it is attained.”

The court in the *Lowenstein* case said, with good reason, that under present conditions about the

only purpose of such a sale is to fix the amount of the deficiency and that except for this, strict foreclosure would accomplish the same purpose. A sale on a foreclosure is no longer of any protection to the mortgagor. "His shield has been converted into a sword to be used against him." In *Baader v. Mascellino*, *supra*, the court quoted the following language from *Suring State Bank v. Giese* (Wis.), 246 N. W. Rep. 556:

"In the present situation the device of a judicial sale largely fails of its intended purpose because of the lack of competitive bidding and the question arises whether a court of equity is wholly impotent to rise to the needs of justice and see that the parties are fairly and properly protected."

It is to be remembered that even at strict Common Law, where the mortgagee was permitted to come into possession of the land pledged, and take its profits, *the profits were in reduction of the debt (vifgage)*. *Glanville*, lib. X, cap 9; *Jenks, A Short History of English Law*, pp. 88, 125. But the institution of the mortgage as we now know it is in its origin and development a creature of Chancery. It was the Chancellors who created the equity of redemption, who established the necessity for foreclosure, and who, following a constitution of the Emperor Constantine, held void any conditions in the loan by which the borrower lost his equity of redemption. *Scrutton, The Influence of the Roman Law on the Law of England*, part II, cc. 6, 10-13, and Concl. This was in line with the motto, "For God and in work of Charity", with which petitions to the King's Council generally concluded. It was Equity to whom one turned for relief from acts of oppression. "The poor appear to have been the objects of their particular care. \* \* \* The defence of the poor and helpless was one of the most ancient,

as it was in the early period of our history one of the most essential, of the prerogatives which descended from the Anglo-Saxon to the Norman sovereigns. Henry III had found it necessary to direct special commissions throughout the country, to inquire into oppressions of the poor, with a view to their redress"; and it was this royal prerogative that descended to the Chancellor and that is the foundation and the substance of his authority. Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. I, pt. 2, cc. 1-4. It is an ancient maxim that "Equity has power, upon circumstances, to relieve against penalties, judgments, and executions", Roscoe Pound, "On Certain Maxims of Equity", *Cambridge Legal Essays*, p. 267; and Sir Joseph Jekyll, M. R., in *Cowper v. Cowper*, 2 P. Wms. 720, 753 (1734), has said that the discretion of the Chancellor "in some cases follows the law implicitly, in others it assists it and advances the remedy; in others again *it relieves against abuse or allays the rigour of it*".

What the Court of Chancery has done in the case *sub judice* is in line with the origin and development of the Court. *What it has done in the case is essentially this: it prohibits the defendant from proceeding on its bond.* It has said to him: "there was a time when this Court, despite the strictness of the Common Law, had to say to the creditor that he took the land not as principal, but only as security; that it was the debt, and not the land, that was intended to be secured as the principal; and if the creditor took money in satisfaction of the debt, he could not take the land also. Now, exigencies over which none of us has any control, necessitates, in the interests of justice, a reversal, and we must say that if you take the land (which you have a right to take), you cannot press the debtor on the bond. Perhaps this is not entirely just to you.

There is some equity on your side, and the law, too, and it has been said that 'law and equity shall prevail against equity only'; but we agree with Lord Cowper, who, in *Oxwith v. Plummer*, Gilb. 13, 15 (1709) said: 'It is generally true that law and equity shall prevail against equity only; but then 'tis with this distinction, that the equity that goes along with the law is of the same nature and is as strong as the other equity'. And it is our earnest belief that, when the equities are weighed, by far the stronger will be found with the debtor".

### CONCLUSION.

We have no desire to convey the impression that we are unmindful of the fact that there are certain passages in the opinion of Mr. Justice Lloyd in the *Fruzynski* case which seem to militate against the complainant. We do not, however, believe that this court intended to disestablish a well-founded equitable doctrine and to overrule a long line of well-considered cases by implication. As the court said in *Snegon v. Consolidated Indemnity & Insurance Co.*, 117 N. J. Eq. 325, 175 Atl. 785:

"This fact of the long continued practical construction and general understanding of bench and bar, while, of course, not controlling, is not lightly to be disregarded."

The *Lowenstein* and some of the other cases cited in this brief have achieved such a place of eminence in the jurisprudence of this jurisdiction, that we do not think this court intended to condemn them by silence. There are, as we have said, distinguishing features in the *Fruzynski* case which necessarily took that case out of the general current, and it is our belief that the *ratio decidendi* is to be found in the special equities which existed

in favor of the mortgagee purchaser. As was said in *Cohens v. Virginia*, 19 U. S. 339:

“It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be accepted but ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason of this maxim is obvious.”

So, too, in *Louisville & N. R. Co. v. Davidson County Court*, 1 Snead 637, 695, the court said:

“\* \* \* the generality of the language used in an opinion is always to be restricted to the case before the court, and it is only authority to that extent. \* \* \* the reason of this is manifest. The members of a court may often agree in a decision—the final result in a case—but differ widely as to the reasons and principles conducting their minds to the same conclusion. It is, then, the conclusion only and not the process by which it is reached, which is the opinion of the court and authority in other cases. The law is thus far settled but no farther. The reasoning adopted, the analogies and illustrations presented, in real or supposed cases, in an opinion, may be used as argument in other cases, but not as authority. In these the whole court may concur, or they may not.”

The construction placed by the defendant upon the *Fruzynski* case is in effect that it was the intention of this court to substitute a rule of procedure in place of a substantive doctrine of equity; that the question before this court was whether the procedure should be by a bill of review, or whether the action was a collateral attack upon the decree in the foreclosure proceedings, etc.

We do not believe that the question presented was anything so narrow and trifling. We recall the fol-

lowing passage from the opinion of the Circuit Court Judge in *McDonald v. State of Nebraska*, 101 Fed. 171:

“There are in the history of the jurisprudence of every country certain epochs which mark the beginning of distinct trends of legal ideas and judicial conceptions of justice. There was a time in England and this country when the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements and technicalities of special pleading. In that period the great fundamentals of the law seemed little and the trifling things great. The courts were not concerned with the merits of the case, but with the methods of starting it. \* \* \* They adopted so many subtle, artificial and technical rules governing the statement of actions and defenses \* \* \* that in many cases the whole contention was whether these rules had been observed, and the merits of the case were never urged and frequently never thought of. Happily for mankind, and for the law itself, that epoch has passed in England and in this country, and we now have an epoch in which substance is more considered than form, in which the justice and right of the case determine its decision, and not some technical error or mistake in the pleadings.”

It is respectfully submitted and earnestly urged that the decree of the Court of Chancery should be affirmed.

Respectfully submitted,

HENN & BURR,  
Solicitors for Complainant-Respondent.

JOHN MILTON,  
Of Counsel.



## New Jersey Court of Errors and Appeals

Between

ROBERT BROADMAN,  
*Complainant-Appellee,*

and

COLONIAL BUILDING-LOAN  
ASSOCIATION,  
*Defendant-Appellant.*

On Bill.

