

2001

# Glenn C. Shaw v. Ashley L. Robison, Kovo Inc v. First Media Corporation : Brief of Appellant

Utah Supreme Court

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**In the Supreme Court of the State of Utah**

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GLENN C. SHAW,  
*Plaintiff-Appellant,*

vs.

ASHLEY L. ROBISON,  
*Defendant-Appellant,*

KOVO, INC., a Utah  
corporation,

*Defendant,*

vs.

FIRST MEDIA CORPORATION  
a Delaware corporation,  
*Intervenor-Respondent.*

DEC 9 1975

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

No.

~~18691~~  
/3823

**BRIEF OF APPELLANT**

Appeal from the District Court of Utah County  
the Honorable Allen B. Sorensen, Judge

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FILED

JAN 31 1975

Clark, Supreme Court, Utah

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# In the Supreme Court of the State of Utah

GLENN C. SHAW,  
*Plaintiff-Appellant,*

vs.

ASHLEY L. ROBISON,  
*Defendant-Appellant,*

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corporation,

*Defendant,*

vs.

FIRST MEDIA CORPORATION  
a Delaware corporation,

*Intervenor-Respondent.*

No.  
13691

## BRIEF OF APPELLANT

Appeal from the District Court of Utah County  
the Honorable Allen B. Sorensen, Judge

## NATURE OF THE CASE

This is an action under the receivership laws of Utah, involving the two equal shareholders of KOVO, Inc., a Utah corporation, which resulted from a deadlock in the management of the corporation.

## DISPOSITION IN LOWER COURT

After determining that a deadlock existed and appointing a receiver for the corporation, and after repeatedly and consistently encouraging settlement by the

two shareholders of their differences, the Lower Court ordered that the Receiver sell the corporation's assets to a third party notwithstanding a prior complete settlement by the shareholders of their differences and their joint petition to dissolve the receivership.

### RELIEF SOUGHT ON APPEAL

Both of the shareholders of KOVO, Inc. seek (1) to have set aside the order that the Receiver sell the corporation's assets, and (2) a remand of this case with directions that the Lower Court honor the settlement made by the owners and dismiss the receivership under appropriate safeguards for the rights of all interested parties. In the alternative, appellants seek a determination by this Court that the contract proposed to the Court for approval fails in important respects to properly protect the interests of appellants and a remand of the case with directions that the Lower Court insure that the rights and interests of appellants are properly and adequately protected in any contract provisions which it may hereafter approve.

### PRELIMINARY STATEMENT

Clearly this action involving receivership laws and accounting between the parties is an equity proceeding. 19 Am. Jur. 2d, *Corporations*, § 1610, p.970; *West v. West*, 16 Utah 2d 411, 403 P.2d 22 (1965). And, being

an equity proceeding, the rule to be followed on this appeal is as stated by this Court in *Reiman v. Baum*, 115 Utah 147, 203 P.2d 387 (1949):

“In equity proceedings in this jurisdiction, this court reviews both law and facts . . . we review the record and pass on the weight and sufficiency of the evidence . . . we determine where lies the preponderance of the evidence . . . ”

To the same effect are *Coombs v. Ouzounian*, 24 Utah 2d 39, 465 P.2d 356 (1970); *Provo City v. Jacobsen*, 111 Utah 39, 176 P.2d 130 (1947).

The further rule that review on appeal of equity proceedings

“is in the light most favorable to the findings of the trial court, who heard the evidence and observed the witnesses” *Coombs v. Ouzounian*, 24 Utah 2d 39, 465 P.2d 356, 357 (1970).

would have no application to the present case since the Lower Court concluded at the conclusion of the evidence, and all counsel agreed, that “there is really no material conflict in the evidence” and “I don’t have any fact issues to decide.” (Transcript of Hearing on July 3, 1974, p.52). Due to the equity nature of this proceeding and the importance of the specific things done the Statement of Facts which follows is more detailed than usual.

## STATEMENT OF FACTS

The plaintiff Glenn C. Shaw, hereinafter sometimes referred to as "Shaw," and the defendant Ashley L. Robison, hereinafter sometimes referred to as "Robison" are the two equal shareholders of KOVO, Inc., a Utah corporation, hereinafter referred to as "KOVO," which for many years has owned and operated radio station KOVO in Provo, Utah. As a result of serious differences and ill will between Shaw and Robison, the management of the station and its business affairs became deadlocked. This action was commenced by Shaw for the appointment of a Receiver and an accounting by Robison and the corporation. Robison counterclaimed for an accounting by Shaw and for damages. In addition Shaw and Robison each claimed that substantial personal obligations were owed by the other and each claimed that the other was liable for mismanagement and defamation.

Although the deadlock in the management was apparent soon after the action was filed, (T. May 16, 1973, p.7 line 22) the Lower Court was extremely reluctant to appoint a Receiver in view of the fact that the corporation was not insolvent. (T. Aug. 31, 1973, p.7 line 14, p. 11 line 3; T. Sept. 6, 1973, p. 59 line 24, p. 60 line 1 and line 7, p. 61 line 5) At the urging of the Lower Court an interim arrangement was worked out in April, 1973 (T. April 24, 1973) soon after the suit was filed.



That arrangement failed and, again at the Lower Court's urging, a second interim arrangement was worked out (T. May 16, 1973) in an effort to avoid the necessity for the court to appoint a Receiver.

Because of a continuing series of differences and problems further hearings were held in the Lower Court in late August (T. Aug. 31, 1973) and early September, 1973 (T. Sept. 6, 1973) and a Receiver was finally appointed. (T. Sept. 6, 1973, p.68 line 22) In requesting that a Receiver be appointed, notwithstanding the Lower Court's reluctance, it was specifically urged that the court appoint a Receiver to provide independent management in order to permit (1) the parties to work out a sale by one to the other, or (2) the sale to a third party. (T. Aug. 31, 1973, p.22 line 4, p.23 line 12) Even at that time the scope of the accounting dispute was narrowing (T. Aug. 31, 1973, p.9 lines 19-21) and there were signs that with independent management there was a possibility of working out a buy-sell between the owners (T. Aug. 31, 1973, p.22 line 24)

In appointing the Receiver the Lower Court granted him full authority "to carry on routine and usual management activities" but directed that

"any unusual or extraordinary expense or management decision must be approved by the Court after notice to all interested parties and hearing before the Court.

