

and intention, while the latter, by definition, concede proper motivation and intention and differ only as concerns methods and modes of achievement and realization." *Dochenez v. Bentworth School District*, 6 Pa. Commw. Ct. 173, 185 (1972); *Kennedy, et al. v. Ringgold School District*, 10 Pa. Commw. Ct. 191, 194 (1973).

Merely stating that the board has abused its power does not make it so. The courts are not super school boards with the authority to substitute their judgments for that of the duly elected members of the School Board. Thus, this demurrer had to be sustained and the case dismissed for pleading over could not present an issue which would give this Court jurisdiction.

ORDER OF COURT

NOW, February 27th, 1978, the exceptions to the Court's order sustaining the demurrer and dismissing the case are dismissed.

Editor's Note—

The foregoing case was appealed to the Commonwealth Court of Pennsylvania, to 406 C.D. 1978; see notice filed March 10, 1978.

FARMERS AND MERCHANTS TRUST COMPANY OF CHAMBERSBURG V. HESS, C.P. Franklin County Branch, Execution No. 1975-297, A.D. No. 1976-24

Sheriff's sale - proper cause for setting aside and ordering resale - Pa. R.C. P. 3132 Purchaser's Unilateral Mistake - Purchaser's Penalty for Negligence

1. Unilateral mistake of a purchaser in failing to understand the meaning of the expression "under and subject to" is proper cause for setting aside a Sheriff's sale and ordering resale of real property under Pa. R.C.P. 3132 where their mistake is asserted by petition prior to delivery of the Sheriff's deed, and where denial of their petition would impose an unconscionable, unreasonable and lasting financial hardship on them and unjustly enrich the defendant. However, a penalty will be exacted from the petitioners for their negligent mistake which led to this factual situation and this litigation by having them pay the costs of the Sheriff's sale, plus all interest accrued on the plaintiff bank's judgment and on the mortgage during the period of time petitioners secured the stay of these proceedings, plus a sum for expenses and counsel fees of defendant in connection with this litigation.

Lawrence C. Zeger, Esq., Attorney for Petitioners

Richard K. Hoskinson, Esq., Attorney for Plaintiffs

Thomas J. Finucane, Esq., Attorney for Defendant

OPINION AND ORDER

KELLER, J., January 6, 1978:

This proceeding is before the Court on the petition of William D. Rotz and Twyla K. Rotz, his wife, petitioners, to set aside a sheriff's sale of real estate owned by Ronald D. Hess, defendant, and order the refund to petitioners of their downpayment of \$7,700.00.

FINDINGS OF FACT

1. On January 26, 1977, the Farmers and Merchants Trust Company of Chambersburg, plaintiff, filed praecipes for writs of execution to Nos. 24 - 1976 E.D. and 297 - 1976 E.D. directing the Sheriff of Franklin County, Penna. to levy upon and sell specifically described real estate of the defendant located in Peters Township, Franklin County, Penna. and his personal property to collect \$24,408.05 with interest from date and costs and \$1,758.89 with interest from date and costs.

2. Pursuant to the praecipes writs were issued and the levies made.

3. The plaintiff realized \$9,500.00 toward the total sum due from defendant by the private sale of certain personal property of the defendant prior to the sheriff's sale of defendant's real estate.

4. Pursuant to the writs of execution and advertisements the Sheriff conducted an execution sale of the defendant's real estate located in Peters Township, Franklin County, Penna. on March 25, 1977.

5. The defendant had granted a mortgage on the said real estate to the Mechanics' Building and Loan Association. The lien of the mortgage was a first lien in the amount of \$15,345.64 as of March 25, 1977.

6. Within a week of March 25, 1977, the petitioner William D. Rotz inquired at the sheriff's office as to the amount "against" the defendant's real estate and was advised of the total amount of the plaintiff's executions and that he should secure the services of an attorney. At the time of the inquiry neither the Sheriff nor his deputies had been made aware of the existence of the mortgage lien.

7. Immediately prior to the sale an officer of the Mechanics' Building and Loan Association delivered a letter

**MEMBERS OF THE BAR AND OTHER PERSONS INTERESTED,
PLEASE NOTE**

We are nearing the completion of volume 1 of these advance sheets. Our plan is to end that volume, for binding purposes, at the conclusion of the first case report after page 250 is reached. We presently contemplate this will be in late May.

The bound volume 1 will then be published, and we shall commence publication of volume 2 of the advance sheets. All subscriptions to advance sheets, of course, will continue until the completion of a full year from the date of subscription, and a reminder to renew such subscriptions will be printed in the advance sheets sometime this coming June.

Right now, however, we have to commence gathering information as to how many bound volumes 1 to prepare. Please start thinking about the matter. Those of you who are already entitled to receive one bound volume may wish to obtain more than one copy of this first issue of our bound volume. Other subscribers and even non-subscribers may also want to obtain copies.

