

2001

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

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 } **BRIHAM YOUNG UNIVERSITY**

vs.

J. Reuben Clark Law School

ASHLEY L. ROBISON,

Defendant-Appellant,

KOVO, INC., a Utah corporation,

Defendant,

Case No.
13823

vs.

FIRST MEDIA CORPORATION, a

Delaware corporation,

Intervenor-Respondent.

BRIEF OF RESPONDENT

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

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

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.

Case No.
13823

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action pertaining to the sale of the assets of KOVO, Inc., through a liquidating receivership established on petition of Plaintiff-Appellant Glenn C. Shaw

due to a deadlock in the management of this corporation which is the licensee of Radio Stations KOVO(AM) and KFMC(FM), Provo, Utah.

DISPOSITION IN LOWER COURT

Because of the complete and continuing failure of the two equal, feuding shareholders of KOVO, Inc., to resolve their deadlock, a liquidating receivership was established by Court order upon petition of shareholder Glenn C. Shaw to sell the corporate assets. Pursuant thereto a formal, written offer of Respondent First Media Corporation (hereinafter "FMC") to buy Radio Stations KOVO-(AM) and KFMC(FM) was accepted by the Lower Court. Neither of the Lower Court's prior orders were appealed. By Order dated August 16, 1974, the Lower Court granted its appointed Receiver's Motion to approve the form of the longer form agreement in the concluding of the details of the transaction, which Order is on appeal.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the Lower Court's Order dated August 16, 1974.

STATEMENT OF FACTS

Appellants have failed to set forth a complete Statement of Facts in this matter, and it is believed that a more full Statement of Facts in chronological sequence by the Respondent will be helpful.

A. Commencement and Early Progress of Re-

ceivership Proceedings (April, 1973 - September, 1973).

This action seeking the appointment of a Receiver for the liquidation or sale of the assets of KOVO, Inc., was commenced by the filing of a verified Complaint dated April 5, 1973, by Glenn C. Shaw (hereinafter "Shaw"), a 50% shareholder and Vice President of KOVO, Inc. (R. 3). The action was precipitated due to a severe management deadlock and feud between Shaw and the other 50% stockholder and President, Ashley L. Robison (hereinafter "Robison") (R. 3, 11). KOVO, Inc., is licensed by the Federal Communications Commission as a trustee to operate Radio Stations KOVO(AM) and KFMC(FM), Provo, Utah, pursuant to federal law in the public interest (R. 11, 25; Tr., Sept. 6, 1973, pp. 28, 67; Exh. 7, Feb. 6, 1973 hearing).

In an Amended Complaint, Shaw alleged, *inter alia*, that there was a deadlock in the management of the corporation with the two equal stockholders being unable to agree on the appointment of a corporate director to fill a vacancy on the three-man board (R. 11, 12, 15). Shaw alleged further that serious differences existed between himself and Robison to the effect that "Unless a receiver is appointed by the Court without delay irreparable injury to the corporation and to the plaintiff will result" (R. 15). Numerous points of serious managerial discord and intra-corporate warfare are set out in the pleadings, including that ". . . Robison has purposely

refused to make payments which are due and owing on an equipment lease . . . and caused to be filed . . . a suit in the United States District Court for Utah . . . ,” the hiring and discharging of “. . . an inordinately high number of employees,” the tenuous relationship with the Intermountain Network due to “unreasonable acts” of Robison, failure to hold board meetings, and fundamental disagreements concerning finances, accounts and the direction of basic corporate policy (R. 12-14).

In an effort to restore corporate peace, the parties appeared in Court on April 24, 1973, and it was there indicated that they had arrived at an interim solution (Tr. April 24, 1973). This attempted accommodation failed, and the feuding stockholders then attempted another interim arrangement, thus delaying the necessity of appointing a Receiver during the summer of 1973 (Tr. May 16, 1973). On May 24, 1973, Robison counterclaimed, alleging that Shaw had breached the terms of his employment agreement with KOVO, Inc., had charged personal expenditures to the corporation, “. . . received compensation substantially in excess of that authorized by the Board of Directors . . . ,” and had improperly disposed of corporate assets (R. 48-50).

B. Liquidating Receiver Appointed by Court
Upon Petition of Appellant Shaw Because
of Renewed Failure of the Shareholders to
Resolve Corporate Deadlock (September,
1973).

The second interim arrangement for the corporation also disintegrated in failure. At a hearing on August 31, 1973, Shaw strenuously urged the Court to appoint a Receiver, liquidate the corporation and sell the radio stations:

Mr. Martineau (Counsel for Shaw):

I might also say in the interim period there has been an accounting worked out on most items by the accountant, Mr. Sid Gilbert. Also there have been contacts with people that might be willing to buy the station and we have offers in writing on that. *Eventually this station has got to be sold in order to be liquidated*, since these men cannot operate it together. *There is a deadlock. We want a receiver appointed so it can be liquidated.* We feel that we have bent over backwards these three or four months in permitting this thing to settle down and to be given every opportunity (Tr. Aug. 31, 1973, p. 9). (Emphasis added.)

A hearing was set for September 6, 1973, to consider the basic question of the appointment of a liquidating Receiver. At this hearing, counsel for Shaw again urged:

... the issue before the Court now, that (there) is a deadlock and *a need for a receivership*, the record is clear and we feel that our motion is meritorious and should be granted and the Court should appoint a receiver forthwith and to take in control the management of the affairs and the records of this corporation *with the view toward a liquidation within the shortest time as prac-*

licable. (Tr. Sept. 6, 1973, p. 58.) (Emphasis added.)

After full opportunity to present evidence, the Court ordered on September 17, 1973, that Sidney Gilbert be "... appointed as Receiver for the *sale and liquidation* of the assets and business of the corporation ..." and that "The proceeds of sale of any property, asset or right of the corporation shall be applied as provided in Section 16-10-93, U. C. A." (R. 106-108). (Emphasis added.) The Court later observed that "... the only reason that the Court is in this act under the corporation code is to preserve the assets until it can be turned to cash or some other assets." (Tr. Jan. 24, 1974, p. 17.) The Receiver testified with regard to his understanding of the action of the Court on September 17, 1973, that: "I believe this was the order of the Court, was to sell the station, and we set out to do that." (Tr. June 28, 1974, p. 118.) Neither of the contending equal shareholders appealed the September 17, 1973, order.

C. Court Administered Procedure to Liquidate and Sell the Assets of KOVO, Inc., (Radio Stations KOVO(AM) and KFMC(FM)) (September, 1973 - January, 1974).