“6. No property, assets or rights of the corporation shall be sold or encumbered in whole or in part until approved by the Court after notice to all interested parties and hearing before the Court.” (R. 107; T. Sept. 6, 1973, p.71 line 20)

The Court then restated the same guideline in more specific terms:

“I have one other limitation I want to put in expressly. *No sale* of the business or any of the assets in whole or in part *will be binding upon the corporation until it has . . . prior approval of the Court.* That is the probate rule, gentlemen.” (T. Sept. 6, 1973, p.72 line 17) (Emphasis added)

At the conclusion of the hearing on September 6, 1973, after the Receiver had been selected and his appointment had been arranged, (T. Sept. 6, 1973, p.70 line 27) the Lower Court clearly stated, in response to counsel's specific inquiry, consistent with the continuing serious effects of the parties toward settlement and the Court's continuing representations to the parties that if a settlement could be achieved between Shaw and Robison the receivership would be terminated.

“MR STOTT: One other question if I may, Your Honor?

THE COURT: Yes, sir.

MR. STOTT: I suppose it's easier to clarify them now than come back again. *In the event the agreement is arrived at between the parties in*

this matter *as to the sale or purchase* of the corporation, I suppose *at that time the receiver would be dissolved and we would have no problem as far as —*

THE COURT: *Not only would you have no problems, but the Court would be more than happy to entertain that petition. I might even entertain that not on notice. Not quite that far, but I would be more than happy to see that happen. As a matter of fact, that is what I thought I was achieving last April.*

MR. STOTT: *I assumed that was the case.*"  
(T. Sept. 6, 1973, p. 76 line 11) (Emphasis added.)

The Court also explicitly left the owners free to sell or transfer their KOVO stock to each other or to third parties, (T. Sept. 6, 1973, p. 75 line 7) and this freedom was never restricted in any way thereafter.

This very strong indication from the Court of its desire that the owners continue their efforts to settle their own dispute, and the Court's specific assurance that the owners would have no problem in the event of a settlement, in having the receivership terminated, left the owners and their counsel with every reason to believe that their continuing efforts at settlement, if successful, would be honored, at least until a sale of the assets of the corporation had been finalized and completed. The Court's pointed and explicit encouragement

to the owners to settle, moreover, continued consistently thereafter until after such a settlement was finally achieved. Then, surprisingly, the settlement was rejected by the court.

Following appointment of the Receiver there were further discussions regarding settlement but the lack of sufficient financial backing proved to be a serious handicap. In the meantime the Receiver, and the parties as well, encouraged interest from third parties to purchase the radio station. Having received various offers to purchase, counsel for the Receiver in a hearing before the Court on January 24, 1974 gave a brief status report and then indicated:

“we hope . . . within a very short time (to) present to the Court . . . those (offers) we consider to be the highest and best offer, and to *seek approval* from the Court at that time to *proceed with further negotiations and a final contract* with the parties — the Court finds to be the highest and best offeror.” (T. Jan. 24, 1974, p.4 line 11)

At that same hearing the Court characteristically encouraged the parties:

“You gentlemen get together during the next recess I am going to call and quit kidding yourselves and get your pencils out and start arriving some way to find this fiaseo up.” (T. Jan. 24, 1974, p.67 line 6)

On January 30, 1974 the Receiver petitioned the Court for a hearing on various purchase offers he had received and, *following the hearing*, (R. 151) for an order

“authorizing the Receiver to *negotiate and execute an appropriate contract* of sale of the corporate assets . . . ” (R. 151) (Emphasis added.)

At a hearing on the Receiver’s Motion on February 6, 1974 counsel for the Receiver explained that following the presentation of the offers and selection of the highest and best one, the Receiver would *then* request

“that the Court authorize the receiver to *proceed to negotiate a firm and binding contract* of sale . . . ” (T. Feb. 6, 1974, p.2 line 9) (Emphasis added.)

Again at that hearing, at which Intervenor’s counsel was present, the Court strongly encouraged settlement, which at that time was still being actively pursued by the parties.

“I should imagine the only matter the receiver would be interested in is, and is first and the one that *would make me most happy, for the shareholders to agree on something*. The course this matter has taken since I reluctantly allowed you to get the Court involved would indicate to me it would be difficult to get them to agree to the time of day. (T. Feb. 6, 1974, p.3)

“I think you know, Mr. Roberts, that I don’t feel very comfortable with a matter like this before me. Would there be any useful purpose served in Counsel getting together and arriving at what proposition would be to the best advantage of the shareholders?

MR. ROBERTS: Your Honor, I have seriously attempted to do that by way of individual conversations with Counsel for both the shareholders. My opinion is that —

THE COURT: At least they’re talking to each other, aren’t they?

MR. ROBERTS: The attorneys?

THE COURT: Yes.

MR. ROBERTS: Yes, they are. Yes, they are. And again I am not challenging the good faith of anyone.

THE COURT: Neither am I. In a matter of this nature there are bound to be differences of opinion. The whole nub of the thing is *I would be most happy if a modus operandi could be worked out or a proposal acceptable to all parties could be arrived at without the interest of the Court.*

MR. ROBERTS: *I would be most pleased if we could do that, Your Honor.”* (T. Feb. 6, 1974, p.4)

The Court further said

*“My concern is to try to see to it that whoever submits the offer that the Court accepts will be that which is acceptable to Mr. Martineau and his client and Mr. Stott and his client. You understand that this is not a liquidating receivership.*

MR. HARDY: *I understand.* (T. Feb. 6, 1974, p.10 line 21) (Emphasis added.)

Mr. Hardy, the attorney representing the Intervenor, FMC, was as noted, present throughout the hearing on February 6, 1974.

At the conclusion of that hearing the Court instructed the Receiver to study the offers and make a recommendation to the Court. On February 21, 1974 the Receiver recommended the FMC offer over the equivalent offer of Robison and the superior offer of Shaw, (R. 170, 171) as a matter of equality of treatment of the two shareholders. (R. 171). On February 22, 1974 the Court accepted “the report and recommendation of the receiver” and directed that the receiver

“proceed to accept the offer of F.M.C., Inc., and proceed with all reasonable dispatch to conclude sale to the offeror.” (R. 173)

It was understood by the Receiver and his counsel that the Court intended by this order not to create a binding contract but only to give FMC an exclusive opportunity

to negotiate further with the Receiver. The Receiver, for example, testified:

“Q. Wasn’t that letter that you received initially from FMC after the Court’s order of February 22nd *used merely as the basis for negotiation* of a definite contract?

A. I assumed that these offers were to be presented to the Court, the Court would then make its decision as to which offer it would recommend, and *then proceedings would be had from that point on to conclude a contract.*

Q. You understand the Court’s order would be merely that one of these offers would be selected so further negotiations could be had?