### APPELLANT'S BRIEF.

#### The Facts.

In a separate previous suit (Chancery Docket 100-375) appellant conducted foreclosure proceedings to a decree and sale. The appellee here was a party defendant therein because he executed the bond accompanying the mortgage. He was served with subpoena and ticket which apprised him of the reason for being made a defendant. He interposed no defense and he made no objection to the confirmation of the sale held April 15, 1934. The final decree dated February 19, 1935 was for \$7262.50 and interest from February 15, 1934, taxed costs \$253.73. The Sheriff's fees were \$117.37. Appellant purchased the property on April 5, 1934 for \$100, *but subject to taxes \$1145.80 and water rents \$54.09.*

On May 10, 1934, appellant brought suit for the deficiency on the bond, setting up that there was due the difference between the amount of the decree, interest, costs and Sheriff's fees and the amount for which the property was sold.

Appellee thereupon brought this proceeding, *an entirely new suit*, and upon the filing of the bill, an order to show cause was issued with an *ad interim* restraint against the law suit. On the return day, the Vice Chancellor continued the restraint and referred the bill to a master to ascertain the "fair value" of the premises. Realtors who testified before the master valued the property as \$9100. It was stipulated before the master (p. 15) that the appellee, Broadman, had been a party in the foreclosure proceedings, was served with subpoena and ticket which notified him of the reason for being made a defendant; that he filed no answer, that a decree was entered against him, that the final decree was entered, property sold and no objections were filed to the confirmation. Exceptions were filed to the master's report (p. 17). The appellant's answer to the bill of complaint is substantially a plea, but under rule 68 of the Court of Chancery, had to be made by answer. It sets up substantially the same matters covered by the stipulation before the master (see answer, p. 18), viz.: that Broadman was made a party defendant in the foreclosure proceedings, served by subpoena and ticket notifying him the reason he was made a party, that he interposed no defense and filed no exceptions to the confirmation of the sale.

On the master's report, exceptions thereto, and the defense set up by the answer, the Vice Chancellor advised a final decree and

(1) *Dismissed the exceptions* to the master's report (p. 22, line 10);

(2) *Adjudged the fair value of the premises to be in excess of the amount due complainant either on Broadman's bond or the foreclosure decree;*

(3) *Directed that the \$9100 (fixed as "fair value" by the master) be credited against Broadman's bond and appellant's decree; and*

(4) *Ordered, adjudged and decreed that nothing was due appellee on Broadman's bond and permanently enjoined appellant from prosecuting its law suit.*

**It is to be noted that while this decree in no way refers to the final decree in the foreclosure proceedings or the order confirming the sale, it in fact discharges Broadman from the earlier decree and takes away from appellant the rights adjudicated to him therein.**

### Argument.

There was a decree *pro confesso* against Broadman in the original foreclosure case (p. 16, line 12). Interpolating the language used by Chancellor ZABRISKIE in *Brinkerhoff v. Franklin*, 21 N. J. E. 334, it would read as follows: "Mr. Broadman had his option to answer the bill, or if there was nothing in it about which he wished to contest, to avoid the costs and expense of answer to himself, by allowing *the bill stating facts truly to be taken as confessed against him. This is the effect given to his omission to answer by the statute.*" This case was cited and approved by Vice Chancellor VAN FLEET in *Consolidated Electric Co. v. Atlantic Trust Co.* (50 N. J. E. p. 94), where he said on page 96, "Now, however, by force of the statute just mentioned, if a defendant fails to appear and make defence, the Chancellor may treat his failure *as a confession of the truth of the*

*facts stated in the complainant's bill.*" (See also *Mutual Life Insurance Co. v. Sturges* (32 N. J. E. p. 678, reversed in 33 N. J. E. 328); but the substance of the *Brinkerhoff v. Franklin* case, as cited above, was upheld.

The decree *pro confesso* was followed by a final decree. As Chief Justice GUMMERE said in *Murry v. Pierce* (95 N. J. L. 104), "As between him and the present appellant the decree was *res judicata* on the question of the amount of the mortgage debt, and he could only obtain relief against the binding force of the decree by an application to the court in which it was entered."

Again in *Bragg v. King*, 104 N. J. L. 6 (Court of Errors), Chief Justice GUMMERE said: "The doctrine of *res adjudicata*, as defined by our Court of Errors and Appeals, is that the judgment of a court of competent jurisdiction on a question of law or fact, when litigated and determined, is, so long as it remains unreversed, conclusive upon the parties and their privies, not only in the suit in which it is pronounced, but in all future litigation between the same parties or their privies, touching upon the same subject-matter. *In re Walsh's Estate*, 80 N. J. Eq. 565."

*The decree does not in terms open complainant's original decree in the foreclosure case, does not in terms set aside the sale, does not direct a new sale.* The result is that appellant has still a valid and undisturbed final decree which found substantially \$7677 due from the defendants (including Broadman) in that foreclosure proceeding; and appellee has *in a separate suit*, a decree that there is nothing due from him to appellant. The two decrees are inconsistent.

### Complainant's Bill Is a Collateral Attack on the Foreclosure Proceedings.

In those cases where the general subject has been considered, it will be found that the effort to secure relief by crediting "fair value" was in *the same cause*. But in the instant case, we have a separate suit brought by the defendant in the foreclosure case against the complainant in that suit to (1) set aside the sale in the foreclosure case (Case, p. 8, par. 2) and (2) to ascertain a "fair value" to be credited on the deficiency in the foreclosure case.

This is nothing less than an attempt to collaterally attack the foreclosure proceedings and especially the order confirming the sale therein.

In the *Vanderbilt-Brunton* case, Judge CASE was considering the constitutionality of the Act of 1933, which provided that in the suit on a bond, evidence could be introduced as to "fair value". He said, "But the proposition now advanced is that the power of the Court of Chancery to view the whole field of related circumstance, to place all parts of the picture in true perspective, and to refuse an order which on this showing would work shocking injustice is correlative with the right, created for the first time by this statute, of an obligor on the bond to reduce or wipe out his debt by resort to the single and isolated fact, to be ascertained by the court in which the bond is sued, of 'market value' at the time of a sale *had and consummated under the order of another court* months before, however inequitable such reduction or destruction may be upon a view of the entire case. We find to the contrary."

In *Hoffmeyer v. Kieran*, 103 N. J. E. 256, the following quotation from 21 C. J. 692 was quoted and approved: "A decree in equity being the

judgment of a court of equity where the court has jurisdiction of the subject-matter and of the parties, its adjudication is not subject to collateral attack, and when on the merits *it is res adjudicata may be pleaded in bar to another suit upon the same cause of action*. The conclusiveness of a decree is not affected by the fact that it is contrary to the generally accepted principles of equity jurisprudence."

Again in *Cyc.*, Vol. 23, page 1055, the rule is stated thus: "A judgment rendered by a court having jurisdiction of the parties and the subject matter, unless reversed or annulled in some proper proceeding, is not open to a contradiction or impeachment in respect to its validity, verity, or binding effect by parties or privies in any collateral action or proceeding \* \* \*" (Also on p. 1056) "The rule just stated as to the collateral impeachment of judgments applies generally to varieties of judgment—such as, among others, decrees in equity, foreclosure, etc." This rule, in identical language, is repeated in *C. J.*, Vol. 34, pages 511 and 514.