The bound volume 1 will be hard-bound, contained in a tan jacket, and will have, in addition to all of the case opinions printed in volume 1 of the advance sheets, a table of contents, an index of legal points discussed in the cases, a table of cases on appeal, and an illustrated title page.

We think many persons may be interested in becoming the owner of such a book, and this is especially so right here, in Franklin County, where the decisions of our county courts have their first direct impact and involve cases arising out of the legal problems of our own populace. It should also be noted, we believe, this volume is the first such publication in Franklin County legal history.

Soon, the Board of Directors of Franklin County Legal Journal will meet to establish a price for the sale of bound volume 1 in this county. Sales outside Franklin County, Pennsylvania, will be handled by Geo. T. Bisel Co., of Philadelphia, but we will be making direct sales within the county. When the price has been established, we intend to commence accepting orders. We shall also establish a deadline for orders, and when that deadline date is reached, the number of bound volumes to be prepared will be established. We do not wish to prepare fewer bound volumes than we shall need, but it must be understood that economic considerations require that we do not prepare a grossly excessive number of such volumes.

Please start considering the matter now!

advising of the existence of its mortgage to the Sheriff. The letter stated:

"This is to inform you that Mechanics' Building and Loan Association of Chambersburg, Penna. is the holder of a first mortgage lien on the property of Ronald D. Hess, located in Peters Township, which property is being offered at Sheriff's Sale at 1:00 P.M. today. This property is being foreclosed on the lien of a subsequent creditor.

"We are requesting that this property be sold subject to our mortgage lien. The amount owing on this lien as of this date is \$15,345.64.

"We would appreciate notification of the above lien to any prospective purchasers before property is sold."

8. The Sheriff's auctioneer announced the sale and before exposing the property for bids read the terms of sale and the letter of the Mechanics' Building and Loan Association above quoted.

9. The petitioners attended the sheriff's sale on March 25, 1977 without counsel. They had not conferred with an attorney prior to the sale regarding their interest in bidding on the real estate.

10. The petitioners heard the auctioneer announce that the defendant's real estate was being sold subject to the mortgage, but did not comprehend the meaning of the language used.

11. The petitioners' bid of \$38,500.00 was the highest and best bid received, and the property was struck down to them.

12. The petitioners believed the mortgage would be paid from the proceeds of the Sheriff's sale.

13. Nothing was done by the plaintiff or defendant or by any officer or person involved in the conducting of the Sheriff's sale to in any way mislead the petitioners or suggest to them that any of the proceeds of the sale would be applied to the mortgage.

14. Pursuant to the terms of sale the petitioners delivered the sum of \$7,700.00 to the Sheriff as a downpayment.

15. The petitioners never intended to purchase the

defendants' real estate for the sum of \$38,500.00, and also assume payment of a mortgage of \$15,345.64.

16. The petitioners, upon learning of their error and realizing that they were required to pay \$15,345.64 more than they had anticipated or intended when making their bids on the property, retained counsel, who prepared and presented their petition to set aside the Sheriff's sale on April 6, 1977. The petition was presented prior to the delivery of the Sheriff's deed.

17. The Order of Court dated April 6, 1977, granted a rule on the plaintiff and defendant to show cause why the sale should not be set aside and the downpayment returned, and stayed all proceedings.

18. The defendant filed his answer to the petition on April 21, 1977. The plaintiff filed no responsive pleading.

19. The defendant by his answer admits "that the bid price of \$38,500.00 is sufficient to pay the aforesaid first mortgage of the Mechanics' Building and Loan Association, the claim of the execution creditor, Farmers and Merchants Trust Company, and the cost involved, and that a balance would be left for payment to the execution debtor Ronald D. Hess." (Paragraph 11 of petition and answer.)

20. No element of fraud can be attributed to any of the parties to this proceeding nor to the mortgagee, Sheriff, Sheriff's deputies or auctioneer.

21. There is no evidence that the defendant changed his position in reliance upon the result of the Sheriff's sale.

22. No evidence was received as to the value of the real estate as of March 25, 1977.

DISCUSSION

Hearing on the petition and answer was held on June 27, 1977. Counsel for petitioners and defendant filed briefs and argued the case on August 4, 1977. Counsel for the parties requested the Court defer disposition of the issues during settlement negotiations. At the end of October, the Court was advised that the negotiations had not proven fruitful, and the matter was ripe for disposition.

Pa. R.C.P. 3132 provides:

"Upon petition of any party in interest before delivery of the personal property or of the sheriff's deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances."

