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BILL OF COMPLAINT.

Filed May 5, 1926.

In Chancery of New Jersey

To his Honor Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainant, Joseph Sapinsky, of Griggstown, in the Township of Franklin, in the County of Somerset, respectfully shows unto your Honor:

1. Heretofore and on or about the eleventh day of September, 1923, an action in attachment was commenced in the Somerset County Circuit Court by Gilbert Stout against the complainant. When the complainant learned of the pendency of this action he retained Voorhees Kline, an attorney and counsellor-at-law of this State, of Somerville, New Jersey, to defend it, and informed the said Voorhees Kline that the claim asserted by the plaintiff in attachment, Gilbert Stout, was unjust, giving full written information as to the facts, and instructing the said attorney to oppose and defend the said action. The complainant had communication with this said attorney by telephone and by correspondence from time to time until the complainant wrote his said attorney on or about the twenty-second day of January, 1924, again repeating the facts of the case, and again instructing his attorney to oppose the said action. Thereafter the complainant heard no more either from his said attorney or from the plaintiff in attachment, Gilbert Stout, or the plaintiff's attorney, or from anyone concerning the said attachment action, until the

eighth day of August, 1925, during all of which time the complainant supposed that the said action was being properly defended by his said attorney.

2. On the eighth day of August, 1925, the complainant was informed by a friend and neighbor that his property hereinafter more particularly described had been sold under writ of execution. The complainant thereupon made inquiries of his said attorney, of Amos M. Waln, attorney of the plaintiff in attachment, and of Joseph Hanlon, Esquire, Sheriff of Somerset County, and also examined the papers and records in the Somerset County Clerk's office, from which inquiries and examination, the complainant learned that on April 1, 1924, an affidavit and assessment of damages was filed in the said attachment action, showing the said plaintiff's damages to be $124.83, and that on April 10, 1924, there issued a *fieri facias de bonis et terris,* on a judgment entered in the said attachment action to the Sheriff of Somerset, commanding the Sheriff to raise the sum of $124.83, plus costs, or the sum of $168.03 in all.

3. Pursuant to the command of that writ, the Sheriff of Somerset levied on the complainant's homestead property at Griggstown, in the County of Somerset, more particularly described as follows:

ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Franklin, in the County of Somerset and State of New Jersey:

BOUNDED AS FOLLOWS: On the north by lands of James Cortelyou and Widow Brown, on the east

by lands of the same and John H. Voorhees, on the south by the public road leading from Griggstown to Ten Mile Run, and on the west by the public road leading from Millstone to Princeton, along the Delaware and Raritan Canal. Containing eight and one-half (8½) acres of land, more or less. One-eighth of an acre occupied as a burying ground is reserved.

Being also one of the parcels described in a certain certificate of tax sale made by Edwin Garretson, Collector of Franklin Township, dated February 10, 1921, and recorded in the Somerset County Clerk's office in Book 0.9 of Mortgages, page 214, and therein described as follows: "Eight acres of land and buildings."

Being the same premises conveyed to Joseph Sapinsky by John B. Acken and Alice Acken, his wife, by deed dated June 9, 1922, and recorded in the Somerset County Clerk's office in Book W-18 of Deeds for said county on pages 136 and 137.

4. Thereafter and heretofore the Sheriff advertised the said real estate for sale, and on July 27, 1925, and although at all times between April 10, 1924, and the date of the said sale there were on the said premises goods and chattels belonging to the complainant of a value far more than enough to make the full amount to be raised by the said writ of execution, the Sheriff, acting upon the instructions of the attorney of the plaintiff in the attachment action, proceeded to sell to the plaintiff in attachment the real estate hereinabove described, and the same was bought in by the said plaintiff in attachment for the sum of $168.03.

5. The complainant had no notice of the said sale, which was held at the Sheriff's office in

Somerset; did not attend it, and, and at all times, until he was informed by a neighbor as above stated, on August 8, 1925, was wholly ignorant that judgment had been entered against him in that action, or that a writ of execution had been issued, or that any proceedings thereunder had been taken, but at all times until August 8, 1925, supposed that the attachment action was being defended by his attorney, Voorhees Kline.

6. The complainant's property hereinabove described, sold as aforesaid, consists of eight and one-half acres of land, on which is erected a frame brick filled house containing sixteen rooms. The complainant bought the property in 1922 for the sum of $3,800, and has since that time spent large sums of money for additions and improvements, so that the said property, sold as aforesaid under the said writ of execution for $168.03, is worth at least the sum of $22,000.

7. Shortly after August 8, 1925, the complainant applied to Amos M. Waln, Esquire, attorney of the said Gilbert Stout, the plaintiff in the attachment action, and was informed by the said Waln that the said Stout had obtained a deed from the Sheriff for the said property. The complainant inquired what sum the said Stout would take, and the said Stout at first demanded $1,500, and later reduced his demand to $1,200, but, although the complainant offered to pay more than the judgment, interest and costs, the said Stout refused to do anything unless the complainant paid the sum of $1,200.

8. The complainant is ready, willing and able to pay such sum as may be due the said Stout under the said judgment and execution, but submits that nothing is due except the sum of

$124.83, plus interest and costs, and offers to pay that sum, or such other sum as the Court may fix, to the said Gilbert Stout.

9. Heretofore, the complainant applied by petition to the Somerset County Circuit Court, setting forth the facts hereinabove alleged, and praying that the said sale be set aside, and the said Stout, by counsel, opposed the said petition on the ground that the Somerset County Circuit Court had no further jurisdiction to make the order prayed for, because the said Stout had received a deed from the Sheriff under the execution sale, wherefore no order has yet been made by the Somerset County Circuit Court upon the complainant's said petition.

10. The said Gilbert Stout is married, but the complainant does not know the Christian name of his wife, and, therefore, designates her as Mary Stout, the name "Mary" being fictitious. Any interest which the said Mary Stout may claim in the property hereinabove described is subject to the complainant's rights therein.

11. At all material times, the complainant has been and still is in peaceable possession of the property hereinabove described, and claims to own the same.

WHEREFORE, the complainant prays:

1. That Gilbert Stout and Mary Stout, his wife (the name "Mary" being fictitious, as her true first name is unknown to the complainant) who are the defendants herein, may answer this bill of complaint and each statement therein made.

2. That the execution sale aforesaid, pursuant to which Gilbert Stout bought the property here-

inabove described, be set aside, and that the deed from the Sheriff of Somerset to Gilbert Stout be set aside and be adjudged to convey no right, title or interest in and to the property hereinabove described to the said Gilbert Stout, and that it be adjudged that neither of the defendants has any right, title or interest in or lien upon the property of the complainant hereinabove described, and that the cloud upon the complainant's title to the said property by the said judgment, execution, sale and deed, be removed.

3. That the complainant have such other and further relief as may be just; and

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

McCARTER & ENGLISH,
Solicitors of Complainant.

G. W. C. McCARTER,
Of Counsel.

NOTICE OF MOTION TO DISMISS.

IN CHANCERY OF NEW JERSEY.

Between JOSEPH SAPINSKY, *Complainant,* *and* GILBERT STOUT, *et als.*, *Defendants.*	*On Motion to Dismiss Bill of Complaint.* *Notice of Motion.*

To: McCarter and English, Esqs., Solicitors for Complainant.

Gentlemen:

PLEASE TAKE NOTICE that on Tuesday, the 22nd day of June, 1926, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, at the Chancery Chambers, at the State Capitol, in the City of Trenton, New Jersey, I shall move before his Honor the Chancellor that the bill of complaint filed in the above-entitled cause be dismissed for the following reasons:

First: The said bill shows no ground for the interposition of this Court.

Second: The said bill does not show any fraudulent, improper or inequitable conduct on the part of the defendants.

Third: The said bill shows laches on the part of the complainant.

Fourth: The said bill shows that the situation against which the complainant prays relief was occasioned by neglect attributable to him.

Fifth: The said bill does not show that the sale which is complained of was for a grossly inadequate consideration.

Sixth: The said bill shows that all of the acts of the said defendants have been regular and proper.

Seventh: The said bill shows that this court will not take jurisdiction of the matters therein set forth.

Eighth: The said bill does not show that a proper tender has been made, nor that the requirements of such a tender have been carried out.

Ninth: The said bill discloses no cause of action.

Tenth: The said bill shows that the complainant is not entitled to the relief prayed.

Respectfully,

AMOS M. WALN,
Solicitor of and Counsel with Defendants.

Dated: June 16, 1926.

Service of the within notice is hereby acknowledged this eighteenth of June, 1926.