1. FCC Approves Transfer of Corporate Control to the Court Appointed Liquidating Receiver.

On October 10, 1973, the Receiver submitted an ap-

plication (FCC File No. BTC-7267) to the Federal Communications Commission (hereinafter "FCC") seeking consent to the involuntary transfer of control of KOVO, Inc., from the deadlocked equal shareholders to the Receiver (R. 349). In Exhibit No. 1 of the transfer application, the Receiver represented to the FCC that "the ultimate aim of the receivership is to sell the going business . . ." FCC approval was granted on December 6, 1973 (R. 349, 405).

2. Formal Solicitation of Offers to Purchase Radio Stations.

With respect to the liquidation and sale of the KOVO, Inc. assets, the Court-appointed Receiver represented in a written report to the Court on November 29, 1973, that ". . . now that the financial statements have been prepared, your Receiver intends to circularize all of such interested purchasers and request written offers from them on or before a fixed date" (R. 125). In compliance with this procedure, and the order of the Court to sell the stations, the Receiver solicited written offers from third parties. (Tr. June 28, 1974, p. 118.) The Receiver in fact did receive several competing written offers, including offers submitted by each of the shareholders, Shaw and Robison, and their investment partners, the Respondent FMC, and two or three others, including the Ross Davis and Brockbank offers (Tr. June 28, 1974, pp. 119, 127.)

3. First Media Corporation (FMC) Sub-

mits Written "Highest and Best Offer"
Containing Time Deadline for Acceptance.

Within the time schedule approved by the Receiver, FMC transmitted a written offer dated January 15, 1974, with a copy to the Court. (R. 126; FMC Exh. 1 and 2, June 28, 1974 hearing.) This detailed four-page, single-spaced offer contained essential contract terms, such as identification of the property to be purchased, price and payment. The offer by its terms specified January 21, 1974, as the time deadline for acceptance. (FMC Exh. 1, June 28, 1974 hearing, p. 3.) However, it became apparent that the Receiver would need more time beyond the January 21, 1974, expiration date of the FMC offer in which to consider and study all competing offers, and thus FMC agreed by letter to extend the acceptance date. (FMC Exh. 3, June 28, 1974 hearing; Tr. June 28, 1974, p. 16.) On January 31, 1974, the Receiver petitioned the Court for a hearing to consider and act upon offers received (R. 150). The Receiver's Motion stated that, "... your Receiver is of the opinion that the *highest and best offer* received to date is one from First Media Corporation (FMC) ..." (R. 150). (Emphasis added.)

With respect to the deadlocked appellant shareholders, the Receiver indicated in his Motion that he had "... invited either Mr. Shaw or Mr. Robison to make a bid to purchase the corporation, *but no such bid has been forthcoming* as of this time from either of said per-

sons" (R. 150). (Emphasis added.) Finally, on the day of the evidentiary hearing to consider the written offers (February 6, 1974), the Shaw group (including Shaw, Murray Rawson and Ben W. Wilkerson) and the Robison group (including Robison, Tim Themy and William Hesterman) *each* submitted competing written offers which were in fact filed beyond the deadline established for other parties. (Exh. 8 and 9, Feb. 6, 1974 hearing; Tr. Feb. 6, 1974, pp. 28 and 44.) Nevertheless, the Court did consider these offers along with the FMC offer at the hearing on February 6, 1974, as is hereinafter more fully set forth.

D. Complete Failure of Stockholders to Resolve Corporate Deadlock and Settle Differences; Robison's Appropriation of Corporate Opportunity and the AbCaTron Dispute (September 1973 - February 6, 1974).

From August 31, 1973, until the February 6, 1974, evidentiary hearing held by the Lower Court on the competing offers to purchase submitted by the Shaw Group, the Robison Group and FMC, the record in this liquidating receivership proceeding is silent regarding any settlement or attempted settlement of any kind between Shaw and Robison. Rather, the adversary stockholders remained deadlocked and pursued their own interests in acquiring control of the assets of the corporation in competition with each other and with other interested parties such as FMC, Ross Davis, Brockbank and others whose

offers were solicited by the Receiver. (Tr. Feb. 6, 1974.) The continued adversary posture of the two equal stockholders was further manifest in the rise and final disposition in January, 1974, of the AbCaTron Corporate opportunity matter involving the KOVO(AM) transmitter site. (Tr. Jan. 24, 1974.)

While serving as President and in a fiduciary capacity as Director of KOVO, Inc., Robison acquired for himself and not KOVO, Inc., an option to purchase some of the indispensable parcels of land on which the KOVO(AM) radio antenna tower and grounding system is situated. Robison thereupon assigned his option to AbCaTron Corporation, which corporation then proposed to lease the same land back to KOVO, Inc., for \$3,000 per month over a 20-year period. (R. 157-161; Exh. 10a, Jan. 24, 1974, hearing.) KOVO, Inc. could have acquired the land for \$50,000. (Exh. 2A, Jan. 24, 1974, hearing.) As Robison's assignee, AbCaTron would therefore receive a 72% annual return on its investment at the expense of KOVO, Inc. (R. 160).

Following an evidentiary hearing on January 24, 1974, the Court found "... that the deprivation of the Jacobson Trust Property (transmitter site) and the *removal of the opportunity* to obtain the property results in extreme hardship, irreparable damage, and perhaps *devastating injury* to KOVO, Inc." (R. 150). (Emphasis added.) Because of defendant-appellant Robison's fiduciary relationship to KOVO, Inc., as a director and his direct involvement in securing the exclusive option on the

transmitter land to the detriment and injury of KOVO, Inc., the Court imposed a constructive trust on the option (R. 161).

E. Evidentiary Hearing Relative to Submitted Offers; Receiver's Report and Recommendation of FMC Offer; Court Acceptance of FMC Offer (February, 1974).

1. Evidentiary Hearing on the Competing Written Offers Submitted by the Shaw Group, the Robison Group and FMC.

On February 6, 1974, the Court held a full evidentiary hearing at which legal representatives of Shaw, Robison, the investment partners of Shaw and Robison, and FMC were invited to discuss, on the record, their clients' competing offers to the Court. (Tr. Feb. 6, 1974, pp. 8, 28, 37.) Each party was carefully examined by the Receiver's attorney, the other counsel, and the Court, regarding the salient characteristics of their respective offers and underlying qualifications. (Tr. Feb. 6, 1974.) The hearing record is absolutely devoid of any discussion at this time by Shaw and Robison that they were trying to reach some accord, as *each* formed an investment group and submitted a competing written offer. (Tr. Feb. 6, 1974, pp. 28 and 37; Exh. 8 and 9, Feb. 6, 1974 hearing.)