In *Vandyke v. Bastedo* (15 N. J. L., p. 228), the Supreme Court, through Chief Justice HORN-BLOWER found that the judgment was rendered in the absence of the defendant and without any evidence, and *that there was no doubt that it was an erroneous judgment* and might have been reversed, if a reversal had been sought for *in a proper manner*; but the Court said that *the attack was made in a subsequent action of trover* where the defendant's property was sold under an execution issued under the erroneous judgment. The Court said that the "judgment" is not a nullity, but a valid, subsisting judgment, binding, on the parties, *only avoided by due process of law*.

In *National Docks v. Pennsylvania R. R.* (52 N. J. E., p. 58, affirmed *idem* 590), V. C. VAN FLEET said, on page 61:

“In the language of Mr. Justice Miller, in *Harvey v. Tyler*, 2 Wall. 328, 342: ‘Whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, *however erroneous they may be*, until they are reversed on error or set aside by some direct proceeding for that purpose.’ And Chief Justice Beasley, in *McCahill v. Equitable Life Assurance Society*, 11 C. E. Gr. 531, 538, stated the same principle in these words: ‘The decision of a court of general jurisdiction, acting within the scope of its powers, has inherent in it such conclusive force that *it cannot be challenged collaterally*, and that such decision definitely binds all parties embraced in it unless, on objection made to such court itself, or in a direct course of appellate procedure.’” Cited and approved in *Hedden v. Hedden*, 162 Atl. Rep. 114, *In re Leupp*, 108 N. J. E. 58; *Second Workingmen’s B. & L. Assn. v. Wickers*, 83 N. J. E. bottom page 400.

There is a very old case, *Diehl v. Page* (3 N. J. E., p. 143), where Chancellor VROOM said: “We are not to inquire whether the judgment is erroneous and irregular, but whether it is void, and, coming up collaterally before this court, is to be taken as a nullity. *On this question there ought to be no doubt.* The jurisdiction of the court which rendered the judgment was complete. It was a general jurisdiction over the whole subject matter; and while acting within that jurisdiction, *their judgments are not to be impeached, though erroneous on the face of them.*”

In *Palmer v. Freeholders* (77 N. J. L., p. 143), Judge VOORHEES, speaking for the Supreme Court,

said on page 145: "The defendants insist that the record discloses upon its face that the judgment was improvidentially and prematurely entered and hence is void \* \* \* *irregularity in proceedings* in a court of general jurisdiction as against collateral attack is cured by judgment."

It must be obvious from the foregoing citations that the argument as to any inequity in the Chancery Court proceedings can be of no avail to the appellee in this case. He was a party to those proceedings. The purpose of making him a party was clearly set forth in the bill and the ticket served on him, and he is bound by the decree *pro confesso*, the order confirming the sale and the final decree.

It will be observed that in the foregoing citations it was claimed that the former proceedings were irregular; yet the cases hold that those irregularities were not subject to attack in a collateral proceeding. But in the instant case there is no suggestion that there was any irregularity in the foreclosure proceedings. *A fortiori*, therefore, it is not subject to collateral attack.

Vice Chancellor VAN FLEET in *Dringer v. Erie Railway*, 42 N. J. E. 579, said: "Where a litigant has had his day in court, and been afforded the opportunity which the law secures to every litigant to meet the case made by his adversary, and to overthrow it by proof and argument, and judgment passes against him, if he believes that injustice has been done, he has a right to have such judgment reviewed by such legal method as may be appropriate to the redress of the wrong or error of which he complains. He may sue out a writ of error, apply for a new trial or rehearing, or take an appeal, *but he cannot maintain a bill in equity to retry* the case on its merits, *or retry any of the questions settled by the judgment*, on the ground

that the judgment is a fraud because it is contrary to the real truth or right of the case."

In the recent case of *Furzynski v. Jablonski*, decided by this court (reported in 117 N. J. E. 117), it is clearly pointed out that it is not "within the power of the Court of Chancery, while the sale stood as confirmed to ignore its own decree, which was conclusive as to value, by taking an *ex post facto* proceeding to redetermine such value for the purpose of itself effecting a credit on the decree or on the bond."

This is the latest ruling of this court and we contend that the complainant in this suit cannot here open the decree in the previous foreclosure case. As Judge LLOYD said in the *Furzynski* case: "The prayer of the petitioner was that the decree of foreclosure and the order confirming the sale be set aside; or, apparently, in the alternative, that confirmation of sale only be set aside and a resale of the property be ordered. Disregarding both of these prayers, the court below of its own motion directed a costly inquiry as to the value of the mortgaged premises, made the order of reference to a master for the purpose, and the complainants, without opportunity to retain the property on terms or to bid at another sale, were compelled to accept satisfaction of the decree and cancellation of their bond. *Such procedure was wholly without authority of law.*"

As far back as *Snyder v. Blair*, in 22 N. J. E. 208, Vice Chancellor VAN FLEET held "that the court is not at liberty, in case the market value of the premises happens to exceed the sum realized at the sale, to deduct the market value and enter the decree only for the balance of the mortgage debt."

In *Murray v. Pierce*, 95 N. J. L. 104, Chief Justice GUMMERE, speaking for this court, said that where the party executing the bond was made a party

defendant in the foreclosure proceedings and made no defense, he is liable at a suit at law for "the difference between the amount of the debt as adjudged in the foreclosure proceedings and the amount of money produced at the sale of the mortgaged premises under those proceedings." This view was confirmed by the opinion of Judge CASE in this court in *Vanderbilt v. Brunton Piano Co.* (111 N. J. L. 597).

It is true that under a number of cases in the Court of Chancery, since that time, it has been held inequitable for the mortgagee to hold the property acquired at foreclosure sale at a nominal figure of, say \$100, and then sue the mortgagor for the difference between the decree and the price realized at the sale under foreclosure. But where the inequity is alleged, the remedy must be by a resale, "not by arbitrary and illegal methods, but in the manner provided by law. If in a given case the property is sold so much below the market value to shock the conscience of the court, the remedy is to set aside the sale before confirmation, (or if the circumstances justify, probably after confirmation) and effect a resale." (*Fruzynski v. Jablonski*, 117 N. J. E. 117.)

In the instant case, Broadman was a party to the original foreclosure proceedings. He made no answer and permitted a decree to go against him. He had an opportunity to object to the confirmation of the sale on the ground of inadequacy of consideration, but he failed to do so. Under the *Fruzynski* case we respectfully contend that he cannot by a bill in a separate litigation secure a decree that frees him from a debt which was decreed due in the earlier case.

Let us compare the prayer of the instant case with that in the *Fruzynski* case:

## THE FRUZYNSKI CASE.

That the foreclosure decree and order confirming sale be set aside: or that confirmation of sale be set aside and a resale of property ordered.

## THE INSTANT CASE.

That confirmation of sale in foreclosure proceedings be set aside in order that a new sale may be had: or that matter be referred to a master to determine fair value which defendant should be compelled to credit to deficiency.