McCARTER & ENGLISH,
Solicitors of Complainant,
Reserving all objections to lateness of notice.
6|620

MEMORANDUM.

Filed September 17, 1926.

IN CHANCERY OF NEW JERSEY.

Between

JOSEPH SAPINSKY,
Complainant,

and

GILBERT STOUT, *et als.*,
Defendants.

Memorandum.

(Not to be printed at all.)

ON MOTION TO DISMISS BILL.

Mr. Amos Waln, for the motion.
Messrs. McCarter & English, *contra.*

BUCHANAN, *V.-C.*

The bill in this cause was dismissed on motion, for the reason that it sets forth no cause of action. It alleges an attachment suit in the Somerset County Circuit Court commenced and prosecuted by the present defendant against the present complainant, resulting in judgment for $168.03, *fi. fa.* and sale of the present complainant's real estate. No fraud, inequitable or even irregular conduct by the present defendant is alleged: simply that complainant had instructed an attorney to defend, supposed it was being defended, and had no notice of the judgment or sale until about a week after the sale. It does not even allege that he actually had a real or meritorious defence to the attachment suit. It alleges that the property was bought in at the sale by the present defendant for $168.03 and that the property was worth $22,000.

Memorandum of Vice-Chancellor.

There is no allegation that there were no other liens or encumbrances against the property—but passing that, it is not perceived that any facts are stated which would warrant the interposition of this Court. If the complainant has suffered damage, it has been the fault of himself or his attorney. He may have ground for action against the attorney; he may have ground for application to the Somerset County Circuit Court for relief, but under the facts set forth there seems no ground upon which this Court could make decree against the present defendant; and no authority or precedent for the maintenance of such a bill has been cited.

Decree of Dismissal.

DECREE OF DISMISSAL.

Filed July 16, 1926.

IN CHANCERY OF NEW JERSEY.

Between JOSEPH SAPINSKY, *Complainant,* *and* GILBERT STOUT, *et als.*, *Defendants.*	*Decree of Dismissal.*

This matter coming on to be heard in the presence of Frederick W. Nixon, appearing for McCarter & English, solicitors of the complainant, and Amos M. Waln, solicitor of the defendants, and the court having heard the argument of the said solicitors, and being of the opinion that the bill of complaint filed herein discloses no cause of action;

And it appearing that due notice of the said defendants' motion to dismiss the bill of complaint has been given to said complainant;

It is thereupon, on this sixteenth day of July, 1926, ORDERED, ADJUDGED and DECREED that the complainant's said bill of complaint be and the same is hereby dismissed with costs.

E. R. WALKER,
C.

Respectfully advised,

MALCOLM G. BUCHANAN,
V.-C.

NOTICE OF APPEAL.

Filed September 15, 1926.

IN CHANCERY OF NEW JERSEY.

Between JOSEPH SAPINSKY, *Complainant,* *and* GILBERT STOUT, *et al.*, *Defendants.*	*On Bill, &c.* *Notice of Appeal.*

The complainant hereby appeals from the final decree made in this Court by the Chancellor on the advice of Vice-Chancellor Buchanan in the above-stated cause on July 16, 1926, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

McCARTER & ENGLISH,
Solicitors for and of Counsel
with Complainant.

Dated September 14, 1926.

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

G. W. C. McCARTER,
Of Counsel with Complainant.

PETITION OF APPEAL.

Filed October 13, 1926.

New Jersey Court of Errors and Appeals

Between JOSEPH SAPINSKY, *Complainant-Appellant,* *and* GILBERT STOUT, *et al.*, *Defendants-Respondents.*	*Petition of Appeal.*

To the Honorable The Court of Errors and Appeals in the last resort in all causes:

The petition of JOSEPH SAPINSKY, the appellant in the above stated cause, respectfully shows that:

Your 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 the sixteenth day of July, 1926, wherein your petitioner was complainant, and Gilbert Stout, *et al.*, were defendants, in this respect, to wit:

The said decree adjudges that the complainant's bill of complaint be dismissed with costs.

And your petitioner appeals from the whole and every part of the said decree, upon the ground that the same is erroneous in that the said Chancellor should not have dismissed the complainant's bill of complaint, but should have overruled and denied the defendants' motion to dismiss the same.

Petition of Appeal.

Your petitioner, therefore, prays that the said decree of the said Chancellor may be in all particulars aforesaid reversed, set aside, and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem fit.

McCARTER & ENGLISH,
Solicitors of Complainant-Appellant.

New Jersey Court of Errors and Appeals

Between,

JOSEPH SAPINSKY,
Complainant-Appellant,

And

GILBERT STOUT, *et als,*
Defendants-Respondents.

On Appeal From Decree in Chancery.

BRIEF OF DEFENDANTS-RESPONDENTS.

The Defendants-Respondents respectfully submit to the Court that the decree in the above entitled cause should be affirmed for the following reasons:

1. *The bill of complaint shows no ground for the interposition of a Court of Equity.*
2. *The said bill does not show any fraudulent, improper or inequitable conduct on the part of the Defendants.*
3. *The said bill shows that all of the acts of the said Defendants have been regular and proper.*

The said bill of complaint shows that on or about the eleventh day of September, 1923, an action in attachment was commenced in the Somerset County Circuit Court by Gilbert Stout against the Complainant, when the Complainant learned of the pendency of this action and retained Voorhees Kline, an attorney, of Somerville, New Jersey, to defend it, that he informed his said

attorney that the said claim of the said Stout was unjust, that he had communicated with his said attorney by telephone and by correspondence from time to time up until January 22, 1924, that thereafter he heard nothing further from his said attorney, nor from anyone else concerning the matter until August 8, 1925; that on August 8, 1925, he was informed that the property described in the bill of complaint had been sold under writ of execution in said action; that thereupon he made further inquiry and examination of documents and verified this information; that on or about April 1, 1924, judgment was entered in said action and on April 10, 1924, an execution issued on said judgment to the Sheriff of Somerset; that thereafter the said Sheriff advertised the said property for sale, and on July 27, 1925, sold the property at such sale to the Complainant in attachment for the amount of the judgment and costs. Complainant alleges that he was ignorant of the entry of said judgment, of the issuance of the writ of execution and also of the sale. The Complainant further alleges that the value of the property described in the bill of complaint, and which he alleges was sold under said writ of execution is $22,000.00. He further alleges that shortly after August 8, 1925, he applied to the Defendant, Stout, to find out what sum he would take, and that the said Defendant demanded $1,500.00, and later demanded $1,200.00. The Complainant admits that there is due the amount of the judgment plus interest and costs, and offers to pay that sum or such other sum as the Court may fix. The Complainant further alleges that he has applied by petition to the Somerset County Circuit Court upon the same facts as in the said bill of complaint alleged, and praying that the said sale be set aside, he alleges that this application was opposed, and that no order has yet been made by the said Circuit Court upon the said petition. The Complainant still further alleges that he has been and

still is in peaceful possession of the property and claims to own the same.

There is no allegation whatever in the said bill that there was any fraud or improper or inequitable conduct on the part of the Defendants, or on the part of the attorney for the Defendant, Gilbert Stout, in the attachment suit. So far as the bill shows, action in attachment was brought upon a claim against the Complainant, a judgment was entered, an execution issued, the property properly advertised and sold under said execution. There is no allegation nor even any intimation that the Complainant in the action of law did anything calculated to prevent the Defendant therein from obtaining full knowledge of all of these things. In nearly every case in which equity has exercised its jurisdiction and set aside a judicial sale, there has been some unconscionable or inequitable conduct on the part of the Complainant or his attorney, which is entirely absent in this case. The bill shows no fraud or irregularity of any kind. Unless the bill shows accident or mistake, a court of equity will not exercise its jurisdiction to set aside a regular sale under the process of another tribunal.

> The policy of the law is against interfering with the orderly prosecution of judicial sales.
>
> *Murray* vs. *D'Orsi et al*, 131 Atl. 122 (N. J. Ch.) (Nov., 1925) (Bentley V. C.)
>
> Citing *Hoffman* vs. *Quigley*, 79 N. J. Eq. 617, 82 Atl. 900.
>
> In the absence of fraud, irregularity, accident or mistake, judicial sales will not be set aside for inadequacy of price, unless the inadequacy is so gross as to justify an inference of fraud.
>
> *Hoffman* vs. *Quigley* (Ct. of Err. & App.) 82 Atl. 900, 79 N. J. Eq. 617.
>
> (Syllabus by the Court).
>
> In *Skillman* vs. *Holcomb* (1858) 12 N. J.

