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Bill for Relief.

Filed Dec. 19, 1928.

In Chancery of New Jersey.

Between

HENRY ALSOPP,
Complainant,

and

LOUIS WEISS, *et als.*,
Defendants.

On Bill, etc.

Bill for Relief.

To the HONORABLE EDWIN ROBERT WALKER, Chancellor of the State of New Jersey:

The complainant, Frederick Fatzler, Jr., of the City of Newark, County of Essex and State of New Jersey, respectfully shows, that:

1. The complainant is the purchaser of certain lands and premises described in the bill of complaint herein, sold by William N. Beach, Sheriff of the County of Morris, on August 13th, 1928, pursuant to a writ of fieri facias issued in this cause.

2. The said lands and premises are described as follows:

Situate, lying and being in the Township of Passaic in the County of Morris and State of New Jersey:

BEGINNING at the southwest corner of Cedenier E. Lum's house lot; thence (1) running east along

the said line twenty-two chains and fifty-four links to Totton meadow; thence (2) south forty-two chains and eighteen links to A. Stiles land; thence (3) west twenty-two chains and fifty links to the said Lum's line; thence (4) north forty-two chains more or less to the place of Beginning.

3. The said premises were struck off and sold to the complainant by said William N. Beach, Sheriff of the County of Morris, at said sale at the price of $2300.00. The complainant, being the highest bidder, thereupon signed the conditions of said sale and an acknowledgment of his purchase, and paid to the said Sheriff the sum of $361.84 on account of the purchase price in accordance with the conditions of sale.

4. By an order of this court made in this cause thereafter, said sale was duly confirmed and the Sheriff was directed to execute good and sufficient conveyance in law for the lands and premises so purchased.

5. The complainant has not yet completed his said purchase and the deed for the said lands and premises has not yet been delivered to him.

6. At the time the complainants bill was filed in the said cause title in fee to said premises vested in Louis Weiss and Samuel Wollmann, as appeared of record, although in fact the said parties held title as trustees for Attillio Giacomelli who was in fact, until the date of sale referred to, the owner of the fee title to said premises.

7. At the time of the filing of the complainant's bill and until this date, the Fidelity Securities Corporation have held a mortgage in the sum of $1300 covering the same premises which is secured

by a bond made by the said Attillio Giacomelli in the penal sum of $2600 to secure the consideration mentioned in the mortgage referred to.

8. This complainant holds a judgment against the said Attillio Giacomelli which was docketed in the New Jersey Supreme Court on July 7th, 1927, which was at the time of sale a lien against the said premises subject to the complainant's mortgage and to the lien of the mortgage held by the Fidelity Securities Corporation.

9. An examination of the title record for said premises and of the description set forth in the writ of fieri facias referred to or the description in the Sheriff's notice, duly published, of the time and place of said sale does not disclose the location of the said premises with the exception that the same are located in the Township of Passaic, Morris County.

10. The complainant bid at the Sheriff's sale referred to upon the representations of the said Giacomelli, of the Fidelity Securities Corporation through its agents and servants and of the complainant Henry Alsopp, through his agents and servants, that the premises to be sold were situated upon the Ryersville Road leading from Green Village and that the road frontage was approximately fourteen hundred feet, which representations were made by the said persons, who are all parties in interest, although the same were untrue, the said lands and premises in fact being rear land having access to the Myersville Road only by crossing other lands and premises fronting on the said road.

11. The said statements and misrepresentations

induced this complainant to bid at the sale referred to.

12. Since the sale referred to this complainant has discovered that the premises have no right of way or right of ingress and egress to any public road or highway, or that if such right of way exists the title to said premises is clouded and unmarketable and that such right of way over adjoining lands and premises, necessary for ingress and egress to a public road or highway, was not set forth in the successive conveyances of the said premises since a deed made by Cedenier E. Lum and William A. Lum to Thomas Weldon, bearing date November 29th, 1875, until the conveyance to the said Lewis Weiss and Samuel Wollman referred to in the original complaint filed in this cause. The servient estate, a title in fee held by Cedenier E. Lum at the time said right of way originally created by the deed referred to to Thomas Weldon has since been conveyed by successive conveyances without reference to the right of way originally created. That by reason of the failure to include or make reference to the said right of way in any conveyances of the premises so sold to this complainant or to the adjoining premises comprising the dominant estate, and by reason of the failure of the complainant's original bill to set forth said right of way in the bill of complaint or the writ of fieri facias or in the Sheriff's notice of the time and place of sale, the title remains clouded and unmarketable.

13. The notice of the time and place of the sale duly published by the Sheriff should have set forth that a right of way for ingress and egress would be included in the conveyance of the premises under

foreclosure, so that this complainant or any other bidder would have notice of the premises and appurtenances intended to be sold.

This complainant is without remedy in the courts of law and therefore prays:

1. That William N. Beach, Sheriff of the County of Morris be restrained from re-advertising or re-selling the premises described in the original bill of complaint filed in this cause until the further order of this court.

2. That the complainant herein be relieved from his bid for each or all of the causes set forth and that the sale may be opened and set aside and that the said Sheriff be directed to return to the complainant herein his deposit and all sums paid to the said Sheriff as aforesaid.

3. That William N. Beach, Sheriff of the County of Morris, Henry Alsopp, Fidelity Securities Corporation, Lewis Weiss, Samuel Wollmann and Attillio Giacomelli who are the defendants to this bill for relief may answer this bill of complaint, without oath, and each statement herein contained.

4. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

WALTER A. BEERS,
Solicitor and counsel with Complainant.

Order Amending Bill.

Filed March 4, 1929.

IN CHANCERY OF NEW JERSEY.

Between HENRY ALSOPP, Complainant, and LOUIS WEISS, *et als.*, Defendants.	On Bill for Relief. Order Amending Bill.

This matter being opened to the court by Walter A. Beers, solicitor for Frederick Fatzler, Jr., and I. Henry Coyne, solicitor for the defendant Henry Alsopp and Milton M. Unger, solicitor for the defendant Fidelity Securities Corporation, having, in open court, consented hereto;

It is, on this Fourth day of March, Nineteen Hundred and twenty-nine, ORDERED that the bill for relief filed in this cause be amended by inserting the following paragraphs after paragraph 11:

"11A. This complainant was not guilty of any negligence in submitting his bid and made every effort to obtain information from all of the parties in interest who might have knowledge as to the location of the premises referred to, and in addition to the assertion of the misrepresentations says that the bid submitted at the Sheriff's sale referred to was made in mistake, the said complainant believing the lands and premises to be sold were located on a public road or highway.

11B. This complainant submitted his bid and

offer to purchase at the Sheriff's sale referred to and entered into a contract to purchase with the said Sheriff for the purchase of a parcel of land located on the road leading from Green Village to Myersville, in Morris County, New Jersey, which bid this complainant submitted after inspection through his agents and servants of a parcel of land consisting of ninety acres situated upon the Myersville Road, although in fact the premises so sold by the Sheriff were not situate upon any public road or highway and were premises not inspected by this complainant or his agents and servants.

11C. If the complainant is not relieved of his bid, and compelled to accept title to the premises in question, he will suffer a loss of several thousand dollars, he having bid far in excess of the true value of the said premises.

Respectfully advised

ALONZO CHURCH,

V. C.

Answer.

Filed Jan. 24, 1929.

IN CHANCERY OF NEW JERSEY.

Between HENRY ALSOPP, Complainant, and LOUIS WEISS, *et als.*, Defendants.	On Bill, &c. Answer.

The Defendant Fidelity Securities Corporation, a corporation of the State of New Jersey, having its principal office in the city of Newark, Essex County, New Jersey, answering the Bill of Complaint filed herein, says that:

1. It admits Paragraphs 1, 2, 3 and 4 and 5 of the complaint.

2. It denies Paragraph 6 of the Complaint.

3. It admits paragraps 7 and 8 of the Bill of Complaint herein.

4. It denies Paragraphs 9, 10, 11, 12 and 13 of the Complaint.

COUNTERCLAIM.

By way of counterclaim exhibited by the defendant against the complainant, the defendant says that:

Answer.

1. This defendant prays that the complainant may be ordered and decreed to complete his purchase, and to pay the amount of the bid made by him at the Sheriff's sale, pursuant to the terms and conditions thereof.

MILTON M. UNGER,
Solicitor of Defendant Fidelity
Securities Corporation.

Answer and Counterclaim of Henry Alsopp.

Filed Jan. 23, 1929.

IN CHANCERY OF NEW JERSEY.

Between HENRY ALSOPP, Complainant, and LOUIS WEISS, *et als.*, Defendants.	On Bill for Relief. Answer and Counterclaim of Henry Alsopp.

Henry Alsopp, at present residing in the City of Winter Park, County of Orlando, and State of Florida, answering the bill of complaint for relief filed herein by Frederick Fatzler, Jr., one of the above named defendants, says, that

1. He admits the allegations in the 1st, 2nd, 3rd, 4th and 5th paragraphs of the bill for relief.

2. He admits that the fee to the premises in question are vested in Louis Weiss and Samuel

Wollman as appears of record, and has no knowledge or information as to who was the true and actual owner.

3. He admits the allegations contained in the 7th and 8th paragraphs of the bill.

4. He denies the 9th paragraph of the bill.

5. He denies the allegations contained in the 10th paragraph of the bill as to any representations ever made by him as to the location of the premises in question, and specifically denies the same so far as they relate to any representations ever made by him; he has no knowledge or information sufficient to form a belief as to where the premises are in fact located, and therefore leaves complainant to make such proof as may be required.

6. He denies the 11th paragraph.

7. He has no knowledge or information as to whether or not the premises in question have a right of way, and alleges and asserts that the defendant is not entitled to the relief sought, notwithstanding the fact that there may be no right of way.

8. He has no knowledge or information concerning the remaining allegations set forth in said bill, and therefore leaves complainant to make such proof as may be required of him, excepting that he specifically denies that the title is unmarketable or clouded.

9. The allegations contained in the 13th paragraph are a legal conclusion, and the same is specifically denied by complainant in the original bill to foreclose.

Answer and Counterclaim of Henry Alsopp.

By way of counter-claim against the said Frederick Fatzler, Jr., this defendant, Henry Alsopp named in the Bill for Relief, complainant named in the original Bill to Foreclose, alleges:

1. The allegations contained in the original bill to foreclose as amended are expressly made part of this paragraph to the same effect and purpose as if they were all recited at full length herein.

2. The allegations contained in the 1st, 2nd, 3rd, 4th, 5th, 7th and 8th paragraphs of the bill for relief filed herein by said Frederick Fatzler, Jr. are expressly made a part of this paragraph, to the same effect and purpose as if they were all recited at full length herein.

3. The said Frederick Fatzler, Jr. is not entitled to the relief prayed for.

4. This defendant, Henry Alsopp, the original complainant in the original bill to foreclose is without adequate remedy in the courts of law, and therefore prays

A. That said Frederick Fatzler, Jr., defendant to this counter-claim, may answer the allegations of this counter-claim and each statement therein made.

B. That said Frederick Fatzler, Jr. may be decreed to pay to the Sheriff of Morris County the balance of the purchase price of the premises in question, and consummate said purchase, together with interests and costs and such other expenses and costs that this defendant, Henry Alsopp, has been put to by reason of the said Frederick Fatzler's failure to consummate said purchase, in accordance with the law.

C. That a determination and an adjudication may be made respecting the liability of the said Frederick Fatzler, Jr. to consummate the purchase aforesaid.

D. That this defendant, Henry Alsopp, may have such further and other relief as to the bill of relief filed herein by said Frederick Fatzler, Jr., that may be just and equitable.

I. HENRY COYNE,
Solicitor for Henry Alsopp.

Final Decree.

Filed March 19, 1929.

IN CHANCERY OF NEW JERSEY.

Between HENRY ALSOPP, Complainant, and LOUIS WEISS, *et als.*, Defendants.	On Bill, &c. Final Decree.

This matter coming on to be heard in the presence of I. Henry Coyne, Esq., Solicitor of the Complainant, Walter A. Beers and John J. Clancy, of counsel for Frederick Fatzler, Jr., the purchaser at the sheriff's sale, and the complainant in the Bill for Relief filed in this cause, and Milton M. Unger, Solicitor for the Defendant Fidelity Securities Corporation, and the Court having heard the evidence of the parties and the arguments of counsel, and being of the opinion that the said Frederick Fatzler, Jr., should not be relieved from his bid in the above entitled cause, and that he is not entitled to the relief prayed for in the Bill of Complaint, and the Fidelity Securities Corporation having filed a Counterclaim praying that the said Frederick Fatzler, Jr., may be ordered and decreed to complete his purchase and to pay the amount of the bid made by him at the Sheriff's sale herein.

It is on this 19th day of March, 1929, on motion of I. Henry Coyne, Esq., Solicitor of Henry Alsopp, and Milton M. Unger, Solicitor of Fidelity Securi-

ties Corporation, Ordered, Adjudged and Decreed, that the bill of Complaint filed by the said Frederick Fatzler, Jr., be and the same is hereby dismissed, and

It is further Ordered, Adjudged and Decreed, that the said Frederick Fatzler, Jr. do carry out and complete his purchase, made by him at the Sheriff's sale conducted in the above entitled cause, pursuant to the terms and conditions thereof, and that in case of his failure to do so any of the parties hereto may have the right to apply to this Court for such other and further relief as may be equitable and just,

And it is further Ordered, Adjudged and Decreed, that the said Frederick Fatzler, Jr., do pay to the said Henry Alsopp, his costs of suit to be taxed, in which shall be included a counsel fee of $50. and that he do pay to Fidelity Securities Corporation, its costs of suit to be taxed in which shall be included a counsel fee of $100.

E. R. WALKER
C.

Respectfully advised
ALONZO CHURCH,
V. C.

Notice of Appeal.

Filed April 23, 1929.

IN CHANCERY OF NEW JERSEY.

Between HENRY ALSOPP, Complainant, and LOUIS WEISS, *et als.*, Defendants.	On Bill, etc. Notice of Appeal.

The complainant, Frederick Fatzler, Jr., hereby appeals from the decree made in the above entitled cause by the Chancellor on the advice of Vice Chancellor Alonzo Church, on March 19th, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated: March 27th, 1929.

WALTER A. BEERS,
Solicitor for and of counsel with
Complainant.

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

WALTER A. BEERS,
Of counsel with Complainant
Frederick Fatzler, Jr.

Petition of Appeal.

Filed May 13, 1929.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between HENRY ALSOPP, Complainant-Respondent, vs. LOUIS WEISS, *et als.*, Defendants-Respondents. FREDERICK FATZLER, JR., Defendant-Appellant.	On Appeal from Court of Chancery. Petition of Appeal.

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

The petition of Frederick Fatzler, Jr., the appellant in the above entitled cause respectfully shows:

Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date March 19, 1929, which cause was entitled Henry Allsopp, Complainant and Louis Weiss, et als, defendants, in which cause this appellant filed a bill for relief as complainant, to be relieved of a bid made at sheriff's sale, which Bill of Complaint was entitled the same as the original bill filed for the foreclosure of a mortgage, by Henry Alsopp, the Complainant therein, in this respect, to wit: that said final decree adjudges that this appellant's bill for relief, to be relieved from his bid made at a sheriff's sale conducted in the original cause for the purchase of certain premises

under foreclosure, should be dismissed, and further adjudges that this appellant as defendant to a counterclaim filed by Henry Alsopp, and as defendant to a counterclaim filed by the defendant Fidelity Securities Corporation, should carry out and complete his said purchase.

And petitioner appeals from said final decree as aforesaid upon the grounds that the same is erroneous in that:

1. The testimony discloses that the title to said premises to be conveyed by the sheriff, pursuant to appellants bid is and was at the time of sale defective, clouded and unmarketable, entitling this appellant to relief pursuant to the statute in such case made and provided, in that the said lands and premises are rear land and inaccessible, having no right of way, and no rights of ingress and egress to any public road or highway.

2. If a right of way, or right of ingress and egress does exist over other lands to any public road or highway, the evidence discloses it is not established by deed or by user, and an inspection of the premises does not disclose what land is or has been used as such an outlet, which would subject the purchaser to the hazard of litigation to gain access thereto.

3. The evidence shows that the appellant submitted his bid to the said sheriff, by reason of an accident or mistake, made without negligence, in that after inquiry, he examined premises other than sold by said sheriff, and submitted his bid believing he was purchasing premises examined by him through his agent.

4. The evidence shows a mutual mistake was

made by the appellant and the complainant in the original cause, and the defendant Fidelity Securities Corporation, in that all believed the premises so sold were situated and abutted on a public road or highway, the Myersville Road, when in fact the said premises were to the rear of other lands which abutted on said road.

5. The evidence shows the appellant purchased said premises, relying upon a misrepresentation by parties in interest, Attilio Giacomelli, the equitable owner thereof, the agent of Henry Alsopp, and the agent of the Fidelity Securities Corporation, to wit: that said lands and premises were situated upon and abutted a public road or highway, the Myersville road, which statement was untrue or based upon erroneous understanding of the parties making said statement.

6. The enforcement of the contract made by this appellant with the said sheriff is inequitable, which will result in serious loss to this appellant.

7. The evidence shows there was no meeting of the minds, of the parties in interest, in that the sheriff, as agent for the parties in interest was selling a particular piece of property, and the appellant as purchaser believed he was purchasing another piece of property.

Petitioner therefore prays that the said final decree, made by the Chancellor be in the particulars aforesaid reversed, set aside and for nothing holden, and that petitioner may have such other and further relief in the premises as to this Court shall seem proper.

WALTER A. BEERS,
Solicitor and of Counsel
with Appellant.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Filed June 4, 1929.

HENRY ALSOPP, Complainant-Respondent, vs. LOUIS WEISS, *et als.*, Defendants-Respondents. FREDERICK FATZLER, JR., Defendant-Appellant.	On Appeal from Court of Chancery. Answer to Petition of Appeal.

The answer of Henry Allsopp, complainant-respondent and Fidelity Securities Corporation, Defendant-respondent, to the Petition of Appeal of Frederick Fatzler, Jr.

These respondents, not admitting the truth of all or any of the matters in the said petition of appeal contained for answer thereto nevertheless severally say that a Final Decree was, on March 19th, 1929, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said Final Decree, these respondents beg leave to refer thereto when the same shall be produced.

These respondents are advised and believe that said Final Decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these respondents.

MILTON M. UNGER,
Solicitor for and of Counsel with Henry Alsopp, Complainant-Respondent, and Fidelity Securities Corporation, Defendant-Respondent.

Testimony.

IN CHANCERY OF NEW JERSEY.

March 4, 1929.

Between

HENRY ALSOPP,
Petitioner,

and

LOUIS WEISS, ROSE K. WEISS, SAMUEL WOLLMAN and FIDELITY SECURITIES CORPORATION,
Defendants.

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, ALONZO CHURCH, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of John Clancy for petitioning defendant, Frederick Fatzler; Milton M. Unger for defendant, Fidelity Securities Corporation.

Mr. Clancy: There is a notice in this case, first, Vice Chancellor, that the bill of complaint be amended, and I understand from Mr. Unger there is no objection to that and there will be no objection to his answer.

The Court: What is it all about?

Mr. Clancy: This is a petition filed in a foreclosure cause to relieve Fatzler Company from carrying out its bid, made at a sheriff's sale on the ground, first, that there was misrepresentation as to the property;

second, on the ground of mistake, and, third, on the ground that the property is rear land, the title is not marketable because there is no right of ingress and egress and that the bidder at the sheriff's sale in the foreclosure suit bid on what he thought was one piece of property and which turned out to be another piece of property and that all due diligence was made before the sheriff's sale to ascertain the location of the property—it is farm property—and that the defendant's found what they thought was the property and after they bought it they found that that was not the property at all.

The Court: Well, I don't know whether I could—well, all right, what do you say? Go on.

Mr. Clancy: The situation is that, under the cases, until the money has passed and a deed has passed to the sheriff that the fifa, being a process of this court, this court still has control of its orders and writs and can stay the carrying out of the writ or the entry of the deed, upon the ground that there has been a mistake, on the ground of lack of marketability of title or misrepresentation. And that is the theory of the case.

Mr. Unger: We have filed a general denial, your Honor please, and also a counter claim, asking that the petitioner be ordered specifically to perform his deed and complete his purchase. He has filed a bill to be relieved of his purchase, setting up fraud, mistake, and, perhaps, a few other

things and I take it that the relief now reverses itself and he must establish his case by that degree of proof which a complainant always must in this court. This is not an application in the cause, but it is an independent bill.

Mr. Clancy: The answer to that is, I believe, if the Court please, that, under the cases, the procedure is proper. It might either be made by a petitioner in the case or an independent bill for relief.

I will call Edward F. Beers.

EDWARD F. BEERS, sworn for complainant.

Direct-examination by Mr. Clancy:

Q. Mr. Beers, you are a practicing attorney at law of this State? A. Yes, I am.

Mr. Clancy: And do you admit the qualifications, Mr. Unger?

Mr. Unger: Yes.

Q. Did you, at the request of Walter Beers, make an examination of the title of the property in this suit? A. Yes, I did.

Q. When did you make that examination? A. My report sheets seem to be missing here. The exact date I don't know.

Q. Approximately what time? A. Oh, I made it last fall some time.

Q. Did you plot the property? A. Yes, I did.

Q. Has the property any road frontage? A. It has not.

Q. How far, if you know from your sketch, is this property from a road? A. The nearest point would be the corner and it is at least five hundred feet from the road.

Q. What is the name of that road? A. That is the Myersville road to Green Village.

Q. And is there any driveway or roadway from the Meyersville road into the property? A. I did not—whether it actually exists?

Q. Have you ever seen this property? A. Why, I have never seen this particular property. I went out there, thought we were looking at this property; I was looking at something else.

Q. Well, is there—(interrupted) A. That was before my search. Of course, if I made my search at the time, I would know where to look for it.

Q. Does there appear in the title any right of way over the dominant estate, adjoining this property through the property? A. There was an attempt to create a right of way.

Q. When was that? A. That was in 1875, and it is the only time that any mention is made of a right of way in the entire chain of title.

Q. Will you give me the deed recital and the date from your abstract? A. Yes, I will. That was created by the deed K-9-303, recorded December 11, 1875.

Q. Will you give me the parties to that deed? A. Cedemur E. Lum and William A., her husband, to Thomas Weldon. That conveyed the premises in question. And do you want me to read the recital?

Q. Yes. A. "It is hereby agreed that the said party of the second part shall, at all times, have a right of way over the property adjoining hereby conveyed."

Q. Well, now, at the time—(interrupted)

The Court: What is that?

Witness: That is all it says, your Honor. It does not say where to or just where it shall be located.

Q. At the time that deed was recorded, was Lum the owner of the adjoining property? A. No. He had been cut off by foreclosure of the mortgage.

Q. How long before, if you know, had Lum owned both the properties? A. The mortgage on the adjoining property was made in 1865 and the sheriff's deed foreclosing that was recorded on March 15, 1875.

Q. And what was the date of this deed out of Lum? A. That was recorded on December 11, 1875.

Q. Some six months after the sheriff's deed cut off the title of Lum, the grantor in the deed, giving the right of way? A. Nine months later.

Q. Nine months later. What property was sold under this deed given in pursuance to foreclosure? A. A very large tract surrounding this property almost entirely on three sides.

Q. And did that property have roads running on the Myersville road, on the sheriff's deed? A. For three thousand feet, at least.

Q. That is the property under the sheriff's deed? A. That is right.

Q. And I think that you said Senator Lum—whatever that name was, was the common owner of the property sold under the sheriff's deed, and the property now involved in this suit, at one time? A. Yes.

Q. Did C. E. Lum own the property involved in this suit at the time he made the mortgage on the Myersville road property? A. No, he did not.

Q. Can you tell me when he acquired that title? A. He acquired title to the property in question by a deed in 1872.

Q. The mortgage is dated, I believe you said, April, 1865? A. April, 1865, that is right. I beg your pardon; I looked at the wrong instrument there. 1872 is right, anyway.

Q. So your testimony is just the same. A. Yes, that is right.

Q. Did you plot out the property involved in this suit, either from an examination of your title, or from reference to any maps? A. Yes, I went to the tax assessor's office and got a general idea of the lay and made a rough sketch of it and then went back to the Court House in Morristown and checked the descriptions with the plottings which I had already made, and they jibed up. This is the rough plotting. It is not drawn to scale, but it gives a general idea of the location.

Mr. Clancy: Have you any objection to that, Mr. Unger?

Mr. Unger: No.

Mr. Clancy: I will offer that, then.

(Paper marked Exhibit C-1.)

Q. Will you mark with a large X the property involved in this suit? Run it from one line to the other across diagonally. A. (Witness does as requested.)

Mr. Clancy: The witness marks the property in the center of the sheet with an X.

Witness: The road on top.

(Paper handed to Court.)

The Court: Where is the road?

Mr. Clancy: The road? Is that for the witness or for me?

The Court: There it is. I see. All right. Do you want to see it?

Mr. Unger: No; I have seen it before.

Mr. Clancy: Oh.

Q. When did you make a report on your examination of title to Mr. Walter Beers, attorney for Mr. Fatzler? A. I am not sure of it. It was last fall I made a search originally. At that time I was not sure where the property was located. I had not seen the tax map so, when I made the report to my brother, I suggested that perhaps the property might not have any road frontage, in view of that recital and also in view of the fact that the descriptions contained no description of a roadway, and it was after that time that we started to investigate by going to the tax collector and looking at the map.

Q. Where else did you go to look at maps? A. That was the only place we went to look at maps.

Q. That was the only place you went to? A. Yes. I left it to my brother to get what information he could.

Cross-examination by Mr. Unger:

Q. Did you make your examination of title before or after the sale took place? A. Before or after the sale? I don't know when the sale was.

Q. The sale took place on the 13th of August, 1928. A. It was after that time.

Q. You did not make any examination until after that time? A. Not of the record title, no.

Q. You can read a description, of course, and follow it? A. Yes, sir.

Q. And have you effected a description which covers property which was sold in this case? A. I assume that 94 acre piece, which is owned by Giacomelli is the piece I searched.

Q. You had before you a description of the title, didn't you? A. Oh, yes; I have it here.

Q. That is the property which is described in the complaint as beginning at the southwest corner of the C. E. Lum house; is that right? A. That is the beginning point.

Q. That description in itself shows it does not front on a road, does it not? A. I wouldn't say that, no.

Q. There is a total absence of anything? A. Total absence of a reference to a road, and that is what made me suspicious.

Q. I mean, any title searcher or lawyer can tell it makes no mention of a highway or road. A. By reading it, it is apparent there is no mention made of a roadway.

Q. How did you reach this property? A. How did I reach it?

Q. Yes. I mean, from the road. A. Why, you would have to walk over 400 feet of someone else's property.

Q. Did you actually walk over that property? A. Did I actually walk over the property?

Q. Yes. A. No, I did not.

Q. Then you don't know by actual experience whether or not a right of way exists over any body else's property.

The Court: No, he said he could not because—(interrupted)

Q. You did not look at it?

The Court: You did not look at the property in question, did you?

Witness: I went out to that section and we were right out to where the property was and we looked at something I thought was it, and it later developed it was not it.

Q. Now, that means, necessarily, that you did not walk from the Meyersville road over any property which would lead you into this particular place. A. I did not.

Q. So you did not know the physical characteristics of the land. A. I could see it from the road.

Q. And now you tell us that there was recorded on December 11th, 1875, a deed from Lum to Thomas Weldon, conveying the premises in question? A. That is right.

Q. What is the date of that deed? A. November 29, 1875.

Q. And recorded on December 11, 1875? A. That is right.

Q. And that deed makes no mention of the right of way? A. This is the only deed that does—(interrupted)

Q. Does it make mention of the right of way? A. Yes.

Q. Now, I understand you to say that Lum, the grantor in that deed, was cut off by the foreclosure of the mortgage made in 1865? A. As to adjoining property?

Q. As to adjoining property. A. Yes.

Q. I am referring to the date of that mortgage. A. Am I right about that?

Mr. Clancy: You are right.

Witness: 1865.

Q. That mortgage was made in 1865, dated in 1865? A. Yes.

Q. And the foreclosure of that mortgage cut off the right of way? A. Yes, sir.

Q. And that mortgage was made at a time when the mortgagor did not own the land? A. The property in question?

Q. Yes. A. That is right.

Q. So that mortgage was inoperative so far as the premises therein contained are concerned. A. What is that?

Q. I understood you to say that the mortgage was dated in 1865 and the mortgagor did not own —(interrupted)

The Court: What I understand the witness to say was this, that, when this mortgage was made on the property along the road, the mortgagor did not own this interior piece, which is the property in question, but that he got the interior piece in 1872. (To witness:) Is that right?

Witness: Yes, sir.

The Court: That is what he said.

Q. Let me see if I followed it. I understand, Mr. Beers, that you claim as a title examiner that the foreclosure of the mortgage which resulted in the delivery of the deed dated March 15, 1875—(interrupted) A. Recorded March 15.

Q. (Continuing.) Recorded March 15, 1875, re-

sulted in cutting off the right of way that Lum created in it to Thomas Weldon. A. No.

Mr. Clancy: I object to that; that calls for a conclusion of law.

The Court: Wait a minute. That calls for a conclusion.

Q. Was that your statement of it? A. I do not recall that I just said that or not. If I did, it would be for the reason that the deed—the sheriff's deed cutting off Lum was given eight months prior to the time he created the right of way.

