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Notice of Appeal.
(Filed March 12th, 1935.)

IN CHANCERY OF NEW JERSEY.
92/129

Between JAMES P. HALL, BARRY L. BALCH, ROVENGO - HALL COMPANY, and WEST BERGEN TRUST COMPANY, Complainants, and J. FRANK FINN, Defendant.	}	On Bill, etc. Notice of Appeal from decree made by Chancellor Luther A. Campbell; Advised by Vice Chancellor Charles M. Egan.	10
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The complainants, James P. Hall, Barry L. Balch, Rovengo-Hall Company and West Bergen Trust Company, hereby appeal from the final decree made in the above entitled cause on May 16th, 1934, by the Chancellor and advised by Vice Chancellor, Charles M. Egan, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes. 20

Dated, March 11th, 1935.

JOHN W. OCKFORD,
Solicitor for and of Counsel
with Complainant. 30

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

JOHN W. OCKFORD,
Of Counsel with Complainant.

Service of a copy of the within notice of appeal acknowledged March 11th, 1935.

LICHENSTEIN, SCHWARTZ & FRIEDENBERG,
Solicitors of Defendant. 40

Petition of Appeal.NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	JAMES P. HALL, BARRY L. BALCH, ROVENGO - HALL COMPANY, and WEST BERGEN TRUST COMPANY, Complainants-Appellants, vs. J. FRANK FINN, Defendant-Respondent.	} On Appeal from the Court of Chancery.
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TO THE HONORABLE COURT OF ERRORS AND APPEALS
IN THE LAST RESORT IN ALL CAUSES:

20 The petition of James P. Hall, Barry L. Balch, Rovengo-Hall Company and West Bergen Trust Company, the appellants in the above entitled cause, respectfully shows that:

30 1. Petitioners find themselves aggrieved by the final decree made in the Court of Chancery by his Honor Luther A. Campbell, Chancellor of the State of New Jersey, and advised by Vice Chancellor Charles M. Egan, bearing date the 16th day of May, 1934, in a certain cause in said Court of Chancery, wherein the said James P. Hall, Barry L. Balch, Rovengo-Hall Company and West Bergen Trust Company, were complainants, and the said J. Frank Finn, was defendant (docket 92, page 129), in this respect, to wit:

That the said decree adjudged that the complainants' Bill of Complaint be dismissed.

40

Petition of Appeal.

2. And your petitioners appeal from the said decree of the Chancellor, which decrees a dismissal of the Bill of Complaint, as aforesaid upon the ground that the same is erroneous, in that complainants were entitled to a decree in their favor, for the reason that complainants were the beneficiaries of a trust and were entitled to affirm and ratify the sale of the trust property to the defendant, who was their fiduciary and were also entitled to elect, to ratify the sale and hold the defendant to his bid; and that their trustee, who had purchased at a public sale, could and should have been held to the same at the election of the complainants, who were the beneficiaries. 10

3. And for the further reason that the defendant trustee elected, on his part, to improve the property and make leases, and could not thereafter disaffirm his election to treat the property as his own, and for the reason that pursuant to an agreement entered into between the parties, defendant was obligated to complete his bid because under such agreement he was not given the right or privilege of making only a nominal bid, or one merely as trustee; for the further reason that the agreement fixed such options as might be exercised by the parties, neither of which were exercised. 20 30

4. Complainants further show that upon the facts of the case, it appeared that defendant elected to hold and treat the property as his own and changed the status and condition thereof and thereby could not compel complainants to exercise the option or options, provided for by the agreement.

5. Complainants further show that defendant did not exercise his option to resell and did not apply 40

Petition of Appeal.

to the Court for leave to resell or for the other relief, but on the contrary elected to stand on his individual bid, and hold and treat the property as his own, and obtained a confirmation of the sale, took the deed individually and made improvements and executed leases.

- 10 6. Complainants further show that defendant was bound to obtain the amount of the sale and could not legally or equitably deny or dispute the selling price, and defendant is obligated to account to complainants for the amount of the sale and pay them the difference between the amount of the bid and the amount of his original claim.

- 20 Petitioner therefore prays that the said decree of the said Chancellor may be set aside and for nothing holden and that the Court of Chancery be directed to enter a decree in favor of the complainants and against the defendant in accordance with the prayer of the Bill of Complaint, and according to the pleadings, proofs and rules of law applicable thereto, and that the Court of Chancery be directed to enter a decree requiring defendant to account to complainants for the difference between the amount of the bid and the amount of defendant's individual claim, and that they may have such other and further relief in the premises as this Court shall deem just and proper.
- 30

JOHN W. OCKFORD,
Solicitor for and of counsel with
appellants.

Final Decree.
(Filed May 16, 1934)

92/129.

IN CHANCERY OF NEW JERSEY.

Between JAMES P. HALL, BARRY L. BALCH, ROVENGO - HALL COMPANY, and WEST BERGEN TRUST COMPANY, Complainants, and J. FRANK FINN, Defendant.	}	On Bill, &c.	10
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This cause coming on to be heard in the presence of John W. Ockford, Esq., of counsel with the complainants, and Lichtenstein, Schwartz & Friedenberg, Esqs. (Julius Lichtenstein, Esq.), of counsel with the defendant; and the pleadings having been read, and proofs having been taken in open court, and the arguments of the respective counsel having been heard; and the court having duly considered the said pleadings, proofs and arguments; and the court being satisfied that the complainants are not entitled to the relief sought and prayed for by them against the defendant, J. Frank Finn, in their Bill of Complaint: 20

IT IS, on this 16th day of May, 1934, ORDERED, ADJUDGED AND DECREED that the complainants' Bill be, and the same is hereby, dismissed. 30

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complainants pay to the defendant, J. Frank Finn, his costs of this suit to be taxed, together with a counsel fee of \$100.

LUTHER A. CAMPBELL,
C.

Respectfully advised,
CHARLES M. EGAN,
V. C.

40

Bill of Complaint.

(Filed August 9, 1932)

IN CHANCERY OF NEW JERSEY.

TO HIS HONOR, EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey.

The complainants, James P. Hall, Barry L.
10 Balch, Rovengo-Hall Company, a corporation of the
State of New Jersey and West Bergen Trust Com-
pany, a banking corporation of the State of New
Jersey, all of Jersey City, Hudson County, New
Jersey, respectfully show that:

1. On or about November 26, 1929, an agree-
ment, in writing, was entered into by and between
J. Frank Finn, as party of the first part, Barry L.
20 Balch and James P. Hall, parties of the second
part, and Charles Zerman, party of the third part.
A copy of the said agreement is hereto annexed and
made a part hereof and marked Exhibit "A".

2. Prior to the making of the said agreement,
the said J. Frank Finn filed or caused to be filed
in this Court, a Bill to foreclose a mortgage made
and executed by Modern Theatre Company to the
said J. Frank Finn, to secure the sum of \$154,760.00,
30 bearing date April 8, 1929, and recorded in the office
of the Register of Hudson County in Book 1546 of
Mortgages for said County, page 410, and which
was the mortgage referred to in the aforesaid agree-
ment of November 26, 1929. The said foreclosure
suit is indexed in docket 75 of this Court, page 591,
and for greater particularity, complainants refer to
the proceedings had in such action in this Court.

3. The said J. Frank Finn had an interest in
40 the aforesaid mortgage as security for the payment
of \$94,600.00 and interest.

Bill of Complaint.

4. Pursuant to the aforesaid agreement and by reason of certain assignments hereinafter more fully set forth, the said J. Frank Finn held the legal title to the aforesaid mortgage as trustee for the benefit of himself and complainants.

5. On or about December 16, 1929, an Order was made by this Court in the aforesaid cause for the sale of the mortgaged premises, more particularly described in the said mortgage and in the said Bill of Complaint, which Order provided for such sale pendente lite under the direction of a Master of the Court and for greater particularity complainants refer to the said Order and an Order amending the same filed January 14, 1930. 10

6. On or about March 4, 1930, the said mortgaged premises were sold by the Master to the said J. Frank Finn for the sum of \$145,000.00 and the sale was confirmed by an order of this Court filed March 24, 1930 and for greater particularity complainants refer to the Report of sale and the said confirming order which are a part of the records of this Court. 20

7. On or about July 11, 1929, the said Charles Zerman duly assigned to James P. Hall and Barry L. Balch his then interest in the aforesaid mortgage made by the Modern Theatre Company to J. Frank Finn, dated April 8, 1929, and recorded, as aforesaid, subject to the claim of the said J. Frank Finn to the sum of \$94,600.00. A copy of the said assignment is hereto annexed and made a part hereof and is marked exhibit "B". 30

8. In connection with such assignment and with all of the subsequent proceedings hereinbefore and 40

Bill of Complaint.

hereinafter referred to the said James P. Hall acted for and in the interest of Rovegno-Hall Company and the said Barry L. Balch for the Oakland Lumber Company.

10 9. On or about August 8, 1929, the said Oakland Lumber Company duly assigned to West Bergen Trust Company its right, title and interest in and to the aforesaid mortgage. A copy of the said assignment is hereto attached and made a part hereof and marked Exhibit "C".

20 10. The aforesaid mortgage made by Modern Theatre Company had been guaranteed by Hudson Exchange Realty Corporation and after the making of the aforesaid assignment by Charles Zerman to James P. Hall and Barry L. Balch, the said Hall and Balch duly notified Modern Theatre Company and Hudson Exchange Realty Corporation that such assignment had been made and that J. Frank Finn held the same as security for payment of the sum of \$94,600.00 and interest for monies advanced by Finn to Zerman and that the said Hall and Balch were the assignees of the equity in the said mortgage, subject to such interest of the said J. Frank Finn.

30 11. The said Balch and Hall duly performed on their part, all of the terms and conditions of the aforesaid agreement of November 26, 1929, and secured a release of the certain mechanics' lien referred to in said agreement.

40 12. By reason of the aforesaid agreements and the proceedings had in the foreclosure suit and the sale of the mortgaged premises, the said J. Frank Finn became obligated to account to complainants

Bill of Complaint.

for the sum of \$145,000.00 and to pay over to complainants the difference between such sum plus interest from March 24, 1930, less the sum of \$94,600.00 with interest to March 24, 1930, together with costs of said foreclosure suit. The said J. Frank Finn has failed to so account and pay over, although such accounting and payment has been duly demanded. 10

13. The said Rovegno-Hall Company, a corporation of the State of New Jersey, and West Bergen Trust Company, a banking corporation of the State of New Jersey, are duly organized and existing corporations.

14. Complainants did not and do not desire to exercise the option given them by paragraph 3 of the aforesaid agreement of November 26, 1929. 20

15. Since the aforesaid sale the said J. Frank Finn has treated and dealt with the former mortgaged premises as his own and has dealt with the same accordingly and complainants acquiesce in this conduct and have elected and do elect to hold the said J. Frank Finn as their trustee to account to them for the value of the property as fixed by the sale to him and for the proceeds of such sale as fixed by the terms and conditions thereof, and complainants seek to have the said J. Frank Finn account to them as aforesaid. 30

COMPLAINANTS ARE WITHOUT ADEQUATE REMEDY IN THE COURTS OF LAW AND THEREFORE PRAY:

1. That J. Frank Finn, who is the defendant to this suit may answer this Bill of Complaint and each statement therein made. 40

Bill of Complaint.

2. That the said defendant, J. Frank Finn, may be ordered and decreed to make a full and true accounting of the monies and property referred to in this Bill of Complaint.

10 3. That the said defendant, J. Frank Finn may be required to account to and that he may be ordered and decreed to pay over to complainants their rightful shares of the monies which may be found owing to them on such accounting.

20 4. That it may be adjudged and decreed that the sale of the mortgaged premises pendente lite to the said J. Frank Finn for the sum of \$145,000.00 fixed and determined the value of the same and obligated the said J. Frank Finn to complainants to pay over to them the difference between such sum plus interest from March 24, 1930, less the sum of \$94,600.00 with interest and costs as aforesaid and interest thereon from the date of the advances to the said Zerman to the said 24th day of March, 1930.

5. That complainants have such other and further relief as to the Court may be deemed just and proper.

30 6. That a Writ of Subpoena may issue commanding the said defendant to answer this Bill of Complaint and to abide by such decree as this Court may make in the premises.

JOHN W. OCKFORD,
Solicitor for and of counsel with
complainants.

Exhibit "A".

THIS AGREEMENT made this 26th day of November, nineteen hundred and twenty-nine, between J. FRANK FINN, party of the first part, BARRY L. BALCH and JAMES P. HALL, parties of the second part and CHARLES ZERMAN, party of the third part;

WITNESSETH :

10

WHEREAS the party of the first part advanced certain moneys to the Modern Theatre Company at the request of the party of the third part; and

WHEREAS the party of the first part holds a mortgage in the principal sum of \$154,760.00, made by the Modern Theatre Company on premises in the Town of West New York, New Jersey, as security for the payment of \$94,600.00 and interest; and
and

20

WHEREAS the equity in the said mortgage was owned by the party of the third part; and

WHEREAS the party of the third part has assigned and conveyed to the parties of the second part all his right, title and interest in and to the said mortgage, subject, however, to the payment to the party of the first part of said sum of \$94,600.00 and interest; and

30

WHEREAS, the said mortgage is now being foreclosed by the party of the first part; and

WHEREAS the party of the first part holds a construction mortgage on premises 250 Harrison Avenue, Jersey City, New Jersey, owned by the party of the third part; and

40

Exhibit "A".