Thereupon the Court of Chancery decreed that the amount of the so-called "fair value" found by the Master should be "applied" (Case, p. 22, line 26) on the bond of Broadman as against the amount due the Building-Loan Association and that, therefore, "there is nothing due (p. 22, line 32) on the bond." The Court of Chancery fell into the very error that this Court pointed out at the top of page 121 in the *Fruzynski* case. No direct attempt was made to open the previous decree or set aside the sale; but the effect of the decree is clearly to collaterally attack the previous decree.

Judge LLOYD said: "An inquiry as to value was relevant, if at all, *only on the prayer to open the order of confirmation of sale to the end that, if equity required, a resale be had. It was not within the power of the court of chancery, while the sale stood as confirmed, to ignore its own decree which was conclusive as to value* (Snyder v. Blair, supra) by taking an *ex post facto* proceeding to redetermine such value for the purpose of itself effecting a credit on the decree or on the bond. Such procedure was destructive of the complainants' contract and of their rights."

There is a suggestion on the last page of the report in the *Fruzynski* case that if the sale should

be set aside, "it must be upon terms and conditions as will restore the parties to the conditions existing before the sale".

It must not be overlooked that all the proceedings in the *Fruzynski* case were in the original proceedings; and that in the instant case, we are dealing with a decree made in an entirely separate suit, which did not in terms, but in substance, actually set aside the decree and sale.

Judge LLOYD emphasizes his views by adding, "In *Vanderbilt v. Brunton* (*supra*) this course was indicated with such clarity and definiteness that it should not be misunderstood, and it is hereby reiterated for the guidance of the court below." In *Vanderbilt v. Brunton* (*supra*), Judge CASE, speaking for this Court, referred to the possible inequity that might arise by the selling price being shockingly out of proportion to the amount of the mortgage; and then he says, "But assuming this to be true, an ample remedy was at hand. It is within the broad powers of the court of chancery to withhold confirmation of a sale if to confirm would work gross inequity. \* \* \* With that remedy available as a step in the then pending cause, the present appellants, parties to the Chancery action, permitted the order confirming to go as of course. They have never challenged that order. If the appellants were, \* \* \* subject to a wrong in the Court of Chancery, the wrong should have been righted in the court where it occurred; where, also, the remedy could be applied with due regard to the rights and equities of the opposing party." And Judge LLOYD in the *Fruzynski* case says "The remedy is to set aside the sale".

### Bill of Complaint Is Not a Bill of Review.

If by any theory (not yet suggested), it is sought to turn complainant's bill into a bill of review,—it cannot be overlooked that permission was not obtained for leave to file a bill of review and that without such permission, there can be no such bill filed.

Besides, there is nothing in the bill which, in any way, indicates that it was ever conceived as a bill of review, and any suggestion that the bill can now be so considered must fail for lack of the permission,—if not for the reason that there are none of the essential equity requirements set up in the bill to justify the Court in so considering it. (See the ordinary forms for a bill of review in Dickinson's Chancery Precedents, page 509, or in Daniel's Chancery Precedents.)

Counsel perhaps misunderstands the opinion of this Court as expressed by Judge TRENCHARD in *Laurie v. Hockenjos* (115 N. J. E. 304), when he says the bill "in such a case is in the nature of a bill of review." What the Court did say is found on page 307. After referring to several previous opinions, Judge TRENCHARD never deviated from the rules regarding a bill of review. He simply referred to the bill as—"looking at his bill from the aspect most favorable to complainant, it must be regarded as a direct attack; that is to say as, a bill of review, which also is maintainable as a matter of grace and not of right. Except for an error manifest upon the face of the decree sought to be reviewed, *leave to file the bill of review must first be obtained.*"

The result of the decree appealed from is that appellant is deprived of all his rights under Broadman's bond. He is saddled with the obligation to pay superior liens for taxes amounting to \$1199.17.

If there are equities to be adjusted, they must include the equities due appellant. If it is to be deprived of its rights under the Broadman bond, it must be restored to its position before the foreclosure sale, and this cannot be done in this separate proceeding. If Broadman has any rights at all, *at this late day*, it is not available to him in this suit. He must go back to the original foreclosure suit and open the final decree, as well as the order confirming sale. His bill of complaint here should be dismissed because he has no equity standing in this suit. His remedy, if any he has, is only in the original suit. That is the only place where the *status quo ante* can be decreed.

It is respectfully submitted that the decree of the Court of Chancery should be reversed and the bill of complainant ordered dismissed.

GEORGE G. TENNANT,  
*Solicitor for and of  
Counsel with Appellant.*

# New Jersey Court of Errors and Appeals

Between:

ROBERT BROADMAN,  
*Complainant-Appellee,*

and

COLONIAL BUILDING-LOAN  
ASSOCIATION,  
*Defendant-Appellant.*

#87,

February 1935  
Term.

## APPELLANT'S REPLY BRIEF.

### **An Actual Right and Not a Mere Procedure is Involved.**

Counsel for appellee devotes considerable space in his brief to the suggestion that an order for a resale of the property would only bring about another sale for an inadequate price. What right have we to assume any such conclusion? The appellant might bid the property up to \$7,500 and let it go to another purchaser,—preferring to take cash rather than the property. As Judge CASE points out in *Vanderbilt v. Brunton* (111 N. J. L. 598), "There is no legal obligations upon a mortgagee either to bid up, or to bid in, the property at the foreclosure sale."

When the appellee seeks the equity he so strongly proclaims, he himself must do equity. As Judge CASE said in the *Vanderbilt* case, if the mortgagor

was subjected to any wrong, the wrong should have been righted in the court where it occurred, where also the remedy could be applied with *due regard to the rights and equities of the opposing party*.

Too much emphasis is laid in this case upon the equities of Broadman. An attempt is made to say that we are urging only a "technical procedure". But that is far from the fact. As Judge CASE said in the *Vanderbilt* case, "a right and not a mere procedure is involved" (p. 602 of the opinion). And the protection of the right must be in accordance with the proper procedure. Instead of arbitrarily forcing appellant to make a credit on its bond, it should be given the opportunity to determine whether on a resale it would let the property go for less than its decree, or by inviting other bidders, effect a sale to a third party.

After buying in the property it had to pay approximately \$1,200 for taxes, etc. The Court of Chancery made no terms or conditions as to bidding at another sale.

Vice Chancellor BIGELOW in the very recent case of *Bluestone Building & Loan Assn. v. Glasser*, 117 N. J. E. 392, recognizes this rule when he said, "Petitioners will have to put complainant in as good a condition as complainant was when at first it took over the property"; and he cites in support the *Fruzynski* case. He made an order opening the order confirming the sale—conditioned, however, upon the petitioner *reimbursing* complainant the taxes paid. He also provided that such payment need not be made and the decree not opened if complainant *elected* to surrender its bond.

Vice Chancellor BIGELOW here permitted the sale to be opened only if the complainant's *status quo ante* was cared for. The equities were bal-

anced. But in the instant case all the equities of complainant were ignored.

It is common knowledge that banks, trust companies and individuals after buying in properties in their own foreclosure proceedings, sell for considerably less. They prefer to take the cash rather than to be loaded with the care and responsibility of the property.