Q. I follow you on that, but I understood you to say that Lum's right of way was cut off by the foreclosure of a mortgage made in 1865.

The Court: Well, now, that is not important, whether he said it or not, because that is clearly a conclusion and it is up to the Court to decide whether, under those circumstances, the right of way was cut off.

Mr. Unger: All right.

Q. Now, what was the date of that mortgage?

The Court: 1865.

A. 1865.

Q. And do I understand that, according to the records, Lum did not have the title to the premises at that time? A. When he made the mortgage?

Q. Yes.

The Court: He said he didn't have title to the interior property, but, of course, he had title to the property on which he made the mortgage.

Mr. Unger: That is what I want to know.

The Court: Didn't he?

Witness: That is right.

The Court: He didn't have title to the interior piece, but he got title to the interior piece in 1872.

Witness: That is right.

Q. Is that right? A. That is right.

Q. So that in 1865 he had title to the property embraced in the mortgage, according to your record. A. Yes, he did.

Q. And in 1872 he acquired title to the interior? A. Yes.

Q. Had there, in the meantime, been any release so far as you have been able to find, by any parties of the right of way which had been created?

Mr. Clancy: Well, let me interrupt and object here. The right of way, if the Court please, was not created until nine months after the sheriff gave a deed cutting off Lum to the road property.

Mr. Unger: I follow counsel absolutely on that, but the right of way does not have to be created through. There is a right of way which arises out of a prescriptive right, known as an easement by necessity, and it does not need any grant. There can be easements by grant and easements by implication and easements by necessity.

The Court: Yes, there can be a right of way by necessity.

Mr. Unger: That is all.

The Court: That is all.

Redirect-examination by Mr. Clancy:

Q. You said that you could see from the road the property—(interrupted) A. I didn't look at it; I didn't know it was it, but now I know that I saw it at that time.

Q. What kind of property is it? A. Oh, it is swampy land; it is low land. It falls down gradually off the road and it is all open property. You can see a considerable distance, much further than our property.

Recross-examination by Mr. Unger:

Q. How many acres of land in this tract? A. Ninety four acres, roughly, ninety four.

Q. And about square in shape? A. Roughly, yes.

Q. Rectangular? A. Yes.

Redirect-examination by Mr. Clancy:

Q. Has it been your experience or do you know from your experience of times in title examinations where property fronts on a road and the rest is either by degrees or minutes and by feet and no reference made to the road—in farm property? A. It is unusual, but I have seen it.

Mr. Clancy: That is all.

Further recross examination by Mr. Unger:

Q. Just let me ask you: Do you find a first mortgage on this property? A. Do I find a first mortgage on this property?

Q. Yes. A. Yes. I found two or three mortgages.

Q. How much is that, from your record? A. Have you got my report? That will help me a lot. I can't find it in here, but if you can find the report, it will help me a lot.

Mr. Unger: Maybe we can agree on that.

Mr. Clancy: We can agree on that.

Mr. Unger: The first mortgage is how much?

Mr. Clancy: The first mortgage, $1,000.

Mr. Unger: $1,000; this is a second mortgage which is under foreclosure.

Mr. Clancy: $560, was it not? $565, something like that, the second, under foreclosure.

Witness: The first mortgage is $1,000.

Mr. Unger: The first mortgage is the $1,000, and five sixty five—

Witness: Five ninety five was the second.

Mr. Unger: Five ninety five the second, that being the mortgage under foreclosure, and the petitioner, the objector, Fred Fatzler, had a judgment of how much money?

Mr. Clancy: Thirty one hundred.

Mr. Walter Beers: $3,096.

Mr. Unger: Three thousand ninety six dollars against the owner and that he was the bidder?

Mr. Clancy: He was the bidder at the sale.

Mr. Unger: For twenty three hundred dollars.

Mr. Clancy: Twenty three hundred dollars.

Mr. Walter Beers: Subject to the first mortgage.

Mr. Clancy: Subject to the first mortgage.

Q. Now, I want to ask you one more thing, Mr. Beers: Do you find a mortgage of any substantial size on this property back a number of years? A. Which has been cancelled, you mean?

Q. Foreclosed or cancelled. A. There were mortgages foreclosed prior to this time. I can give you those.

Q. Did you find a mortgage as large as three thousand dollars, or so, on this property, at one time? A. $3,323.63.

Q. First mortgage? A. And, apparently, a second mortgage, second to the thousand dollar mortgage.

Q. Covering this ninety four acre tract? A. Yes.

Q. And what is the date of that three thousand dollar mortgage? A. July 30, 1909.

Q. Yes.

The Court: What happened to that?

Mr. Unger: It has been foreclosed.

Witness: Foreclosed.

Q. And Thomas Weldon, who purchased in 1875, how did title get out of him? A. He conveyed by deed.

Q. What year? A. In June, 1877.

Q. In 1877. And did the title get back into any member of his family after that, anybody by the name of Weldon? A. By the name of what?

Q. Weldon. A. Back into anybody by the name of Weldon?

Q. Weldon. A. Yes, got back; deed recorded simultaneously with the deed out of Thomas back to Caroline, wife of Thomas.

Q. The same year? A. Yes, the same year.

Q. Eighteen what? A. Seventy seven.

Q. And how long did it stay in the Weldon family? A. Why, it was sold to Caroline Weldon, who had remarried, under the name of Caroline Allen, in 1905.

Q. It stayed from eighty seventy something down until 1905 in Weldon?

The Court: 1875, I think he said.
Witness: Eighteen—(interrupted)
The Court: No, 1877. 1877.

Q. And who got it in 1905? A. Eleanor Haines.

Further redirect-examination by Mr. Clancy:

Q. Did you grantor C. E. Lum from 1875 down? A. Yes, I did.

Q. Did you find out of C. E. Lum any right of way, any easement? A. No.

Q. Any right over this property? A. No.

Q. Or over his property through this property? A. No.

Q. Did you find any such right in any subsequent purchaser? A. No, I did not.

Further recross-examination by Mr. Unger:

Q. Did not find any release or surrender of any right of way, if one existed? A. No, I do not.

Further redirect-examination by Mr. Clancy:

Q. Did any of the conveyances affecting the front

property mention any right of way, or that the property was sold subject to a right of way, after 1875? A. 1875?

Q. Front property. A. No, no, I don't go back —let me see. Pardon me just a moment. I came all the way down to 1928 on that, yes. I didn't realize I came that far. It did not mention it.

Mr. Clancy: That is all.

The Court: Now are you sure you are through?

Mr. Clancy: I am through now.

The Court: All right; that is all.

JAMES E. SHEA, sworn for complainant.

Direct-examination by Mr. Clancy:

Q. Mr. Shea, what is your occupation? A. Realtor.

Q. Are you a licensed realtor of this state? A. I am.

Q. And where is your office? A. At Chatham.

Q. And do you deal generally with property in that neighborhood? A. I deal with properties all the way from the Maplewood line to Succasunna.

Q. Is this property within that radius? A. Yes.

Q. Are you familiar with this property and the surrounding properties? A. Yes, very much.

Q. Do you know where it is? A. Yes.

Q. What is the character of this property? A. Well, it is not very good. It is a piece of property that you could grow Pin Oaks on and swamp maple. It makes good grazing ground for pheasants. Why, you couldn't raise anything on it unless the Lord was kind.

Q. What is that property known as in that neighborhood? Has it any name, that particular property and the surrounding property? A. Well, now, what they call it is—it is not generally known outside, but up there they all allow it is grab land for Hudson County when they put the reservoir in.

The Court: What is that?

Witness: It is grab land for Hudson County when they put the reservoir in.

The Court: What does that mean?

Witness: It cannot be used for anything else but their purposes; if they put a reservoir in that it creates a lake and swamp.

The Court: Oh, I get you.

Q. Is it known to you and others there as a great swamp? A. It is.

Q. Are you familiar with the values of this property in the neighborhood? A. I have been over many pieces of it and the values on them.

Q. Did you look at this property recently? A. I did.

Q. What is its value?

Mr. Unger: I object. I don't see how the price has anything to do with it.

Mr. Clancy: Well, if it hasn't anything to do with it, as the case later develops, it may be stricken from consideration. I maintain that it has, that when the case is developed the question of mistake, the question of looking at one piece of property and bidding on the assumption that that was the piece of property involved, and later learning that this is the property that he must

buy, if he must buy, it would work a hardship on him, that it would be injurious to impose this property upon him, when it is worth so far below what the property would be worth that the bidder thought he was purchasing.

The Court: I will allow the witness to answer the question.

Q. What is its value? A. Why, I would estimate that any where from six to ten dollars an acre.

Q. And what does that range of six to ten depend on, the availability of a purchaser or the need for it? A. The availability of a purchaser or the need for the property.

Q. Do you know how many acres there are in this piece? A. Well, I understand there is some ninety odd acres in the piece.

Q. Do you know if there is any road into that property? A. I wouldn't say there is any road—as a country town driveway or farm driveway—that is where they knocked the edge of the road down, leading to a farm house that is owned by Mr. Jackson, of the Westinghouse Manufacturing Company of East Pittsburg, Pennsylvania, that is, you couldn't drive my car in there—in fact, you couldn't drive in far enough to turn around. I had to drive out on the grass out beyond, before I could turn my car around; I wouldn't call it a driveway. It is not a road.

Q. How far does the driveway extend back from the property of Jackson? A. Well, it ends—if you call it a driveway—it ends there at the house.

Q. And how far is the end of that driveway from the beginning of this property, approximate-

ly? A. Well, I would say approximately five hundred feet.

Mr. Clancy: That is all.

Cross-examination by Mr. Unger:

Q. How did you get in the property? A. I walked in, counsellor.

Q. Yes. You say there is no road?

The Court: There is an old road as far as the house and then—(interrupted)

Witness: No; what they done, they knocked the edge of the road down, that is, from the Myersville road leading in, as they would do in these back woods country towns; they just knocked that bank down and they just plowed through the field to get into the house.

Q. And they get in that way? A. Yes, they get in that way, but it is easy to get over at the other side.

Q. Well, did you find evidences of an old road?

The Court: Mr. Unger, that doesn't make any difference, because the house is five hundred feet from this property.

Mr. Unger: I am referring to the rest of the—(interrupted)

The Court: The rest of it there isn't any road.

Witness: No, there is nothing beyond the house.

Q. My question is whether you found any evidence of any road leading directly into the prop-

erty. A. I found evidence of an old road from the Myersville road.

Q. To where? A. Leading in to the Jackson's house.

The Court: But from Jackson's house to this ninety acres—(interrupted)

The Witness: No, no, there is nothing there.

Q. Didn't find anything— A. Nothing at all. No evidence of anything, no track marks of any kind.

Q. You value this from six to ten dollars an acre because it has no means of access? A. That is the prevailing price through the swamp.

Q. Suppose it had means of access, would that increase the price? A. I wouldn't say so.

Q. Then it makes no difference whether you have a road leading to it. A. Because you cannot reach the land.

Q. Can you account for the fact that a mortgage of three thousand dollars was put on this land in 1870? Can you explain that away?

Mr. Clancy: I object to that, unless he knows the circumstances in 1870.

The Court: I don't think this witness was in the real estate business in 1870.

Witness: You are right; I was not, Judge —in this section, anyway.

Q. Now, how were you enabled to get into the property at all? How did you know how to get there? A. Well, I was brought up there myself.

Q. By whom? A. By Mr. Walter Beers, and I was shown where the property was and we check-

ed up with Mr. Jackson's map and it corresponded with the map that Mr. Beers' brother had taken from the records at Morristown.

Q. Did you go over the whole ninety four acres? A. Last Saturday I did not walk over the whole ninety four acres. I walked over a portion of it.

Q. Was it all wet and swampy? A. Well, now, if there was any dry part I didn't find it.

Q. You said it was a part of the Jersey City Something—you mean the Jersey City water shed? A. No; it is considered the future water shed for the expanding needs of Hudson County. Now, that has been the talk up through there for many years.

Q. Into what does this water drain? A. Passaic River.

Q. The Passaic River does not furnish any water shed, does it? Jersey City does not get its water from the Passaic River? A. No; this is a future —(interrupted)

Q. You mean it may develop into a future water shed? A. Exactly.

Q. And with that supposition you don't think it is worth more than six to ten dollars an acre? A. No.

Mr. Unger: That is all.

WALTER A. BEERS, sworn for complainant.

Direct-examination by Mr. Clancy:

Q. Mr. Beers, you are an attorney and counsellor at law of this state and have been an attorney for about six years? A. That is right.

Q. And you were the solicitor for Frederick

Fatzler during the time this matter was going on? A. I was.

Q. Were you present at the sheriff's sale? A. I was.

Q. What was Fatzler's interest at that sheriff's sale? A. To protect a judgment which he had on the property.

Q. Against whom? A. Atillio Giacomelli.

Q. Atillio Giacomelli? A. Yes.

Q. And who was Giacomelli? A. Giacomelli was the owner of that property.

Q. Was he—at that time? A. At that time, yes.

Q. Was he the record owner of the property? A. No, he was not the record owner.

Q. Who was the record owner? A. Louis Weiss and Samuel Wollman.

Q. And do you know how they acquired title? A. Giacomelli owned this property and he made an agreement with Silodor and Sirota and Weiss and Wollman. Silodor and Sirota loaned Giacomelli thirty five hundred dollars and Silodor and Sirota owed Weiss and Wollman—(interrupted)

Mr. Unger: If Mr. Beers is testifying to unrecorded title, I don't see where we are bound by it.

The Court: No.

Mr. Clancy: Well, I can do the same thing by another witness.

Mr. Unger: I don't see how it is material. I do not want to object to stuff that is going to help the Court, but what difference does it make if the record title is here in Weiss?

Mr. Clancy: Well, it makes a difference so far as the proof goes with respect to the

inquiry of the owner of the property. If Giacomelli is the real owner and somebody else owns the title, a security for a loan it makes some difference.

Mr. Unger: That would not be binding on us, on the complainant.

Mr. Clancy: No; it is part of our case.

Mr. Unger: I don't see how it would be binding on us, even if they got all kinds of assurances made as to who was or who was not the owner. I think they can only tie this up to the complainant.

Mr. Clancy: Well, I think the proofs will develop that it has something to do with it.

The Court: Well, what is this final decree here? Is this a decree of foreclosure?

Mr. Unger: I don't know, sir. I assume that is what it was in the other suit. I think Mr. Coyne was familiar with it.

Mr. Coyne: That bill of foreclosure went to a final decree and failed.

The Court: Yes, I see.

Witness: I think those are the wrong papers, probably, your Honor.

The Court: Well, this seems to be a final decree here. I haven't read it; I don't know what it is about.

Mr. Coyne: It is a final decree. Fifa was issued upon that final decree, directed to the sheriff of Morris County, and pursuant to that the sheriff sold.

The Court: I get you.

Q. Do you know who the mortgagor was in these mortgages which were set out in the bill to foreclose? A. I do.

Q. Who were they? A. Albert E. Allsop held the first mortgage; Henry Allsop his brother, held the second mortgage, which was the one foreclosed; and the Fidelity Securities Corporation held the third mortgage.

Q. Do you know who made the bond? A. The bond on the Fidelity Securities mortgage was made by Atillio Giacomelli.

Q. Now, who was present at the sheriff's sale? A. There was Mr. Fatzler, Mr. Coyne, representing Allsop and Mr. Popik, representing the Fidelity Securities Corporation, and myself.

Q. Had you seen this property before you went to the sheriff's office? A. I thought I had seen it.

Q. Did you make any inquiry to ascertain the location of this property? A. I did.

Q. Before you went to the sheriff's office? A. I did.

Q. From whom? A. I first telephoned Mr. Henry Coyne, about one week before the sheriff's sale. I told him Fatzler was considering protecting his judgment; I might want to bid on this property, and I wanted to know where it was located for Mr. Fatzler so that he would know whether or not he cared to protect his judgment. Coyne said to me, "All I know is that the property is on some road out of Green Village. Ask Davy Popik; he made a search; he will tell you all the other information." I then telephoned David Popik and Mr. Popik said to me, "The property is on the Myersville road." I asked him how I could get there; told him I was inquiring for Fatzler so that Fatzler could make an inspection and decide whether or not he wanted to bid and he said to me, "Well, now, if you want to know how

to get there, you will have to ask Giacomelli. He can take you up." I then wrote Atillio Giacomelli a letter to call at my office, which he did and Giacomelli drew a sketch for me. He drew the center of Green Village. He showed me the post office located right at the center of Green Village and he drew a fork in the road, one which, I believe, leads to Stirling and the other to Myersville, he told me, "I measured by my automobile speedometer two miles. You go out that road to Myersville exactly two miles and there is the property right on your left on the road. It is right past a little white house which is the Lum house lot."

Q. Just a minute, have you got that sketch? A. No, I haven't got the sketch.

Mr. Unger: I let this testimony go in without objection because I thought that Mr. Clancy might connect it with the complainant, Allsopp, but here there is no connection between Mr. Giacomelli's representation or Mr. Popik's representation, for that matter, and the complainant. I think your Honor should strike out the testimony. It cannot be binding upon the complainant because Mr. Beers says that Henry Coyne, who represents the complainant said, "All I know is that it is outside of Green Village."

Witness: "On a road".

The Court: "On a road".

Mr. Unger: No; Mr. Coyne did not say that.

Mr. Clancy: Well, Mr. Beers testified Mr. Coyne said that.

The Court: That is what he said he said.

Mr. Unger: I didn't get that.

The Court: Yes.

Mr. Unger: "On the road".

The Court: Yes.

Mr. Unger: I have it recorded: "It is outside Green Village and you take it up with Popik".

The Court: He said it was on the road outside of Green Village and to take up the rest of it with Mr. Popik, whatever his name is.

Q. Did Giacomelli make a sketch for you? A. He made a sketch for me.

Q. Have you got the sketch? A. I didn't consider it important at that time and I destroyed it after I examined what I thought was the property.

Q. Then, was the property which you saw the Lum property? A. I went up there on a Sunday afternoon, the Sunday before the sheriff's sale.

Q. With whom? A. With my brother, Edward Beers, and my wife and his wife.

Q. And you inspected the property which you thought was this property? A. I found this white house which Giacomelli said was the Lum house. A. man in the driveway tinkering with an automobile said it was the Lum house and I asked him if he knew who owned that property out on the road alongside of it—(interrupted)

Mr. Unger: I object.

Q. Did you ascertain who owned that property alongside of the white house? Did you ascertain? Yes or no. A. I thought that it was the property that I was looking for.

Q. Did you ascertain? Did that fit the description given you by Giacomelli? A. It fitted exactly.

Q. And was that road front property? A. It was.

Q. And your brother, Edward Beers, who testified, was with you? A. He was.

Q. Did you communicate that information to your client? A. I did. I described the property then to Mr. Fatzler.

Q. And, relying upon the information given him by you, you both went up to the sheriff's sale? A. We did.

Q. And what happened at the sheriff's sale? A. Mr. Fatzler authorized me to submit a bid on the information which I had given him.

Q. What— A. I told him that there was fourten hundred—approximately fourteen hundred feet on the road, that is what Giacomelli told me.

Q. And what happened up at the sheriff's sale? A. Mr. Coyne gave me the amount due on the first and second mortgages—or, rather, the second mortgage under foreclosure and the third mortgage, and told me that, if I bid twenty three hundred dollars, that would cover the prior liens.

Q. Subject to the first mortgage? A. Subject to a thousand dollar first mortgage and three years taxes. For Fatzler, I submitted a bid of twenty three hundred dollars and the property was struck off and sold to him.

Q. And then what happened after the property was struck off by the sheriff? A. Coyne—Mr. Coyne and Mr. Popik came over and said, "Do you want any partners in this? You have a good buy." Fatzler said, "I don't think so now." And Mr. Fatzler said, "Walter, will you take me out to the

property now and show it to me?" And I then took him out and showed him this road frontage along the road alongside of the Lum house lot.

Q. Did you examine any maps or any references in the sheriff's office after the property—(interrupted)

The Court: It doesn't seem to me it is important after the sale. What we want to find out is what happened before the sale, and, then, after the sale, it is quite evident —(interrupted)

Mr. Clancy: Perhaps I was anticipating some of the defense. I will reserve that.

Q. And Fatzler saw the property which you pointed out to him after the sale? A. That is true.

Q. Now, was there a time fixed for the taking of the deed? A. Yes. It was to be—the sale was August the 13th and the deed was to be taken up September 13th.

Q. And did you then arrange for an examination of the title? A. I did.

Q. And from time to time did you receive reports from your brother, Edward Beers? A. Yes; he told me he was having great difficulty in completing his title examination.

Q. Did you continue the taking of the deed and the postponing taking of the deed with counsel, Mr. Coyne? A. Mr. Coyne was the person who did close and each time I called and explained the situation and he adjourned the time for closing from time to time.

Q. When was it you learned that this was not road front property and not the property you look-

ed at? A. It was about December the 10th to 15th.

Q. Did you communicate with counsel about it, after that time, Mr. Coyne or Mr. Popik? A. Yes, I did.

Q. What happened? Tell us about that. A. Well, I told them it was not on the road and that I was about to file a bill, which I filed, to be relieved of the bid.

Q. Did you have any talk with Giacomelli after you learned— A. Rebuttal.

Mr. Clancy: Withdraw that. That is all, at this time.

Witness: I would suggest to counsel that I made a second examination of the property.

Q. Did you go with Mr. Shea to this property? A. I did; I took Mr. Shea there.

Q. And is there a road leading to this property? A. There is a roadway up to the Lum house.

Q. How far back does that run from the road, the Myersville road? A. It ends immediately in back of the house.

Q. How long is it, about? A. Approximately, one hundred feet from the road.

Q. And how far is the end of that driveway or roadway from the property involved in this suit? A. From the surveyor's sketch of the Jackson property, I would say, eight hundred feet.

Q. And what is the character of the property involved in this suit? A. It is low land and a swamp and part of it is wood land.

Q. Did you see any evidences of any kind of any other roadway, driveway or walk leading back to the property? A. Absolutely none.

Walter A. Beers—Cross.

Cross-examination by Mr. Unger:

Q. Your client, Mr. Allsopp, bought this property? A. Mr. Fatzler.

Q. Mr. Fatzler, upon your representation as to where it was and what it was, I presume? A. Upon the representations which were made to me as his agent.

Q. Well, I am asking you whether or not you represented it to Allsop and told him—or, to Fatzler—(interrupted) A. I gave Fatzler the word I received and he bought on that information.

Q. You told him it was on the road? A. That is true.

Q. How many hundred feet on the road? A. I did, fourteen hundred.

Q. And upon that report he bought it? A. He did.

Q. And when did you find out that that was not so? A. About December the 10th to the 15th.

Q. Did you notify either Mr. Coyne or Mr. Popik in writing or by letter that you desired to withdraw your bid on that account? A. I did not. I immediately filed a bill.

Q. Yes. When did you file the bill? A. I think, about the 15th of December.

Q. Now, isn't it true that your client, Mr. Fatzler, bought this property in order to resell it to somebody else and the purchaser to whom he intended to sell it backed down? A. He had no such intention at the time he bought it.

Q. Did he have those intentions in the month of September, 1928? A. Yes.

Q. Yes. A. After he bought it, it subseqently developed he might be able to turn it over.

Q. The sale fell through, did it? A. It was not a sale; there was never any agreement drawn.

Q. Did you write this letter (showing witness letter)? A. What you refer to—(interrupted)

Q. Wait a minute. Did you write that letter to Mr. Coyne? A. That is correct.

Mr. Unger: I offer it. Well, I suppose I will have to mark it for identification.

The Court: If counsel does not object, it can be offered in evidence.

Mr. Clancy: I consent it go in evidence.

(Letter marked Exhibit D-1.)

The Court: What is the letter?

(Letter Exhibit D-1 read.)

Q. Isn't it a fact that Giacomelli declined to take this title? A. No, he did not.

Q. The sale fell through because of his inability to raise the money? A. He was unable to raise the money.

Q. Isn't it true, from that time on, your client lost interest in buying the property? A. No, it is not.

Q. When did you first order the search to be made on this property? A. I believe I handed my notes to my brother the early part of August.

Q. 1928. And you want us to understand that on the 28th of September, 1928, you had gotten no report from him that this property was no located on the road? A. That is true.

Q. Almost two months? A. Yes. I will explain that, if you wish.

Q. Yes. A. I told my brother at that time that Giacomelli was expecting a mortgage loan, and, if that was so, he might not have to make the search,

he might not have to complete it, that he should take his time with it.

Q. Did you stop him from completing an examination of this title? A. Nothing other than what I have said.

Q. Well, then, there was nothing that would interfere with the completion of this title within a week or so, if somebody attended to it diligently, was there? A. If you gave—I don't know; I never made a search.

Q. Well, are you sure about that? A. Positive.

Q. You have made searches, haven't you? A. Never. Never picked up a deed book.

Q. This property was in Morris County? A. Yes.

Q. Now, you got numerous letters from Mr. Coyne? A. I did.

Mr. Unger: And won't you produce the letters which were written to you and which are contained in the notice to produce?

(Letters produced.)

Q. Did you make any reply to any of these letters which were written to you by Mr. Coyne? A. Why, that one letter which Coyne wrote me was, I believe, September the 13th or 25th, that his client's indulgence had ended two weeks after the time title was to be taken up, is the only letter I gave him in writing.

Q. Well, he has one as late as November 6th, 1928, when he told you that he will have to readvertise if you do not complete your sale. Did you ever answer that letter? A. I answered each one by telephone.

Q. You made no written reply to any of them

other than the one that has been read here. A. None that I can recall.

Q. Now, when did you, as a matter of fact, find out for the first time that this property had, or, as you claim, it had no frontage on the Myersville road? A. I have letters here to show that. I made many examinations at the different title companies—when my brother handed me his search notes and said he didn't know where the property was; I went to the National Commercial and saw Mr. Pilch; I was in the office of Riker & Riker and I was in several other offices where they have maps.

Q. Well, Riker & Riker do not, or any other office, do not have records of the County Clerk of Morris County, do they? A. You want to know—they have atlases, yes.

Q. Your brother has testified to matters of record, which, I presume, indicate as you claim, that this easement had been foreclosed or wiped out. A. Yes.

Q. Now, that was always a matter of record, wasn't it?

The Court: Yes.

A. Yes, it was.

Q. Now, when did you first find out the things which he here testified to, regarding the condition of the paper title, the title of record. A. That sketch which my brother submitted was a sketch which he made after December, after I filed my bill to foreclose.

Q. That is not what I am talking about, Mr. Beers. I am talking about the records which he has been testifying to: the deed to Lum in 1875 and the mortgage in 1865 and the two or three in-

struments which he testified about. When did you first learn of those? A. I received the title examination of the rear piece some time around October—possibly November.

Q. I don't want that. A. At that—

Q. Pardon me. I don't want to know when you got it. I want to know when he pointed out or told you of those things. He was your title examiner on it. A. Well, he made—don't you understand, he made two separate title examinations. The first title examination, which I am explaining to you, was a clear chain of title for this ninety four acres, with a report that there is a clear title to ninety four acres, but I can not say where it is.

Q. When did you get that? A. That, as I say, was in October, possibly November.

Q. 1928? A. We had no suspicion or any reason to look over the adjoining property at that time.

Q. Well, I will go along with you that you found that out in October or November, 1928. Did it take from that time until the middle of December to find out that this easement contained in one instrument existed or did not exist, foreclosed by mortgage? A. It took me that long a time.

Q. Are you sure that was the only thing that was delaying the title? A. That is what delayed the title, with the exception—

Q. The—(interrupted)

The Court: With the exception of what?

Witness: With the exception of the time there that I was waiting for Giacomelli to take the title, if he wanted it.

Q. If Giacomelli had taken the title and paid the money, you would never have raised the question of the location of the land? A. We would never have known anything about it.

Q. When you went up to this property there on the Sunday with your brother and stopped at the white house, did you find occupants in that house? A. I found—I did not go in. There were two men in the driveway tinkering on an automobile.

Q. Did you ask them if this was the property of Giacomelli the man who made you the sketch and whom you thought was the owner? A. I did.

Q. Did they say it was Giacomelli's property? A. They did not know.

Q. So there was nothing that you learned from the occupants of the white house which would lead you to believe that you were then on Giacomelli's property. A. I wouldn't say so, no.

Q. Now, when that—the first one I understand you called up about this property was Mr. Coyne? A. That is true.

Q. And he was the solicitor of the complainant and the man who was foreclosing the second mortgage? A. Yes.

Q. And what is it you say he told you? A. He said that—he said "the property is on some road out of Green Village, just where I can't tell you. Call up Davy Popik, he made a search."

Q. Yes. Now, did he tell you it was on the Myersville road? A. He did not.

Q. No. And can you tell us when it was you asked him about this? A. The conversation I refer to?

Q. Yes. A. About one week before the sheriff's sale.

Q. And then what did you do? A. Then telephone David Popik.

Q. And how long was that afterwards? A. I believe it was the same day.

Q. And he told you the same thing? A. He told me a little more.

Q. And what else did he tell you? A. As I have said he told me, "The property is on the Myersville road".

Q. Yes? A. I said, "How do you get there?" He said, "Now, you better get Giacomelli to take you up; I can't give you that information."

Q. Well, you did not tell us before that he told you to have Giacomelli to take you up did you? A. I did not, but he said that.

