INADEQUACY OF CONSIDERATION IN JUDICIAL SALES—The Sheriff of Union County reports: "From September 2, 1931, to August 31, 1932, our office advertised for sale 1261 foreclosure matters. Of these, 946 were sold at the nominal price of $100.00, or under. Of the remaining 315 approximately one-half were sold for bids of $200.00 or $500.00, or included several tracts sold at $100.00 each."[1] This record is fairly typical of the widespread sacrifice of property values under the judicial hammer throughout the state today, and justifies an attempt to examine the cases and to state the law relating to inadequacy of consideration in judicial sales.

The Court of Errors and Appeals recently undertook to summarize the pertinent rules as follows: "* * * judicial sales made without irregularity or fraud, and which had not been affected by accident or mistake, will not be set aside for mere inadequacy of price;"[2] and "It is equally well settled that a judicial sale, resulting from proceedings entirely regular will be set aside even if there has been no fraud where there is gross inadequacy of price, combined with mistake, surprise, misapprehension or accident, as a result of which the party complaining has been prevented from attending the sale and protecting his interests."[3] It is submitted at the outset that specific applications of these generalities in the past have been such as to leave little basis today for accurate prediction of judicial behavior or confident analysis of property rights within a broad proportion of the cases where title flows from a judicial sale. It will be convenient to examine the excerpts quoted above, in order.

The first quotation evokes from the informed lawyer the observation that there is no unanimity in the courts as to what constitutes "mere inadequacy." Cases which afford no difficulty are numerous.[4] But there is noteworthy support for the theory that in mortgage foreclosure sales, inadequacy of price cannot be estimated by the naked difference between the actual value of the property, as based upon normal net earning power, for example, and the nominal bid at which foreclosing mortgagees are frequently enabled to buy in, but rather between such value and the amount of the mortgage lien as represented

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[1] Letter from the Sheriff's office of Union County, bearing date November 30, 1932.

[2] Hecht v. Hoogmoed, 111 N. J. Eq. 331 at p. 333 (E. & A. 1932), citing Guaranty Trust Co. v. Fitzgerald Hotel and Development Corp., 97 N. J. Eq. 277 (E. & A. 1925).

[3] Hecht v. Hoogmoed, *supra*, note 2, at p. 333, citing Raphael v. Zehner, 56 N. J. Eq. 836 (E. & A. 1898).

[4] In Guarantee Trust Co. v. Fitzgerald Development and Hotel Corp, *supra*, note 2, a foreclosure sale of property worth $72,000 and sold for $54,025, was held not gross inadequacy; likewise, as to property worth $150,000 and sold for $78,000 in Hoffman v. Godfrey, 79 N. J. Eq. 617 (E. & A. 1912); as to property worth $15,000, and sold for $7500, in Hurley v. Potash, 93 N. J. Eq. 167 (E. & A. 1921); as to an advanced bid of ten percent in Morrisse v. Inglis, 46 N. J. Eq. 306 (E. & A. 1889); as to property worth $11,250 and sold for $8,000, Murray v. D'Orsi, 98 N. J. Eq. 548 (Chancery 1925).

by the decree.[5] And to the reply that the nominal bid leaves the mortgagee with both the property and the right to a judgment for deficiency, the Court of Errors and Appeals rejoins that the exercise of the mortgagee's option to take such judgment opens the sale to the judgment debtor's right of redemption.[6] This rationale, of course, is of no comfort to the considerable marginal group of foreclosed mortgagors, who, while not possessed of the resources requisite to consummation of redemption, are nevertheless subjected to judgment obligations inflated beyond reasonableness by execution sales for considerations wantonly inadequate. In the absence of remedial legislation,[7] however, this line of authority which purports to disregard the amount realized on the sale as an indicium of inadequacy of consideration in foreclosure cases is embarrassing to an effort to understand the significance of the first excerpt quoted above from *Hecht* v. *Hoogmoed,* considered both in the light of the distinguished authority pro-

