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Notice of Appeal.

(Filed July 13, 1938.)

In Chancery of New Jersey

118/66.

Between FIDELITY UNION TRUST COMPANY, as Trustee, Complainant, *and* GEORGE MINTZ, Defendant.	On Bill, etc. Notice of Appeal.

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The complainant, Fidelity Union Trust Company, as Trustee, hereby appeals from the final decree made in the above entitled cause by the Chancellor on the advice of the Honorable John O. Bigelow, Vice-Chancellor, on June 2, 1938, and from the whole and every part thereof, to the New Jersey Court of Errors and Appeals in the Last Resort in All Causes.

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Dated: July 12, 1938.

HOOD, LAFFERTY & CAMPBELL,
Solicitors of Complainant.

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WALLACE R. CHANDLER, JR.,
of Counsel.

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

WALLACE R. CHANDLER, JR.,
Of Counsel with Complainant.

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Service acknowledged.

ABRAHAM I. MAYER,
Solicitor for Defendant,
July 12, 1938.

Petition of Appeal.

(Filed July 23, 1938.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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Between FIDELITY UNION TRUST COMPANY, as Trustee, Complainant-Appellant, *and* GEORGE MINTZ, Defendant-Appellee.	**On Appeal from the Court of Chancery.** **Petition of Appeal.**

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

The petition of Fidelity Union Trust Company, as Trustee, the Appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his
30 Honor, Luther A. Compbell, Chancellor of the State of New Jersey, upon the advice of his Honor, John O. Bigelow, Vice-Chancellor, bearing date the second day of June, 1938, in a certain cause in the Court of Chancery wherein the Fidelity Union Trust Company, as Trustee, was complainant, and the said George Mintz was defendant, in these respects, to wit: that the said decree directs that complainant's bill of complaint be dismissed and that the complainant pay the
40 defendant upon his counterclaim the sum of $1,000 paid by the defendant to the complainant as a

deposit upon a certin contract referred to therein, and a further sum of $50 on account of his cost of searching title.

And the petitioner appeals from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous in that: 10

(1) Said decree did not direct the defendant, as vendee, to perform specifically the contract of sale made between him and the complainant, as vendor.

(2) Said decree did not find and declare the deed to the premises tendered by the complainant, as trustee, was sufficient to convey a good and marketable title to said premises. 20

(3) The complainant, as trustee, had the right by the terms of the agreement between the settlors and the complainant constituting the trust, to sell and convey the premises which are the subject of this suit without the joinder or consent of the beneficiaries or any other person or party.

(4) The complainant, as trustee, had the right, by virtue of the statute in such case made and provided, to sell and convey the premises which are the subject of this suit, without joinder or consent of the beneficiaries or any other person or party. 30

(5) Said decree directed the petitioner, as complainant, to pay the defendant on his counter-claim the sum of $1,000 paid as deposit on account of the agreement referred to in such decree, and $50 paid on account of search fees, inasmuch as 40

this petitioner, as complainant, was entitled to a decree of specific performance against the defendant.

The petitioner, therefore, prays that the decree of the Chancellor may be wholly reversed and set
10 aside and for nothing holden, and that the petitioner may have such other relief in the premises as to this court may seem proper.

HOOD, LAFFERTY & CAMPBELL,
Solicitors of Complainant-Appellant.

WALLACE R. CHANDLER, JR.,
of Counsel.

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Service of the within Petition of Appeal is hereby acknowledged this 21st day of July, 1938.

(Signed) ABRAHAM I. MAYER,
Solicitor of George Mintz,
Defendant-Appellee.

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Bill of Complaint.

(Filed January 5, 1937.)

IN CHANCERY OF NEW JERSEY.

To the Honorable Luther A. Campbell,
Chancellor of the State of New Jersey:

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The complainant, Fidelity Union Trust Company, a New Jersey corporation, with its principal office located in the City of Newark, in the County of Essex, and State of New Jersey, as Trustee, respectfully shows that:

1. On February 27, 1936 complainant was seized in fee simple of all that certain tract or parcel of land and premises situate, lying and being in the City of Newark, County of Essex, and State of New Jersey:

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Beginning at the intersection of the southerly line of Sixteenth Avenue with the easterly line of South Eighteenth Street; thence along the said line of South Eighteenth Street South twenty-three degrees West twenty-four and seventy-six one-hundredths feet; thence South sixty-seven degrees East forty-seven and thirty-seven one-hundredths feet to the westerly face of the building standing on the premises adjoining on the east; thence along the same North twenty-three degrees twenty-five minutes East twenty-four and seventy-six one-hundredths feet to the aforesaid line of Sixteenth Avenue; and thence along the same North sixty-seven degrees West forty-seven and fifty-five one-hundredths feet to the point and place of Beginning.

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The above description being in accordance with a survey made by Borrie & Kreiner, dated January 29, 1936.

Being part of the premises conveyed to the complainant by deed from Louis E. Batchelor, Sheriff of the County of Essex, dated September 24, 1935, and recorded in the Register's Office of the County of Essex in Book B-90 of Deeds for said County, pages 30-33.

2. On the date last mentioned, complainant and the defendant, George Mintz, executed and delivered a certain written agreement whereby complainant agreed to sell and convey said lands and premises to defendant by bargain and sale deed at the office of the complainant, Fidelity Union Trust Company, 755 Broad Street, Newark, New Jersey, on November 1, 1936, for the consideration of $7,500, which said purchase price defendant agreed to pay in the following manner: $1,000 in cash upon the execution and delivery of the aforesaid contract, $1,000 in cash to be paid to complainant upon delivery of the deed, and the balance, to wit, $5,500, to be paid either in cash or, at the option of defendant, to be secured by a purchase money bond and mortgage to be given to the complainant, in said sum, payable three years from date, with interest thereon at the rate of six per cent per annum, payable quarter-annually. A true copy of said agreement is hereunto annexed, made a part hereof, and marked Exhibit "A".

3. The defendant paid to the complainant the sum of $1,000 at the time of the execution and delivery of said agreement of sale.

4. Complainant was ready and willing to deliver said deed to defendant at the time and place

mentioned in said agreement of sale and at all times thereafter, but defendant failed to appear at said time and place or at any time thereafter for the purpose of completing said sale.

5. On December 7, 1936 complainant tendered a bargain and sale deed to said premises, duly executed and acknowledged by complainant in due form according to law and according to the terms of said contract, to the defendant by tendering the same to Abe Mayer, Esquire, the defendant's attorney and solicitor, at his place of business, thereunto duly authorized to accept and receive same, which said tender was accompanied by a demand on behalf of the complainant for the balance of the purchase money pursuant to the terms of said agreement of sale, but the defendant by his attorney duly authorized thereunto refused to accept same and to pay the balance of said purchase price.

6. Complainant has always been ready and willing, and now holds itself ready and willing to perform its part of the contract, and on being paid the remainder of the purchase money in accordance with the terms of said agreement with lawful interest to convey said lands and premises to the said defendant by deed duly executed by complainant.

7. Defendant has been in possession of said lands and premises since the execution and delivery of said agreement of sale under the rental stipulation set forth in said agreement. Said agreement particularly provided that if the defendant should fail to comply with any of the covenants and terms of the same, then the com-

plainant might reenter said premises, and furthermore, in case of such default, terminate said agreement and retain any payment made on account thereof as liquidated damages.

Complainant is without adequate remedy in
10 the courts of law and therefore prays:

1. That George Mintz who is the defendant to this suit may answer this bill of complaint and each statement therein made;

2. That the said George Mintz may be compelled by decree of this court specifically to perform said agreement with complainant and to pay to complainant the remainder of said purchase
20 money as in and by said agreement provided, with interest from the time said purchase money ought to have been paid on the delivery by complainant to said George Mintz of a deed executed by complainant, as in said agreement provided;

3. That in case said defendant George Mintz should, within the time limited by this court for the performance of said contract, fail and neglect upon the tender of said deed to pay the said re-
30 mainder of said purchase money in manner and form as provided in said contract, then and in that event, the said sum together with interest and costs may be and become a lien upon the said lands and premises in favor of the complainant and that the said lands and premises may be sold under the direction of this court for the satisfaction of such lien so impressed on said lands and premises; in case a deficiency should arise upon said sale, that the defendant may be ordered
40 by this court to pay such deficiency together with interest and costs to this complainant;

Bill of Complaint.

4. That in the alternative, in case the said defendant George Mintz should fail within the time limited by this court for the performance of said contract and upon the tender of said deed to pay the remainder of said purchase money, then the said agreement of sale be delivered up, cancelled, and rescinded, and that the defendant be debarred and foreclosed of all equity of redemption in said lands or of any interest whatsoever therein, as well as of all payments heretofore made by the defendant to the complainant on account of said purchase price; 10

5. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide by such decree as this court may make in the premises. 20

Hood, Lafferty & Chandler,
Solicitors of Complainant.

Wallace R. Chandler, Jr.,
Of Counsel.

Agreement mentioned in paragraph 2 of bill of complaint omitted by agreement of parties.

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Answer and Counterclaim.

(Filed January 20, 1937.)

IN CHANCERY OF NEW JERSEY.

Between FIDELITY UNION TRUST COMPANY, a New Jersey corporation, as Trustee, Complainant, *and* GEORGE MINTZ, Defendant.	**On Bill, &c.** **Answer and Counterclaim.**

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Defendant George Mintz, residing in the Town of Irvington, County of Essex and State of New Jersey, answering the bill of complaint herein, says that:

1. He denies that the complainant was seized in fee simple of the premises referred to in paragraph 1.

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2. He admits the allegations of paragraph 2.

3. He admits the allegations of paragraph 3.

4. He denies the allegations of paragraphs 4 and 5 of said bill, except that he admits that complainant tendered to defendant's attorney a bargain and sale deed, executed and acknowledged by complainant, and that complainant tendered the same to defendant's attorney, and that de-

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fendant's attorney refused to accept the same and refused to pay the purchase price.

5. He denies the allegations of paragraph 6, except that he admits that complainant was and is ready and willing to deliver its deed to defendant.

6. He admits the allegations of paragraph 7, except that he alleges that the agreement contained other provisions, covenants and stipulations, as will more fully appear upon reference to said agreement, and as more particularly hereinafter set forth.

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Further answering the complainant's bill, the defendant says:

7. On May 5, 1933, Henry Bochner and others executed a mortgage to complainant, individually and not as trustee, embracing the premises referred to in paragraph 1 of the bill, which mortgage was recorded in the Register's Office of Essex County, on May 7, 1933, in the amount of $25,000.00.

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8. Said Fidelity Union Trust Company, individually, assigned said mortgage to Charles F. Ellery by assignment recorded in Book 170 of Assignments of Mortgages for said County, page 24.

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9. Said Charles F. Ellery assigned an interest in said mortgage as follows:

a. Fidelity Union Trust Company as Trustee for Harlan W. Cortright, William L. Cortright and John H. Cortright for $3,000.00.

b. Fidelity Union Trust Company, as Trustee for Rose Frank under agreement dated December 9, 1930, for $3,500.00.

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c. New Jersey Baptist Convention (State Mission Endowment Fund) for $5,400.00.

d. Fidelity Union Trust Company, as Trustee under last will and testament of Susan L. Clapp, deceased for $500.00.

10 e. Fidelity Union Trust Company, as substituted Trustee for estate of Jabez Harrison, deceased, for $450.00.

f. Fidelity Union Trust Company, as Trustee for Joseph F. Imfeld, under a trust agreement dated May 20, 1924, for $500.00.

g. Fidelity Union Trust Company, as Trustee under last will and testament of Philip N. Jackson, deceased for $1,000.00.

20 h. Angelena Forbes Jackson and Fidelity Union Trust Company, as Trustee under last will and testament of Schuyler B. Jackson, deceased, for $500.00.

i. Fidelity Union Trust Company, as Trustee under a trust agreement made by Albert G. Scherer, dated December 28, 1922, or Silbert G. Scherer, Jr., for $5,000.00.

30 j. Fidelity Union Trust Company, as Trustee under the last will and testament of Franklin Murphy, deceased, for Susan C. Pearson, for $400.00.

k. Fidelity Union Trust Company, as Trustee under the last will and testament of William H. Murphy, deceased, for William A. Murphy, for $1,000.00.

On October 2, 1924, said Charles F. Ellery as-
40 signed to complainant said mortgage by an

assignment of mortgage bearing said date, recorded in Book 170 of Assignments of Mortgages for said County, page 23, as Trustee for all persons, interested in said mortgage as holders of shares or parts thereof or therein.