Q. And you did not get him to take you up there. A. How?

Q. You did not get Giacomelli to take you up there? A. I tried to, but I could not arrange—(interrupted)

Q. You said he came in and wrote down a sketch. A. That is right.

Q. And that is the sketch you have lost? A. That is right.

Q. Are you sure in that sketch he located your property on the Myersville road? A. Positive.

Q. Was it marked "Myersville road"? A. It was—the road was not marked the Myersville road.

Q. That is what I am asking you whether—(interrupted) A. He had "Myersville" written out in the direction where the property was.

Q. Yes. And did he have the road marked "Myersville" or anything like that? A. No—yes, he told me that it was the Myersville road.

Q. So on the sketch that he made it did not ap-

pear that the word "Myersville road" was in front of the property? A. It did not.

Q. It showed a road in front of the property of some kind? A. That is right.

Q. Yes. Now, did Giacomelli make this sketch himself or did you make it at his direction? A. Giacomelli drew it himself.

Q. He wrote it down himself? A. He did.

Q. He put everything down there? A. He did.

Q. Now this, as I understand it, was two or three days before the sale? A. It was.

Q. Well, now, was it between that conversation and the sale that you went out to the property? A. It was.

Q. Yes. So you went out on a Sunday preceding the sale. A. The day before the sale.

Q. The sale took place on a Thursday. A. On a Monday.

Q. On a Monday, and before you had asked about the property that occurred during the preceding week? A. That is true.

Q. Did you go over the property at all? A. I did.

Q. How far in did you go? A. I only went up the road as far as that automobile was and talked with those gentlemen.

Q. Now, the road that you saw, comprising, as you thought, one hundred acres, was on good dry ground, wasn't it? A. Parts of it. The front part is, I would say, level with the road. There are pools of water scattered all through the whole district.

Q. And did you understand that the house was on the property? A. I did not.

Q. The house did not go with the property? A. No.

Q. Did you inquire whether the property next door on the road was the property that you were looking for? A. I did not ascertain definitely that it was. I tried to.

Q. Now, what did the tenants of the property tell you as to the ownership of it? A. The property next door? The man that was there could not speak very good English and I pointed to the road frontage there and asked him, "Is this the Palmer property?" I believe that is the last deed name before Giacomelli and he said, "Yes," but I don't think he knew what I was talking about.

Q. Didn't he tell you or didn't the man that you made the inquiry of there, the tenant there tell you that the property belonged to somebody else? A. No; he just grunted "Yes". I don't think he understood me.

Q. Didn't one of the tenants on the property tell you that it belonged to a man named Lum? A. He said the house—the property he was on was the Lum house, yes.

Q. Sure about that? A. Yes, sir.

Q. Didn't you show them the sketch that you had and didn't they tell you that the property on that sketch was owned by Lum? A. No.

Q. Didn't you make an affidavit to that effect? A. I did not.

Q. Didn't you say in your affidavit, "The Sunday before the sheriff's sale I drove to the premises, pursuant to the direction; the tenants in the house shown on the sketch told me that they thought the property was owned by E. S. Lum." A. Well, that is what I said. The house property was the E. S—the C. E. Lum property, surely.

Q. Well, now, here you have got this house shown on your sketch here. A. Yes.

Q. And you want us to understand that you meant by this affidavit, and that you now mean that the information that they gave you was that the house as distinguished from the property was owned by C. E. Lum? A. I want you to understand that the property that these men were on was what they said was the C. E. Lum house lot.

Q. Now, let me read this again: "The tenants in the house on the sketch—house shown on the sketch told me that they thought that the property was owned by S. E. Lum". A. That property referred—(interrupted)

Q. "There is about 1400 feet road frontage at the point marked '100 acres by Giacomelli' ". A. Let me see that. (Pause) There is a period in there where you kept on reading.

Q. Well, you read it your way. A. "The tenants in the house shown on the sketch told me they thought that the property was owned by C. E. Lum."

Q. Now, what meaning did you intend to convey by the word "that"? A. That property that they were on.

Q. The house? A. The house property.

Q. But you were not interested in the house property. A. Just a moment—(interrupted)

The Court: Well, you understood that the house and nothing else was Lum property?

Witness: The—(interrupted)

The Court: That is what you understood?

Witness: I understood that.

The Court: I see.

Witness: (Continuing.) That the Lum property ended at the road there. Now, I go on; there is no paragraph; this is an en-

tirely new thought, a separate sentence. "There is about 1400 feet road frontage at the point marked 100 acres by Giacomelli." My thought there is this: "I was told there was about 1400 feet along the road, along the Lum house lot and when I got up there I saw that there was that many feet clearance and believed it to be the property."

Mr. Unger: That is all.

Redirect-examination by Mr. Clancy:

Q. When Giacomelli drew this sketch setting out the Lum house, did he tell you that the property that he, Giacomelli owned, adjoined that house and that he would give you that little house as a boundary or as a marker to find your own property? A. That is exactly it.

Q. And, when you were up there, and according to the sketch that Giacomelli drew, that house and that lot upon which that house was, had nothing at all to do with the property you were interested in? A. No, sir.

Q. Except to identify its end or beginning? A. I looked for the 1400 feet along that house.

The Court: Well, now, Mr. Clancy, are you testifying or is the witness? It seems to me those two questions are exceedingly leading.

Mr. Clancy: Well, I will withdraw them both, and the answers, and consent that they be stricken out.

Q. What did Giacomelli say about the house and its relation to the sketch on the property you were

interested in? A. He sketched a house for me just exactly two miles from Green Village center; he sketched a road way on the right of that house and drew the four boundary lines on the road of his property and put an X in it.

Q. Now, after you learned that this property was rear land and had no road frontage on the Myersville road, did you communicate with Mr. Coyne or Mr. Popik? A. I did.

Q. Well, tell us what they said. First, Mr. Coyne. A. Mr. Coyne at that time, did not know anything about the location of the property. He said, "Call up Davy Popik". I told him, I wanted to be sure that there was road frontage.

The Court: No. This is after you found out.

Witness: I told him, I did, your Honor, state that to him, after I found out, to find out what he would say the next time, and he told me to get in touch with Popik.

Q. And did you? A. And I called up Popik. I told Popik, "Coyne wants me to close this matter now. A survey is too expensive. I want to be sure of my location." I said this after I knew where it was located and, at that time he repeated to me that there was road frontage to that property.

Mr. Clancy: That is all.

The Court: Why didn't you get a survey in the first place?

Witness: (Witness pauses.)

The Court: Why didn't you get a survey in the first place?

Witness: What do mean, your Honor, before we bid?

The Court: Certainly.

Witness: Well, I inquired from—(interrupted.)

The Court: You had a week. Was it because the survey was too expensive?

Witness: Surely. I did not consider it good practice to survey ninety acres of property before you knew you were going to bid in the property, and I had no reason to suspect that it was not so located—I inquired of everyone possible who would have knowledge.

The Court: Have you anything further with this witness?

Recross-examination by Mr. Unger:

Q. This sale was on for July 3rd, wasn't it, and was adjourned for one week at your request? A. That is true.

Q. And then on the 10th of July it was again adjourned at your request? A. That is true.

Q. And then on the 6th of August it was then adjourned to the 13th and the day on which the sale took place. A. I think one adjournment Mr. Coyne put off himself.

Q. At all events, you were granted a number of adjournments? A. Yes, sir.

Q. Is it true that at the same time of the sale no representation as to the location of this property was made by either Mr. Coyne or by Mr. Popik? A. There was not a bit of discussion about location at the sheriff's sale.

Q. Nothing said at the sale. A. No, sir.

Mr. Clancy: I just have one question.

Further redirect-examination by Mr. Clancy;

Q. Will you tell us the reason for the adjournment around the sixth or thirteenth of July? A. I think I had not inspected the property yet and Fatzler had not seen it.

Q. As a matter of fact, you got married and were out of town, weren't you, July 14th, in through there?

The Court: Now, Mr. Clancy, are you blaming the young man for getting married?

Mr. Clancy: No, sir; I was at his wedding.

The Court: That is all.

Witness: I think I was back the 2nd of August.

Mr. Clancy: That is all.

ATILLIO GIACOMELLI, sworn for complainant.

Direct-examination by Mr. Clancy:

Q. Mr. Giacomelli, you owned this property at one time. A. Yes.

Q. When did you buy it? A. I believe it is three years ago.

Q. And you still own it? A. No, sir.

Q. When did you sell it? A. I didn't sell. I gave as collateral to a loan which—(interrupted)

Q. You gave what, the deed? A. A deed which the loan never came through. I never received my money for it.

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Q. When did you sell it? A. I didn't sell. I gave as collateral to a loan which—(interrupted)

Q. You gave what, the deed? A. A deed which the loan never came through. I never received my money for it.

Q. And what did the agreement provide?

Mr. Unger: Now, just a minute. Are you contending that the title is no good due to some unrecorded agreement?

Mr. Clancy: No. I am contending that while it appears that Weiss and Wollman have the legal title, this man has the equitable—is the equitable owner. Will you consent to that?

Mr. Unger: I will let you prove it if you can. I do not see how it makes any difference.

Mr. Clancy: It makes a difference this way—(interrupted)

The Court: Go on. We will see.

Mr. Unger: If you want to prove something in connection with the property—

Mr. Clancy: I want to prove he is a party in interest and that he made a representation.

Mr. Unger: He is a defendant in this suit.

Mr. Clancy: He is a defendant in this suit and he was a defendant in the other suit.

Mr. Unger: I will object then; it is not binding on us.

The Court: I will receive it and find out about it later.

Q. From whom did you get that money, that loan? A. From a party named Silodor and Sirota.

Q. Silodor and Sirota? A. Yes, sir.

Q. I show you an agreement dated the 21st of

November, 1927, between yourself and your wife, Mary Louis Wise and Samuel Wollman, parties of the 2nd part and Silodor and Sirota, party of the third part. A. Yes, sir.

Q. And I ask you if you entered into this agreement. A. Yes, sir; this is the agreement to—(interrupted)

Q. And does that recite that loan that you told us about? A. Yes, sir.

Q. And did you ever get the money on that loan? A. No, sir; I got the checks but they never made it good.

Q. What happened to Silodor and Sirota? A. They went in bankruptcy.

Q. And you never got any consideration? A. No, sir.

Q. For that loan? A. No, sir.

Q. And the transfer of the title and the deed was to be collateral for a loan? A. Yes, sir.

Q. And for this loan of thirty-five hundred dollars? A. Yes.

Q. And you never got that money? A. No, sir.

Q. And was the deed to Weiss and Wollman recorded under this agreement? A. Yes, sir.

Q. Now, do you know the signature of Weiss and Wollman and Silodor and Sirota? A. Well, I wouldn't know, no.

Mr. Unger: I do not deny the agreement was made. My objection is it is immaterial.

Mr. Clancy: I offer it.

(Paper marked Exhibit C-2).

Q. When you owned that property, did you make a bond and mortgage? A. Yes, sir.

Q. You signed the bond? A. I did.

Q. And were you a defendant in the foreclosure suit? A. They served me the paper, yes, sir.

Q. You were the actual owner of that property at that time, were you not? A. No, sir, because there were deeds given to Weiss and Wollman.

Mr. Unger: You say, Mr. Clancy, that he was a party defendant at the foreclosure?

Mr. Clancy: That was my understanding.

Mr. Coyne: He was not.

Q. Well, did you execute a bond or a bond and mortgage or just a mortgage? A. A bond and mortgage.

Q. A bond and mortgage? A. Yes, sir.

Q. And you were not made a defendant in the foreclosure suit? Were you served? A. I think I was served by the Court; I wouldn't swear to it, but I believe I was served.

The Court: These papers show, "Louis Weiss, and Rose E. Weiss, his wife, Samuel Wollman, unmarried, and Fidelity Securities Corporation, defendant."

Mr. Coyne: There was a Supreme Court judgment, an amendment—

The Court: Wait a minute. Amendment to bill?

Mr. Clancy: I assume that this was so, that this man was not a defendant in the foreclosure suit.

Q. Was there any mortgage made by Weiss and Wollman? A. No, sir.

Q. —to the— (interrupted)

The Court: Well, is it admitted that he was not?

Mr. Unger: Well, I say he was not and counsel admits he was not, so—(interrupted)

Mr. Clancy: I assume he was not the defendant.

The Court: Well, do you admit it?

Mr. Clancy: No, he was not a defendant in the foreclosure suit.

The Court: All right, then I won't look through these papers any longer. It is admitted he was not a defendant.

Q. Who made the mortgage accompanying the bond which you signed? A. The mortgage company, the Fidelity Securities, I think it was.

Q. And who made that mortgage to them? A. I made it.

Q. You made it to them? A. Yes, sir.

Q. You made a mortgage to the Fidelity Securities and you were not defendant in the suit? A. (No answer).

Q. You know Mr. Beers? A. I do.

Q. Did you see Mr. Beers before the sheriff's sale? A. I did.

Q. Did he speak to you about this property? A. He did.

Q. Did he ask you where it was? A. He did.

Q. Did you make this sketch? A. I did.

Q. Did you tell him where the property was? A. I did.

Q. Where did you tell him where it was?

Mr. Unger: I object on the ground it is not binding on any of the parties to the suit

except Giacomelli and he is not even now a party.

Mr. Clancy: Giacomelli is defendant in this suit, sir.

Mr. Unger: Well, we did not—not binding on the parties whom I represent, the complainant and the Fidelity Securities Company.

Mr. Clancy: The Fidelity Securities is also a defendant here.

The Court: I will admit it; let him answer it.

Q. Where did you tell him it was? A. I show him a sketch which he could look at the property. He had been trying to make a date to go with him, but I couldn't, so I made a sketch as best my knowledge.

Q. And where did the sketch show that property to be? A. I told him, between the Green Village post office and I showed to him the road and then I told to locate the Allen property, which everybody knows.

Q. The Lum property? A. The Lum property, yes, right next door to the Lum property this property supposed to be because according to the description reads, "Begin at the Lum property."

Q. Did you tell him it was right on the road? A. I didn't mention exactly what it is or how much, because myself didn't know exactly how much it was.

Q. Did you tell him it was rear property? A. I beg your pardon?

The Court: Now, don't lead him. Ask him what he told him.

Q. What else did you tell him about the property? A. I show him that according to the chain of lands it must be a square piece of property. He asked me if I made a survey. I told him I never did and it looks like seventeen—four hundred one side and fourteen hundred the other side, and if he would go down to Lum's house and find out from the Palmer property, everybody will show it to him, because they are well known.

Q. Well, did you tell him anything else about the Lum house except that he might inquire there? A. That is all. I showed the description where the house begins with it—that is, the lots begin with it.

Q. I show you a sketch which is contained in an affidavit made by Mr. Beers, and I ask you if that sketch is the same as the sketch you made. A. Yes, sir. I showed to him this was the Lum house where the X is and right next to it, I told even there was a cow path or a road, inside of here, which is supposed to be Palmer property.

Q. And this is the same as the sketch you made for him? A. Yes, sir.

Mr. Clancy: I offer that part of this case that contains the sketch.

Mr. Unger: What about the affidavits?

Mr. Clancy: I don't think those affidavits were filed.

(One page of paper containing sketch marked Exhibit C-3).

The Court: I see there is an X there. Is that supposed to be the Lum property?

Witness: The Lum house, yes, sir.

The Court: The Lum house is where the X is?

Witness: Yes, sir. And then between here—here there is a cow path.

The Court: Yes.

Witness: Which begins here continues the road and supposed to begin from the Lum house to here.

The Court: Then you mean to say when he got to the Lum house—

Witness: Yes.

The Court: He had to come back?

Witness: No. I told him when he is at the Lum house he will find out where is the Palmer property and not exactly—

The Court: You told him you did not know where it was?

Witness: I told him not exactly, but I told him when he finds this property, he can find out the Palmer property and then easily locate it.

The Court: Yes.

Q. What is that property marked there with the X?

The Court: That is the Lum property.

Q. The big square? A. That is the Lum property.

Q. No; this small one next to it is marked, this little one, the Lum house— A. Yes.

Q. That is the X. All right, that is this one here to the left (indicating)? A. No. This is the Lum house. This is the Lum house.

Q. The big one is the Lum house? A. Yes.

Q. What is the little one? A. I don't know. There is no other house down there; it is all vacant land.

Q. What is the little one on this sketch, then?

A. On the sketch; there is nothing on the sketch. I told that there was the only house that is on the Myersville road.

Q. You said this is the same sketch that you made for Mr. Beers? A. Yes, sir.

Q. All right. What do you say this big thing is with the X in it? A. That is the Lum house.

Q. That is the Lum house? A. Yes, sir.

Q. What is that little square with the X in it? A. There is no other square in the Mr. Beers. Right here the words "Lum house" here.

Q. What is that small square with the X? What does that mean on the sketch? What did that mean on your sketch? A. What he means, I have showed to him that before the property reach to the Lum house there is something like a swimming pool or a duck house, so I told him he will easily recognize the property, had a swimming pool, that is what I told him.

Q. Had you ever been on the property? A. Three or four times.

Q. Three or four times? A. Yes.

Q. Then you knew where it was? A. I know where it is as much as I have to show it to Mr. Beers.

Q. Well, you were on the property, you knew where it was? A. Yes.

Q. And you knew whether it was property on the road or property in the back, didn't you? A. No, sir.

Q. You didn't know that? A. No, sir. If I knew there was no entrance whatsoever, I would have used a machine, a flying machine to get down there. I wouldn't buy thirty-five hundred feet.

Q. Did you believe you always had a road front?

A. I didn't know what frontage I had, but I was under the impression that I had it.

Q. On the road? A. Some frontage, and in fact, the cow path, according to the presentation (representation) to me, the brokers, supposed to be a road, and my property would be in a long frontage of that road, too, but I never went deeper, because I thought the property was worth the money, and I bought it.

Q. You thought then that it was on the main road and on the cow pasture road, too? A. Yes, sir, sure.

Q. There were two roads on it? A. I had some kind of road frontage on the Myersville road, that is my belief, but I didn't misrepresent to nobody, because I never made any survey.

Q. Well, I am not saying or implying that you misrepresented it, but you believed that you were on the Myersville road? A. I believe that I had some road frontage, whether it is not next to the Lum house, to get in, where there is all this strip of land, I don't know.

Q. But you told Mr. Beers, you said you had a road frontage? A. I showed Mr. Beers just the situation. I told him that is the land.

Q. Just what you told me? A. That is what I said now and I told him.

Mr. Clansy: That is all.

Cross-examination by Mr. Unger:

Q. You owned the property for three or four years? A. Yes, sir; three years, I believe.

Q. You paid thirty-nine hundred dollars for it? A. Something like that, yes.

Q. Yes. And you looked at it before you bought it? A. Yes.

Q. And you didn't know how many feet you had on the road? A. No, sir.

Q. And you didn't know if you had any feet on the road? A. Well, not exactly, no.

Q. You were not sure just where it was? A. No. They just show me that was the land.

Q. And when did you get this sketch?

Mr. Unger: Have you got that, Mr. Clancy?

Mr. Clancy: The sketch you have.

Q. And when you made this sketch here—did you make it yourself? A. I did. I did, in order to locate the property.

Q. Yes. You located this square here? A. Yes, sir.

Q. Intending that that should represent the Lum house? A. That is right.

Q. Not the lot? A. No, sir.

Q. The land, that one hundred acres shown in back of it? A. I showed to him that beginning from Lum's house that was our land.

Q. And how far does the Lum property go? A. I don't know.

Q. Five or six hundred feet? A. I can't tell you.

Q. Well, anyway, you intended to convey to him the information that the one hundred acres or so—(interrupted) A. Begins from the Lum house.

Q. The Lum house? A. Lum house.

Q. In back? A. Well, I didn't mention the front or back.

Q. You didn't tell him on the road? A. I told him there were a cow path on this road here and

once he located the Lum house then easily to locate the Palmer property.

Q. I am right in saying that you did not tell him and that you did not intend the piece marked "X" on this map shown on the road was the one hundred acres? A. No, sir.

Q. That represents the house? A. That represents Lum property.

Q. Not the land? A. Not the land.

The Court: He has said that several times.

CHARLES WELDON sworn for complainant.

Direct-examination by Mr. Clancy:

Q. Mr. Weldon, are you related to some of the predecessors in title in this property? A. I am.

Q. Are you familiar with the property? A. More or less.

Q. Did you go up there with Giacomelli when he bought it? A. I did.

Q. Did you sell the property to Giacomelli? A. I did.

Q. Did he know where the property was at that time? A. I think so.

Q. Did you show him any property on the road? A. No.

Q. Did you tell him that it was rear land? A. Yes. Inside land, I called it.

Q. Inside land? A. Inside.

Mr. Clancy: That is all.

Cross-examination by Mr. Unger:

Q. And you knew it was inside land? A. I did.

Q. And it has always been inside land? A. As far as I knew.

Q. The right of way leading into it? A. I had always understood so.

Mr. Unger: That is all.

Redirect-examination by Mr. Clancy:

Q. You never examined, did you, Mr. Weldon, the record title in the Register's or County Clerk's office in Morristown to ascertain whether there was a right of way? A. No.

Mr. Clancy: That is all.

Recross-examination by Mr. Unger:

Q. From whom did you understand that? A. I understood it from my mother.

Q. And she was there for how many years, owned it for how many years? A. I think since in the nineties.

Q. Down to when?

The Court: 1905.

A. 1905.

Further Redirect-examination by Mr. Clancy:

Q. Was the rear land ever occupied?

The Court: Now, gentlemen, if you want to examine this witness, you must examine him in the proper way on the witness stand, and I wish you would try to finish your examination all at one time.

Mr. Clancy: I think it was redirect, sir, and then recross.

The Court: Well, re-re-re-redirect.

Mr. Clancy: Yes, sir.

The Court: Well, now, make it all direct hereafter.

Q. Was that inside land, as you call it, ever occupied? A. Not to my knowledge.

Q. What is the character of that inside land? A. Some of it is low and—swampy—and some of it has a wood growth, if I remember it correctly.

LOUIS WEISS, sworn for complainant.

Direct-examination by Mr. Clancy:

Q. Are you the Louis Weiss mentioned in this agreement marked Exhibit C-2 in evidence?

Mr. Unger: Well, I have admitted the executor of the agreement.

A. Yes, I am.

Q. Did you take a deed from that property from Giacomelli and his wife? A. I did.

Q. You with your partner, Samuel Wollman? A. Yes, sir.

Q. Was there any consideration ever paid to Giacomelli for that property by Silodor and Sirota? A. Well, supposed to have been a loan made by Silodor and Sirota to Giacomelli at that time, at the time the deed was given.

Q. And what happened to that loan? What happened to Silodor and Sirota? A. Well, part of the money that Silodor and Sirota gave to Giacomelli or a check for part of the money, I understand,

was never made good. Silodor and Sirota afterwards went bankrupt.

Mr. Unger: I do not see how this is binding on us. This is all after our mortgage.

The Court: No, it is not.

Mr. Clancy: It is before your foreclosure.

Mr. Unger: We derived our right under our mortgage.

Mr. Clancy: That is all.

FRED FATZLER, sworn for complainant.

Direct-examination by Mr. Clancy:

Q. Mr. Fatzler, you were a defendant in the foreclosure suit, were you not? A. I was.

Mr. Clancy: These questions are leading, because they are all admitted.

Q. And you are a defendant because you were the holder and owner of a judgment which you recovered against Giacomelli? A. I was.

Q. Did you discuss the purchase of this property at the sheriff's sale? A. Not at all, until after the sale.

Q. Did you take it up with your counsel before the sale? A. I had.

Q. And upon what did you act when you bid at the sale? A. Upon what did I act?

Q. Did you act in bidding at the sale? A. Upon my counsel's advice.

Q. And did he give you certain information about the property before you went up there? A. He did.

Q. And what happened when you got up to the sheriff's office? A. Well, we were possibly three quarters of an hour late, due to a little trouble with my car going up there, we got there probably quarter to three, and we met Mr. Pipik and I don't remember the other name—Mr. Coyne, and the sheriff in the corridor of the Court House. We immediately started the sale. Mr. Popik and Mr. Coyne, Mr. Beers had gotten together as to the amount of money which was required to buy it. Mr. Beers came and told me that the price was twenty-three hundred dollars. I bid the twenty-three hundred. After the property was sold I said, "Well, now, let us go and look at the property." Before we had gone out, I said, "Well, is there any maps issued, where the property is?" We had gone into the next room and looked at some atlases and there we only found county atlases, we could not find any descriptions of any property in these atlases. There was a name there the "Great Swamp." I asked if this property happened to be in the Great Swamp and I was told it was not. From there we left—well, before that, prior to that Mr. Popik or Mr. Coyne asked me if I cared to have any partners, that I had made a good buy. I said, no, that I didn't think I did. After that we had gone out to the property.

Q. Did you go down and inspect the piece of property after the sale? A. Well, for what I was told the property was, yes.

Q. Well, you inspected a piece of property? A. A piece of property.

Q. And what were you told about the property?

The Court: Well, now—

Mr. Unger: I object to what he was told.

Q. Was it the same day of the sale? A. The same day of the sale, Mr. Beers and myself drove down. We first located Green Village, and, as I understood it, it was about two miles off of Green Village on the Myersville road. We drove down there and this point was an old farm house which had a pathway or a driveway, I would call it, leading back to the house, and the property was adjoining this driveway, and it was explained to me by Mr. Beers.

The Court: Now, that was after the sale.

Witness: That was after the sale. He had told me that the property was about fourteen hundred feet on the roadway.

Mr. Unger: Who?

Witness: Mr. Beers.

Q. Did you have any information about the location and character of the property before the sale? A. I did, positively, getting it from Mr. Beers.

Q. Was the property that you saw after the sale the same property he described to you before the sale or not? A. As I understood it, yes.

Q. Did he tell you what inquiry he had made? A. He told me that he had gone up there and made inquiries around there to find out as near as he could the location of the property.

Q. Did he tell you the names of any other persons from whom he inquired about this property? A. I can't say that he did.

Q. And when you made your bid, upon what were you bidding? A. Upon approximately ninety or ninety-six acres, to be accurate, as I was told, of

land on Myersville road, about two miles outside of Green Village.

Q. And how much was your bid, approximately? A. Approximately twenty-three hundred dollars.

Q. And what was the subject to? A. Subject to taxes of 1926-1927, part of 1928; also a mortgage of a thousand dollars.

Q. And how much was your judgment? A. Approximately three thousand dollars, I believe.

Cross-examination by Mr. Unger:

Q. You were interested in buying this in order to protect your judgment? A. I was.

Q. And that made you a little more anxious to get it than you otherwise would have been? A. I wouldn't have been anxious, I wouldn't have wanted the property if it wasn't for protecting my judgment.

Q. Did you see Giacomelli at any time before the sale? A. In regard to this property?

Q. Yes. A. I did not.

Q. You didn't know him until after the sale? A. Oh, yes; I did know him; I did some other business with him.

Q. Had you discussed this property with him at any time before the sale? A. I had not.

Q. And you had not seen the sketch then before the sale? A. I did not.

Q. So you knew nothing of the existence of this sketch at the time you bid on the property? A. I did not.

Q. And at the sale there was no mention of any location by either Mr. Popik or Mr. Coyne? A. Until after the sale.

Q. I say, at the time, any time before the sale. A. There was not.

Q. There was no mention and you knew, at that time, that the property was in the Great Swamp? A. In the Great—no, I didn't know. That is just what I asked after the sale was over; I asked if it was in the Great Swamp and I was told it was not.

Q. And so— A. That was after the sale.

Q. The same day of the sale? A. The same day of the sale.

Q. Who did you ask? A. Both Mr. Popik and Mr. Coyne.

Q. And you had not asked them before that time? A. How is that?

Q. You had not asked them before that time? A. I had not, no.

Q. You were interested in getting some time for the payment of the first mortgage? A. I what?

Q. Were interested in getting some time for the payment of the first mortgage. A. Yes.

Q. And that was discussed at the sale? A. No, that was not discussed at the sale, outside of Mr. Beers telling me before the sale that I was supposed to get some months to pay the first mortgage, and, at the last minute, up at the sale Mr. Coyne or Mr. Popik mentioned to Mr. Beers that his client could not afford to let the first mortgage on there and it ought to be obtained immediately and we finally agreed to pay it within one month.

Q. That—(interrupted) A. (Continuing) But before that I always had the impression that I had three or four months to pay the mortgage.

Q. That was all before the sale took place? A. Yes, sir.

Q. Now, at this time did you have Giacomelli

as a prospective purchaser of the property? A. At this time, no.

Q. Did you get him afterwards? A. Through Mr. Beers telling me that Mr. Giacomelli would buy the property back.

Q. You intended to sell it to him? A. Well, whether he—or if the property was worth it, I would have kept it.

Q. Could you—whether it was worth it or not, you had Mr. Giacomelli in tow as a prospective purchaser? A. Through Mr. Beers.

Q. Yes. I don't care who it was through. He was trying to finance the purchase? A. I think he was.

Q. And he fell down on it, was unable to do it? A. Well, the deal was taken through Mr. Beers and what transpired through Mr. Beers and counsel—

Q. You have been in touch with Mr. Beers, haven't you? A. No, I really wasn't. I was letting Mr. Beers take care of my interest.