At this February 6 hearing, the Court approved and set into motion an exacting schedule wherein each of the three competing offeror groups was given opportunity to

submit any additional information so desired to the Receiver by February 11, 1974. (Tr. Feb. 6, 1974, pp. 46-50.) During these proceedings the Receiver specifically requested that FMC hold its offer open for acceptance so as to meet the stipulated timetable. (Tr. Feb. 6, 1974, pp. 47-48; Tr. June 28, 1974, pp. 20-21):

MR. ROBERTS (Counsel for Receiver): . . . and I would like to have the record reflect if it can, Mr. Hardy, that your client is willing to hold your offer open for that period of time.

MR. HARDY (Vice President, FMC): Yes, and I will provide you with an appropriate instrument. (Tr. Feb. 6, 1974, pp. 47-48.)

Pursuant to the Court's schedule, Messrs. Richard E. Marriott, Glen T. Potter and Ralph W. Hardy, Jr., officers and directors of FMC, directed a telegram to the Receiver dated February 11, 1974, confirming the oral agreement made in open Court to keep its offer open. (FMC Exh. 5, June 28, 1974 hearing.)

2. Receiver's Written Report and Recommendation of FMC Offer.

In obedience to the schedule mandated by the Court at the February 6, 1974, evidentiary hearing, the Receiver submitted his formal written Report and Recommendation to the Court for consideration on February 19, 1974 (R. 169). In his report the Receiver recommended the FMC offer (R. 172).

3. Court Acceptance of FMC Offer and Communication of Acceptance to FMC.

By Order dated February 22, 1974, the Court accepted the offer of FMC:

The court having considered evidence presented in support of proposed offers of purchase of KOVO, Inc., and having considered the report of the receiver herein concerning such offers, and having considered the course taken by this proceeding since its inception, it concludes that the best interests of all parties herein would be served in the most even handed and expeditious manner by *accepting* the offer of F.M.C., Inc.

It is therefore ordered that the 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., Inc., and proceed with all reasonable dispatch to conclude sale to that offeror.*

Dated this 22nd day of February, 1974.

/s/ Allen B. Sorensen

Allen B. Sorensen, Judge

(R. 173.) (Emphasis added.)

A duplicate original of this acceptance order was mailed directly by the Court itself to Ralph W. Hardy, Jr., Vice President and Secretary of FMC (FMC Exh. 8, June 28, 1974, p. 23.) Receiver's counsel also sent a separate copy of the Court's order to Mr. Hardy. (FMC Exh. 9, June 28, 1974, hearing; Tr. June 28, 1974, pp. 23-24.)

Robison's objection to the Court's February 22, 1974,

acceptance order was denied by the Court after opportunity for a hearing on March 15, 1974 (R. 180, 182-183). No objection to the said order was filed by Shaw. *Neither* the February 22, 1974, order, nor the March 15, 1974, order denying Robison's objections was appealed by *either* Shaw or Robison or their respective investment partners.

F. Formalization of Conforming Long Form
 "Agreement for the Sale and Purchase of
 Assets" Document and Detrimental Reliance of FMC. (February, 1974 - May, 1974.)

In confirmation of, and in express reliance upon the Court's February 22, 1974, acceptance of FMC's time-limited offer, FMC commenced to prepare with the Receiver a conforming longer form "Agreement for the Sale and Purchase of Assets." A draft of this long form, which was conformed to and based upon the Court-accepted detailed written FMC offer, was expeditiously sent by FMC upon request to the Receiver the latter part of February, 1974. (Tr. June 28, 1974, hearing, pp. 49, 61 and 70.) Receiver afforded both Robison and Shaw an opportunity to offer suggestions concerning the long form (R. 186).

During this same period immediately following the Court's acceptance of its offer, FMC engaged in other activity to complete details in reliance on the Court's mandate "... to *conclude* sale to (this) offeror" (R. 173). Officers and directors of FMC came to Utah to undertake community surveys which are required to expedite

the lengthy required F.C.C. approval for transfer of the radio licenses. (Tr., June 28, 1974, pp. 73, 78, 80-82.) One of these was a "general public" survey, and the other a "community leader survey." (Tr. June 28, 1974, pp. 80-81.)

At this time, there was a pending lawsuit against KOVO, Inc. by a very substantial creditor, Schafer Electronics Corporation, and with the encouragement and approval of the Receiver after acceptance of its offer, FMC held conferences, including a meeting in Washington, D. C. to assist in bringing this creditor matter to a resolution. (Tr., June 28, 1974, pp. 27-29, 33-34; FMC Exhibits 13, 14, June 28, 1974 hearing.) Because of the Court acceptance of its offer, FMC determined not to take further steps relative to another potential investment, the purchase of Radio Stations KBOI and KBOI-FM in Boise, Idaho. (R. 88; FMC Exh. 19, June 28, 1974 hearing.) Without considering the lost investment opportunity relative to the two KBOI stations, FMC expended \$18,926.97 in the period of time following acceptance of its offer to expedite the concluding of the matter in strict obedience with the Lower Court's February 22, 1974, acceptance order. (FMC Exh. 15, 17 and 18, June 28, 1974, hearing.)

G. Motion By Receiver to Approve the Long Form "Agreement for the Sale and Purchase of Assets" and Hearings Thereon. (May, 1974 - July, 1974.)

The Receiver filed a Motion dated May 11, 1974, seeking approval of the long form "Agreement for the Sale and Purchase of Assets" which had been prepared pursuant to, and consistent with, the Court accepted FMC written offer (R. 186). The Motion recited that "In the opinion of the Receiver, the agreement (the long form entitled, "Agreement for the Sale and Purchase of Assets") (R. 189 *et seq.*) is consistent with the initial offer and proposal filed by First Media Corporation in this proceeding" (R. 186). This long form was described in testimony by the Receiver's counsel as a "... 'flushing (sic fleshing) out' or sort of completing the details" — as the earlier written FMC offer "... had the basic elements ..." (Tr. June 28, 1974, p. 147-148.) This fact was recited in the long form itself which was presented to the Court by the Receiver:

WHEREAS, KOVO, INC. (through the Receiver and *with the approval of the Court dated February 22, 1974 . . .* and FIRST MEDIA *have reached an understanding with* respect to the sale by KOVO, Inc. and the acquisition by FIRST MEDIA of certain assets from KOVO, Inc. (R. 190). (Emphasis added.)

The Court, in discussing the relationship between the Court acceptance of FMC's offer on February 22, 1974, and the long form agreement referred to the analogy of of an earnest money receipt compared to the longer form real estate contract. (Tr. June 28, 1974, p. 61.)

After the Receiver's May 11, 1974, Motion was filed,

Shaw's attorney called the Receiver's attorney and asked that hearing on the Motion be continued. The reason given by counsel was that he would be unable to be present at the hearing as presently scheduled, but that he wanted to be present to *support* the Receiver's Motion. (Tr. June 28, 1974, p. 142, R. 408.)

