

New-Jersey Court of Errors and Appeals.

JOHN I. PLUME, Appellant, }
and } Oh Appeal from the
GEO. D. SMALL, Respondent. } Court of Chancery.

STATE OF THE CASE.

George D. Small, the Respondent, being the owner of a lot of land on the corner of Broad and Fulton streets, in the city of Newark, of one hundred and six feet on Broad, and three hundred feet, or thereabouts on Fulton, an agreement in writing, was entered into between certain persons, of whom the Appellant was one and the Respondent another, by which the associates agreed to become interested in the said lot severally and respectively, that the same should be taken at the valuation of twenty-eight thousand dollars, in shares of one thousand, or half shares of five hundred dollars each, to be filled up and each associate to be answerable and held responsible to the Respondent for (and only in proportion to) the number of shares or half shares affixed to their respective names, and not for the others; that the Respondent should receive payment in the same ratio of cash and securities contained in the articles of sale to be agreed upon by a majority of the associates, and out of such cash and securities, that the said property should be advertised and sold at such time, and in such manner, and upon such terms as the owners of a majority of shares should agree upon and direct, and the deeds given with clear title by the Respondent and his wife to the purchasers; that ten per cent of the purchase money should be paid to the Respondent at the time of the signing of the agreement, in cash or notes, at sixty or ninety days, which should respectively become forfeited upon a non-compliance by the associates or either of them, with the terms and conditions of sale to be agreed on as aforesaid by the associates, upon which agreement was a marginal note, as follows: "I do hereby agree to the terms and conditions herein proposed, twenty per cent cash or approved endorsed notes, on the delivery of the deeds to be paid to me," and signed by the Respondent, the Appellant being a subscriber for one share of one thousand dollars, and the Respondent for five shares amounting to five thousand dollars.

At a meeting of the owners of a majority of shares, at which the Appellant and Respondent were present, Joel W. Condit, William A. Myer and Ambrose Williams, were appointed a committee to make arrangements for the advertising and sale thereof, and upon what terms the same should be sold; and thereupon the said committee did settle the terms and conditions and the time and manner of said intended sale of said property,

and fix upon the 21st May, 1836, for the said sale, and the said committee did draw up certain conditions of sale, which were as follows, viz :

" 1. The highest bidder to be the purchaser.
 5 2. Fifteen per cent of the amount of purchase money of the lots to be paid by approved endorsed note, payable with interest in six months.

15 Fifteen per cent by approved endorsed note, payable with interest in twelve months, and the balance by bond, payable in five years, with interest thereon payable half yearly, to be secured by mortgage on the ground purchased.

3. The buildings will be sold to be removed within thirty days from this date from the premises.

15 4. The purchase money for the buildings to be paid by approved endorsed note in equal sums, payable with interest in six and nine months, where the amount exceeds \$200. Purchases under \$200 and exceeding \$50, to be paid by approved endorsed notes with interest in equal shares, in three and six months, and all purchases under \$50 to be paid in cash.

20 5. Lots Nos. 1, 2, 3, 4 and 5, will be sold 25 feet front, and Nos. 6 and 7, as one lot 40 feet front : also lots Nos. 8, 9 and 10, will be sold 25 feet front, and Nos. 11 and 12, as one lot 31 feet front.

25 6. If any purchaser shall refuse to take the property as bid off by him, it shall immediately be put up and re-sold, and if it sell for more he shall not receive the benefit thereof, but if it sell for less he shall make good the deficiency.

30 7. The deeds will be ready for delivery by Ambrose Williams, at the office of the Mechanics Fire Insurance Company, on Saturday next, and a bond and mortgage prepared at the expense of the purchasers, for them to execute.

8. Each purchaser before he leaves the place of sale, shall subscribe these articles of sale.

35 The property as originally divided into lots consisted of twelve lots, lots Nos. 1, 2, 3, 4, 5, 6 and 7, being on Fulton street, and lots No. 8, 9, 10, 11 and 12, on Broad street, and previous to the first sale, the Respondent having expressed to some one or more of the said subscribers, and to other persons his desire to purchase the lot on which the building south of the main house,
 40 hereinafter mentioned, stood, if the said lot should be so laid out as that the said boundary would cover the same. For the purpose of meeting the wishes of the Respondent, or for some other reason, the said lot was so altered that the same was put up and sold 31 feet front instead of 46 feet front, as by the first map, the same
 45 was laid out, and in such manner that the said building covered the same, the northerly end of the building being precisely on the line of the said lot, adjoining the lots purchased by the said complainant as aforesaid, and the lots No. 8, 9 and 10, were so altered that the same were put up and sold 25 feet front each, instead of
 50 20 feet front each.