Q. Were you leaving the Giacomelli interest to a lawyer? A. Yes, sir.

Q. And did he inform you that—(interrupted) A. All I understood through Mr. Beers was that Mr. Giacomelli was interested in buying the property and that I should not sell it to anybody else but him, but what took place between Mr. Beers and Mr. Giacomelli I don't know.

Q. Giacomelli was going to buy it for three thousand dollars? A. I don't know the price. I was leaving that to Mr. Beers.

Q. You didn't know anything about that and didn't you know that Giacomelli was going to get a mortgage on the property and going to finance

it that way? A. Through Mr. Beers' office, what was explained to me, yes.

Q. Then you heard through Mr. Beers that the transaction with Giacomelli had fallen through. A. I did, yes, sir.

Q. And it was then that you decided you didn't want the property? A. Yes, sir.

Q. Had you ever—(interrupted) A. If the property was on the road I would still say the property was all right and that was when I first bought the property.

Q. When did you first learn it was not on the road? A. Some time—when I delivered the check to pay the full amount of the twenty three hundred dollars, Mr. Beers had explained to me—interrupted)

Q. When was that? A. That they were having trouble with closing the title.

Q. When was that? A. I think approximately about the end of November, if I remember right.

Q. And you then learned it was not on the road? A. And I said to Mr. Beers—well, he didn't tell me that it was not on the road at that time; he was saying they were having trouble with the closing of the title and I said that if there was any trouble he should hold it up, he should not give the check out, and, finally, on the tenth of December he told me that there was no road frontage and I told him I didn't want the property at any price.

Q. Did you ever have any talk with Mr. Coyne during the course of which he informed you that it was on the road? A. I had never spoken to Mr. Coyne or Mr. Popik prior or after the sale.

Q. And at the sale neither one of them mention-

ed the fact that it was on the road? A. Neither one of them had mentioned that to me, no.

Redirect-examination by Mr. Clancy:

Q. I show you a check, your check, dated November 28, 1928, to the order of William W. Beach, sheriff for the sum of $2107.06, what did that represent? A. That represented the balance due on the purchase price of the property.

Q. And does that help to fix in your mind the time about which you heard that this had no road frontage? A. No; I didn't know that it had no road frontage until the tenth—about the tenth of December, but at that time I learned that there was some trouble with the title.

Q. And was that when you told him to hold up the check? A. That was when I told Mr. Beers to hold it up.

Mr. Clancy: I offer the check.

Recross-examination by Mr. Unger:

Q. And, at that time, you had Giacomelli as a purchaser for the property? A. At that time I didn't—Mr. Beers had Giacomelli as a purchaser for the property.

Q. Well, that is the same thing. A. That is not the same thing. Do not say that is the same thing.

Q. But he represented you, didn't he—Mr. Beers? A. Mr. Beers represented me, yes.

Q. And you bought upon his report? A. Upon his report.

Q. You are not trying to hide behind him, are

you? A. I am not trying to hide behind anybody.

Q. Then he was dealing with Giacomelli for you. A. Possibly he was.

Q. And with your knowledge and consent. A. With my knowledge and consent that he could have sold it to Mr. Giacomelli or anybody else.

Q. At a profit? A. Not mentioning any price. I was leaving it to Mr. Beers.

Q. What was the price Giacomelli was buying at? A. I don't know.

Q. It was over three thousand dollars, wasn't it? A. I don't know.

(Check marked Exhibit C-4.)

Mr. Unger: Oh, it is an unpaid check.

Mr. Clancy: Yes; it is an unpaid check.

The Court: Keep it, keep it, don't give it to me. Anything further?

Mr. Clancy: That is all.

Mr. Unger: Rest?

Mr. Clancy: That is our case.

Noon Recess.

DAVID N. POPIK, sworn for defendant.

Direct-examination by Mr. Unger:

Q. You are a member of the bar, Mr. Popik? A. Yes.

Q. And you represent the Fidelity Securities Investment Company? A. The Fidelity Securities Corporation, I do.

Q. And that is the corporation which held a second mortgage on this property? A. I believe there was a third mortgage?

Q. Yes. A third mortgage. And that was a mortgage given by Giacomelli? A. Yes.

Q. And covered by the decree under which the property was sold? A. That is right.

Q. Now, did you attend the sale? A. I did.

Q. Before you attended the sale, did you receive any inquiries from anyone regarding the location or situation of this land? A. Before the sale?

Q. Yes. A. I did not.

Q. Did Mr. Fatzler or his solicitor Mr. Beers, ask any information from you about where it was located? A. They did not.

Q. Either in writing or otherwise? A. No.

Q. When did you first meet Mr. Fatzler? A. At the sheriff's sale in Morristown.

Q. Will you tell us, first, who was there? A. Mr. Coyne, Mr. Beers, Mr. Fatzler and myself.

Q. Now, did Mr. Fatzler get there at the same time as you did? A. No. Mr. Coyne and I started out together from Newark and we waited for Mr. Fatzler for about an hour.

Q. At whose request? A. Well, I don't know at whose request. I know I went there with Mr. Coyne and when we didn't find Mr. Beers there, I waited around a few minutes and then I suggested to Mr. Coyne that he better go ahead himself, because I didn't think that the other people would be represented.

Q. Yes? A. So Mr. Coyne said, "Well, I promised Walter Beers—" Oh, no. He said, "I know that Walter Beers is coming here and I don't want to hold the sale without giving him an opportunity to bid."

Q. Did you want to go ahead? A. I did, yes.

Q. And Mr. Coyne waited until they came? A. Until they came.

Q. And Mr. Beers came in after with his client, Mr. Fatzler? A. Yes.

Q. Now, when they came was there anything said by you or by anybody else in your presence, regarding the location of that property? A. There was not.

Q. Did you talk to Mr. Beers over the telephone at any time prior to that time, giving him any information at all with respect to the location of this property? A. Not prior to the sale.

Q. Did you know where it was located? A. I did not.

Q. How did you happen to have a mortgage on it? A. Well, this man, Giacomelli, was my client for some years. I had loaned him money on notes even in greater amount, and he came to me and told me that he was buying this property and he had to have thirteen hundred dollars, because he had delayed the closing for some time and he could not go through with it. He convinced me that we would not be going wrong by taking that mortgage and I took the mortgage for my company without seeing the land.

Q. Had you ever been up on the property at all? A. No.

Q. Never seen it? A. Never seen it.

Q. Did you tell Mr. Beers or your client or anybody else, before the sale, that it was located on the Myersville road? A. Never heard of that road until after the suit was started.

Q. Now, did you refer Mr. Beers to Mr. Giacomelli for the purpose of getting information where the property was located? A. I did, but that was after the sale.

Q. And he has spoken of a telephone to you in

which you referred him to Giacomelli, is that the occasion? A. That is true, yes.

The Court: Was that before or after the sale?

Witness: After the sale.

Q. I want you to be careful as to whether or not you ever talked with Mr. Beers or his client about this property in any way, prior to the sale. A. (Witness nods no.)

Q. Did not? A. Did not.

Q. And Mr. Beers says that at the sale you and Mr. Coyne asked him to go in partnership with you on the property. What have you to say about that? A. Well, after he bought the property we did ask him—I think I asked him whether he would—whether Fatzler wanted any partners in it, because I had discussed with Mr. Coyne the advisability of purchasing that property, although we had never seen it, because, as I told Mr. Coyne at the time that approximately one hundred acres located in New Jersey particularly that I had heard that the Westinghouse bought up some land there, might be worth a great deal of money perhaps in ten years from today, and I was willing if Henry Coyne was willing to join me—that is, if Fatzler didn't show up to buy, I would have bought it if Coyne had joined me.

Q. Your only interest was to protect your second mortgage? A. That is all.

Q. After the sale did Mr. Beers or Mr. Fatzler communicate with you about any defects in the title? A. The only communication that I received from Mr. Beers was a telephone call a few days after the sale, in which conversation he tried, he

asked me to loan him an abstract of title. I told him at the time that I had an abstract but I would advise him to make a search of his own accord, because I recalled that when I had the title examined by the Morris County Abstract Company they had omitted a deed and I had considerable trouble and I didn't want him to have the same trouble, and I therefore advised him he better make his own search; I didn't know how complete my own search was.

Q. When did you first learn from him or anybody else that it was claimed that the location had been misrepresented by you or anybody else? A. Well, the day that he served the papers on me, he came into my office and he said he wanted to serve some papers on me and, when I looked at the date, I asked him what the trouble was and he told me that the property did not have any road frontage and things were misrepresented, and I said in—earlier in my office he said that there was misrepresentation here and I said, "Who misrepresented it to you?" Well, he didn't answer that, he simply started walking towards the door and he never gave me any definite reply except he first said there was misrepresentation.

Q. Those were papers in the present case and prior to that time you had not heard any complaint? A. I didn't hear any complaint, but I had a conversation.

Q. When the property was being sold, at the time of the sale, do you know whether Mr. Beers and Mr. Fatzler were making an examination of any papers there? A. In the sheriff's office of Morris County? Well, when they first came there they discussed with Mr. Coyne as to whether his client would permit the mortgage to remain, and

when I say "they" I mean Mr. Beers, because Mr. Fatzler didn't do very much talking; Mr. Beers consulted Mr. Coyne and myself, and they wanted to know if our mortgages would be permitted to remain, and we told them, no, that our clients wanted the money. Then it is my recollection that there was a map under a glass top on the table or a desk in the sheriff's office and that Mr. Beers and Mr. Fatzler were bending over that map and were looking for something. I suppose they were trying to locate the land.

Q. At the time of the sale was there any statement made by the sheriff or by the solicitor that the property was located on the Myersville road or any other road? A. No, sir.

Mr. Unger: That is all.

Cross-examination by Mr. Clancy:

Q. Mr. Popik, did you know that Mr. Beers was coming up there with Mr. Fatzler, before Mr. Coyne told you? A. I didn't know positively whether he would be there or not. I knew he had a judgment against Giacomelli, that is all.

Q. And you were interested for your clients because they held the mortgage? A. That is right.

Q. And you were going to buy in, if need be, to protect your mortgage, your client's mortgage. A. That is right.

Q. And didn't you know that he was going to be up there, Mr. Beers or Mr. Fatzler or both to protect their judgment? A. I didn't know positively, no. I had no knowledge of that, no information on it.

Q. Did you represent—(interrupted) A. (Con-

tinuing.) Except that I knew that Mr. Beers was following Giacomelli—I thought there was a foreclosure or wherever Giacomelli got into it, and he had some difficulties in the past year or two and I knew there was an old judgment and that Beers followed it up pretty closely.

Q. And you first knew of that in the Court House in Morristown when the time had passed for the sale? A. No, I wouldn't say that, because I knew from Mr. Coyne; when I met Henry Coyne and drove him up to the Court House, he, at that time, told me on the way up that he expected Walter Beers and when he got to the sheriff's office Mr. Coyne began waiting there and when a half hour or maybe twenty minutes or a half hour went by, I told him that I didn't think they would be here.

Q. And notwithstanding that you waited? A. Well, Mr. Coyne insisted on waiting. Yes, we did wait.

Q. Did you represent Giacomelli when you bought this property? A. Yes.

Q. You got a search on it from the Morris County Title Company? A. Yes.

Q. And you represented a mortgagee in that property did you not? A. Yes.

Q. Did you get another search—Oh, and you are interested to a slight degree, at least, in the mortgage company? A. Yes.

Q. And that company is one of the parties to this suit? A. Yes.

Q. Did you use the abstract that you had from the Morris County Title Company to pass upon the Finance Company's loan or did you make a new one? A. I didn't make a new search, no; I

believe that I used the old one. I don't see why I should have made two searches, because we gave him the loan simultaneously with the closing of title with Palmer, as far as my recollection goes.

Q. And is that the search you gave Mr. Beers? A. That is the only search I had used, yes; that is the search I gave Mr. Beers. I don't recall whether I ever gave him one. I knew he asked for one. If he got a search from me that is the one.

Q. Didn't you say—I think this is what you testified to—didn't you say that you would rather he wrote one of his own? A. I told him that and that is why I now say I don't really know whether he sent over for my abstract.

Q. Do you know what page there was or deed there was missing on your search? A. No, I do not, except that it had something to do with a lawyer in Jersey City, who cleared the matter up for me. I don't remember just what the question was in the title and I had my local searcher here check the abstract made by the Morris County Abstract Company and he told me that there was an abstract of a deed missing, and, when I got in touch with the Morris County Title Company, they supplied that missing link and I thought that the title was all right and passed it.

Q. So you had a complete chain at that time? A. I guess I did, yes.

Q. Did you plot it off? A. I didn't, no.

Q. Did you know that it was real land? A. I didn't know anything about that land. I never made any inquiries. I thought that Giacomelli knew the land.

Q. You were making a search for clients of yours. A. You mean, for the mortgage company?

Q. Yes. A. I did not rely on the search, because, as I stated before, I would have given Mr. Giacomelli the money without a mortgage.

Q. Well, there was a company which you were representing that had a right to be assured as the security of their mortgage, did they not? A. They were satisfied.

Q. You took it up with them. A. I did not, no. I didn't have to.

Q. That was entirely up to you? A. That is right.

Q. And did you ascertain from an examination of the abstract of title that the property was inside or rear land property? A. I did not, no.

Q. Did Giacomelli ever tell you it was? A. I don't think I ever took up that question with him.

Q. You passed on the title for the purpose of a loan to your client without knowing the character, and this was a third mortgage you were representing. A. That is right.

Q. Without knowing whether the property was inside or outside property, whether or not it had road frontage, a right of ingress or egress, and you passed on that title as a loan to your company? A. Exactly.

Q. Now, you went up there to protect your client's mortgage. A. That is right.

Q. And you were willing to buy. A. That is right.

Q. If Fatzler had not bought, you would have bought? A. Yes.

Q. Without knowing where the property was? A. Yes, sir.

Q. Without knowing that it was inside property? A. Yes, sir.

Q. And do you know anything about the values of property up there? A. I did not, only that I judged ninety or one hundred acres to be worth three thousand or whatever the amount came to.

Q. And you were willing to purchase it without knowing the character of the property except that there were ninety some acres there? A. Except that Giacomelli was a real estate man and he was not blind when he bought it, I figured.

Q. Then you would rely on that, the mere fact that Giacomelli bought it and owned it for a while? A. Yes, sir.

Q. And for the purpose of your bid the same amount would necessarily have to be raised, would it not—twenty three hundred dollars? A. Well, now, do you mean by that whether the twenty three hundred would cover my mortgage?

Q. Yes. A. Yes, I believe so.

Q. So that your bid would have been about the same? A. Well, I don't know whether my bid would have been twenty three hundred. I usually do not bid that way; I try to save sheriff's fees. I might have bid a couple of hundred dollars more; if Fatzler had not bid at all; probably would have bid one or two hundred dollars more than Mr. Coyne's mortgage and I could have the property that way.

Q. And, after Mr. Fatzler bought the property you or Mr. Coyne or either one or the other in Fatzler's presence, asked Fatzler if he would like to have a partner? A. That is right.

Q. You still thought, at that time, that you would be willing to go in either on a basis of one half or one third, to the extent of twenty three hundred dollars, plus the first mortgage, plus the taxes? A. Yes.

Q. For this property? A. Yes, sir; that is right.

Q. And you say you would have done that individually, I assume? A. Not individually, no. I didn't say that.

Q. Didn't you intend to buy it in for yourself? A. For the corporation.

Q. Well, if you asked Fatzler if he wanted a partner in it, didn't you mean yourself? A. Myself and Mr. Coyne, yes.

Q. Yes, and you have had a great deal of experience with real estate, have you not, Mr. Popik? A. A little.

Q. Well, a great deal. A. I wouldn't say—

Q. Isn't that so? A. I wouldn't say that. I have passed a great many titles, but I haven't had such a wide experience with real estate.

Q. How many years have you been practicing, Mr. Popik? A. Ten years.

Q. And have you had a great deal of experience in passing titles, at least, without looking at the property, you were willing to put up either a half of twenty three hundred or a third of twenty three hundred to buy property at a sheriff's sale that you had never seen? A. Because I learned that the Westinghouse had bought all the surrounding land and I thought that was a good thing to buy this property.

Q. Well, now, didn't you make that offer to Fatzler after the sale so that Fatzler would think he had a good buy and naturally feel if you wanted to go in he better keep it? A. Why should I make that remark.

Q. Well, now, did you? A. No, I did not.

Q. You did not. Did Mr. Beers ask you before the sheriff's sale, where that property was situat-

ed? A. I have no recollection of ever having had such a conversation with Mr. Beers.

Q. Would you say you did not? A. To the best of my knowledge I did not. I have spoken to Mr. Beers so many times in reference to Giacomelli's troubles.

Q. Didn't you—(interrupted). A. (Continuing.) I know I have had at least a dozen telephone calls I am quite certain, very certain.

Q. I appreciate that, Mr. Popik, but it is quite important at this time that you fix the time with respect to those conversations. Didn't you suggest to Mr. Beers, when he called you up, trying to find out where this property was, that he get in touch with Giacomelli? A. That was after the sale? .

Q. After the sale? A. (Witness nods yes).

Q. Didn't you, in an affidavit made in this cause, say, "It is true that Mr. Beers called me over the telephone and asked me for the location of the property." A. I said that, yes.

Q. Do you remember saying that? A. Yes, sir.

Q. Further, "I told him I was under the impression that it contained about ninety acres. I told him to communicate with Mr. Giacomelli and he would probably take him upon the land." Did you say that? A. That is correct.

Q. And you say that was after the sale? A. I believe that was after the sale, yes.

Q. Now, was it or wasn't it, Mr. Popik? A. I believe that it was after the sale.

Q. After the sale. You believe it was after the sale. A. I believe it was after the sale, yes—because— (interrupted).

Q. And, notwithstanding the fact that Mr. Beers and Mr. Fatzler had been up at the sheriff's sale

and made an examination, as you say, of a map, it was still after that time when they knew, according to you from the record, where it was? It was after that time that he again called you up and asked you where this property was? A. I don't know whether they knew, because on Mr. Beers' testimony the search was not in until a long time after the sale. I don't know whether he knew when he had that conversation with me whether that property was on the Myersville road, or not.

Q. Well, you knew, or you testified, rather, that he made an examination of a map. A. In the sheriff's office.

Q. Yes. And that you didn't tell him on the day of the sheriff's sale where this property was. A. I did not tell him, that is right.

Q. That Mr. Beers and Mr. Fatzler looked at the map? A. That is right.

Q. And it was in the county in which that property was situated? A. If the property is—yes, in Morris County, that is right.

Q. And, notwithstanding the fact that they were present personally at a sale, bid on a piece of property, looked at a map to find out where it was, you still say that it was after the sale that he called you up and asked you the location of this property? A. Yes, sir.

Q. No doubt about that in your mind, is there? A. No, sir.

Q. How long after the sale was that? A. Oh, perhaps a week.

Q. And did you send Giacomelli to him a week after the sale? A. I don't think I sent Giacomelli there, no. I told him to communicate with Giacomelli.

Q. You told him to commuicate with Giacomelli? A. I believe that is what I told him.

Q. At that time when you told him that was about a week after the sale? A. Perhaps it was two weeks, I don't know, Mr. Clancy.

Q. And did Giacomelli ever report to you that he had gone to Mr. Beer's office? A. Well, he did, yes, after he made an affidavit in Mr. Beers' office, after I had been served with the papers, in the affidavit of the Fidelity Securities Corporation.

Q. Did you ever tell Mr. Beers that this property was on the Myersville road? A. I did not, sir.

Q. Did you ever tell him it was on a road? A. No, sir. Couldn't very well do that from the description, could I?

The Court: No, no.

Q. No. I am asking you the question. A. I am sorry. I beg your pardon.

Q. Did Mr. Beers call you up after the sale and ask if the property was on the road? A. Mr. Beers called me after the sale and asked me—I recall now. It was when he asked me for the abstract of title. That is the time I had the conversation with him, and he asked me how to get to that property and I told him I didn't know a thing about it, that he better communicate with Giacomelli, and he asked me "Did you ever see it?" And I said "No."

Q. Well, Giacomelli—you heard Giacomelli testify here this morning? A. I heard him, yes.

Q. Didn't Giacomelli testify that he went over there before the sale to show Mr. Beers the property so he could go up on Sunday and see it before he bought it or go up before he bought it? A. I can't help what Mr. Giacomelli testified. I am only testifying to what I know.

Q. That does not change your testimony? A. It does not, no, sir.

Q. That conversation, I believe you said on your direct examination, Mr. Popik, was a few days after the sale—he asked you about the abstract? A. It might have been a week, it might have been ten days or two weeks.

Q. Yes. It was a short time? A. Short time after, I believe, yes.

Q. And you said that was the only communication you had with Mr. Beers or Mr. Fatzler about this property? A. I didn't say that, sir. I said that I had had another conversation with him after that.

Q. When was the next conversation you had with him? A. About three weeks.

The Court: You see. This is all after the sale, Mr. Clancy.

Mr. Clancy: Yes, sir. And if I can develop what I have in mind, I think I can hook it up.

The Court: All right.

Mr. Clancy: And I am laying the foundation for my rebuttal.

Q. Did you have any other conversation with him after this two or three week conversation? A. With whom?

Q. With Mr. Beers. A. Yes, sir.

Q. When was that? A. That was, perhaps, two or three weeks before I was served with the complaint.

Q. And Mr. Beers asked you at that time where the property was? A. Mr. Beers did not ask me anything. I approached him. I met Mr. Beers

in front of the Fireman's Insurance Building at the corner of Broad and Market Street, and as I walked along he was coming in my direction. I stopped him for a moment, and I said, "Say, Beers when are you taking title?" He said—well, he says, "Fatzler is financially strapped at this time," and he would take title at some future date.

Q. The conversation within a few days or two or three weeks after the sale—the conversation that you had with him around the Fireman's Building, were they the only two conversations or communications that you had with him after the sale with respect to this property? A. I believe that those were the only two times that I discussed with Mr. Beers this property, yes.

Q. Did he telephone you some time in December and ask you whether or not this property was on the Myersville road or whether it was on any road? A. I don't recall that, Mr. Clancy.

Q. Do you recall the one shortly after the sale in July and August? You do not recall any in December? A. When I say "shortly after the sale" Mr. Clancy, that might have been two weeks, because as soon as we got through with the sale I dismissed that entire thing from my mind. It might have been two weeks or three weeks.

Q. I am not asking two weeks or three weeks. I mean on that occasion. A. I don't recall of any other occasion.

Q. That occasion and the occasion in front of the Fireman's Building are the only conversations you had with him? A. Those are the only two occasions I can recall at this time.

Q. Are you certain that they are? A. As certain as any man can be, sir.

Q. Did Giacomelli ever tell you that he had been

on the property? A. Well, at the time that he bought it, I believe that there was some discussion. I asked him what kind of property, asked him what he was buying and he told me a large plot containing a good many acres, and it looked good to him. I never asked him point blank whether he was on the property, because I assumed that when a man bought real estate that he saw it.

Q. Well, now, when he told you that it was a large piece—a number of acres, a large piece of property, that he saw it, did you ask him what kind of property it was? A. I didn't say that he said that he saw it.

Q. Didn't you ask him any more? A. Oh, I don't recall that, because he had purchased that property and was unable to close the title on account of having some other financial transactions; he needed some money and he came in to me specifically because the vendor refused to wait any longer. As a matter of fact, I recall now that Ben Newman represented the vendor and started to make a fuss about it and they came in one day.

Mr. Clancy: I think that is immaterial, and move to have it stricken out.

The Court: It seems to me the whole thing is immaterial.

Q. Did you give Giacomelli any report after the abstract of title from the examination came back to you as to the location of the property, that it was inside land, or anything else? A. I did not, no, sir.

Mr. Clancy: That is all.

The Court: That is all.

Now, I don't understand, Mr. Clancy, what your theory is about developing what happened after the sale. As I understand it, your bill is that there was fraud and mistake which persuaded this man to buy this property, but what difference does it make what happened after the sale?

Mr. Clancy: What happened after the sale has this to do with it; if it appears that Mr. Popik or Mr. Coyne knew or said something after the sale which would indicate that they knew of the time of the sale and for several years prior thereto, the character of this property and if they stood by and let somebody else examine a map and say, "Is it in the swamp," and he says "No," having in mind that Giacomelli told him it was on the road, to go up there and—(interrupted)

The Court: Giacomelli didn't tell him that.

Mr. Clancy: Giacomelli told Mr. Beers that; and he drew a map of it and the map is in evidence.

The Court: No, Giacomelli never said any such thing. He said, "Go up there and the Lum house is where this X is, and I am not sure where the property is and you can ask the people up there where it is." That is what Giacomelli said.

Mr. Clancy: He said that, yes, and he said, too, that this is the sketch that he drew and that the thing runs along a cow path and it is on that road there and this road here, he didn't say how much was on the road. I said, "Is that the same day you are telling us now that you told Mr. Beers?" and he said, "Yes." There was a man led to be-

lieve from inquiry made by Mr. Beers that Mr. Coyne—(interrupted).

The Court: Don't let us sum up now. If you have any further testimony, I will be glad to hear it, but, as I say, I can't see why the happenings after the sale have anything to do with it.

Have you any more witnesses?

Mr. Unger: Yes. Mr. Coyne.

I. HENRY COYNE, sworn for defendant.

Direct-examination by Mr. Unger:

Q. Mr. Coyne, you are a member of the bar? A. Yes, sir.

Q. You represented the complainant in the suit? A. I did.

Q. You are the solicitor who was foreclosing the mortgage which resulted in the sale? A. Yes, sir.

Q. And did you attend the sale? A. I did.

Q. Before that time did you talk to Mr. Beers about this property? A. Yes.

Q. What did you say to him? A. I think he called me up about a week or so before the final adjourned date, and he asked me where this property was.

Q. What did you tell him? A. I told him I had never seen the property and I couldn't tell him where it was and that I didn't think if my client ever saw the property, but suggested that he get in touch with Dave Popik who might be able to give him some information and that was the end of our conversation.

Q. Did you give him any information beyond

that at any time before the sale? A. No, sir; I knew nothing to tell him.

Q. Had you ever, in fact, ever seen the property? A. I have not seen it yet. I have no idea where it is yet.

Q. At the time of the sale did you make any statements or representations or any description as to where the property was located, other than having the sheriff read the description? A. No, sir. And he will not say so, either.

Q. Was there any statement made at the sale, at any time before the sale, that the property was located on the Myersville road or any road? A. Any statement by whom?

Q. By anybody there, by either you or Mr. Popik? A. No, sir.

Q. When did you— A. There were no questions asked at the time of the sale, outside of the request for time for paying of the first mortgage which we also controlled.

Q. When did you first hear it complained that the location of the property had been misrepresented by anybody in the case? When did you first hear about that? A. When Walter Beers came in my office, I think, with some papers.

Q. Papers in this suit? A. Yes.

Q. I show you seven letters written to you by Mr. Beers, between July 10, 1928, and November 6, 1928, all of which have been produced here by the other side and ask you if you wrote these letters and whether in reply to them you received any answer at all from Mr. Beers? A. Well, Mr. Unger, I will have to look at my files to ascertain whether I received the replies.

The Court: No, he did not receive any replies. Mr. Beers said the only reply was by telephone. There was no written reply whatever.

Q. Is that your recollection?

The Court: Now, you wrote those letters, did you?

Witness: Yes, sir.

The Court: All right. Let them be—are they marked in evidence?

Mr. Unger: Not yet. I will offer them now.

The Court: Let them be marked.

(Seven letters marked Exhibit D-2).

Mr. Clancy: I think there was one letter which Mr. Beers wrote back about the indulgence.

The Court: Yes. That is in there, but aside from that Mr. Beers says the only reply to these letters was by telephone.

Mr. Clancy: That is right.

Witness: I think that is right, but I—(interrupted).

Q. Did you know Giacomelli before the sale? A. I never saw him until this morning.

Mr. Unger: That is all.

Cross-examination by Mr. Clancy:

Q. Who did you represent, Mr. Coyne? A. Henry Allsopp, the complainant.

Q. Henry Allsopp was the complainant in the foreclosure suit? A. Yes, sir.

I. Henry Coyne—Cross.

Q. He was the mortgagee on that second mortgage made by whom? A. I believe, either Caroline Allen or—(interrupted)

Q. When was that made? A. I am not sure about that, Mr. Clancy. I would have to look at my bill of complaint.

Q. It was several years before Giacomelli bought it that this went on? A. Oh, yes; this is an old mortgage; it is about eight or nine years old, I think.

Q. And did you have the title searched for your client? A. I did not, sir.

Q. You had? A. I did not.

Q. You did not. Did you know anything about the property? A. No, sir.

Q. Did you know anything about its value? A. I did not, sir.

Q. Did your client, Allsopp, ever tell you the value of that property? A. He had never seen it.

Q. And he didn't know, either? A. No, sir.

Q. How much was his mortgage? A. We had—I think it was a six hundred dollar mortgage, if I am not mistaken, but I will have to refer to the bill of complaint again.

Q. And your mortgage—what mortgage was yours at the time it was made in priority? A. A second.

Q. And how much was the first? A. One thousand dollars.

Q. And, at the time you filed the bill to foreclose were you still the holder of a second mortgage? A. Yes.

Q. Was Allsopp—(interrupted) A. Yes.

Q. And who owned the first mortgage? A. Either Albert or George Allsopp.

Q. And did they take it by assignment or pur-

chase? A. If I recall rightly, the thousand dollar mortgage, which was the first lien on this property was originally given to a client of John Strahan's, I think. I think after we got the second mortgage I purchased either for Albert or George Allsopp the first mortgage so that I could control both of them.