10. Complainant thereupon issued participating certificates in the form and containing the provisions of the certificates annexed, hereto, made and part hereof and marked "Exhibit 1," to each person having an interest in said mortgage as aforesaid. No authority is given the complainant to convey the premises aforesaid, by said certificate. 10

11. On or about April 5, 1935 a bill to foreclose said mortgage was filed in this court, by complainant, as Trustee for each of the persons having an interest in said mortgage as aforesaid, and joining as complainants each of the said *cestuis que trustent.* 20

12. Such proceedings were had in said foreclosure proceeding that on June 17, 1935 a final decree was entered ordering the premises aforesaid sold to raise and pay unto the complainant as Trustee the amount due on said mortgage. 30

13. On August 13, 1935 the Sheriff sold said premises to complainant as Trustee, without naming the *cestuis que trustent* for whom complainant bought, and a deed was executed by the Sheriff to "Fidelity Union Trust Company, as Trustee," also not naming the *cestuis que trustent* for whom complainant took title. There is no instrument of record naming the *cestuis que trustent* in said premises, nor is there any instru- 40

ment of record giving the terms of complainant's trust. Complainant has informed defendant that it holds said premises in trust, pursuant to the participating certificates referred to in paragraph 10 above.

10 14. On February 27, 1936, defendant and complainant entered into the agreement set forth in "Schedule A" of the bill herein, which agreement provides that if an examination of the title by the defendant before the delivery of the deed therein contemplated should disclose that the title "is not a good, marketable title" then all moneys paid under said agreement should be returned to the defendant, and that the said agreement should be delivered up and cancelled.

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15. Defendant, prior to December 7, 1936, and since said date, was ready and willing, and tendered himself ready and willing to perform his part of the contract if the complainant's *cestuis que trustent* would join in the conveyance by complainant to defendant, or if the complainant would obtain the consent of the said *cestuis que trustent* to said conveyance. Complainant refused to obtain such consent, or joinder of said *cestuis*
30 *que trustent.*

16. An examination of title by defendant prior to the delivery of the deed contemplated by said agreement disclosed the facts set forth in paragraphs 7-13 above. Complainant was therefore unable to convey a good and marketable title in fee simple, without first obtaining the consent of its *cestuis que trustent* to said conveyance. Complainant refused to obtain such consent. There-
40 upon, this defendant became entitled to rescind

said agreement, and did rescind said agreement, and informed complainant of said rescission.

17. Defendant alleges that complainant's *cestuis que trustent* are necessary parties to this action.

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

1. He repeats the allegation of paragraph 7 of his Answer.

2. He repeats the allegation of paragraph 8 of his Answer.

3. He repeats the allegation of paragraph 9 of his Answer.

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4. He repeats the allegation of paragraph 10 of his Answer.

5. He repeats the allegation of paragraph 11 of his Answer.

6. He repeats the allegation of paragraph 12 of his Answer.

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7. He repeats the allegation of paragraph 13 of his Answer.

8. He repeats the allegation of paragraph 14 of his Answer.

9. He repeats the allegation of paragraph 15 of his Answer.

10. He repeats the allegation of paragraph 16 of his Answer.

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11. Defendant expended the sum of $100.00 for an examination of the title, and deposited $1,000.00 with complainant pursuant to said agreement.

10 The defendant therefore prays:

1. That complainant may answer this counterclaim and each statement herein made.

2. That complainant may be decreed to pay to this defendant the sum of $1,100.00, plus lawful interest, which defendant expended for search fees, and for a deposit with complainant as aforesaid.

20 3. The complainant may be decreed to deliver up the said agreement between complainant and defendant for cancellation.

Abraham I. Mayer,
Solicitor for and of Counsel
with Defendant.

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Replication.

(Filed February 2, 1937.)

IN CHANCERY OF NEW JERSEY.

118/66.

Between FIDELITY UNION TRUST COMPANY, as Trustee, Complainant, *and* GEORGE MINTZ, Defendant.	On Bill, &c. Replication.

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The complainant joins issue on the answer of the defendant.

As to the counterclaim contained in said answer complainant says:

1. Paragraph 1 referring to paragraph 7 of the answer is admitted except that the complainant says the date of the mortgage of Henry Bochner and others referred to therein is May 5, 1923 instead of May 5, 1933 as therein alleged.

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2. Paragraph 2 and 3 referring to paragraphs 8 and 9 of the answer respectively are admitted.

3. Answering the allegations of paragraph 4 referring to paragraph 10 of the answer, the complainant says that complainant issued the participating certificates therein referred to, to Charles F. Ellery, who thereupon reassigned same to the persons having an interest in said mortgage.

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Replication.

Complainant denies so much of said paragraph which alleges that it has no authority to convey the premises in question.

4. Paragraph 5 referring to paragraph 11 of the answer is admitted.

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5. Paragraph 6 referring to paragraph 12 of the answer is admitted, except that complainant says the date of the final decree referred to therein is June 14, 1935 instead of June 17, 1935 as therein alleged.

6. Paragraph 7 referring to paragraph 13 of the answer is admitted except as to the allegation that the Sheriff's Deed does not refer to the beneficiaries for whom the complainant took title; complainant says that all the beneficiaries under the trust were designated in the preamble of said deed, in which they were referred to as parties complainant in the foreclosure proceedings.

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7. Paragraph 8, referring to paragraph 14 of the answer, is admitted.

8. Answering the allegations of paragraph 9 referring to paragraph 15 of the answer, complainant says that it is under no obligation nor duty to obtain the consent of the beneficiaries to said conveyance.

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9. Complainant denies the allegations of paragraph 10 referring to paragraph 16, and further says that the consent of the beneficiaries is not a necessary requirement to the conveyance of a good and marketable title in fee simple.

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Replication.

10. Answering the allegations of paragraph 11, complainant admits that it deposits $1,000. pursuant to said agreement, but has no knowledge or information sufficient to form a belief as to the sum expended for examination of title, and further says that in any case it is not liable for same or any part thereof. 10

HOOD, LAFFERTY & CAMPBELL,
Solicitors for Complainant.

Order of reference by the Chancellor to Honorable John O. Bigelow and order designating time and place of hearing are omitted by consent of parties.

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Stipulation.

(Filed May 12, 1937.)

IN CHANCERY OF NEW JERSEY.

118/66.

Between FIDELITY UNION TRUST COMPANY, as Trustee, Complainant, *and* GEORGE MINTZ, Defendant.	On Bill, &c. Stipulation.

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It is stipulated and agreed by and between the complainant and the defendant in this cause as follows: 40

New Jersey State Library

Stipulation.

WHEREAS, the defendant filed a counterclaim in the above entitled cause for the return of the deposit paid by him and also for search fees, and complainant in its replication, among other things, denied that it was under any obligation as to payment of search fees;

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IT IS, THEREUPON, agreed that the reasonable cost of defendant's search fees is $50. and that if it should be determined that complainant has not a good and marketable title, and it should be decreed that the bill of complaint be dismissed, then the defendant, in addition to the return of his deposit, shall be entitled to receive said sum of $50. from the complainant on account of search fees as aforesaid.

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IT IS FURTHER STIPULATED AND AGREED by and between the complainant and the defendant that complainant will pay its costs and counsel fee of its counsel and defendant will pay his costs and counsel fee of his counsel whatever may be the determination of the court on the facts submitted in this cause, and that in no case shall either party be entitled to receive either costs or counsel fees from the other party.

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HOOD, LAFFERTY & CAMPBELL,
Solicitors of the Complainant.

ABRAHAM I. MAYER,
Solicitor of the Defendant.

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Amended Stipulation.

(Filed February 18, 1938.)

IN CHANCERY OF NEW JERSEY.

118/66.

Between FIDELITY UNION TRUST COMPANY, AS TRUSTEE, Complainant, *and* GEORGE MINTZ, Defendant.	**On Bill, etc. Amended Stipulation.**

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It is hereby stipulated and agreed between the complainant and the defendant in this cause as follows:

I. Complainant agreed to sell and defendant agreed to purchase the lands described in the bill of complaint. Complainant tendered a deed from "Fidelity Union Trust Company, as Trustee" to "George Mintz" signed "Fidelity Union Trust Company" by one of its vice presidents. Defendant declined to accept the deed upon the sole alleged ground that the deed tendered would not convey a marketable title. Therefore, the only questions involved in this suit are: Would the deed tendered convey a marketable title to the lands therein described and are the *cestuis que trustent* necessary parties to this suit? Or, in other words, can one who, upon the foreclosure of a mortgage held by him as trustee for others, pur-

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chased the mortgaged property at the sheriff's sale thereof, thereafter effectively convey it to a third person without either the joining of the *cestuis que trustent* or an order of the Court of Chancery?

10 II. The facts concerning the trust in this case are as follows:

On or about October 2, 1924, the Fidelity Union Trust Company, acting in several fiduciary capacities, had on hand for investment small sums of money; and on October 2, 1924, in order to invest those funds, the Fidelity Union Trust Company, being then the owner in its individual capacity of a mortgage given to it by Henry Bochner and wife
20 in the sum of $25,000., and upon which there was then due $21,500., assigned said mortgage to Charles F. Ellery, who thereupon, on the same day, assigned said mortgage to Fidelity Union Trust Company, as Trustee. Upon the assignment by said Ellery, the Fidelity Union Trust Company, as Trustee, on the same day, issued and registered in the name of Ellery participation certificates in said mortgage in amounts following, viz: $3,000., $3,500., $5,400., $1,000., $400., $500.,
30 $700., $500., $1,000., $500. and $5,000., making a total of $21,500.

Upon the receipt of said participation certificates, Ellery, on the same day, transferred and caused to be registered said certificates in manner following:

Fidelity Union Trust Company, as Trustee for Harlan W. Cortright, William L. Cortright and John H. Cortright .... $3,000.

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Amended Stipulation.

Rose W. Frank .... 3,500.
(Subsequently transferred to and registered in name of Fidelity Union Trust Company, Trustee for Rose W. Frank under agreement dated December 9, 1930)

Fidelity Union Trust Company, as Agent for New Jersey Baptist Convention (State Mission Endowment Fund) .... 5,400.

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Estate Charles F. Moelich .... 1,000.
(Subsequently transferred to and registered in name of Fidelity Union Trust Company, as trustee under last will and testament of William H. Murphy, deceased, William A. Murphy Fund)

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Estate John Cahill .... 400.
(Subsequently transferred to and registered in name of Fidelity Union Trust Company, as Trustee under the last will and testament of Franklin Murphy, deceased, for Susan G. Pearson)

Fidelity Union Trust Company, as Trustee under the last will and testament of Susan L. Clapp, deceased... 500.

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Fidelity Union Trust Company, as Substituted Trustee of the Estate of Jabez Harrison, deceased ....$ 700.

Fidelity Union Trust Company, as Trustee for Joseph F. Imfeld under trust agreement dated May 20, 1924 (Alice M. Rutman Fund) .... 500.

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Fidelity Union Trust Company, as Trustee under the last will and testament of Philip N. Jackson, deceased 1,000.

Angela Forbes Jackson and Fidelity Union Trust Company, as Trustees under the last will and testiment of Schuyler B. Jackson, deceased.... 500.

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Thomas Danquard, Atty. .... 5,000.
(Subsequently transferred to and registered in name of Fidelity Union Trust Company, as Trustee under trust agreement made by Albert G. Scherer, dated December 28, 1922, for Albert G. Scherer, Jr.)

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Upon the transfer of said certificates by said Ellery and the registration thereof, the Fidelity Union Trust Company, in its individual capacity, was paid from the respective trusts the face value of said certificates.

The sum of $250. was paid on account of said mortgage and that sum was applied on account of the $700. certificate issued to Fidelity Union Trust Company, as Substituted Trustee of the Estate of Jabez Harrison, deceased,—the $700. certificate having been cancelled and a new certificate issued therefor in the sum of $450.

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III. Each such certificate recites that it: "is given upon the following terms which the holder thereof accepts as constituting the contract between such holder and the Company, to wit:

"1. The Company may issue participations in such amounts as it may desire and upon the surrender and cancellation of exist-

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ing participations may issue in lieu thereof new participations, either for the original sums or otherwise, but in no event shall the total participations issued or to be issued aggregate more than the amount of principal moneys remaining unpaid on said bond and mortgage. 10

"2. The Company hereby is appointed irrevocably the agent and attorney of all owners and holders of said certificates for the purpose: (a) of collecting the interest and principal of said bond and mortgage, and of satisfying and discharging the same in its own name on receiving full payment; (b) of deciding when and how any provision of said bond and mortgage shall be enforced, and of 20 enforcing it accordingly; (c) of agreeing to any extension of the time of payment of said bond and mortgage, without notice to the holder hereof.