WHEREAS the party of the third part has arranged for a new mortgage on said premises 250 Harrison Avenue, Jersey City, New Jersey, and the parties of the first and third part have requested the parties of the second part to secure a release of certain mechanics liens against said property, so that the party of the third part may secure said new mortgage and the party of the first part may secure payment of his said construction mortgage;

NOW, THEREFORE, in consideration of the premises and the sum of One Dollar (\$1.00), each to the other in hand paid, the receipt whereof is hereby acknowledged, it is mutually agreed as follows:

1. That the party of the first part holds a mortgage dated April 8th, 1929, in the principal sum of \$154,760.00, made by the Modern Theatre Company, covering premises in the Town of West New York, which mortgage is recorded in the Hudson County Register's Office in Book 1664 of Mortgages, page 410, for said county, in trust for the use and benefit of himself and the parties of the second part; the party of the first part, however, to be first paid out of the proceeds realized from the said mortgage, the sum of \$94,600.00, with interest, and the balance to be paid to the parties of the second part.

2. That in the event that the mortgaged premises are sold under foreclosure proceedings now pending, the party of the first part will protect the interests of the parties of the second part by bidding up to the amount due on said mortgage, if necessary.

3. That in the event that title to the said mortgaged premises is acquired by the party of the first

Exhibit "A".

party, the party of the first part agrees, if required by the parties of the second part, to convey the said premises to them, upon payment of the sum of \$94,600.00 and interest; otherwise that the said premises may be sold by the party of the first part for the highest and best price obtainable, and that the proceeds thereof, over and above the said sum of \$94,600 and interest be paid to the parties of the second part. 10

4. That the parties of the second part agree to secure releases of mechanics liens against the premises 250 Harrison Avenue, Jersey City, New Jersey, from Rovegno-Hall Company and Oakland Lumber Company.

5. This agreement shall inure to and bind the heirs, executors, administrators and assigns of the respective parties hereto. 20

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

CHARLES ZERMAN (L. S.)
 J. F. FINN (L. S.)
 BARRY L. BALCH (L. S.) 30
 JAMES P. HALL (L. S.)

Signed, sealed and delivered }
 in the presence of: }

F. J. HALL.

Exhibit "B".

KNOW ALL MEN BY THESE PRESENTS, that whereas the Modern Theatre Company made and executed a mortgage to J. Frank Finn, dated April 8th, 1929, in the sum of \$154,760.00, payable August 4th, 1929, which mortgage is recorded in the Hudson County Register's Office, Book 1546 of Mortgages, page 410 for said county;

10

AND WHEREAS the payment of the principal and interest of the said mortgage is guaranteed by Hudson Exchange Realty Corp.;

AND WHEREAS the said J. Frank Finn holds the said mortgage as collateral security for loan to Charles Zerman of \$94,600.00;

20

AND WHEREAS the said Charles Zerman has requested Barry L. Balch, James P. Hall and Bernard Manacher to become sureties on a certain indemnity bond against mechanics lien claims in the sum of \$225,000.00 to the New Jersey Title Guaranty & Trust Company, dated July 11th, 1929;

30

AND WHEREAS, in consideration of the said Harry L. Balch, James P. Hall and Bernard Manacher executing the said bond to the said New Jersey Title Guaranty & Trust Company and to secure them against any loss by reason of the execution of said bond, said Zerman has agreed to assign his interest in the said mortgage made by the Modern Theatre Company to said J. Frank Finn, aforesaid, to the said James P. Hall and Barry L. Balch;

AND WHEREAS the said Charles Zerman is the owner of certain lands and premises in the City of Jersey City, known as part of Plot F-21, Block

40

Exhibit "B".

1811, situated on the northeasterly side of Harrison Avenue, Jersey City, Hudson County, New Jersey and known by the street numbers 268-276 Harrison Avenue, Jersey City, N. J.;

AND WHEREAS said Charles Zerman is about to secure a mortgage from the Prudential Insurance Company of America in the sum of \$225,000.00 on said lands and premises; 10

AND WHEREAS Rovegno-Hall Company, a corporation of the State of New Jersey and Oakland Lumber Company, a corporation of the State of New Jersey, have furnished and are furnishing materials for the erection and construction of the buildings on said lands;

AND WHEREAS the said Charles Zerman has requested said Rovegno-Hall Company and the said Oakland Lumber Company to execute a release of their liens or claim of liens against the said real estate by virtue of "an Act to secure to mechanics and others payment for their labor and materials in erecting any building (Revision of 1898)", said release, however, to operate only in favor of the said mortgagee, Prudential Insurance Company of America to the extent of its said mortgage of \$225,000.00, or such part thereof as may be actually advanced; 20 30

AND WHEREAS in consideration of the said Rovegno-Hall Company and the said Oakland Lumber Company executing said release and to secure to the said Rovegno-Hall Company and the said Oakland Lumber Company the payment of their claims for materials furnished and supplied and to 40

Exhibit "B".

be furnished and supplied in the erection and construction of the buildings on the lands and premises above described; said Zerman has agreed to assign his interest in said mortgage to said James P. Hall and Barry L. Balch for their benefit.

10 Now, THEREFORE, I, the said Charles Zerman, in consideration of the premises and the sum of One Dollar (\$1.00) and other valuable consideration to me in hand paid, the receipt whereof is hereby acknowledged, do hereby assign, transfer, set over and convey unto the said James P. Hall and Barry L. Balch, their heirs and assigns, the said mortgage made by the Modern Theatre Company to J. Frank Finn, dated April 8th, 1929 and recorded in the Hudson County Register's Office in Book 1646, page
20 410, in the sum of \$154,760.00 and all moneys now due or to grown due thereunder, and the debt and bond thereby secured and covenants therein contained;

30 And the said Charles Zerman does hereby constitute and appoint the said James P. Hall and Barry L. Balch, or their assigns, his true and lawful attorney, irrevocable, with power of substitution and revocation, for the use and at the proper costs and charges of the said party of the second part to ask, demand and receive and to foreclose the said mortgage and to take all lawful ways for the recovery of the money due or to become due on the said mortgage; and on payment to acknowledge satisfaction, or discharge the same, and the said Charles Zerman does hereby covenant that there is now due on the said mortgage the sum of \$154,760.00, with interest.

40 This assignment, however, to be subject to the claim of the said J. Frank Finn to the sum of \$94,-

Exhibit "B".

600.00 for moneys advanced by him to the said Zerman, as aforesaid.

IN WITNESS WHEREOF the said Charles Zerman has hereunto set his hand and seal this 11th day of July, nineteen hundred and twenty-nine.

CHARLES ZERMAN (L. S.)

10

Signed, sealed and delivered }
 in the presence of }
 ANGELO LIMON

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss. :

BE IT REMEMBERED that on this 11th day of July in the year one thousand nine hundred and twenty-nine, before me, an attorney at law of New Jersey, personally appeared CHARLES ZERMAN, who I am satisfied is the person named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he thereupon acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

20

ANGELO LIMON,
 Attorney at Law of New Jersey.

30

I, J. FRANK FINN, have read the foregoing assignment and the recitals with respect to the said mortgage made by the Modern Theatre Company to me are correctly set forth, and I hereby acknowledge that I hold the said mortgage as collateral security for the repayment by Charles Zerman to me of the sum of \$94,600.00, together with accrued interest.

Dated: July 11th, 1929.

40

Signed: J. FRANK FINN.

Exhibit "C".

KNOW ALL MEN BY THESE PRESENTS, that:

10 WHEREAS, CHARLES ZERMAN, of Jersey City, Hudson County, New Jersey, is indebted in the sum of upwards of \$10,000.00 to the OAKLAND LUMBER Co., a corporation of New Jersey, of the same place, on book account for lumber sold and delivered by the Oakland Lumber Co. to Charles Zerman; and

20 WHEREAS said Charles Zerman, by assignment in writing dated July 11th, 1929, assigned to one James P. Hall of the Rovegno-Hall Company, and to Barry L. Batch, President of the Oakland Lumber Co., all his right, title and interest, to the extent of \$60,160.00 in and to a certain Mortgage made by the Modern Theatre Company to J. Frank Finn, dated April 8th, 1929 and recorded in the Hudson County Register's Office in Book 1646 of Mortgages for Hudson County on Pages 410, &c., in the sum of \$154,760 with interest, as security for the payment of said indebtedness of said Charles Zerman to said Oakland Lumber Co., as well as the indebtedness of said Charles Zerman to said Rovengo-Hall Company; and

30 WHEREAS said Oakland Lumber Co. has agreed to assign to said West Bergen Trust Company all moneys now due or to grow due to said Oakland Lumber Co. under the assignment aforesaid, as security for the indebtedness of said Oakland Lumber Co. as endorser on notes of said Charles Zerman now owned and held by said West Bergen Trust Company;

40 NOW, THEREFORE, said Oakland Lumber Co., in consideration of the premises and of the sum of

Exhibit "C".

One (1) dollar and other valuable consideration, to it in hand paid, the receipts whereof is hereby acknowledged, does hereby assign, transfer set over and convey unto said West Bergen Trust Company, all its right, title and interest in and to the mortgage of the Modern Theatre Company to J. Frank Finn aforesaid, as security for the payment of said indebtedness of said Oakland Lumber Co. to said West Bergen Trust Company; and said Oakland Lumber Co. hereby does constitute and appoint said West Bergen Trust Company, or its assigns, its true and lawful attorney, irrevocable, with power of substitution and revocation, for the use and at the proper costs and charges of the said West Bergen Trust Company, to ask, demand and receive, and to foreclose said mortgage, and to take all lawful ways for the recovery of the money due or to become due on the said mortgage; and, on payment, to acknowledge satisfaction, or discharge the same;

IN WITNESS WHEREOF the said Oakland Lumber Co. has hereunto caused its corporate seal to be hereto affixed, and these presents signed by its President, attest by its Secretary, this 8th day of August, 1929.

OAKLAND LUMBER Co. 30
 By BARRY L. BALCH
 President.

Attest:

RALPH R. IMHOFF
 Secretary.

Exhibit "C".

(Corporate Seal)
 STATE OF NEW JERSEY }
 COUNTY OF ESSEX } ss. :

10 BE IT REMEMBERED that on this 8th day of August, 1929, before me, a Notary Public of New Jersey, personally appeared Ralph R. Imhoff who, being by me duly sworn according to law, did make proof to my satisfaction that he is the Secretary of the OAKLAND LUMBER COMPANY, a corporation of New Jersey, the Party of the 1st Part to the within Assignment; that he well knows the corporate seal of said company, and that the seal affixed to said Assignment is such seal, and that same was thereto affixed and said Assignment signed and delivered by BARRY L. BALCH who was at the date and execution thereof, the President of said Company, as the voluntary act and deed of said company, and by due authority thereof, in the presence of deponent, and that deponent subscribed his name as witness to the execution thereof.

20

RALPH R. IMHOFF.

30 Subscribed and sworn to before me at }
 Jersey City, N. J., the date aforesaid. }

HELEN E. RECTOR
 Notary Public of New Jersey.

Exhibit "C".

WHEREAS the Oakland Lumber Co. is indebted to the West Bergen Trust Company, on commercial or business paper of Charles Zerman, endorsed by said Oakland Lumber Co. and owned and held by said West Bergen Trust Company; and

WHEREAS said Oakland Lumber Co. has agreed to secure the payment of said indebtedness by assigning all its right, title and interest in and to a certain Mortgage made by the Modern Theatre Company to J. Frank Finn, dated April 8th, 1929, in the sum of \$154,760 payable August 4th, 1929, which Mortgage is recorded in Book 1646 of Mortgages for Hudson County on Pages 410 &c.;

NOW, THEREFORE, BE IT RESOLVED that the President and the Secretary of the Oakland Lumber Co. be and they are hereby authorized and empowered to execute and deliver to said West Bergen Trust Company, an assignment of all its right, title and interest in and to the Mortgage aforesaid.

I hereby certify the foregoing is a True copy of a RESOLUTION passed by the Oakland Lumber Co., at a meeting of its Board of Directors, held August 8th, 1929.

ARTHUR E. JUM
Secretary Pro Tem.
(Seal)

Answer.

92/129

IN CHANCERY OF NEW JERSEY.

(Filed August 19, 1933)

Between

JAMES P. HALL, BARRY L. BALCH,
ROVENGO - HALL COMPANY, and
WEST BERGEN TRUST COMPANY,
Complainants,

and

J. FRANK FINN,
Defendant.

10

On Bill, etc.

The defendant, J. Frank Finn, of the City of
Jersey City, in the County of Hudson and State of
New Jersey, answering the Bill of Complaint filed
against him herein, says:

20

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted.

30

5. Paragraph 5 is admitted.

6. Paragraph 6 is admitted, but the defendant
alleges that said bid of \$145,000.00 was made at the
request of complainants James P. Hall and Barry
L. Balch, individually, and acting for, in behalf of,
and in the interest of, their respective principals,
Rovegno-Hall Company and Oakland Lumber Com-

40

Answer.

pany, to protect the interest of the parties of the second part mentioned in said agreement and for the sole purpose of carrying out the true intent and meaning of said agreement of November 26th, 1929; that it was considered, understood and agreed between the said complainants, individually and acting as aforesaid, and this defendant that the bid of
10 \$145,000.00 made by this defendant was to be considered merely nominal as between the parties and solely for the purpose of insuring the obtaining of title to said mortgaged premises for the purpose of being held to carry out the provisions of said agreement of November 26th, 1929, and that such bid was not to be considered, nor was it ever intended to be considered, as an obligation of this defendant to pay the whole, or any part thereof.

20 7. Paragraph 7 is admitted, but defendant says that said assignment was made by said Charles Zerman to James P. Hall and Barry L. Balch for the benefit of Rovegno-Hall Company and Oakland Lumber Company, their principals, respectively.