Q. Why did you want to control both mortgages? A. Because I believe that Strahan's client demanded payment of the first mortgage.

Q. Did you not buy that to protect your second mortgage? A. To protect my second mortgage?

Q. Yes. A. Oh, I possibly had that in mind.

Q. Did you have any idea at that time of the worth—of the value of the property? A. No, sir.

Q. None at all? A. No, sir; I tell you now that neither Henry Allsopp, Albert Allsopp or myself ever saw the property—or George Allsopp.

Q. Before the sale, Mr. Beers called you up on the telephone? A. Yes, sir.

Q. And told you, I suppose, that he represented Fatzler, who held a judgment? A. I knew it from a search.

Q. And did he ask you where the property was at that time? A. He did.

Q. And did you not tell him, you say, because you did not know? A. I told him I did not know.

Q. Yes? A. I had never seen the property and could not tell him, and then suggested he see Mr. Popik.

Q. And for what purpose did you suggest that he see Mr. Popik? A. If he wanted to get the location of the property, I assumed he was going to make up his mind as to whether or not he was go-

ing to bid to protect Fatzler's judgment.
where it was? A. I didn't say I knew. I suggested that he get in touch with Mr. Popik and find out.

Q. Mr. Popik ever tell you he knew where the property was? A. He did not.

Q. Did you tell Mr. Beers that Popik knew where the property was? A. I did not.

Q. How did you know that Mr. Popik knew where the property was? A. I did not.

Q. At any time at all?

The Court: He said he didn't know.

Witness: I don't think so. I don't see how I could when I know that he did not see the property.

Q. Did you have a telephone conversation with Mr. Beers in December about the location of this property? A. In December?

Q. In December, 1928. A. I don't recall, sir.

Q. It was a conversation, I believe, that Mr. Beers testified to on direct-examination. A. What was it about, sir?

Q. About the location of this property. A. No, sir.

Q. You had none? A. No, sir. I said he—if I am not mistaken maybe he mentioned something about a road, but I think that was the day he brought in the papers.

Q. I show you a letter produced in response to a subpoena from Mr. Strahan, on your letter head — A. Who?

Q. Strahan, I think the name is, John Strahan—on your letter head.

Mr. Unger: Dated September 14, 1925. Mr. John W. Strahan.

Q. Is that your signature, your letter head? A. Yes. That is my stenographer's signature.

Q. It says here, "Mr. Allsopp never saw this property until last week and his visit has not impressed him favorably." Now, that is September 14, 1925.

Mr. Unger: 1925?

Mr. Clancy: 1925.

Q. Can you explain that? A. Three years—September, 1925?

Q. Yes, sir. A. I don't recall it, sir.

Q. Well, it is your letter head? A. Yes.

Q. From your office about your matter. A. Can I read it?

Q. Yes, in just a minute. Further in this letter it says, "Will you be kind enough to advise me as to what amount is due on your mortgage, together with all interest? If your client can see her way clear to allowing Mr. Allsopp a reasonable discount on her mortgage, I may persuade Mr. Allsopp to take this mortgage over and gamble with the property."

The Court: That is all right.

A. I think I recall now what that was.

Q. Well, now, Allsopp did know something about that property, didn't he? A. I say now that I do not believe he ever saw it. I know I never saw it.

Q. Well, now, I am not interested in you just now.

The Court: How does he know whether Mr. Allsop saw it or not?

Mr. Clancy: He wrote in the letter that Mr. Allsop had been up to see it. Now, evidently, Mr. Allsop told him he had been there.

The Court: How do you know?

Witness: May I see this?

Q. Did Allsop tell you he saw that property? A. I don't recall, sir, if he had told me I wouldn't say that he had never seen it.

Q. Now, I don't want an explanation of that; I want to know why—(interrupted)

The Court: Now, wait a minute. Did Mr. Allsop tell you he had seen the property?

Witness: No, sir.

The Court: Well—

Q. Why did you on your letterhead write that "Mr. Allsop never saw this property until last week and his visit has not impressed him favorably." Why did you write that? A. It is possible, sir, that I might have tried to get as big a discount on the first mortgage as I could possibly get.

Q. I don't want the possibilities, I want the facts. A. Well—

Q. What is the fact. What is the answer?

The Court: No.

Witness: What is the question?

Q. What is the fact, not about the possibility of your trying to get as big a discount as possible. What is the fact about Allsop's visit to this property? A. I say now, sir, that I don't believe he ever saw the property.

Q. Well, did you, when you wrote this letter to Mr. Strahan intend to mislead Mr. Strahan? A. Oh, I—(interrupted)

Mr. Unger: I object.

Mr. Clancy: That goes to his credibility.

The Court: No, I will sustain the objection.

Q. Was there any foundation in fact for the statement in your letter of September 14th to Mr. Strahan that, "Mr. Allsop never saw this property until last week and his visit has not impressed him favorably." Is there any foundation, in fact, for that statement? A. I do not believe so.

Q. The first mortgage was a thousand dollars, was it not? A. I think so.

Q. That Mr. Allsop was buying? A. Yes.

Q. And he bought that for a five percent discount and a waiver of the interest, did he not? A. I don't remember what he paid for it, Mr. Clancy.

Q. Well, perhaps I can refresh your recollection with another letter dated September 18th to Mr. Strahan; it says—(interrupted)

Mr. Unger: What year?

Mr. Clancy: 1925.

Mr. Unger: Of what importance is that?

The Court: Nothing.

Mr. Clancy: Whether they bought a mortgage at a discount?

The Court: It isn't the slightest bit of importance, but I am giving Mr. Clancy all the rope he wants.

Mr. Clancy: This man has testified that he didn't know anything about this property, he couldn't tell Mr. Beers anything about

it, although Mr. Beers called him up within a week of the sale, and yet here in 1925, three years before, he is dealing with this very property, he writes it has not impressed his client favorably, wants a discount on the first mortgage and a waiver of the interest, and yet he doesn't know anything about this property.

I call your attention to that letter of September 18, 1925, wherein it refers to a five per cent discount of the mortgage. Does that refresh—(interrupted)

Witness: May I read it?

Mr. Clancy: Surely.

Mr. Unger: He has already given his explanation as to the circumstances under which he wrote the letter. We are only wasting time going into it.

Witness: That is my letter.

Mr. Clancy: In the first place, I think it has something to do with it if you don't.

Q. Were you willing to go into a partnership arrangement at the sale? A. Was I willing?

Q. Yes. A. Assuming I was, if I had an opportunity of examining the property, surely, and providing my client was willing to take the cash instead of the property.

Q. Didn't you acquiesce in the suggestion of Mr. Popik that you and he would go in partners with Fatzler? A. Yes, sir.

Q. And now you say that before you would do that you would want to go and look at it. A. I told that to Popik.

Q. Well, where would you go and look? A. We

would have to find out where it was. I would do it before the sale, though, not after.

Q. Well, in your affidavit filed in this cause, you stated that at the sale Mr. Popik jocularly mentioned the fact that he would like to go in as a partner with Fatzler. What do you mean by that? A. Why, I think we started joking first.

Q. Did you think that the partnership in this property was a joke? A. Well, I think up to that time it was.

Q. You think it now is? A. Now it is a serious joke.

Mr. Clancy: That is all.

The Court: That is all.

Redirect-examination by Mr. Unger:

Q. Did you get that letter from Mr. Beers of July 9th, or dated July 9, 1928? A. Yes, sir.

Mr. Unger: I offer this in evidence.

(Letter marked Exhibit D-3.)

(Exhibit D-3 read.)

Mr. Unger: We are through.

The Court: That is all. How many witnesses have you?

Mr. Clancy: I think two on rebuttal.

The Court: All right. Now, I want to finish this.

DOROTHY DOGGART, called in rebuttal.

Direct-examination by Mr. Clancy:

Q. Miss Doggart, where are you employed? A. Walter A. Beers' office, 60 Park Place.

Q. And were you employed there on Saturday, December 15th? A. I was.

Q. Did you take down a telephone conversation on that day between Mr. Popik and Mr. Beers? A. Yes, I did.

Q. Have you your notes there? A. I have.

Q. Will you read the conversation?

Mr. Unger: When was it?

Mr. Clancy: December 15th.

The Court: Long after the sale. Let it go in the record. Go ahead.

Q. Read the conversation.

A. "Operator: Hello.

Mr. Beers: Mr. Popik?

Operator: Who is this, please?

Mr. Beers: Mr. Beers.

Mr. Popik: Hello.

Mr. Beers: Mr. Popik?

Mr. Popik: Yes.

Mr. Beers: Walter A. Beers.

Mr. Popik: Yes.

Mr. Beers: I understand Coyne told the sheriff that he wants the Giacomelli matter closed on Monday.

Mr. Popik: Yes.

Mr. Beers: Have you any interest in that title now?

Mr. Popik: No; I have not.

Mr. Beers: I see. Have you been in touch with your client lately?

Mr. Popik: About two weeks ago, and I don't know anything except that there is a square piece up there, Mr. Beers, which is on the road.

Mr. Beers: Is it a two thousand or fourteen hundred feet?

Mr. Popik: I don't know, but I know it is a square piece.

Mr. Beers: Did you look it over?

Mr. Popik: No, I did not.

Mr. Beers: Do you know what road it is on, Mr. Popik?

Mr. Popik: I think Henry Coyne can give you that information, Mr. Beers.

Mr. Beers: It is on the road, though, isn't it?

Mr. Popik: Yes, it is.

Mr. Beers: Well, I will get in touch with Mr. Coyne."

Mr. Clancy: That is all.

Cross-examination by Mr. Unger:

Q. Why did you take that conversation down? A. What is it?

Mr. Clancy: Just one moment.

Mr. Unger: Are you through?

The Court: Now, get through.

Mr. Clancy: Just—I have another conversation.

Examined by Mr. Clancy:

Q. Did you, on Monday, December 17th, 1928, take down a conversation stenographically between Mr. Beers and Mr. Coyne? A. I did.

Q. Will you read that?

A. "Is Mr. Coyne there?

Operator: He is, yes.

Mr. Beers: Mr. Beers.

Operator: Just a moment.

Mr. Coyne: Hello.

Mr. Beers: Henry? Walter A. Beers. I understand that today the sheriff is supposed to readvertise the Giacomelli property.

Mr. Coyne: For the last three weeks we have been trying to get somewhere in this matter.

Mr. Beers: I haven't had a survey. That will be expensive, you know, that is a square plot up there isn't it?

Mr. Coyne: I believe so.

Mr. Beers: Is it the small side—or, the large side on the road?

Mr. Coyne: I don't know. I would be only guessing if I started to tell you.

Mr. Beers: But one of them is on the road?

Mr. Coyne: One of them I think is on the road, but I don't think I ever saw the place, so I don't —That is right; I am thinking of another place.

Mr. Beers: You didn't see it?

Mr. Coyne: No, I did not.

Mr. Beers: You told me up at the sheriff's office that one was on the road; you thought it was the smaller one.

Mr. Coyne: Dave maybe told you. Popik saw it, but I never saw it.

Mr. Beers: You did not—I don't think there is road frontage.

Mr. Coyne: You don't think there is?

Mr. Beers: No, sir.

Mr. Coyne: Well, I don't know. I thought there was.

Mr. Beers: I am expecting some further word on it today. If there is I will carry out my contract. I have checks on my desk for a couple of

weeks, but I wanted to check up on this point first.

Mr. Coyne: I thought Fatzler had gone over this thing before. I thought he had gone up and saw a map.

Mr. Beers: No. We relied on what Giacomelli told us.

Mr. Coyne: He is the fellow who knows. I think Dave saw it, but I wouldn't swear.

Mr. Beers: You said it was fourteen hundred feet?

Mr. Coyne: I don't know whether it was fourteen hundred or fourteen thousand.

Mr. Beers: You wanted to go in with Fatzler, didn't you?

Mr. Coyne: Maybe Dave mentioned it."

Q. Now, did you take down a conversation between Mr. Beers and Mr. Giacomelli on December 17th? A. Yes, sir.

Q. Will you read that?

A. "Mr. Beers: Mr. Coyne says to take up the deed today. I don't want to make a survey. It costs too much money and Mr. Giacomelli—(interrupted)

Mr. Unger: What is the date of that?

Mr. Clancy: December 17th, also after, Mr. Unger.

Witness: (Continuing.)

Mr. Giacomelli: Don't make any.

Mr. Beers: You are satisfied that one of the four sides is on the road, either fourteen hundred or two thousand; is that right? One is on the road?

Mr. Giacomelli: Yes, one of them is.

Mr. Beers: Does Popik know that?

Mr. Giacomelli: No, he doesn't. It was like

this: No one knows because we took it like blind."

Mr. Clancy: That is all.

The Court: Do you want to cross-examine on that?

Mr. Unger: I just wanted to ask her if she thought Mr. Beers succeeded in getting across it was on the road.

Mr. Clancy: I think so. It doesn't make any difference what the witness thinks about it.

Mr. Unger: It is all right.

The Court: That is all.

WALTER A. BEERS, recalled in rebuttal.

Direct-examination by Mr. Clancy:

Q. Mr. Beers, I show you exhibit C-3, in evidence, which is a map identified by Mr. Giacomelli and I ask you what Mr. Giacomelli told you about the map, what explanation was made, if any.

Mr. Unger: I object to it upon the ground that the witness has already testified at length and in detail concerning the map.

The Court: I will sustain the objection—No, I won't. I will allow Mr. Beers to reiterate. Go on.

A. He wrote down the words "Lum house" on the little parcel that he marked on the left of the driveway and the parcel on the right of the driveway he told me was the acreage on the road which was the subject of the sale. If he had marked—(interrupted)

The Court: No. Say what he told you.

Q. And is that the large parcel—the larger parcel marked with the X? A. Absolutely.

Q. Have you attended a number of sheriff's sales in your practice? A. I have.

Q. Is it customary before purchasing at a sheriff's sale to have the property surveyed? A. I don't believe it is.

Mr. Unger: I think that depends more or less upon the lawyer and how careful he is.

The Court: I will allow it.

Witness: I don't think so. I have never done so.

The Court: Therefore it is unnecessary; is that the idea?

Q. Do you know of any other source—or, did you know of any other source before this sheriff's sale from which you have secured any more information with respect to this property other than the sources to which you went? A. Not another person I knew where I could have inquired.

Cross-examination by Mr. Unger:

Q. As a matter of fact, all the information which you have thus far obtained was acquired after the sale? A. Every bit of it?

Q. Yes. A. No; it was acquired before sale.

The Court: You did not make a search until after the sale, did you?

Witness: No, I did not.

The Court: You did not make any survey at all?

Witness: I have not made a survey to this day.

Q. Then I am right, am I not, that all the information that you have acquired with respect to this property—(interrupted) A. You mean with respect to the actual location?

Q. Yes. A. Yes, with respect to the actual location, that was all acquired after.

Q. After the sale? A. After the sale.

Q. And that included, as well, the plotting of the property? A. Oh, no, surely not. On direct-examination I explained that Giocomelli drew that sketch for me.

Q. I am not referring to Giacomelli's sketch. He did not examine the title for you. I am referring to the sketch that your brother said he had put in maps and descriptions, and which was marked in evidence. A. That was put in after.

Q. After the sale. A. Long after.

Q. And there was no reason on earth, was there, why it could not have been put in before the sale if you had started soon enough; isn't that so? A. Before the sale?

Q. Yes. A. Well, there was no reason, no—(interrupted)

Q. Have you ever heard of anybody making an examination of title and making a survey and ascertaining the physical characteristics and everything connected with the title before he bought? A. A search of the title before?

Q. Yes. A. Never heard of it, no.

Q. Before a man agreed to buy? A. Never heard of making a search beforehand. I have heard—in my practice; you ascertain by verbal word of mouth from the parties in interest the lo-

cation of the property, draw your agreement and then make your search to find out—(interrupted)

Q. Well, the description in this case did not apprise you of the fact that the property was or was not located on the road, did it? A. It did not.

Q. And therefore you knew that at and before the sale. A. No, I didn't know.

The Court: Then you were not sure before the sale whether it was on a road or not, were you?

Witness: I was sure it was on the road.

The Court: I mean, from the description you were not.

Witness: From the description I didn't know.

The Court: No, and you took Mr.—what's his name?

Mr. Unger: Giacomelli.

Mr. Clancy: Giacomelli.

The Court: Giacomelli's word for it that it was on the road?

Witness: And Coyne's and Popik's.

Q. As you say.

The Court: Yes. All right.

Q. And Giacomelli's word was conveyed to you the Sunday before the sale? A. No.

Q. Well— A. It was a week—

Q. —two days before the sale? A. A few days before.

Q. Not until then? A. Not until then.

Q. Do you, Mr. Beers, assume responsibility for the telephone conversations which have been introduced here in evidence? A. I do.

Q. You say those occurred? A. Absolutely.

Q. And they occurred on the 15th and 17th of December? A. Exactly.

Q. Rather significant dates, are they not?

The Court: No. Now, I won't—that calls for a conclusion.

Q. Your bill was mailed out on the 18th of December? A. It was.

Q. And you were engaged in what is called making evidence for the trial?

The Court: No, no.

A. That is just what I did. I wanted them to reiterate what they told me in the beginning.

Q. And you were doing your best to make one of these lawyers say that it was located on the road, weren't you? A. For the simple reason that they had told me once. I thought, "There is no reason why they won't tell me again."

Q. Well, you didn't succeed very well in getting that admission, did you? A. I did; Mr. Popik said so.

The Court: Well, now.

Mr. Unger: All right.

The Court: Is that all?

Mr. Unger: That is all.

The Court: Anything further?

Q. You didn't tell him while that conversation was going on that you were going to file a bill in the Court of Chancery the next day? A. I did not, because I called Mr. Popik on Saturday—

Q. I don't care for the reason. I want to know if you apprised the gentleman of the fact that you were going to use the conversation in some way.

A. I didn't want one to telephone the other before I could get him.

Mr. Clancy: That is all.

The Court: Is that the case?

Mr. Clancy: Just a moment. I think that is all the evidence we have.

If your Honor will indulge with us I would like to submit some authorities on this question.

The Court: No. I am prepared to decide this thing right away. If you want to sum up I will be glad to listen to you.

Mr. Clancy: May I, in view of the fact that I am only trial counsel, that my acquaintance—as you may have noticed from the examination I made—with this case is rather short. I got into it yesterday, and, if there is no objection on the part of Mr. Unger and on the part of the Court, I would like to suggest that Mr. Beers be permitted to sum up because he is more familiar with it than I am.

The Court: Very well.

Mr. Unger: I do not object.

The Court: How long do you want to sum up?

Mr. Unger: Five minutes.

Mr. Beers: I do not think five minutes will help me.

Mr. Unger: He can have more, if he wants.

The Court: All right.

(Mr. Unger sums up.)

(Mr. Beers sums up.)

The Court: The only reasons for the sustaining of this bill are fraud or mistake. As far as fraud is concerned, I do not have to go into that elaborately, because no fraud has been proved whatever. As far as the mistake is concerned, the mistake

under our decisions has to be mutual except in cases of unilateral mistake, where there is no negligence.

Now, this, undoubtedly, was a case of what we call unilateral mistake. Mr.—the complainant, whatever his name is, through his solicitor evidently considered that this property was on a road. He asked Mr. Coyne who referred him to Mr. Popik, who referred him to Mr. Giacomelli and he followed Mr. Giacomelli's advice. He went up to this property and says that he understood that the property was right next to the Lum's house. He insists that Giacomelli told him that the X on the map represented the property. This, Giacomelli, categorically denies. Therefore, there is no corroboration for his statement. And he also says that he tried to interview two men who were right on the property, and tried to ask them where the locus in quo was situated. They did not, apparently, understand him, he says, and he made no further effort to ascertain. Now, before the sheriff's sale he had, as I understand it, at least three weeks in which to ascertain where this property was situated. His solicitor says that he did not make a survey because it would cost too much, that he, the solicitor, never made a search in his life and thinks that surveys are unimportant, but those of us who at the bar in the beginning had to work for a living in making searches realize very fully that one of the first things—especially in a farm property—a man does in making a search is to order a survey. I remember when I was searching for the Park Commission titles on the mountain—and those South Mountain Reservation titles are very similar to this one—the first thing

we did was order a survey and then from the survey we plotted them on maps and then we drew our descriptions to discover whether they agreed with the description of the property that we were supposed to be buying.

Now, for three weeks he made no effort to find out whether this property was on the road, or whether it was in the woods or in the Great Swamp. He relied entirely upon the statement of a man, who, according to the man's own statement, did not know where his property was, he hoped that some of it might be on a road. Now, I say that this negligence and the mistake—the unilateral mistake cannot be successfully maintained in this case on account of the negligence which is coupled with it, and I will, therefore, dismiss the bill.

Exhibit C 1

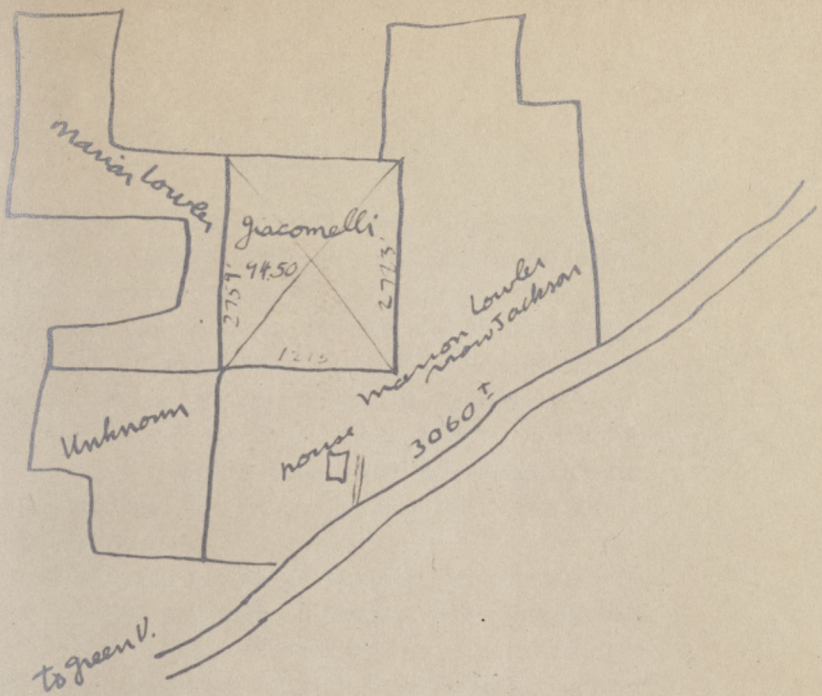
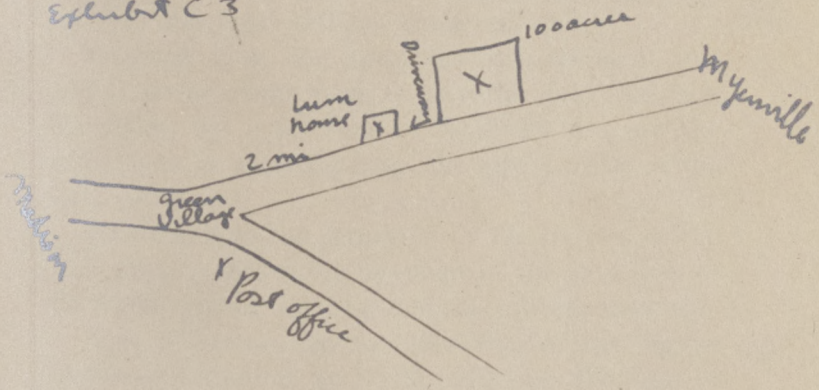


Exhibit C 3



Photocopy paper 7x11

Exhibit C-2.

Articles of Agreement made this twenty-first day of November, 1927, between Attilio Giacomelli, and Mary Giacomelli, his wife, parties of the first part, Louis Weiss and Samuel Wollman, parties of the second part, and Silodor and Sirota, Inc., party of the third part, Witnesseth:

Whereas Silodor and Sirota Inc., hereinbefore known as the party of the third part, has this day loaned to the parties of the first part, the sum of $3500.00 and

Whereas the parties of the first part have agreed and by these presents do hereby agree to pay back to the said Silodor and Sirota Inc., the said sum of $3500.00 within six months from date hereof, and

Whereas the said Silodor and Sirota Inc., is indebted to Weiss & Wollman, in the sum of $3500.00 for fees and legal services rendered, and

Whereas it is the intention and desire of the party of the third part to pay the said Weiss & Wollman the said sum of $3500.00 out of the moneys to be received from the said parties of the first part, and

Whereas it is the intention of the parties of the first part to secure the payment of the said sum of $3500.00 within the six months aforementioned.

Now Therefore in consideration of the agreements and mutual promises, and also the sum of One Dollar ($1.00) by each party to the other in hand paid, receipt whereof is hereby acknowledged, the party of the third part hereby assigns all its right, title and interest in and to the said $3500.00 to the said Weiss & Wollman, and hereby authorizes the said parties of the first part, their heirs and assigns, to pay the said sum of $3500.00 to the said Weiss & Wollman, which principal sum shall not bear interest, and

Exhibit C-2.

The said parties of the first part to secure the payment of the said sum of $3500.00 are simultaneously with the execution of this agreement also executing to the said Weiss & Wollman, a deed for the premises situated in the Township of Passaic, County of Morris and State of New Jersey, on the following express conditions, to wit: That if the said parties of the first part shall pay to the said Weiss & Wollman, the sum of $3500.00 within six months from date hereof, without interest, then and in that event the said Weiss & Wollman will and hereby expressly agree to re-convey the said premises to the parties of the first part, without any costs to the parties of the first part. Should however, the parties of the first part fail to repay the said sum of $3500.00 within six months from date hereof, then and in that event, both legal and equitable title in and to the premises so conveyed shall remain in the said Weiss & Wollman, their heirs or assigns forever, and neither the said Weiss & Wollman nor the said Silodor and Sirota Inc., shall have any claim against the said parties of the first part for the said $3500.00 and neither shall the said parties of the first part have any claim against the said property, or any part thereof, nor shall they have any claim whatsoever against the said Weiss & Wollman, or Silidor and Sirota Inc., for the conveyance made to them.

The parties of the first part, for the purpose of inducing the said Silodor and Sirota Inc. to loan to them the said sum of $3500.00 and also for the purpose of inducing the said Weiss & Wollman and Silodor and Sirota Inc. to accept the security aforementioned, hereby expressly warrant and represent that there are no liens or encumbrances

Exhibit C-2.

whatsoever against any part of the said premises, except mortgages aggregating the sum of $2800.00, which mortgages are one year mortgages but are renewable.

In Witness Whereof the parties of the first part and the parties of the second part have hereunto set their hands and seals, and the party of the third part has caused these presents to be signed by its President, attested by its Secretary and its corporate seal to be hereunto affixed, the day and year first above written.

Signed, Sealed and Delivered
in the presence of

LOUIS WEISS (L.S.)
SAMUEL WOLLMAN (L.S.)
SILODOR AND SIROTA INC.,
Chas. Silodor,
Pres.
(Seal)

Attest:
Felix Sirota
Sec.

Exhibit C-4.

FRED FATZLER JR.

No. 1063

Newark, N. J. November 28 1928

Pay to the order of

William N. Beach—Sheriff— $2107 06/100
Two Thousand One Hundred Seven Dollars Six Cents Dollars

Clinton Trust Company,
Newark, N. J.

FRED FATZLER, JR.
Real Estate Account.

Exhibit D-1.

WALTER A. BEERS
Counsellor at Law
Military Park Bldg.
Newark, N. J.
Market 2360

September 28th, 1928.

I. Henry Coyne, Esq.,
784 Broad Street,
Newark, N. J.

Dear Henry:

I do not know what you mean by your client's "indulgence." As I see it, pending another foreclosure which you commenced and for several years prior thereto, He sat by with the mortgage which he held. Just as soon as my client, Fatzler, bid in the property his indulgence ended immediately.

You say you wrote me twice since the time limited expired. Your first letter was before the thirty days, within which time Fatzler expected to take title. At this writing he is two weeks beyond the time limited. That length of time is not unusual delay in closing matters, especially with a title as involved as this is.

Fatzler has agreed to turn the property over to Giacomelli who expects word in a few days with reference to a mortgage he is arranging. Inasmuch as Fatzler has no great amount of cash available at this moment, he does not wish to put up $3,000 if he can avoid it by having Giacomelli, through his mortgagee, put up the funds.

If you sincerely believe that this is the end of your client's "indulgence", I, of course, cannot prevent your proceeding on Monday next.

Very truly yours,

WALTER A. BEERS.

WAB:D

Exhibit D-2.

Law Offices
I. HENRY COYNE
Firemen's Building
Newark, N. J.
Telephone 3514 Market

Joseph Slifkin

July 10, 1928.

Walter A. Beers, Esq.,
60 Park Place,
Newark, N. J.

Dear Walter:

Pursuant to your request, I will adjourn the sale in the Allsopp vs. Weiss matter for one week.

Yours very truly,
I. HENRY COYNE.

IHC/DT

Exhibit D-3.

WALTER A. BEERS
Counsellor at Law
Military Park Bldg.
Newark, N. J.
Market 2360

July 9th, 1928.