A. *When a contract was finished, then the Court would approve that contract.*

Q. Yes, *that would be presented to the Court before it became finalized?*

A. Yes.

Q. *That is what is before the Court now in connection with your motion that Mr. Greene just mentioned, isn’t that true?*

A. *That is what I understand.*

Q. And you have *never told FMC that they had a contract* have you?

A. Well, I think *that goes without saying.*



Q. You have never told them that their offer was accepted as such, have you?

A. Well, I don't think I could until it was approved by either Mr. Roberts or the Judge.

Q. You mean the definitive-final detailed contract?

A. I left all those matters up to Mr. Roberts to work out.

Q. Okay. And you expected that before it became final it would be approved by the Court?

A. Yes

Q. And that *it would be executed by you*"

A. *After approval of the Court?*

Q. Yes. *But you haven't executed it at this point*, have you?

A. I don't believe I have."  
(T. June 28, 1974, p.128, 129) (Emphasis added.)

Similarly the Receiver's counsel testified:

*"[W]hat I intended to do as counsel for the receiver was to negotiate, complete the negotiations of the contract along the lines of the FMC offer, and I understand procedurally it would be resubmitted to the Court for final approval.*

THE COURT: I suppose you thought you were *carrying out the order* of February the 22nd?

MR. ROBERTS: *That is what I thought I was doing . . . procedurally I understand there would have to be further approval by the Court.*" (T. June 28, 1974, p.137 line 5-12, 16-17) (Emphasis added.)

Counsel's letter dated February 27, 1974 advising Mr. Hardy for FMC that the Receiver's recommendation of the FMC offer shows a similar understanding of the Court's order. He there requested

"would you kindly, therefore, submit to me the draft contract *so that we may proceed* as soon as possible *to negotiate* all final terms and finalize the matter. (R. 314) (Emphasis added.)

In connection with a general objection to the Receiver's report and the Court's order of February 22, 1974 approving the Receiver's recommendations counsel for Robison filed an objection on March 7, 1974 (R. 177) in which he complained that "the acceptance of any offer to sell the assets of KOVO, Inc. . . . is premature." (R. 177). At a hearing on that objection on March 15, 1974 the Court assured counsel for Mr. Robison and the parties that he considered the FMC letter offer of January 15, 1974 (R. 141) to be merely an offer to negotiate and the basis for negotiation and not an acceptance of as an offer or a sale as such. (T. June 28, 1974, p.6 line 2)

Although it was indicated in the Minute Entry that the hearing was reported, for some unexplained reason no record of it could be found. An affidavit from Attorney Stott, confirming the statement of Shaw's counsel to the Court, not disputed by the Court, as to what occurred at that hearing, as noted in the last record reference above was, suprisingly, not admitted by the Court, but was left in the record as a proffer of proof. (R. 311) Suffice it to say, there is no dispute that such assurances was given by the Court at that time a considerable time after the court's February order. Further, Intervenor is charged with notice of that proceeding and the Court's assurances given there which were consistent with his assurances given September 6, 1973.

In all events, the parties relied upon that assurance by the Court, which was in all respects consistent with their understanding that they had a continuing right to settle their differences if they could. (T. June 28, 1974, p.6 lines 11-22) That assurance was also consistent with the prior and subsequent strong encouragement by the Court of a settlement between the parties. It is also consistent with the Court's order overruling Robison's objections dated March 27, 1974 which provided:

“It is hereby ordered that the Objection of Ashley L. Robison to the Order of this Court authorizing the Receiver *to proceed to negotiate a sale* with FMC Corporation are hereby overruled and denied.” (R. 182) (Emphasis added.)

Following the receipt by the Receiver's counsel of a draft of a detailed agreement of sale in March, 1974 he furnished copies to counsel for Shaw and Robison and conferred with them to receive their suggestions and objections. Both raised serious objections to many of the provisions which were added to or substantially different from those contained in the original letter offer. (T. June 28, 1974, p.140; R. 378-387) Significantly, an extremely important and extremely harsh Escrow Agreement (R. 388) which was to have been a part of the overall sales agreement was never furnished to counsel for either Shaw or Robison until late June, 1974 and only then because it was specifically requested. Nor did it accompany the proposed contract submitted to the Court for approval. (R. 186-259) Nor was any form of Employment Agreement, which also was to have been a part of the proposed contract, ever submitted to the Court. The many substantial changes and additions actually proposed, as well as the incompleteness of the documents submitted to the Court for approval demonstrated the very general and preliminary nature of FMC's original bid and the need which then remained and still remains for further negotiations to refine and formalize any binding agreement.

Having ignored, or at least having failed to incorporate into the sales agreement, even the most important of the owners' serious objections, and having failed even to furnish copies of the harsh Escrow Agreement to counsel or the Court, and having made no effort to discuss

or complete the contemplated Employment Agreements with Shaw and Robison, the Receiver on May 13, 1974 filed his Motion to Authorize Execution of Sales Contract. (R. 186-259) The Receiver's Motion shows clearly his understanding, and that of his counsel, that even at that date there had been no binding contract made with the Intervenor. The Receiver properly petitioned:

“That the Court enter its order *approving the execution* of the document by the receiver *in a manner which is binding upon KOVO, Inc.*” (R. 186-187) (Emphasis added.)

Relying upon the Lower Court's continuing and definite urging that it would like the parties to settle their differences, and its clear and specific assurance that if the owners' differences were resolved, it would terminate the receivership, the owners and their counsel continued to explore and narrow down the avenues of possible compromise. Sources of financial backing for a buy-sell arrangement, at first almost wholly lacking, became conditionally available. Furthermore, the negotiations concentrated on not only a sale of the business but a complete settlement of all of the very broad and difficult issues, claims and differences between the parties as well.

With substantial financial backing finally available, (T. June 7, 1974, p.10 line 4) definite proposals for settlement were discussed between counsel for Shaw and Robison on May 1, 1974. (T. July 3, 1974, p.10). In a

meeting between the owners and their counsel on May 3, 1974 a format for settlement negotiations was worked out. During the ensuing ten-day period four additional meetings were held involving counsel and the parties to further narrow the areas of difference. (T. July 3, 1974, p.11-12) All of the foregoing, of course, occurred before the Receiver's Motion to Authorize Execution of Sales Contract, dated May 11, 1974 had been received.

During the weeks of May 13th, May 20th and May 27th further extensive negotiations were conducted which resulted in a resolution of the last remaining major problems on May 30th. (T. July 3, 1974, p.12) At that time counsel for the Receiver, who had previously been advised that negotiations were proceeding which appeared to have possibilities of success, (T. July 3, 1974, p.17 line 22; T. June 28, 1974, p.149 line 25, p.150 line 2) was advised that a settlement had been achieved. At his request counsel for the Intervenor was advised the following day. (T. July 3, 1974, p. 12-13) As early as May 24, 1974 the Court had been advised that a settlement was in the offing as reflected by the Minute Entry to that effect in the file. (R. 262).