8. Paragraph 8 is admitted.

30 9. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 9, and leaves complainants to their proof thereof.

40 10. Defendant neither admits nor denies that the aforesaid mortgage made by Modern Theatre Company was guaranteed by the Hudson Real Estate Exchange Corporation, but begs leave to have said alleged guaranty referred to for greater certainty. He has no knowledge or information sufficient to

Answer.

form a belief as to the other allegations of paragraph 10.

11. Paragraph 11 is denied, except so much thereof as alleges the complainants secured a release of a certain mechanic's lien referred to in said agreement, which is admitted.

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12. Paragraph 12 is denied, except that defendant admits that he has not paid over any money to said complainants, or any of them.

13. Paragraph 13 is admitted.

14. Paragraph 14 is admitted, and defendant further says that said complainants James P. Hall and Barry L. Balch, acting individually and in behalf of their said respective principals, repeatedly, and up to the time of the filing of the Bill herein, informed defendant that they did not desire to, and would not, exercise the opinion given them by paragraph 3 of the aforesaid agreement dated November 26th, 1929, and that they, and each of them, waived all of their rights and privileges theretofore existing under said paragraph 3.

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15. Defendant denies that since the aforesaid sale to him he has treated and dealt with the former mortgaged premises as his own, and has dealt with the same accordingly, as alleged in paragraph 15, but, on the contrary, defendant alleges that he acquired said mortgaged premises at the request of the said complainants for the mutual benefit of this defendant and said complainants, to be held under and by virtue of the terms and provisions of said agreement of November 26th, 1929; that from the

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Answer.

10 time of the acquisition of said mortgaged premises under said sale, this defendant held said premises for the benefit of himself and said complainants under the provisions of said agreement until said complainants notified defendant that they did not desire to, and would not, exercise the option given them by paragraph 3 of the aforesaid agreement and disclaimed and abandoned any further interest in said mortgaged premises, or any right to the proceeds of the sale thereof in the event that same was sold by this defendant.

20 16. This defendant further answering says, that at the time of the acquisition of said mortgaged premises, there was erected thereon a partially completed theatre and stores building, the same having been abandoned and not completed by the former owner before the institution of said foreclosure proceedings, which structure was practically worthless in its incomplete condition; that after said premises were bid in as aforesaid, there were numerous conferences between complainants and defendant, at which it was agreed between the parties that said premises could not be sold or leased in its incomplete condition, and that if a possible purchaser could be found therefor, the price realized would not
30 be sufficient to pay the amount due this defendant alone under said agreement; that, for the purpose of giving defendant an opportunity to either sell or lease, said complainants thereupon requested this defendant to complete said building and to equip the same for the conduct of a motion picture theatre therein and to add the cost thereof to the amount due him aforesaid, which work this defendant did, expending therefor the sum of \$44,582.46. It was
40 also necessary to keep said premises insured against

Answer.

the loss and damage by fire, and defendant expended the sum of \$3,252.70 for such insurance; that defendant also paid the sum of \$1,870.24 for taxes on said lands and premises to the Town of West New York; that all of said work was done and moneys expended with the knowledge, consent and request of said complainant; that no interest has been paid on said sum of \$94,600.00 since the 8th day of April, 1929, and no part of the moneys expended by him as aforesaid in the completion of said building and the equipment thereof, or insurance and taxes, has ever been refunded to him by any one, nor has he ever received any interest thereon; that since the sale of said mortgaged premises as aforesaid, this defendant has used every effort within his power to sell said premises, but without success.

17. Defendant further answering says, that by reason of the conduct and action of the said complainants, they have no further right, title or interest in and to said lands and premises, or any part thereof, nor have they any interest in said lands and premises under and by virtue of the provisions of said agreement of November 26th, 1929.

18. Defendant further answering says, that at all times, and from the time of said sale of said mortgaged premises to the time when he started to complete said building, he was ready and willing and offered to convey the same to said complainants, or their principals or nominees, upon the repayment to him of said sum of \$94,600.00, together with interest, and since that time he has been ready and willing and offered, and still is ready and willing, and hereby offers, to convey said lands and premises so acquired to said complainants, their principals

Answer.

10 or nominees, upon the repayment to him of the aforesaid sum of \$94,600.00, together with interest, and the amount of moneys expended by him in the acquisition of title to said premises, the cost of completing and equipping the same, together with all moneys expended for insurance and taxes, and interest on said several sums of money, or to convey the same upon the repayment to him of such sum of money as this Honorable Court may determine to be equitable and just.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Solicitors for and of Counsel with defendant.

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Replication.

IN CHANCERY OF NEW JERSEY.

92/129

JAMES P. HALL, BARRY L. BALCH,
ROVENGO - HALL COMPANY, and
WEST BERGEN TRUST COMPANY,
Complainants,

vs.

J. FRANK FINN,
Defendant.

} On Bill, etc. 10

The complainants join issue on the answer of the
defendant.

JOHN W. OCKFORD, 20
Solicitor of Complainants.

I hereby consent to the filing of the within replica-
tion as within time.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Solicitors of the Defendant.

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Order of Reference.

(Filed November 23, 1933)

IN CHANCERY OF NEW JERSEY.

92/129

10	JAMES P. HALL, BARRY L. BALCH, ROVENGO - HALL COMPANY, and WEST BERGEN TRUST COMPANY, Complainants,	}	On Bill, etc.
	vs.		
	J. FRANK FINN, Defendant.		

20 This matter being opened to the court by John W. Ockford, Solicitor of the complainants, and it appearing that Lichtenstein, Schwartz and Friedenberg, Esqs., Solicitors of the defendant, have consented hereto :

It is on this 23rd day of November, 1933, on motion of John W. Ockford, Solicitor of the complainants,

30 ORDERED that the above entitled cause be referred to Hon. J. J. Fallon, one of the Vice Chancellors of this court, to hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein.

LUTHER A. CAMPBELL
C.

We hereby consent to the entry of the foregoing Order.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Solicitors of the Defendant.

A true copy.

40 FERD GARRETSON,
Clerk.

The cause was rereferred by the Chancellor to Vice Chancellor Charles M. Egan, after Vice Chancellor Fallon's resignation, and upon the Court's own motion.

Notice of Hearing.

IN CHANCERY OF NEW JERSEY.

92/129

JAMES P. HALL, BARRY L. BALCH,
ROVENGO - HALL COMPANY, and
WEST BERGEN TRUST COMPANY,
Complainants,

vs.

J. FRANK FINN,
Defendant.

On Bill, etc.

10

SIRS:

PLEASE TAKE NOTICE that the above entitled cause will be heard before Vice Chancellor Charles M. Egan to whom this cause stands rereferred, at Chancery Chambers, 1 Exchange Place, Jersey City, N. J., on April 23rd, 1934, or as soon thereafter as counsel can be heard. The aforesaid time and place having been duly fixed by Order of Designation of the said Vice Chancellor.

20

Dated: February 14th, 1934.

Yours etc.,

JOHN W. OCKFORD,
Solicitor for Complainants.

30

To:

Messrs. LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
51 Newark St.,
Hoboken, N. J.
Solicitors for Defendant.

Service of the within Notice of Hearing is acknowledged this 15th day of February, 1934.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Solicitors of Defendant.

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Conclusions.

IN CHANCERY OF NEW JERSEY.

92/129

10	Between JAMES P. HALL, BARRY L. BALCH, ROVENGO - HALL COMPANY, and WEST BERGEN TRUST COMPANY, Complainants,	}	On Bill, &c. On Final Hearing.
	and		
	J. FRANK FINN, Defendant.		

20 1. Equity has no power to change, alter, amend or vary the terms of an instrument, essentially legal and conceded to plainly and certainly express the views and ideas of its authors.

2. Equity cannot make an agreement for the parties or substitute one agreement with another.

30 3. Equity cannot read into an agreement a plant not contemplated by the parties to it.

4. Each party to the agreement evidenced his approval and consent to it with his signature. That approval or consent is an act of reason accompanied with deliberation, the mind weighing as in a balance, the good and evil on each side; and equity assumes when competent and informed men express it, they mean just what they say.

40

Conclusions.

5. When the complainants, in effect, stand passive and aloof, while the defendant fulfills his expressed obligations under the contract, equity, thereafter, will not permit them to add to his obligations when such action is not warranted by the letter, or the spirit of the agreement.

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6. The defendant under a contract with complainants, agreed to bid up to a certain amount and acquire premises at foreclosure sale, and then convey the same to complainants upon their paying him his investment, plus interest; he accordingly purchased the premises and stood ready to convey; the complainants made no request to convey, but expressly waived their right to it; they demand an account; their application is denied.

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Mr. JOHN W. OCKFORD, for Complainants.

MESSRS. LICHTENSTEIN, SCHWARTZ & FRIEDENBERG, for Defendant.

EGAN, V. C.

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The complainants show that on November 16, 1929, a written agreement was entered into between the defendant, J. Frank Finn, who was a party of the first part thereto, and the complainants, James P. Hall and Barry L. Balch, who were parties of the second part thereto, and Charles Zerman, who is not a party to this suit, was party of the third part thereto. That part of it pertinent to this case, provides as follows:

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Conclusions.

10 "1. That the party of the first part holds a mortgage dated April 8th, 1929, in the principal sum of \$154,760., made by the Modern Theatre Company, covering premises in the Town of West New York, which mortgage is recorded in the Hudson County Register's Office in Book 1664 of Mortgages, page 410, for said County, in trust for the use and benefit of himself and the parties of the second part; the party of the first part, however, to be first paid out of the proceeds realized from the said mortgage, the sum of \$94,600.00 with interest, and the balance to be paid to the parties of the second part.

20 2. That in the event that the mortgaged premises are sold under foreclosure proceedings now pending, the party of the first part will protect the interests of the parties of the second part by bidding up to the amount due on said mortgage, if necessary.

30 3. That in the event that title to the said mortgaged premises is acquired by the party of the first part, the party of the first part agrees, if required by the parties of the second part, to convey the said premises to them, upon payment of the sum of \$94,600.00 and interest; otherwise that the said premises may be sold by the party of the first part for the highest and best price obtainable and that the proceeds thereof, over and above the said sum of \$94,600.00 and interest be paid to the parties of the second part.

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Conclusions.

4. That the parties of the second part agree to secure releases of mechanics liens against the premises 250 Harrison Avenue, Jersey City, New Jersey, from Rovegno-Hall Company and Oakland Lumber Company."

On November 16, 1929, Finn filed a bill to foreclose the above mortgage, and at the foreclosure sale which followed, on March 4, 1930, purchased the premises for the sum of \$145,000.00. 10

On July 11, 1929, Zerman assigned his interest in the mortgage to the complainants, James P. Hall and Barry L. Balch, subject to Finn's claim of \$94,600.00. Hall acted for and in the interest of Rovegno-Hall Company, and Balch for the Oakland Lumber Company.

On August 8, 1929, the Oakland Lumber Company assigned its interest in the mortgage to the West Bergen Trust Company, one of the complainants. 20

Balch and Hall secured a release of the Mechanics' lien claims referred to in the agreement, and they allege they have performed their part of the agreement.

Complainants seek an accounting from Finn, and an order decreeing "that the sale of the mortgaged premises * * * to Finn for the sum of \$145,000.00, fixed and determined the value of the premises and obligated Finn to pay complainants the difference between said purchase price and Finn's interest of \$94,600.00 in the said mortgage." 30

They assert in the bill that they "did not and do not desire to exercise the option given them by paragraph 3 of the aforesaid agreement" and allege that they "have elected to and do elect to hold the said J. Frank Finn as their trustee to account 40

Conclusions.

to them for the value of the property as fixed by the sale to him and for the proceeds of such sale as fixed by the terms and conditions thereof."

10 When Finn acquired the title, as aforesaid, there was an unfinished structure upon the land. This, he had completed, and it was afterwards rented or leased. He denies that said sale "fixed and determined the value of the premises" and says he is not obliged to pay complainants the difference between the sum due him under the mortgage, and the price he paid for the premises, as they allege, and he counters with an offer to convey the premises to them if they will satisfy his claim of \$94,600.00, plus interest and such expenditures as he was forced to make in order to fit the building for the accommodation of tenants.

20 There is little or no dispute about the facts. Finn bought the premises pursuant to the agreement, nobody contends to the contrary. The agreement permitted him "to bid up to the amount due on said mortgage." He agreed "if required by the parties of the second part, to convey the said premises to them upon payment of the sum of \$94,600.00 and interest; otherwise, that the said premises *may* (italics mine) be sold by the party of the first part for the highest and best price obtainable, and that

30 the proceeds thereof, over and above the said sum of \$94,600.00 and interest be paid to the parties of the second part." He was willing to convey the premises upon the acknowledged terms and makes such offer in his answer. The complainants admit they "did not" request him to convey to them; and they expressly waive a conveyance. He has not sold the premises as he is authorized to do under the agreement, and out of the price obtained deduct his

Conclusions.

claim; no time limit within which he "MAY" sell is fixed by the instrument. The agreement does not say he "SHALL" sell, but "MAY" sell. The complainants demand what the agreement gives them no title to exact: an accounting. They may, under certain conditions acquire the premises, but no provision of the agreement comprehends an account.

The parties themselves fixed and determined their rights, when they appended their signatures to the undisputed agreement. That agreement is not elastic; it is decisive. The rights of the parties to it still are what they then and there declared them to be: nothing more; nothing less. Equity has no power to change, alter, amend or vary the terms of that, their, instrument, which is essentially legal and conceded to plainly and certainly express the views and ideas of its authors or makers. Equity cannot make an agreement for them, nor can it substitute their agreement with another; it cannot read into it, a plan not contemplated by the parties to it. Each party to the agreement evidence his approval and consent to it with his signature. That approval or consent is an act of reason accompanied with deliberation, the mind weighing as in a balance, the good and evil on each side; and equity assumes when competent and informed men state it, they mean just what they say.