I. Henry Coyne, Esq.,
790 Broad Street,
Newark, N. J.

Dear Henry:

This will acknowledge receipt of the notice of Sheriff's sale in Allsopp vs. Weiss for which I thank you.

I am going away on the 14th and will not return until August 2nd or 3rd. I expect to submit a bid in this matter and for that reason would like to have the sale postponed for one week.

Will you please advise me in the matter?

Very truly yours,

WALTER A. BEERS.

WAB:D

New Jersey Court of Errors and Appeals

	On Bill, &c.
Between HENRY ALSOPP, Complainant-Respondent, vs. LOUIS WEISS, *et als.*, Defendants-Respondents. FREDERICK FATZLER, JR., Defendant-Appellant.	On Appeal from Court of Chancery. Refusal to relieve purchaser at foreclosure of his bid. Sat below CHURCH, *V. C.*

BRIEF FOR APPELLANT FREDERICK FATZLER, JR.

(Italics etc. ours, except where otherwise noted)

Statement of the Case.

Alsopp brought his suit to foreclose a mortgage on land in the Township of Passaic, Morris County. Appellant Fatzler was the holder of a judgment against Giacomelli, the equitable owner of the property, the record title being in Louis Weiss and Samuel Wollman (pp. 2, 3, 43). There was due upon judgment $2600. Fidelity Securities Corporation held a mortgage for $1300., which was subject in lien to the mortgage of Alsopp but prior to the judgment of Fatzler (p. 3).

The property was struck off by the Sheriff on August 13th, 1928 (p. 63) to Fatzler for $2300. X (p. 3). Present at the sale were Mr. Coyne, an attorney, representing Alsopp, Mr. Popik, an officer of and also the attorney representing Fidelity

X

Subject to a mortgage of $1,000. and 2 years taxes approximately in all $3500.

Securities Corporation, Mr. Walter A. Beers, an attorney, representing Fatzler and Fatzler himself (p. 45). The property is in what is known as the Great Swamp and has no road frontage and no access to any road. There are ninety odd acres worth from six to ten dollars an acre, depending upon the purchaser's need, (p. 39).

At the time of the sale Mr. Beers and Fatzler believed that they knew where the property was located, and that it had a road frontage of approximately 1400 feet, (pp. 45, 41). Mr. Beers had made inquiry as to the location of the property of Mr. Coyne, who represented Alsopp, and was informed by him that all he knew was that it was on some road out of Green Village. Mr. Coyne directed Mr. Beers to inquire of Mr. Popik, who represented Fidelity Securities Corporation. Mr. Beers inquired of Mr. Popik and Mr. Popik stated that the property was on the Myersville Road, and that if Mr. Beers wanted to know more definitely "you will have to ask Giacomelli. He can take you up" (pp. 45, 46). Mr. Beers got in touch with Giacomelli and received directions as to the location of the property, and was given a sketch which Giacomelli describes (pp. 70, 71, 72, 73) and Giacomelli says that the sketch Exhibit C-3 is the same as that drawn by him for Mr. Beers.

Giacomelli told Mr. Beers that the property consisted of about 100 acres and was on the road two miles from Myersville. The distance Giacomelli said he measured exactly with his auto speedometer. He said it was the piece of property contained in the large square marked with the "X", on Exhibit C-3. That Mr. Beers would know when he reached it by the little white house—the Lum house. The fact is that it is the piece of property included in a square and marked "Giacomelli" on Exhibit C-1, pp. 46, 47, 48.

Mr. Beers went to the location indicated by Giacomelli and found a piece on the Myersville Road which exactly fitted the description given to him by Giacomelli (pp. 47, 48).

Mr. Beers informed his client Fatzler as to the location of the property and that it had some fourteen hundred feet frontage on the road and it was upon this information that Fatzler bid (p. 51). Fatzler says that he was told by both Mr. Popik and Mr. Coyne that the property was not in the Great Swamp. It was indicated on the atlas, (p. 79). After the sale Mr. Fatzler and Mr. Beers went to look at the property and saw the same property as Mr. Beers had seen before the sale, i. e., the property with fourteen hundred foot frontage on the road (p. 80)

After the sale there was difficulty in making searches. It finally, between December 10th and 15th, developed that the property was not on the road, but was an interior piece without an exit to the road (p. 51). The searcher found it difficult to locate the property from the records (pp. 26, 27).

Immediately upon discovery that the property had no road frontage and no exit to the road, Fatzler filed an original bill in the Court of Chancery December 19, 1928, setting up the facts and alleging that Fatzler was misled by the representations of Giacomelli as to the location of the property and that Alsopp and Fidelity Securities Corporation were bound by those representations and that he bid in reliance upon such representations, the description in the advertisement of the Sheriff giving no indication that there was not even ingress and egress to the property, and that the lack of ingress and egress made the property wholly unmarketable, and he prayed to be relieved of his bid (p. 1). The bill was amended (p. 6). Both

Alsopp and Fidelity Securities Corporation filed answers and counterclaims, in the latter asking for specific performance against Fatzler. It will be noted that, as an original proceeding, the cause is improperly entitled. It is entitled as if the proceeding were by petition in the original foreclosure suit of Alsopp against Weiss. In the hearing before the Vice Chancellor the proceeding was considered as on a petition in the cause (p. 21).

The theory of Fatzler was that either there was a mutual mistake and all parties at the sale thought that the property was on the road, and certainly had ingress and egress to a road, or that Fatzler was mistaken and had been led into that mistake by the representations of Alsopp and Fidelity Securities Corporation, Mr. Coyne, the representative of Alsopp, having referred Mr. Beers to Mr. Popik when inquiry was made as to the location of the property, and Mr. Popik having referred him to Giacomelli and Giacomelli having told him that the property was on the road and having given him a sketch which so indicated.

Either there was mutual mistake or there was mistake on the part of Fatzler and conduct which is equivalent to fraud on the part of Alsopp and Fidelity Securities Corporation for the testimony clearly shows, we submit, that the representatives of Alsopp and Fidelity Securities Corporation knew, at the time of the sale, that Fatzler and Mr. Beers believed that the property was on the road and, so knowing, their silence, under the circumstances, was fraud.

The Vice-Chancellor (pp. 124, 125) accepts the story of Mr. Beers to the effect that he inquired of Mr. Coyne, representing Alsopp, and was referred by him to Mr. Popik, representing Fidelity Securities Corporation, and that Mr. Popik referred him to Giacomelli, and that he acted upon

the information received from Giacomelli. True, the Vice-Chancellor says that Giacomelli denies that he told Mr. Beers that the big "X" in the large square indicated the property, and that there is no corroboration for the statement of Mr. Beers to that effect. The "X" in the big square could indicate only the property described by Giacomelli as the property in question. The testimony of Giacomelli (pp. 71, 72, 73) in which he tries to say that it does not, indicates clearly that it does. It could be meant to indicate nothing else, and Giacomelli himself says (p. 73) that *he* was under the impression that *there was road frontage*. In other words, he testifies that he thought the property was at precisely the same point as the big square, with the "X" inside of it. Mr. Beers explains on pp. 119 and 120 the markings on this sketch (Exhibit C-3) and says that the large square with the "X" mark in it was stated by Giacomelli to be the property under foreclosure. The Vice-Chancellor concedes that there was mistake on the part of Mr. Beers and Fatzler a "unilateral mistake" he calls it. He then proceeds to decide the case upon the theory of negligence on the part of Fatzler and Mr. Beers. The negligence is rested on the facts that, after Mr. Beers had been at the point indicated by Giacomelli and had there seen two men, who did not understand him, he did not make further inquiry and did not have a survey made, (p. 125). If Mr. Beers had not found a piece of property which exactly fitted with the description given him by Giacomelli, it might be negligence to make no further inquiry. But the property he found exactly fitted and the mere fact that two men, who were at the Lum house, which is the small square on Exhibt C-3 with the "X" within it, did not understand him, certainly

did not put him upon further inquiry, and we submit that it is not negligence, when one has been advised by the party who is the equitable owner of the property, to which person he has been referred by the other parties in interest, of the location of the property, to refrain from having a survey made before bidding. It is not the practice of buyers at judicial sales, or of purchasers at private sales, to have surveys made before property is bought at a judicial sale, or contracted to be bought at a private sale.

The Vice-Chancellor says that he does not go into the question of fraud because "no fraud has been proved whatever." But he holds that there was *no mutual mistake.* In so holding, he must have found that Mr. Coyne and Mr. Popik knew where the property was located, and that it did not have a road frontage and that it had no ingress or egress. But, if that be so, the remaining silence under the circumstances *was* fraud.

The Vice-Chancellor finally concludes that the unilateral mistake, which he concedes existed, cannot be made the basis for relief because of the negligence coupled with it.

Thereupon a decree was entered (p. 13) dismissing the application of Fatzler to be relieved and directing him to specifically perform his contract. From that decree, this appeal is taken (Notice of Appeal, p. 15; petition of appeal, p. 16).

ARGUMENT.

Fatzler was led to believe that the property had a road frontage under such circumstances as that Alsopp and Fidelity Securities Corporation are responsible for that misleading.

The description of the property gave no idea of its precise location (p. 1). We have already, in the statement of the case, recited the testimony of Mr. Beers, Fatzler and Giacomelli as to how it was that Mr. Beers thought the property had a road frontage and that he thought he had seen the property. The story told by Mr. Beers with respect to his calling up Mr. Coyne, and being advised by him to get his information from Mr. Popik, and of his having called up Mr. Popik and being advised by him to get his information from Giacomelli seems to have been accepted by the Vice-Chancellor.

Mr. Coyne (p. 104), concedes that Mr. Beers called him up about a week or so before the sale and asked where the property was and that Mr. Coyne told Mr. Beers:

> "I had never seen the property and I couldn't tell him where it was and that I didn't think if my client ever saw the property, but suggested that he get in touch with Dave Popik who might be able to give him some information and that was the end of our conversation."

Mr. Coyne says *he* never knew where the property was and did not at the time of the trial, (p. 105). He says that his client, Mr. Alsopp, had never seen the property and did not know where it was (p. 107). But, on cross-examination, a let-

ter emanating from his office, sent to a Mr. Strahan, dated September 14, 1925, is shown him (p. 110). In that letter he said:

> "Mr. Alsopp never saw this property *until last week and his visit has not impressed him favorably*".

That was in 1925.

Notwithstanding the statements contained in this letter Mr. Coyne persists (pp. 111, 112, 113) that neither he nor Alsopp had ever seen the property. He says there is no foundation in fact for the statement contained in the letter of September 14, 1925, to Mr. Strahan. What dependence is to be put upon the testimony of this witness to the effect that he did not know that this property was not on the road?

Mr. Popik, representing Fidelity Securities Corporation, denies that he received any request from Mr. Beers prior to the sale regarding the location of the property (pp. 87, 88), and he says that *he* did not know where the property was and had never seen it (p. 88). Giacomelli had been the client of Mr. Popik (p. 88) when he, Giacomelli bought the property and Mr. Popik had made a search for him. He says that he *did* refer Mr. Beers to Giacomelli to locate the property but that this was after the sale (p. 88). Notwithstanding the fact that he took a mortgage for his client, a corporation of which he was an officer and financially interested in, on Giacomelli's property, making a search (p. 93) he did not ascertain whether the property was inside or rear land and passed the title for the purpose of a loan from his client "without knowing the character and this was a third mortgage you were representing."

He says he attended the sale representing his client and, if Fatzler had not bought, *he* would

have bought without knowing the character of the property. He weakens (p. 97) as to whether the time of his conversation with Mr. Beers in which he referred Mr. Beers to Giacomelli to ascertain where the property was located, and testifies (p. 97):

"Q. I appreciate that, Mr. Popik, but it is quite important at this time that you fix the time with respect to those conversations. Didn't you suggest to Mr. Beers, when he called you up, trying to find out where this property was, that he get in touch with Giacommelli? A. That was after the sale?

Q. After the sale? A. (Witness nods yes).

Q. Didn't you, in an affidivit made in this cause, say 'It is true that Mr. Beers called me over the telephone and asked me for the location of the property.' A. I said that, yes.

Q. Do you remember saying that? A. Yes, sir.

Q. Further, 'I told him that I was under the impression that it contained about ninety acres. *I told him to communicate with Mr. Giacomelli and he would probably take him upon the land.*' Did you say that? A. That is correct.

Q. And you say that was after the sale? A. I *believe* that was after the sale, yes.

Q. Now, was it or wasn't it, Mr. Popik. A. *I believe that it was after the sale.*

Q. After the sale. You believe it was after the sale. A. I believe it was after the sale, yes—because—(interrupted)

Q. And, notwithstanding the fact that Mr. Beers and Mr. Fatzler had been up at the sheriff's sale and made an examination, as you say, of a map, it was still after that time when they knew, according to you from the record, where it was? It was after that time that he again called you up and asked you where this property was? A. I don't know whether they knew, because on Mr.

Beer's testimony the search was not in until a long time after the sale. I don't know whether he knew when he had that conversation with me whether that property was on the Myersville road, or not.

Q. Well, you knew, or you testified, rather, that he made an examination of a map. A. In the sheriff's office.

Q. Yes. And that you didn't tell him on the day of the sheriff's sale where this property was. A. I did not tell him, that is right.

Q. That Mr. Beers and Mr. Fatzler looked at the map? A. That is right.

Q. And it was in the county in which that property was situated? A. If the property is—yes, in Morris County, that is right.

Q. And, notwithstanding the fact that they were present personally at a sale, bid on a piece of property, looked at a map to find out where it was, you still say that it was after the sale that he called you up and asked you the location of this property? A. Yes, sir.

Q. No doubt about that in your mind, is there? A. No, sir.

Q. How long after the sale was that? A. Oh, perhaps a week.

Q. And did you send Giacomelli to him a week after the sale? A. I don't think I sent Giacomelli there, no. *I told him to communicate with Giacomelli.*

Q. You told him to communicate with Giacomelli? A. I believe that is what I told him.

Q. At that time when you told him that was about a week after the sale? A. Perhaps it was two weeks, I don't know, Mr. Clancy.

Q. And did Giacomelli ever report to you that he had gone to Mr. Beer's office? A. Well, he did, yes, after he made an affidavit in Mr. Beer's office, after I had been served with the papers, in the affidavit of the Fidelity Securities Corporation."

The fact is brought to his attention that Giacomelli had stated that it was before the sale that he gave Mr. Beers the location of the property, but the witness says that *that* does not change his testimony.

The testimony of Giacomelli is to the effect that it was *before the sale* that he saw Mr. Beers and gave him the sketch and told him where the property was located (pp. 68, 69, 70, 71).

Mr. Beers was at the property location before the sale, and he took Fatzler thereafter they left the Sheriff's office on the day of the sale. He needed no information after that as to how to reach the property. Having been at the location, the only possible inquiry he might make later, was whether the land was on the road or rear land—if he had any doubt, his inquiry of Popik would then have been not, "How do you reach this property?" but would be, "I have been there. Is it front or rear land?" We submit the fact that no questions were asked point blank, indicates clearly that Mr. Beers had information as to the exact location of the property on the road, and that no doubt arose in his mind on that point until after the search had been completed.

There is no question but that Mr. Popik is mistaken when he says that it was after the sale that he referred Mr. Beers to Giacomelli.

Mr. Coyne admits that Mr. Beers called him up to get information as to the location of the property and that he referred Mr. Beers to Mr. Popik. The obvious thing would have been for Mr. Beers to have called up Mr. Popik. If he did not, how did he get the name of Giacomelli. Mr. Popik concedes that he gave the name of Giacomelli to Mr. Beers as the one who could point out the property. Giacomelli says, as does Mr. Beers, that this was before the sale. It is clear that both Mr.

Beers and Fatzler thought that they knew where the property was located at the time of the sale, and the only way that they could have acquired knowledge was by getting the information from Giacomelli. Both Mr. Popik and Mr. Coyne say that they did not know where the property was located, and that it had no road frontage. But Mr. Coyne goes too far and insists that his client, Alsopp, did not know and he persists in that insistence notwithstanding the fact that, in 1925, he had written a letter in which he had said that Alsopp had been up to see the property and he told the court below that there was no justification for the statement contained in that letter.

Mr. Popik insists that he did not know where the property was located, notwithstanding the fact that he represented Giacomelli when he bought it and had made a search and had made a loan on it for a client, a corporation, for which he was the spokesman.

The inference is obvious, we submit, that both Mr. Popik and Mr. Coyne knew where this property was located, or at least knew that it had no road frontage and knew that Mr. Beers and Fatzler thought it had. Although Fatzler was late for the sale they waited for him an hour—they say because they did not want to hold the sale "without giving him an opportunity to bid" (p. 87). The opportunity reserved for him was to buy a piece of inside swamp land without ingress or egress to the road, for $2300. subject to a mortgage of $1000. and 2 years taxes, a total of approximately $3500., worth perhaps $500.

After the sale they told Fatzler that he had made a "good buy" and asked him if he did not care to have some partners (pp. 79, 48). Mr. Coyne says that he acquiesced in the suggestion of Mr. Popik that he and Mr. Popik go in as partners with Fatz-

ler (p. 113), but he says that he would not have done so without examining the property (p. 113). But, according to his letter, in 1925 his client Alsopp *had* examined the property.

Mr. Popik says that it is a fact that, after Fatzler bought the property, he asked Fatzler if he would like to have a partner (pp. 95, 96).

It is inconceivable that these statements should have been made by Mr. Coyne and Mr. Popik bona fide if they did not think that this property had a road frontage, or at least, had ingress and egress to the public road. If they did not so think, then there was mutual mistake. If the statements were not made bona fide, but with the intent of leading Fatzler to believe that he had made a "good buy," and therefore induce him to keep the property, there was evidence of fraud.

It is suggested that Fatzler did not make objection to this title until he knew that Giacomelli, who had negotiated with him to buy the property, would not go through with the contemplated purchase (pp. 85, 86). That may be so, but it is highly significant that Giacomelli, who was negotiating, but who never made a contract, was a former client of Mr. Popik for whom Mr. Popik had searched the property and for whom Mr. Popik had made the loan from his corporation, Fidelity Securities Corporation, and had permitted that corporation to take the mortgage without knowing anything of the property.

In any event, the matter was turned over by Mr. Walter Beers to his brother, Mr. Edward F. Beers, who is an attorney and a searcher (p. 23) and he had great difficulty in searching and locating the property (pp. 24, 25, 49, 50).

The time for closing title was extended by Mr. Coyne, who represented the complainant in the foreclosure suit.

When Mr. Beers ascertained that this property was without a road frontage and had no ingress or egress, he called up both Mr. Popik and Mr. Coyne on the telephone and had his stenographer listen in to the conversations and she testified to them (p. 114, etc.)

Mr. Popik said that he had no further interest in the title (p. 115); he was doubtful with respect to where the property was located, but it was a square piece and on the road; he thought Mr. Coyne could give the information.

Mr. Coyne stated that he believed the property was a square piece but he did not know whether it was the long side or the small one which was on the road. He would only be guessing, and—

> "One of them I think is on the road, but I don't think I ever saw the place, so I don't —That is right; I am thinking of another place."

And then—

> "Mr. Beers: You didn't see it?
> Mr. Coyne: No, I did not.
> Mr. Beers: You told me up at the sheriff's office that one was on the road; you thought it was the smaller one.
> Mr. Coyne: Dave maybe told you. *Popik saw it, but I never saw it.*
> Mr. Beers: You did not—I don't think there is road frontage.
> Mr. Coyne: You don't think there is.
> Mr. Beers: No, sir.
> Mr. Coyne: Well, I don't know. *I thought there was".*
>
> * * * * *
>
> "Mr. Coyne: I thought Fatzler had gone over this thing before. I thought he had gone up and saw a map.
> Mr. Beers: No. We relied on what Giacomelli told us.

Mr. Coyne: He is the fellow who knows. I think Dave saw it, but I wouldn't swear.

Mr. Beers: You said it was fourteen hundred feet?

Mr. Coyne: I don't know whether it was fourteen hundred or fourteen thousand."

We submit that this testimony shows that Fatzler at the sale was laboring under a mistake as to the location of the property, the subject matter of the sale, and that he was led into that mistake by the statement of Mr. Coyne, who was the solicitor of Alsopp, the mortgagee, referring Mr. Beers to Mr. Popik for information, and by Mr. Popik, the solicitor and officer of the other mortgagee and the only other person interested, referring him to Giacomelli, who was the equitable owner of the property, as the person who could tell where the property was located, and by Giacomelli giving him directions with respect to the property which led him to believe that it had a road frontage of something like 1400 feet. The Vice-Chancellor held that there was a mistake.

We submit that the testimony also shows either that the mistake was mutual and that the representatives of the mortgagees believed that this property had a road frontage or, if it was not mutual, that there was fraud because, if they did know that it did not have a road frontage they should not have permitted Fatzler to labor under the impression that it had, remembering that he acquired the information that it had as a result of inquiries made to them.

Of course, if the mistake was mutual, the purchaser will be relieved but even if it was unilateral, the purchaser will be relieved unless there was negligence upon his part which bars him from relief.

In Green v. Stone, 54 N. J. Eq. 387, this Court said:

> "A court of equity may rescind a contract for a mistake which is unilateral—that is, a mistake on the part of one of the parties only."

While prior to the statute (Sec. 35, 4 Com. St. 4686) the rule of caveat emptor usually applies to judicial sales, Vice Chancellor Pitney said in Boorum v. Tucker, 51 N. J. Eq. 135, affirmed sub-nomen, Hartshorne v. Boorum, 52 N. J. Eq. 587:

> "I understand the rule in New Jersey to be that a purchaser at a judicial sale is bound to take such title as an examination of the proceedings will show that he will get; he is bound to examine for himself beforehand to see what title he will obtain by the sale. The court, however, treats a contract made with one of its officers as being made with the court itself, and will deal with its contractee upon equitable principles—the same principles, indeed, which govern in all cases of specific performance. Campbell v. Gardner, 3 Stock. 423; Cool's Exr. v. Higgins, 8 C. E. Gr. 308; S. C., 10 C. E. Gr. 117."

And see Campbell v. Parker, 59 N. J. Eq. 342.

In 27 R. C. L., title "Vendor and Purchaser" Section 53, p. 353, the author says:

> "Sometimes a mistake occurs as to the identity of the land sold, and as a general rule this will afford ground for the non-enforcement of the contract if wholly executory or for rescission in so far as executed. If, however, the mistake is unilateral and the purchaser's mistake as to the identity and extent of the land sold is due solely to his negligence, relief will not ordinarily be grant-

ed. To furnish ground for relief it has been held that a mistake as to the exact location of the land sold must be material, that is, it must have animated and controlled the conduct of the purchaser. Usually the mistake as to the identity of the land on account of which relief is sought has been a mutual mistake and one arising from the act of the vendor in pointing out in good faith what he thought the actual boundaries or location of the land. To entitle the purchaser to relief, however, it is not essential that the mistake on his part should have been caused by any representations by the vendor, if in fact the minds of the parties did not meet as regards the subject matter and this was not caused by negligence on the part of the party seeking relief. *Thus in a well considered case it appeared that the plaintiff, knowing that defendant had a certain lot for sale, went to examine the same with a view to purchase, but by mistake looked at a different lot from the one the defendant had for sale. She did not see the defendant's lot, but the one she viewed being satisfactory, and believing it to be the lot defendant had for sale, she entered into a written contract of purchase with the defendant, the description in said contract being for defendant's lot. The court decided that she was entitled to rescind.*

In Dzuris v. Pierce, 216 Mass. 132, 103 N. E. 296, the Massachusetts Supreme Court said:

"It is an elementary principle of the law of contracts that, if one party thinks he is buying one thing and the other party thinks he is selling another thing, there is no meeting of minds on the subject matter of the sale. When there is no agreement as to the identity of the subject matter of the contract there can be no contract. Kyle v. Kavanagh, 103 Mass. 356, 4 Am. Rep. 560; Bridge-

> water Iron Co. v. Enterprise Ins. Co., 134 Mass. 433. Where a conveyance has been made based upon such a misunderstanding, even though it may be innocent on both sides, equity in proper cases will grant relief. Spurr v. Benedict, 99 Mass. 463; Long v. Athol, 196 Mass. 497, 504, 82 N. E. 665, 17 L. R. A. (N.S.) 96. *This branch of equitable relief is distinct* from the reformation of contracts entered into by mistake, which must be mutual by all parties before relief can be granted. 'Mutual mistake' in that connection means a mistake common to all the parties to the contract. Page v. Higgins, 150 Mass. 27, 31, 22 N. E. 63, 5 L. R. A. 152; Loud v. Barnes, 154 Mass. 344, 28 N. E. 271. Further, such a misunderstanding between the parties touching the identity of the subject matter of the contract, in order to be ground for relief in equity must not have arisen from the voluntary negligence or failure to obtain reasonably accessible knowledge on the part of the complaining party in the absence of fraud or duress. Clark v. Boston, 179 Mass. 409, 60 N. E. 793; Grymes v. Sanders, 93 U. S. 55, 61, 23 L. Ed. 798; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203."

In the case at bar, while the selling officer was the sheriff, the property was in fact being sold by the mortgagees.

While it is said in the cases that there cannot be relief against a unilateral mistake if there be negligence (and it was upon this theory that relief was denied to appellant), the question as to whether there is sufficient negligence to warrant the court in denying relief is a matter to be determined in each case under the circumstances of that case.

The learned Vice Chancellor seemed to believe that the mere fact that, *before the sale,* a survey

had not been obtained by appellant was plenary proof of negligence. There is no practice of obtaining surveys before attendance at a sale. A survey is a costly thing and no one knows when he attends a sale whether he will get the property or not.

There is no testimony that it is customary for a person intending to bid at a foreclosure sale to have a survey or search made before the sale. The only testimony there is in the case is to the contrary, that of Mr. Beers p. 120.

Nor is it the practice to obtain a search before a sale. That also is a costly thing.

The facts upon which negligence is predicated in the case at bar and the conduct of appellant and Mr. Beers, his counsel, must be taken in connection with the fact that Mr. Beers had made inquiries of those who were interested in the property and who should know where it was located, i. e., the solicitor of complainant, the holder of a mortgage, and the solicitor and officer of a corporation the holder of another mortgage, and had been referred to Giacomelli, who was the holder of the equitable title, and had been advised by him that this property had a road frontage and that it was a certain property which, in fact, it turned out not to be.

There is no proof that any negligence of appellant injured anyone. The mortgagees have all that they ever had. They have not been injured by the sale. Appellant had no interest in the property which would require him to make a search. He acquired whatever interest he had in in vitem the owner. He had nothing but a judgment. The mortgagees had had searches made before they took their securities. It is presumed that they knew what they were getting before they advanced their moneys. The judgment creditor was in no such

position. The mortgagees "waited" for him at the sale so that he might be induced to relieve them from the consequences of their bad bargains.

It was inequitable to hold him and he should have been relieved of his bid without necessity of resort to the provisions of the statute section 35 of an Act relative to sales of lands, etc., 4 Comp. Stat. of N. J., p. 4686.

The clear intent of this statute was to do away with the doctrine of caveat emptor in judicial sales coming within its operation. The Vice Chancellor holds that appellant was guilty of negligence because he did not make a survey, and, inferentially, because he did not make a search, for it would seem that, if he must make a survey, he must make a search prior to the sale, notwithstanding that the statute permits a purchaser to be relieved of his bid if the title be unmarketable, thus clearly indicating that the legislature intended that an intending purchaser at a judicial sale need *not* make a search or a survey. The Vice Chancellor's conclusion upon the matter of negligence is wholly opposed to the intent of the statute.

II.

Appellant was entitled to relief under the statute.

Because of the rule of caveat emptor in judicial sales, the Legislature in 1906 adopted Arbitrary Section 35, An Act relative to sales of lands, etc., 4 Comp. Stat. of N. J. p. 4686. That statute provides that a bidder at a judicial sale

> "shall be entitled to be relieved from his bid if before delivery of the deed he shall satisfy the court by whose authority such sale was made of the existence of any substantial defect in or cloud upon the title of the premises sold which would render said title unmarketable, or of the existence of any lien or encumbrance thereon, unless a reasonable description of the estate or interest to be sold, and of the defects in title and liens or encumbrances thereon, with the approximate amount of said liens and encumbrances, if any, be inserted in the notices and advertisements required by law, and in the conditions of sale;"

The property in question not only has no road frontage but it has no ingress or egress to a public highway and is unmarketable. There is no way of necessity. An attempt was made to create a right of way to it, but, at the time of the foreclosure sale, there was no such right of way.

C. E. Lum acquired title to the property in 1872. At the time he owned a parcel with 3,000 feet frontage on the road which blocked any entrance to the lands in question from Myersville Road. In 1865 he had given a mortgage upon that property. The mortgage on the front parcel was foreclosed

in March 1875, after Lum had purchased the rear piece. By operation of law, the sheriff's deed gave to the purchaser the title which Lum had when the mortgage was made, and at that time the front parcel was subject to no right of way. Lum then sold the rear piece, which is the subject matter of this suit, after foreclosure of the mortgage on the front parcel, (on December 11, 1875) and in that deed there was a recital—"It is hereby agreed that the said party of the second part shall at all times have a right of way over the property adjoining that hereby conveyed."