Eq. 131, Williamson Ch. said, "It would take a very strong case of fraud, mistake, surprise, or accident to induce this court to interfere with the completion of a sale upon an execution at law," and pointed out that all of the cases referred to by counsel were cases in which that court was asked to interfere with the execution of its own process, and concluded that this is "a very different thing from interfering with the process of another and independent tribunal."

The Complainant does not even attempt to show by the allegations of his bill that he had any meritorious defense to the action at law.

The bill of complaint alleges that, although at all times between April 10, 1924, and the date of the said sale there were on the said premises goods and chattels belonging to the Complainant, of the value far more than enough to make the full amount to be raised by the writ of execution, the Sheriff, acting upon the instruction of the attorney of the Plaintiff in the attachment action, proceeded to sell to the Plaintiff in attachment, the said property. Whether the object of this allegation is to raise an inference of improper or inequitable conduct on the part of the Plaintiff in the attachment suit or his attorney is not clear, nor is it clear whether the Complainant contends that there is any rule of law or equity requiring a levy to be first made upon the personal property. Personal property being of such a transitory and illusive nature, and the ownership of it being so difficult to discover, it can hardly be seriously contended that, in the absence of any rule of law regarding such a case, the Plaintiff or his attorney could be held to be guilty of any improper conduct in causing the Sheriff to levy upon real estate. There appears to be no rule of law in this state requiring that the Sheriff shall first levy upon personal property under a common law writ.

If it be the rule that a Sheriff must first levy an execution on personal property before levying on real estate, his impropriety in not doing so is a subject for correction by the court out of which execution issued and the debtor cannot invoke injunctive relief.

Palladino vs. *Hilpert*, 72 N. J. Eq. 270, 65 Atl. 721. In this case, Garrison V. C. said in his opinion, "If it is to be the rule in New Jersey that the Sheriff must first levy upon the personal property, under a common law writ, surely such a rule should be established by the courts of law, and the Sheriff should be controlled in executing their process in this respect by those courts."

A judgment creditor can sell personalty or realty at his option on execution.

In RE. Fritz's Estate, 91 A. 1017, 83 N. J. Eq. 610.

In this case Lewis V. C. said in his opinion.

"A judgment creditor can sell personalty or realty at his option on execution. He is the one the law is particularly interested in seeing made whole. However, when the debtor dies and his estate is sued, his personalty becomes liable first of all, and his realty only secondarily. The law still primarily looks after the judgment creditor. The protection of the heir is only a secondary matter. The heir may give bonds to prevent the sale of the real estate if he wishes to do so, and thus prevent a forced sale of the realty."

Also, it should be observed that the allegations of the bill show that the action at law was an action in attachment, and it is also apparent from the allegations of the bill that the judgment in that action was entered by default. It does not appear to be contended that the Sheriff did not levy upon and sell under the execution

the identical property attached under the writ of attachment, and of which writ the Complainant had knowledge. Obviously, in the situation disclosed by the bill of complaint, if there was no appearance, or if, in the case of a non-resident, a special appearance was entered, the Plaintiff in the action at law could not properly have caused any property to be levied upon and sold under the execution other than the property which had been attached, and certainly can not be charged with any impropriety in failing to do so.

If the Defendant be a resident, then in case he does not appear the judgment and execution shall be special against the property attached only, but in case he does appear the judgment and execution shall be against him generally; if the Defendant be a non-resident, he may appear specially or generally; in case he does not appear or shall enter a special appearance, the judgment and execution shall be special against the property attached only, but in case he enters a general appearance the judgment and execution shall be against him generally. (P. L. 1903, p. 563; 3 C. S. 4078; Rev. of 1903) Sheen's New Jersey Practice Act, p. 77, sec 91.

Where there is no appearance by Defendant, attachment proceedings are strictly in rem, and the judgment is available only against the property attached.

Blessing vs. *Blachburn Varnish Co.* (1919) (N. J. Sup.) 107 A. 599, citing *Davis* vs. *Megroz*, 55 N. J. L. 429, 26 A. 1009.

If the Defendant in attachment was a non-resident at the time of that suit, and a special appearance was entered, the judgment and execution could only, under the above statute, be special against the property attached.

Even after an appearance in an attachment suit, the action remains a proceeding in rem so far as the attached real estate is concerned, and its sale on execution.

Where lands were attached under a writ and a return made thereto, and an inventory and appraisement filed, a general appearance for the Defendants in attachment was entered in the Clerk's book, under section 38 of the attachment act. Held, that after such appearance the suit proceeded in personam, remaining a proceeding in rem as to the property attached, and that a motion to quash the attachment and proceedings thereunder will be refused.

Connelly vs. *Lerche*, 56 N. J. L. 97, 28 A. 430.

A judgment for the Plaintiff in an attachment suit, where the Defendant appeared without giving bond, has a twofold effect; (1) The property, real and personal, attached, may be sold to satisfy the judgment; and (2) the judgment recovered after an appearance has the force and effect of a judgment in personam.

Davis vs. *Megroz*, 55 N. J. L. 427, 26 A. 1009.

Although the Complainant alleges in his bill that, "although at all times between April 10, 1924, and the date of the said sale there were on the said premises goods and chattels belonging to the Complainant of a value far more than enough to make the full amount to be raised by the said writ of execution, the Sheriff, acting upon instructions of the attorney of the Plaintiff in the attachment action, proceeded to sell to the Plaintiff in attachment the real estate hereinabove described," (State of Case, p. 3, line 27), there is no allegation that the Plaintiff in attachment or his attorney had any knowledge that the defendant owned any goods or chattels within reach of the process of the Court, or that the said Plain-

tiff or his attorney acted fraudulently, or were influenced by any motive or even desire to oppress the Defendant, or that there was any design or intention on the part of the said Plaintiff or his attorney to obtain the real estate upon a sale under the execution rather than to obtain the amount of the debt by a sale of the personal property. Certainly the conduct of the Plaintiff in attachment or his attorney in respect to the sale of the real estate could not be held to be either improper, inequitable or oppressive unless it be shown by some allegation that either of them had some knowledge of the existence of the personal property, and that the sale of the real estate was because of some design to obtain it, or was fraudulent or oppressive.

Also it should be observed that while the allegation is that the goods and chattels were "of a value far more than enough to make the full amount to be raised by the said writ of execution," Complainant does not state of what such goods and chattels consisted, or their even approximate value. In this connection, the attention of the court is called to the fact that, as the Complainant alleges that the real estate sold was his "homestead" property, the goods and chattels located there to which he refers, may have been household goods and furniture, in which event, if he had a family residing in this State, such goods to the value of $200 would be exempt from attachment (P. L. 1901, p. 172; I. C. S. p. 148, sec. 36), and from sale. Complainant does not even show, by the allegations of his bill, that the goods and chattels to which he refers were of sufficient value to make the amount of the judgment and costs in excess of this exemption.

Although it is alleged in the bill that the Sheriff, in proceeding to sell the real estate under the execution, which appears to have been issued more than a year and three months prior to the sale, acted upon "the instructions of the attorney of the Plaintiff in the attachment action

(State of Case, p. 3, line 34)," there is no allegation as to what such instructions consisted of. The instructions alleged appear to have been in connection with the sale rather than the levy. There is no allegation that the instructions of the attorney of the Plaintiff were in any sense improper or designed to oppress the Defendant. It is not alleged that the attorney of the Plaintiff instructed the Sheriff to levy upon or sell the real estate even if the Sheriff could find sufficient personal property to satisfy the demand, or that the attorney instructed the Sheriff to ignore any personal property that he found. Obviously, a Sheriff, in executing such a writ, aside from the command of the writ, always acts "upon the instructions of the attorney of the Plaintiff." There is nothing in this bill of complaint to indicate that the instructions in this case were not entirely innocent. The Complainant has apparently attempted, by his method of alleging a perfectly innocent act, and without setting forth anything wrongful about it, or even claiming that it was done wrongfully or with an improper motive, to raise an inference of some possible wrong-doing, which is certainly not warranted from the allegations of the bill.