The complainants say, since Finn acquired the title to the premises, he has exercised absolute control over it. That is true, but they have acquiesced in such control. They have elected to hold him as their trustee to account to them for the value of the property as fixed by the sale. By what authority, I fail to discover. What part of the agreement accords them that privilege? No part of it ever

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Conclusions.

suggests such an inference. It was not calculated, nor intended, that the foreclosure sale bid would establish the value of the premises. Finn, aside from protecting his own investment, accommodated the others. He unquestionably had a right to manage and control the property for the purpose of keeping it in a tenantable condition; he had invested heavily in it; he had the unfinished structure completed; he paid the taxes and insurance premiums charged against it; all of this he did, not only for his own benefit, as before noted, but for the benefit of the complainants as well. He sought no gain; he has shouldered the burden throughout. The complainants, in effect, stood passive and aloof, while Finn fulfilled his expressed obligations under the contract; they knew what he was doing and raised no voice of protest; then when his efforts made the premises physically and financially attractive without cost or labor to them, they come to life and demand a share in the fruits of accomplishment, without having borne any of the burden; equity, therefore, will not permit them to add to his obligations when such action is not warranted by the letter, or the spirit of the agreement. In my opinion, Finn throughout has acted equitably and just towards the complainants. He has set an admirable example of fairness well worthy of emulation. Complainants seek equity but show no inclination to extend it. Finn "MAY" yet sell the premises, because "TIME is not of the essence."

The bid of Finn to acquire the title was made in accordance with an agreed purpose. That purpose cannot be distorted, or converted, into something not contemplated by the parties in their agreement. Complainants have expressly renounced their right

Conclusions.

to ask for a conveyance and pray for relief not warranted by the agreement. Finn has in all respects complied with the terms of the agreement; to grant complainants prayer, in effect, would be to penalize the good conscience exhibited by the defendant. The court, under the circumstances, has no alternative but to grant the application of the defendant and dismiss the bill of complaint. 10

I shall advise a decree to this effect.

Dated, May 11, 1934.

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Case.

IN CHANCERY OF NEW JERSEY.

10	Between JAMES P. HALL, BARRY L. BALCH, ROVENGO-HALL COMPANY, a cor- poration of New Jersey, and WEST BERGEN TRUST COMPANY, a banking corporation of New Jersey, <p style="text-align: center;">Complainants,</p> and <p style="text-align: center;">J. FRANK FINN, Defendant.</p>	} On Bill, &c.
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April 23, 1934.

20 Transcript of stenographic record of final hearing in the above entitled cause before His Honor, CHARLES M. EGAN, Vice Chancellor, at the Chancery Chambers, Jersey City, New Jersey, in the presence of Mr. John W. Ockford, for complainants, and Mr. Julius Lichtenstein (of Lichtenstein, Schwartz & Friedenbergl) for defendant.

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CASE FOR THE COMPLAINANTS.

Mr. Ockford: I desire to offer in evidence the agreement referred to in paragraph 1 of the bill of complaint and admitted by the answer.

Mr. Lichtenstein. No objection.

(Agreement marked Exhibit C 1 in evidence.)

Mr. Ockford: I desire to offer in evidence the assignment of July 11, 1929 by Charles Zerman to the

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J. Frank Finn. Called by Complainants. Direct.

complainants Hall and Balch. It is referred to in the pleadings and admitted by the answer.

Mr. Lichtenstein: No objection.

(Assignment marked Exhibit C 2 in evidence.)

Mr. Ockford: I desire to offer in evidence the assignment to the complainant West Bergen Trust Company, which is also set out in the pleadings and admitted in the answer. 10

Mr. Lichtenstein: No objection.

(Assignment marked Exhibit C 3 in evidence.)

Mr. Ockford: If your Honor please, I requested the clerk to forward to you the file in the case of J. Frank Finn against Modern Theatre Company, Docket 75, page 591. In lieu of that I would like to offer in evidence an abstract of those proceedings merely for convenience. You have the file here if it is necessary to refer to it. 20

Mr. Lichtenstein: No objection.

(Abstract marked Exhibit C-4 in evidence.)

Mr. Ockford: The file of the foreclosure suit and the abstract show that on March 4, 1930 the mortgaged premises were sold by the master to the defendant in this case for the sum of \$145,000, and that the sale was thereafter confirmed on March 24, 1930. I will ask Mr. Finn to take the stand. 30

J. FRANK FINN, being sworn:

DIRECT EXAMINATION BY MR. OCKFORD:

Q. Mr. Finn, you are a member of the bar of this state? A. Yes, sir.

Q. And you are the defendant in this suit? A. Yes, sir. 40

J. Frank Finn. Called by Complainants. Direct.

Q. And of course you are familiar with all the transactions referred to in the pleadings in this case. A. Yes, sir.

Q. Do you recall the sale to yourself on March 4th, 1930? A. I do.

10 Q. And thereafter did you receive a deed for the mortgaged premises from the master? A. Yes, sir.

Q. Can you tell us when you actually got the deed?

Mr. Lichtenstein: Can't we agree on it?

Mr. Ockford: Maybe you have the deed here.

Mr. Lichtenstein: Yes.

The Witness: I will get it.

20 The Court: In looking over the memoranda submitted by counsel I think there are a lot of things you can agree to. You both seem to be in accord on a great many things.

Mr. Ockford: Yes, sir. I merely want to know what happened after the sale—what Mr. Finn done with the property.

BY MR. OCKFORD:

Q. You have the deed yourself? A. Yes, sir.

30 Q. Will you produce it? A. Yes, sir. (Deed produced by witness.)

Mr. Ockford: I offer in evidence a deed from Frank W. Hastings, Special Master, to J. Frank Finn, dated March 24, 1930, recorded July 19, 1932 in Book 1799 of Deeds for Hudson County on page 346.

(Deed marked Exhibit C 5 in evidence.)

J. Frank Finn. Called by Complainants. Direct.

BY MR. OCKFORD:

Q. Mr. Finn, did you at any time pay into the Court of Chancery, or to the master, any part of that sum of \$145,000? A. I did not.

Q. Did you sign a receipt in lieu of paying the money? A. Well, I don't remember now whether I did or not give a receipt. We simply took the deed for the property. I simply bought it for the purpose of this agreement. 10

Q. The question is how did you get the deed without paying the money. A. Of course, being one of the complainants we were entitled to it.

Q. You signed a receipt or a release. A. This was a sale pendente lite and not a sheriff's sale—a master's sale. My recollection is there wasn't any paper signed. 20

Q. Well, you got the deed and you didn't pay any money. A. That's right.

Q. You still retain title to the property. A. I have the record title to the property.

Q. After the sale was confirmed what, if any action, did you take with respect to the property itself, first as to completing the sale, and secondly as to any disposition of the property. A. Well, the property was sold, I believe, in 1930, and after the sale all the persons in interest got together and had numerous conversations. 30

Q. I want the facts. Tell us what you did with respect to the property—the actual property itself. A. From 1930 there wasn't anything done to it at all for about two years, and as I say our idea was—

Q. Mr. Finn, just tell us the facts. What happened to the building itself? A. Nothing was done for over two years.

Q. And then what was done? A. Then in order to protect the interests— 40

J. Frank Finn. Called by Complainants. Direct.

Mr. Ockford: I move to strike that out.

The Court: What was done? Either something was done or there was nothing done.

(Witness continuing.) The property was then completed. The property was going to ruin and we had to complete it in order to preserve the equity in the property.

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BY MR. OCKFORD:

Q. You had it completed by contract work, did you? A. Yes.

Q. What is the character of the building? A. The character?

Q. Yes. A. It is a theatre building.

Q. And stores? A. And stores and a loft above.

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Q. When was it completed? A. It was completed around July or August, 1930. The end of the summer of 1930. 32, pardon me—1932.

Q. Did you rent out any part of the premises to any one? A. After it was completed we tried to dispose of the building and couldn't do anything with it. So in order not to have it going to decay—

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Mr. Ockford: I move to strike that out.

BY THE COURT:

Q. Did you rent the property? A. Yes.

BY MR. OCKFORD:

Q. To whom was it rented? A. It was originally leased to one corporation and they got out of it, and we had to rent it to another party.

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C. W. Rovegno. Called by Complainants. Direct.

Q. Did you rent the stores separately or did you rent the entire building? A. In the first instance we rented the entire building. Since then it has been to individuals.

Q. Is there a tenant now in occupancy? A. A tenant for the theatre?

Mr. Lichtenstein: Just answer the question. 10

A. Yes.

BY MR. OCKFORD:

Q. What part of the premises is rented? A. The theatre and one store.

Q. Since you acquired the title have you encumbered the property by mortgage or otherwise? A. No. 20

Mr. Ockford: That's all.

Mr. Lichtenstein: No questions, Mr. Finn.

CHARLES W. ROVEGNO, being sworn:

DIRECT EXAMINATION BY MR. OCKFORD:

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Q. You are an officer of the Rovegno-Hall Company, a corporation of this state? A. Yes, sir.

Q. And what office do you hold? A. President.

Q. Were you the president of the company in November, 1929? A. Yes, sir.

Q. Have you been president ever since? A. Yes.

Q. You are familiar with this West New York theatre property, are you not? A. Yes.

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C. W. Rovegno. Called by Complainants. Direct.

Q. Are you familiar with the transaction between your company and Mr. Finn regarding the theatre property in West New York? A. I am.

Q. Did you attend the sheriff's sale, or the master's sale, when the property was sold? A. I was there.

10 Q. At any time after that sale did your company, or Mr. Hall for it, receive any part of the proceeds of that sale in money? A. No, sir.

Q. Where did it take place, by the way. A. In the building. In the theatre building in West New York.

Q. And do you remember Mr. Hastings, the master, conducting the sale? A. I do.

Q. Was Mr. Finn there? A. Yes.

Q. And others were there. A. Yes.

20 Q. Did you hear the bidding? A. Yes.

Q. Was there any bid besides the bid which was accepted? A. No, only one bid.

Q. And that was made by whom? A. Mr. Finn.

Q. What was the amount? A. \$145,000.00.

30 Q. Prior to the actual bidding did you have a conversation with Mr. Finn? A. Well, I got there a little late and when I came in Mr. Finn came over to me and he said, "How high will I bid?", and I said, "Our interest would accept \$45,000 in cash."

Mr. Lichtenstein: One minute, if the court please. I object to that and ask it be stricken out upon the ground it is incompetent, irrelevant and immaterial. That doesn't come within the terms of the pleadings at all.

The Court: How is it incompetent, irrelevant and immaterial?

40 Mr. Lichtenstein: It is just alleged. They are not standing on any such theory.

Barry L. Balch. Called by Complainants. Direct.

Mr. Ockford: It has a direct bearing on the issue raised by the answer, and the witness, Mr. Finn, was obliged to make a bid to protect. I didn't expect the witness to tell all that was said and I am not particularly interested. It may become important on rebuttal. I want to establish—

Mr. Lichtenstein: What. 10

Mr. Ockford: That there was one bid of \$145,000 by Mr. Finn.

Mr. Lichtenstein: We consent to that if that's what you want.

Mr. Ockford: I think sooner or later it will have to be done. Let it stand subject to your objection.

Mr. Lichtenstein: I would like to have the record clear, if you don't mind. If that is all he wants to find out, whether there was more than one bid, why go into the matter. But the statement of the witness is irrelevant at this time. 20

The Court: There won't be any question about it. It will be stricken out. I will sustain the objection.

Mr. Ockford: All right, that's all for the moment.

Mr. Lichtenstein: No questions. 30

BARRY L. BALCH, being sworn:

Mr. Lichtenstein: Do you want to bring out that he received any moneys?

Mr. Ockford: Yes.

Mr. Lichtenstein: We admit Mr. Balch received no cash from the proceeds of this property. 40

Barry L. Balch. Called by Complainants. Direct.

Mr. Ockford: I just want to ask him one question.

DIRECT EXAMINATION BY MR. OCKFORD:

10 Q. Mr. Balch, which company are you connected with in this matter? A. Oakland Lumber Company.

Q. And your claim is assigned to the West Bergen Trust Company but you still have an equity in it, isn't that so? A. We have no equity in it.

Q. Did you have charge of the transaction at the time the sale took place for the Oakland Lumber Company? A. Partially so, yes.

Q. Did you attend the master's sale? A. No.

20 Mr. Ockford: That's all.

Mr. Lichtenstein: No questions.

Mr. Ockford: That's all. That's our prima facie case.

Mr. Lichtenstein: The defendant rests, if the court please.

Mr. Ockford: Does your honor wish to hear argument or submit a brief.

Mr. Lichtenstein: Why can't we argue it and be done with it.

30 The Court: All right.

(After argument of counsel.)

The Court: I will take the matter under consideration. If you want to submit any further memorandum I would be glad to receive it.

Exhibit C-4.

the sum of \$154,760. Bears date April 8, 1929. Bond of even date. Mortgage recorded in Hudson County, in book 1546, page 410.