The attempt to create this right of way was abortive, for Lum could not create a right of way over the front parcel against his mortgagee who had taken the mortgage prior to his acquiring the rear parcel. No deed refers to the right of way since 1875 (pp. 23, 24, 25, 26, 30, 31, 32)

Nor is there any right of way of necessity now over the property of which the lands, the subject matter of this suit, formed a part at the time they were sold to Lum for, at that time Lum owned the front parcel and did not need a right of way. There was no express grant of a right of way over the property of the grantor of Lum and no right of way of necessity arose because Lum, at that time, owned the front parcel upon which he had placed the mortgage. It was Lum's own fault that his rear parcel became valueless and without an exit because he permitted a foreclosure of the mortgage covering the land he owned on Myersville Road. He cannot, nor can his successors, now turn to the grantor of the rear piece and say—"A way of necessity *now* exists".

There is no way into these lands upon the ground and nothing to indicate that any right of way can be claimed by prescription. The nearest

approach to the land of any road or driveway is 500 feet away and that is a driveway leading to the Jackson house on the front lands, not on the lands the subject matter of this foreclosure (p. 39, 40). There is nothing leading into these 90 acres (p. 41) "nothing at all, no evidence of anything, no track marks of any kind."

A way of necessity arises if a man has two parcels of land, one of which is inaccessible except over the other. The way passes as incident to the grant.

French v. Smith, 40 N. J. E. 361.

A way of necessity does not pass unless it is "essential to the beneficial enjoyment of the premises. If so it passes."

Brakley v. Sharp, 10 N. J. E. 206.

As Vice Chancellor Leaming said in Higbee Fishing Club v. Atlantic City Electric Co., 78 N. J. E. 434, at p. 435:

> "It is well settled that a right of way over a grantor's land arises when such grantor sells land wholly surrounded by other lands which he retains, or when the part sold is surrounded in part by the land retained and in part by that of a stranger, over which there is no right of access. In such cases the way is a necessary incident to the grant, *for without it the grant would be useless.* The grant is necessarily for the beneficial use of the grantee and the way is necessary to the use."

But no way of necessity can be claimed over the lands of a stranger.

In Logan v. Stogdale, 123 Ind. 372, 24 N. E. 135, the Indiana Court said p. 137:

> "If the appellant's grantor had remained the owner of the land now owned by the appellee, it is clear that she would be entitled to a way as of necessity to the public road. Kimball v. Railroad Co., 27 N. H. 448. A way by necessity exists by grant, and the grant is an implied one. Nichols v. Luce, 24 Pick. 102. *The theory is that, where land is sold that has no outlet, the vendor grants one over the parcel of which he retains the ownership.* It results from this that a way of necessity cannot be successfully claimed over the land of a stranger; and, if the appellant were asserting a right of way over a stranger's land, she could not succeed. If the appellee occupies the position of a stranger, then the appellant must fail; but, if he occupies the position as to her that the common grantor did before he parted with title, then she is entitled to the relief she prays. In our judgment, the appellee is in the position of his grantor, in so far as the question before us is concerned, and must yield the appellant a right of way. As the law implied a grant at the time the common grantor conveyed to the appellant, and as that grant was prior to the conveyance to the appellee, the latter must carry into effect his predecessor's implied grant."

The case at bar differs in its facts from the Indiana case in that, in the Indiana case, the person over whose lands the right of way of necessity was estblished obtained title after the law had implied the grant of a way of necessity, while in the instant case, the mortgage, which was foreclosed against the land which bordered upon the road, was given before there was a union of title.

In Ellis v. Blue Mountain Forest Ass'n, 69 N. H. 385, 41 Atl. Rep. 856, the New Hampshire Court said p. 857:

> "The fact that the plaintiff's land is completely surrounded by the defendants' does not of itself give the plaintiff a way by necessity over their land. A way by necessity is founded on an implied grant. When a person grants land to which there is no right of way except over his own land, or retains land which is inaccessible except over the land which he conveys, a right of way is presumed to have been granted or reserved. But without a unity of ownership there will be no way of necessity. *If there can ever be a parcel of land with no right of way to it, a conveyance of it will convey no right to pass over the adjoining land of a stranger, however necessary it may be to the enjoyment of the land conveyed.*"

In Nichols v. Luce, et al., 24 Pickering, 41 Mass. 102, the Massachusetts court said:

> "The three different modes of acquiring and holding rights of way, in their origin resolve themselves into one. The distinction between them relates more to the mode of proof than to the source of the title. *They are all derived from the voluntary grant of the proprietor of the fee.* Prescription presupposes, and is evidence of a previous grant. Necessity is only a circumstance resorted to for the purpose of showing the intention of the parties and raising an implication of a grant. And the deed of the grantor as much creates the way of necessity as it does the way by grant. The only difference between the two is, that one is granted in express words and the other only by implication. Quando aliquis aliquid concedit, concedere videtur et id sine quo res uti non potest. Thus when a man grants a close inaccessible

> except over his own land, he impliedly grants a right of passing over that land. *Otherwise the grantee could derive no benefit from the grant.* The same rule of construction would govern a reservation out of lands granted. Co. Lit. 56a; Liford's case, 11 Coke, 52; Lord Darcy v. Askwith, Hob. 234; Clark v. Cogge, Cro. Jac. 170; Howton v. Frearson, 8 T. R. 56; Morris v. Edgington, 3 Taunt. 23; Gayetty v. Bethune, 14 Mass. R. 55. *It is not the necessity which creates the right of way, but the fair construction of the acts of the parties.* No necessity will justify an entry upon another's land. If a man can be supposed to hold land without any right of access to it, a grant of it would not convey to the grantee any right to pass over the adjoining land, however necessary it might be to the enjoyment of the thing granted. *He would acquire nothing more than his grantor held.* The estate would gain no accretion by passing from hand to hand. *The necessitites of the parties would add nothing to it.* Dutton v. Tayler, 2 Lutw. 1487."

In 2 Washburn on Real Property, 6th Ed., sec. 1236 the statement is made, (p. 281)

> "If one has a right of way by necessity over the land of another, it is lost when the necessity ceases; so that, if he afterwards acquires a new way to the estate previously reached by the way of necessity, the first is thereby *extinguished.*"

These cases indicate—

1. That: a way of necessity is created because lands without access are valueless; the necessity gives rise to an implication of a grant; the very fact that the way is one of necessity shows that property, without access, is *unmarketable* for it is

not to be contemplated that property will be purchased, which cannot be enjoyed.

2. That: no matter how dire the necessity there is no way of necessity over the lands of a stranger; the purchaser at the foreclosure sale of the mortgage given before the union of title of the plot along the road and of the rear plot, and his grantees did not take subject to the right of way sought to be created by Lum for, within the meaning of the law, the mortgagee, having taken his mortgage before the creation of the right of way, was a stranger.

3. That, if there be a right of way of necessity, and subsequently the necessity disappears, the right of way is extinguished.

In this case, when Lum purchased the rear plot, he owned the front plot. There was no right of way of necessity created over the lands of his grantor for the necessity did not arise. He had access to the highway over his own lands. The fact that he, and those succeeding in the title, have, by their own fault, lost that access, cannot now give rise to a way of necessity over the lands of his grantor of the rear plot.

The land is, therefore, without access to a highway, and is useless, and the title unmarketable for, as this court said, in Bier v. Walbaum, et als., 131 Atl. 888 (not officially reported) marketable means salable.

In Denne v. Light, 8 De. G. M. & G. 774, 44 English Reprint, 588, a decision of the Court of Chancery granting specific performance of a contract for the purchase of land, where it was doubtful whether there was any access to the land, Lord

Justice Turner, one of the Justices, in delivering his opinion, said:

> "It is situate in and part of the open or uninclosed common field called Ham Common Field. The objection on the part of the purchaser to the specific performance as taken by the answer is, that there is no cartway or carriageway to the land contracted to be sold. In fact, so far as appears, there is no access to it, the land being separated from the public road by an intervening strip belonging to another proprietor, and being surrounded on all the other sides by lands also belonging to other proprietors. The vendor insists that this objection on the part of the purchaser cannot be maintained, on several grounds: first, because nothing is said in the contract on the subject of a right-of-way, and an agreement for the sale of land does not, as she insists, import that there is a cartway or carriageway to the land, to the absence of which she contends that the purchaser's objection is limited by the answer; secondly, because, as she alleges, the purchaser at the date of the contract was acquainted with the nature and circumstances of the holdings of land in these common fields, and the rights of the proprietors of land therein with reference to the enjoyment of and obtaining access to their respective lands, and the question and difficulties which might exist and be raised with spect thereto; and, thirdly, because, as she also alleges, the purchaser, before entering into the contract, was told by her agent that although his belief was that there could not be any land in an open common field without a right-of-way to it, the vendor would not define or point out any way or road, and that if he the purchaser purchased the land he must take it with such rights and liabilities as pertained to it, and such as the vendor possessed.

> With respect to the first of the points thus insisted upon by the vendor, I do not think it material whether the purchaser's objection is or is not limited by the answer to the absence of a cartway or carriageway, for the land in this case is sold as arable land; and if the sale of the land at all imports a right-of-way, I think it must import such a right-of-way as is necessary to the enjoyment of the land, and a cartway or carriageway is clearly necessary to the enjoyment of arable land. I think, therefore, this part of the objection is unimportant; and as to the rest of this objection, I am of opinion that, setting aside the question of previous knowledge and previous information, it would not, whatever may be the import of this agreement at law, be consistent with the principles of a Court of Equity or with the decided cases, to enforce this contract against the purchaser without securing to him a cartway or carriageway to the land. To do so would be to compel the purchaser to pay for what he would not have the means of enjoying."

There is another theory upon which the title can be said to be unmarketable, and that is, that, Lum, having attempted to create a right of way in 1875, *that right of way was an essential part of that which the sheriff in the foreclosure suit pretended to sell,* that is to say, he sold the lands, not as lands without access to the highway, but as lands *with a right of way attempted to be created by Lum in 1875.* It *now* appears that the right of way supposed to be sold as a part of the property is non-existent. No notice was given at the time of the sale, in accordance with the provisions of the statute, that there was any doubt with respect to this right of way. The purchaser is entitled not only to good title to the land as such but

good title to the right of way. He cannot get good title to the right of way because it is non-existent.

Lastly upon this phase of the case, it is a well-established rule that, if there be serious doubt as to the title, specific performance will not be decreed. Here, to say the best for respondents, there is at least doubt.

> Simpson v. Klipstein, 89 N. J. E. 545.
> Saracino v. Klosower Construction Co., 140 Atl. 458; 6 N.J. Adv. Rep. 255.

In both of these cases, this court held:

> "It is the uniform rule to decline specific performance at the suit of the vendor of real estate where a reasonable doubt concerning the title exists, though rested on grounds merely debatable, but which might visit upon the purchaser litigation in that regard, and that too, where at law the title might, in fact, be declared good."

Conclusion.

It is respectfully submitted that, under all of the circumstances of this case, the decree of the Court of Chancery should be reversed and the record remitted with directions to the Court of Chancery to enter a decree or order denying the application of the respondents on their counterclaims to specific performance and granting the application of appellant to be relieved of his bid.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

HENRY ALSOPP, *Complainant-Respondent,* *vs.* LOUIS WEISS, *et als.*, *Defendants-Respondents,* FREDERICK FATZLER, JR., *Defendant-Appellant.*	*On Bill, &c.* *On Appeal from Court of Chancery.*

BRIEF OF RESPONDENTS.

Statement of Facts.

The bill for relief, a dismissal of which by a Decree in the Court of Chancery was brought to this court by this appeal, sought to secure the relief of Frederick Fatzler, Jr., from a bid he made at a sheriff's sale, under a writ of *fieri facias* issued in a mortgage foreclosure suit brought by Henry Alsopp.

Reliance was placed, in the stating of the case, upon three grounds: fraud, mistake and unmarketability of title.

The defendant Fidelity Securities Corporation, a mortgagee, included in the answer it filed a counter-claim praying for the completion by the bidder, of his purchase at the sheriff's sale, pursuant to the terms and conditions thereof. The Final Decree orders such completion.

The various respects in which the decree of the Court of Chancery is alleged by the Petition of Appeal to be erroneous, are not supported by the testimony, nor by law.

Four points will be made in this brief.

1. The appellant is not entitled to equitable relief upon the ground that the title to the premises in question was defective, clouded and unmarketable.

2. The appellant is not entitled to equitable relief upon the ground that the property in question is without means of ingress and egress.

3. The appellant is not entitled to equitable relief upon the ground of fraud.

4. The appellant is not entitled to equitable relief upon the ground of mistake.

POINT ONE.

The appellant is not entitled to equitable relief upon the ground that the title to the premises in question was defective, clouded and unmarketable.

There is no indication in the record that the title to the premises in question is defective, clouded or unmarketable. The testimony indicates that the property is rear land. It does not front upon any definitely laid out road. It does have, however, means of ingress and egress by necessity over adjoining land.

It is elementary that a plot of land has an easement by necessity over other property of the common owner of both tracts which adjoins it as in this case, so that access to it may be enjoyed.

In the hands of any holder of the dominant estate, a court of equity will enforce and protect this right when occasion requires, against the owner of the servient estate. This condition does not, *per se,* render the title to the prop-

erty unmarketable or clouded. It may be that a lesser number of purchasers would be available for such property, but this consideration goes not to the marketability, but to the intrinsic value of the land.

It does not equitably lie within the mouth of this purchaser at the sheriff's sale to contest the marketability and validity of the title to the lands in question.

By the provisions of Section 35 of the Act relating to sales of land, 4 C. S. 4686, the prior existing rule of *caveat emptor,* which applied to judicial sales of land, was modified. The Statute is in the following language:

> "Any purchaser of real estate at any public sale, held under the provisions of the act to which this is a supplement, or of any supplement thereto or amendment thereof, except at sales under general execution and actual levy thereunder, or for unpaid taxes or municipal liens, shall be entitled to be relieved from his bid if before delivery of the deed he shall satisfy the court by whose authority such sale was made of the existence of any substantial defect in or cloud upon the title of the premises and which would render said title unmarketable, or of the existence of any lien or encumbrance thereon, unless a reasonable description of the estate or interest to be sold, and of the defects in title and liens or encumbrances thereon, with the approximate amount of said liens and encumbrances, if any, be inserted in the notices and advertisements required by law, and in the conditions of sale; provided, however, that if the court shall direct any lien or encumbrance not described, and which is due and payable, to be paid out of the proceeds of sale, the purchaser shall not then be relieved by reason of such lien or encumbrance."

This Enactment was construed by Chancellor Walker, while a Vice-Chancellor, in *Oakley* v. *Shaw* (not officially reported), 69 Atl. Rep. 462. A bidder at a sheriff's sale objected to its confirmation upon the ground that a prior encumbrance upon the property existed, and which was not referred to in the advertised notice of sale. The prior encumbrance was a mortgage which the objector himself had, sometime in the past, executed, covering the identical property. Vice-Chancellor Walker said:

> "What is aimed by this statute is notice, and, independent of the statute, it seems to me that one who has notice of the condition of the title cannot object that he did not obtain that notice in the manner and form prescribed by the statute. In other words, he cannot be relieved if he has notice."

In the instant case the only objection as to marketability which can possibly be conceived, is that the property is rear land without right of ingress or egress, in the ordinary way. Even if this were a valid objection on that score, the testimony abounds with indications that the bidder is chargeable with notice of the situation. When he applied, through his solicitor, to the owner of the land for information respecting its location, he was, in effect, informed that the owner did not exactly know where the property was.

Mr. Giacomelli, who was the equitable owner, and for whose benefit the record owners held the title in trust, was called on behalf of the bidder. On direct examination he said (S. C., p. 69):

> "Q Did you tell him it was right on the road? A I didn't mention exactly what it is or how much, because myself didn't know exactly how much it was.

Q Did you tell him it was rear property? A I beg your pardon?

The Court: Now, don't lead him. Ask him what he told him.

Q What else did you tell him about the property? A I show him that according to the chain of lands it must be a square piece of property. He asked me if I made a survey. I told him I never did and it looks like seventeen—four hundred one side and fourteen hundred the other side, and if he would go down to Lum's house and find out from the Palmer property, everybody will show it to him, because they are well known.

Q Well, did you tell him anything else about the Lum house except that he might inquire there? A That is all. I showed the description where the house begins with it—that is, the lots begin with it."

It is evident that this information should have informed the bidder that Mr. Giacomelli was not purporting to tell him where the property was, because he never made a survey, and referred him to the owners of the Palmer property, or people in the vicinity, for the purpose of indicating to him where the land was located.

The witness also testified that he made a sketch, which is marked Exhibit C. 3, and appears at page 127 of the State of the Case. He testified that the Palmer property adjoined the Lum House, which was marked with an "X" on the sketch (S. C., p. 70).

The witness then testified, in response to interrogation by the Court, as follows (S. C., p. 70):

"The Court: The Lum house is where the X is?

The Witness: Yes, sir. And then between here—here there is a cow path.

The Court: Yes.

The Witness: Which begins here continues the road and supposed to begin from the Lum house to here.

The Court: Then you mean to say when he got to the Lum house—

The Witness: Yes.

The Court: He had to come back?

The Witness: No. I told him when he is at the Lum house he will find out where is the Palmer property and not exactly—

The Court: You told him you did not know where it was?

The Witness: I told him not exactly, but I told him when he finds this property, he can find out the Palmer property and then easily locate it.

The Court: Yes."

The witness testified on cross examination that in making the sketch he intended only to represent the Lum property, and not the land in question. Thus he said (S. C., p. 74):

"Q And when you made this sketch here —did you make it yourself? A I did. I did, in order to locate the property.

Q Yes. You located this square here? A Yes, sir.

Q Intending that it should represent the Lum house? A That is right.

Q Not the lot? A No, sir.

Q The land, that one hundred acres shown in back of it? A I showed to him that beginning from Lum's house that was our land.

Q And how far does the Lum property go? A I don't know.

Q Five or six hundred feet? A I can't tell you.

Q Well, anyway, you intended to convey to him the information that the one hundred acres or so—(interrupted). A Begins from the Lum house.

Q The Lum house? A Lum house.

Q In back? A Well, I didn't mention the front or back.

Q You didn't tell him on the road? A I told him there were a cow path on this road here and once he located the Lum house then easily to locate the Palmer property.

Q Am I right in saying that you did not tell him and that you did not intend the piece marked 'X' on this map shown on the road was the one hundred acres? A No, sir.

Q That represents the house? A That represents Lum property.

Q Not the land? A Not the land.

The Court: He said that several times."

Whenever the solicitor of the bidder endeavored to secure information as to the location of the property, he was, in effect, informed by the person he addressed, that the latter had no definite information.

Mr. Walter A. Beers testified that he spoke to Mr. Henry Coyne, attorney for one of the mortgagees, and detailed that conversation as follows (S. C., p. 45):

"Q From whom? A I first telephoned Mr. Henry Coyne, about one week before the sheriff's sale. I told him Fatzler was considering protecting his judgment; I might want to bid on this property, and I wanted to know where it was located for Mr. Fatzler so that he would know whether or not he cared to protect his judgment. Coyne said to me, 'All I know is that the property is on some road out of Green Village. Ask Davy Popik; he made a search; he will tell you all the other information.' I then telephoned David Popik and Mr. Popik said to me, 'The property is on the Myersville road.' I asked him how I could get there; told him I was inquiring for Fatzler so that Fatzler could make an inspection and decide whether or not he wanted to bid and he said to me, 'Well, now, if you want to know how to get there, you will have to ask Giacomelli. He can take you up.' I then wrote Attillio Giaco-

> melli a letter to call at my office, which he did and Giacomelli drew a sketch for me. He drew the center of Green Village. He showed me the post office located right at the center of Green Village and he drew a fork in the road, one which, I believe, leads to Stirling and the other to Myersville, he told me, 'I measured by my automobile speedometer two miles. You go out that road to Myersville exactly two miles and there is the property right on your left on the road. It is right past a little white house which is the Lum house lot.' "

It is important to note that Mr. Coyne referred him for exact information, to Mr. Popik. When Mr. Beers communicated with Mr. Popik who represented a mortgagee, he was informed that the property was on the Myersville Road, according to Mr. Beers' statement. Mr. Popik, however, told him that if he wanted to know how to get there he would have to inquire of Mr. Giacomelli, thereby making it clear that he was unfamiliar with the exact location of the property.

Accepting the testimony offered on behalf of the bidder, without looking to the contradictory testimony by Mr. Coyne and Mr. Popik respecting the alleged conversations with Mr. Beers, which it was entirely competent for the Vice-Chancellor to believe, it is quite evident that the bidder was put upon notice that, to say the least, the location of this property was not definitely known by any of the parties with whom he communicated on that subject. In a court of equity he stands charged with a knowledge of facts which carried with them the obligation to inform himself as to the nature of the location of this property. Equity regards notice as an agency by which it protects equitable rights and titles. This case is certainly one where that doctrine should be in-

voked. The bidder, through his solicitor, was apprised that if he purchased the property at the sheriff's sale without making an independent inquiry after the information which Messrs. Giacomelli, Coyne and Popik furnished, he would be buying property as to which he had no authoritative, definite information, and as to which he had no representation respecting its location. He should not now be permitted to be relieved from a purchase made under such circumstances, upon the ground that the title is defective, clouded and unmarketable.

POINT TWO.

The appellant is not entitled to equitable relief upon the ground that the property in question is without means of ingress and egress.

A broad statement of the doctrine of ways of necessity, has already been made under Point One.

According to the testimony of Edward F. Beers, called as a witness on behalf of the appellant, a Mr. Lum owned in 1872, the property in question, and the lands which lie between it and the Myersville Road. His interest in the last named property was cut off by a foreclosure sale nine months before he conveyed the property in question.

The witness said (S. C., p. 25):

> "Q At the time that deed was recorded, was Lum the owner of the adjoining property? A No, he had been cut off by foreclosure of the mortgage.
>
> Q How long before, if you know, had Lum owned both the properties? A The mortgage on the adjoining property was made in 1865 and the sheriff's deed foreclosing that was recorded on March 15, 1875.

Q And what was the date of this deed out of Lum? A That was recorded on December 11, 1875.

Q Some six months after the sheriff's deed cut off the title of Lum, the grantor in the deed, giving the right of way? A Nine months later.

Q Nine months later. What property was sold under this deed given in pursuance to foreclosure? A A very large tract surrounding this property almost entirely on three sides.

Q And did that property have roads running on the Myersville road, on the sheriff's deed? A For three thousand feet, at least.

Q That is the property under the sheriff's deed? A That is right.

Q And I think that you said Senator Lum—whatever that name was, was the common owner of the property sold under the sheriff's deed, and the property now involved in this suit, at one time? A Yes.

Q Did C. E. Lum own the property involved in this suit at the time he made the mortgage on the Myersville road property? A No, he did not.

Q Can you tell me when he acquired that title? A He acquired title to the property in question by a deed in 1872."

The same witness further testified (S. C., p. 29), that Lum conveyed the premises in question by deed dated November 29, 1875, and recorded December 11, 1875.

That deed, the same witness had earlier in his testimony stated (S. C., p. 24), contained a recital to the effect that the party of the second part, presumably the grantee, should have a right of way over the adjoining property.

In March, 1875, however, the interest of Lum in the adjoining property was wiped out by the foreclosure of a mortgage he had executed on it.

While a right of way, under the circumstances, may not exist by express reservation, there certainly is such a right by implication.

The general rule respecting the creation of a way of necessity has been well stated by Vice-Chancellor Leaming in *Higbee Fishing Club* v. *Atlantic City Electric Co.*, 78 N. J. E. 434. The learned Vice-Chancellor said:

> "It is well settled that a right of way over a grantor's land arises when such grantor sells land wholly surrounded by other land which he retains, or when the part sold is surrounded in part by the land retained and in part by that of a stranger, over which there is no right of access. In such cases the way is a necessary incident to the grant, for without it the grant would be useless. The grant is necessarily for the beneficial use of the grantee and the way is necessary to the use. Stuyvesant *v.* Woodruff, 21 N. J. L. (1 Zab.) 133, 155; Love *v.* Stiles, 25 N. J. E. (10 C. E. Gr.) 381, 383; French *v.* Smith, 40 N. J. E. (13 Stew.) 361, 362; 3 Kent Com. (420); 14 Cyc. 1774, note 33. By the grant to complainant a way of necessity over the remaining lands of grantor was undoubtedly created in favor of complainant."

The doctrine expressed above is supported by many other decisions in this State, among them: *Camp* v. *Whitman,* 51 N. J. E. 467; *French* v. *Smith,* 40 N. J. E. 361; *Love* v. *Stiles,* 25 N. J. E. 381.

A corollary to this proposition has also been established by judicial decisions, the purport of which is summed up by the following statement in 19 C. J. 926:

> "Although the owner of land cannot subject one part of his land to another by an easement because he cannot have an ease-

> ment on his own property, yet if he grants a portion of it to another, leaving other land of the grantor to which he can have access, only by passing over the land granted, a way of necessity is reserved in the grant by implication, unless, as may be done, the intent to reserve the way is negatived by the express terms of the deed. This is an exception to the rule that a grantor is not to be heard to assert any right in derogation of his covenant, and the ground on which it is based is that the law presumes an understanding of the parties that the one selling a portion of his land shall have a legal right of access over the part sold to the remainder if he cannot reach it in any other way, and 'it is *pro bono publico* that the land should not be unoccupied.' This presumption prevails over the usual covenants of a warranty deed, which cannot be construed as a waiver of the right of way, and which does not estop the grantor to claim such way over the land granted."

Upon the sale, under foreclosure, of the lands surrounding the property in question, the latter tract, by necessity, became endowed with a right of way over the lands formerly owned by Lum, his title to which was cut off by the foreclosure sale. The severance of the ownership of the two properties need not be by voluntary conveyance to carry with it this result. The decree and sale in the foreclosure proceedings were just as effective for this purpose as a voluntary conveyance.

In this connection, it is said in 19 C. J., page 925:

> "The method of alienation to create or transfer a right of way by necessity is not material. The conveyance may be legal or equitable, and the rule governing ways by necessity has been held to apply to a devise of land as well as to conveyances *inter vivos*. Also a way of necessity may arise by acts

> of the party owning the land, or it may arise by judicial decree or sale under a decree, or by sale under an execution. In other words, a way by necessity passes by implication where the dominant and servient estates are severed by legal proceedings, as well as in case of voluntary grant, the way passing with each successive transfer of title whether voluntary or involuntary."

The contention is made on behalf of the appellant, that the mortgage, which was foreclosed against the land lying between the plot in question, and the Myersville Road, was executed before there was a union of title to the two tracts in lump, and that therefore, no way of necessity arose upon the sale under the foreclosure of that mortgage of the plot having road frontage. To so hold, would be to give to a mortgage the effect in equity, which is only accorded to it in law.

In equity, the mortgage is not regarded as an absolute conveyance, but only as a lien. Equity will regard as a conveyance to the extent that it may be necessary to so construe it, to protect the interest of the mortgagee. Primarily, however, it has been the policy of our Court of Chancery to construe a mortgage as a lien. This being so, there is no impediment to the creation of a way of necessity in favor of the tract of land in question, over the adjoining land upon the foreclosure of the mortgage executed in 1865, the foreclosure sale coming at a time when both tracts of land were owned by the same person. The learned Vice-Chancellor found, it may be presumed, that a right of way existed in favor of the premises in question.

That conclusion is evident from the following testimony, S. C., page 31:

"Q I follow you on that, but I understand you to say that Lum's right of way was cut off by the foreclosure of a mortgage made in 1865.

The Court: Well, now, that is not important, whether he said it or not, because that is clearly a conclusion and it is up to the Court to decide whether, under those circumstances, the right of way was cut off.

Mr. Unger: All right.

Q Now, what was the date of that mortgage?

The Court: 1865.

A 1865.

Q And do I understand that, according to the records, Lum did not have the title to the premises at that time? A When he made the mortgage?

A Yes.

The Court: He said he didn't have title to the interior property, but, of course, he had title to the property on which he made the mortgage.

Mr. Unger: That is what I want to know.

The Court: Didn't he?

The Witness: That is right.

The Court: He didn't have title to the interior piece, but he got title to the interior piece in 1872.

The Witness: That is right.

Q Is that right? A That is right.

Q So that in 1865 he had title to the property embraced in the mortgage, according to your record? A Yes, he did.

Q And in 1872 he acquired title to the interior? A Yes.

Q Had there, in the meantime, been any release so far as you have been able to find,

by any parties of the right of way which had been created?

Mr. Clancy: Well, let me interrupt and object here. The right of way, if the Court please, was not created until nine months after the sheriff gave a deed cutting off Lum to the road property.

Mr. Unger: I follow counsel absolutely on that, but the right of way does not have to be created through. There is a right of way which arises out of a prescriptive right, known as an easement by necessity, and it does not need any grant. There can be easements by and easements by implication and easements by necessity.

The Court: Yes, there can be a right of way by necessity.''

Every dictate of equity would seem to indicate that the recognition of such a right of way, under such circumstances, is in accord with the well-established policy that it is *pro bono publico,* that land should not be unoccupied. A mortgagor does not undertake, by the execution of a mortgage, that he will not purchase other lands, access to which could only be had by way of the mortgaged property. His purchasing so, is not in derogation of his mortgage, and to hold, under such circumstances, that upon foreclosure of the mortgage, no right of way existed would bring about a great injustice to the mortgagor.

It is respectfully submitted that there is no foundation for the appellant's contention that he should be relieved of his bid, upon the ground that the property is without means of access.