Between May 30th and June 5th the agreement between Shaw and Robison was reduced to writing and finalized for all practical purposes. (T. July 3, 1974, p.13; Exhibit 20) Prior to the hearing on the Receiver's Motion, on June 5, 1974, counsel filed on behalf of Shaw and Robison a Motion to Terminate Receivership and

Discharge Receiver, upon the ground that, "subject only to approval of the Court," "all outstanding issues have been resolved and settled" between Shaw and Robison. (R. 266-267). The agreement was expressly conditioned upon approval of the Court and termination of the receivership. (Exhibit 20; T. June 28, 1974, p.156 line 23)

In a hearing before the Court on June 7, 1974, the Receiver and his counsel took no position pro or con with respect to the Receiver's Motion. (T. June 7, 1974, p.6 line 11) At that hearing the Court readily conceded that it had consistently and strenuously urged settlement (T. June 6, 1974, p.26 lines 24-30). The Court, for example, stated:

"The law favors settlement of differences amongst parties outside the judicial process. I am most reluctant to continue if these parties have actually settled their differences. As a matter of fact, I have *worked harder than counsel to try to get that for a year.*" (T. June 7, 1974, p. 20 lines 28-30, p.21 lines 1-2) (Emphasis added.)

Significantly, the Court observed at the conclusion of that hearing:

"Now my concern is twofold. *Am I bound when the parties, the principals in this litigation, have reconciled their differences? Am I bound by that? My inclination to answer that question is yes; second, does Mr. Greene's client have a vested right and entitled to the protection of the*

Court? *Mr. Greene has the burden of convincing me of that.* Do you understand that, Mr. Greene? Those are the questions.” (T. June 7, 1974, p.23 line 1-7) (Emphasis added.)

At a second hearing on the Receiver’s Motion on June 28, 1974, at which the Receiver again took no position either way on his own Motion, (T. June 28, 1974, p.150 line 12) the Court conceded that it had advised counsel at the March 15, 1974 hearing that it had intended the FMC letter offer to be merely an offer to negotiate as is readily apparent from the following discussion between counsel and the Court:

“But at that hearing the Court was very explicit in saying that this was merely an offer to negotiate and the basis for a negotiation and not an acceptance of an offer or sale as such. The contract was entered by the Court and approved by the Court. I am sure we all proceeded on that basis.

THE COURT: Your position simply I take it is analogous to a probate proceeding where the sale of the property is not final until it is approved by the Court, is that right?

MR. MARTINEAU: That is right.”  
(T. June 28, 1974, p.6 lines 7-16)

The Court also noted again at that hearing that:

“An overriding rule of law in this country is that the law favors compromises and settlement. Apparently Mr. Conder and Mr. Martineau’s clients



have compromised their differences. This is not a receivership that would involve the rights of creditors." (T. June 28, 1974, p.8 lines 19-23)

The Court also noted,

"I think as far as those two people (Shaw and Robison) are concerned they have got themselves in a blind. Because they have settled their differences.

MR. MARTINEAU: We have, Your Honor."  
(T. June 28, 1974, p.12, lines 1-4)

At a final hearing on July 3, 1974 the following discussion occurred:

"THE COURT: . . . I am considering the purpose of why the Court is in this action in the first instance.

MR. MARTINEAU: The reason was there was a deadlock.

THE COURT: I am aware of that.

MR. MARTINEAU: And it couldn't be straightened out without assistance of the Court. The Court's assistance has allowed us to settle these problems.

THE COURT: The only question I have at the present moment is whether in the process of doing that FMC, the intervenor, attained any rights.

MR. MARTINEAU: Well, or whether our rights were divested." (T. July 3, 1974, p.33-34, lines 3-20)

\* \* \*

"THE COURT: (addressing counsel for the Intervenor) Of course, absent your client's position, except for that, the Court would latch onto that offer (settlement between Shaw and Robison) in a hurry, wouldn't it? Absent a person in the position of your client?" (T. July 3, 1974, p.39 line 26)

\* \* \*

"I am not passing on the business judgment. Anytime a plaintiff and defendant come to a settlement of their differences the Court grabs onto that in a hurry. That gets rid of the case, doesn't it?

MR. GREENE: In this kind of a case with this kind of background I would think not Your Honor.

THE COURT: Except for a person in the position of your client.

MR. MARTINEAU: This is an especially appropriate case for that very thing." (T. July 3, 1974, p.40 line 6)

\* \* \*

MR. MARTINEAU: I would say this, Your Honor: *The Court has consistently encouraged us to settle.* I think it has always been our understanding properly —

THE COURT: I have been trying to get you to either settle or appeal.

MR. MARTINEAU: I don't want to have to appeal it if I don't have to, but let me say this: *It has always been our understanding in conferences with the Court and with the receiver and his counsel that the letter of FMC was merely a basis for negotiation.* Any final document would have to be negotiated, presented to the Court, and approved before it become final. That is consistent with all the orders and all of the motions and all of the proceedings in this Court. FMC cannot claim they are not — that they can only rely on one order of the Court and one letter from the receiver, because everything else is very clear the other way."

(T. July 3, 1974, p.539, lines 14-30, p.54 line 1)

*"Mr. Gilbert and Mr. Roberts both said that they intended that the letter was the basis for negotiation.* (T. July 3, 1974, p.55) (Emphasis added.)

To the same effect is the testimony at T. July 3, 1974, p.14 line 14:

"MR. MARTINEAU: I will further testify that at no time have I advised my client that FMC had a contract. I have never been advised by anyone that any offer of FMC has been accepted. My conversations with Mr. Roberts were always to the effect that a definitive contract would be presented to this Court and approved before any party would be bound."

In a "RULING" dated July 29, 1974 the Court, in direct contravention of its own specific assurance to the owners and their counsel, that if a settlement were achieved it would be honored and the receivership would be terminated, and contrary to the understanding of the owners and their counsel as well as the Receiver and his counsel, that the FMC letter offer had been approved merely as the basis for negotiations, which understanding was specifically and expressly confirmed by the Court at the hearing on March 15, 1974, and in disregard of the tremendous time, effort and expense incurred by the owners in achieving a settlement which had been therefore consistently and forcefully urged by the Court with the specific assurance that it would be honored, and in disregard also of the fact that the settlement was conditioned wholly as to its validity upon its approval by the Court, and notwithstanding the numerous substantial additions made in the contract as presented to the Court for approval and its readily apparent incompleteness, the Court granted the Receiver's Motion dated May 11, 1974. (R. 396-399) The owners' serious objections to the contract as proposed were never even considered by the Court.

This appeal, joined in by both Shaw and Robison, is from that ruling.

## ARGUMENT

## POINT I

THE LOWER COURT ERRED IN GRANTING THE RECEIVER'S MOTION TO AUTHORIZE EXECUTION OF SALES CONTRACT.-

A. In order for the proposed contract of sale to be in any respect binding or effective it required the further specific approval of the Lower Court.