The mortgaged premises are described as follows :

10 ALL those certain tracts or parcels of land and premises, together with the appurtenances to the same belonging or in anywise appertaining, hereinafter particularly described, situate, lying and being in the Town of West New York in the County of Hudson and State of New Jersey, and more particularly described as follows :

20 FIRST TRACT: Which on a certain map on file in the office of Register in the County of Hudson, entitled Map "F", property belonging to the West New York Improvement Company, situated in West New York, Hudson County, New Jersey, County Block 2451, made by Ord. J. Darling, Town Surveyor, December 1906, and filed in the said Register's office of Hudson County on July 1, 1908, are known, marked and distinguished as lots Nos. 17, 18, 19 and 20 in Block 9 and being more fully described as follows: BEGINNING at a point in the northerly side of Twentieth Street 98.82 feet westerly from the corner formed by the intersection of the northerly side of Twentieth Street with the westerly side of Bull's Ferry Road, now Park Avenue; running thence northerly parallel with Park Avenue or nearly so 100 feet; thence westerly and parallel with Twentieth Street or nearly so 100 feet; thence southerly and again parallel with Park Avenue, or nearly so 100 feet to the northerly side of Twentieth Street, and thence easterly along the northerly side of

Exhibit C-4.

Twentieth Street 100 feet to the point or place of beginning.

SECOND TRACT: Which on a certain map on file in the office of the Register in the County of Hudson entitled Map "F", property belonging to the West New York Improvement Company, situated in West New York, Hudson County, New Jersey, County Block 2451, made by Ord. J. Darling, Town Surveyor, December, 1906, and filed in the Register's office of Hudson County on July 11, 1908, is known and distinguished as lot No. 24, in block No. 9, situated on the westerly side of Bull's Ferry Road beginning at the distance of 75 feet from the northerly side of Twentieth Street as shown on said map, and is 25 feet wide in front of Bull's Ferry Road, 25 feet wide in the rear, 99 feet and 33 one-hundredths of a foot in depth on the northly side as laid down on said map.

THIRD TRACT: Which on a certain map on file in the office of the Register in the County of Hudson, entitled map "F", property belonging to the West New York Improvement Company, situated in West New York, Hudson County, New Jersey, County Block 2451, made by Ord. J. Darling, Town Surveyor, December 1906, and filed in the said Register's office of Hudson County on July 11, 1908, are known, marked and distinguished as lot No. 23, in block 9, situated on the westerly side of Bull's Ferry Road beginning at the distance of 50 feet from the northerly side of Twentieth Street as shown on said map, and is 25 feet wide in front on Bull's Ferry Road, 25 feet wide in the rear, 99 feet and 12 one-hundredths of a foot in depth on the southerly side and 99.22 feet in depth on the northerly side, all as laid down on said map.

Exhibit C-4.

June 6, 1929

Modern Theatre Co., mortgaged said land to Ready Realty and Investment Co. for \$32,700. Mortgage recorded in book 1564, page 42.

June 6, 1929

10 Modern Theatre Co., mortgaged said land to Jacob B. Wolfe for \$3,300. Mortgage recorded in book 1564, page 46.

June 6, 1929

20 Modern Theatre Co., mortgaged said land to Philip Epstein for \$16,250. Mortgage recorded in book 1564, page 50. Said mortgage contains a clause in the event Samuel L. Hirschberg shall be obligated to pay the sum of \$4,000, in accordance with agreement made between the Modern Theatre Co., Jacob Weisberg trading as Weisberg & Weisberg and said Samuel L. Hirschberg, as trustee, then the monies so advanced shall be a prior lien on the lands and premises described therein, to that of the said mortgage to Phillip Epstein.

30 Payment of principal and interest of aforesaid mortgage made by Modern Theatre Co. to J. Frank Finn, was guaranteed by the Hudson Exchange Realty Corporation.

The whole of the principal is due.

Prayer for subpoena directed to defendants first above named.

The bill is signed,

JOHN H. MORIARTY,
Sol'r. and counsel with Compl't.

Exhibit C-4.

Subpoena tested Nov. 16, 1929

Defendants all in court except Philip Epstein who was returned non est.

Petition for Leave to Sell Property pendente lite.
Filed Dec. 2, 1929

The petition of the Complainant shows that the building upon the premises is so constituted so as to make it liable to deteriorate in value pending this suit, and to make its care or preservation difficult or expensive, and that the said building can now be sold, and a better price realized therefor than at a later season. 10

Petitioner further shows that by reason of the foregoing, it is absolutely essential that this court direct a sale pendente lite of the lands and premises described in the bill. 20

Prays that an order may be made herein for the sale of the mortgaged premises, pending this suit, and that the proceeds thereof be paid into court.

Duly verified.

Order to Show Cause for Sale of Property Pendente Lite.

Filed Dec. 2, 1929

Service acknowledged for all the defendants except Phillip Epstein. Duly mailed to Phillip Epstein. 30

Answer of Hudson Exchange Realty Corporation
Filed Dec. 16, 1929

Samuel L. Hirschberg, Sol'r.

Order for Sale of Property Pendente Lite
Filed Dec. 16, 1929

It is ORDERED that the premises be sold at public auction to the highest bidder in the presence and 40

Exhibit C-4.

under the direction of Frank W. Hastings, Jr., Master, and that after such sale he forthwith report the same to this court, and if said report be confirmed by this court, that he make and execute to the purchaser or purchasers good and sufficient conveyances in the law for said lands and premises, upon their complying with the conditions of said
10 sale; and that said sale and conveyance or conveyances, duly executed as aforesaid, be valid and effectual forever, and operate as an effectual bar, both at law and in equity, against the parties to this suit and all persons claiming by, from or under them or any of them.

It is further ordered that the said Special Master pay the proceeds of said sale to the Clerk of this court, to remain in the custody of said clerk,
20 subject to the same liens and equities of all parties in interest as were the said mortgaged premises, pending this suit, and to be disposed of as this court shall direct.

Order of Publication
Filed Jan. 6, 1930

Directed to the non resident defendant.

Order Amending Order for Sale.
30 Filed Jan. 14, 1930

It appearing that the description of mortgaged premises contained in the order for sale thereof, dated Dec. 16, 1929, contains certain errors and omissions from the description thereof contained in the bill:

It is ordered that said order for sale be amended and the Master therein named is ordered and directed to sell and advertise the sale of the premises
40

Exhibit C-4.

in accordance with the description contained in said bill.

Notice of Jacob B. Wolfe and Ready Realty and Investment Co. to have their liens reported upon Filed Jan. 25, 1930
Samuel L. Hirschberg, Sol'r

10

Proof of Publication & Mailing
Filed March 10, 1930

Duly published.

On Jan. 16, 1930 notice was mailed to Phillip Epstein, 38 Second Avenue, New York City.

Decree Pro Confesso
Filed March 10, 1930

Bill is taken as confessed against all the non answering defendants.

20

Report of Sale:
Filed March 17, 1930

The Master reports that on March 4, 1930 he sold the premises at public vendue to J. Frank Finn, for the sum of \$145,000.

Affidavit of highest and best price annexed.
(Regular.)

30

Proof of Publication in the Hudson Dispatch and Posting annexed.

NOTE: "There is a proof of publication annexed to the report which appears to belong in another case. There is no proof of publication in the Jersey Journal as reported by the Master."

40

Exhibit C-4.

Order Confirming Sale
 Filed March 24, 1930

Sale is confirmed. Deed to Purchaser.

Order of Reference
 Filed March 31, 1930

Referred to James J. Murphy, Master.

10

(Service acknowledged by Sol'r for Hudson Exchange Realty Corporation of notice of application for reference.)

Petition & Order Admitting Cadel Bros. Inc., as party def't.
 Filed April 25, 1930

20

Petition sets forth that the face amount of the said mortgage held by complainant is \$154,760. Of the said sum owing by said Modern Theatre Co. under the bond and mortgage mention in the bill, there is claimed to be due by Complainant to him, the sum of \$94,000 and the said complainant acknowledges that he holds the said bond and mortgage as payment to him of said sum of \$94,600. and interest, as trustee for the benefit of Charles Zerman.

30

On or about July 9, 1929 Charles Zerman assigned his interest in said mortgage to the extent of \$10,000 to Cadel Bros Inc. Assignment recorded in Hudson County Register's office and is known as instrument No. 800.

It is ordered that leave be and it hereby is granted the petitioner Cadel Bros Inc. to intervene herein as party defendant with like force and effect as though it were made party defendant in the said bill, as the same is filed herein, and said Cadel Bros. Inc., is hereby admitted as party defendant.

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Exhibit C-4.

Petition & Order Admitting Party Defendant.

Filed April 25, 1930

The petition of Israel Max, Harry Max, David H. Max and Bernard Max, trading as Israel Max & Sons shows that on Feb. 6, 1930 Charles Zerman assigned his then interest in and to the aforesaid bond and mortgage to petitioners. Assignment recorded in Hudson County, and is known as instrument No. 801. 10

It is ordered that leave be and it hereby is granted the petitioner Israel Max & Sons to intervene herein as party defendant, with force and effect as though it were made party defendant in said bill, as the same is filed herein, and the said Israel Max & Sons is hereby admitted as party defendant.

Petition & Order Admitting Party Defendant.

Filed May 5, 1930 20

The petition of Rovegno-Hall Company, a corporation shows that on Dec. 12, 1929 Charles Zerman assigned his then interest in and to the aforesaid bond and mortgage to N. J. Lathers Inc., a corporation of N. J. assignment recorded in book 200, page 109. Thereafter on Dec. 16, 1929 N. J. Lathers Inc., a corporation of N. J. assigned to petitioner its interest. Assignment recorded in book 200, page 110. 30

On Jan. 3, 1930 Charles Zerman assigned his then interest in and to the aforesaid bond and mortgage to Charles Sondak & Sons Inc., a corporation of N. J. Assignment recorded in book 200, page 111.

On Jan. 3, 1930 Charles Sondak & Son Inc., a corporation of N. J. assigned its interest in said mortgage to petitioner. Assignment recorded in book 200, page 113. 40

Exhibit C-4.

It is ordered that leave be and it hereby is granted the petitioner to intervene herein as party defendant, with like force and effect as though it were made a party defendant in said bill, as the same is filed herein; and the said Rovegno-Hall Company is hereby admitted as party defendant herein.

10

Master's Report.

Filed June 3, 1930

The Master reports that the Solicitor for the Complainant produced his bond and mortgage, as referred to in the bill. Due thereon the sum of \$165,413.00.

20 The Master further reports that he was attended by the Solicitors for Samuel Hirschberg, Jacob B. Wolfe, and Ready Realty and Investment Company.

"Master's summons annexed.—Service duly acknowledged."

Searches.

Filed June 3, 1930

30 Order dismissing bill as to the Hudson Exchange Realty Corporation

Filed Aug. 5, 1930

Consented to by the Sol'r. for Hudson Exchange Realty Corporation and Sol'r. for Complainant.

Final Decree.

Filed Aug. 5, 1930

It is ordered, adjudged and decreed that the said bill be taken as confessed, and that the said Master's report with all matters and things therein con-

40

Exhibit C-4.

tained stand confirmed; that the complainant is entitled to have the sum of \$165,413. with lawful interest thereon to be computed from the date of said report together with his costs of this suit, raised and paid out of the mortgaged premises.

And it appearing that proceeds of said sale are not sufficient to pay amount due Complainant together with his costs of suit, it is further ordered that, upon payment to said Master of his fees and commissions and expenses of said sale, said complainant may give his receipt to said Master on account of the amount so as aforesaid due to said complainant, in lieu of cash, in satisfaction of said purchase price and that thereupon the aforesaid decree in favor of complainant for \$165,413 and interest be deemed satisfied to the extent of said purchase money, less the amount of said Master's fees, commissions and expenses of sale and amount of complainant's costs to be taxes.

Defendants stand debarred and foreclosed, etc.

Petition & Order to Show Cause why complainant should not complete his bid
Filed Aug. 18, 1930

Stipulation
Filed Aug. 27, 1930

It is stipulated that the hearing at the return of order to show cause made Aug. 18, 1930 be adjourned until Sept. 22, 1930.

Compl'ts. Costs. \$1,147.01.

LAST ENTRY.

* * * * *

Exhibit C-5.

We have examined the proceedings in the above entitled cause and report the same regular in form, except as above noted.

The State Capital Title & Abstract Company,
FREDERICK ELER,
Title Officer.

10

Dated Sept. 25, 1930
M.

Exhibit C-5.

This Indenture made the 24th day of March, 1930, between Frank W. Hastings, Jr., Special Master in Chancery of the first part and J. Frank Finn of the City of Jersey City, County of Hudson, State of New Jersey of the second part;

20

Whereas on the 16th day of December, 1929, the Court of Chancery of New Jersey in a certain cause therein depending, wherein J. Frank Finn is complainant and Modern Theatre Company, a corporation of the State of New Jersey and others are defendants, did order and decree that the mortgaged premises mentioned in the Bill of Complaint in said cause, with the appurtenances, be sold at public auction to the highest bidder, in the presence and under the direction of Frank W. Hastings, Jr., one of the Special Masters of this Court; and that he give public notice of the time and place of such sale and in all respects conduct the same according to the provisions of the statutes in such case made and provided; and that after such sale he forthwith

30

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Exhibit C-5.

report the same to said Court and if said report be confirmed by the Court, that he make and execute to the purchaser or purchasers good and sufficient conveyance in the law for said lands and premises upon their complying with the conditions of said sale and said Court having by a subsequent order in said cause dated January 14th, 1930 order and direct said Master to advertise and sell said premises in accordance with the description contained in said Bill of Complaint and hereinafter particularly described; all of which will more fully appear by reference to the record in said cause; and

10

Whereas by the report of said Master dated March 10th, 1930 and proofs thereto attached, it appears that said Master did by public advertisements signed by himself and set up at five or more public places in the County of Hudson, one whereof was in the ward of Jersey City where said real estate is situate, at least three weeks next before the time appointed for selling the same, and also published in the Jersey Journal and in the Hudson Dispatch, two of the newspapers printed and published in the County of Hudson in which said real estate is situate, of which one was a newspaper printed and published at the County seat of said County and one of which was a newspaper printed and published at the City of Union City in said county, four times in each of said newspapers, at least once a week during four consecutive calendar weeks, the last publication being not more than seven days prior to the time appointed for said sale, give public notice that the said lands and premises would be exposed to sale at public vendue to the highest bidder on Tuesday the 11th day of February, 1930, at two o'clock in the afternoon upon the premises;

20

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Exhibit C-5.

and at the time and place so appointed and advertised, did publicly adjourn said sale from week to week until Tuesday the 4th day of March, 1930 at the hour of two o'clock in the afternoon of said day; and at the time and place to which the said sale was adjourned as aforesaid, did expose the said lands and premises mentioned and described in said Bill
10 of Complaint to sale at public vendue to the highest bidder and J. Frank Finn then and there bidding therefor the sum of One Hundred Forty-five Thousand (\$145,000) Dollars for the same and no one bidding so much or more for the same, the said tracts of land and premises hereinafter described were struck off and sold to the said J. Frank Finn at the price aforesaid;

20 And, whereas the said Court of Chancery by its order entered in said cause dated March 24th, 1930 ordered that the said sale be confirmed as valid and effectual at law and further ordered the said Special Master to execute a good and sufficient conveyance in the law to said purchaser or his assigns, for the said mortgaged premises so sold.