It is not proper to assume that on a resale, complainant would bid up to the full amount of the decree and then assume the municipal liens. Such a statement is a mere speculation. In practice, it is just as fair to assume the complainant, or even defendant, would invite outside bidders, and that complainant would let the property go for \$7,500 or \$8,000,—preferring to have the cash rather than the property and to have to pay other liens on it.

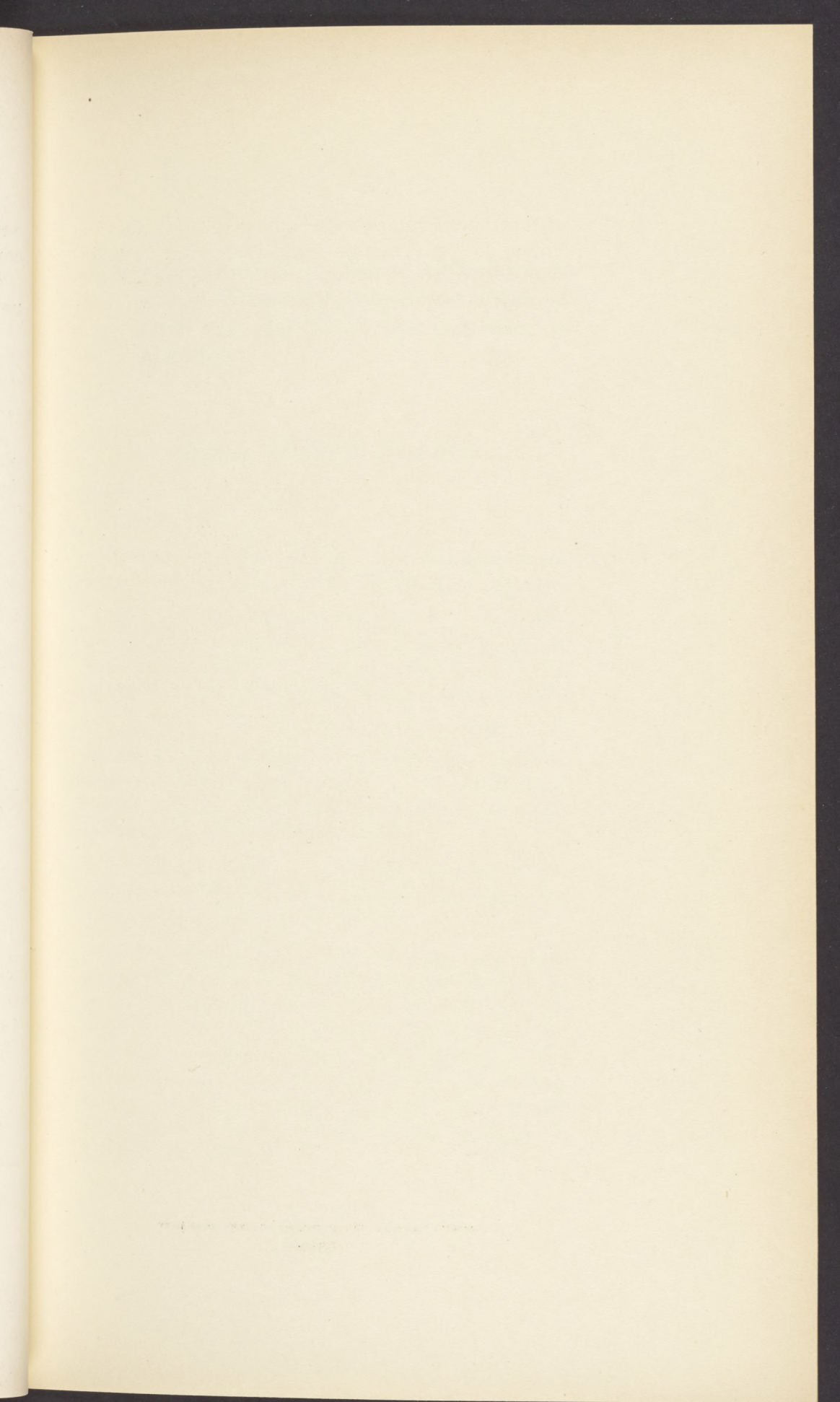
This right was taken from complainant when the Court of Chancery in this separate suit, compelled complainant “to forego the fruits of a solemn decree of a court of competent jurisdiction in its favor” (*Fruzynski*, p. 119), refused to relieve it of its purchase, and arbitrarily loaded it with the property with no redress for its rights given by the contract,—the bond.

The equities of complainant were entirely overlooked. There are a number of cases where the order directing the credit was conditional upon preserving the mortgagee’s rights. (See *Lurie v. Hockenjos*, 113 N. J. E.; *Clevenger v. Feckenbach*, 169 Atl. 349; *Fidelity v. Fidelity*, 113 N. J. E. 356.)

Respectfully submitted,

GEORGE G. TENNANT,  
Solicitor for and of Counsel  
with Complainant.  
*Defendant.*





APPEAL PRINTING CO., 22 THAMES ST., NEW YORK CITY

[ 8666 ]

**Affidavits annexed to Bill of Complaint on  
which original injunction was obtained.  
They are printed at the insistence of  
Appellee.**

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**Affidavit of Robert Broadman.**

State of New Jersey }  
County of Hudson } ss.:

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

1.—I am the complainant named in the fore-  
going bill of complaint. I have read the same and  
the matters and things therein contained are true  
to the best of my knowledge and as I verily believe. 20

2.—On the 15th day of November, 1926, I was  
the owner of a certain plot of land with a building  
thereon erected and known as 76 Brinkerhoff  
Street, Jersey City, New Jersey, more particularly  
described in the Bill of Complaint.

3.—On November 15, 1926, I executed to the  
Colonial Building-Loan Association, of Jersey City,  
a mortgage in the sum of \$7,000.00. 30

4.—On September 15, 1927, I sold the said mort-  
gaged premises more particularly described in the  
bill of complaint to James F. McCormack and  
Mary E. McCormack, his wife, which deed recited  
that same was subject to the mortgage held by the  
defendant and received back from the McCor-  
macks, a purchase money mortgage second and  
subsequent to the lien of defendant's mortgage in  
the sum of \$4500.00. 40

*Affidavit of Robert Broadman.*

10 5.—On January 12, 1934, foreclosure proceedings were instituted upon the said lands in the Court of Chancery of New Jersey for the Colonial Building-Loan Association, of Jersey City, a corporation of the State of New Jersey against myself and the then owners. These proceedings result in a decree for the Colonial Building-Loan Association, of Jersey City, of \$7,262.50, together with interest and costs and ordered that the said premises be sold to satisfy the said decree.

20 6.—On April 5, 1934, the said tract of land was sold by the Sheriff of Hudson County to Colonial Building-Loan Association, of Jersey City, for the nominal consideration of \$100.00, there being no other bidders present.

7.—Deponent is informed in such manner that he believes it to be true that out of some seventeen parcels sold on the same day, fourteen were sold for a nominal consideration of \$100, one for a nominal consideration of \$150.00 and two for a nominal consideration of \$200.00.