"3. If the Company decides that any action or proceeding shall be begun on said bond and mortgage, notice of its intention shall be mailed to the last registered holder of this certificate and this certificate shall be transferred and delivered at once to the Com- 30 pany, which will issue a trust receipt in return therefor, entitling the holder to his proportion of the proceeds of said mortgage when collected.

"4. Whenever the principal of said bond and mortgage shall be collected in full, the Company will give notice to the last registered holder of this Certificate, mailed to his registered address, of the receipt thereof and will 40

pay over the same to the registered holders of all of said certificates ratably on presentation and surrender of such certificates at the principal office of the Company in Newark, New Jersey.

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"5. The Company reserves the right to require Certificate holders to present certificates for the purpose of endorsing thereon the payment of interest.

"6. The Company may itself be the holder and owner or pledgee of one or more of the said certificates, in which event nothing herein contained and nothing in such act shall be construed to operate as a merger of the interest represented by said certificate or certificates and the mortgagee interest in said mortgaged premises held by said Company as trustee for all certificates held thereunder.

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"7. The Company shall not be liable for the repayment or return of said amount representd by this certificate or any portion thereof, or for the payment of any interest thereon, except out of moneys collected by it in said bond and mortgage or under the said title guaranty; and it shall be entitled to reimbursement, *pro rata,* from all the certificate holders of moneys which it has expended in good faith in the execution of the trust and the protection of the trust property which said disbursements the Company may deduct, *pro rata,* out of any moneys coming to its hands in the premises.

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"8. In giving any notice under this certificate, it shall be sufficient for the Company to mail such notice to the last registered holder

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hereof, at his registered address; and every holder hereof shall be bound by notice so given.

"9. The Company, exclusively, shall have the right to institute actions and proceedings both at law or in equity for the enforcement of any covenant for the protection of the rights of the holders of said Participation Certificates, and no holder of a Participation Certificate shall have the right to collect interest or principal on said mortgage or give receipt or satisfaction therefor; nor shall any holder institute any suit, action or proceeding unless and until the company shall have been requested, in writing, by the holders of a majority in amount of the certificate secured by said mortgage and shall have refused and failed to comply with such request within thirty days after the same shall have been made: nor shall any request as aforesaid be binding upon the Company until, if required by the Company, the certificates of the holder or holders making such request are submitted to it for inspection and title thereto satisfactory established, if disputed."

IV. The mortgage was foreclosed and the certificate holders, under the power reserved in paragraph 2 of the certificates, were joined with Fidelity Union Trust Company, as Trustee, as parties complainant. The decree was for the sum of $23,410.42.

V. Upon the foreclosure sale of the mortgage property, the Fidelity Union Trust Company purchased it in its name, as trustee, for the sum of $100; and the sheriff executed and delivered

a deed therefor to Fidelity Union Trust Company, as Trustee.

VI. Exhibits now in the possession of the Court are, of course, to be considered as a part of or in addition to the above stipulations.

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Dated: February 1, 1938.

Hood, Lafferty & Campbell,
Solicitors of Complainant.

Abraham I. Mayer,
Solicitor of Defendant.

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Exhibits mentioned in amended stipulation were:

1. Bill of complaint in the cause entitled, "In Chancery of New Jersey, Between Fidelity Union Trust Company, as Trustee, *et al.*, complainants, and Superb Holding Co., *et al.*, defendants" (Docket 108-268).

2. Final decree in above entitled cause.

3. Deed from Louis E. Batchelor, Sheriff, to Fidelity Union Trust Company, Trustee.

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4. Contract of purchase and sale between Fidelity Union Trust Company, Trustee, and George Mintz, mentioned and described in paragraph 2 of the bill of complaint.

5. Tendered deed from Fidelity Union Trust Company as Trustee to George Mintz.

6. Form of trust, the terms of which are set forth in amended stipulation.

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All of the above exhibits are omitted by consent of the parties.

Conclusions of Vice-Chancellor.

(Filed April 8, 1938.)

(Not to be printed in any report.)

IN CHANCERY OF NEW JERSEY.

Between

FIDELITY UNION TRUST COMPANY,
Complainant,

and

GEORGE MINTZ,
Defendant.

On Bill, &c.
118/66.

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April 8, 1938.

MESSRS. HOOD, LAFFERTY & CAMPBELL, for Complainant.

MR. ABRAHAM I. MAYER, for Defendant.

MEMORANDUM.

BIGELOW, V.-C.

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In this suit for specific performance, the defendant, the purchaser named in the contract of sale, objects that the title tendered him is not marketable.

Complainant bought the property at sheriff's sale on foreclosure of a mortgage which it held as trustee for the equal benefit of holders of certificates of participation in the mortgage. The sheriff's deed runs to complainant "as trustee" without further description, but the parties agree

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that it bought and holds under the trust declared in the participation certificates collectively, or under a trust resulting for the certificate holders.

Defendant takes the position that the trust is a dry or passive one which has been executed by the statute of uses, so that legal title is now
10 vested in the beneficiaries. Or else that the terms of the trust expressed in the certificates give the trustee no power of sale and hence that it has none.

The certificates do not expressly empower the trustee to buy at foreclosure or to sell the land if it should buy. They do, however, contain the following provisions which may bear on the case:

"2. The Company (complainant) hereby is
20 appointed irrevocably the agent and attorney of all owners and holders of said certificates for the purpose: (a) of collecting the interest and principal of said bond and mortgage, and of satisfying and discharging the same in its own name on receiving full payment; (b) of deciding when and how any provision of said bond and mortgage shall be enforced, and of enforcing it accordingly; * * *

"3. If the Company decides that any action
30 or proceeding shall be begun on said bond and mortgage, notice of its intention shall be mailed to the last registered holder of this certificate and this certificate shall be transferred and delivered at once to the Company, which will issue a trust receipt in return therefor, entitling the holder to his proportion of the proceeds of said mortgage when collected."

I here interpolate that the record is silent whether complainant gave such notice, whether
40 the certificates were surrendered to it and trust receipts issued.

"4. Whenever the principal of said bond and mortgage shall be collected in full, the Company will give notice to the last registered holder of this Certificate, mailed to his registered address, of the receipt thereof and will pay over the same to the registered holders of all of said certificates ratably on presentation and surrender of such certificates at the principal office of the Company in Newark, New Jersey." 10

"7. * * * And it (complainant) shall be entitled to reimbursement, *pro rata,* from all the certificate holders of moneys which it has expended in good faith in the execution of the trust and the protection of the trust property which said disbursements the Company may deduct, *pro rata,* out of any moneys coming to its hands in the premises." 20

"9. The Company, exclusively, shall have the right to institute actions and proceedings both at law or in equity for the enforcement of any covenant for the protection of the rights of the holders of said Participation Certificates, and no holder of a Participation Certificate shall have the right to collect interest or principal on said mortgage or give receipt or satisfaction therefor; nor shall any such holder institute any suit, action 30 or proceeding unless and until the Company shall have been requested, in writing, by the holders of a majority in amount of the certificates secured by said mortgage and shall have refused and failed," etc.

It will be noticed (par. 4) that when the principal of the bond and mortgage is paid in full, the trust comes to an end. Complainant is not empowered to reinvest in other securities but must pay the moneys to the certificate holders. 40

It will also be noted that complainant is given the right to foreclose (paragraph 2(b)).

Ordinarily a trustee—for instance, a testamentary trustee—who is obliged to foreclose a mortgage, may and should purchase for the benefit of the estate, if that course is necessary in
10 order to avoid loss. *Holcomb* v. *Holcomb's Executors,* 11 N. J. Eq. 281; *Banta* v. *Board of Trustees,* 39 N. J. Eq. 123; *Kidder* v. *Houston,* (N. J.) 47 A. 337; *Restatement of the Law: Trusts,* Sec. 231(h). Whether a trustee under a mortgage securing a bond issue, may bid at foreclosure sale in behalf of the bondholders, is a subject of conflicting decisions. *First National Bank* v. *Neil,* (Kan.) 20 Pac. (2d) 528; 88 A. L. R. 1252; *Cosmopolitan Hotel* v. *National Bank,* (Col.) 40
20 Pac. (2d) 245; 96 A. L. R. 1446. The denial of such power in the trustee is based on the view that, "Each bondholder has the absolute right to determine for himself, in case of default, whether he shall take his loss and quit, or continue to gamble; if the property is sold at public sale, he has a right to take his proportion of the best bid that can be secured in cash, and cannot be compelled to become an owner of an undivided interest in the property." *Werner* v. *Equitable Trust Co.,*
30 35 F. (2d) 513.

The position of complainant as trustee for participation certificate holders is much closer to that of a trustee for bondholders than to that of a testamentary or other trustee who is under a duty to reinvest. In this suit for specific performance, I cannot assume, as a basis for a decree for complainant, that it was authorized by the trust agreement to bid in the land.

The question of complainant's power to buy in
40 at foreclosure sale is not directly presented—all

the certificate holders joined as complainants in the foreclosure suit. But if the power is not expressed or implied in the trust agreement, it would seem logically to follow that complainant now holds not under the express trust, but under a resulting trust. And a fiduciary of a resulting trust cannot give good title except to the beneficiaries. 65 *C. J.* 740. 10

Such a theory was advanced by the appellant in *Hoffman* v. *First Bond etc. Co.,* (Conn.) 164 A. 656, but he conceded that, owing to the large number of note holders, conveyance to or partition among them would be impracticable and he asked the court to substitute a public sale by a master. The court held, however, that the trustee had a right to buy at the foreclosure under the indenture. A similar case and decision was *Sturges* v. *Knapp,* 31 Vt. 1. I have found no other cases dealing with the power of sale of a trustee for bond holders, who has bought at foreclosure when not authorized by the trust mortgage to do so. 20

Complainant relies, in order to establish its power of sale, first on *Banta* v. *Board of Trustees, supra,* which related to executors and trustees of a will, and is not convincing in the present case. Secondly, complainant pins to the statute, *R. S.* 3:20-3, which provides in case a trustee purchases at foreclosure, the lands "shall be assets of the trust estate in his hands, and may be sold and conveyed by him without order of a court, and he shall receive, be accountable for and pay over the proceeds of such sale the same as he would have been required to do under the terms of his trust with the proceeds of said mortgage or with the trust funds used for the purposes aforesaid." 30

This statute does not apply to all trusts. For instance, one who obtained a mortgage by fraud, 40

foreclosed and holds the land as a constructive trustee, is not thereby empowered to sell. Or a trustee of a special trust whereby he is required to convey to the beneficiary land taken on foreclosure. Purposely I refrain from attempting to define the cases which the statute effects. I think
10 it does not govern the instant case.

"I feel constrained to deny the prayer of the bill. In doing so, I intend that it shall be distinctly understood that I do not affirm invalidity of title. I simply recognize that the title is burdened with difficult and unsettled questions, which arise above mere speculation, theory and possibility, and so stand in the way of a free alienation of the land, that it should not be forced on the defendant. It is to be remembered the judgment in this case is in
20 *personam* and not in *rem,* and that the decree I may make for the complainant will not settle the questions suggested as to those who are not parties to this suit." *Paulmier* v. *Howland,* 49 N. J. Eq. 364.

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Final Decree.

(Filed June 2, 1938.)

IN CHANCERY OF NEW JERSEY.

118/66.

Between FIDELITY UNION TRUST COMPANY, as Trustee, Complainant, *and* GEORGE MINTZ, Defendant.	On Bill, etc. Final Decree.

This matter coming on to be heard in the presence of Hood, Lafferty & Compbell, Solicitors of the Complainant, and Abraham I. Mayer, Solicitor of the Defendant, and it appearing that the complainant agreed to sell to the defendant by an agreement dated February 27, 1936, a certain tract of land located in the City of Newark, County of Essex and State of New Jersey, and more particularly described in the complainant's bill of complaint, and brought this action as Vendor to compel the defendant, as Vendee, to specifically perform said agreement; and it further appearing that the defendant contended that the deed tendered by complainant as Trustee was insufficient to convey a good marketable title to the premises above described, and counterclaimed for the deposit heretofore paid by the defendant upon said contract, and the sum expended for examination of title; and this matter having been sub-

mitted to the Court upon an agreed stipulation as to the facts with exhibits annexed thereto, and the Court having examined the same and having heard and considered the arguments of counsel; and being of the opinion that the complainant is not entitled upon tender of deed signed by it as
10 Trustee to specific performance of said agreement, and that the defendant is entitled to receive from the complainant upon his counterclaim the deposit paid by him, together with the cost of searching title which the parties have stipulated should be in the amount of $50.00;

It is, thereupon, on this 2nd day of June, 1938, on motion of Abraham I. Mayer, Esquire, Solicitor of the defendant, by the Chancellor ordered,
20 adjudged and decreed that the complainant's bill of complaint be and the same is hereby dismissed; and

It is further ordered, adjudged and decreed that the complainant pay the defendant upon his counterclaim the sum of $1,000.00 hitherto paid by the defendant to the complainant as a deposit on account of said contract, and the further sum of $50.00 on account of the defendant's cost of searching title; and
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It is further ordered that, pursuant to stipulation filed in this cause, neither party shall be entitled to receive costs from the other party.