30 Now, therefore, this Indenture witnesseth, that I the said Frank W. Hastings, Jr., Special Master as aforesaid, under and by virtue of said orders and decrees and in execution of the power and trust in me reposed, and also for and in consideration of the said sum of \$145,000, to me in hand paid, the receipt whereof I do hereby acknowledge, have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said J. Frank Finn his heirs and assigns:

40 All those certain tracts or parcels of land and premises, together with the appurtenances

Exhibit C-5.

to the same, belonging or in any wise appertaining, hereinafter particularly described, situate, lying and being in the Town of West New York in the County of Hudson and State of New Jersey, and more particularly described as follows:

First Tract.

10

Which on a certain map on file in the office of Register in the County of Hudson, entitled map "F", property belonging to the West New York Improvement Company, situated in West New York, Hudson County, New Jersey, County block 2451, made by Ord. J. Darling, Town Surveyor, December, 1906 and filed in the said Register's Office of Hudson County on July 11, 1908, are known, marked and distinguished as lots Nos. 17, 18, 19 and 20, in Block 9, and being more fully described as follows:

20

Beginning at a point in the northerly side of Twentieth Street ninety-eight feet and ninety two one hundredths of a foot westerly from the corner formed by the intersection of the northerly side of Twentieth Street with the Westerly side of Bull's Ferry Road, now Park Avenue; running thence northerly parallel with Park Avenue, or nearly so, one hundred feet; thence westerly and parallel with Twentieth Street, or nearly so, one hundred feet, thence southerly and again parallel with Park Avenue, or nearly so, one hundred feet to the northerly side of Twentieth Street, and thence easterly along the northerly side of Twentieth Street, one hundred feet to the point or place of beginning.

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Exhibit C-5.

Second Tract.

10 Which on a certain map on file in the office
of the Register in the County of Hudson, en-
titled Map "F", property belonging to the West
New York Improvement Company, situated in
County Block 2451, made by Ord. J. Darling,
Town Surveyor, December, 1906, and filed in
the Register's office of Hudson County on July
11, 1908, is known and distinguished as lot No.
24 in Block No. 9, situated on the westerly side
of Bull's Ferry Road, beginning at the distance
of seventy-five feet from the northerly side of
Twentieth Street as shown on said map, and
is twenty-five feet wide in front on Bull's Ferry
20 Road, twenty-five feet wide in the rear, ninety-
nine feet and thirty-three one hundredths of a
foot in depth on the northerly side as laid down
on said map.

Third Tract.

30 Which on a certain map on file in the office
of the Register in the County of Hudson, en-
titled map "F", property belonging to the West
New York Improvement Company, situated in
West New York, Hudson County, New Jersey
County Block 2451, made by Ord. J. Darling,
Town Surveyor, December 1906 and filed in the
same Register's Office of Hudson County on
July 11th, 1908 are known marked and distin-
guished as lot No. 23 in Block 9, situated on the
westerly side of Bull's Ferry road, beginning
at the distance of fifty feet from the northerly
side of Twentieth Street, as shown on said map,
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Exhibit C-5.

and is twenty-five feet wide in front on Bull's Ferry Road, twenty-five feet wide in the rear, ninety-nine feet and twelve one hundredths of a foot in depth on the southerly side and ninety-nine feet and twenty-two hundredths of a foot in depth on the northerly side, all as laid down on said map.

10

Together with all and singular the hereditaments and appurtenances to the said premises belonging or in anywise appertaining, to have and to hold the same unto the said J. Frank Finn, his heirs and assigns to his and their only proper use benefit and behoof forever, in as full ample and beneficial a manner as by virtue of the said orders and decrees, I may, can or ought to convey the same.

20

In witness whereof, I Frank W. Hastings, Jr., Special Master aforesaid have hereunto set my hand and seal this day and year first above mentioned.

FRANK W. HASTINGS,
Special Master in Chancery.

Duly sworn to and subscribed before a Master in Chancery of New Jersey, and certificate of approval by said Master attached.

30

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TABLE I

Faint, illegible text, likely a table or list of contents, spanning the majority of the page.

New Jersey Court of Errors and Appeals

Between

JAMES P. HALL, BARRY L. BALCH,
ROVENGO-HALL COMPANY, and
WEST BERGEN TRUST COMPANY,
Complainants-Appellants,

J. FRANK FINN,
Defendant-Respondent.

On Appeal
from the
Court of
Chancery.

BRIEF FOR APPELLANTS.

Statement.

This is an appeal from a decree of dismissal. The Bill of Complaint was filed to compel defendant-respondent to account for the proceeds of a sale of trust property.

That defendant was a trustee for complainants and that there was a sale of the property is not disputed.

The trust property consisted of a mortgage. Defendant held the same for himself and complainants. The mortgage was foreclosed by defendant herein. The mortgaged premises were sold *pendente lite* by a Master. Respondent purchased at the sale. His was the only bid. The price was \$145,000.00. Of this respondent was entitled to \$94,600.00 plus interest, and complainants to the rest.

Respondent being the trustee and becoming the purchaser could be held as such or could be held to hold the property in trust. The complainants

had the right to elect to ratify or disaffirm the sale. They elected to ratify the sale and hold defendant to the price. Defendant by his conduct acquiesced in such election. The facts do not appear to be in dispute.

Facts.

Defendant J. Frank Finn held the legal title to a \$154,760.00 mortgage made by Modern Theatre Company in trust for himself and complainants. His interest was in the amount of \$94,600.00 plus interest. Complainants were entitled to the balance. Defendant Finn foreclosed the mortgage. There was a sale *pendente lite*. Mr. Finn bought at the sale. His bid, the only one, was for \$145,000.00. The sale was duly confirmed and title passed to Mr. Finn. At the time of the sale the building on the premises was unfinished. After taking title Mr. Finn completed the building, made leases and exercised full ownership and control.

Prior to the sale an agreement in writing was entered into which provided for the contingency of the sale. This agreement is Exhibit "A" to the bill of complaint (Case, p. 11).

This agreement provided that Mr. Finn should protect at the sale "by bidding up to the amount due on said mortgage, if necessary" (Case, p. 12, l. 38). It also provided for either a re-sale by Finn, or a compulsory conveyance to complainants upon payment of Mr. Finn's share (Case, p. 13).

The contract did *not* (a) preclude a purchase by Mr. Finn, (b) authorize a nominal or protective bid *unless necessary*, (c) waive the obligation created by successfully bidding, (d) authorize the trustee to incur an additional prior burden by completing the structure, (e) authorize renting the premises in whole or in part, nor (f) deprive com-

plainants of their right to elect to affirm or disaffirm the sale and compel their trustee to account for either the price or the property.

Complainants elected to ratify the sale. Defendant by his conduct, elected to hold and treat the property as his own.

Further pertinent facts will be referred to in the argument. Before presenting complainants' argument as to the law, reference should be made to the state of the pleadings and proofs.

Pleadings.

The Bill shows the agreement; the mortgage and its foreclosure; defendant's interest; the trust relationship and the sale. These allegations are admitted by the answer (Case, pp. 6, 7, 23).

The Bill further shows complainants' respective interests, which are in nowise in dispute; complainants election to ratify the sale and also defendant's individual ownership and control (Case, pp. 7, 8, 9).

These allegations are not challenged by defendant in his answer. His defense, as shown by the answer, appears to be that his bid was "nominal" and was not "intended" to constitute an obligation (Case, pp. 23, 24).

No agreement to that effect is shown by pleadings or proof.

Testimony.

In addition to the facts established by the pleadings complainants also proved:

1. The agreement (Ex. C. 1).
2. An assignment (Ex. C. 2).
3. An assignment (Ex. C. 3). (These assignments are merely formalities.)

4. Abstract of the foreclosure proceedings (Ex. C. 4). (Case, pp. 49-60.)
5. Master's deed to Mr. Finn (Ex. C. 5).
6. Mr. Finn did not pay any part of the purchase price into Court or otherwise (Case, p. 43).
7. Retention of title by Mr. Finn.
8. Only one bid and "bidding up" not required (Case, p. 46).
9. Defendant completed building.
10. Defendant rented the property in part (Case, p. 45).

Argument.

The substantial question involved in this appeal appears to be whether a trustee purchasing the trust property at a sale can be held to the terms of such purchase at the election of the beneficiaries. Appellants contend that such a trustee can be so held.

POINT I.

Complainants as *cestuis qui trust* can elect to ratify the sale to their trustee.

Appellants contend that of course they could have disaffirmed the sale and held the trustee to account for the *property*.

But, equally, they had the right to ratify the sale and hold the trustee to account to them for the *price*.

Marr v. Marr, 73 N. J. E. 643;
Raleigh v. Fitzpatrick, 45 N. J. E. 561;
Goodell v. Monroe, 87 N. J. E. 328;
Mulford v. Munch, 11 N. J. E. 16;
Deegan v. Capner, 44 N. J. E. 339.

In
Twin-Lick Oil Co. v. Marbury, 91 U. S. 587,
 the Court said :

“The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party claiming under it.”

The rule was stated in

Starkweather v. Jenner, 216 U. S.

“At most, the sale was voidable, not void, and he who would complain must seasonably elect whether he will avoid or not.”

This election becomes more necessary where the property is not sold to the trustee at a price below the real value.

This distinction is referred to in

McCormick v. Ocean City Assn., 45 N. J. E. 561, aff. 47 N. J. E. 599.

Where the trustee is also protecting an individual interest, as here, the requirement is much more pressing. The election must be then promptly made. If there is no disaffirmance the property becomes the trustee's individually. As Equity is Equality and rights are mutual a reference to this class of cases becomes important.

Where the beneficiaries do not promptly object the sale is deemed to be affirmed.

New York Central & H. R. R. Co. v. Cottle,
 187 N. Y. App. Div. 131, aff. 229 N. Y.
 514;

Steinbeck v. Bon Homme Mining Co., 152
 Fed. 333 (C. C. A. 8th C. Opinion by
 Judge Sanborn).

In the last cited case the sale to the trustee was held to have been affirmed by the *cestui qui* trust by their aloofness and standing by, the very thing that the Court found in the case at bar (Case, p. 33, l. 2).

The facts were also somewhat parallel;

“The land in controversy here was a prospective mine, property of the most speculative nature. While it was unproductive, while its value was doubtful, and the burden of protecting it against taxes and tax titles and the labor of developing it were heavy and the benefits to be derived problematical, the complainant refused to share either. For more than eight long years when times were hard, and the burden of caring for and protecting the property exceeded the benefit, Steinbeck bore it alone.”

The Court found an affirmance of the purchase by the trustee and held the land to be free of the trust.

The affirmance arises out of the conduct of the parties and both are equally bound.

The affirmance is found not only in complainants conduct but also in defendant's.

Mr. Finn's conduct amounting to affirmance may be summarized as follows:

- (a) The unequivocal bid.
- (b) Unconditional confirmation of the sale.
- (c) Acceptance of the Master's deed.
- (d) Completing the building on his own account.
- (e) Renting the theatre and stores.
- (f) Imposing additional costs on the property.
- (g) Failure to re-sell.
- (h) Failure to insist that complainants exercise their option, or submit to such re-sale.

(i) Making the bid for neither a nominal amount or the full amount.

(j) Failing to obtain a release or waiver before taking the deed from the Master.

(k) Failure to act as or account as Trustee.

(l) Absolute exercise of individual control and dominion over the property after the sale.

The inferences to be drawn from the foregoing are quite obvious but the reference to the *amount* of the bid should be clarified.

The decree was for upwards of \$165,000.00 (Case, p. 59). At the time of the sale there was due approximately \$160,000.00 and Mr. Finn's claim was \$94,600.00 plus interest. There was no competition and only one bid (Case, p. 46). Mr. Finn could have made a nominal bid of \$1,000.00 or even \$100.00. Had he made a protective bid, it should have been for \$160,000.00 plus. Why did he bid \$145,000.00? The answer is obvious. By so doing he could become the sole owner and acquire complainants' interests for at least \$15,000.00 less than they amounted to (Case, p. 46).

Mr. Finn, although on the witness stand, did not attempt to give any other explanation.

It appearing that the sale has become binding defendant's liability to account must also appear.

POINT II.