A hearing on the Receiver's Motion was then reset for May 24, 1974 (R. 260). Testimony of both the Receiver's counsel and Shaw's attorney indicate that Shaw's attorney asked for yet another continuance on *May 22 or 23*. (Tr. July 2, 1974, p. 15, 19.) At this time, the record is clear that there was still no final settlement, understanding or new offer involving Robison, Shaw or other third party purchasers or financial backers. (Tr. July 3, 1974, p. 12.) Finally on *either May 30, 1974, or May 31, 1974*, with the hearing time delayed at Shaw's request and the Receiver's Motion now set for June 7, 1974, Shaw's attorney again called the Receiver's counsel to tell him for the first time that major problems between Shaw and Robison had been allegedly worked out. (Tr. July 3, 1974, p. 12.) A Motion to Terminate the receivership was not filed by Shaw and Robison, however, until as late as June 5, 1974 (R. 266).

In light of these thirteenth-hour developments, and to afford all a fair chance to be heard, the Court on June 6, 1974, rescheduled the hearing on the twice continued Receiver's May 11 Motion for June 28, 1974. FMC petitioned for formal Intervention alleging that it had vested contract rights which had ripened into existence dating

back to the Court's action on February 22, 1974, accepting its offer (R. 268, 282). FMC alleged that it was now entitled to enter the action as a formal party to protect its vested contract rights (R. 268-284). Both Robison and Shaw filed pleadings consenting to such Intervention (R. 296-98).

After a full evidentiary hearing on the Receiver's May 11, 1974, Motion on June 28, 1974, and July 3, 1974, the Court ruled that FMC's offer had in fact been accepted by it (the Court) through its own Order of February 22, 1974, and that the Receiver's May 11 Motion should be granted. The Court's Order along with its Findings of Fact and Conclusions of Law were signed August 16, 1974 (R. 400-410). No objection to the Findings of Fact and Conclusions of Law were filed by either Shaw or Robison. However, both Shaw and Robison filed notices of appeal from the said August 16, 1974, Order, which is the subject matter of this present appeal (R. 414).

ARGUMENT

POINT I

THE ACTION OF THE LOWER COURT ORDERING COMPLETION OF THE SALE TO RESPONDENT FMC WAS PROPER.

The Order of the Lower Court appealed from herein states:

IT IS HEREBY ORDERED, ADJUDGED

AND DECREED that the Receiver's Motion dated May 11, 1974, is hereby granted and thereby Receiver is authorized to execute the "Agreement For The Sale And Purchase of Assets" attached to said Motion, and to proceed with all reasonable dispatch to do whatever is necessary to conclude the sale relative to the assets of KOVO, Inc. to First Media (R. 401).

A. The Lower Court Properly Held that It had Accepted the Written Offer of FMC to Purchase the Assets of KOVO, Inc.

1. The Court Order of February 22, 1974, Constituted Acceptance of FMC's Offer.

The facts in this case are easily distilled into the basic contractual concept of an offer by FMC to purchase the KOVO, Inc. assets, and acceptance of that offer by the Lower Court:

The written offer of First Media was accepted through order of this Court dated February 22, 1974, and in such a manner as to create a lawful and enforceable contract. (Conclusions of Law, R. 409.) (Emphasis added.)

Throughout the entirety of their brief, appellants conveniently overlook this fundamental contractual concept as well as principles of law and equity related to the administration of judicial sales. For instance, at pages 42-43 of their brief, appellants argue that a bid accepted by a receiver but not the Court does not give rise to the

creation of a vested right and cite various references including 2 Clark on Receivers, § 519 at 835, and 50 C. J. S., *Judicial Sales*, § 22. What is completely ignored by the appellants, however, is that the Lower Court itself *did accept* the offer of FMC through its order of February 22, 1974, as made abundantly clear by its Conclusions of Law, *supra*. Thus, the law and procedure discussed by the appellants throughout their brief was adhered to in that the FMC, Shaw, and Robison offers were discussed with *both* the Receiver and the Court on February 6, 1974, and then after the Receiver made his recommendation the Lower Court took the separate and distinct step of accepting the FMC offer, thereby giving judicial approval to the sale (R. 401).*

*In attempting to avoid the consequences of the Lower Court's acceptance order of February 22, 1974, and contrary to fundamental principles of appellate argument, the appellants argue facts which are *not* in the record with respect to a hearing on March 15, 1974. For instance, on page 35 of their brief they state: "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 negotiations." No citation is given for such a statement in the record because it does not exist. The record is clear that at the March 15 hearing, the Lower Court *denied* the objections of Robison to the Court's February 22 Order (R. 182). In fact, one of the objections of Robison to the February 22 order was that the Court's *acceptance* of the FMC offer was "premature," thus indicating that Robison indeed believed that the Lower Court accepted the FMC offer. (Appellants' Brief, p. 14; R. 177.)

The appellant's unsupported assertion, *supra*, only compounds the error in appellants' Statement of Facts. In the first full paragraph on page 15 of their brief, appellants state that the Lower Court did not dispute the contents of an affidavit of an attorney that was proffered into evidence, the affidavit stating what the Court supposedly said on March 15. (There was no transcript for said hearing.) It is incredibly obvious that the Lower Court did not have

Appellants make the novel argument at pages 25-28 of their brief that "acceptance" and "confirmation" of an offer are two distinct acts required of a court in a judicial sale. The authorities cited by appellants suggest that the requirement may exist that where an offer is first accepted by a sale officer *other than the court* itself, such as by a receiver, there may then be a requirement of a separate "acceptance" or "confirmation" by the Court. But there is absolutely no requirement for two acts where the Court itself is the accepting officer. In *Freebill v. Greenfield*, 204 F. 2d 907 (2 Cir. 1953) (cited by appellants, p. 41) this principle is clarified, as "confirmation" by the Court was sought because the person actually conducting the sale and receiving the bid or offer was a trustee in bankruptcy. The acceptance or confirmation by the Court was not a *second act by the Court.*, but its *only* act of acceptance following the first action of the

*Continued.

to disagree with the contents in the affidavit, as the affidavit was *not* admitted into evidence. (Tr. July 3, 1974, p. 3.)