Respectfully advised

John O. Bigelow, V.-C. | Luther A. Campbell, C.

Consented to as to form.
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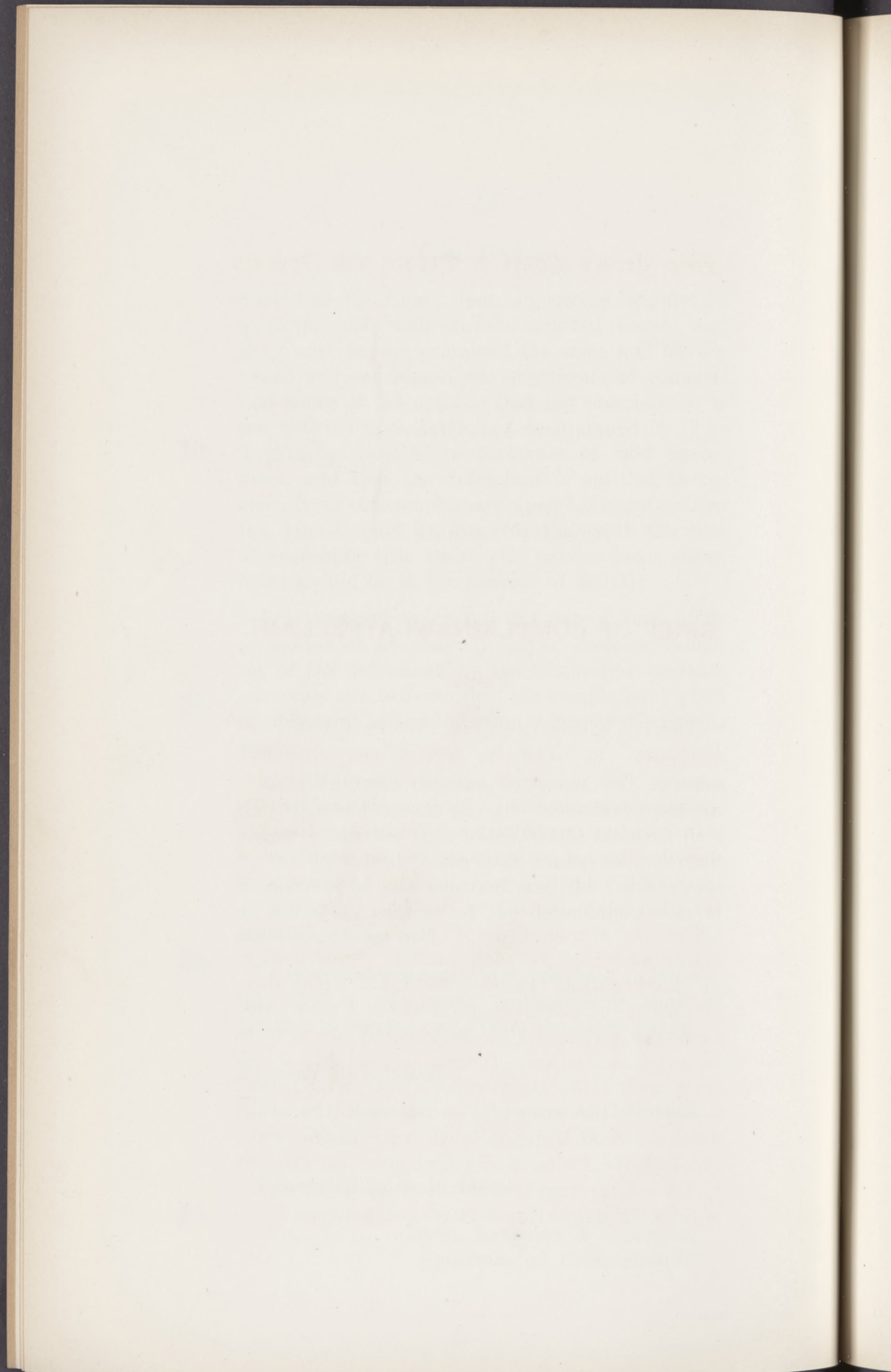
Hood, Lafferty & Campbell,
Solicitors of Complainant.



New Jersey Court of Errors and Appeals

Between FIDELITY UNION TRUST COMPANY, as Trustee, Complainant-Appellant, *and* GEORGE MINTZ, Defendant-Appellee.	On Appeal from Court of Chancery.

BRIEF OF COMPLAINANT-APPELLANT.

Facts.

This is a suit instituted by Fidelity Union Trust Company, as Trustee, complainant-appellant, against George Mintz, defendant-appellee, for specific performance of a written contract entered into between the parties wherein the defendant-appellee agreed to purchase the lands described in the bill. The bill was dismissed by decree of the Chancellor advised by Bigelow, *V.-C.*

Fidelity Union Trust Company, as Trustee, held a mortgage for the benefit of eleven holders of participation interests therein. Upon foreclosure of the mortgage, the Fidelity Union Trust Company purchased the mortgaged property in its name as Trustee. It then entered into a contract with said Mintz wherein it agreed to sell a part of the property so purchased by it as Trustee. Said Mintz declined to accept deed from the Fidelity Union Trust Company, as Trustee, on the sole ground that the deed tendered, signed only by "Fidelity Union Trust Company, as Trus-

tee", would not convey a marketable title. The facts are stipulated in detail on pages 21 to 28 of the State of Case.

Questions Involved.

1. Would the tendered deed from the Fidelity Union Trust Company, as Trustee, to George Mintz convey a marketable title to the premises therein described?

2. Should the Court of Chancery, under the facts of this case, have decreed specific performance of the contract?

POINT ONE.

The deed tendered by the Fidelity Union Trust Company, as Trustee, to George Mintz, would convey marketable title.

It is clear that when lands are conveyed or devised to a trustee, he has no power of sale unless such power is expressly given by the instrument creating the trust or is necessarily implied from the duties imposed upon the trustee thereunder. But when lands are acquired by a trustee upon the foreclosure of a mortgage held by him, he has the power of sale both at common law and under the statutes of this state.

We submit that the Fidelity Union Trust Company, as Trustee, could and can convey marketable title,

First: because of the express provisions of the mortgage certificates;

Second: because of Sections 3:20-3 and 3:20-4 of the Revised Statutes of 1937; and

Third: because of the common law rule that when lands are acquired by a trustee upon foreclosure of a mortgage held by him, the lands may be sold and conveyed by him without a court order.

A. Paragraph 2 of the participation certificates (S. C., p. 25) provides that:

> "The Company hereby is appointed irrevocably the agent and attorney of all owners and holders of said certificates for the purpose: (a) of collecting the interest and principal of said bond and mortgage, and of satisfying and discharging the same in its own name on receiving full payment; (b) of deciding when and how any provision of said bond and mortgage shall be enforced, and of enforcing it accordingly; (c) of agreeing to any extension of the time of payment of said bond and mortgage, without notice to the holder hereof."

It needs no citation to say that it is the common and prudent experience of mortgagees, when a bond and mortgage are in default, to foreclose the mortgage, buy in the property, and hold the same until a purchaser can be obtained. The absence of competitive bidding at sheriffs' sales has made such procedure a commonplace. Does it come within the express authority granted above?

While there is no particular authority in the certificates to purchase the mortgaged property for the benefit of the holders of the certificates, yet, we think that the above authority carries with it the necessary implication that the trustee must protect the interests of the certificate holders and purchase the property if no bid is received at the sheriff's sale. Could it be said that the interest and principal of the bond and mortgage have been collected and satisfied if the certificate holders have not yet realized, in a practical way, upon

the security given for the bond? When the investment was made in the bond and mortgage, a loan was given secured by a mortgage on real estate. Prudent judgment dictated the reduction of the lien to possession and title. But the loan continues unpaid and the security unrealized. It seems clear, therefore, that the trustee has not completed its task of collecting and satisfying the obligation. As the Vice-Chancellor recognized in his opinion, paragraph 4 of the certificates provides:

> "that when the principal of the bond and mortgage is paid in full, the trust comes to an end" (S. C., p. 31).

That will not occur until the mortgagee has sold the property.

B. Even apart from the express language of the certificates, statutory authority is given a fiduciary to sell lands acquired upon foreclosure of a mortgage held by him. Sections 3:20-3 and 3:20-4 of the Revised Statutes of 1937 provide:

> *3:20-3* "When, at a sale upon foreclosure of a mortgage forming part of the assets of the estate in his hands, a fiduciary shall purchase the real estate affected or when, to avoid foreclosure of such a mortgage asset, the fiduciary shall acquire title by deed from the owner of the real estate affected, or when, to protect such a mortgage asset, the fiduciary shall become a purchaser under any sale made upon foreclosure of any other mortgage, tax sale or other lien on the real estate, or at a sale of the real estate under execution upon any judgment or decree, the real estate so purchased or acquired by the fiduciary shall be an asset of the estate in his hands and may be sold and conveyed by him without court order, and any sale or conveyance made by any such fiduciary of real estate so acquired shall be valid and effectual in all

> respects to sell or convey such real estate as if made under order of the court."
>
> The title acquired by two or more cofiduciaries under authority of this section shall vest in such cofiduciaries as joint tenants, and upon the death, discharge or removal of any cofiduciary or fiduciary the surviving or remaining fiduciary or cofiduciaries or duly appointed substituted fiduciary may make the sale and conveyance authorized by this section with the same effect as if all had been living or acting and had joined therein."
>
> *3:20-4* "The proceeds of a sale and conveyance of real estate pursuant to section 3:20-3 of this title shall be received, accounted for and paid over by the fiduciary in the same manner as he would have been required to do with the proceeds of the mortgage or the trust funds used by him to acquire the real estate."

This statute, it seems to us, gives express authority for the trustee in the case *sub judice* to purchase the mortgaged premises at sheriff's sale and resell without order of the court. If it authorizes a fiduciary to sell and convey lands acquired by him upon foreclosure of a mortgage held by him in a fiduciary capacity, it carries with it, of necessity, the power to purchase at sheriff's sale.

Why, then, does not this statute dispose of our case? Vice-Chancellor Bigelow, in the court below, held:

> "This statute does not apply to all trusts. For instance, one who obtained a mortgage by fraud, foreclosed and holds the land as a constructive trustee, is not thereby empowered to sell. Or a trustee of a special trust whereby he is required to convey to the beneficiary land taken on foreclosure. Purposely I refrain from attempting to define the cases which the statute effects. I think it does not govern the instant case" (S. C., pp. 33-4).

Why does it not govern the instant case? The Vice-Chancellor does not give a clear answer to this question but apparently the answer, as well as the crux of his decision, may be found in the following quotation from an earlier paragraph:

> "* * * complainant now holds not under the express trust, but under a resulting trust. And a fiduciary of a resulting trust cannot give good title except to the beneficiaries" (S. C., p. 33).

It is this conclusion which prevents the Vice-Chancellor from holding that the trustee can convey marketable title by virtue of the express provisions of the mortgage certificates. It is this conclusion which distinguishes the case, in the Vice-Chancellor's opinion, from the many cases affirming the common law rule that when lands are acquired by a trustee upon foreclosure of a mortgage held by him, he may sell without court order. Similarly, in the opinion of the Vice-Chancellor, it excludes appellant from the benefit of the aforesaid statute applicable to "fiduciaries." This conclusion is the turning point of our case and will be disposed of at once.

Our dispute is not with the Vice-Chancellor's conclusion that a trustee under a resulting trust cannot give good title, but with his decision that appellant holds not under an express trust, but under a resulting trust. If he is correct, then appellant's trust terminated upon foreclosure of the mortgage, and title to the property vested at the sheriff's sale in the certificate holders. Appellant's powers and obligations ceased at that time, the "trustee" holding merely the bare record title with nothing more.