Defendant should be required to account.

It is conceded that defendant was a trustee. He sold the trust property for \$145,000.00. It is only incidental that he is also the buyer. He is doubly liable to account for the price. It is certainly no answer for a trustee to say: True, I sold the prop-

erty, but I didn't collect. His duty to account and pay over the established value is fixed beyond question.

65 C. J. 781, 782, and cases cited.

A part of the expense should be borne by complainants.

Equitable Trust Co. v. Swoboda, 113 N. J. E. 399.

But clearly defendant is liable to complainants for the difference between \$145,000.00 and \$94,600.00 plus interest plus a proportion of the foreclosure expense.

Respondent argues that *he* never intended to be bound by his bid. His intent is not controlling. There is a plain written agreement and the conduct of the parties further fixed and established their rights.

Respondent will also probably talk about equities but appellants say that both the merits and the equities are in their favor as well as the law.

POINT III.

Defendant should be held to his purchase upon the merits and equities of the case.

Defendant fixed the price. He imposed the burden upon himself of a greatly increased cost of building. He declined to re-sell. He retained the property for himself. He went into the real estate business and incidentally, the theatre business. Complainants did not ask him to do these things. They had a right to rely upon the plain terms of a

plain agreement. They had a right to believe that the solemn sale was not a mere gesture and an idle ceremony. They did not waive any of their rights or release defendant from his obligations. In electing to affirm the sale they are giving defendant the benefit of a large and substantial reduction in the price to be paid. Defendant's attitude is most inequitable, in that he expects complainants to wait indefinitely for their money, without the slightest chance of payment, while in the meantime he enjoys the use of the property as an owner.

The agreement provided for "bidding up to the amount due on said mortgage, if necessary" (Case, p. 12).

No such necessity arose (Case, pp. 46, 47).

Mr. Finn had the right to re-sell. He did not do so (Case, pp. 12, 13).

The finding that defendant fulfilled his obligation is contrary to the fact (Case, p. 33).

Complainants in standing "aloof" acted within their rights and such conduct affirmed the sale and did not result in confirming and continuing the trust.

Steinbeck v. Bon Homme Mining Co., 152
Fed. 333.

The indefinite continuance of the trust, with added burdens, is not only against the letter of the agreement but also the spirit. The true spirit was that complainants, who were material men, should get out of the property as fast as possible and not stay in it forever.

The conclusions in stating "the agreement permitted him to bid up to the amount due on the mortgage" (Case, p. 36), is error, because the important words "if necessary" are omitted and disregarded (Case, p. 34).

The conclusions (Case, p. 37) stress the word "may" but overlook the effect of such word as em-

phasizing the optional nature of the right to take the property off defendant's hands.

The right to have and compel the account arises from the trustee's sale, by operation of law. It does not require an agreement to account (Case, p. 37).

The same is true of complainant's right to elect to affirm the sale. This arises from the facts and by operation of law. It was not necessary that the agreement specifically provide for such an election (Case, p. 37).

To sustain the decree is to say that the judicial sale was but an idle ceremony and merely a pretty gesture. Will the Court say that it may be thus trifled with?

The conclusions suggest that Finn sought no gain (Case, p. 38).

But this is not so, as he sought to make about \$15,000.00 and more by fixing his bid at the figure which he did.

It is suggested that Mr. Finn may yet sell (Case, p. 38).

Complainants say not so. He was only authorized to sell that which he bought and in the same form as acquired. He was not authorized to create a different, more costly and burdensome structure and then sell.

It is no distortion to hold defendant to his express agreement and to an obligation voluntarily created and assumed.

It is distortion to permit him to avoid this plain obligation by allowing him to say that he is still a trustee and that he should not be held to his bid because *he* didn't intend to be bound.

Defendant did not have to bid as he did; he did not have to invest more money and add to the burden; he did not have to become the owner as an individual instead of as trustee.

With his eyes open he elected to take the chance of reaping the profit on the sale price and on the future operations.

It would be most inequitable to compel complainants to submit to the additional burdens imposed by defendant's speculations.

They are reasonable, fairly and equitably entitled to their share of the sale price now and not in the remote future. They are entitled to a decree for their share and a lien on the property for the same. It is not to be supposed that the present market conditions will be overlooked in dealing equitably with the decree sought. There is no intention to deal inequitably with defendant but complainants are entitled to have their rights fixed and established.

POINT IV.

The decree should be reversed with a direction to enter a decree for complainants.

Respectfully submitted,

JOHN W. OCKFORD,
Solicitor for Appellants.

JOHN MILTON,
JOHN W. OCKFORD,
Of Counsel.

With the great number of letters
 received the fact is that the
 office is now a very busy
 place and it is necessary
 to have a system of
 filing the letters in
 order that they may be
 found when needed. It is
 also necessary to have
 a system of keeping
 the accounts of the
 office so that they may
 be found when needed.

The office should be
 arranged in such a way
 that the work may be
 done in the most
 efficient manner.

Very truly yours,
 John W. [Name]
 [Address]

John W. [Name]
 [Address]

New Jersey Court of Errors and Appeals

Between

JAMES P. HALL, BARRY L.
BALCH, ROVENGO-HALL COM-
PANY and WEST BERGEN
TRUST COMPANY,
Complainants-Appellees,

and

J. FRANK FINN,
Defendant-Respondent.

On Appeal
from Court
of Chancery.

BRIEF FOR DEFENDANT-RESPONDENT.

This is an appeal from a decree of dismissal. Defendant Finn held a mortgage in his own name for \$154,760.00 on an unfinished theatre building, as security first, for the payment to him of \$94,600.00 and interest, and the equity therein thereafter was owned by the complainants (Exhibit A, p. 11 of state of case). Proceedings to foreclose said mortgage having been instituted by Finn, the agreement Exhibit A was thereupon entered into between all the parties interested in the mortgage, and the mortgaged premises were thereafter sold and struck down to the defendant Finn on his bid of \$145,000.00. The amount due under the mortgage at the time of the sale was in excess of \$165,000.00.

The rights, duties and obligations of all the parties are clearly set out in said Exhibit A, under which it is provided:

"1. That Finn holds said mortgage in trust for the use and benefit of himself and the parties of the second part; the party of the first part, however, to be first paid out of the proceeds realized from the said mortgage, the sum of \$94,600.00, with interest, and the balance to be paid to the parties of the second part;

"2. That in the event that the mortgaged premises are sold under foreclosure proceedings now pending, the party of the first part will protect the interests of the parties of the second part by bidding up to the amount due on said mortgage, if necessary;

"3. That in the event that title to the said mortgaged premises is acquired by the party of the first part, the party of the first part agrees, if required by the parties of the second part, to convey the said premises to them, upon payment of the sum of \$94,600.00 and interest; otherwise that the said premises may be sold by the party of the first part for the highest and best price obtainable, and that the proceeds thereof, over and above the said sum of \$94,600.00 and interest be paid to the parties of the second part."

The complainants, by their bill, in disregard of the provisions of said agreement Exhibit A, and the true intent and meaning thereof, seek a decree that the sale of the mortgaged premises to the defendant Finn on the bid of \$145,000.00, fixed and determined the value of the mortgaged premises, and obligated the defendant Finn to pay to complainants the difference between \$94,600.00 and interest, due him under the mortgage, and the bid of \$145,000.00 and interest, although com-

plainants never requested defendant to convey to them, never tendered the \$94,600.00, or any part thereof, and the defendant Finn has been unable to sell the property.

Pleadings.

The material allegations of the bill of complaint are, that defendant Finn filed his bill to foreclose the mortgage in question; that Finn had an interest therein as security for the payment of \$94,600.00; that the agreement Exhibit A was entered into between all the parties interested in said mortgage; that, pursuant to said agreement, said defendant Finn held the legal title to the mortgage as trustee for the benefit of himself and complainants; that an order was made for the sale of said premises *pendente lite*, and that the Master sold the premises to the defendant Finn for the sum of \$145,000.00, which sale was thereafter confirmed. In paragraph 12 of the bill of complaint it is alleged:

“By reason of the aforesaid agreements and the proceedings had in the foreclosure suit and the sale of the mortgaged premises, the said J. Frank Finn became obligated to account to complainants for the sum of \$145,000.00 and to pay over to complainants the difference between such sum plus interest from March 24, 1930, less the sum of \$94,600.00 with interest to March 24, 1930, together with costs of said foreclosure suit,”

and that Finn has failed to so account. It is further alleged in paragraph 15 of the bill of complaint that since the sale, defendant Finn has treated and dealt with the mortgaged premises

as his own "and complainants acquiesce in this conduct and have elected and do elect to hold the said J. Frank Finn as their trustee to account to them for the value of the property as fixed by the sale to him and for the proceeds of such sale as fixed by the terms and conditions thereof, and complainants seek to have the said J. Frank Finn account to them as aforesaid." The prayer is, as already stated.

The answer admits most of the formal allegations of the complaint, but alleges that the bid of \$145,000.00 was made to protect the interest of the parties of the second part mentioned in said agreement Exhibit A and for the sole purpose of carrying out the true intent and meaning thereof; that it was understood and agreed between the parties that the bid of \$145,000.00 made by defendant was to be considered merely nominal as between the parties and solely for the purpose of insuring the obtaining of title to said mortgaged premises for the purpose of being held to carry out the provisions of said agreement Exhibit A; that such bid was not to be considered, nor was it ever intended to be considered, as an obligation of the defendant to pay the whole, or any part thereof; that up to the time of the filing of the bill, complainants informed defendant that they did not desire to, and would not, exercise the option given them by paragraph 3 of said agreement Exhibit A and that they waived all their rights and privileges theretofore existing under said paragraph 3. (This allegation that complainants did not and do not desire to exercise the option given them by paragraphs 3 of said agreement Exhibit A is admitted by paragraph 14 of the complaint.)

Defendant denies that since the sale, he treated or dealt with the premises as his own, but, on the

contrary, alleges that he held the same for the mutual benefit of himself and the complainants, under and by virtue of the provisions of the agreement Exhibit A. In his answer, he further says that, at the time of the acquisition of the mortgaged premises, there was erected thereon an unfinished theatre and store building which had been abandoned by the former owner before the institution of said foreclosure proceedings; that the structure was practically worthless in its then condition; that after the same was bid in by him, there were conferences between the parties, at which it was agreed that the premises could not be sold or leased in its then condition; that if a possible purchaser could be procured, the price realized would not be sufficient to pay the amount due the defendant alone; that, for the purpose of giving the defendant an opportunity to sell or lease, complainants requested defendant to complete the building, which he did at a considerable cost to himself; that it was necessary to keep the premises insured against loss and damage by fire; that taxes had to be paid; that the work was done and moneys expended, with the knowledge, consent and request of the complainants; that no part of the principal, interest or other moneys expended by him after the acquisition of the property has been repaid, and that, since the sale of the premises, he has made every effort within his power to sell the premises, but without success. He further alleges that he has at all times been ready and willing, and still is ready and willing, and offers, to convey the premises to the complainants upon the payment to him of the amount due him or upon the repayment to him of such sum as the court may determine to be equitable and just.

The Testimony.

The testimony (State of Case, p. 40) consists of but five pages. After the formal documentary proof was offered, defendant Finn was called as a witness (the record already indicating that the mortgaged premises were sold to him for \$145,000.00 and that the sale was confirmed). Defendant Finn said that he received a deed for the mortgaged premises from the Master, dated March 24th, 1930; that he never paid any part of the \$145,000.00 bid by him into court; that he still retains the record title to the property; that for a period of about two years after the property was sold under foreclosure, nothing was done with the property, but then in order to protect the interest of the parties "the property was then completed; the property was going to ruin and we had to complete it in order to preserve the equity in the property" (p. 44); that the property was completed in July or August, 1932; that he endeavored to sell the building, but could do nothing with it; so, in order to prevent it from going to decay, he rented the property (p. 44), and that since the acquisition of record title by him, he has not encumbered the property by mortgage or otherwise (p. 45). Two other witnesses, representatives of complainants, were merely called for the purpose of showing that they had received no part of the \$145,000.00 bid of Mr. Finn.

This completed the complainants' case, and both parties having rested, the court dismissed the bill for the reasons set out in the Conclusions appearing on page 32 of the state of case.

Argument.

As we read complainants' brief, there is but one question submitted for consideration by the court, and that is (p. 4 of complainants' brief):

"The substantial question involved in this appeal appears to be whether a trustee purchasing the trust property at a sale can be held to the terms of such purchase at the election of the beneficiaries. Appellants contend that such a trustee can be so held." And, further, "Appellants contend that of course they could have disaffirmed the sale and held the trustee to account for the property. But, equally, they had the right to ratify the sale and hold the trustee to account to them for the price."

In other words, it is contended that the defendant Finn, having bid the property in, stands in the position of a trustee purchasing trust property at a sale, and complainants could have their election to either account for the property or account for the purchase price. Many cases are cited under Point I of complainant's brief illustrating circumstances under which the beneficiary may disaffirm or ratify the purchase of trust property by a trustee. We have no cause to comment on these decisions, since they have absolutely no application to the issues involved in the case before this court. As we conceive it, there is but one issue. What are the rights, duties and obligations of the parties concerning this property, not because of any resulting trust, but under the agreement Exhibit A entered into in writing between the parties?