It is well established that the appointment of a receiver is an equitable function. 19 Am. Jur. 2d, *Corporations*, § 1610, p.970. Where not provided by statute, as in Utah, a receiver's sale is a judicial sale which rests upon and is governed by orders of the court decreeing the sale.

“[J]udicial sales, unless defined or regulated by statute, rest upon and are governed by the order of the court decreeing the sale. In a judicial sale the court makes its own law of the sale, subject only to the use of sound discretion in the exercise of the power.” *Chapman v. Schiller*, 95 Utah 514, 83 P.2d 249, 251 (1938).

It is a further well-established rule that

“[A] judicial sale must ordinarily be reported to and confirmed by the court which ordered it.” 47 Am. Jur. 2d, *Judicial Sales*, § 2, p.301.

## A bid at a judicial sale

*"remains merely an offer to purchase until it is accepted and confirmed by the Court."*

and the purchaser

*"bids with full notice that the sale to him is subject to judicial confirmation, that the Court has the duty to exercise its discretionary power to confirm so as to secure to the owner of the property the largest practical return, and that the purchaser's rights are subject to the rational exercise of such discretion."* 47 Am. Jur. 2d, *Judicial Sales* § 136, p.407. (Emphasis added.)

It is also stated:

*"It is generally regarded as essential to the completion of a judicial sale . . . to obtain final (judicial) confirmation."* 47 Am. Jur. 2d *Judicial Sales*, § 25, p. 612-613:

The well-established rule, that not only acceptance by the Court but confirmation as well are required to bind the Court, is stated as follows in 50 C.J.S., *Judicial Sales*, § 25, p. 612-613:

*"Since confirmation is the formal expression of the judicial sanction of the sale, it is generally essential to completion of a judicial sale. The sale, however, is not a nullity until such confirmation."*

Confirmation is the formal expression of the judicial sanction of the sale by which the court makes the sale its own, and an order of confirmation is a judicial, and not a ministerial, act. It has been held that confirmation is not the sale, but only an approval of something already done.

*Since before confirmation the sale is a sale only in the popular, and not in a technical and legal sense, and the accepted bidder is merely a preferred purchaser, as discussed supra § 22, confirmation is necessary in order to complete the sale, and in order to divest the former owner's title and render valid the deed to the purchaser, whether the sale is public or private." (Emphasis added.)*

Confirmation may be refused where the sale will work an injustice to the parties.

"[T]he simple fact that confirmation would sacrifice the interests of those entitled to the protection of the court is sufficient ground for a refusal to confirm. . . ."

\* \* \*

"Particular grounds for refusing to confirm include: . . . mistake, misunderstanding or misrepresentation as to the terms or manner of sale. . . ." 50 C.J.S., *Judicial Sales*, § 28, p.620.

Accordingly, the successful bidder at a judicial sale prior to confirmation of the sale occupies merely the position of the preferred purchaser, and has no rights substan-

tial enough to require that judicial confirmation be given if there are legal or equitable reasons why it should not occur. 50 C.J.S., *Judicial Sales*, § 22, p.606-607; *J. S. Sugarman Company v. Davis*, 203 F.2d 931, 933-934 (10th Cir. 1953). Also as noted in 2 Clark on Receivers § 519 at 835:

“It has been held that a bidder at a receiver sale acquires no enforceable rights until his bid is accepted by the court.”

If the nature of the judicial sale is such that a contract is necessary a judicial sale is not complete until the bid and contract made in consequence thereof are confirmed by the Court, 66 Am. Jur. 2d, *Receivers*, § 106, p. 397. The definite rule that the judicial sale is not complete until the Court confirms the actual contract of sale is necessary and salutary rule in order for the Court to be assured that the contract fairly and adequately reflects the terms of the bid and properly protects the interests of the owner of the property being sold by the Court. Additionally where multiple parties are interested in property subject to a judicial sale it is within the Court's discretion to grant rights to exclusive negotiation and the opportunity to proceed to negotiate a contract with the Receiver, but subject to obtaining final judicial confirmation.

Both of the owners and their counsel understand and believed throughout the proceedings until July, 1974, as



did the Receiver and his counsel, that at every stage of the receivership the Lower Court had acted and was acting within the rules set out above. They had every reason to believe, and did believe, that consistent with the foregoing rules, the Lower Court was proceeding in a manner so as to permit an alternative approach to a proper disposition of the dispute. On the one hand, it appointed the Receiver to manage the business and solicit bids from prospective buyers. On the other hand, it gave forceful encouragement to the parties to settle so that a sale would be unnecessary. This dual approach to a resolution of the problem is consistent with all actions taken by the owners, their counsel, the Receiver and his counsel, and by the Court itself throughout the proceedings until July, 1974.

In requesting that the Receiver be appointed, counsel specifically advised the Court that the appointment was required in order to permit either (1) a settlement between the owners, or (2) a sale in liquidation. (T. Aug. 31, 1973, p.22 line 2). And it would be difficult to express a more definite assurance, that upon settlement the case would be dismissed, than that given to the owners by the Court immediately following appointment of the Receiver.

“MR. STOTT: . . . In the event the agreement is arrived at between the parties in this matter as to the sale or purchase of the corporation, I suppose at that time the receiver would be dissolved and we would have no problems as far as—

THE COURT: Not only would you have no problem, but the Court would be more than happy to entertain that petition. . . .

MR. STOTT: I assumed that was the case.”  
(T. Sept. 6, 1973, p.76 line 15)

In subsequent contracts with the Court and with the Receiver and his counsel, the understanding that both a sale of the business and a settlement by the owners were being alternatively pursued was reinforced. For example, on January 24, 1974 the Receiver reported to the Court his progress in locating a buyer for KOVO and indicated that he would present the offers to the Court and “seek approval from the Court *at that time* (following presentation and evaluation of the offers) *to proceed with further negotiations and a final contract. . . .*” (T. Jan. 24, 1974, p.4 line 14) (Emphasis added). This report is consistent with the understanding that any *final contract* would have to be presented to the Court for approval and confirmation.

Similarly on January 31, 1974, the Receiver moved “for order of the court respecting sale of the corporate assets,” and prayed that a hearing be held to receive evidence with respect to the highest and best offer received as of the date of the hearing. The Receiver in his Motion further requested that, following the hearing, the Court issue an order:

“ . . . authorizing the receiver to *negotiate and execute an appropriate contract of sale of the corporate assets* in accordance with the provisions of Utah Code Annotated, § 16-10-93. (R. 151) (Emphasis added.)

This Motion also is consistent with the understanding of the owners, their counsel and the Receiver that the letter offer of FMC would be accepted merely as the basis for negotiation of a final contract which would then be presented to the Court for approval and confirmation.