30 8.—On May 10, 1934, Colonial Building-Loan Association, of Jersey City, instituted suit in the New Jersey Supreme Court against your deponent for the deficiency so arising at the said sale.

9.—Deponent further says that although the Colonial Building-Loan Association, of Jersey City, has credited the said sum of \$100.00 received at said sale, it is holding the said lands at a value in excess of \$10,000.00.

40 10.—The actual value of the said lands and premises, even though at the present time there is no market therefor, is more than and exceeds the amount of the decree, interest and costs.

*Affidavit of Robert Broadman.*

11.—Deponent further says that by reason of the foregoing, it is unconscionable that the Colonial Building-Loan Association, of Jersey City, the defendant in this suit, should receive any further benefits at a time when a condition exists due to a financial emergency. 10

12.—Deponent further says that by reason of the financial depression generally prevalent throughout the United States and particularly in the State of New Jersey, that there is neither now nor was there at the time of the said sale, any market for the sale of the said real estate and that the amount realized at the said sale was not and is not a fair measure of the sound value of the said property upon which a deficiency suit should be based. 20

13.—Deponent further says that by reason of said present financial condition and the inability of any one to refinance the property at this time, that he was prevented from bidding at the said sale and is further prevented, by reason of the same condition, from being ready and able to exercise his right of redemption in the suit at law and that, as a result, his said right has become nullified. 30

ROBERT BROADMAN.

Sworn and subscribed to before me }  
 this 28th day of May, 1934. }

SADIE CANNON,  
 Notary Public  
 of New Jersey.

40

**Affidavit of Louis A. Miller.**

IN CHANCERY OF NEW JERSEY.

10

Between

ROBERT BROADMAN,  
*Complainant,*

and

COLONIAL BUILDING-LOAN ASSOCI-  
ATION, OF JERSEY CITY, a corpo-  
ration of the State of New  
Jersey,

20

*Defendant.*On Bill, etc.  
Affidavit.State of New Jersey )  
County of Hudson ( ss.:

LOUIS A. MILLER, of full age, being duly sworn, according to law, upon his oath, deposes and says:

30

1.—I am a construction engineer and a graduate of Stevens Institute School of Technology more than 15 years, experienced in the construction of buildings. I have during all of this time appraised properties for various individuals and for the United States Government and am now appraising properties for the Home Owners' Loan Corporation and by reason thereof, am familiar with the values of properties throughout Hudson County and more particularly in the City of Jersey City.

40

2.—I have inspected the premises 76 Brinkerhoff Street, Jersey City, New Jersey. The said property

*Affidavit of Louis A. Miller.*

consists of a plot of ground 18.40 feet in width by 100 feet in depth on which there is erected a one family four story brick and stone dwelling. The main building is about 18.25 feet in width by about 40 feet in depth and about 40 feet in height, with a two story frame extension in the rear which is approximate 18 feet in width by about 13 feet in depth and about 20 feet in height. This building contains eleven rooms and two baths and has all modern improvements. 10

3.—The said building is located in a very good residential section of the City of Jersey City and is in very good condition.

4.—The fair market value of this property on April 5, 1934, was, in my opinion, worth about the sum of \$9,600.00. 20

LOUIS A. MILLER.

Sworn and subscribed to before me )  
this 28th day of May, 1934. (

SADIE CANNON,  
Notary Public  
of New Jersey. 30

**Affidavit of George J. Wolf.**

IN CHANCERY OF NEW JERSEY.

10

Between

ROBERT BROADMAN,

*Complainant,*

and

COLONIAL BUILDING-LOAN ASSOCIATION, OF JERSEY CITY, a corporation of the State of New Jersey,

20

*Defendant.*

On Bill, etc.

Affidavit.

State of New Jersey )  
County of Hudson { ss.:

GEORGE J. WOLF, of full age, being duly sworn, according to law, upon his oath, deposes and says:

30

1.—I am engaged in the real estate business in the City of Jersey City and have been so engaged for the past 25 years appraising property for banks, building and loan, estates and private individuals and am familiar with the value of properties throughout Hudson County and more particularly in Jersey City.

40

2.—I am well acquainted with the premises 76 Brinkerhoff Street, Jersey City, New Jersey.

*Affidavit of George J. Wolf.*

3.—The said property consists of a plot of ground approximately 18.40 feet in width by 100 feet in depth on which is erected a one family four story brick and stone dwelling, the main building being approximately 18.25 feet in width by 40 feet in depth with a two story frame extension in the rear of approximately 13 feet in depth. Said building contains eleven rooms and two baths and has all improvements. 10

4.—The said premises are located in a very good residential section of Jersey City and are in good condition.

5.—The fair market value of this property, in my opinion, on the date of sale of the said premises, namely April 5, 1934, was worth the sum of \$9,000.00. 20

GEORGE J. WOLF.

Sworn and subscribed to before me }  
this 28 day of May, 1934. }

SADIE CANNON,  
Notary Public  
of New Jersey. 30



*Affidavit of Harry P. Clifton.*

feet in depth on which there is erected a one family four story brick dwelling, approximately 55 feet in depth with a two story frame extension in the rear. The said building contains 11 rooms and two baths, has parquet and hardwood flooring and is heated by steam.

10

4.—The said premises are located in a first class residential section of Jersey City and are in good condition.

5.—Taking into consideration the location of the property and the condition of the house, the fair market value of this property on the date of sale of the property, namely April 5th, 1934, was, in my opinion, worth at least \$9,400.00.

20

HARRY P. CLIFTON.