The purpose of the agreement is clearly apparent. Finn's first mortgage interest was large. The theatre building, a specialty structure, was unfinished, and there was the probability, in view of the magnitude of the claim of Finn, that the equity, if any, in the mortgage over the amount due him would be wiped out under the foreclosure proceedings. By this agreement, they secured the consent of Finn to bid in the property

to the full extent of the amount due under the mortgage, thus providing that under any and all circumstances the property should be bid in by Finn unless a bid in excess of the total amount due under the mortgage was secured from outside sources. If a bid was made in excess of the full amount due, by a third party, then all parties would be paid in full, but, on the contrary, if no bid were made in excess of the total amount due under the mortgage, then the title was to be taken by Finn and held under the terms of the agreement. Thus the interest of all the parties would be preserved, and saved from sacrifice, so far as the interests of the complainants were concerned. Having protected the interest of complainants by bidding in the property, as provided in paragraph 2, Finn acquired the title, to be held as provided under paragraph 3 of the agreement. Thereby, complainants secured unto themselves, the protection that they desired; namely, the right, upon request, to have the premises conveyed to them upon payment of the amount due Finn. If this privilege was not exercised, paragraph 3 provides: "That the said premises may be sold by the party of the first part for the highest and best price obtainable, and that the proceeds thereof, over and above the said sum of \$94,600.00 and interest be paid to the parties of the second part."

The option was never exercised. No demand was ever made upon Finn to convey title to the complainants. No offer or tender was ever made of the amount due him. The property has not as yet been sold because of Finn's inability so to do, and no claim was made, either in the bill or in the testimony, that Finn could have sold.

It will be noted that in paragraph 14 of the bill of complaint, it is admitted that complainants did not, and do not, desire to exercise the option

given them by paragraph 3 of the agreement. In other words, by their affirmative and solemn act, they admit that they abandoned all rights reserved by them under that paragraph. Nowhere in the bill is there any allegation, nor is it contended by complainants, that defendant Finn in anywise violated any of the provisions of the agreement. On the contrary, by virtue of the agreement, Finn was obligated to bid in the property and to hold it under the terms of the agreement so as to enable the complainants to make a tender and payment to him, if they so desired, and if the option was not exercised, to hold it until such time as the same could be sold. Under these circumstances, we contend that this is not a case in which a trustee purchases trust property in his own name in violation of his trust, giving rise to a right in the beneficiaries to repudiate or ratify the sale as they see fit.

Under Point II of complainants' brief, page 7, it is contended that since defendant was a trustee, he must be held to have sold the trust property for \$145,000.00 by reason of the bid, and that it is no answer for a trustee to say: "True, I sold the property, but I didn't collect. His duty to account and pay over the established value is fixed beyond question", and that in equity, under these circumstances, defendant should be obliged to pay to complainants the difference between \$94,600.00 and \$145,000.00.

Under Point III, it is further contended that the defendant should be held to the purchase upon the equities of the case, because he completed the building and declined to resell. The statement that defendant declined to resell is inaccurate. The complainants do not charge him with failure to resell, and the testimony shows that he endeavored to sell, but could not (p. 44, l. 25).

It seems to us inconceivable that complainants should talk about equities in their favor. The agreement, Exhibit A, apparently had for its purpose only the protection of the interest of the complainants after ~~complainants~~^{DEFENDANTS} rights are satisfied. For two years after the sale, they failed to exercise their option by tendering to Mr. Finn the amount due him. This was either because they were unable to make payment or because they realized that the claim of Mr. Finn was more than the value of the property. They sat by, and without objection, for two years permitted Mr. Finn to hold title to the property, receive no income on his mortgage, pay taxes and insurance, complete the building and rent it, all at great cost to himself, without contribution on their part. It was only after the work was completed, and the property preserved so that it became something of value, that the bill in this cause was filed.

The equities, we respectfully submit, are all with the defendant Finn, and, as was well stated by Vice Chancellor EGAN on page 37 of printed case:

“They have elected to hold him as their trustee to account to them for the value of the property as fixed by the sale. By what authority, I fail to discover. What part of the agreement accords them that privilege? No part of it even suggests such an inference. It was not calculated, nor intended, that the foreclosure sale bid would establish the value of the premises. Finn, aside from protecting his own investment, accommodated the others. He unquestionably had a right to manage and control the property for the purpose of keeping it in a tenantable condition; he had invested

heavily in it; he had the unfinished structure completed; he paid the taxes and insurance premiums charged against it; all of this he did, not only for his own benefit, as before noted, but for the benefit of the complainants as well. He sought no gain; he has shouldered the burden throughout. The complainants, in effect, stood passive and aloof, while Finn fulfilled his expressed obligations under the contract; they knew what he was doing and raised no voice of protest; then when his efforts made the premises physically and financially attractive without cost or labor to them, they come to life and demand a share in the fruits of accomplishment, without having borne any of the burden; equity, therefore, will not permit them to add to his obligations when such action is not warranted by the letter or the spirit of the agreement. In my opinion, Finn throughout has acted equitably and just towards the complainants. He has set an admirable example of fairness well worthy of emulation. Complainants seek equity but show no inclination to extend it."

And further, on page 38:

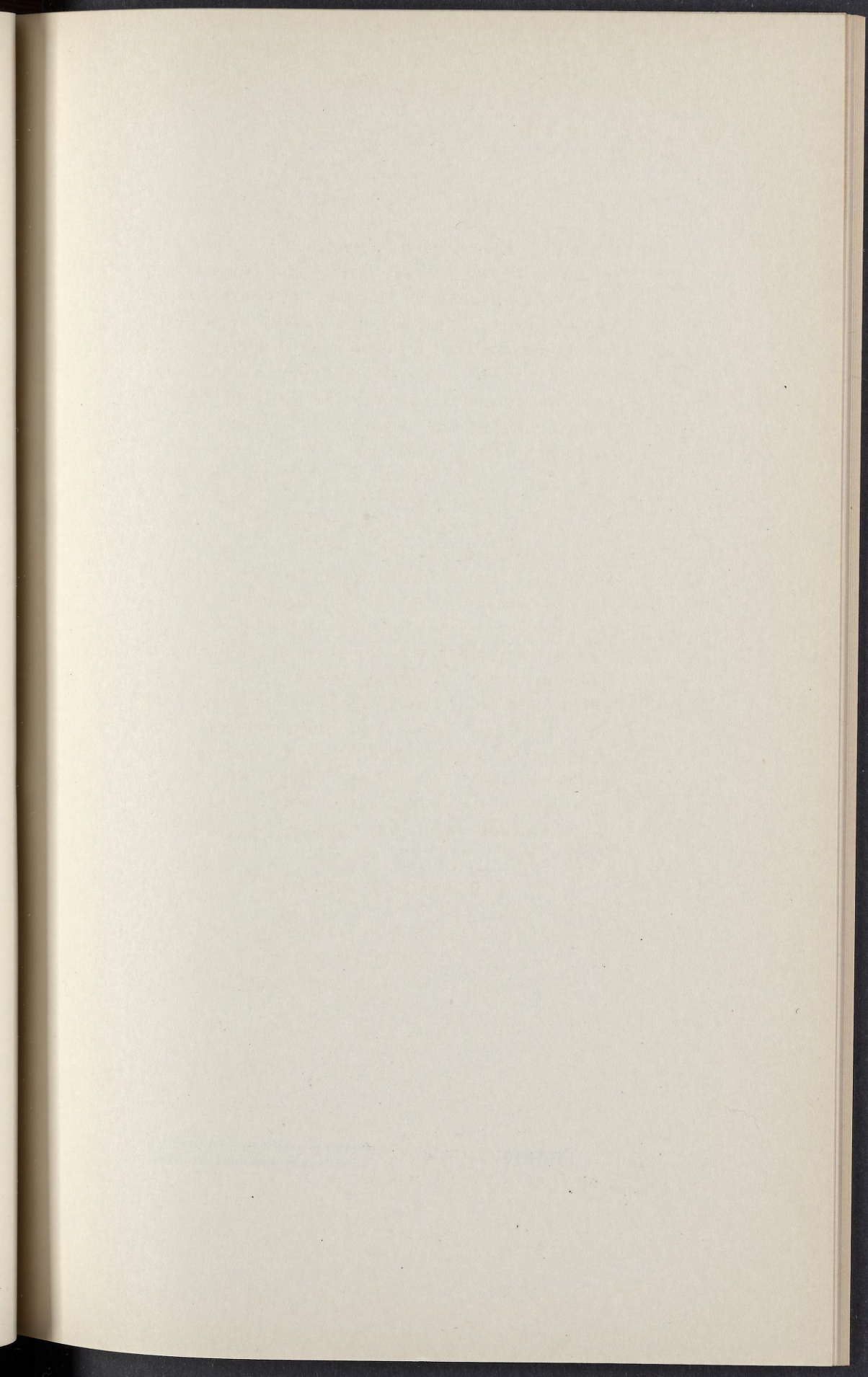
"The bid of Finn to acquire the title was made in accordance with an agreed purpose. That purpose cannot be distorted, or converted, into something not contemplated by the parties in their agreement. Complainants have expressly renounced their right to ask for a conveyance and pray for relief not warranted by the agreement. Finn has in all respects complied with the terms of the agreement; to grant complainants' prayer, in effect, would be to penalize the good conscience exhibited by the defendant."

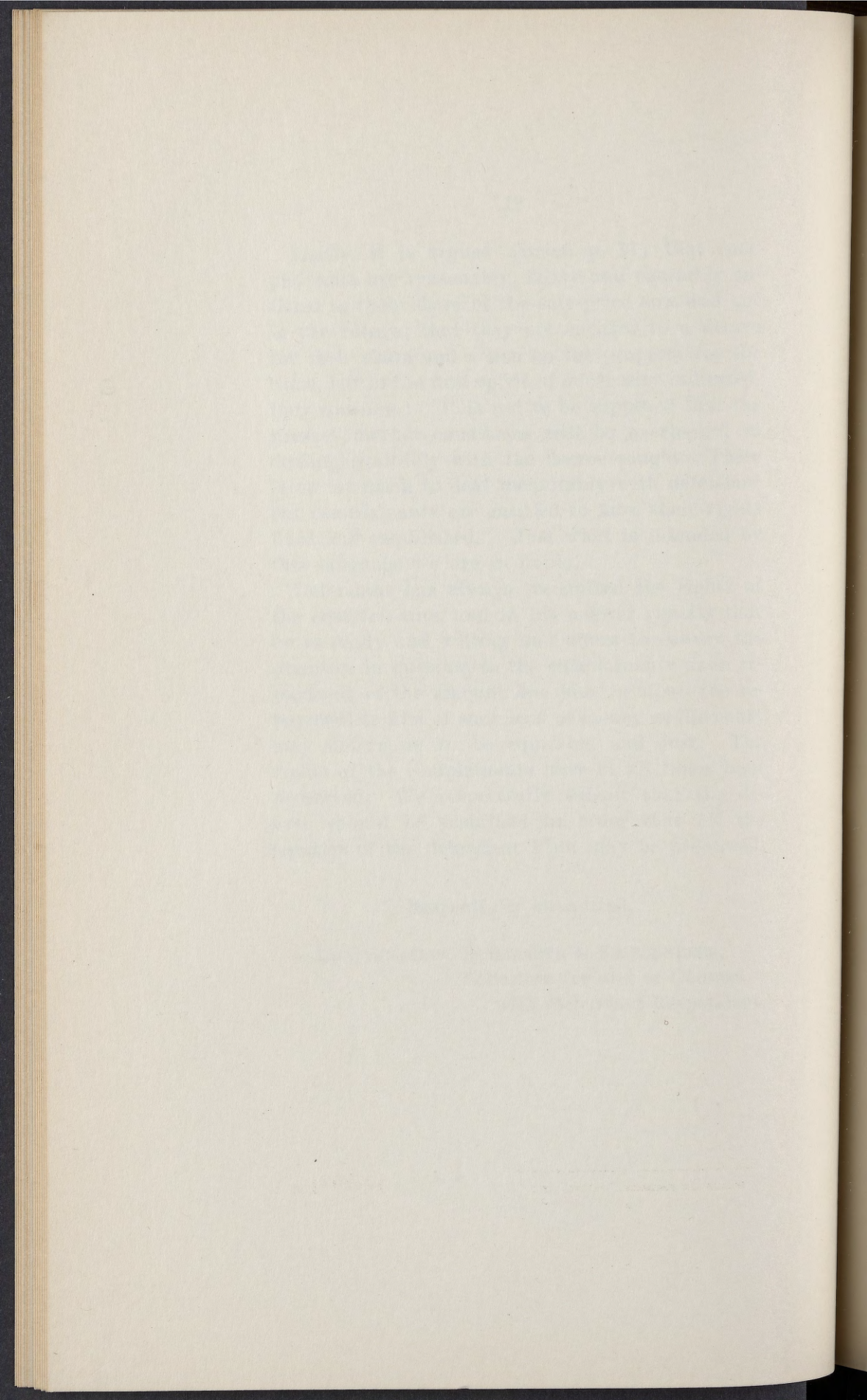
Lastly, it is argued (Brief, p. 11) that complainants are reasonably, fairly and equitably entitled to their share of the sale price now and not in the future; that they are entitled to a decree for their share and a lien on the property for the same, but in the first spirit of generosity indicated, they continue: "It is not to be supposed that the present market conditions will be overlooked in dealing equitably with the decree sought. There is no intention to deal inequitably with defendant but complainants are entitled to have their rights fixed and established." Just what is intended by this language we are in doubt.

Defendant has always recognized the rights of the complainants, and in his answer repeats that he is ready and willing and offers to convey the premises in question to the complainants upon repayment of the amount due him, or upon the repayment to him of such sum of money as the court may determine to be equitable and just. The rights of the complainants have at all times been preserved. We respectfully submit that the decree should be sustained in order that all the equities of the defendant Finn may be preserved.

Respectfully submitted,

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Solicitors for and of Counsel
with Defendant-Respondent.





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