FMC indicated to the Court by way of direct refutation to what appellants claimed the Court had said at the March 15, 1974, hearing that it had extensive notes that it would enter into evidence as to what was said at the March 15 hearing. (Tr. July 3, 1974, p. 13. See also Tr. June 28, 1974, pp. 43-44.) This evidence was unnecessary due to the failure of the appellants to put in any evidence as to what the Court said. Appellants on page 15 of their brief say that the affidavit of Robison's former attorney was "surprisingly not admitted . . ." It was not admitted because having notice for nearly two weeks of the hearing, they failed to produce Robison's former attorney who lived in Provo and who attended part of the hearing to testify in person subject to cross examination. Thus, the affidavit in an evidentiary trial-type hearing was nothing more than rank hearsay. To then argue in their brief something as being fact, which is not in the record, goes beyond the bounds of appellate propriety.

trustee. Of a similar vein is *Morrison v. Burnette*, 154 F. 617 (8 Cir. 1907) (cited in appellants' brief, p. 41), wherein the two acts of acceptance and confirmation refer to the sale officer first taking the bid and then the Court confirming or accepting such:

... that the bidder at a sale by a master or receiver . . . buys subject to the confirmation or avoidance of the sale by the court. (p. 263.)

Thus, the entire thrust of the appellants' argument is misplaced as the Lower Court in this case *did* accept or confirm the FMC offer by order separate from earlier action of the Receiver.

2. The Lower Court Did Not Recognize or Permit An "Alternative Approach," But Rather Ordered Settlement and Sale to FMC as Purchaser in Accordance With Its Offer.

Appellants argue that until July, 1974, the Lower Court had followed a procedure permitting an *alternative approach* to the disposition of the stockholder 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 action taken by the owners, their counsel, the Receiver and his counsel and by the Court itself

throughout the proceedings until July, 1974. (Appellants' Brief, p. 29.) (Emphasis added.)

Not only is this self serving statement wholly unsupported by the record, but, as a fundamental matter of equity and the orderly conduct of judicial sales, any such dual approach by the Lower Court would clearly constitute a fraud upon *bona fide* third-party purchasers. There is no basis for such alleged schizophrenia and uncertainty in the court order of February 22, 1974 (R. 173).

It is submitted that third persons who filed solicited offers with the Court's Receiver in good faith, such as the Ross Davis and the Brockbank groups and FMC, were entitled to rely upon a *bona fide* judicial sale procedure. These good faith offerors were entitled to rely upon orderly procedures and the assurance that they were not engaged in a meaningless exercise in the event of acceptance of an offer by the Court itself. *A fortiori*, once its deadlined offer was in fact accepted by the Court on February 22, 1974, FMC was entitled to rely on the fact that the Court or its Receiver would not inconsistently later approve action which would nullify the Court's own acceptance.* The record lends no support whatsoever

*At pages 9-10 of their brief, appellants include a quotation from the February 6, 1974 transcript suggesting the Court was still encouraging settlement. First, it should be noted that the colloquy quoted by appellants from the February 6 hearing is argued out of context. The Court was suggesting that perhaps there could be agreement as to which *one* of the *three* competing offers should be accepted. Secondly, the three parties who made offers (FMC, Shaw & Robison) did not agree as to which one should be accepted, and the Court proceeded to take evidence so that it could make the decision. (Tr. Feb. 6, 1974, pp. 2-6.)

to the theory that the Lower Court was involved in the duplicity of such an inconsistent approach after it ordered acceptance of the FMC offer thereby creating vested rights, *supra*.*

3. The Lower Court's Conclusion That
FMC Acquired Vested Rights Based
Upon Acceptance of the Original FMC
Offer is Consonant With Fundamental
Principles of Contract Law.

The Lower Court concluded that "Through acceptance of its written offer, First Media acquired vested rights." (Conclusions of Law, R. 409.) *Daum Construction Company v. Child*, 247 P. 2d 817, 819 (Ut. 1952). See also *Thornton v. Pasch*, 104 Ut. 313, 139 P. 2d 1002 (1943). In its written Ruling, the Court fully articulated the fundamental principle that failure to recognize the creation of vested rights in FMC "... would be unjust, and would render proceedings under the pertinent statute useless" (Ruling, R. 398).

FMC asserted in its June 7, 1974, Petition in Intervention that it "... acquired vested rights by reason of proceedings which have heretofore occurred, and failure

*The fact that the Court did not take such a dual approach is emphasized by a later order, dated March 27, 1974, wherein the Court expressly ordered that all disputes between Glenn C. Shaw and Ashley L. Robison regarding their ownership, financial disputes "... are hereby referred to Division One of this Court for trial setting ..." (R. 182). The Lower Court, by this order, stressed again that it was involved in the sale with FMC at this point and not the basic shareholder feud.

to permit intervention would deny petitioner's rights including due process of law" (R. 268). Appellants inconsistently appear to have acquiesced in this position, both Shaw and Robison having filed pleadings consenting to the intervention (R. 296, 298).

Appellants suggest that because of the Receiver's May 11, 1974, Motion seeking approval of the long form "Agreement for the Sale and Purchase of Assets," FMC acquired no rights through the Court's earlier acceptance order of February 22 (Appellants Brief, p. 36). Such an argument is patently contrary to basic contract law wherein it is not unusual for there to be a binding written agreement between parties on basic terms to be later expressed in a longer, more detailed document. The preparation of the longer form does *not* destroy the binding effect of the shorter form. *Bunnell v. Bills*, 13 Utah 2d 83, 368 P. 2d 597 (Utah 1962); *Phillips and Easton v. International*, 512 P. 2d 379 (Kan. 1973). An example is the court suggested relationship of an earnest money receipt to the longer real estate contract form:

COURT: Then what do you claim for the contract that you now have submitted to the receiver?

HARDY (Vice President, FMC): What do you mean what do I claim?

COURT: What is there in that contract — is that contract any different than the offer in January?

HARDY: In substance it is not different.

There are flushing (sic fleshing) out of what I would call basic first principles, boilerplate language, representations of warranties, that sort of thing that is in addition that would need to be approved.

COURT: I am taking what you are trying to express *is analogous to an earnest money receipt* in a final real estate contract. Is that what you are talking about?

HARDY: I am not a real estate lawyer, but I think that is fair. (Tr. June 28, 1974, p. 61.) (Emphasis added.)

This characterization was also made by the Receiver's counsel as he, too, said that the FMC offer "had the basic elements." (Tr. June 28, 1974, p. 147-148.)

The last paragraph of the Lower Court's February 22 acceptance Order* plainly shows the intent of the Court in taking such a bifurcated short form/long form approach, i.e., (1) to first *accept* the written offer of FMC, thereby binding the parties (with a comma inserted *before* the "and," thus clearly breaking the thought) *and* then (2) to proceed to finalize the transaction pursuant to the terms of the accepted short form agreement. This is consistent with the Court's concern about the expiration of FMC's offer expressed at the February 6, 1974, hearing and shows a clear intent to bind FMC — thus creating a "binder" like agreement so as to justify FMC

*"It is therefore ordered that the 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., Inc., *and* proceed with all reasonable dispatch to conclude sale to that offeror."

and the Receiver expending time to prepare a more formal long form agreement in conformance with the offer.*

A careful review of the detailed FMC offer shows that it contains *all* material terms essential to the creation of a contract such as a description of what was to be purchased, price and the procedures to complete the transfer of KOVO, Inc.'s assets and business. (FMC Exh. 1, June 28, 1974, hearing.) The FMC offer contained definite, certain and enforceable guidelines. Under the contract doctrine of mutuality, FMC *could not* have arbitrarily withdrawn from the transaction. By the same token the Receiver could no longer entertain other offers, *e.g.*, such as the one attempted on behalf of Messrs. Robison, Hesterman, Howard Bradshaw and/or American Savings and Loan Association on May 31, 1974, *infra*.