4. *The said bill of complaint shows laches on the part of the Complainant.*

5. *The said bill shows that the situation against which the Complainant prays relief was occasioned by his neglect and by negligence attributable to him.*

The bill of complaint shows that the action in attachment was commenced on or about the eleventh day of September, 1923. The bill further shows that the Complainant learned of the pendency of this action, that he retained an attorney at law of Somerville, New Jersey, to defend it, that he fully informed his said attorney of his defense, and instructed him to oppose and defend the said action. The bill further shows that the Complainant

had communication with his said attorney by telephone and by correspondence from time to time up until January 22, 1924, when the Complainant wrote to his attorney in reference to the matter. The bill further shows that thereafter the Complainant heard no more either from his said attorney or from the Plaintiff in attachment, or from the Plaintiff's attorney, or from anyone, concerning the said attachment action until August 8, 1925. The bill further shows that a judgment was entered in said action about April 1, 1924, that on April 10, 1924, an execution was issued, and that the sale under said execution was not held until July 27, 1925. The bill does not show that the Complainant ever received or made any further effort to obtain any reply from his said attorney to his letter of January 22, 1924, nor that the Complainant ever communicated with his attorney after January 22, 1924, and before August 8, 1925, in order to obtain any information concerning the status of the action. The bill sets forth the residence of the Complainant as Griggstown, in the Township of Franklin, in the County of Somerset. The court will take judicial notice of the fact that Griggstown is but a short distance from Somerville, and located in the same County. Although, it appears that the residence of the Complainant was but a few miles from the residence of his attorney, and located in the same County, the bill does not show that the Complainant made any effort to communicate, either by telephone or by letter, with his said attorney, concerning the matter during the period from January 22, 1924, until August 8, 1925, a period of over a year and six months. The bill shows no effort on the part of Complainant to communicate with the Plaintiff in attachment or his attorney, or with any other person, during the said period, in reference to the action. From the bill, it appears that the Complainant knew that his property had been attached, and he certainly knew that unless the action was defended, and unless it was defended successfully, his property might be in danger of being sold. Yet, the bill of complaint does not attempt to justify in any way his failure to take any apparent interest in the matter for more than a year and a half. He does not show any good reason why he apparently failed to seek any information concerning the action for nearly a year and four months after the judgment was entered, and when he contends his attorney ceased to represent him. The situation shown by Complainant's bill shows merely gross neglect, rather than any mistake or misapprehension, on his part.

While the Complainant in his bill sets forth his residence as being in the Township of Franklin, in the County of Somerset, in this State, and alleges in his bill and reiterates in his brief that the property sold was his "homestead" property, and while there appears from the bill to be no contention that the Sheriff did not properly advertise the property for sale according to law, the Complainant offers no explanation or excuse for his failure to see or learn of the notices of sale, one of which is required to be posted in the Township, or the advertisement of the sale required to be published in a newspaper circulating in the County, for four weeks prior to the sale. Even where a party has set up a reasonable ground for surprise, a court of equity will not interfere where the surprise is owing to his own negligence, even in the case of a sale under the process of that court.

> The fact that a party to the suit, who is entitled to the surplus money on a sale of the mortgaged premises, is so far deprived of his eyesight as not to be able to read a newspaper, and alleges that on this account he did not see the advertisement of the sale, and that in consequence of his absence from the sale the property was sold at a sacrifice, is not a ground for the Court's ordering a re-sale of the property.

> Surprise is one of the grounds upon which the Court interferes, and orders a re-sale, where the party has suffered loss by the property's having been sacrificed. But where the surprise is owing to his negligence, and is of a character which would have been avoided by the exercise of ordinary prudence, as a general rule, the court will not interfere. It will not interfere where the surprise is not created by the misconduct or inadvertence of a third person, but by the neglect and inattention of the party complaining.
>
> *Parkhurst* vs. *Cory*, 11 N. J. Eq. 233. (Williamson Ch.)

Neither does the Complainant attempt by his bill to show that he is in any sense an ignorant or stupid person, or even unfamiliar with legal proceedings, and it is quite significant in this connection that he does not, in his bill, disclose the business or profession in which he is engaged.

The Complainant appears to base his right to relief upon the ground that he instructed his said attorney to defend the action at law and that his said attorney neglected to do so. However, if we are to assume that such fact is true, which we are required to assume, such neglect of his said attorney is not a proper ground for the relief prayed by the Complainant. The rule seems to be that the neglect of the Defendant's attorney is attributable to him and is not proper ground for setting aside a judicial sale.

Garrison V. C. in *Palladino* vs. *Hilpert*, 72 N. J. Eq. 270, 65 Atl. 721, in speaking of the neglect of Defendant's attorney, said:

> "That the negligence or carelessness of his attorney, if there was any such, must be attributed to him is too well settled to require discussion. The

> citations will be found collected in 16 Am. & Eng. Ency. of Law (2 ED) p. 392. Even if there was proof . . . which there was not in this case, that the property was sacrificed, I do not think it is a proper case in which to extend the aid of this Court. If it is a proper case then I cannot conceive of any case in which a Sheriff's sale under an execution at law could stand if the Defendant asserted that he did not have belief that the property would be sold, and I am sure that to extend the jurisdiction so as to produce this result is not in keeping with the spirit animating this court with respect to this subject. The courts have frequently called attention to the necessity of having Sheriff's sales or judicial sales upheld unless there is some strong reason for setting them aside, and have pointed out that the purchaser at an official sale becomes invested with a fixed and definite legal right of which he should not be deprived except upon some legal or equitable ground. *Chamberlain* vs. *Larned* (Ct. of Er. 1880) 32 N. J. Eq. 295; *Morisse* vs. *Inglis* (Ct. of Er. 1889) 46 N. J. Eq. 306, 19 Atl. 16; *Bethlehem Iron Co.* vs. *P. S. S. R. Co.* 49 N. J. Eq. 366, 23 Atl. 1077, (Magill, Ch. 1892); *Hunt* vs. *Swayzse* (Supt. Ct. 1892), 55 N. J. Law 33, 25 Atl. 850; *Zimmerman* vs. *Place* (N. J. Ch.) 48 Atl. 994 (Magie, Ch. 1901); *Ryan* vs. *Wilson* (N. J. Perog.) 52 Atl. 993 (Reed V. C. 1902).
>
> There are many jurisdictions in which one whose land has been sold by judicial process has a certain length of time within which to redeem the same. This right is created and regulated by statute. There is no such statute in New Jersey. The court cannot legislate. The Complainant herein, in my view of the circumstances

and the law, is seeking nothing more or less than the right to redeem. He does not show any existing equity, but does disclose a situation which demonstrates, perhaps, the advisability of the creation of a new equity, namely, the right to redeem property sold by judicial process. I cannot find any authority in our law establishing any such right."

The Complainant, by his offer made in his bill, and the reiteration of his offer in his brief, appears to be merely urging the indulgence of the court to permit him to redeem.

Negligence of attorney in conducting case is attributed to client.

Leo vs. *Green*, 53 N. J. Eq. 1; 28 Atl. 904.

McGill Ch. citing *Wakeman* vs. *Duchess of Rutland*.

3 Ves. 233; *Dillett* vs. *Kemble* 25 N. J. Eq. 66;

Mott vs. *Shreve* 25 N. J. Eq. 438.

Although the Defendant does not pray that this court set aside the judgment at law, but only execution and sale, it seems that the Complainant might be in laches upon this application by analogy to the statutory requirements concerning the time within which an application may be made to the court of law to set aside a judgment.

12. "If in any action judgment shall pass against either party by reason of the failure of the attorney of such party to file any proper pleading, the court or judge shall on application within one year after the entry of such judgment open said judgment and permit a proper pleading to be filed upon terms, if in the opinion of the court

or judge injury or wrong has resulted or may result from such failure."

Sheen's N. J. Practice Act, p. 87, P. L. 1903, p. 569; 3 C. S. 4087; 1893 p. 290; 1895, p. 712.

Nor does the Complainant in his bill attempt to offer any excuse for the fact that he had neglected to make his present application to the Court of Chancery for a period of about ten months after the time when he admits that he learned of the judgment, execution, sale and delivery of the deed by the Sheriff.

In *Palladino* vs. *Hilpert* (N. J. Ch.) 65 Atl. 721, Garrison V. C. said, "The next essential for one seeking the application of the doctrine above stated, after he has established gross inadequacy of price, is to show that he was under some mistake or misapprehension which caused him to fail to protect himself at the sale. . . . I do not think it would be proper to hold that he was, legally speaking, under any mistake or misapprehension."

Equity will not apply doctrine of mistake, where there is negligence upon part of him who seeks its application.

Murray vs. *D'Orsi, et al.*, 131 Atl. 122 (N. J. Ch.) (Bently V. C. Nov., 1925).