> "A resulting trust is always a passive or dry trust, a mere holding of the title for the benefit of another, no duties or responsibili-

> ties being imposed on the trustee as to the management, control, or disposition of the property except, perhaps, to reconvey to the *cestui que* trust at his discretion." *65 C. J. 363.*

If our situation is a resulting trust, then the certificate holders are left high and dry. The trustee's obligations ceased upon receiving the sheriff's deed. It has no power or duty to rent and manage the foreclosed premises, to see that taxes are paid, to keep the premises in repair, or to negotiate for a purchaser. The trustee had the obligation to use its judgment prudently in determining to foreclose the mortgage. Apparently, thereafter it walked out leaving the certificate holders holding the bag. A "resulting trust," like a "constructive trust," is in fact, no trust at all. Technically, the term is inapplicable to our situation but refers to the case where title to a trust *res* reverts back to the settlor when the original conveyance is incomplete or when the active trust has terminated. Similarly, a "constructive trust" is a legal fiction using the phraseology of trust law to effect equitable results.

The determination of whether appellant is a trustee under an express trust or the mere holder of legal title, depends upon whether the purchase at sheriff's sale be viewed as a step in the liquidation of an earlier investment, or as a reinvestment of trust funds. If it is the former, then the express trust continues until the investors have realized in cash upon their security and the loan has been repaid to the fullest extent. If it is the latter, then we agree with the Vice-Chancellor that appellant had not the power to purchase at sheriff's sale and resell without court order.

In view of the mortgage situation of the past several years, it seems clear that the mortgagee's

purchase at sheriff's sale was not done with a view to reinvestment, but with the intention of bringing investors out as nearly whole as possible. Real estate management was forced upon trustees of mortgage investments and not welcomed with open arms. In view of these circumstances, we submit, the Vice-Chancellor's conclusion that the express trust has terminated is improper. The common law rule that a trustee, without power to buy or sell real estate, may nevertheless buy at sheriff's sale and resell without court order, recognizes that this is really a process of liquidation of the mortgage investment. The aforementioned statute, like similar statutes applicable to mortgage investments of banks and insurance companies, enacts the rule into statute law. The express trust continues until the bond and mortgage have been paid to the fullest.

Furthermore, while the Vice-Chancellor found implied exceptions to the broad language of Section 3:20-3 of the Revised Statutes, the word "fiduciary" as used is not qualified by any limitation and is a word of general application. It includes, we believe, the present appellant.

C. The common law rule that a trustee who is obliged to foreclose a mortgage, may and should purchase for the benefit of the trust estate, if that course is necessary in order to protect the beneficiaries, was recognized by the Vice-Chancellor in the opinion below (S. C., p. 32). The rule is stated in Section 231(h) of the *Restatement of the Law of Trusts,* as follows:

> "If a trustee properly holds in trust a mortgage upon real property and the mortgage is foreclosed, the trustee can properly purchase the property on foreclosure if it is prudent to do so in order to avoid a loss al-

though the trustee is not authorized to invest in the purchase of real property. He is under a duty, however, to sell the property when he has a reasonable opportunity to do so."

In New Jersey the rule was followed in *Holcomb* v. *Executors of Holcomb,* 11 N. J. Eq. 281, *Banta* v. *Board of Trustees,* 39 N. J. Eq. 123, *Lippincott* v. *Bechtold,* 54 N. J. Eq. 407 and *Perrine, Administratrix* v. *Vreeland, Executor,* 33 N. J. Eq. 102, affirmed in 33 N. J. Eq. 596, before the enactment of the statute quoted above in 1900.

Holcomb v. *Executors of Holcomb, supra,* came before Chancellor Williamson on exceptions to a master's report stating the executor's account. The court affirmed the power of executors and trustees to purchase at sheriff's sale arising out of foreclosure of a mortgage held by them, saying:

"The executors filed their bill, and obtained a decree on the Scudder bond and mortgage. On the day of sale, finding that the property would not bring the amount of the decree, and considering it for the interest of the estate that the property should be purchased in by them, the three executors, on the 22d of February, 1853, entered into a writing under their hands and seals, by which it was agreed that the said John Coryell should purchase the mortgage premises at the sheriff's sale, and take a deed for the same, and hold the land for the benefit of the estate, and should sell it in lots, at such times and upon such terms as a majority of said executors should agree, and that the proceeds thereof should be applied, after paying all expenses, to the benefit of the estate of the said John Holcomb. Under and in accordance with this agreement, the premises were struck off to John Coryell, and the sheriff made him a deed for the same.

"This arrangement was not only not objectionable, but was proper in itself. The executors might perhaps have become the

> purchasers at the sale. Some such arrangement was necessary, or else the alternative must be submitted to of a sacrifice of the property. It was a reasonable arrangement, and such as judicious and prudent men would make in reference to their own property. It is right, therefore, that this court, which may mitigate the rigor of strict law, should regard the transaction with complacency. If the executors had pursued the tenor of that agreement, and carried it out in its true spirit, they would have avoided all just censure upon their conduct. Their further disposition of the property was not only in violation of the agreement, but with very much the appearance of bad faith."

The case of *Banta, et als., Executors,* v. *The Board of Trustees of School District No. 3, etc.,* 39 N. J. Eq. 123 (decided in 1884), was an action for specific performance brought by two executors. It appears that Banta, one of the executors under the will of Maria Banta, deceased, had, upon foreclosure of a mortgage held by the estate, purchased the mortgaged property in his name for the benefit of the estate. Subsequently, the executors entered into a contract with the Board of Trustees for the sale of the property. The court, in decreeing specific performance, said:

> "The defence is, that the complainants have no legal title to the land, and that if they have such title, it is bad in equity, because, as the defendants allege, they, being trustees, purchased the trust property at their own sale thereof."

Other objections made to the title were not sustained. The court then said:

> "The executors were at liberty to purchase at the sale, and, if it was necessary to do so, to protect the estate from loss by sacrifice of the property, it was their duty to do it.

> *Perry on Trusts, Sec. 458.* When Mr. Banta thus bought in the property he held it in trust, in place of the mortgage security from foreclosure of which it was derived, and it is to be treated accordingly. It was merely taking the thing pledged for payment of the debt into his hands instead of the debt, through the medium of a judicial sale under foreclosure proceedings. The legal title to the land was by the sale vested in him, and it was conveyed to him by the sheriff accordingly. He held it and still holds it in trust for the estate. He has power to sell and convey it. That power is not derived from the authority to sell given by the will. It is incident to the ownership of the land. To obviate all liability to question, on the ground of the existence of the trust on which he, in fact, holds the property, his co-executor and he, as executors, join in a deed to the defendants. And, in order to prevent all question as to her right of dower in the property, his wife joins with him in a deed to them."

Lippincott v. *Bechtold* (decided in 1896), 54 N. J. Eq. 407, came up on exceptions to the executors' accounts. Mr. Justice Dixon, speaking for the Court of Errors and Appeals, said:

> "The testator, in his lifetime, had owned a large number of vacant lots, and had conveyed them to various persons, taking in return bonds and mortgages for the entire consideration. After his death, these persons reconveyed the lots to the executors, in satisfaction of the bonds and mortgages. Afterwards, some of these lots were transferred by the executors through one Hartley to the testator's widow. The testator's will gave to his widow his homestead during her life, 'besides her right of dower in all of my personal and real estate.' *The lots above mentioned represented the testator's personal estate*, and do not appear to have exceeded the value of the widow's 'dower' therein. We think,

> therefore, that the complainants, who are only residuary legatees and devisees, were not wronged by the transfer." (Italics ours.)

In *Perrine, Administratrix, etc.* v. *Vreeland, Executor,* (decided in 1880), 33 N. J. Eq. 102, affirmed by the Court of Errors and Appeals in 33 N. J. Eq. 596, it appears that the executor invested funds of the estate on mortgage security and was obliged to foreclose the mortgage. The administratrix of the son, who was at the time of his death, according to a construction of the will, entitled to the estate, made demand upon the executor for the amount of the moneys invested on the mortgage. The Chancellor said:

> "When, in 1873, he invested it on the lots in Bayonne, he appears to have been guilty of no negligence. Though the lots were vacant, yet they were in a growing city, and were worth at the time at least $500. apiece. There were nineteen of them, and they were then worth $9,500.—more than three times the amount of the fund. The want of a market for the property is due to the great revulsion which has taken place since the investment was made. At sheriff's sale, under the foreclosure proceedings, the property was bid up to nearly $3,000. by another person, and the executor, for the protection of the fund, deemed it prudent to buy it in. His action in that matter does not appear to have been such as to render him liable to the charge of breach of trust. He is bound to account for the fund, but is not bound to pay it over in cash. He may pay it over in the property itself. He will be ordered to pay it over in the property, which he will be required to convey to the complainant, as administratrix, on receiving payment from her of what may be due to him for costs and fees paid in the foreclosure proceedings and on the sheriff's sale, and taxes, if any, paid by him, and his commissions, and his costs of this suit. Or, the

> trust may be closed by the sale of the property under the direction of this court, and the proceeds, after deducting the beforementioned payments to the trustee, paid over to the complainant."

And see also the opinion of Vice-Chancellor Emery in *Kidder* v. *Houston*, 47 Atl. 336, 342 (1900). Not officially reported.

A very interesting case is that of *Lockman, Executor* v. *Reilly*, 95 N. Y. 64, which was an action for specific performance. It appears that title to the property had been acquired by the executrix of and trustee under the will of William H. Raynor, deceased, on foreclosure of a second mortgage held by the testator. The first mortgage was thereafter foreclosed and objection was made to the title on the grounds that though the executrix and trustee and the children of the testator were made parties defendant, his grandchildren were not. The court, in disposing of the objection, held that since title to the property was acquired by the executrix of and trustee under the will of Raynor on foreclosure of a mortgage held by him, there was no equitable conversion—the property remained personal property in her hands —and therefore she was the only necessary party defendant to the foreclosure of the first mortgage. The court then said:

> "That land bought in by executors on a foreclosure of a mortgage belonging to the estate is to be treated as personal property, which the executors may sell, and for which they are accountable as such, has been frequently decided, and it is immaterial whether the deed is taken in the names of the executors as such or in their individual names. (Citing cases.) In all these cases land thus purchased by an executor or administrator is regarded as a substitute for the mortgage

> foreclosed and takes its place for all purposes as between the executor or administrator and the parties interested in the estate. It is not treated as land belonging to the testator. His heirs or devisees take no direct interest in it and cannot dispute the title of a purchaser from the executor, though no power of sale be contained in the will. The heirs of an intestate cannot question the title of a purchaser from his administrator who has purchased land under such circumstances.''

In *Valentine* v. *Belden,* 20 Hun. 537, plaintiff, as administrator of deceased, foreclosed a mortgage that had been assigned to deceased and bought in the property. He contracted to sell the lands to the defendant and tendered deeds from himself, both individually and as administrator. In granting the plaintiff specific performance the court said:

> ''To save the estate from loss it was also his right and duty to bid in the premises at the sale, and to hold the same until they could be disposed of by him for the benefit of the estate which he represented.
>
> ''The premises thus purchased, by force of the doctrine of equitable conversion, are to be regarded as personal property in the possession of the plaintiff in his character as administrator, to be converted by him into money and accounted for by him as a part of the personal estate. The land thus purchased became a substitute for the bond and mortgage, and in our judgment the plaintiff acquired as perfect a title to it as he possessed to the bond and mortgage previous to the foreclosure, and the conveyances which he tendered to the defendant would vest in the latter a perfect title to the premises. (Citing cases.) We conclude that as the plaintiff tendered to the defendant a perfect title to the premises, he should have accepted the same as a performance of the agreement on the part of the plaintiff.''

In *Cook* v. *Ryan,* 29 Hun. 249, plaintiffs, with no power of sale, as executors foreclosed a mortgage, but pending suit took a conveyance and discontinued the action. Then they contracted to sell the land to defendant and sought specific performance. In granting it the court said:

> "They not only have power, but it is their duty to sell and dispose of the property, and to convert it into cash for the payment and discharge of the liabilities of the estate of their testator, and their conveyance will constitute a perfect title."

It will be seen from the ~~three~~ cases above cited that a trustee had the right to convey property acquired by him upon the foreclosure of a mortgage held by him in a fiduciary capacity prior to the first statute on the subject which was passed in 1900.

The Vice-Chancellor, in the case *sub judice,* expressed the view that the common law rule may not be applicable to a trustee for bondholders, and that appellant's position is close to that of a trustee for bondholders. He based his opinion upon the cases of *First National Bank* v. *Neil* (Kan.) 20 Pac. (2nd) 528, 88 A. L. R. 1252; *Cosmopolitan Hotel* v. *National Bank* (Col.) 40 Pac. (2nd) 245, 96 A. L. R. 1446; and *Werner* v. *Equitable Trust Company,* 35 Fed. (2nd) 513.