[5] In Dunlop v. Chenowith, 90 N. J. Eq. 601 (Chancery 1918), *aff'd* 90 N. J. Eq. 601 (E. & A. 1919), objections were filed to confirmation of a sheriff's sale of land in foreclosure. The mortgagee had bought in for $2,000. The objections were based on inadequacy of price and were supported by expert testimony to the effect that the property was worth between $20,000 and $25,000, and by the affidavit of a subsequent incumbrancer to the effect that he had been ill at the time of sale, would have bid $16,000 could he have attended, and was now prepared to offer that sum at a resale. Said Backes, V. C., in overruling the objections, at p. 87, conceding that the Court may refuse "to confirm a sale where the bid is so grossly inadequate as to shock the conscience * * * that situation was not before me. The sale was not of a $20,000 property for $2,000. The bid was made to protect the purchaser's liens of $16,000 plus, and the difference between that sum and the estimated value of the property is a prominent and, most times and in this case, a controlling one on an appeal to the conscience on the ground of inadequacy of price."

In New Jersey National Bank and Trust Co. of Newark v. Savemore Realty Co., 107 N. J. Eq. 478 (E. & A. 1930) where the court assumes for the sake of discussion that a foreclosure sale of property worth $40,000 to the mortgagee for the sum of $500, where the latter's decree is for $41,000, is not of itself such inadequacy as to warrant setting aside the sale, but is moved by other circumstances making such a step equitable. And see Hurley v. Potash, *infra,* note (6).

[6] Hurley v. Potash, 93 N. J. Eq. 167 (E. & A. 1921) was the foreclosure of a mortgage under which $14,000, plus, was due. The property was bought in at the sale by the mortgagee for $7,500. The mortgagor had become bankrupt, and the trustee undertook to request that confirmation of the sale be refused so that a subsequent bid of $15,000 for the property could be accepted. The vice-chancellor acceded. On appeal, the vice-chancellor's ruling was reversed; the $15,000 offer is only about $750 more than the complainant's decree, and under such circumstances the inadequacy in price is negligible. The consideration that the mortgagee may present a claim for deficiency to the trustee is dismissed thus: "* * * a debatable question would then arise whether, under Smith v. Crater, 43 N. J. Eq. 636, it would not be the bringing of a suit on the bond, and whether if the claim should be allowed in bankruptcy, it would not be an adjudication amounting to a judgment, the rendering of which would allow the mortgagor, or his representative, the trustee in bankruptcy, to come in within six months and redeem the property, which would, of course, accomplish all that the objectors to the confirmation would be entitled to * * *."

[7] See Mortgage Deficiencies, by Bernard Devin, Building and Loan Guide and Bulletin, June, 1932, p. 113, at p. 117, for a discussion of a legislative program.

posing such an approach,[8] and of the settled authority per contra.[9] To the extent, however, of cases where the sale is surrounded by accident or mistake, the distinction between "gross" and "mere" inadequacy, is academic. In both cases the sale is voidable. The rules of the *Hecht* case[10] do truly reflect this condition, the first of them by inference, and the second by declaration. In cases involving concededly gross inadequacy under the traditional view, such mistakes as misconception of the nature of an original subpoena,[11] disbelief as to the genuineness of the proceedings,[12] and misapprehension as to the date of sale induced by prior negotiations,[13] have been held to warrant the setting aside of the sale. On the other hand, "mere" inadequacy has been held to justify such procedure, when coupled with mistakes substantially similar in nature, and not necessarily such as to be shocking, in normal contemplation.[14] The orthodox application of Equity jurisdiction over cases of accident is clear and generally serves to warrant the setting aside of judicial sales when coupled with any degree of inadequacy or unfairness of consideration.[15]

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[8] Vice Chancellor Backes, in Dunlop v. Chenowith, *supra,* note (5); Judge Bergen in Hurley v. Potash, *supra,* note (6).

[9] These are foreclosure sale cases where the difference between the sale price and the value of the property was considered the criterion of adequacy, and was found to represent a gross inadequacy. Campbell v. Gardner, 11 N.J. Eq. 423 (Chancery 1857); Hazard v. Hedges, 17 N.J. Eq. 123 (Chancery 1864); Wetzler v. Schaumann, 24 N.J. Eq. 60 (Chancery 1873).