The buildings on the property were a building called Cadet

Hall, on the corner fronting Broad; a main house on Broad, with a building or wing on the south of the main house, and a barn on Fulton street. The Cadet Hall stood upon lot 8 and part of lot 9; the main house on lot 10 and part of lot 9, and the buildings south of the main house on lot 11 as divided and sold. 5-

On the day of sale the several lots and buildings were separately struck off and sold; lot 11, of 31 feet front, to the Respondent at \$179 for each front foot; lot 10, of 25 feet front, to the said Ambrose Williams, at \$177 50 for each front foot, and lot 9, of 25 feet front, to Joel W. Condit & Co., at \$172 50 for each front foot, the said Ambrose Williams and Joel W. Condit being two of the said associates and of the said committee; the main house to Archer Gifford for \$250; the buildings south of the main house to the said Joel W. Condit & Co. at \$475, and the barn to the Respondent for \$55. The said Joel W. Condit & Co, having 10- bid for, purchased, and signed the articles of sale in their names, for, and in behalf of the Respondent, pursuant to, and at his request, on a private understanding between them, and lot 11 having been previously struck off to the Respondent and immediately after the sale, each of the purchasers, including the said Ambrose Wil- 20- liams and Joel W. Condit & Co., signed the articles of sale in acknowledgment of their purchases; but the said Ambrose Williams and Joel W. Condit & Co., subsequently declined to take the lots struck off to them, alleging that they, as members of the said committee, had bid off the said lots, not as actual purchasers 25- but in behalf of the associates, and thereupon the said lots were subsequently advertised to be sold on the ninth day of July, in the year one thousand eight hundred and thirty-six, and on that day were severally struck off and sold to the Appellant, lot 9 at \$155 62 for each front foot, and lot 10 at \$155 37 for each front 30- foot, under and pursuant to the terms and conditions of sale, as agreed on and fixed by the said committee, and declared and published on that day and before the sale was commenced, to the bystanders, as follows, to wit:

"1. The highest bidder to be the purchaser. 35-

2. The terms of payment are 15 per cent in six months, 15 per cent in twelve months, by approved endorsed notes, payable with interest, and the balance by bond, payable in five years with interest thereon half yearly, secured by mortgage on the purchase.

The deeds are to bear date the 9th July, 1836, from which time interest is to be paid. 40-

The building to be removed by the first day of August next."

All the buildings were sold at the first sale. But the main building on lot 10 and part of lot 9, the buildings south of the main house on lot 11 and the barn, were standing on the said property 40- at the time of the second sale.

The said Appellant thereupon immediately signed the said article of sale, in acknowledgment of his said purchase, and subsequently made and delivered his note and bond and indenture of Mortgage upon the said lots to the said committee for the pur- 50- chase money, according to the terms and conditions of the said

article, and received from them a deed for the said lots, made and executed by the said Respondent and his wife pursuant to the said agreement, and thereupon the said committee delivered to the said Respondent the said notes and bonds and indenture of mortgage, in part payment of the amount so agreed to be paid to him for the said property as aforesaid.

The said notes were both protested for non-payment, and subsequently paid to the said Respondent by the endorsers; that which came to maturity last having been paid between January and April, in the year one thousand eight hundred and thirty-eight, and the said Respondent having subsequently paid or accounted for both of the said notes to the endorsers thereof respectively.

At the term of February, in the year one thousand eight hundred and thirty-eight, the said Respondent brought a suit upon the said Bond in the Supreme Court of this State; and on the fifteenth of June following, the said Appellant exhibited his bill against the said Respondent, in the Court of Chancery of this State, charging, that he gave his notes, Bond and Indenture of Mortgage, and received his Deed under a presumption of the fairness of the transaction, and that the conditions of the said sales would be complied with by all the purchasers, by the removal of the buildings and otherwise; but that afterwards, and after his notes were paid, he was informed and believed that there were no other real bidders for the property except himself, and that any bid in opposition to him was not for the person bidding, but in behalf of the said Respondent, to inflate the price; and that the price at which the lots were struck off to him, was far beyond their value, that the said property was situated in a well settled and respectable part of the said City of Newark; that for many years a public house had been kept thereon, and that there was two buildings thereon, which had been from time to time occupied as theatres and public shows, and that circus riding and other entertainments were had in vacant lots thereon; and that the buildings were generally old, and that in order to free the neighborhood from the demoralizing influence of such associations, the said associates had entered into the said agreement, and not from any profit to be expected therefrom, and that in making such arrangement it was their design, and was so represented and understood by them and the said Respondent, that all the buildings were to be removed from the premises; without which no reasonable inducement could be given to any person to purchase any of the said lots, and that it was with that intent that among the conditions of the said sales, it was made imperative on the purchaser of each lot, to remove the buildings thereon; and that the buildings on the lot occupied by the said Appellant was removed therefrom; but that on the adjoining lot, struck off to the Respondent, the buildings thereon were permitted to remain, and that a part thereof which had been occupied as a Bar-room and a long room in the rear thereof in which theatrical and other exhibitions had been made still remained, and the said Barn, also