There can be no precise or all-inclusive definition of what constitutes "proper cause shown", and it is within the sound discretion of the court to determine whether proper cause has indeed been shown. The court's discretion "will not be reversed on appeal unless there is a clear abuse of that discretion." *Fidelity Bank v. Pierson*, et ux., 437 Pa. 541, 542, 264 A. 2d 682, (1970); *Philadelphia National Bank v. New Ideas Enterprises, Inc.*, 424 Pa. 284, 227 A. 2d 873 (1967); *Capozzi v. Antonoplos*, 414 Pa. 565, 201 A. 2d 420 (1964).

Vol. 9 Goodrich-Amram 2d Sect. 3132.2 states inter alia: "... The court's determination whether or not to set aside the execution sale will be governed by the particular facts of the case at hand, the terms of the Rule contemplate a broad discretion, which should properly be subject only to limited appellate review for clear abuse thereof. The power to set aside should be exercised whenever necessary to avoid injustice to the aggrieved party." This general rule is subject to the condition that an application to set aside such a sale "must be made promptly before intervening rights are prejudiced." *Hettler v. Shepherd*, 326 Pa. 165, 166, 191 A. 2d 581, (1937).

The controlling issue in the case at bar is whether the unilateral mistake of a purchaser is grounds for setting aside a sheriff's sale.

In *Crawford v. Boyer*, 14 Pa. 380, 383 (1850), the Supreme Court of Pennsylvania declined to grant relief to a purchaser at a sheriff's sale, who had mistakenly believed he could satisfy his first mortgage on the real estate he purchased in lieu of paying to the sheriff the amount that he bid at the sale thus defeating the claims of junior lienholders who had caused the execution to issue. After finding against the purchaser on the grounds that he had followed the wrong procedure, the court observed:

"... if the plaintiff in error stands in danger of injustice, it results from the refusal of the Court of Common Pleas to set aside the sheriff's first sale. If the mortgagee bid for and purchased the land under a misapprehension of his right... I should think the mistake might have furnished a sufficient reason for setting aside the sale. In the exercise of reasonable discretion, the courts have not been rigid in the application of

the maxim caveat emptor to judicial sales, but have always liberally interfered for the protection of an erring purchaser untainted by fraud.”

In *Cummings' Appeal*, 23 Pa. 509, 511, 512 (1854), the Supreme Court concluded the trial court could set aside a sheriff's sale if equity and justice required such action when the purchaser bid at the sale under the erroneous belief that the lien of a first mortgage would be discharged from the sale proceeds, and the mistake was discovered before confirmation of the sale. Justice Lowrie stated:

“We do not forget the rule that refuses to hear the allegation of ignorance of the law as a ground of relief; but we must be very cautious in applying this rule to judicial proceedings; for the whole doctrine of amendments proceeds upon a partial denial of it, and it is not at all of absolute obligation in questions of new trial.

“A judicial sale is a contract with the Court, made as a part of a remedial process, and certainly the Court has a greater power over such contracts than over any other (1 P. Wms. 747, 1 Green's Ch. R. 216), in analogy to the control which it has over other parts of its proceedings.

“There are cases wherein it has exercised this control by setting aside the sale because of the mistake of the purchaser in relation to his legal right in the proceeds: 2 Wend. 260; 8 Paige 337. In one of our own cases the purchaser was led to believe that he was buying a complete legal title discharged of liens when it was otherwise; and in relation to this it was said that had the purchaser brought such a case before the Court below, he would probably have been discharged from the purchase, and a resale have been ordered.”

In *Stroup v. Raymond*, 183 Pa. 279, 283 (1897), the court in setting aside a sheriff's sale on the grounds of inadequacy of purchase price coupled with a mutual mistake of law observed:

“Undoubtedly, courts have, in cases where the purchaser believed he bought the land discharged from the lien of a mortgage, relieved him from the obligation incurred by his bid, if he made prompt application before acknowledgment of deed.”

And again, in *Kline et al., Admrs. v. Kline, et al., Aplnts.*, 324 Pa. 145, 146, 188 A. 119, (1936), the Supreme Court, in a short Per Curiam Opinion, stated:

“It is clear from a careful review of the evidence that the bidders were under a misapprehension as to the effect on the sale of liens of record. The court below did not abuse its discretion in setting aside the sale and attaching thereto the conditions stated.”

In *Commonwealth National Bank v. Stoll*, 63 Lanc. L.R. 225 (1971), counsel for the bank, who was high bidder on real estate at a sheriff's sale, did not realize until some days after the sale that the bank's judgment was a subordinate lien and that the senior judgment creditor was demanding payment of the sale proceeds on his judgment. The Lancaster County Court of Common Pleas set aside the sale observing:

“The application is an appeal to the equitable powers of the court, powers which the courts have continuously and consistently used to relieve parties from the consequences of their own mistakes. The cases point out that where failure to set aside the sale would not only subject the petitioner to hardship but would also yield unjust enrichment to others, the reason for granting the relief is two-fold. . . .” (P. 228)