[10] *Supra,* note (2).

[11] Campbell v. Gardner, *supra,* note (9).

[12] Kloepping v. Stellmacher, 21 N. J. Eq. 328 (Chancery 1871); Connolly v. Donohue, 36 N. J. L. J. 174 (C. P. 1913).

[13] Raphael v. Zehner, *supra,* note (3); West Ridgelawn Cemetery v. Jacobs, 108 N. J. Eq. 513 (Chancery 1931); and see C. D. Corporation v. Griffiths, 109 N. J. Eq. 319 (Chancery 1931).

[14] Howell v. Hester, 4 N. J. Eq. 266 (Chancery 1843), where the petitioner's agent mistook the day of sale, failed to appear and thereby indirectly caused other prospective purchasers not to attend the sale; Mutual Life Ins. Co. v. Goddard, 33 N. J. Eq. 482 (Chancery 1881); Rowan v. Congdon, 53 N. J. E. 385 (E. & A. 1895), where although the purchase price was $10,000, the amount of the purchasing mortgagee's decree, a resale was ordered upon a showing of mistake, and the posting of a bond guaranteeing a bid of $25,000 upon resale; Schilling v. Lintner, 43 N. J. Eq. 444 (Chancery 1887); Wetzler v. Schaumann, *supra,* note 9; and see Strong v. Smith, 68 N. J. Eq. 650 (E. & A. 1905), and Eberhardt v. Gilchrist, 11 N. J. Eq. 167 (Chancery 1853) at 170.

It should be added that the mistake which will move the court must be a "producing" cause, or *sine qua non,* of the sacrifice of the property, and not a mere concomitant circumstance. Guarantee Trust Co. v. Fitzgerald Hotel and Development Corp., *supra,* note (2). But compare the result reached in Wetzler v. Schaumann, *supra,* note (9).

[15] A leading case in this connection is Strong v. Smith, *supra,* note (14); also New Jersey National Bank and Trust Co. of Newark v. Savemore Realty Co., *supra,* note (5), where the interested party arrived at the sale too late because of a street car delay, and Seaman v. Riggins and Moir, 2 N. J. Eq. 214 (1839) where a second mortgagee interested in bidding at the sale was misdirected and therefore failed to attend. Strong v. Smith, *supra,* voices a motif which characterizes this whole field. At p. 653, Vice-Chancellor Bergen, whose

In the cases where some element in addition to inadequacy is thought necessary to move the conscience of the Court, however, it is said to be the rule that the petitioner must not be guilty of negligence.[16] But different judges have taken such divergent views of what constitutes negligence, and as to what considerations excuse it, that an undesirable variant is introduced into a field of law where stability and predictability should be a desideratum.[17]

Within the limitations set by the matter next above set forth, it can be stated with some degree of certainty, nevertheless, that where other equitable matter is present, inadequacy of consideration militates against confirmation of a judicial sale. The next question that poses itself is, when will inadequacy of consideration unattended by allied equities suffice to furnish ground for upsetting a judicial sale? This is the important question, in the light of the statistics first above set out. It will be noted that the statement of the law in *Hecht* v. *Hoogmoed* quoted above does not include a hypothesis that bare inadequacy (that is, unaccompanied by fraud, surprise, accident, etc., whether "mere", or "gross" in respect of degree) will warrant the nullification

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opinion was adopted on appeal by the Court of Errors and Appeals, says, "The control of the court over the use of its process ought to be liberally exercised to prevent a wrong; in this case the sale is not to an indifferent party, but to a prior incumbrancer, who can suffer no injury if protected in the payment of his debt * * *." To the same effect, but in a foreclosure case, writes Chancellor Williamson in Campbell v. Gardner, *supra*, note (9) at p. 429, "There is another consideration. The purchaser is the mortgagee and not a stranger. I think, where the mortgagee is the purchaser, and the party applying to open the sale offers to pay all the money due upon the security, and there has really been a mistake on the part of the owner of the equity of redemption, owing to which the property has been sacrificed, the Court ought to regard an application for resale with more indulgence than when a stranger is the purchaser." In similar vein are Murray v. D'Orsi, *supra*, note (4), and West Ridgelawn Cemetery v. Jacobs, *supra*, note (13).