6. *The said bill does not show that the sale which is complained of was for a grossly inadequate consideration.*

The Complainant attempts to show by the bill that the property which was sold was of great value, and alleges therein that it was worth $22,000.00. The Complainant attempts to raise the inference from the allegations of the bill that the sale was for such a grossly inadequate amount

in comparison to the value of the property as to shock the conscience. It would seem, however, that the value of the property is rather immaterial, and that the value of the Complainant's interest in the property is the material fact for the consideration of the court. All that could possibly be sold under the judgment and execution against the Complainant was the Complainant's interest in the property, but the Complainant in his bill of complaint, has apparently very carefully avoided showing what the value of his interest in the property is. He does not show whether the property is subject to any mortgages or liens, he does not show whether there are any other interests or claims against the property adverse to him. He does not show what his interest in the title to this property consists of, except that the description of the land, as set forth in the bill of complaint, contains a recital annexed thereto of the conveyance to the Complainant. It is significant, however, that the description of the property as set forth in the bill contains annexed thereto a recital to the effect that the property was one of the parcels described in a certain certificate of Tax Sale made by Edward Garrison, collector of taxes of Franklin Township, dated February 10, 1921, and recorded in the Somerset County Clerk's Office in book 0-9, page 214. It is significant, also, that while the Complainant refers to the property in his bill of complaint as his property, the bill of complaint also contains the allegation that he "claims to own the same." It would seem quite clear, that on a bill of this nature, the Complainant is required to show the value of his interest in the property in question, and what the encumberances and liens consist of, as he is the party urging that, because of the gross inadequacy of the price for which his interest therein was sold, the sale should be set aside. The bill does not upon its face show that the sale was for a grossly inadequate amount, irrespective of what the total value of the property may be. The total value of the property may be many

thousands of dollars, and the value of the Complainant's interest in which may be very little or almost nothing. The total value of the property may be conceded to be $22,000, and still the Complainant's interest therein may not be worth $200.

At a Sheriff's sale, properly advertised and regular in other respects, lands alleged to be worth $6,500.00, were sold for $93.34, under execution issued on a judgment for $254.37, recovered against the Complainant widow's deceased husband in his lifetime, and paramount to the dower right of the Complainant, such sale being subject to another judgment having priority, recovered against his heirs for $5,658 and costs, and the purchaser being the owner of both judgments. Upon a bill filed by the widow to annul the Sheriff's deed, alleging that the property was sold for a grossly inadequate price, and the purchaser, or his father for him, was guilty of inequitable conduct, namely, "the purpose fraudulently and deceitfully to cut out" her dower right, held: (1) That such allegations of the bill do not indicate fraudulent conduct on the part of the purchaser or his father; (2) That the purchaser was guilty of no fraud in procuring an assignment of the earlier judgment, he having the same right to acquire it as the Complainant or any one else, even if his motive were bad; and (3) *That the bill is defective in not showing how valuable the widow's dower is.*

Holly vs. *Kellogg* ,et al., 98 Atl. 640 (Ct. of Err. and App. of N. J. March 6, 1916). (Syllabus by the Court).

(This case was an appeal from a decree of the Court of Chancery, Stevens V. C., dismissing

the bill of complaint on motion, and this court affirmed the decree in a per circum opinion, for the reasons stated by Stevens V. C. in the court below).

The Sheriff, at the sale, said he was selling the right and title of the mortgagor, and the crier of the sale advised a friend of his, who asked his advice aside, privately, to have nothing to do with the property; that whoever bought it would probably buy a law suit. The property, for which the Complainant had agreed to pay $2,800.00, was sold for $1,400.00. It had been a neighborhood talk that the title of the mortgagor was disputed, and the Complainant had himself contributed to becloud the title. *There was no allegation in the bill that the title was free from dispute*, nor that any better offer had been made for the property. The court refused to set aside the sale.

Mervine vs. *Van Lier*, 7 N. J. Eq. 34.

Upon the face of the bill, an inference may be raised that there is an outstanding tax title against the property, the holder of which, under the tax act, would be entitled to possession. The bill fails to show what the Complainants' title or rights in this property consists of, except that it contains the allegation that he bought the property in 1922 for the sum of $3,,800.00. The bill does not show that he has expended the difference between this sum and the sum of $22,000.00 in the meantime upon the property. The bill does not allege even any approximate sum which the Complainant has expended for improvements. The bill does not show what was the approximate value of this property in 1922. Why was a property of such a large value as that alleged in the bill sold to the Complainant for $3,800.00 in

1922. Can it be that the expenditures of the Complainant upon the property, together with some increase of value thereof, have reached the sum of approximately $18,000.00, and so account for the difference between the alleged purchase price and the alleged present value. Is it not somewhat significant that the sum of $3,800.00 was paid in 1922 for the property which is now claimed to be worth $22,000.00, without any showing of why such a insignificant sum was paid for such a valuable property or what such a difference between purchase price and present value consists of. The Complainant does not even show whether the purchase price consisted of cash or mortgage, or whether he is married and the property in that event, subject to a dower right.

It would seem also, that as this bill is a bill in the nature of a bill to remove a cloud from title, for that reason also the Complainant is required to set forth what his title to the property consists of if he has any title.

Generally, equitable jurisdiction cannot be invoked to remove a cloud from title unless Plaintiff has the legal title and the possession.

Robinson vs. *Marion*, 145 Md. 301, 125 Atl. 701, 36 A. L. R. 692.

One who comes into equity seeking equitable relief in aid of a legal title must first establish a legal title, and where the latter is doubtful the court will not grant relief.

Moore vs. *Rochester Weaver Mining Co.* 42 Nev. 164, 174 Pac. 1017, 19 A. L. R. 830, citing *Low* vs. *Staples*, 2 Nev. 209; *West* vs. *Schnebly* 54 Ill. 523; *Huntington* vs. *Allen*, 44 Miss. 654; *Sanford* vs. *Cloud*, 17 Fla. 568; Story Eq. Jur. 12th ed. 700, note.

7. *Inadequacy of consideration alone has never been*

considered by the courts as sufficient ground for setting aside a judicial or execution sale, even in equity.

Inadequacy of consideration is not of itself ground for setting aside an execution sale, nor is it, per se, proof of fraud.

Bank vs. *Hasser*, 1 N. J. Eq. 1; *Simmons* vs. vs. *Vandergrift*, 1 N. J. Eq. 55; *Mercereau* vs. *Prest*, 3 N. J. Eq. 460; *Smith* vs. *Duncan*, 16 N. J. Eq. 240; *Meyer* vs. *Bishop*, 27 N. J. Eq. 141; *Large* vs. *Ditmore*, Oct., 1876; *Outcalt* vs. *Disborough*, 3 N. J. Eq. 214; *Crane* vs. *Conklin*, 1 N. J. Eq. 346; *Marlatt* vs. *Warwick*, 18 N. J. Eq. 108.

It has long been the settled doctrine and practice of the Courts of this State, that judicial sales made without irregularity or fraud, and not affected by accident or mistake, will not be set aside for mere inadequacy of price.

Morrisse vs. *Inglis*, 46 N. J. Eq. 306, 19 A. 16; *Iron Co.* vs. *Railway Co.*, 49 N. J. Eq. 356, 23 A. 1077; Leary's Case, 50 N. J. Eq. 383, 25 A. 197.

It is no objection to the validity of an execution sale that the premises did not sell for their full value.

Flomerfelt vs. *Zeller*, 7 N. J. L. 153.

A bid of $100 at a fair public sale under execution of property worth $1,500, but upon which there were liens amounting to $800, there being no pretense of fraud, held not to be so grossly inadequate as to set aside the deed.

Weber vs. *Weilling*, 18 N. J. Eq. 441.

Where land worth from $2,500 to $2,800, with an encumbrance of $1,500, was sold under execution for $25, the inadequacy of the price

was insufficient ground on which to base a decree setting the sale aside as fraudulent.

Fullerton vs. *Seiper*, 34 Atl. 680.

That property sold on execution for only $6,200, was worth from $9,000 to $15,000, is not of itself ground for setting aside the sale.

Lennon vs. *Heindel*, 56 N. J. Eq. 8, 37 Atl. 147.

Even in a case similar to this, but where the equities were much more strongly in favor of the Complainant, the court refused to set aside the sale.

Inadequacy of price, together with the fact that the judgment was in attachment against a non-resident debtor, who had no personal notice and was not aware of the proceedings until after the sale, and who has a good defense against the judgment, affords no sufficient ground for avoiding the sale.

Everhart vs. *Gilchrist*, 11 N. J. Eq. 167. (Opinion by the Chancellor).

In all of the cases cited by the appellant in which a court of equity has set aside a Sheriff's sale or deed, either under its own process or that of a court of law, or where a court of law has set aside a sale under its process, there has been far more than merely inadequacy of consideration, however, gross that may have been.