Again, at the hearing held pursuant to the Receiver's request, on February 6, 1974, at which representatives of the Intervenor were present, counsel for the Receiver explained that the purpose of the hearing was to present the Court with the best offers :

“[F]or the purpose of having the court determine which of these constitutes the highest and best offer, and *then requesting the court to authorize the receiver to proceed to negotiate a firm and binding contract of sale* with the offeror who has presented the highest and best offer.” (T. Feb. 6, 1974, p.2 line 7) (Emphasis added.)

Certainly at that time the Receiver's counsel contemplated, not that the FMC letter offer as such would be accepted and confirmed by the Court, but that it would upon acceptance be merely the basis for the negotiation

of a detailed final contract which only upon further approval and confirmation by the Court would become binding upon the Court, and parties or KOVO.

The Intervenor is, of course, charged with knowledge of the pleadings, notices, etc. filed with the Court and with matters developed at hearings before the Court. With even more justification, the Intervenor is charged with knowledge of matters developed in hearings at which it was represented and matters developed in pleadings and in hearings after it entered into the picture. Thus it cannot now claim that it was not aware of the strenuous efforts of the Court to encourage settlement or the fact that from the orders, motions and discussions referred to above the parties as well as the Receiver and his counsel reasonably understood that the FMC letter was, if accepted, to be used merely as the basis for negotiation and that a final contract would have to be given further approval and confirmation by the Court to be binding.

FMC's counsel was present when the Court on February 6, 1974, for the umpteenth time restated his strong view that the parties should, if possible, settle the case so as to make unnecessary the intervention of the Court to liquidate the corporation. The Court stated:

“[T]he one (thing) that would make me the most happy (is) for the shareholders to agree on something.”

"[I] would be most happy if a modus operandi could be worked out or a proposal acceptable to all parties could be arrived at without the interest of the Court.

MR. ROBERTS: I would be most pleased if we could do that, Your Honor." (T. Feb. 6, 1974, p.3-4, line 18)

\* \* \*

THE COURT: My concern is to try to see to it that . . . the offer . . . will be . . . acceptable to (the owners). You understand this is not a liquidation receivership.

MR. HARDY: I understand." (T. Feb. 6, 1974, p.10 line 21)

Following the hearing and submission to the Court of a report of the Receiver, in which the Receiver recommended the less desirable Intervenor offer over the other offers, primarily as a matter of fairness to the owners, the Court entered an order dated February 22, 1974 that:

*"[T]he report and recommendation of the receiver be accepted by the court and filed in this proceeding and that the receiver proceed to accept the offer of F.M.C. and proceed with all reasonable dispatch to conclude a sale to that offeror."* (R. 173) (Emphasis added.)

This order, which the Court later erroneously found constituted acceptance of the FMC offer clearly was no

such thing. It merely accepts the report of the Receiver and instructs him to proceed toward a binding acceptance.

The letter dated February 27, 1974 to counsel for the Intervenor from counsel for the Receiver advised that the Lower Court had approved the Receiver's recommendation which was to approve the FMC offer as the basis for further negotiations in order to finalize a contract which could then be submitted to the Court for approval and confirmation and requested from the Intervenor "the draft contract so that we may proceed as soon as possible to *negotiate all final terms and finalize the matter.*" (R. 314) (Emphasis added.)

Copies of this letter were not sent to the co-owners or their counsel.

On March 15, 1974 the Lower Court considered objections to its order of February 22nd filed by Robison and in its order overruling said objections the Lower Court stated:

"(1) It is hereby ordered that the objections of Ashley L. Robison to the order of this court authorizing the receiver *to proceed to negotiate a sale* with FMC Corporation are hereby overruled and denied." (R. 182) (Emphasis added.)

At the March 15th hearing the Court expressly advised those present that he had not approved any sale to the Intervenor and that he had only approved Intervenor's offer as a basis for negotiation.

The settlement negotiations by the owner are themselves further evidence of their understanding, consistent with all of the foregoing, that a settlement between them would be honored by the Court if achieved before any final contract was submitted to the Court for approval and confirmation. Otherwise, on what basis and for what reasons would they be negotiating? Without the business to buy or sell there would be virtually nothing to negotiate or settle upon.

The settlement which should have been approved by the Lower Court resolves not only the issues which required the appointment of the Receiver but also all other issues and claims between the owners as well, including the very difficult and potentially time-consuming accounting claims between the owners, claims with respect to ownership and management of KOVO and other serious and substantial claims among and between the owners. Settlement reached by the owners, moreover, was far superior from a financial standpoint, for both owners than sale to the Intervenor could possibly have been. The offer submitted by Intervenor was, at best, at distress prices as would be expected.

On May 11, 1974 the Receiver petitioned the Court for its order to authorize execution of a sales contract. In making its motion the Receiver clearly acknowledged his understanding, again consistent with all of the foregoing, that there was then no binding contract with the Intervenor and requested "that the court enter its order *approving the execution* of the document by the receiver in a *manner which is binding* upon KOVO, Inc." (R. 186-187) (Emphasis added) Serious negotiations by the owners toward settlement were well advanced before they were aware of the Receiver's motion, as is noted in the Statement of Facts, above. Both the Court and Receiver's counsel were advised that serious negotiations were proceeding with some reasonable chance of success at least two weeks before the hearing on the Receiver's motion for approval. The owner's motion to terminate the receivership was also filed prior to the hearing on the Receiver's motion.

Ignoring all of the foregoing background, and in direct contradiction of his own encouragement of settlement and his direct, consistent and explicit assurances that such a settlement would be honored, the Court in its RULING dated July 29, 1974 concluded that Intervenor had acquired vested rights on February 22, 1974 and therefore directed the Receiver to proceed to conclude the sale. (R. 396-399) The Court's Ruling in favor of the Intervenor totally ignores the rights and interests of the owners, whose property is under the total control



and mercy of the Court, and whose interests it was the Court's primary duty to protect. Instead the ruling favors the rights and interests of the Intervenor, who was charged with knowledge of the reasonable, but apparently misplaced, reliance of the owners and the Receiver upon the specific prior encouragement and assurances of the Court.

As is clearly demonstrated from the references to the record set forth above and in the Statement of Facts, the Court initially established a procedure, consistently followed and relied upon thereafter by the owners and the Receiver, whereby it was understood that the judicial sale would not be complete or binding until the final contract of sale was approved. Clearly indicated in the motions made by the Receiver, and relied upon by the owners, is the fact that to be binding the final contract had still to be confirmed at the time the owners moved the Lower Court for its order terminating the receivership.

It is incredible, and indeed shocking, that the Lower Court would conclude as it did that FMC acquired vested and binding contract rights by virtue of its order dated February 22, 1974 in disregard of its continuing and explicit encouragement, given in the presence of FMC's counsel, to the parties to continue their settlement efforts at the hearing on February 6, 1974. It is even more incredible and shocking in view of the Court's specific representation at the March 15 hearing that no such con-

tract rights had been given and its continuing encouragement of settlement thereafter. In explanation, the Court by July, 1974 had, perhaps understandably, forgotten the encouragement and the assurances shown in the record and relied upon by the parties. The transcript reviewing these assurances was not before the Court to be considered in connection with its decision, because no transcript had then been prepared.