Germane to the cases involving accident are those where, coupled with inadequacy of consideration there has been close dealing on the part of the creditor or of the selling officer. Hecht v. Hoogmoed, *supra*, note (2); Cummins v. Little, 16 N. J. Eq. 48 (Chancery 1863); West Ridgelawn Cemetery v. Jacobs, *supra*, note (13); Van Order v. Bailey, 104 N. J. Eq. 585 (Chancery 1929).

[16] Palladino v. Hilpert, 72 N. J. Eq. 270 (Chancery 1906); Parkhurst v. Cory, 11 N. J. Eq. 233 (Chancery 1856); Smith v. Duncan, 16 N. J. Eq. 240 (Chancery 1863); and see New Jersey National Bank, etc. v. Savemore Realty Co., *supra*, note (5) at p. 481.

[17] In Campbell v. Gardner, *supra*, note (9), advanced age and the non-availability of advice excused failure to investigate the nature of a subpoena in a suit to foreclose a mortgage. In Kloepping v. Stellmacher, *supra*, note (12) the ignorance and perverse stupidity of the petitioners were held sufficient to induce Equity to overlook in their favor a wanton inattention to repeated notices of the proceedings culminating in sale of their property. In the same spirit is Connolly v. Donohue, *supra*, note (12), and Schilling v. Lintner, *supra*, note (14). But contrast the attitude of the Court in Parkhurst v. Cory, *supra*, note (16), where it is said at p. 236, that "Where the surprise is owing to the negligence of the party injured, 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." And see Palladino v. Hilpert, *supra*, note (16), at pp. 276-278.

of a sale. That "mere" inadequacy without the attending equitable circumstances will not warrant disturbing a sale, has been frequently held, on cogent grounds of policy.[18] But there are square judicial pronouncements that "gross" inadequacy in and of itself may amount to constructive fraud,[19] and such authority, though not uncontradicted by other decisions,[20] is reinforced by dictum of the Court of Errors and Appeals that gross inadequacy may of itself support the voiding after its consummation of a judicial sale.[21] In such a background of authority, the latest summary of the law by the Court of Errors and Appeals in the *Hecht* case furnishes small guidance to the practising attorney whose advice is sought as to the validity of particular judicial sales made for nominal considerations.

It remains to consider the procedural mechanics incident to inadequacy of consideration. Where the sale sought to be attacked is in the course of a mortgage foreclosure, it is usual, before confirmation, to object to confirmation.[22] It seems clear that such procedure should be resorted to only where the gravamen of the injury is the grossness of the inadequacy, not an extrinsic factor such as accident, surprise or mistake.[23] In such cases, and after confirmation generally, there should be a petition in the suit wherein the sale was had,[24] or in cases other than foreclosure, by a petition to the Court out of which the execution issued.[25] In the latter class of cases, the normal mode of attack is

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[18] Guarantee Trust Company v. Fitzgerald Hotel and Development Corp., *supra,* note (2); Hecht v. Hoogmoed, *supra,* note (2); Hoffman v. Godfrey, *supra,* note (4); Hurley v. Potash, *supra,* note (4); and Palladino v. Hilpert, *supra,* note (16), where the Court says at p. 278, "The purchaser at a judicial sale becomes invested with a fixed and definite legal right, of which he should not be deprived, except upon some legal or equitable ground."

[19] As early as 1863, it was held in Chancery that, "Mere inadequacy of price is no ground for relief, but fraud is; and the inadequacy of price may be so gross and unconscionable as to shock the conscience, and in the case of a private contract, to amount to conclusive and decisive evidence of fraud; or in the case of a judicial sale to constructive fraud and abuse of trust." Cummins v. Little, *supra,* note (15). In accord: Hazard v. Hedges, *supra,* note (9). And see Daly v. Ely, 51 N. J. Eq. 104 (Chancery 1893); Eberhardt v. Gilchrist, *supra,* note (14), at p. 170; and Hodgson v. Farrell, 15 N. J. Eq. 88, at p. 89, (Chancery 1862).