remained on Lot 7, in Fulton street; and that the said Respondent had resided on the premises and continued to occupy them for some time thereafter, and subsequently leased the same as a tavern stand and for the purposes aforesaid; and that the buildings were still maintained and kept up on the said lots contrary to the understanding of the parties, whereby the lots bought by the said Appellant were greatly injured in value. And that since the payment of the said notes for a part of the said purchase money, he had been informed of the fact that the said Respondent was the true bidder for the said buildings, so bought by the said Joel W. Condit & Co., in their names as aforesaid, and that all the bidders against him were bidders in behalf of the said Respondent; and that since he had discovered that the said sale was conducted fraudulently, and with a design to sell off the property at an inflated price, and since the said Respondent determined to keep up the said buildings, the said Appellant has applied to the said Respondent, and remonstrated with him against keeping up the said buildings, and demanding the payment of the said Bond; and that the said Respondent has brought the said suit and thereupon praying an injunction, to restrain the further prosecution of the said suit upon the said Bond. That the said Bond be delivered up to be cancelled; that the said Respondent be decreed to account for and pay back to the said Appellant, all moneys received by him on account of the purchase money of the said lots, and that the Deed therefor be declared void; or that the said Respondent be decreed to remove the said buildings on the lot so struck off to him as aforesaid. And the said Appellant to pay to the said Respondent, only the amount of the principal money due on the said Bond to the time of such removal, and that the interest on the said notes heretofore paid should be computed to the time of such removal, and refunded by the said Respondent.

Upon the filing of the said Bill, an Injunction was ordered and issued according to the prayer thereof, restraining all further proceeding in the said suit upon the said Bond; and thereupon the Respondent filed his answer to the said bill, and thereby as responsive to the said bill, admitted that the lots 9 and 10 remained unsold at the said first sale, having been struck off to the said Ambrose Williams, and Joel W. Condit & Co., at the prices herein before set forth, and as he was informed and believed purchased by them as underbidders at the said first sale, for and in behalf of the persons interested as shareholders in the said property, and not in good faith as purchasers on their own account; but denied that he had any knowledge or agency in the giving of authority to the said Ambrose Williams, and Joel W. Condit & Co., to underbid at the said first sale, or to purchase for, or in behalf of the persons interested as shareholders in the said property, the said lots 9 and 10, or either of them, or any other of the said lots, and thereby further admitted that his design in requesting the said Joel W. Condit & Co., to purchase for him the said buildings south of the main house, and on the lot 11, was to keep

and maintain them on the said lot 11; he having previously purchased the same. And the said Joel W. Condit, having a full knowledge of his said design, and that he has, and still doth keep up and maintain the said buildings so purchased for him, as aforesaid, and the said barn so purchased by him as aforesaid, and that he has since the first sale, and still does continue to exercise possession and control over the said lot and buildings thereon; and thereby denied all knowledge of the motives of the said several associates, for entering into the said agreement, and particularly of any such motives as are in the said Bill, charged in relation to the demoralizing influences therein alledged and set forth, and stated his belief to be, that the said several associates, or any of them did not enter into the said agreement with the motives in the said Bill set forth; but with a view, and for the purpose of speculation. The said associates having actually divided a small profit out of the proceeds of the sale of the said property, after paying this Respondent the price of the same; and thereby denied that at the time of entering into the said agreement, or at any other time before or since, he had any knowledge, information, or intimation, other than are given by the said Bill. And until the filing of the said Bill, that in the purchase of the said property at the time of entering into the said agreement, or subsequently at either of the times of the sale of the said property, as aforesaid, the said associates, or either of them, or the said Appellant in particular were or was actuated or influenced to purchase or sell the same with the desire, design or intent that all, or any of the buildings thereon should be removed for any reason whatsoever, or that the said public house kept thereon, should be discontinued; and thereby denied that it was made imperative on the purchaser of any lot who should become the purchaser of any buildings thereon to remove such buildings therefrom. And thereby stated that though he could not deny that the sale of the said property, was conducted fraudulently and with a design to sell off the same at a price inflated and far beyond its value, so far as related to some of the said associates, yet he denied that he had at the time of the said sales, or at any other time, any agency in, or connection with any fraud in the conducting of either of the said sales, or any knowledge or information, except by said Bill, of any such fraud, unless the employment of secret underbidders at the sale of the said property might be regarded as fraudulent, and as to such thereby stated, that he had been informed, but not till long time after the said first sale, and believed that at the said first sale, there were persons who did bid on said lots, or some of them, with a view that the same should not be struck off below certain prices fixed on the same, and to the extent of such prices. But that he did not know whether such persons were authorised by the said associates so to do, and denied that he gave any such authority in any manner, to make any bid on any of the said lots or buildings except as aforesaid; and thereby denied that he at either of the said sales made any bid whatever on any other lot than such as were pur-