Recognition of the binding effect of a short form

*Indeed from appellants' suggestion that FMC's January 15 offer was not accepted by the Court on February 22 and that it could not be accepted until Court approval of the long form agreement the absurd conclusion necessarily follows that FMC's time-deadlined January 15 offer must somehow still be open and that it can be drawn down or otherwise snapped up by the Court at any time and at *its pleasure* wholly beyond the control of offeror FMC. This open ended acceptance condition obviously is not the case. FMC's January 15 written offer was formally and deliberately extended *twice* in order to accommodate the Lower Court's schedule for considering the Receiver's Report and Recommendation and the ultimate Court acceptance of an offer. As fully set forth in FMC's offering documentations, as amended and on the record in this proceeding, such an open-ended offer was neither intended nor authorized by FMC. Prompt acceptance or rejection of its time-deadlined offer was contemplated by FMC and the Court. Simply stated, it was to be an "up" or "down" matter, as satisfied by the Lower Court in its Acceptance Order of February 22, 1974.

agreement, without reference to contemplated later formalization and detailed refinement thereof, and without all of the traditional "boilerplate" language found in a longer form is well supported in the law. In *City Stores Co. v. Ammerman*, 226 F. Supp. 766 (Dist. Ct. D. C. 1967), *aff'd.*, 394 F. 2d 950 (D. C. Cir. 1968), plaintiff sought specific performance of a letter agreement from the defendant stating that the plaintiff could be given an "... opportunity to become one of our ... center's major tenants with rental and terms at least equal to that of any other major department store in the center." *City Stores, supra*, at 770. Even though certain terms were not spelled out in minute detail in the letter such as building design and specifications, the Court had no difficulty enforcing the agreement because such terms would be "... within the customary contemplation of parties entering into shopping center agreements of the type at issue in this case" (p. 771). *Walsh v. Rundlette*, 9 D. C. (2 Mac.) 114 (1875).

The Court in *Morris v. Ballard*, 56 U. S. App. D. C. 383; 16 F. 2d 175 (1926) upheld the efficacy of an option to purchase property with a provision that the price was to be "on terms to be agreed upon." Upon careful review of the law, the Court held that this:

... was in good conscience a stipulation that he would in fact agree with plaintiff *upon reasonable terms of payment, and would not arbitrarily refuse to proceed with the sale* ... 56 App.

D. C. 383, 384; 16 F. 2d 175, 176. (Emphasis added.)*

In a similar vein is the California Supreme Court's holding that "the contract . . . was neither illusory nor lacking in mutuality of obligation because the parties inserted a provision in their contract making plaintiff's performance dependent on his satisfaction with the leases to be obtained by him." *Mattei v. Hopper*, 330 P. 2d 625, 628-629 (1958). Likewise in *Fincher v. Belk-Sawyer Company*, 127 So. 2d 130 (Fla. 1961), the Florida Court held that:

The contract leaves to the future agreement of the parties the establishment by the defendant of a beauty consulting service, shopping service and the amount of additional compensation based upon the gross sales of the defendant's fashion department, beauty consulting service and shopping service . . . We conclude that these provisions left for future agreement do not render the remaining promises, which are definite and certain, unenforceable. 127 So. 2d at 132. (Emphasis added.)

The same approach is taken with insurance agreements wherein there is a "phase 1." or "binder" agreement before issuance of a more formal and lengthy policy. *Fisher v. Underwriters at Lloyd's London*, 115 F. 2d 641 (7 Cir. 1940). Without question, FMC became bound and by the same token acquired vested rights upon the ac-

*See also *Roig v. Electrical Research Products, Inc.*, 57 F. 2d 639 (1 Cir. 1932).

ceptance of its offer through action of the Lower Court, and the best evidence of the intent of the Lower Court to so bind FMC is its own Decision in August, 1974, that it had indeed accepted FMC's written offer (R. 409).

B. Shaw and Robison Failed to Settle Their Differences Prior to the Lower Court's Acceptance of the FMC Offer, and the Purported Agreement of Shaw, Robison and New Third Parties Over Three Months Later Constituted an Untimely New Offer.

1. Shaw and Robison Failed to Settle Their Differences Prior to the Acceptance of the FMC Offer.

Throughout their Brief, appellants strain to argue that they were somehow diligently working towards a settlement culminating in the arbitrary rejection of the purported settlement by the Lower Court. (Appellants' Brief, p. 37.) A meticulous review of the record fails to lend even a modicum of support to this bootstrap attempt by the appellants to camouflage the salient fact that contract rights vested in FMC upon acceptance of FMC's time-deadlined offer by the Lower Court by order of February 22, 1974.

As the factual chronology plainly shows, for several months immediately after the receivership action was filed in *April*, 1973, the feuding shareholders tried in vain to resolve their deep discords with encouragement of set-

tlement by the Lower Court (R. 59-60). However, it is equally evident from the *record* that these several early attempts to bridge the everwidening gulf of stockholder acrimony completely disintegrated, flaring into plaintiff Shaw's concerted effort in *August*, 1973, to have a Receiver appointed to effectuate a sale of the KOVO, Inc., assets in the shortest time practicable:

MARTINEAU (Counsel for Shaw): There is a deadlock.

We want a receiver appointed so it can be liquidated . . . we have bent over backwards these three or four months in permitting this thing to settle down . . . (Tr. Aug. 31, 1973, p. 9; see also Tr. Sept. 6, 1973, p. 58.) (Emphasis added.)

In view of the marked intrasigence of the parties, two interim settlement failures, mounting creditor claims, lawsuits and the crippling deadlock of the corporate licensee of Radio Stations KOVO(AM) and KFMC(FM), the Court finally acceded to Shaw's petition pursuant to statutory provisions (U. C. A. § 16-10-93, *et seq.*) and appointed a Receiver in September, 1973, ". . . for the sale and liquidation of the assets and business" of KOVO, Inc.* (R. 106-108). It is significant that *neither* of the appellants appealed the Court's order of appointment.