First National Bank v. *Neil* reviewed the authorities and concluded with an approval of *Nay-Aug Lumber Company* v. *Scranton Trust Company,* 240 Pa. 500, 87 Atl. 843, which is the leading case deciding that a trustee for bondholders, without express authority to bid at foreclosure sale, may bid if such is necessary to protect the interest of the bondholders. The court affirmed an order authorizing the trustee to bid up to the amount of its judgment, despite the objection of one of the bondholders.

Cosmopolitan Hotel v. *Colorado National Bank* and *Werner* v. *Equitable Trust Company,* like one or two other cases which might as easily have been cited by the Vice-Chancellor, denied the right of a trustee for bondholders to compete with outside bidders at sheriff's sale by bidding substantial amounts over the objection of minority bondholders. Thus in the *Cosmopolitan* case, the Colorado Supreme Court by a vote of three to two reversed a decree entered over the objection of minority bondholders, authorizing a trustee for a $1,500,000. bond issue to bid at sheriff's sale in the event that no outsider bid up to an upset price of $1,000,000. The minority bondholders objected to the trustee buying in the property when bidders were said to be available for $500,000. or $750,000., and obtained the reversal on the ground, as the court said, that they should not be forced into "a glorified receivership".

Similarly, in the *Werner* case, objections to confirmation of sale arising out of foreclosure brought by a trustee of a $150,000. bond issue were filed by a minority bondholder and by an unsuccessful outside bidder at the foreclosure sale. An order was entered prior to said sale, on application of a committee representing holders of $90,000.00 worth of bonds, authorizing the trustee to bid up to the amount of the final decree. It was directed that the property be sold in eight parcels. The outside party bid $30,-050. in cash for three of the parcels, but the trustee purchased the property with its paper bid of $75,000. The Circuit Court of Appeals, Tenth Circuit, reversed the order permitting the trustee to bid and directed that a new sale be held, saying:

> "It is customary and proper, in a decree of foreclosure, to authorize any bondholder or group of bondholders to bid at the sale and

apply such bonds as they may own on the purchase price, paying in cash to other bondholders their proportionate amount of the net proceeds of the sale. The difficulty with the matter here is that such an order was not made prior to the sale; entering such an order after the sale is too late. At the time the sale was held, an order was outstanding authorizing the trustee to bid and discharge the bid by a credit on the indebtedness, without reference to the ownership of the bonds. On the large parcel, the first bid made was a cash bid of $30,050., and the next was a paper bid of $75,000. It is impossible to say what would have been the result of the sale if this paper bid had not intervened. Outsiders may have been willing to bid $40,-000., or $50,000., or $60,000. cash for the property, but were discouraged, if not foreclosed, from making it because of the intervention of the $75,000. paper bid. If it had not been for the order authorizing the paper bid, the appellant may have raised the bid of May, paying the other bondholders their proportion of the bid in cash. Harry A. May might have increased his bid several times against cash bids, where there was no reason for increasing it against a paper bid. The existence of the order permitting the paper bid at least chilled the bidding at the sale, if it did not result in there being in fact no public sale. As between the immediate parties to the suit, it may be that the appellant is not in position to complain of this situation, since it was brought about by its own action, and the appellees are not here complaining as to the order of confirmation. But there are some $26,500 of bonds, the owners of which are entitled to protection of the court, and who are not represented. Their rights have been prejudiced by the order, which resulted in the absence of any competition among the cash bidders at the sale.

"It is our conclusion, therefore, that a new sale should be held; that the order of February 17th, permitting the trustee to bid for and on behalf of all of the bondholders, should be

> set aside; that the order of sale should contain the usual provision that the appellant, the appellees, or any other bondholder or group of bondholders may bid at the sale; that each bidder shall make such cash deposit as the court may think appropriate for taxes, costs, and expenses of the sale, and shall pay in addition in cash a sufficient amount to pay other bondholders their proportionate amount of the net proceeds of the sale. Nothing herein shall be construed as in any manner limiting the power of the trial court in other respects; that is, if the trial court believes that an upset price should be fixed, or other provision made for the protection of the bondbolders, his judgment in such respects is not fettered by this opinion."

It will be recognized at once that the above cases cited by the Vice-Chancellor, are widely different from the present suit. In our case there was a total absence of competitive bidding at the sheriff's sale, and the trustee purchased the property for $100., which was hardly sufficient to cover sheriff's fees. It cannot be said that a matter of discretion was involved. The purchase could have no other aspect than as a step in the liquidation of the mortgage investment.

In the western cases cited above, however, there was a definite question of reinvestment of trust funds. The trustee was faced with a choice of letting the bondholders take a loss or of continuing to gamble on the future of the real estate market. The logic of the court in the Werner case, quoted by Vice-Chancellor Bigelow, is applicable to such a situation although totally irrelevant to our suit. The court said in the Werner opinion:

> "Each bondholder has the absolute right to determine for himself, in case of default, whether he shall take his loss and quit, or continue to gamble; if the property is sold at public sale, he has a right to take his pro-

portion of the best bid that can be secured in cash, and cannot be compelled to become an owner of an undivided interest in the property."

Assuming that the *Cosmopolitan* and *Werner* cases were, on their facts, properly decided, but of which there are grave doubts as will appear by the authorities hereafter cited, they are, nevertheless, irrelevant to the present facts. In this case there is no question of gambling with real estate or taking a present cash loss. No alternative offering, no matter how great the loss, is involved. We have not here an objection of a minority bondholder. In our case a vendee is seeking to resolve a doubt as to the ability of appellant to convey marketable title to the foreclosed premises—the last step in the liquidation of the mortgage investment.

The following authorities support the proposition that a trustee for bondholders may purchase the mortgaged premises at foreclosure sale to protect the interest of the security holders:

Nay-Aug Lumber Co. v. *Scranton Trust Co.,* 240 Pa. 500; 87 Atl. 843;
Beckman v. *Emery-Thompson Machinery & Supply Co.,* 90 App. 275;
Hoffman v. *First Bond & Mortgage Co.,* 116 Conn. 320; 164 Atl. 656.

Dictum:

Silver v. *Wickfield Farms,* 209 Ia. 856, 227 N. W. 97 at 99;
Straus v. *Chicago Title & T. Co.,* 273 Ill. App. 63;
Kitchen Bros. Hotel Co. v. *Omaha Safe Deposit Co.,* 126 Neb. 744, 254 N. W. 507;
Smith v. *Mass. Mut. Life Ins. Co.,* 116 Fla. 390, 156 So. 498.

In *Nay-Aug Lumber Co.* v. *Scranton Trust Co., supra,* the court says:

> "The first question raised by this appeal is as to the right of a trustee in a mortgage to buy in the property for the benefit of the bondholders."

The court further says:

> "It is difficult to see any good reason why a trustee should not be permitted to bid at a foreclosure sale, if it be necessary to protect the interests of the bondholders. But little authority upon the question can be found, probably for the reason that corporation mortgages usually provide specifically for the purchase at foreclosure sales of mortgaged premises by the trustee, in the interest of the bondholders and for the purpose of reorganization. Where such power is not explicitly given, it may very well be implied. This doctrine is recognized by the textbook writers. In 3 Thompson on Corporations (2d Ed.) par. 2678, it is said: 'It seems clear that the trustee has implied power to purchase for the benefit of bondholders. At least he has such implied power to bid in their behalf to an amount equal to the principal and interest due on the mortgage. * * * It has been said that the duty of the trustee does not end with the institution and prosecution of the foreclosure suit, but his duty requires him to attend the sale and protect the rights of the bondholders, and if necessary bid in the property; and this right, it seems, exists independently of the terms of the mortgage. Thus, where the court directed the trustee to bid to a certain amount for the benefit of all bondholders, this was held not to prevent him from bidding a larger amount, although not requested to do so by a majority of the bondholders. The court's order was construed as fixing only a minimum bid, or rather as naming a minimum sum, below which he should not permit the property to be sacrificed. James v. Cow-

ing, 82 N. Y. 449.' In 3 Cook on Corporations (6th Ed.) par. 885, it is said: 'It seems that a trustee has implied power at the foreclosure sale to bid for the property, in behalf of the bondholders, up to a figure equal to the principal and interest due upon the mortgage debt.' In Jones on Corporate Bonds and Mortgages (1907) par. 289, it is said: 'It is the duty of a mortgage trustee to protect the security he has taken for the bondholders to the utmost of his ability.' And paragraph 290: 'It is the duty of trustees intrusted with the sale of lands for the benefit of the bondholders to make the sales as available as possible for the extinction of the debt for the security of which they hold the land.' In Com. *v.* Susq. & Del. R. R. Co., 122 Pa. 306, 319, 15 Atl. 448, 450, 1 L. R. A. 225, Mr. Justice Williams said: 'When a default occurs the duties of the trustee (in a corporation mortgage) become active and important. He represents all the bondholders, and is under obligation to protect them so far as the property in his hands in trust for them will enable him to do so.' The trustee was bound, in the exercise of the discretion left to it, to use the same diligence and care in protecting the interests of the bondholders, that a prudent man would use in protecting his own interests. Certainly any prudent man would bid up to the amount of the debt and interest at a foreclosure sale under his control, provided the property was worth that much or more. Under the circumstances shown, the court below would have authorized the trustee to bid, had an application been made to it before the sale, and 'The rule has been adopted in equity that a trustee has the power to do that without a special order, which the court under proper proceedings would order.' 28 Am. & Eng. Ency. L. 982.

"Having purchased the property in the proper exercise of discretion, there can be no doubt of the right of the trustee to make sale of it to the best advantage." (Italics ours.)

In *Beckman* v. *Emery-Thompson Machinery & Supply Co., supra,* the court, in reply to the contention that a trustee lacks power to purchase mortgaged property on behalf of the bondholders unless all of them unite in requesting him to do so, said:

> "It would be strange indeed if, as in the present case, one or more of the bondholders might interfere with the preservation of the interests of the great majority of bondholders in their purchase of the property at the earliest opportunity offered in such a way as to save them any unnecessary loss."

The court further added that:

> "In this case the very fact that but little more than one-third of the judgment would be satisfied by the proceeds of the sale and that no bidders were on hand to bid two-thirds of the appraisement shows that it was to the great interest of the bondholders to buy at the sheriff's sale and become the owners of the property with as little further cost as possible in order that they might dispose of it to their best advantage."

In *Hoffman* v. *First Bond & Mortgage Co., supra,* the mortgage foreclosed contained a power to sell—strict foreclosure—but did not expressly authorize the trustee to bid at its foreclosure sale. The decree was for $62,400.; the property was appraised at $85,000.; the trustee moved for permission to bid at the foreclosure sale for the benefit and protection of the note holders a sum sufficient to cover the amount of the mortgage debt and taxes, municipal assessments and costs, representing that notwithstanding the appraisal of $85,000. there was grave doubt whether any outside bids sufficient in amount to protect the note holders would be made owing to the depressed condition of the real estate market. The motion

was granted over objections. The property was sold and purchased by the trustee. The objecting note holders then filed bill for partition of the real estate or sale thereof and a division of the proceeds among the note holders. The court said:

> "The trial court held that the provision in the mortgage concerning sale after strict foreclosure extended, by inference, to acquisition of the title by the trustee through purchase in foreclosure by sale. The appellant contends that this inference is unwarranted and inadmissible. But even if he be correct in this, the exigency which arose must be regarded as one which was so unanticipated that no express or implied provision was made for it in the mortgage, and the result reached by the court is afforded ample support in its equitable powers. 'Trustees, in carrying the trust into execution, are not confined to the very letter of the provisions. They have authority to adopt measures and to do acts which, though not specified in the instrument, are implied in its general directions, and are reasonable and proper means for making them effectual. This implied discretion in the choice of measures and acts is subject to the control of a court of equity, and must be exercised in a reasonable manner.' 3 Pomeroy's Equity Jurisprudence (4th Ed.) p. 2428; New York Trust Co. *v.* Michigan Traction Co. (D. C.) 193 F. 175, 180. When exigencies arise which were not contemplated by the creators of the trust and which, had they been anticipated, undoubtedly would have been provided for, the court in such emergency may sanction acts by the trustees which, while not directed by the trust instrument, are such as the court deems the parties would have dictated had they anticipated the peculiar development. Curtiss *v.* Brown, 29 Ill. 219; note 46 L. R. A. (N. S.) 44; 26 R. C. L. Sec. 241. It is one of the most important and essential powers of a court of equity to raise the implications growing out

> of the state of trust property, the purposes to be accomplished, and the mode adapted to that end, without violence to, or forced construction of, the trust instrument. Sturges *v.* Knapp, 31 Vt. 1, 52."