chased by him at the said sale, or had any agency or participation whatever at any time in any such underbidding; or in any means whether fraudulent or otherwise, to inflate the price of the said property, at either of the said sales, or in conducting or controlling the same or in fixing the terms and conditions thereof, and thereby denied that any person did underbid on the lots so purchased by the said Appellant, at the said second sale, or that any measures were taken at the said second sale, to inflate the price of the said property.

A general replication being filed to the said answer, depositions of witnesses were taken on the part of the Appellant, and the cause brought on to a final hearing upon the pleadings and proofs therein, and His Honor the Chancellor, declared his opinion as follows, to wit:—

“An Injunction was issued according to the prayer of the Bill. The answer denies that there was any underbidding whatsoever at the second sale, and there is no proof of it. It also denies that there is any thing in the conditions of the first sale, even if the conditions of the first sale can be considered conditions of the second sale also, which requires a person who bought a lot and also the building standing on it, to remove the building from it, and I am of this opinion.

“Another point is made by the proofs in the case, and the argument of Counsel on the part of the Complainant. It is that Small induced the first subscriber, for a share, to put down his name, it would go, and that he should sustain no loss. Whether this would avail a purchaser at the sale made by the associates through a subscriber, I am not called upon to say. For the reason that no such ground is taken by the Bill, and a Complainant cannot be allowed to make one case by his Bill, and another by his proofs, “*Let the Injunction be dissolved.*”

The causes of Error will appear in the following assignment of Errors, to wit:—

FIRST—That the Chancellor has not in making the said decree noticed the inadequacy of price, at which the property was bid off to your Petitioner, under the circumstances attending the sale, although there was sufficient evidence of such inadequacy of the price, being nearly three times its value; and although the defendant admitted the same in his answer.

SECOND—That no regard has been had to the fact as sufficiently proved, that there were underbidders at the sale, and although such underbidding was admitted in the defendant's answer.

THIRD—That in making said decree, no notice has been taken of a violation of the conditions of sale, in not removing the buildings from off the premises at the times specified in the articles of sale, while it is admitted by the defendant's answer, and shewn by evidence that the said defendant himself contributed to keep

the said buildings on the premises from that time to the present day.

FOURTH—That the said decree has been made without due consideration of the circumstances under which the sale was got up by the individual negotiations of the said defendant, with one of the associates and one of the committee men; the said defendant admitting that there was fraud, with due proof of such fraud.

FIFTH—That no notice has been taken of the fact that two of the committee men, Joel W. Condit and Ambrose Williams, bid for certain lots, and were released, although they did not decline taking the lots after the sale was completed, but signed the articles of sale.

SIXTH—That the said decree has been rendered without regard to the fact that the articles of the first sale and conditions thereof referred and applied to the second sale, which was advertised and intended to close that concern, and to resell the identical property in part, which the said Joel W. Condit and Ambrose Williams had purchased.

SEVENTH—That although it was proved that the defendant had occupied the lots sold to the complainant, and had used the building stones in the cellar thereof, and otherwise converted it to his own use, and built a passage, way or entrance way upon one of the said lots; yet no allowance therefor whatever has been made to the complainant.

EIGHTH—That no regard has been had in making of said decree, to the fact as sufficiently proved and admitted by the defendant that there was a concealment of material circumstances and the suppression of such truths as would have prevented the complainant from purchasing at said auction had they been made known to him.

NINTH—That the said decree has been in other and material respects without proper cause, and not agreeable to the evidence offered by your Petitioner, or to the admissions by the defendant in his answer, or agreeable to equity.

TENTH—And for that the decree is in favor of the defendant with costs, whereas it should upon the pleadings and evidence have been in favor of the complainant, granting the relief prayed in and by the said Bill.

It is understood that there are other allegations and charges in the Bill and answer, to which the parties will refer, together with the evidence taken in the cause, all which is submitted to the Court as a part of the case.