*The appellants in their Statement of Facts at p. 5 suggest that at this time (August 31, 1973) there appeared to be some possibility of ". . . working out a buy-sell between the owners." This was, however, *prior* to the time of the full evidentiary hearing on the appointment of the Receiver, which was held on September 6, 1973. Thus, what may have been "possible" on August 31 obviously failed, as the appointment of a Receiver came in point of time after.

Without any question as to the liquidating purpose of this receivership, the Lower Court designed, approved and set into motion and supervised a formal competitive offering, acceptance and liquidating sale procedure. For instance, in Exhibit No. 1 of an application for consent to the transfer of control of KOVO, Inc. from the feuding shareholders to the Receiver, it was represented to the F.C.C. that "The *ultimate aim* of the receivership is to *sell* the going business." (F.C.C. File No. BTC-7267.) (R. 349; 405). Then, in a report filed with the Court in November of 1973, the Receiver stated that the financial statements had been prepared and that he "... intends to circularize all of such interested purchasers and request written offers from them on or before a fixed date" (R. p. 125). It was in fulfillment of this Court-filed report that the Receiver directed form letters in mid-December, 1973 to interested third parties, including FMC, to solicit *written offers*. Obviously, there was no "settlement" with these positive definite steps towards sale being taken. A most revealing objective indication of the still existent shareholder enmity in January, 1974, was the AbCaTron dispute. This attempt by Robison to gain control of KOVO, Inc. through seizure of a corporate opportunity was prohibited with the Court's Order not being appealed (R. 151).

Appellants' assertion in their Statement of Facts that "... there were further discussions regarding settlement ..." but there was a "lack of sufficient financial backing" finds no support in the record, and appellants failed to

give any citations to the record in their brief in support of the proposition. (Appellants' brief, p. 8.) The record, as shown, *supra*, is entirely to the contrary.

2. The Court-administered Procedure
Whereby the Court Accepted the FMC
Written Offer was Understood, Agreed
to and Participated in by Shaw and Rob-
son.

The events during February, 1974, further emphasize the utter failure of the appellants to settle their differences. At the February 6, 1974, evidentiary hearing the three competing written offers made by FMC, Shaw and Robison were received into evidence (Exh. 7, 8 and 9), and the need for the Lower Court to either promptly *accept or reject* the FMC offer was made very clear: *

MR. HARDY (FMC): . . . I do want to say one other thing. We would be hopeful that this matter could be resolved as soon as possible. I was hopeful that the stockholders would have been able to submit their offers substantially ahead of this, because we felt that we were under a

*Neither the Receiver's report nor any other document in the record lends even the slightest support to the suggestion of the appellants in their brief at page 35 that the FMC offer of \$540,000 was at "distress prices." Since appellants' competing offers were patterned after FMC's, one could only assume then that theirs were also at "distress prices." The record, however, just gives no support to such a thesis suggested by appellants. It should be noted that the entire paragraph in their brief wherein this is "argued" cites *no* reference in the record. This is an example of argumentative liberty which pushes the bounds of reasonable credulity.

deadline, as I understand other offerors have felt they were under a deadline some time ago, *and we are just very anxious to get the thing wrapped up, either our offer will be rejected or accepted in the very near future.*

COURT: *And get onto something more profitable if it's rejected.*

MR. HARDY: So we can get onto something else. (Tr. p. 17.) (Emphasis added.)

A strict time schedule was set by the Court to accept an offer, and both Shaw and Robison expressly agreed to the procedure of holding *no* further hearings on the specific issue of the acceptance of an offer:

THE COURT: *Well, I am not even considering the dispute between the shareholders.*

MR. MARTINEAU: No, but I am saying this would leave that pending without prejudice.

THE COURT: *Yes. I intend to draw an order on that when I refer it to another Judge to try that issue. That won't be tried in this division of Court. I don't want to hear any more of it.*

MR. ROBERTS: One further thing I think, Your Honor, *the order should further provide that all parties, receiver and all offering parties, are willing to waive the right to further hearing with respect to —*

THE COURT: On this petition that is before me?

MR. ROBERTS: On that petition and with respect to the financial data to be admitted to the receiver and the receiver's report for that matter.

THE COURT: Any objection to that?

MR. MARTINEAU: *That's stipulated.*

THE COURT: Anything further from you?

MR. MARTINEAU: *No.*

THE COURT: Mr. Stott (Counsel for Ashley Robison).

MR. STOTT: Nothing further and *we will agree.* (Tr., p. 48-49.) (Emphasis added.)

Leave was granted for the submission by February 11, 1974, of further written data relative to the respective competing offers, and the Court prescribed an exacting schedule for acceptance of an offer:

THE COURT: All right. I will leave it this way. The Receiver may consider any additional information provided him from any of the offerors, including your client, Mr. Hardy, provided it is received, *but it must be in his hands no later than Monday morning February the 11th.* (Tr. Feb. 6, 1974, p. 49.)

* * *

MR. ROBERTS (Counsel for Receiver): And I would like to have the record reflect if it can, Mr. Hardy, that your client is willing to *hold your offer open for that period of time.*

MR. HARDY (Vice President, FMC): Yes, and I will provide you with an appropriate instrument. (Tr. Feb. 6, 1974, pp. 47-48.)

In line with this agreement, FMC sent a telegram dated February 11, 1974, confirming that its written offer would

be kept open long enough for the Court to accept or reject it under the schedule agreed to in open Court by *all* parties:

Paragraph 10 of First Media Corporation offering letter dated January 15, 1974, is amended as follows:

10. This offer shall remain open pursuant to that schedule agreed upon among counsel and the Honorable Allen B. Sorensen, District Judge, in the District Court of Utah County, State of Utah on February 6, 1974. (FMC Exh. 5, June 28, 1974 hearing.)

Shortly thereafter the Court *itself accepted* the offer of FMC through its Order of February 22, 1974, *supra* (R. 173). After the appellants agreed to and participated in the offering process, it would be unconscionable and contrary to all traditional notions of substantial justice and fair play for the Court to not recognize the vesting of rights in FMC.

3. The Purported Settlement Involving Shaw, Robison, Hesterman and New Third Parties (Howard Bradshaw and/or American Savings and Loan Association) Over Three Months Following Court Acceptance of the FMC Offer was Merely an Untimely New Offer.
-

Between the date of the Lower Court's February 22, 1974, acceptance order and early June, 1974, the record

establishes that there was no purported "settlement." In fact, the Receiver and FMC were engaged in conducting the sale in line with the Court's February mandate, and even as late as May, Shaw was in support of the Receiver's Motion. Shaw's counsel contacted the Receiver's attorney in May expressly requesting that the hearing on the Receiver's Motion be continued so that Shaw's attorney could be present to *support* the Receiver:

Q. (Greene, FMC Counsel): And is it true that Mr. Martineau (Shaw's Counsel) *contacted* you and said that *he wanted a continuance* of the hearing because he couldn't be present and *wanted to come in and support your position*?