The court then quoted from *Nay-Aug Lumber Co.* v. *Scranton Trust Company, supra,* and then further said:

> "When default of payment of the mortgage debt occurred, and until foreclosure was consummated, the trust was active and the trustee's duties correspondingly so. 'It not only is not a dead, dry trust, but is one of the most active and momentous responsibility.' Sturges *v.* Knapp, *supra,* 31 Vt. page 55. The trustee was bound to use the same diligence and care in protecting the interests of the note holders that a prudent man would use in protecting his own interests."

The court further said:

> "Considerations similar to those which justify the right to bid in at the foreclosure sale dictate that the trustee hold and administer the property acquired thereby until such time as it can be disposed of without unnecessary sacrifice and loss to the note holders. This right and duty would seem to be a necessary corollary and consequence of the right to bid and buy."

We conclude, therefore, that appellant could and can convey marketable title to George Mintz. First, because the express authorization of the mortgage certificates contemplates complete liquidation of the mortgage investment and the continuance of the trust until that purpose has been accomplished.

Second, because Sections 3:20-3 and 3:20-4 of the Revised Statutes of 1937 give express authority to appellant to sell the premises after purchase at foreclosure sale without court order.

Third, because the same authority is vested in appellant under the common law rule followed in this state.

POINT TWO.

The right and power of the trustee to convey a marketable title is not debatable and specific performance should have been decreed.

In *Tillotson* v. *Gesner*, 33 N. J. E. 313, 326, Mr. Justice Scudder, speaking for the Court of Errors and Appeals, said:

> "The true rule is stated in 3 Pars. on Con. (6th Ed.) *380, that if the character of the title be doubtful although the court were able to come to the conclusion that on the whole a title could be made that would not probably be overthrown, this would not be good title enough; for the court have no right to say that their conclusion or their opinion would bind the whole world and prevent an assault upon the title. The purchaser should have a title which shall enable him not only to hold his land but to hold it in peace; and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value. The court cannot satisfactorily or conclusively settle a title in the absence of parties who are not before them in the suit to assert their estate or interest in the lands."

But in *Van Riper* v. *Wickersham*, 77 N. J. E. 232, 237, Mr. Justice Voorhees, again speaking for the Court of Errors and Appeals, quotes Professor Pomeroy as saying that:

> "In a suit by a vendor the purchaser will not be forced to complete the contract unless the title is free from reasonable doubt. * * * If, however, there arises a reasonable doubt concerning the title the court, without deciding the question, regards its existence as a

sufficient reason for not compelling the purchaser to carry out the agreement."

Mr. Justice Voorhees then said:

> "So it is a uniform rule of this state to decline to decree specific performance where such doubt exists, though rested on grounds merely debatable but which might visit upon the purchaser litigation in that regard and that too where, at law, the title might in fact be declared good."

When he used the words "where such doubt exists, though rested on grounds merely debatable", he must and should be understood as referring to "reasonable doubt" as used by Professor Pomeroy. He cites as additional authority several cases, one of which is *Vreeland* v. *Blauvelt,* 23 N. J. E. 483.

In that case Vice-Chancellor Dodd, in speaking of a doubtful title, said, "But there must be some debatable ground upon which the doubt can be justified"; and in *Lippincott* v. *Wikoff,* 54 N. J. E. 107, 120, Vice-Chancellor Emery said:

> "The doubt as to the title must be as was said by Vice-Chancellor Dodd in Vreeland *v.* Blauvelt, 8 C. E. Gr. 483, to be put upon some debatable grounds."

And the first headnote to the opinion written by Mr. Justice Parker in the case of *Rosenson* v. *Bochenek,* 102 N. J. E. 543, is as follows:

> "As a general rule equity will not require a vendee of land to accept a title whose validity is doubtful, but the doubt should be a substantial and not a fanciful one."

We think that the true rule is well stated in *Haberman* v. *Baker,* 128 N. Y. 253, where it was said:

> "Whether equity will enforce the specific performance of such contracts is a matter

resting, it is true, in discretion; but it is a discretion which proceeds in its exercise upon settled rules and not arbitrarily. Where the case is one in which the proceeding is against the purchaser at a judicial sale to compel him to carry out his bid, the discretion of the court may be influenced differently from a case like the present, where the action is upon the private contract of the parties. But this is just; for, in the former case, the bidder is warranted in assuming not only that the title to the land is readily marketable, but also that the judgment of the court has set at rest all questions which might reasonably be raised concerning the validity of the title offered. In all cases, I suppose that the quality of the title must be the same; but where the deliberate convention of private parties results in a contract for the sale and purchase of lands, the matter of the plaintiff's right to an enforcement of that contract should be considered more favorably; and if, notwithstanding all the legal questions raised by objections, or suggested from the records, the vendor is found to have the legal title to the premises and has a legal right to convey, as he has agreed, performance by the vendee must be decreed."

Since the power of Fidelity Union Trust Company, as Trustee, to convey a marketable title to the property is not debatable, specific performance should be decreed.

Respectfully submitted,

Hood, Lafferty & Campbell,
Solicitors of Complainant-Appellant.

Wallace R. Chandler, Jr.,
Of Counsel.

New Jersey Court of Errors and Appeals.

Between FIDELITY UNION TRUST COMPANY, as Trustee, *Complainant-Appellant,* and GEORGE MINTZ, *Defendant-Appellee.*	On Appeal From Court of Chancery.

BRIEF FOR DEFENDANT-APPELLEE.

(Italics throughout are mine.)

This cause arises upon a bill brought by the complainant in its capacity as trustee for the specific performance by the defendant of the terms of a contract of sale of land and to accept a conveyance thereof pursuant to same. The defendant resists upon the ground that the complainant is unable to make a good and marketable title.

From the stipulation of facts filed in this cause, it appears that there are only two issues: (1) whether the complainant as such trustee has the right to convey the premises in question without the consent of the beneficiaries of the trust; and (2) whether said beneficiaries are necessary parties to this suit (see St. of C., p. 21, fols. 34-38).

Title to the premises in question are vested in the complainant by virtue of a Sheriff's Deed, upon the foreclosure of mortgage. Title stands of record in the name of "Fidelity Union Trust

Company, as trustee." The facts preceding the vesting of title as aforesaid are set forth in the amended stipulation of facts (St. of C., pp. 22-27).

The facts leading up to the vesting of title as aforesaid, are briefly as follows:

(a) The Fidelity Union Trust Company, as Trustee, held a mortgage on the premises in the City of Newark. It issued certain participating certificates in said mortgage to persons beneficially interested in the mortgage. The participating certificates set forth the terms of the trust under which the complainant held the mortgage, for the benefit of the said certificate holders.

(b) The Fidelity Union Trust Company, as Trustee, subsequently foreclosed said mortgage, joining as party complainants all of said beneficiaries.

(c) Upon the Sheriff's sale, the premises were sold for $100.00 to "Fidelity Union Trust Company, as Trustee", and Sheriff's deed was so executed.

Views of Defendant.

I. The trust in the case at bar is a dry, naked or passive trust.

II. By virtue of the Statute of Uses, a dry or passive trust is executed vesting the legal title in the beneficiary.

III. The authorities generally hold that a dry trustee has no power to convey real estate. The authorities of the complainant-appellant are distinguished.

IV. The statute relied upon by complainant gives no authority for the sale of property so held by the trustee without the consent of the beneficiaries.

V. There is a substantial doubt about the validity of a conveyance by the complainant, and the decree of this Court should not be granted.

VI. The *cestui que trust* are necessary parties to this suit.

I.

The trust in the case at bar is a dry, naked or passive trust.

The powers of the trustee in the case at bar are set forth in paragraph 2 of the Trust Certificate, as follows:

> "2. The Company hereby is appointed irrevocably the agent and attorney of all owners and holders of said certificates for the purpose: (a) of collecting the interest and principal of said bond and mortgage and of satisfying and discharging the same in its own name on receiving full payment; (b) of deciding when and how any provision of said bond and mortgage shall be enforced, and of enforcing it accordingly; (c) of agreeing to any extension of the time of payment of said bond and mortgage, without notice to the holder hereof."

The life of the trust was dependent upon the existence of the mortgage, and terminated upon its foreclosure. This is obvious from the reading of the trust certificates, for the trustee's duties pertain solely to the collection of interest and principal and otherwise dealing with the mortgage.

In *U. S. Mortgage* v. *Marquam,* 69 Pac. 37, &c., 41 Ore. 391, the Court holds that where a mortgaged property is conveyed to a trustee to hold and manage and apply the rents and profits to the payment of interest and taxes, the life of the trust is dependent upon the existence of the mortgage and terminates upon its foreclosure.

There is nothing in the certificates which declares the powers or purposes of the trust relating to the title of the trustee in the realty. There are no functions under the certificates which the trustee can now perform.

What then was the result in the case at bar, of the vesting of title to the land in Fidelity Union Trust Company, as Trustee, after the foreclosure of the mortgage?

The result was termination of the active trust regarding the mortgage, and the creating of a "dry" or "naked" or "passive" trust in reference to the realty.

The writer of the text, 65 C. J. 522, Section 268, says:

> "* * * The trust is active until its objects are accomplished or until the trustee shall have completed the last active duty imposed by the trust * * *."

II.

By virtue of the Statute of Uses a dry or passive trust is executed vesting the legal title in the beneficiary.

The writer of the text, 65 C. J. 516, Section 267, says:

> "* * * By reason of the Statute of Uses or like statutory enactments relating to trusts and uses a dry or passive trust is executed

> vesting the legal title in the beneficiary and this is true when an active becomes passive * * *"

Our Statute of Uses is set forth in the 1937 Revision 46: 3-9.

In the case of *Zelly* v. *Zelly* (N. J. Ch.), 136 Atl. 738, 101 N. J. Eq. 37, the Court held:

> "But the duration of the trust was dependent upon and determined by its purpose. When no further duties were to be performed the trust was terminated by the Statute of Uses."

Our Court of Errors and Appeals, in the case of *Melick* v. *Pidcock,* 15 Atl. 3, 44 N. J. Eq. 525, held as follows:

> "The deed from Trines to Mrs. Studdiford conveyed to her an estate upon a simple trust, without any discretionary powers or active duties to be performed by the trustee. Under such a conveyance the incidents of the trust estate are a *jus habendi,* or right of actual possession in the *cestui que trust;* and also the *jus dispendi* or right of the *cestui que trust* to require the trustee to convey (to) the legal estate as the *cestui que trust* may direct—Lewin, Trusts, 18. The trust in its nature and quality is such as would be executed by the statute (Statute of Uses)."

The Court later in its opinion says:

> "* * * The statute declares that the grantees to whom the use is given, limited, granted or conveyed shall be deemed in as full and ample possession, to all intents, constructions and purposes, as if such

> grantees, their heirs and assigns, were possessed thereof by solemn livery of seizen and possession * * *"
>
> "In the deed to Mrs. Studdiford the first and only use declared is for the beneficiaries * * * and all the authorities, ancient and modern, agree that the statute executes the first use, and converts it into a legal estate, except where the powers and duties conferred upon the donee to uses are such as require in him the legal estate for their discharge * * *"

In the case at bar, the title was vested in Fidelity Union Trust Company, as Trustee, without any declaration as to the uses or trusts under which the Fidelity Union Trust Company held. The only trust existing is that the Fidelity Union Trust Company, as Trustee, holds the title for the beneficiaries who are co-complainants with it in the foreclosure action.

The writer of the text, 65 C. J. 524, Section 269, says of dry trusts:

> "* * * Of this nature is a trust merely to the use and benefit of a named beneficiary or beneficiaries, the only duty of the trustee being to hold a title no trust being specified * * *."

In *Kronson* v. *Lipschitz,* 60 Atl. 819 (at p. 820), 68 N. J. Eq. 367, our Court of Chancery says:

> "* * * but where you have chattels, machinery, vested by a bill of sale in A for the benefit of B, A has no duties to perform whatever, except to preserve the chattels in case he receives possession of them until his beneficiary takes possession."

In *Cooper* v. *Cooper,* 36 N. J. Eq. 121, the Court held:

> "A simple trust is where the property is vested in one person in trust for another and the nature of the trust not being qualified by the settlor is left to the construction of the law. In this case the *cestui que trust* has *jus habendi* or the right to call on the trustees to execute conveyances of the legal estate as the *cestui que trust* directs."

Although in the *Cooper* v. *Cooper* case the Court held that an active trust was created, such opinion was based upon the fact that:

> "The trust is an active one. It involves confidence and discretion and active duties."

In the case of *In re Behringer's Estate,* 108 Atl. 414, 265 Pa. 111, the Supreme Court of Pennsylvania held:

> "* * * Where a trustee has no duties to perform, there is no limitation over of either principal or income, there are no other estates or interests to preserve, and the trust is not a spendthrift trust or for protection during coveture, the equitable title to the property vests absolutely in the persons beneficially interested * * *"

In the case at bar, no active duties are set forth in any trust instrument for the trustee to perform.