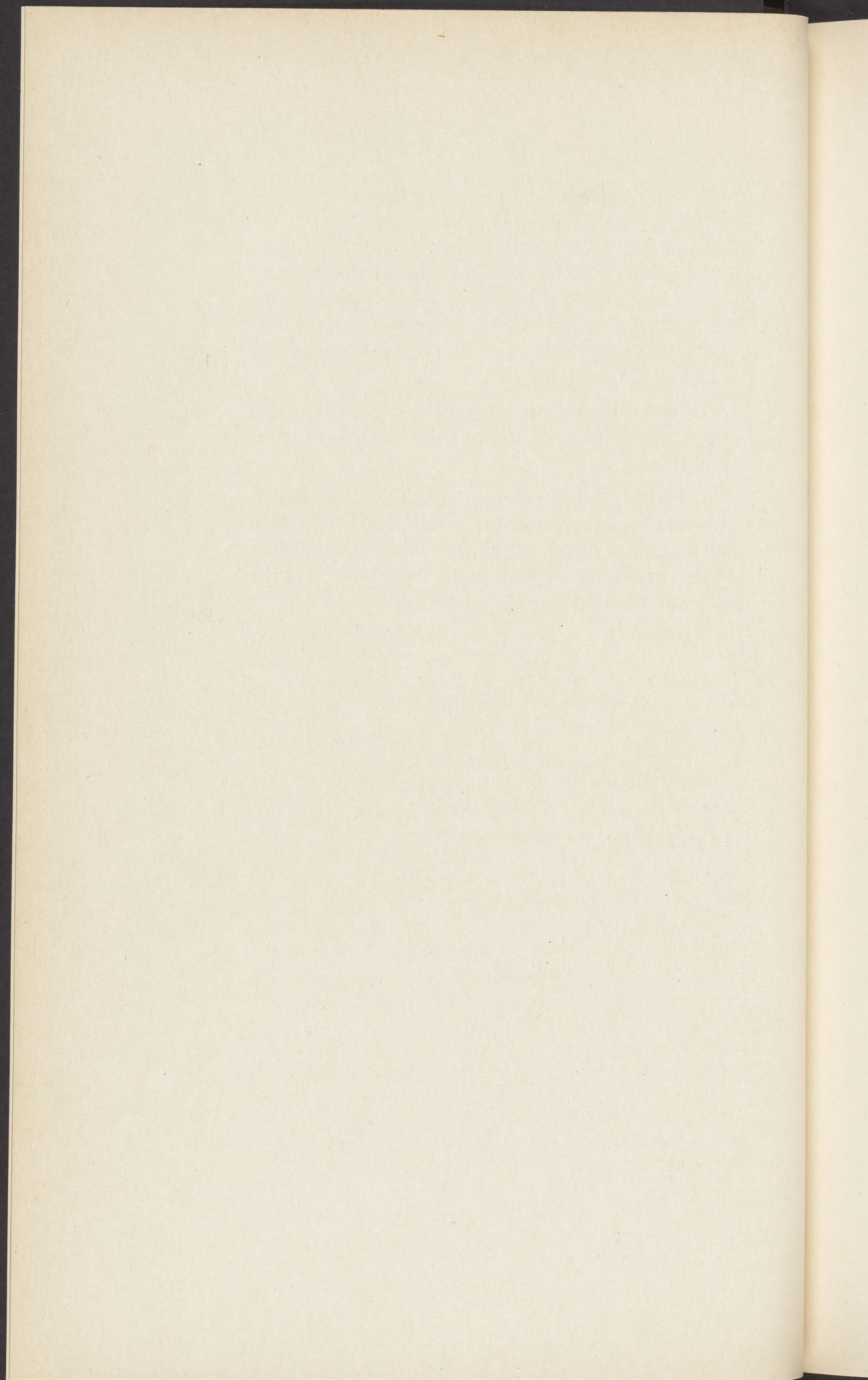
Sworn and subscribed to before me }  
 this 28th day of May, 1934. }

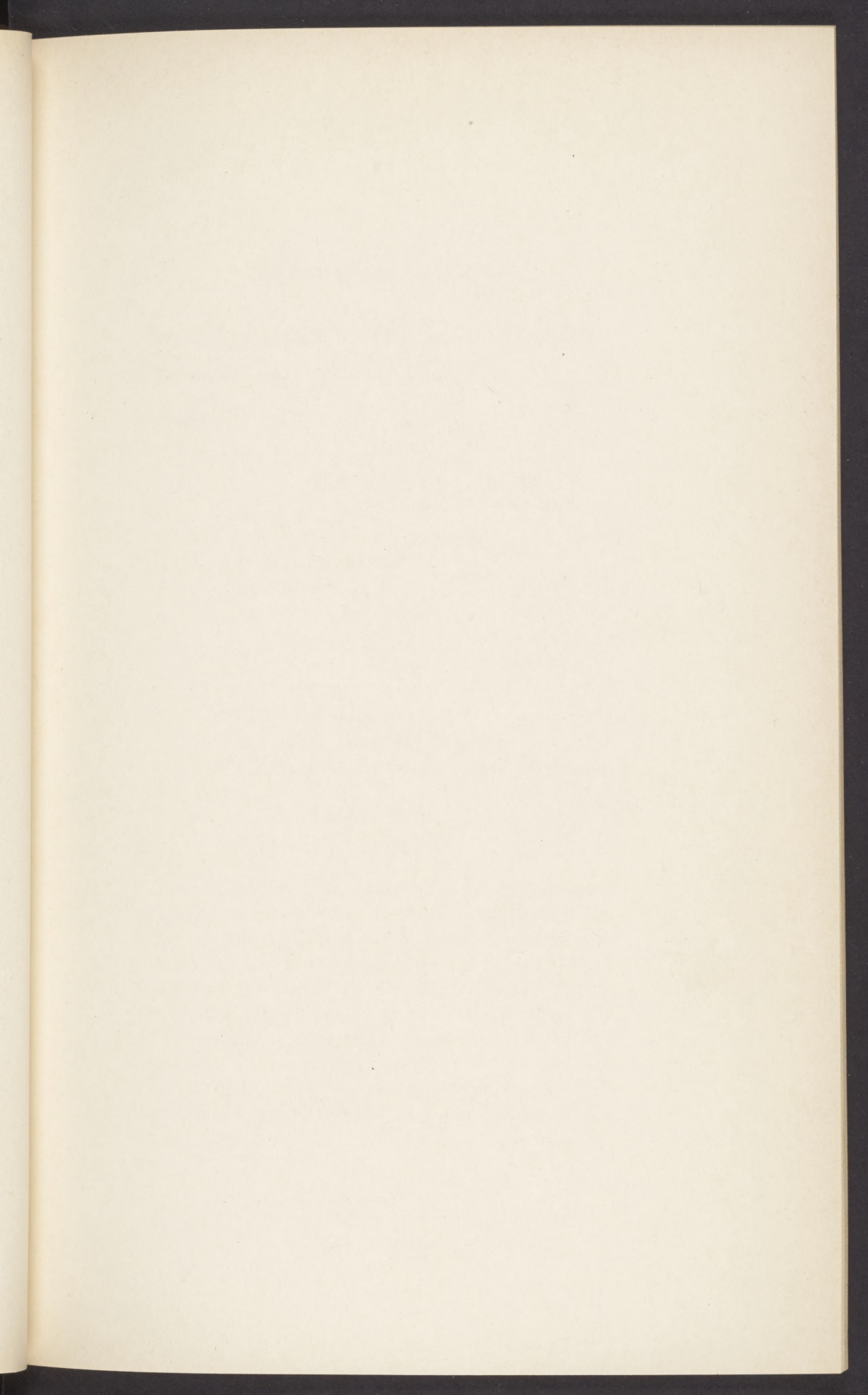
CHARLOTTE T. BRUNTON,  
 Notary Public  
 of New Jersey.

Commission Expires May 15, 1938.

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40







Memorandum Opinion.

In Chancery of New Jersey

*Filed January 28, 1935*

Between

ROBERT BROADMAN,  
*Complainant,*

and

COLONIAL BUILDING-LOAN  
ASSOCIATION,  
*Defendant.*

On Bill, &c.  
On Motion to  
Dismiss Bill.  
102/571.

Messrs. HENN & BURR, for Complainant;  
Mr. John Milton, of counsel.  
Mr. GEORGE G. TENNANT, for Defendant.

MEMORANDUM.

EGAN, V. C.

The defendant held a mortgage for \$7,000.00 on property which at one time was owned by the complainant, and because of default in the conditions of said mortgage, it, on January 12, 1934, instituted foreclosure proceedings, and a decree for \$7,262.50, besides costs, was entered, and a sale of the property, described in the mortgage, was directed and had under the decree. The defendant herein purchased the property at the sheriff's sale for the sum of \$100.00. It was the only bidder at the sale.