In *Seaman* vs. *Riggins*, 2 N. J. Eq. 214, there was a clear mistake of Complainant's agent in missing the road leading to the place of sale, and also a mistake of Complainant's solicitor in naming the house at which the sale was to take place. The court said that these caused the whole difficulty. The court also said, "*Had Mr. Moir, or his agent, neglected his business, there might have been some reason against interfering, but they have both shown diligence, etc.*" The property was purchased by the

buyer for the Defendant owner, and the Court held the course pursued by the purchaser on a day from which the sale had been adjourned and also at the date of sale to have been designed to defeat entirely the Complainant's second mortgage, that the place of sale, an unfit one, had been fixed by the purchaser, and that his conduct had been reprehensible.

In *Howell* vs. *Hester*, 4 N. J. Eq. 266, the Complainant was aged and infirm, unable to go out, and entirely unaccustomed to business. She requested her son to act as her agent. The son, under a misapprehension as to the time of sale, not only did not attend, but prevented others from attending by telling them the sale was to be held on October 8, which was the day after the sale.

In *Kloepping* vs. *Stellmacher*, 21 N. J. Eq. 328, the grounds on which relief was asked were; that the judgment was fraudulently obtained and for a larger amount than was due, that Complainants were not served with process and did not know of it or the execution, and also gross inadequacy of price. The Court said that the Defendants, by the sale, has lost all their property and were ill-fitted to acquire more, that the judgment was founded on another judgment for $44, on which they had paid $36, leaving a balance of only $8, concerning which balance an agreement had been made for its payment by installments. The Court observed that both Defendants were foreigners, that they spoke and understood English badly, that their own language was more or less imperfectly spoken by those who gave them the information concerning the proceedings, and while the Court believed the persons who gave them the information, he could not believe that the Complainants understood and believed it.

In *Raphael* vs. *Zehner*, 56 N. J. Eq. 836, the judgment creditor had dealt with Complainant's husband, and there had been delays and accommodations given to

him, which had been such as to fairly entitle Complainant to notice if Defendant intended to proceed to sale to satisfy the judgment. The decision appears to be upon the ground, as stated in the headnote, that any apprehensions of Defendant in execution has been lulled by the judgment creditor, whereby she did not attend the sale or protect her interests, and thereby the sacrifice of the property was made.

In *Combes* vs. *Hoffman*, 87 N. J. Eq. 148, a judgment for $590 was obtained by a partnership in 1902, and the surviving partner assigned it to his son, who in 1907 received $127 from a special master in a partition suit, being money awarded to the judgment debtor, and applied it on the judgment, and the surviving partner, before its reassignment, assigned it to Defendant in consideration of $75 and on Defendant's representation that he wanted it as a set-off or counterclaim in a pending suit, and Defendant took out execution on the judgment, duly advertised a sale, and purchased thereat for $25, less than the Sheriff's execution fees, without actual notice of the sale to the debtor, and by trick or subterfuge acquired the property, ranging in value from $600 to $1,100, and the son thereafter reassigned to his father. It was upon these facts that the court held that the conduct of the Defendant was so unconscionable and inequitable, that this, coupled with the gross inadequacy of price and the surprise, required that the sale be set aside.

8. *The bill of complaint shows a situation in which the Court of Chancery should not take jurisdiction.*

The bill of complaint herein, shows in paragraph 9, that the Complainant has heretofore applied by petition to the Somerset County Circuit Court, upon the same facts alleged in the bill, that the said sale be set aside, that that application was opposed, and that the said proceeding has not yet been determined. In that sit-

uation, the Court of Chancery should certainly not take jurisdiction. It may be that the Circuit Court upon the said application may hold that it has jurisdiction, and it may make order prayed for by the Complainant. If the Court of Chancery should hold that it has jurisdiction and should make a decree against the Defendants, the Complainant would have the decree of that court and also the order of the Circuit Court at the same time and to a similar effect. The Complainant should not be permitted to pursue a similar remedy, upon the same state of facts and concerning the same property, in two courts at the same time. And the matter having been presented to the Circuit Court, and the Circuit Court not having yet rendered its decision, Chancery should not take jurisdiction. While the Complainant now contends that the Circuit Court has no jurisdiction, and that the Court of Chancery is the proper tribunal, he has invoked the jurisdiction of the Circuit Court, and the proceeding taken by him in that Court is still, according to his bill of complaint, pending and undetermined.

9. *The said bill does not show that a proper tender has been made, nor that the requirements of such a tender have been carried out.*

The bill of complaint does not allege that the Complainant has ever tendered to the Defendants the amount of the judgment, interest and costs, nor any other definite amount. The allegation is that the Complainant offered more than the judgment, interest and costs. The Complainant alleges in his bill that he is ready, willing and able to pay such sums as may be due under the said judgment and execution, or such other sum as the court may fix. It would seem that, where the Complainant comes into the Court of Equity asking affirmative relief and making a tender in his bill of complaint of amounts which he admits to be due, he is required to pay into court

at the time of the filing of his bill the amount which he admits to be due, and allege such payment in his bill.

> In *Taylor* vs. *Reed* (1827) 5 T. B. Mon. (Ky.) 36, it was held that if a party "pretends to avail himself of the plea of tender in equity, because he could not make it at law, he ought to be held to as great strictness as he would be held to at law.' . . . . If a legal tender was made of the money acknowledged by the Complainant in each case to be due, it should have been followed up by a payment of the money into court, at the time of filing their respective bills; and a compliance with this requisition should be shown by an appropriate averment in each bill. Such an averment not having been made, the bill in each case is without equity."

When the tender and its refusal are the basis of a suit for affirmative relief from an instrument or contract, or from threatened action thereunder, it is commonly held that the tender must be kept good.

Webb vs. *Citizens' Nat. Bank* (1917)-Ind. App.-, 115 N. E. 799; *Tuthill* vs. *Morris* (1880) 81 N. Y. 94; *Werner* vs. *Tuch* (1891) 127 N. Y. 217, 24 Am. St. Rep. 443, 27 N. E. 845; *McNeil* vs. *Sun & Evening Sun Bldg.* Mut. L. & Accumulating Fund Asso. (1902) 75 App. Div. 290, 78 N. Y. Supp. 90; *Schieck* vs. *Donohue* (1902) 77 App. Div. 321, 79 N. Y. Supp. 233; *Weil* vs. *Lippman* (1907) 55 Misc. 443, 105 N. Y. Supp. 516; *McClaim* vs. *Battion* (1901) 50 W. Va. 121, 40 S. E. 509. Thus, it was held in *Webb* vs. *Citizens' Nat. Bank* (Ind.) supra, a suit to enjoin the sale of collateral securities, and to recover them free

from any lien, that a tender must be kept good by paying the money into court, the court saying in substance, that where the party seeking to obtain the benefit of a tender comes into a Court of Equity, and demands affirmative relief, the familiar rule is applied that he who seeks the aid of equity must himself do equity, and before such party can obtain an affirmative decree in his favor by virtue of a tender of the amount of the debt, he is required to show that he has brought the amount tendered into court for the benefit of his adversary to the end that no possible question may thereafter be raised, or litigation result, over the right to the money so tendered.

It was held in *Weil* vs. *Lippman* (1907) 55 Misc. 443, 105 N. Y. Supp. 516, that a tender of the mortgage debt was ineffectual to support an action for the cancellation of a mortgage, because the amount offered was not paid into court until more than three weeks after the trial, since the tenderer, suing in equity for affirmative relief, was bound to keep the tender good by paying the money into court at the time of the commencement of the suit, and to allege such fact in the complaint.

And in *McClain* vs. *Batton* (1901) 50 W. Va. 121, 40 S. E. 509, a suit to set aside a deed executed on a defective tax sale, it was held that a tender must be kept good by bringing the money into court.

In *Daughdrill* vs. *Sweeney* (1867) 41 Ala. 310, where the court considered together three bills asking for the cancellation of a mortgage and an injunction of a sale thereunder, a redemption of the mortgage premises, an accounting, and general relief, it was held that the bill in each case

was without equity because the tender of the mortgage debt was not kept good by payment of the money into court.

In *Schearff* vs. *Dodge* (1878) 33 Ark. 340, a suit in equity to enforce a vendor's lien on a title bond, it was held that the vendee asking a decree for title must keep his tender of the purchase money good, and bring the money into Court before the court will decree him the legal title.

In *Dunn* vs. *Hunt* (1896) 63 Minn. 484, 65 N. W. 948, a suit to compel the execution of a certificate of redemption of real estate from a mortgage foreclosure sale, it was held that a tender must be kept good, and on this point the court said: "We apprehend that no case can be found where a tender was essential to or the foundation of an action, and where it was held that the tender was effectual, unless kept good. Equity is no less strict than the law in this respect.

In *Given* vs. *Troxel* (1905) Ala., 39 SO. 578, it was held that where a tender is made, no statutory redemption of lands sold, on a mortgage foreclosure can be had, unless at the time of the filing of the bill the money is actually paid into court, and there is an averment in the bill to that effect.