III.

The authorities generally hold that a dry trustee has no power to convey real estate. The authorities of the complainant-appellant are distinguished.

In the note to *Tyler* v. *Herring,* 19 Am. St. Rep. 263 (Miss.), I have found a most extended

and valuable note on "Sales and Conveyances by Trustees". On page 270 it is held as follows:

> "* * * We have been unable to discover any authority determining whether or not a trustee has power to sell when the trust estate is vested in him without any declaration being anywhere made regarding the extent of his powers or the purposes of the trust * * * We apprehend, though we can find no authority upon the subject, that when a conveyance is made to one person as trustee of or for the use of another, unless through the operation of the statute of uses the legal as well as the equitable estate is thereby vested in the beneficiary, the law implies that the trustee shall continue to hold the property for the use and benefit of the beneficiary until the latter or his successor in interest demands a conveyance thereof, and that any conveyance by a trustee is in contravention of this implied duty, and will, therefore, be vacated in equity."

In the case of *Geyser Marion Gold-Mining Co.* v. *Stark* (C. C. A.) 106 F. 558, 53 L. R. A. 684, the Court said that the term "trustee" is

> "* * * a term of administration and not of sale. A trustee ordinarily holds the property intrusted to his charge to collect the rents, issues, dividends or profits thereof, and to apply them to some specified use. *Brokers, administrators and executors frequently have the power to dispose of the property intrusted to their charge. Trustees commonly have no such power.* Hence the legal presumption is that a trustee has no power to sell or convey the property which he holds in his fiduciary capacity, and the

> fact that he holds it as trustee is a warning and a declaration to all the world that he is without that power of disposition, unless that power is specifically given by the instrument creating the trust or by the assent of those whom he represents. The legal presumption is that the trustee has no power of sale."

The writer of the text, 65 C. J. 730, Section 594, says:

> "In the absence of express or implied authority conferred by the instrument creating the trust and in the absence of the voluntary consent of all the beneficiaries, a trustee is under no duty to sell and convey the corpus of the trust property and has no power to do so * * *"

In the case of *Seif* v. *Krebs,* 86 Atl. 872, 239 Pa. 423, the Supreme Court of Pennsylvania says:

> "It is an undoubted rule of the law of trusts that a trustee has no power to sell trust property unless such power is conferred upon him by the instrument creating the trust, either by express words or by necessary implication. The rule is so stated in 28 Enc. of Law, p. 992 and is supported by the cases there cited."

Defendant especially directs the Court's attention to the fact that this is not a case where a trustee has the power to invest and re-invest, for under such circumstances, a necessary implication of the powers of the trustee would be that the trustee should convert the property into cash in order to enable him to re-invest. Under such circumstances, a necessary implica-

tion of its powers would be the power to convey realty. In the case at bar, the trust certificates gave the trustee only the power to deal with the mortgage and not to re-invest any proceeds derived from a collection thereof. The mortgage was satisfied by decree and sale in the foreclosure and the trust thereupon ended.

Administrators and executors have duties of administration which continue beyond any particular investment, so, if an investment is liquidated the fiduciary re-invests for the purpose of continuing the trust. The court below distinguished between testamentary fiduciaries and other trustees, see also *Geyser Marion Gold-Mining Co.* v. *Stark, supra.*

Therefore, the cases of *Lippincott* v. *Becktold,* and *Perrine, Administratrix* v. *Vreeland, Executor,* cited on pages 11 and 12 of appellant's brief can be distinguished as involving testamentary fiduciaries. It is also to be noted that there was no consideration in these cases of the right of the trustee to convey without the consent of the beneficiaries. The cases of *Valentine* v. *Belden,* cited on page 14 of appellant's brief, and *Lochman, Executor* v. *Reilly,* cited on page 13 thereof can also be distinguished as involving testamentary fiduciaries.

In *Nay-Aug Lumber Co.* v. *Scranton Trust Co.,* cited on page 20 of appellant's brief, the court found that the trustee had the power to sell. It cannot be ascertained from a reading of the case whether all of the beneficiaries were parties to that suit. The action was instituted by the beneficiaries to attack the power of the trustee to convey, and the court held that there were no facts to show that it would be inequitable to allow the conveyance. But the

beneficiaries were in court and bound by the decree, whereas in our case the beneficiaries are not in court and are not bound by the adjudication at bar. In addition the court in the *Nay-Aug Lumber Co.* case relies on cases which authorized testamentary trustees to convey. Note the case of *Yerkes* v. *Richards*, 170 Pa. 346, 352, 32A, 1089, 1091, relied on by the court, which held, "* * * *For the purpose of reinvesting as contemplated by the testator*, it was necessary for him to sell, and accordingly he executed the option contract in suit * * *". In the case at bar there is no claim of appellant of a right to re-invest.

In the case of *Hoffman* v. *First Bond & Mortgage Co.*, cited on page 22 of appellant's brief, the court relied on language of the trust agreement to spell out a power of sale. In our case the trust instrument is silent.

All of the cases relied on by appellant can therefore be distinguished:

(a) as involving the power of testamentary trustees;

or

(b) Because the beneficiaries were in court and bound by the decree;

or

(c) Because under the terms of the trust agreement the trustee was authorized to convey;

or

(d) Because the beneficiaries joined in the conveyance.

In the case at bar the beneficiaries are not parties to the action; the trustee is not a testa-

mentary fiduciary; the trustee has no power to re-invest; the trust agreement does not authorize the conveyance; and the beneficiaries do not join in the conveyance.

In the case of *Banta et als., Executors* v. *The Board of Trustees of School District #3, &c.*, cited on pages 9 and 10 of complainant's brief, the Court specifically points out that the executors who are the beneficiaries in that case and the wife who holds a right of dower joined in the conveyance. Obviously, if the beneficiaries joined, the conveyance would be good.

IV.

The statute relied upon by complainant gives no authority for the sale of property so held by the trustee without the consent of the beneficiaries.

The present statute, 1937 Revision 3:20-3 relied upon by complainant as authorizing the conveyance of lands by a trustee where he has acquired such lands at a foreclosure sale, "without order of a court", dispenses with the necessity of a court order to enable a trustee to convey real estate bought in by the trustee at a sale in a foreclosure proceeding of a trust mortgage. The statute does not eliminate the necessity of the consents of the beneficiaries to the conveyance.

At common law, the right of a trustee to convey real estate was limited to cases where an order of the Court was obtained, or where the beneficiaries consented. The Legislature is deemed to have had knowledge of these two prerequisities. The only prerequisite eliminated was the necessity of a court order. The neces-

sity for the consent of the beneficiaries remains.

Would complainant contend that the statute enables the trustee to convey in violation of an agreement with the beneficiaries? Defendant contends that the statute implies no such authority. No fair reading of the statute would permit such a tortured construction and complainant does not so argue.

In the note to the case of *Tyler* v. *Herring, supra,* at page 272, it is held as follows

> "Though the instrument creating the trust may not have authorized the trustees to sell the trust property such authorization may have been attempted by the legislature. There is a great difference between the authority of the legislature over the estate of a trustee and its authority over that of the *cestui que trust.* The title of the former is not a beneficial or vested interest. He holds it merely that he may perform duties imposed by the trust, and he can therefore be divested of it without being divested of any valuable or vested right of property."

The writer of the note concludes that the Legislature has no power as against the wishes of the beneficiary to authorize trustees to sell subject matter of a trust where such power is not necessary to accomplish the purposes of the trust.

The defendant has made the point that the legal title, as well as the equitable title has vested in the beneficiaries under the Statute of Uses. Even without the operation of the Statute of Uses the active duties of the trustee under the trust instrument ceased upon the foreclosure of the mortgage, and, hence, the Legislature has no power as against the wishes of the beneficiary to authorize the trustees to sell the sub-

ject matter of the trust if any intention of the Legislature to so do were apparent from the reading of the Act.

V.

There is a substantial doubt about the validity of a conveyance by the complainant, and the decree of this Court should not be granted.

Complainant in foreclosing its mortgage availed itself of the protection of having the beneficiaries joined, in order to remove any doubt of the propriety of its foreclosure proceeding.

Why is not the defendant entitled to have the same protection in purchasing the property, *i. e.*, the consent of the beneficiaries to the conveyance or their joinder in this action, as complainant, when it sought to affect the rights of the beneficiaries in the foreclosure action?

Complainant purchased the premises at the foreclosure sale in its name as trustee. It does not appear of record for whose benefit it holds. There is no agreement to which defendant can refer as to the terms of the trust. If defendant takes title, one or more of the beneficiaries may institute suit claiming an agreement with complainant not to convey the premises without their consent. The writer of the text, 65 C. J. 778, Section 648, holds that one dealing with trust property is "charged with knowledge of the terms of the trust and a violation thereof when he has actual knowledge that he is dealing with trust property."

Where a trustee executes a deed without the consent or authority of the beneficiary, the legal

title would pass to the grantee, but the title of the beneficiaries would not pass and the grantee would hold as trustee for them as did his grantor. *Brown* v. *Harris,* 27 So. W. 45; 7 Tex. Civil Appeal 664.

The writer of the text, 65 C. J. 779, Section 648, says:

> "* * * As a purchaser has constructive notice when the facts and circumstances are sufficient to put him on inquiry he is charged with knowledge of the terms of the trust and a violation thereof when he has actual knowledge that he is dealing with trust property * * *"

In the footnote, the case of *Crigler* v. *Rouse,* 272 So. W. 905; 209 Ky. 439, is cited as holding:

> "So a trust deed to a 'trustee and his successors and assigns' by its unusual wording charges notice that the trustee took title in a fiduciary capacity."

In this uncertain state of facts, how can defendant safely purchase the property?

The writer of the text, 65 C. J. 762, Section 631, says:

> "Before purchaser is compelled to take title, he is entitled to have it made plain that the trustees have the right to sell, and they should show either a power to sell under the terms of the trust or that the *cestui que trust* consents to the conveyance."

Defendant would accept the conveyance at bar, if complainant would warrant its authority to convey. But complainant relies upon its authority as a matter of law so to do.

Complainant's title depends upon facts, not fully presented to the Court, namely the terms of the trust agreement under which it now holds the real estate, and upon the construction of a statute doubtful in applicability. We must also consider that the *cestui que trust* are not parties to this suit and not bound by this decree.

Chancellor McGill in *Paulmier* v. *Howland,* 49 N. J. Eq. 364, 24 Atl. 268, refused specific performance and said:

> "* * * There are so many perplexing questions presented in this case, which threaten the complainant's title to the property, and depend upon solution not only upon proofs that are not before me, but also upon the construction which is to be given to the limitations in the deed from Childs, and the terms of the legislative act of 1854, both of which appear to be badly expressed and inartificial instruments, that in the exercise of the discretion allowed me in this form of action, I feel constrained to deny the prayer of the bill. In doing so, I intend that it shall be distinctly understood that I do not affirm invalidity of title. I simply recognize that the title is burdened with difficult and unsettled questions, which arise above mere speculation, theory and possibility, and so stand in the way of a free alienation of the land, that it should not be forced on the defendant. It is to be remembered that the judgment in this case is *in personam* and not *in rem,* and that the decree I may make for the complainant will not settle the questions suggested as to those who are not parties to this suit."

I raise no contention against the holdings of the courts in the cases set forth under Title

II of complainant's brief, and I believe that such authorities amply sustain defendant's contention that under the circumstances of the case at bar, specific performance should not be granted.

VI.

The *cestui que trust* are necessary parties to this suit.

The general rule in the case of *Smith* v. *Gaines* (Court of Errors and Appeals), 39 N. J. Eq. 345, is as follows:

> "The general rule as to the parties in cases of trust property brought either by or against the trustees, the *cestui que trust* are necessary parties."

The Court should, in the case at bar, weigh the equities of the parties.

Complainant has obstinately refused to join the beneficiaries in this action, and has shown no hardship in obtaining such joinder. It is pointed out above that complainant, in foreclosing its mortgage, availed itself of the protection of having the beneficiaries joined in order to remove any doubt of the propriety of its foreclosure proceeding. The defendant should be entitled to have the same protection of having the beneficiaries parties to this action. If the beneficiaries joined in this action, defendant would have no objection to the entry of a decree for specific performance against him.

CONCLUSION.

It is, therefore, submitted that the trustee is without power in the case at bar to make a good conveyance without the joinder of its beneficiaries, that the beneficiaries who are necessary parties were omitted from this proceeding; and that specific performance should be denied.

Respectfully submitted,

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