POINT THREE.

The appellant is not entitled to equitable relief upon the ground of fraud.

The learned Vice-Chancellor, upon reviewing the facts, found that no fraud whatever had been proved. He used the following language (S. C., p. 124):

> "The Court: The only reasons for the sustaining of this bill are fraud or mistake. As far as fraud is concerned, I do not have to go into that elaborately, because no fraud has been proved whatever."

Thereafter, the Vice-Chancellor entered upon a discussion of the matter of mistake, and did not again examine the contentions respecting fraud.

The only testimony which, in the remotest degree, bears upon this issue, is embraced within the alleged conversations between Mr. Walter Beers, and Mr. Coyne and Mr. Popik. These have been, in part, detailed under Point One, and any allegations that Coyne or Popik represented the property to have a road frontage, are refuted in the direct testimony of each of those persons.

Mr. Popik on direct examination, said (S. C., p. 87):

> "Q Before you attended the sale, did you receive any inquiries from anyone regarding the location or situation of this land? A Before the sale?
>
> Q Yes. A I did not.
>
> Q Did Mr. Fatzler or his solicitor Mr. Beers, ask any information from you about where it was located? A They did not.
>
> Q Either in writing or otherwise? A No.
>
> Q And Mr. Beers came in after with his client, Mr. Fatzler? A Yes.
>
> Q Now, when they came was there anything said by you or by anybody else in your

presence, regarding the location of that property? A There was not.

Q Did you talk to Mr. Beers over the telephone at any time prior to that time, giving him any information at all with respect to the location of this property? A Not prior to the sale.

Q Did you know where it was located? A I did not.

Q How did you happen to have a mortgage on it? A Well, this man, Giacomelli, was my client for some years. I had loaned him money on notes even in greater amount, and he came to me and told me that he was buying this property, and he had to have thirteen hundred dollars, because he had delayed the closing for some time and he could not go through with it. He convinced me that we would not be going wrong by taking that mortgage and I took the mortgage for my company without seeing the land.

Q Had you ever been up on the property at all? A No.

Q Never seen it? A Never seen it.

Q Did you tell Mr. Beers or your client or anybody else, before the sale, that it was located on the Myersville road? A Never heard of that road until after the suit was started.

Q Now, did you refer Mr. Beers to Mr. Giacomelli for the purpose of getting information where the property was located? A I did, but that was after the sale.

Q And he has spoken of a telephone to you in which you referred him to Giacomelli, is that the occasion? A Yes, that is true.

The Court: Was that before or after the sale?

The Witness: After the sale."

On cross examination the witness said (S. C., p. 96):

"Q You did not. Did Mr. Beers ask you before the sheriff's sale, where that property was situated? A I have no recol-

lection of ever having had such a conversation with Mr. Beers.

Q Would you say you did not? A To the best of my knowledge I did not. I have spoken to Mr. Beers so many times in reference to Giacomelli's troubles.

Q Didn't you— (Interrupted.) A (Continuing.) I know I have had at least a dozen telephone calls I am quite certain, very certain."

A little further on in his cross examination, the following testimony appears (S. C., p. 99):

"Q Did you ever tell Mr. Beers that this property was on the Myersville road? A I did not, sir.

Q Did you ever tell him it was on a road? A No, sir. Couldn't very well do that from the description, could I?

The Court: No, no.

Q No. I am asking you the question. A I am sorry. I beg your pardon."

Mr. Coyne, who represented the complainant foreclosing his mortgage, testified as follows respecting his conversation with Mr. Beers (S. C., p. 104):

"Q And did you attend the sale? A I did.

Q Before that time did you talk to Mr. Beers about this property? A Yes.

Q What did you say to him? A I think he called me up about a week or so before the final adjourned date, and he asked me where this property was.

Q What did you tell him? A I told him I had never seen the property and I couldn't tell him where it was and that I didn't think if my client ever saw the property, but suggested that he get in touch with Dave Popik who might be able to give him some information and that was the end of our conversation.

Q Did you give him any information beyond that at any time before the sale? A No, sir; I knew nothing to tell him.

Q Had you ever, in fact, ever seen the property? A I have not seen it yet. I have no idea where it is yet.

Q At the time of the sale did you make any statements or representations or any description as to where the property was located, other than having the sheriff read the description? A No, sir. And he will not say so, either.

Q Was there any statement made at the sale, at any time before the sale, that the property was located on the Myersville road or any road? A Any statement by whom?

Q By anybody there, by either you or Mr. Popik? A No, sir.

Q When did you— A There were no questions asked at the time of the sale, outside of the request for time for paying of the first mortgage which we also controlled.

Q When did you first hear it complained that the location of the property had been misrepresented by anybody in the case? When did you first hear about that? A When Walter Beers came to my office, I think with some papers."

Upon cross examination, the testimony of the witness was substantially to the same effect. Thus he said (S. C., p. 108):

"Q Before the sale, Mr. Beers called you up on the telephone? A Yes, sir.

Q And told you, I suppose, that he represented Fatzler, who held a judgment? A I knew it from a search.

Q And did he ask you where the property was at that time? A He did.

Q And did you not tell him, you say, because you did not know? A I told him I did not know.

Q Yes? A I had never seen the property and could not tell him, and then suggested he see Mr. Popik.

Q And for what purpose did you suggest that he see Mr. Popik? A If he wanted to get the location of the property, I assumed he was going to make up his mind

as to whether or not he was going to bid to protect Fatzler's judgment.

* * * * * * *

A I didn't say I knew. I suggested that he get in touch with Mr. Popik and find out.

Q Mr. Popik ever tell you he knew where the property was? A He did not.

Q Did you tell Mr. Beers that Popik knew where the property was? A I did not.

Q How did you know that Mr. Popik knew where the property was? A I did not.

Q How did you know that Mr. Popik knew where the property was? A I did not.

Q At any time at all?

The Court: He said he didn't know.

The Witness: I don't think so. I don't see how I could when I know that he did not see the property."

It is evident that the Court placed little credence upon the conclusions which the appellant intends to draw from a letter on the stationery of Mr. Coyne, directed to a Mr. Strahan, in which a visit of Mr. Alsopp to a piece of property is referred to. The learned Vice-Chancellor, during the course of the examination respecting this letter, said (S. C., p. 110):

"Q Well, now, Alsopp did know something about that property, didn't he? A I say now that I do not believe he ever saw it. I know I never saw it.

Q Well, now, I am not interested in you just now.

The Court: How does he know whether Mr. Alsopp saw it or not?

Mr. Clancy: He wrote in the letter that Mr. Alsopp had been up to see it. Now, evidently, Mr. Alsopp told him he had been there.

The Court: How do you know?

The Witness: May I see this?

Q Did Alsopp tell you he saw that property? A I don't recall, sir, if he had told me I wouldn't say that he had never seen it.

Q Now, I don't want any explanation of that; I want to know why— (Interrupted.)

The Court: Now, wait a minute. Did Mr. Alsopp tell you he had seen the property?

The Witness: No, sir.

The Court: Well—

Q Why did you on your letterhead write that 'Mr. Alsopp never saw this property until last week and his visit has not impressed him favorably'? Why did you write that? A It is possible, sir, that I might have tried to get as big a discount on the first mortgage as I could possibly get.

Q I don't want the possibilities, I want the facts. A Well—

Q What is the fact? What is the answer?

The Court: No.

The Witness: What is the question?

Q What is the fact, not about the possibility of your trying to get as big a discount as possible. What is the fact about Alsopp's visit to this property? A I say now, sir, that I don't believe he ever saw the property."

It was entirely competent for the Vice-Chancellor to give to the testimony, on the question of fraud, the credence which he in fact did accord it, and to find that the case was barren of any proof of misrepresentation to warrant a decree relieving the bidder from his purchase. It is quite true that there is in the record testimony which contradicts, to some extent, the depositions of the witnesses called on behalf of the respondent.

The evidence discloses, however, strong testimony upon which the decree of the lower court may rest with entire propriety.

POINT FOUR.

The appellant is not entitled to equitable relief upon the ground of mistake.

Before proceeding to discuss the fact situation which was developed at the final hearing upon the question of mistake, it will be well to examine into the limits of the application of the doctrine of mistake to the relief of bidders at judicial sales.

A leading case is that of *Hayes* v. *Steiger,* 29 N. J. E. 196. Pursuant to a decree of the Court of Chancery the petitioner purchased mortgaged premises and sought to be relieved of his contract. The contention was that the purchase was made under the belief that the proceedings in foreclosure were full and perfect, but that he had discovered that he was mistaken. It was an admitted fact that the wife of the owner of an equity of redemption of one moiety of the mortgaged premises, was not made a party to the foreclosure suit, and of course, her inchoate right of dower still attached to the premises. Petitioner was represented at the sale by a member of the New York Bar. Respecting the conduct of the petitioner, Vice-Chancellor Van Fleet said (p. 197):

> "If the petitioner acted under a mistake, he alone was responsible for it. He neither sought information by examination or inquiry. His misapprehension was entirely the result of his own carelessness and inattention to his interests."

The learned Vice-Chancellor went on to state the circumstances under which the Court of Chan-

cery would give relief, in the following language (p. 197):

> "The power of this court to set aside a sale made under its authority, and thus relieve the purchaser from his bid, is unquestionable, but its exercise, like all other judicial action, must always rest upon some consideration of justice. Fraud will always justify its exercise. Cummins *v.* Little, 1 C. E. Gr. 48. It may be exercised in case of accident. Seaman *v.* Higgins, 1 Gr. Ch. 214. So, also, where surprise or misapprehension is occasioned by the conduct of the purchaser, or the officer making the sale, to the injury of a person interested, the court will interfere. Woodward *v.* Bullock, 12 C. E. Gr. 507; and in Campbell *v.* Gardner, 3 Stock 423, Chancellor Williamson set aside a sale because it appeared that the defendant, who was an aged female, had been misled, by her brother, as to the contents of a subpoena served upon her."

The Court of Chancery will, of course, not assume to act where there has been merely a mistake of law. The learned Vice-Chancellor in this respect said (p. 197):

> "But this power will not be exercised in behalf of a suitor who seeks to escape from the consequences of his own act induced by a mistake of law. (Wakeman *v.* Duchess of Rutland, 3 Ves. 233; Dillett *v.* Kemble, 10 C. E. Gr. 66; Mott *v.* Shreve, *Ib.* 428;)—*ignorantia juris non excusat*—nor will the court exert it in favor of a purchaser who seeks to escape from a contract on the ground of misapprehension or mistake of fact, when it appears his error resulted entirely from his own negligence, *and that he would have avoided it by the use of ordinary prudence. Parkhurst* v. *Cory*, 3 Stock 233; *Campbell* v. *Gardner, supra; Smith* v. *Duncan*, 1 C. E. Gr. 240; *Haggerty* v. *McCanna*, 10 C. E. Gr. 48."

This decision also established the proposition that the negligence of counsel, in the absence of fraud, will be charged to his client. The learned Vice-Chancellor said (p. 198):

> "In the absence of fraud, the negligence of counsel will be esteemed the fault of the client. Wakeman *v.* Duchess of Rutland, Dillett *v.* Kemble, Mott *v.* Shreve, *supra.* The legal effect of a decree of this court directing land to be sold, and the character and extent of the title to be acquired by virtue of it, are purely matters of law. A purchaser at a judicial sale who voluntarily abstains from all effort to get correct information, and deliberately assumes the hazard of making a purchase ignorantly, must, as a general rule, bear the consequence of his own negligence. Coot's ex'rs *v.* Higgins, 8 C. E. Gr. 308; S. C. 10, C. E. Gr. 117; it would be difficult to imagine a case of grosser negligence than that admitted by the petitioner."

In conclusion the Court said:

> "As the case stands, the highest equity he can claim is, that he has not made as good a bargain as he expected to make. This can hardly be esteemed an equity sufficient to justify the abrogation of a contract. While contracts of this description are, very properly, said to be made with the court, and therefore the court may exercise a greater power over them than it can over any other class of contracts (McCahill *v.* Equitable Life Assurance Society, 11 C. E. Gr. 531) still, it cannot rescind them, without an equitable or legal reason sufficient to justify its action. In my judgment the case made by the petitioner does not entitle him to the relief he asks. His petition, therefore, must be dismissed, with costs."

In *Campbell* v. *Parker*, 59 N. J. E. 342, the defendant, an attorney at law, purchased real estate at a receiver's sale, paid a portion of the price and signed a memorandum acknowledging

the purchase. The Court compelled him to accept the conveyance, although he was ignorant of a restriction in the title shown by the records, prohibiting the sale of liquor on the premises, and although the receiver, after the sale, verbally warranted title to be free from all encumbrances.

Vice-Chancellor Pitney said:

> "I conclude, therefore, that it must be dealt with precisely the same as if it had been made by a master of this court by special order, or by a sheriff under a writ of *fi. fa.* directed to him. If so, then the rule found in the line of cases which culminated in Boorum *v.* Tucker, applies. The rule was there stated as follows (6 Dic. Ch. Rep. 139). 'I understand the rule in New Jersey to be that a purchaser at a judicial sale is bound to take such title as an examination of the proceedings will show that he will get; he is bound to examine for himself beforehand to see what title he will obtain by the sale. The court, however, treats a contract made with one of its officers as being made with the court itself, and will deal with its contractee upon equitable principles—the same principles, indeed, which govern in all cases of specific performance.
>
> It is unnecessary to review all the authorities which preceded that case. Those not there particularly mentioned are collected and cited by Vice-Chancellor Van Fleet in Hayes *v.* Stiger, 2 Stew. Eq. 196; and the only question is whether or not the respondent has shown such a case of fraud, accident or mistake as will induce a court of equity to relieve him from the purchase upon the principles stated in that case.
>
> No accident or fraud is here set up, but a verbal representation amounting to a sort of verbal warranty, like that set up in Boorum *v.* Tucker, is pleaded and proven; also a mistake on the part of the respondent, namely, ignorance of the existence of the clause found in the deed under which the

bank held title. That representation in Boorum *v.* Tucker was held not sufficient of itself to relieve the purchasers from their liability to carry out their contract. * * *

* * * Now, here, the restrictive clause in question is contained in the deed under which the insolvent bank obtained title, and was spread upon the records of the county. The respondent is a lawyer of eminence and experience, and perfectly familiar with the rule that a purchaser of land at a judicial sale takes it subject to all encumbrances and defects shown by the record of the title. Restrictions of this character are quite common in deeds of conveyance in New Jersey, particularly those conveying lots in suburban towns. If the respondent at all anticipated the purchase of these premises, *I think it was his duty to have examined the record of the title beforehand to ascertain what sort of a title he would get under the receiver's deed; and if he had asked the question of the receiver, within a seasonable time before he made the bid, he could have seen the original deed, which was in the possession of the receiver, and have examined it for himself. It seems to me it was clearly and decidedly negligent in him to bid upon the property without such preliminary examination.* It would produce great inconvenience in the conduct of business of this character if parties might come in and bid upon land under such circumstances, and rely upon an examination of the title afterwards."

The learned Vice-Chancellor refers, in the course of his opinion, to the various matters relating to mistake, and refers, particularly, to the denial by Mr. Giacomelli that he indicated on the sketch he drew, the property in question; and to the fruitless interview of two men at the property in an endeavor to ascertain where the *locus in quo* was situated, and to the failure to make further inquiry as to the location of the property. The learned Vice-Chancellor also in-

dicated that he was impressed with the fact that the purchaser had at least three weeks prior to the sheriff's sale within which to ascertain where the property was situated. Particularly important is it to note that the solicitor for the bidder neither made a search nor a survey.

The learned Vice-Chancellor concluded that reliance was placed entirely upon the information of a man who, by his own statement, did not know where the property was.

Looking now to the testimony which supports these findings, the court's attention in the first instance, is directed to the alleged conversations of Mr. Beers, the solicitor for the bidder, with Messrs. Coyne, Popik and Giacomelli. These conversations have already been referred to, to some extent, in this brief. They indicate clearly that the solicitor for the bidder, upon the conclusion of his inquiries, was left with little more knowledge than he had before making his inquiries. Certainly he had no definite authoritative information, unequivocal in nature, respecting the location of the lands. It is significant to note that the sheriff's sale was adjourned several times at the request of the solicitor for the bidder, and when the sale was held no discussion was had respecting the location of the lands.

Mr. Beers testified (S. C., p. 63):

> "Q At all events, you were granted a number of adjournments? A Yes, sir.
>
> Q Is it true that at the same time of the sale no representation as to the location of this property was made by either Mr. Coyne or by Mr. Popik? A There was not a bit of discussion about location at the sheriff's sale.
>
> Q Nothing said at the sale? A No, sir."

The record indicates that the appellant purchased the property on August 13, 1928. His solicitor, prior to the purchase, had not made or caused to be made, any search of the title of the premises. The latter testified on cross examination, as follows (S. C., p. 52):

"Q When did you first order the search to be made on this property? A I believe I handed my notes to my brother the early part of August.

Q 1928. And you want us to understand that on the 28th of September, 1928, you had gotten no report from him that this property was not located on the road? A That is true.

Q Almost two months? A Yes. I will explain that if you wish.

Q Yes. A I told my brother at that time that Giacomelli was expecting a mortgage loan, and, if that was so, he might not have to make the search, he might not have to complete it, that he should take his time with it.

Q Did you stop him from completing an examination of this title? A Nothing other than what I have said.

Q Well, then, there was nothing that would interfere with the completion of this title within a week or so, if somebody attended to it diligently, was there? A If you gave—I don't know; I never made a search.

Q Well you are sure about that? A Positive.

Q You have made searches, haven't you? A Never. Never picked up a deed book."

It was not until December 10, 1928 (S. C., p. 51) that Mr. Beers learned that the property had no road frontage. Mr. Beers stated on cross examination that the sketch made by Mr. Giacomelli did not indicate that the words "Myersville Road" was in front of the property in question (S. C., p. 57):

"Q So on the sketch that he made it did not appear that the word 'Myersville Road'

was in front of the property? A It did not.''

It may therefore, be taken that it was the witness' understanding of the sketch that it did not purport to represent the location of the property in question with exactitude, or as having a road frontage.

The witness, from his own statement, relied upon the inquiries he made, and nothing more, and it was upon the strength of those inquiries, in part, he said, that he determined not to secure a survey of the property (S. C., p. 62):

''The Court: Why didn't you get a survey in the first place?

The Witness: (The witness pauses.)

The Court: Why didn't you get a survey in the first place?

The Witness: What do you mean, your Honor, before we bid?

The Court: Certainly.

The Witness: Well, I inquired from— (Interrupted.)

The Court: You had a week. Was it because the survey was too expensive?

The Witness: Surely. I did not consider it good practice to survey ninety acres of property before you knew you were going to bid in the property, and I had no reason to suspect that it was not so located— I inquired of everyone possible who would have knowledge.''

Having thus inquired, and finding himself in the uninformed state which in fact he was in, every dictate of ordinary prudence would indicate, for that very reason, a search or a survey or both.

The testimony of Mr. Giacomelli is substantiated by the deposition of Charles Weldon, his

vendor, who, on direct examination, made the following statements (S. C., p. 75):

"Q Did you sell the property to Giacomelli? A I did.

Q Did he know where the property was at that time? A I think so.

Q Did you show him any property on the road? A No.

Q Did you tell him that it was rear land? A Yes. Inside land, I called it.

Q Inside land? A Inside.

Mr. Clancy: That is all.

Cross examination by Mr. Unger.

Q And you knew it was inside land? A I did.

Q And it has always been inside land? A As far as I knew.

Q The right of way leading into it? A I had always understood so."

The appellant stated at the hearing that he relied in bidding for the property, upon the advice that he received from his counsel (S. C., p. 78). It may therefore be taken that the only thing which need be looked to on the question of mistake, is the activities of the latter.

The bidder was not informed by, nor had he asked Mr. Popik or Mr. Coyne about the location of the property until after the sale (S. C., pp. 80-82). After the sale the purchaser learned from Mr. Beers that negotiations with Mr. Giacomelli respecting the title to the premises had fallen through. The appellant testified that it was then that he decided that he did not want the property (S. C., p. 84).

Reviewing all of this testimony, together with the many additional indications throughout the record of extreme neglect in ascertaining the nature and location of the property, it is mani-

fest that the conclusions of the learned Vice-Chancellor upon this point are entirely proper and supportable. The true reason for the attempt, at this time, on the part of the appellant to be relieved of his bid, would seem to be the failure of his negotiations with Mr. Giacomelli for the purchase of the property by the latter.

In a letter written by his solicitor to Mr. Coyne, marked Exhibit D. 1, it appears that this purchase was contemplated as early as September 28, 1928. The letter contains the following statement, among others (S. C., p. 131):

> "Fatzler has agreed to turn the property over to Giacomelli who expects word in a few days with reference to a mortgage he is arranging. Inasmuch as Fatzler has no great amount of cash available at this moment, he does not wish to put up $3,000 if he can avoid it by having Giacomelli, through his mortgagee, put up the funds."

The doctrine of mutual mistake has no application whatever to this case. The contract into which Mr. Fatzler entered by his bid at the sheriff's sale, was made with the Court. *Hayes* v. *Steiger, supra.* Thus, the only equitable relief open to the bidder must rest upon fraud, surprise, or misapprehension free from negligence. This is not a case where both parties to the contract indulged in a common erroneous conception.

Assuming that the doctrine of mutual mistake applied in such a case, the record clearly indicates that neither Mr. Popik nor Mr. Coyne nor Mr. Giacomelli knew definitely the plot of land in question. They were all under a mental state of uncertainty respecting its location. The record does not disclose that either of those persons had *a fixed and settled belief that the*

property was on a road. Under such circumstances, there is an entire want of a foundation upon which to rest the finding that the contract which resulted from the bid, was induced by a mutual mistake.

Any mistake made by the bidder is not correctible at this time by any equitable principle without doing grievous injury to the other parties to this litigation. A changed state of affairs exists at this time. The amounts due upon the mortgages by reason of the lapse of time are larger, and a larger bid will be required at the sale to realize the respective sums payable. The sale will have to be re-advertised and expenses of many kinds incurred. No proof has been offered on the part of the bidder to indicate that conditions which regulate the desirability of property of this kind on the market have remained unchanged, or that the respective positions of the parties have remained unchanged. It is therefore respectfully submitted that the decree of the Court of Chancery should be affirmed, and that the bidder should be compelled, pursuant to that decree, to perform his bid.

Mr. Pomeroy has said, 4th Edition, section 839:

> "The erroneous conception or conviction of the understanding which constitutes the equitable notion of mistake has nothing in common with negligence; equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence. Mistake, therefore, within the meaning of equity, and as the occasion of jurisdiction, is an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time."

There is nothing throughout the length of the entire record, to furnish a sufficient reason for excusing this appellant. The position in which he finds himself is due entirely to his own fault, and its creation was not contributed to, in the remotest degree, by any act of the other parties to this litigation.

Whatever position the bidder may find himself in, it was brought about solely through his own negligence and want of ordinary prudence. He was not imposed upon or misled by anybody or anything upon which he was entitled, as a reasonably prudent man, or by which his solicitor was thus entitled, to rely.

MILTON M. UNGER,
Solicitor for and of Counsel
with Respondents.

LEONARD J. EMMERGLICK,
On the Brief.

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New Jersey Court of Errors and Appeals

HENRY ALSOPP, *Complainant-Respondent,* *vs.* LOUIS WEISS, *et als.*, *Defendants-Respondents,* FREDERICK FATZLER, JR., *Defendant-Appellant.*	*On Bill, &c.* *On Appeal from Court of Chancery.*

REPLY BRIEF OF APPELLANT FREDERICK FATZLER, JR.

(Italics, etc., ours except where otherwise noted.)

I.

Reference to the testimony as a whole and to the sketch Exhibit C. 3 will clearly indicate that Giacomelli *did* inform Mr. Beers that he knew where the property was located and *did* indicate that it was on the Myersville Road with 1,400 feet frontage, and that the large square on Exhibit 3 with the "X" within it represented that property.

Respondents overlook, on p. 4 of their brief, when they state that the *only* objection that can possibly be conceived to the marketability of the title is that it is rear land without right of ingress or egress in the ordinary way, that, as pointed out on p. 29 of our original brief, the chain of title showed an attempt to create a right of way and that right of way was an essential part of that which the Sheriff pretended to sell at the foreclosure sale, and that that right of way

does not exist, or, to say the best for respondents there is grave doubt whether it exists.

II.

It is immaterial whether the mortgage be treated as a conveyance as at law or as a lien as in equity (pp. 12 and 13 of respondents' brief). The foreclosure sale in 1875 conveyed the title as it existed in 1865. If respondents' contention made on p. 15, be conceded it would mean that mortgagors might, after the making of the mortgage, by purchasing additional lands, create rights of way, which would be good as against the mortgagee, over the land mortgaged, which might materially depreciate the value of the security, and if mortgagors could so create rights of way in this way they might create other encumbrances.

A right of way over land is an encumbrance upon that land.

III.

Under respondents' Point IV they cite the case of *Hayes* v. *Steiger*, 29 N. J. E. 196 and quote copiously from it. In the first place, the case was before the statute and the rule of *caveat emptor* applied. In the second place, it appears from that portion of the opinion quoted by respondents on p. 24 of their brief, *i. e.*,—"A purchaser at a judicial sale who voluntarily abstains from *all* effort to get correct information, and deliberately assumes the hazard of making a purchase ignorantly, must, *as a general rule*, bear the consequence of his negligence" that the case has no application to that at bar for here there was no voluntary abstinence from *all* effort to get accurate information. A portion of the

opinion, not quoted by respondents, again indicates that the case has no application to that at bar, and that portion not quoted is a single sentence between the two portions quoted on p. 24 of respondents' brief. It reads as follows:

> *"No attempt has been made to show that the title the petitioner will get, if his contract is enforced, is worth less than the sum he agreed to pay; it cannot, therefore, be assumed that he will be required to pay more than the title he will acquire is worth."*

The proof, without contradiction here is that the bid was $2,300, subject to a mortgage of $1,000 and taxes, making a total cost of the property to the purchaser of $3,500, and that the property, being without access, is not worth more than from five to nine hundred dollars.

So *Campbell* v. *Parker*, 59 N. J. E. 342 has no bearing for it was decided before the statute. Vice-Chancellor Pitney refers to the case of *Twining* v. *Neil*, (38 N. J. Eq. 420), on p. 348 of 59 N. J. E. in which case the court *did* relieve "a plain man, not acquainted with the rules of law or methods necessary to be pursued to protect a dealer in real estate" who had "purchased at a sheriff's sale under foreclosure, as many laymen do, that a sheriff's deed under foreclosure would give him a clear title to the whole premises free of other encumbrances, when, in point of fact, the sale was made under the foreclosure of a second mortgage, to which the first mortgagee was not made a party, and the equity of redemption offered for sale was absolutely valueless, and he paid a price which represented the full value of the premises free of encumbrances."

It is not the fact, as stated by respondents on p. 27 of their brief, that the solicitor for the bidder, after making the inquiries "was left with

little more knowledge than he had before making his inquiries'' Giacomelli, to whom he had been referred by the attorneys of both mortgagees, had given him a definite location as that of the property.

It is not, we submit, a fair inference from the testimony of Mr. Beers on cross examination that his understanding of the sketch was that ''it did not purport to represent the location of the property in question with exactitude, or as having a road frontage'' (p. 29, of respondents' brief). Here respondents have omitted to quote testimony immediately preceding testimony quoted and other testimony a part of the context. Preceding the quotation from the record on p. 57, on p. 28 of respondents' brief, we find the following:

> ''Q Are you sure in that sketch he located your property on the Myersville Road? A Positive.
>
> Q Was it marked 'Myersville Road'? A It was—the road was not marked the Myersville Road.
>
> Q That is what I am asking you whether —(interrupted). A He had 'Myersville' written out in the direction where the property was.
>
> Q Yes. And did he have the road marked 'Myersville' or anything like that? A No—yes, he told me that it was the Myersville Road.''

And then follows the question and answer quoted by respondents, and again we ask the court to look at the sketch Exhibit C. 3.

It is a misconception, we submit, of the testimony (p. 62) that it was upon the strength of any inquiries made prior to the sale that Mr. Beers determined not to secure a survey of the property (p. 29, respondent's brief). He testified definitely that he never thought of getting a

survey before bidding; that it is not the practice to get such a survey or a search (pp. 63, 120).

When respondents speak (p. 30) of the bidder not being informed, not asking Mr. Popik or Mr. Coyne about the location of the property until after the sale they are speaking of the *bidder personally.* Information was obtained from both attorneys, as indicated in our original brief, by his solicitor.

On p. 32 of respondents' brief, the statement is made "A changed state of affairs exists at this time." There is no proof of any changed "state of affairs." A condition is supposed to continue to exist unless there be proof to the contrary. The burden was not upon appellant to show that the condition had not changed but upon respondents who now assert the change, but who did not either allege it or attempt to prove it in the court below, to prove it.

If the fact that additional interest has accrued, and that therefore a larger bid will be required at a new sale would be sufficient to bar relief, then there never would be relief granted in any case of this kind. If the Court of Chancery felt that equity required that appellant should bear this additional interest, or the expense of re-advertising, etc., appellant might have been required to make such payment as a condition for relief, but the relief asked for in the case at bar was denied without qualification.

Respectfully submitted,

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