In *Shields* vs. *Lozear* 22 N. J. Eq. 447, Aff. 23 N. J. Eq. 509, it was held that the amount tendered must be kept in readiness, and, on bill to redeem, or on plea or answer setting up tender, the money must be paid into court, and that no less strictness is required in such cases in equity than at law.

10. *The bill discloses no present cause of action against the Defendants.*

The argument under the preceding reasons also apply to this reason. In addition thereto, the attention of the court is directed to the fact that there is no allegation contained in the bill of the fact that the Defendants are the present holders of any lien or interest in the property. It may be that the Defendants, prior to the filing of the bill, parted with whatever interest they had acquired in the property. While the bill shows that the property was sold to the Defendant, Gilbert Stout, by the Sheriff of Somerset on July 27, 1925, and that a deed was delivered to the said Defendant, the bill fails to show that the said Defendant is the present holder of any interest under said deed.

11. *The said bill shows that the Complainant is not entitled to the relief prayed.*

The Complainant does not contend that the Court of Chancery should set aside the judgment in the action of law. He admits that the amount of the judgment plus the interest and costs is due from him to the Defendant. Yet, he prays that the Court of Chancery may adjudge that neither of the Defendants has any right, interest or title in or lien upon the property. Certainly, even if Chancery should set aside the sale and Sheriff's deed, the lien of the judgment would still remain. Certainly, upon the facts shown by the bill, the Court of Chancery would not decree that the land in question be relieved from the sale and the Sheriffs deed, except upon condition, that the Complainant pay to the Defendants the amount of the judgment, interest and costs, together with such sums

as will compensate the Defendants for the trouble and expenses which they have incurred in reference to the said property and in connection with the proceedings since the said sale. But the Defendants respectfully submit that the Complainant has not shown any proper ground or relief in equity, and that the decree of the Chancellor appealed from should be affirmed.

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New Jersey Court of Errors and Appeals

Between

JOSEPH SAPINSKY,
Complainant-Appellant,

and

GILBERT STOUT, *et al.*,
Defendants-Respondents.

On Appeal from Chancery.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from a decree of the Chancellor advised by Buchanan, *V. C., dismissing* on motion the complainant's bill of complaint. The bill alleged the commencement of an action in attachment by the defendant Stout against the complainant in the Somerset Circuit Court; that the complainant retained an attorney-at-law to defend the action, informing the attorney that Stout's claim was unjust and giving full written information and instructing the attorney to oppose and defend the action. The complainant supposed that this action was being defended until he was informed by a friend that his homestead real estate, particularly described in the bill of complaint, had been sold under execution sale. Then making inquiry, Sapinsky learned that a judgment had been recovered by Stout against him in the action and that on April 10, 1924, a *fi. fa.* had issued thereon to the sheriff of Somerset to raise $168.03, and that the sheriff after advertisement sold Sapinsky's real estate to Stout, who bought it in for $168.03. This sale had occurred on June 27, 1925, and that Sapinsky

had no actual knowledge of the sale, execution or judgment, or thought anything other than the action was being defended by his attorney, in accordance with his instructions, until August 8, 1925, and after the execution sale. Sapnisky then applied to the Somerset Circuit Court to have the sale set aside and this application was opposed on the ground that that Court had no further jurisdiction because Stout had received a deed from the sheriff under the execution, wherefore no order has yet been made by the Somerset Circuit Court upon Sapinsky's application. The property sold for $168.03 consists of eight and one-half acres of land at Griggstown, in the County of Somerset, on which is erected a frame brick filled house containing sixteen rooms. The complainant bought the property in 1922 for $3,800 and has since that time spent large sums of money for addtions and improvements, so that the property, sold as aforesaid for $168.03, is worth at least the sum of $22,000.

The complainant has tendered the amount of the judgment, interest and costs to Stout and is ready, willing and able to pay him such sum as may be due him, and offers to pay such sum as the Court may fix. Stout has refused to do anything unless the complainant pay $1,200. At all times the complainant has been and still is in peaceable possession of the property and claims to own it.

The relief prayed for is:

> "That the execution sale aforesaid, pursuant to which Gilbert Stout bought the property hereinabove described, be set aside, and that the deed from the Sheriff of Somerset to Gilbert Stout be set aside and be adjudged to convey no right, title or interest in and to the property hereinabove described

> to the said Gilbert Stout, and that it be adjudged that neither of the defendants has any right, title or interest in or lien upon the property of the complainant hereinabove described, and that the cloud upon the complainant's title to the said property by the said judgment, execution, sale and deed, be removed.
>
> "That the complainant have such other and further relief as may be just; and * * *".

On motion this bill was dismissed for the reason that it sets forth no cause of action. Buchanan, *V. C.*, filed a very brief opinion (Case 9), whereupon this appeal was taken. The propriety of the dismissal of this bill of complaint is the sole question presented by this appeal.

ARGUMENT.

The bill did state a Cause of Action in Equity.

Authority for the sufficiency of the bill of complaint is found in many decisions of our courts; among them are the following:

Seaman v. *Riggins*, 2 Eq. 214 (Pennington, *C.*, 1839). In that case a petition was presented by a junior incumbrancer to set aside a sale on a chancery execution. The facts were the agent of this incumbrancer, whose interests were prejudiced by the sale and who intended to purchase, was prevented from attending the sale by accident and by an unintentional mistake of the complainant's solicitor. The sale was set aside. The chancellor said, on page 217:

> "To justify the interference of the court, there must be a foundation laid—either fraud or mistake or some accident, by which the rights of parties have been affected."

Howell v. *Hester,* 4 Eq. 266 (Haines, *C.,* 1843). The decision in this case is accurately expressed by the headnote, which reads:

> "A sheriff's sale, regularly made by virtue of an execution out of this court, set aside, on the ground that a party having an incumbrance subsequent to the complainant, was by a mistake of her agent prevented from attending the sale, and that the premises sold for an inadequate price, to the prejudice of the party seeking to avoid the sale."

Kloepping v. *Stellmacher,* 21 Eq. 328 (Zabriskie, *C.,* 1871). In this case the property was worth $1,500 and was sold for $52. The complainants were described by the Chancellor as being ignorant, stupid, perverse and poor. The execution was issued on a judgment before a justice of the peace, and was founded on a judgment previously recovered before another justice. The property was duly advertised and a deed was delivered to the defendant. The complainants did not attend the sale by reason of their ignorance, perversity and stupidity. The complainants had due legal notice of all proceedings. The sale was set aside. The Chancellor said:

> "It satisfactorily appears that the property sold was worth over $1,500, and was sold for $52. This is a gross, a very gross, inadequacy of price, from which fraud in some cases might be inferred without further proof. Inadequacy of price itself is not sufficient ground to set aside a conveyance, nor is it, *per se,* proof of fraud. *Bank of New Brunswick* v. *Hassert,* Saxt. 1; *Crane* v. *Conklin,* Saxt. 346; *Smith* v. *Duncan,* 1 C. E. Green 240; *Marlatt* v. *Warwick,* 3 C. E. Green 108.
>
> "But when such gross inadequacy is combined with fraud or mistake, or any other ground of relief, in equity it will incline the court strongly to afford such relief."

* * * * *

> "The property was fairly put up and struck off. The defendant was present; he did not bid, but after the sale the purchaser transferred the bid to him. No positive fraud by him is shown; on the contrary, the whole circumstances seem to clear him of all charge of fraud, other than the inference from inadequacy of price.
>
> "The conduct of the sheriff was free from all blame; he adjourned the sale to allow the complainants to get notice, attend, and protect themselves. He requested one of his deputies, and a respectable attorney who was present, to give the complainants notice of the intended sale; each of these persons testify that he gave them such notice. There is nothing on which to found any charge of fraud upon any one concerned in the sale.
>
> "But a court of equity will set aside a sheriff's sale, even if there has been no fraud, when there is a gross inadequacy of price, and the parties, by reason of mistake or misapprehension, did not attend the sale, and the sacrifice was caused by such mistake or misapprehension."

It should be noted that in this case the sale which was set aside was held not under a chancery execution, but under an execution issuing from a common law court. In that respect the case is on all fours with the case at bar.