Although the integrity of dealings between the Court and third parties must be carefully preserved, as the Court suggests in its RULING dated July 29, 1974 (R. 396-399), the dealings between the Court and counsel, and between the Court and parties who repose their property and confidence with the Court and who rely upon the Court's specific assurances and act thereon, must be even more closely preserved. This is especially true in this case where the third party is charged with actual knowledge of the Court's encouragement of settlement and with at least constructive notice of pleadings filed with the Court and proceedings held in the Court, all relied upon by the owners, thereafter. To accept the result of the Court's RULING of July 29, 1974 in this case would make a mockery and a farce of the prolonged, difficult, time-consuming efforts of the parties to achieve a settlement they believed they had every right as well as full encouragement to make. They were never advised and had no reason to believe their rights had been divested or that they should cease, or even slacken, their settlement efforts.

The specific language of the Court's order dated February 22, 1974 and the Receiver's letter to FMC's counsel dated February 27, 1974, even absent the background of preceding and following events, is at the most uncertain. In the context of pleadings, hearings, discussions and conduct of the parties, however, there should be no doubt that they do not create a contract or give FMC any binding rights. Yet the Lower Court, surprisingly, resolved the matter against the owners.

In view of the extended dealings between the Court and the owners, and their clear, good-faith and full reliance upon the Court's wishes and its assurances, it is especially important that their rights and interests be recognized and protected. Otherwise the high confidence reposed in the Court by counsel and by the parties in litigation is seriously and irreparably eroded and justice severely suffers. The Lower Court *must* protect and give primary consideration to the interests and rights of parties who come before it for assistance.

B. Intervenor had notice of the Receiver's limited authority and acquired no vested rights.

A receiver is an agent of the Court and all persons dealing with the receiver are chargeable with knowledge of the receiver's authority to act or contract. 2 Clark on Receivers, § 433, p.277. This rule is fundamental and necessary to permit effective judicial sales and the law

is well established that persons dealing with a receiver do so at their peril. 66 Am. Jur. 2d, *Receivers*, § 188 p.20 Also, it is well established that the receiver has no implied power to contract merely because he is a receiver but rather a receiver must be empowered to act by order of the appointing court. 66 Am. Jur. 2d, *Receivers*, § 236, p.57. As noted in 3 Clark on Receivers, § 765, p.1418:

“An equity receiver has only such powers as are granted by the order appointing the receiver or subsequent orders of the court appointed the receiver and those powers granted by the usages and rules of equity.”

Here there can be no question that the Intervenor must be charged with constructive notice of the Receiver's limited authority and his lack of authority to make a binding contract for sale without further approval of the Court. Further there should be little question, in light of the representations made by the Court, that the orders signed by it were not sufficient to result in a binding contract as of February, 1974. Certainly there could have been no binding contract at the time the owners moved to terminate the receivership. That motion, therefore, should have been granted. For the foregoing reasons it is evident that Intervenor's arguments concerning reliance and/or promissory estoppel are wholly without merit.

The Lower Court's conclusion that Intervenor acquired vested rights and a “binding, lawful and forceable

contract” by virtue of the Court’s order of February 22, 1974 is simply contrary to the facts, as noted above.

The status of a bidder at a judicial sale between the time his bid is accepted by a receiver and confirmed by the Court appointing the receiver was explained by Judge Learned Hand in *Freehill v. Greenfield*, 204 F.2d 907, 908, 909 (2nd Cir. 1953):

“The court was plainly right that an accepted bid at a judicial sale, subject to confirmation, binds the bidder, *though it does not bind the court*. It is to be considered as a contract concluded between the parties but *subject to the consent* of the third person; indeed, it would otherwise be difficult to conduct judicial sales at all.” (Emphasis added)

And in *Morris v. Burnett*, 154 F. 617, 624 (8th Cir. 1907), the rights of a bidder before confirmation were further explained:

“[T]here is a marked and radical distinction between the situations, the rights of the parties, and the established practice before and after *the confirmation of sale*. The *purchaser bids with full notice that the sale to him is subject to confirmation by the court* and that there is power granted and a duty imposed upon the judicial tribunal when it comes to decide whether or not the sale shall be confirmed to so exercise its judicial power as to secure for the owners of the property the largest practical returns. He is aware that his

rights as a purchaser are subject to the rational exercise of this discretion. But after the sale was confirmed that discretion has been exercised. The power to sell and the power to determine the price at which the sale shall be made has been exhausted. From thenceforth the court and the successful bidder occupy the relation of vendor and purchaser in an executed sale . . . ” (Emphasis added)

And as noted in 2 Clark on Receivers, § 519 at 835, a bidder at a receiver’s sale acquired no enforceable right until his bid has been accepted by the Court. And as is explained in 47 Am. Jur. 2d, *Judicial Sales*, § 179 at 441:

“ . . . no purchaser has the right to rely absolutely upon the order of the court directing the sale and the fact the agent of the court has pursued the terms prescribed thereby.

Thus it is evident that a purchaser at a judicial sale before confirmation of the bid by the court has full notice that his bid may not be accepted and is not entitled to rely in any respect upon the simple fact that receiver has looked with favor upon his bid.

The exact status and rights of a bidder after confirmation by the court is explained in 50 C.J.S., *Judicial Sales*, § 22 at pp.606, 607:

“The bidder does not acquire any rights by his bid until it is accepted and the sale is confirmed by the court. Until a sale is reported to,

and confirmed by, the court, the bid remains an offer, there is no binding contract, the sale is not complete, and there is no sale in a legal, but only in a popular sense. *This is true even in respect to a bid which has been accepted by the officer conducting the sale, and accepted bidder in such case being considered only a preferred proposer or purchaser and the accepted bid being deemed merely the best offer obtainable by the officer.*" (Emphasis added)

Accordingly a bid accepted by the receiver does not arise to the status of a vested right which would preclude a court from denying, in the exercise of its discretion, the confirmation of the sale to the bidder. In this case the Receiver never intended to accept the bid without further approval of the Court.