On May 10, 1934, defendant instituted an action at law against the complainant for the deficiency arising at the foreclosure sale. It was then this bill was filed. It seeks to set aside the confirmation of the sale in the foreclosure suit; and prays that the matter should be referred to a Master to determine the fair value of the property, as of the date of the sale, and that the fair value should be credited on account of the deficiency, and that the defendant be restrained and enjoined from prosecuting the suit at law. It alleges that the complainant by reason of the present financial depression, and the inability of anyone to refinance the property, was prevented from bidding at the foreclosure sale, and was further prevented from being ready and able to exercise his right of redemption in the suit at law; it charges that it would be unconscionable to allow the defendant to receive further benefits in view of the existing financial emergency; and it says that by reason of the financial depression there is not now, nor was there at the time of the sale, any market for the sale of the real estate in question; it maintains that the amount realized at the sale was not and is not a fair measure of the value of the property.

On May 28, 1934, this complainant applied for and obtained from this court an order of ad interim restraint, and the order further directed the defendant to show cause why it should not be permanently restrained and enjoined from proceeding with, or prosecuting, or taking any further steps in the suit at law against the complainant.

The defendant moved to strike the bill, contending that the relief which complainant sought should have been asked for by petition and not by bill. The motion was denied. The case of *Meranus v. Lawyers' and Home-Makers' Building*

and *Loan Ass'n*, 116 N. J. Eq. 402, 174 Atl. 150, was instituted by bill, and, in his opinion, Vice Chancellor Berry among other things said: "And so the present bill will be considered, although procedure by petition to open final decree and order to show cause, the modern substitute for bill of review, is probably the better practice." In the unreported case of *Five Corners' B. & L. Ass'n v. Castro*, Vice Chancellor Fallon held that in a cause somewhat similar to the instant case, the proper procedure is by a bill of complaint and order to show cause, and not upon petition.

On the return day of the order, issued as aforesaid, after considering the affidavits filed herein, and the arguments thereon by counsel, this court referred the matter to a Special Master to take testimony and inquire into, and ascertain and report the fair value of the property. It will be observed that the defendant's answer to complainant's bill, in brief, alleges that in the foreclosure proceedings, the complainant herein was made a party defendant; was served with due process; interposed no defense, and filed no exceptions to the confirmation of the sale at the foreclosure proceedings. Counsel to these proceedings stipulated in open court that this matter should be decided on the pleadings and without taking further proofs in open court. Counsel for complainant and defendant appeared at the hearing before the Special Master. The Master, after hearing, on December 18, 1934, reported that the defendant's decree in the foreclosure suit was \$7,262.50, besides costs of \$253.72; that the sheriff's fees were \$117.37; and that the defendant purchased the premises for the sum of \$100.00, subject to unpaid taxes of \$1145.08, plus interest, and water rents of \$54.09; and that the fair value of the premises as of the date of the sheriff's sale was \$9,000.00; and that the sum

of \$9100.00 should be credited on the bond of the complainant as against the amount due the defendant of \$8910.01; and that the defendant presented no testimony as to the fair value of the premises.

Upon the filing of said Master's report, the defendant filed exceptions to the same urging (1) that the court was without jurisdiction; (2) that the order of reference to the Special Master was illegal; (3) that the method adopted by the Master in fixing the amount to be credited on the bond was contrary to law; (4) that the correct amount to be credited on account of the bond is the difference between the amount of the decree in the proceedings to foreclose the mortgage and the amount realized at the sale under the decree.

By order dated January 11, 1935, the report of the Special Master was confirmed, and the ad interim restraint allowed in the order of May 28, 1934, restraining and enjoining the defendant from proceeding with, or prosecuting, or taking further steps in the law action then pending in the New Jersey Supreme Court, Hudson Circuit, was made permanent. The final decree herein, further adjudged that the fair value of the premises as of the date of the sheriff's sale, fixed as \$9100.00 by the said Special Master's report, be applied on the bond of the complainant as against the amount of \$8910.01 due the defendant; and it further provided that after crediting the said amount, there is nothing due the defendant on the bond of this complainant. *Young v. Weber*, 117 N. J. Eq. 242; *Federal Title & Co. v. Lowenstein*, 113 N. J. Eq. 200.

In my opinion, the equitable principle that a man shall not have double satisfaction of his debt, as expressed in *Young v. Weber*, *supra*, applies to the instant case.

In *Maher v. Usbe B. & L. Ass'n*, 116 N. J. Eq. 398, the court said:

“However, affidavits have been furnished indicating a complete lack of financial responsibility and complete inability on the part of the complainants to protect themselves at the sheriff’s sale and no answering affidavits on this point are filed. I will advise an order restraining the suit of the building and loan association for deficiency *unless* and *until* the association credits upon its deficiency claim the fair value of the mortgaged premises acquired by it at the foreclosure sale.”

The defendant purchased the property at the sheriff’s sale at an unconscionable figure; there was no competitive bidding; the complainant was then unable to protect himself and is still without power to do so; and, under these circumstances, to order a resale presumably would be without advantage, and, I believe, would not cause any change in the condition of the parties. If a resale were directed, it would mean additional expense; the defendant in the foreclosure suit (the complainant herein), evidently would be in no better position to then protect his interests than he was at the last sheriff’s sale, and, judging by experience, another reference would then be made to fix the fair value, all of which would be just a duplication of these proceedings—in effect, vexatious and continuous litigation with increasing costs and expenses. The parties, in my judgment, would be far worse off—in delay and expense—by re-opening the decree of confirmation and ordering a resale than they will be under a decree to credit the amount which the Special Master has found to be the “fair value”, to that which the complainant is entitled to under the decree in the

foreclosure proceedings. In *Young v. Weber, supra*, Vice Chancellor Berry, on page 251, among other things, said:

“It (the opinion of the Court of Errors & Appeals in the case of *Fruzyaski v. Jablonski*, 117 N. J. Eq. 117) does not inhibit the allowance by this court in a proper case of a credit of the “fair value” of the mortgaged premises on a deficiency claim. The criticism of the court of chancery was first, because of the failure of this court, on the face of the appeal record in that case, to accord to the mortgagee purchaser the right to choose whether he would keep the property and credit the fair value thereof against the mortgage debt, or would give up the property and submit to a resale; and second, because of the method adopted here to reach an equitable conclusion. In the final analysis, the same result would be reached, though by a longer route, through the medium of successive sales followed by successive refusals of the court of chancery to confirm. ‘It is a province of equity to avoid circuitry of action and multiplicity of suits.’ *Better Plan Building and Loan Association v. Holden*, 114 N. J. Eq. 537. And while the desire of the appellate court for meticulous care in proceedings of this character is shared by us, this court has never been a slave to form. If possible to accomplish by direct action that which is just if attained indirectly, it has always been the policy of this court to do so, because equity regards the substance rather than the form, and the result rather than the method by which it is attained.”

Dated: January 11, 1935.