[20] West Ridgelawn Cemetery v. Jacobs, *supra,* note (13); and see Palladino v. Hilpert, *supra,* note (16).

[21] Hoffman v. Godfrey, *supra,* note (4), at p. 618. It may be suggested that there is no hesitation in refusing to confirm bids in receivers' sales upon grounds of inadequacy alone, or even because a higher bid has been made since the sale. *In re* New Jersey Refrigerating Co., 96 N. J. Eq. 431, (Chancery 1924); Porch v. Agnew, 66 N. J. Eq. 232 (Chancery 1904), *aff'd,* 67 N. J. Eq. 727 (E. & A. 1904).

[22] As in New Jersey National Bank and Trust Co. of Newark v. Savemore Realty Co., *supra,* note (5).

[23] Oakley v. Shaw, 69 A. 462, at p. 463 (Chancery), and see Dunlop v. Chenowith, *supra,* note (5), at p. 170.

[24] Campbell v. Gardner, *supra,* note (9); Hazard v. Hedges, *supra,* note (9); Howell v. Hester, *supra,* note (14); Schilling v. Lintner, *supra,* note (14).

[25] Connolly v. Donohue, *supra,* note (12).

by bill in chancery after the execution and sale at law.[26] Relief, where granted, is upon conditions, which vary according to the exigencies of particular situations.[27] In any event the attacking party must show an interest or equity of his own in the property sufficiently unincumbered, to render a resale of the property of likely benefit to him.[28]

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NEWARK, N. J.

EFFECT OF RENEWAL LEASE UPON TENANT'S RIGHT TO REMOVE FIXTURES—In the recent case of *Greenspan-Greenberger Co.* v. *The Goerke Company,*[1] the receiver of an insolvent corporation sought to sell the department store fixtures which had been installed by the corporation upon demised premises. The landlord objected to their sale and removal on the ground that the fixtures were in the store during the term of a prior lease to the tenant, and that when, at the expiration of that lease, the present lease was made, title to the fixtures was not reserved to the tenant and consequently passed to the landlord. The court held that title to the fixtures remained in the tenant.

In the relation of landlord and tenant the rigor of the law of fixtures is greatly relaxed in favor of the tenant. It is universally agreed that fixtures annexed to the realty by a tenant for trade purposes are removable by him during his term.[2] The basic reason for this result is the public policy favoring trade and the encouragement of industry. Considerable contrariety of opinion exists, however, as to when the tenant's right so to remove expires.

The authorities agree that where a tenant relinquishes possession at the expiration of his term without having removed the fixtures, title thereto passes to the landlord, and the tenant may not re-enter for the

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[26] Cummins v. Little, *supra,* note (15); Daly v. Ely, *supra,* note (19); Hecht v. Hoogmoed, *supra,* note (2).

[27] In foreclosure sales, the applicant being the mortgagor, the condition may be to pay off the mortgage debt plus costs of the foreclosure and of the sale; Campbell v. Gardner, *supra,* note (9); Hazard v. Hedges, *supra,* note (9). However, the putting up of a bond to guarantee a specific bid, substantially larger than that for which the property was sold, though not large enough to satisfy the decree, has been considered sufficient, New Jersey National Bank and Trust Co. v. Savemore Realty Co., *supra,* note (5); Rowan v. Congdon, *supra,* note (14). In sales in satisfaction of judgments not in foreclosure, payment of the principal debt and costs of sale has been required, Kloepping v. Stellmacher, *supra,* note (12); Connolly v. Donohue, *supra,* note (12).

[28] C. and D. Corporation v. Griffithes, *supra,* note (13); Hodgson v. Farrell, *supra,* note (19).

[1] 111 N.J.E. 249 (Ch. 1932).

[2] 26 C.J. 699; Crane v. Grigham, 11 N.J. Eq. 29 (Ch. 1855); Burns v. Shaffer Co., 8 N.J. Misc. 118, 149 Atl. 66, (Sup. Ct. 1930).