Raphael v. *Zehner,* 56 Eq. 836 (C. E. A. 1898). In this case the sale was set aside in a decree advised by Vice-Chancellor Emery. The execution had issued out of a common law court. The ground of Vice-Chancellor Emery's decision appears in his opinion on page 837:

> "The ground upon which I reach this conclusion, stated generally, is that I think the entire evidence in the case sufficiently estab-

> lishes that there was a gross inadequacy of price at the sale, and that, by reason of mistake or misapprehensoin, the complainant did not attend the sale or protect her interests at the sale, and that the sacrifice of the property was the result of this mistake or misapprehension. The case is within reach of equitable relief upon the principles declared by Chancellor Zabriskie in *Kloepping* v. *Stellmacher,* 6 C. E. Gr. 328, 330."

The decree was affirmed by this court on the opinion below.

Combes v. *Hoffman,* 87 Eq. 148 (Griffin, *V. C.,* 1914). In this case the Vice-Chancellor said on page 152:

> "Hoffman was not bound, in law, to give personal notice to Combes. He proceeded strictly within his rights. The sale was advertised in the manner provided by statute. But it is very evident from the manner in which Hoffman procured the assignment, the secrecy observed by him in the conduct of the sale, and the price bid at the sale, that he intended by trick or subterfuge to acquire the property of the complainant for a nominal sum. In this he succeeded, obtaining a deed for a consideration less than the sheriff's execution fees, with the result that the property of the complainant was taken from him without the defendant paying even one dollar, which was applied in reduction of the judgment debt, and thereafter, the same, undiminished, might be satisfied out of such other property as the complainant might then have owned or should thereafter acquire. The conduct of Hoffman was so unscionable and inequitable, and the price was so grossly inadequate, as to shock the conscience of a court of equity. This, coupled with the surprise of complainant, requires that the complainant be relieved."

It is to be noted that although the affidavit and assessment of damage was filed on April 1st,

1924, and a *fi. fa.* was issued on April 10th, 1924, no attempt was made to sell the property until July 27th, 1925—some fifteen months later (Par. 2 and 4 of the Bill).

It will also be observed that, as alleged in the Bill, "there were on said premises goods and chattels belonging to the complainant of a value far more than enough to pay the full amount to be raised by the said writ of execution" (case 3, paragraph 4, of the Bill). Notwithstanding this, the Sheriff, "acting upon the instructions of the attorney of the plaintiff in the attachment action," sold the real estate and the same was bought in for $168.03 (case 3, paragraph 4 of the Bill).

These circumstances, taken in connection with the gross inadequacy of price, might well present a situation from which fraud is inferred without further proof.

Even a court of common law will, if it still has jurisdiction, set aside a sheriff's sale even if there has been no fraud, where there is gross inadequacy of price, and where the party, by reason of a mistake or misapprehension, did not attend the sale or protect his interest at the sale and the sacrifice was caused by such mistake or misapprehension. This was held in the case of *Linde Paper Company* v. *Gebert,* 92 Law 280 (Supreme, 1918), in a case where property worth $500 was sold for $5.

Chancery, rather than the Somerset Circuit Court, has jurisdiction in the present case because the process of the Circuit Court has been executed by the delivery of a deed by the sheriff to the defendant. Under such circumstances, the jurisdiction of Chancery is clear. It was expressly so held in *Margate Company* v. *Hand,* 86

Eq. 314 (Leaming, *V. C.,* 1916). See also *Ludlam* v. *Pennsylvania Realty Company,* 83 Eq. 130 (Leaming, *V. C.,* 1914).

The allegations of the bill of complaint before the Court bring the case squarely within the cited decisions. In all of them the proceedings were regular and with the possible exception of *Combes* v. *Hoffman,* no fraud could be imputed to the defendant, other than that arising out of the gross inadequacy of the price. In the case at bar the inadequacy of price is such as to shock the conscience of the Court. The property sold is eight and one-half acres of land on which stands a sixteen room house. The complainant paid for this $3,800 in 1922 and has since that time spent large sums of money for additions and improvements. The allegation in so many words is "So that the said property, sold as aforesaid under the said writ of execution for $168.03, is worth at least the sum of $22,000 (case 4). These, of course, speak for themselves.

The Vice-Chancellor says (case 10): "There is no allegation that there were no other liens or incumbrances against the property—". It surely is not incumbent upon the complainant in his bill of complaint to negative the existence of liens or incumbrances. There is no presumption that liens or incumbrances exist.

The bill of complaint describes the property levied on as the complainant's "homestead" property (case 2). The allegation is that the property sold for $168.03 is worth at least $22,000. The property sold under the execution can necessarily be only the interest of the complainant in the lands and buildings, because obviously on an execution in an attachment action at law aganist Sapinsky, only the interest of Sapinsky

in the lands and premises can be reached, and no rights of any incumbrancers can be sold, even thought they might be cut off by the attachment and sale thereunder. The Court must conclude, therefore, that the bill alleges that the complainant's right in the property which was worth $22,000 and which was sold for $168.03.

Of course, the complainant has a cause of action against his negligent attorney. Can it be, however, that that is his only right and will a court of equity let his homestead, worth at least $22,000, go for $168.03, when he is willing to pay such sum of money as the court may fix (case 5), offered the defendant to pay more than the judgment, interest and costs, and explains why he was ignorant of the sale or the proceedings leading up to it?

Neglect on the part of one seeking relief from the consequences of mistake, accident or surprise is not a reason for denying relief on the ground of neglect alone, save where the negligence is culpable or inexcusable.

As was said in *Institute Building and Loan Association* v. *Edwards,* 81 N. J. E. 369, 364:

> "It is indeed difficult to conceive of any form of equitable relief from mistakes where some degree of negligence of the party seeking relief is not involved",

citing also *Collignon* v. *Collignon,* 52 N. J. Eq. 516, 520.

In *Seely* v. *Bacon,* 34 Atl. 139, 140, it is said:

> "Now as a rule equity will refuse to rectify a mistake which occurred through inexcusable negligence * * * but what degree of vigilance is to be exercised must depend upon the facts of each case"

Citing 2 *Pomeroy's Equity,* Sec. 856.

In the cases heretofore cited, where our courts have set aside sales had under execution, the general doctrine which we advance has been recognized and applied. Thus in *Raphael* v. *Zehner, supra,* the husband of the plaintiff was her agent. The husband received notice of the sale; he failed to notify his wife.

In *Linde Paper Company* v. *Gebert,* 92 Law 280, the judgment debtor knew of the proposed sale. He failed to attend because he was improperly advised by his lawyer, who told him that inasmuch as an encumbrancer had served a notice of claim of property, such notice of claim would compel a postponement of the sale.

In each of these cases, notwithstanding the negligence of the agent of the judgment debtors respectively, the sale was set aside.

In *Kloepping* v. *Stellmacher, supra,* the judgment debtor was guilty of something more than mere negligence. They perversely ignored the process served upon them and knowledge of the sale which was brought home to them. Notwithstanding this, the Court relieved them from the sale.

The circumstances in the instant case are much stronger in favor of the complanaint than are those in any of the cases cited. In none of these cases was the dispartiy between the price realized on the sale and the value of the property so great as in the present case, where property worth $22,000 was sold to the judgment creditor for $168.03. In none of the cases were the extenuating circumstances so strongly in favor of the complainant, for in the present case, Sapinsky was not only unaware that his home was being put up for sale, but he was even unaware that a judgment had ever been entered against

him, and had assumed that the litigation was at issue.

Moreover, judgment had been entered in the attachment action prior to April 10, 1924. The representation of Sapinsky by Kline then ended. *Ransom* v. *Sutherland,* 46 Mich. 489; *Keller* v. *Keller,* 100 N. Y. App. Div. 325; 6 Corpus Juris 672-3. After the entry of judgment, therefore, notice to Kline was not notice to Sapinsky, nor could he be charged with Kline's knowledge. *Konta* v. *St. Louis Stock Exchange,* 131 S. W. 380; *Chicago, etc., Co.* v. *Jackson Brewing Co.,* 48 S. W. 275.

When, as in the case at bar, there is such a disparity between the price sold and the value of the property as to shock the conscience of the court, and to amount to a fraud in equity on the complainant, that fraud will not go unrelieved just because the complainant's absence from, or lack of knowledge of, the sale is due to the negligence of his attorney.

The Vice-Chancellor makes a point of the fact that there is no allegation of a meritorious defence to the action in which the execution issued. That is not the point. No relief is asked for against the judgment at law; that is too small to bother with. In this case, as in the cases cited, the judgment or decree on which the execution issued must be taken, for present purposes at least, to be valid.

Both reason and authority unite in requiring a reversal of the decree appealed from and a holding by this Court that, under circumstances such as those alleged, the complainant is entitled to the assistance of a court of equity.

The decree appealed from should be reversed.

Respectfully submitted,

G. W. C. McCARTER,
Of Counsel with Appellant.

May Term, 1927.