This rule is the well-recognized law in Utah. In *Joseph Nelson Plumbing & Heating Supply Co. v. McCrea*, 64 Utah 484, 231 P. 823 (1924) this Court refused to confirm the Lower Court's judicial sale because of a misunderstanding. This decision was explained in *Atwood v. Cox*, 88 Utah 437, 55 P.2d 377, 388, (1936) as standing for the proposition that the court has wide discretion to set aside a receiver's sale. These cases show that a bidder, prior to confirmation, has no right which should interfere with the court exercising its best judgment in the interest of the parties affected by the sale. Consequently, the Intervenor's protracted argument to the Lower Court about the expenditures it made in reliance

upon the Receiver's approval of its bid and attempts to utilize the doctrine of promissory estoppel are completely without merit. Adopting the Intervenor's position would preclude courts from conducting effective judicial sales. In any event, the very substantial effort, time, and expense incurred by the owners over a prolonged period to work out a very difficult settlement at the Court's request merit much greater consideration than the unsolicited efforts and expense by the Intervenor. At the time the owners settled their differences the only interest the Intervenor had in the proceedings was the exclusive right to negotiate with the Receiver. This is buttressed by the Court's representations at the March 15, 1974 hearing that no contract rights had been given the Intervenor and is further supported by the request of the Receiver in May, that the Court approve a contract of sale to the Intervenor "in a manner which is binding upon KOVO." (R. 187) Clearly, the Lower Court erred in determining that Intervenor acquired vested rights in February, 1974 which precluded the Court from exercising its sound discretion to terminate the receivership as it had promised it would of the owner could settle these differences.

## POINT II

THE CONTRACT OF SALE PROPOSED BY  
THE INTERVENOR WAS MATERIALLY  
DIFFERENT FROM ITS BID AND SHOULD  
NOT HAVE BEEN APPROVED BY THE  
LOWER COURT.



As is readily apparent from a comparison of the initial letter offer of FMC (R. 141-144) and the detailed contract submitted to the Court for approval (R. 189-259) the changes between the two are not only numerous but in a number of important respects very substantial. For example, the new paragraph on "definitions" necessarily includes in the sale certain assets such as files, records, books or account the logs nowhere included in the letter offer. This same section requires that KOVO recognize as valid financial and other reports not mentioned in the offer.

Of much greater significance is the provision in paragraph 4(b) at page 7 of the Agreement which requires that \$75,000.00 be placed in escrow against warranties. Although no escrow agreement accompanied the letter offer and none was prepared to accompany the Agreement submitted to the Court, a form of Escrow Agreement not furnished to counsel for the owners or to the Court, apparently prepared in March, 1974, requires the escrow agent to hold the funds for a period of *two years after closing* and the closing itself according to the Agreement is from 5-15 days *after FCC approval* which generally takes from 4-6 months. Although the letter offer merely conditions payment of the purchase price upon conveyance of the assets, the Agreement adds the condition of "performance" by KOVO as well before any of the proceeds are payable. Thus it would be at least two years after the closing which would be some 4-6

months after this appeal is determined before Mr. Shaw or Mr. Robison would have this very substantial portion of the net proceeds of sale so as to be able to get into another business. Yet they would be liable to pay taxes on the entire transaction since it would not qualify as an installment sale but would be without any funds to meet that obligation. In the meantime, by terms of the Escrow Agreement FMC would receive all interest and earnings on both the \$25,000.00 deposit and the \$75,000.00 indemnity amount. The hardship and loss upon Mr. Shaw and Mr. Robison and the substantial benefit to FMC of this arrangement are obvious. That this constitutes a clear, substantial and totally new element in comparison with the original letter offer cannot be seriously disputed. Nor can it be disputed that the escrow requirements clearly demonstrate that the agreement the court purported to approve does not fairly and properly protect the rights of the owner.

Another new provision involves trade-out accounts which FMC's action may affect. Also, the tax consequences shareholders with an unknown liability and subject to claims being made.

As noted, the Agreement provides for a cumbersome indemnification process for the protection of FMC whereby FMC is to be indemnified out of the \$75,000.00 escrow fund set up for that purpose.

Many new burdensome warranties are provided for in the Agreement, which are in addition to the standard warranties.

Many new conditions to the contract closing are imposed by FMC's proposed contract where were not contained in the prior letter offer.

The Agreement also provides that KOVO must warrant that there are no brokerage commissions to be charged as a result of the sale, and further, that FMC *may terminate* the Agreement, once executed, if the FCC has not "finally approved" the transfer by July 31, 1975 or if for some reason the station's broadcasts are interrupted for a period in excess of 30 days. These provisions were not in the letter offer.

Finally, the Agreement provides that the rights created thereunder are assignable by FMC, but implies that KOVO may assign neither its rights or obligations under the Agreement.

The net effect of these many changes added to the Agreement which were not present in the offer is to substantially increase the burdens of KOVO and to substantially decrease the obligations of FMC. Many provisions have been added which would allow FMC to either terminate the contract, once executed, or to renege on the deal. Furthermore, the warranty provisions which

have been added are so encompassing that KOVO assumes all the risks, even in areas of business dealing which FMC's actions may effect. Also, the tax consequences to the principals have as noted above been seriously changed. They could, in fact, bring the owners close to bankruptcy.

Because of the many substantial and important changes in and incompleteness of the contract submitted to the Lower Court it should have been disapproved and rejected, even if a binding contract had in fact been made in February, 1974.

The many changes demonstrated not only the need to reject the contract as presented to the Court but the sound reasons underlying the rule which requires specific confirmation by the Court of any final contract before any vested rights accrue to the buyer and, more importantly, before any of the owners' rights are divested.

## CONCLUSION

It is important to note in conclusion, as heretofore pointed out to the Court, that (1) the primary purpose of the receivership is to protect the interests of the corporation and its shareholders whose property the Court has under its control; (2) the policy of the law is and must be to encourage and facilitate the settlement of disputes at every stage of a proceeding, including a receiver-

ship proceeding; (3) consistent with such a policy the Lower Court consistently and forcefully encouraged the parties here to work out a settlement which they have done; (4) the Lower Court specifically assured the owners that it would honor a settlement between them and the Lower Court expressly advised all parties that no vested rights had been granted; (5) a third party dealing with a Receiver and the Court in this context must act at his peril and he may not presume that he has a binding contract, when not only the Court record but the clear conduct and understanding of the parties and the Receiver and their counsel and the documents theretofore and thereafter prepared by the Receiver's counsel and by FMC itself are inconsistent with that position, in that they contemplate further court approval; (6) the good-faith reliance of parties before the Court in the conduct and assurances given by the Court must be honored and recognized, and (7) the best interests of the corporation and its shareholders are clearly best served by the settlement with which they all agree and which conclude all of the other difficult and substantial and issues between the parties as well.

The Motion of the Receiver for approval of the Agreement, as to which the Receiver and its counsel took no position, should have been denied and the Motion of the parties for dismissal of the receivership action, subject of course to proper safeguards and conditions, should have been granted.

In the alternative this Court should at the very minimum remand this case to the Lower Court with instructions that it scrutinize with care all provisions of any contract which it may hereafter approve to insure not only fair consistency with the initial FMC offer but adequate protection for the rights and interests of the owners and KOVO as well.

*Respectfully submitted,*

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