In response to the respondent's contentions that the sale should not be set aside because the mistake resulted from the negligence of the bank officer and bank attorney our sister court held:

“. . . However, even if the clearest of negligence had appeared, it would have been irrelevant. This court is not sitting to mete out punishment for negligence, but to deal with the consequences of unquestioned mistakes. Probably most mistakes are the consequences of some lapse of care that could be called negligence by those who choose to. A reading of the cases . . . will show that the mistakes for which sheriff's sales have been set aside could well have been called careless mistakes in many instances, and it is from the consequences of the mistakes that the cases have provided relief. The mistakes here are clear. No element of real carelessness was shown, and if there had been, it would not be a basis for refusing the petition.” (P. 228, 229)

In *National Central Bank v. Kopy Kat Originals, Inc.*, et al, 65 Lanc. L.R. 121 (1975), the high bidder at a sheriff's sale petitioned to have the sale set aside and that he be relieved from making the downpayment required by the conditions of sale. The purchaser was unfamiliar with sheriff's sales, did not have counsel advising him concerning the sale and mistakenly believed that a sheriff's sale conveyed title “free and clear” when in fact the real estate was sold under and subject to the

purchasers of the real estate under and subject to the mortgage lien, then the overage due the defendant becomes \$21,833.06 less costs of sale and accrued interest on the plaintiff's judgment.

In our judgment a denial of the petition would impose an unconscionable, unreasonable and lasting financial hardship upon the petitioners and unjustly enrich the defendant beyond his wildest expectations. Such inequitable and unjust results are shocking to the conscience of this Court and unacceptable as a matter of law. We conclude the petition to set aside the Sheriff's sale must be granted.

We note that defendant has contended that the setting aside of the sale would be injurious to his position because there was active bidding at the sale, and there may not be as many interested bidders at a resale; and, also, that the Court would be reluctant to order another sale if he (Hess) were to urge that the second sale price was inadequate and there were no other irregularities. On these points, we note that there is no reason to suppose that a fair price would not be bid at a second sale of the property. The remote possibility of a reduction in interested bidders cannot be determinative of this case in the light of the injury that would be suffered by the petitioners should the sale not be set aside. The injury potential asserted by the defendant is, of necessity, always present in cases involving the setting aside of sheriff's sales, but the courts have not afforded that possibility great weight in reaching their decisions. It is a factor which we have considered with the other equities in the case and not found controlling.

While we are persuaded that the facts and the law require the setting aside of the sheriff's sale, we are also persuaded that equitable principles dictate that a penalty be exacted from the petitioners for their negligence, which led to this factual situation and this litigation. To that end we conclude:

1. The costs of this Sheriff sale shall be paid in full by the petitioners, for it would be unjust to impose any part of those costs on the defendant. The poundage and satisfaction fee cost items will be remitted as unearned.
2. All interest accrued on the judgments of the plaintiff and the mortgage of Mechanics' Building and Loan Association accrued from and after March 25, 1977 to the date of this Order shall be paid by the petitioners, for it was the petitioners who secured the stay of proceeding.

3. The defendant has incurred expense and counsel fees in connection with this litigation. This amount being unknown to the Court, the sum of \$750.00 will be paid to the plaintiff as a credit against the principal sum due from the defendant.

NOW, this 6th day of January, 1978, the petition of William D. Rotz and Twyla K. Rotz to set aside the Sheriff sale of the real estate of Ronald D. Hess is granted. The Sheriff of Franklin County is ordered to list, advertise and expose said real estate at the earliest possible date.

The Sheriff of Franklin County is ordered to pay from the \$7,700.00 deposit made by the petitioners:

1. All costs incurred as a result of the Sheriff's sale of defendant's real estate on March 25, 1977, except poundage and satisfaction fee charges, which shall be remitted.
2. All interest accrued on the judgments of Farmers and Merchants Trust Company and the mortgage of Mechanics' Building and Loan Association from March 25, 1977 to this date.
3. \$750.00 to Farmers and Merchants Trust Company to be applied to the principal sum due on the plaintiff's judgments against the defendant.
4. The balance remaining to the petitioners. Exceptions are granted the defendant and the petitioners.

IN RE: ABSENTEE BALLOTS OF EVELYN S. ZIMMERMAN AND MYRTLE M. SECRIST, C.P., Franklin County Branch, Misc. Doc., Vol. X, Page 56

Election Code - Subject Matter Jurisdiction - Absentee Ballot

1. Section 1308(e) of the Pennsylvania Election Code, 25 P.S. Sect. 3146.8 specifically confers jurisdiction of subject matter initially upon the county election board and for purposes of review, the Common Pleas Court, notwithstanding the fact that they might ultimately decide that they are unable to grant the request sought in the particular case.
2. County election boards are not bound, under the Pennsylvania Election Code, by technical rules of evidence in hearings on absentee ballot challenges.