A. (Roberts, Receiver's Counsel): I think that is correct.

Q. *That is to have it approved?*

A. *That is correct.*

(Tr. July 3, 1974, p. 142.) (Emphasis added.)

Finally, in late May, 1974, after requesting two continuances of the hearing on the Receiver's motion, the appellants circumvented the orderly judicial sale procedure they had agreed to and participated in, *supra*, so as to have another chance to make a new offer which appellants attempt to characterize in their brief as a "settlement." William Hesterman, American Savings and Loan and Howard Bradshaw were now part of this new deal and offering arrangement:

MR. CONDER (counsel for Robison): I

would like to make an appearance on behalf of Mr. Robison and Mr. Bill Hesterman.

THE COURT: Who is Mr. Bill Hesterman? I have been trying to get rid of this case. It's like honey on your hands. You can't get rid of it. (Tr. June 7, 1974, p. 5.)

MR. CONDER: He is one of the people who is working together with Mr. Robison to *buy Mr. Shaw's position* and that is the position we have worked to. Mr. Martineau and I have worked diligently for the last ten days working out an agreement so that we can buy Mr. Shaw's position. (Tr., p. 5.) (Emphasis added.)

* * *

THE COURT: You are appearing on behalf of Mr. Robison?

MR. CONDER: Mr. Robison, *and Hesterman and American Savings and Loan.*

THE COURT: *Where did they get into the Act?*

MR. CONDER: They keep expanding. They're *one of the parties* involved in the *purchase*. (Tr. June 26, 1974, p. 2.) (Emphasis added.)

It is abundantly clear that after failing to have their earlier competing offers accepted by the Court in February, 1974, and not appealing the Lower Court's order accepting the FMC offer, Messrs. Robison and Hesterman (the unsuccessful Robison Group) desired yet another chance to acquire the stations.

The Lower Court properly observed the longstanding

doctrine obligatory to all liquidating receiverships that vested rights of intervening third parties cannot be defeated. Thus, "In determining whether to continue a receivership or discharge a receiver, the court will consider the rights and interests of all parties concerned," and will not grant an application for discharge merely because it is made by the party at whose insistence the appointment is made. *Looney v. Doss*, 189 S. W. 2d 206 2n (Tex. 1945). See also *Hammond v. Hammond*, 216 S. W. 2d 630 (Tex. 1949); *Savings Trust Co. v. Skain*, 131 S. W. 2d 566 (Mo. 1939). The protection accorded the intervening rights of third parties was also recognized by the United States Supreme Court holding that:

[T]he court . . . could, undoubtedly, at any time before the rights of innocent purchasers had intervened, set the whole proceedings . . . aside. But after the rights of *such third parties have intervened*, its authority in that respect can only be exercised consistently with protection to those rights. *Koontz v. Northern Bank of Kentucky*, 83 U. S. 196, 202 (1873).*

To allow such a circumvention of agreed to Court administered procedure, ". . . judicial sales would become farces, and rational men would shun them and refuse to bid, if after the confirmation unsuccessful bidders or dissatisfied litigants could avoid them and secure new sales by offers of higher prices." *Morrison v. Burnette*, 154

*See also *Philan v. Middle States Oil Corp.*, 154 F. 2d 978, 991 (2 Cir. 1940); *Barclay v. Pittsburgh Home Building Co.*, (Pa. Supp. Ct. 1914); *Looney v. Doss*, *supra*.

F. 617, 625 (8th Cir. 1907)*. This Supreme Court has likewise recognized this principle. *Mark v. Nelson*, 65 Utah 320, 237 Pac. 223 (1925).

Appellants' reference to *Joseph Nelson Plumbing & Heating Supply Co. v. McCrea*, 64 Utah 484, 231 P. 823 (1924), is completely misplaced. In that case, the Lower Court made it clear that its own action for not accepting a sale was *not* ". . . because somebody is disappointed or dissatisfied," but because there was a bona fide misunderstanding as to what assets the bidders were making offers for. (64 Utah at p. 486-487.) In the case at bar, there is not a scintilla of evidence that Shaw or Robison did not know what they were bidding on, and thus the Lower Court did in fact properly and within its discretion take the step of acceptance or confirmation. It properly recognized that there just was no cause such as fraud or the like to justify not accepting the bona fide offer of FMC and it is apparent that Shaw and Robison were merely "disappointed" because neither of their offers were accepted and just wanted another chance *over three months later* to make a new offer.

4. The New Offer of Appellants and Their Investment Partners William Hesterman, Howard Bradshaw and/or Ameri-

*Appellants cite *Morrison v. Burnette*, *supra*, at page 41 of their brief in support of the proposition that the rights of a bidder at a receiver's sale do not vest until confirmation by the Court. What the appellants totally ignore is that the Lower Court itself *held* that in February, 1974, it *did* accept the offer — it approved the sale to FMC, *supra*.

can Savings and Loan Association is Not
Even Before the Court.

After asserting that this new offer should be considered over three months after FMC's offer was accepted, appellants objected to the documents memorializing their offer being received into evidence at the July 3, 1974 hearing. (Tr. June 28, 1974, pp. 155-158.) FMC proffered said documents so as to clarify for the Lower Court that what appellants were loosely characterizing as a "settlement" was nothing more than a new "13th hour" offer and that in any event the "agreement" was not sound. Thus, the so-called "settlement" is not even part of the record and was never open to the light of cross-examination due to the objection of the appellants. As a matter of fact, the exhibit is sealed and can be opened only by order of the Court. (Exh. 30, July 3, 1974, hearing.)

C. The Action of the Lower Court in Granting
the Receiver's Motion was Equitable and a
Proper Exercise of its Discretion.

The Lower Court properly exercised its discretion in approving the Receiver's May 11, 1974, Motion, and such was entirely justifiable upon principles of equity as well as law:

The denial of the May 11, 1974, Motion of the Receiver and/or preventing First Media and the Receiver from concluding this matter would be

unjust, inequitable, and would render proceedings under the statutes including § 16-10-92 (a) (i) and 16-10-93 U. C. A. (1953), as amended, *useless*. (Conclusion of Law, R. 409.)

Appellants have not demonstrated in the slightest degree wherein the Lower Court violated its discretion which it clearly has under the relevant statute in granting the Receiver's May 11 Motion, or that it was arbitrary and capricious.* The overwhelming evidence is to the contrary.

Not only did FMC secure contract rights, but also rights of an equitable nature. In direct reliance on the Court's acceptance of its offer, FMC expended nearly \$19,000 to conclude details incidental to the sale, including the taking of community ascertainment surveys necessary to the F.C.C. assignment process, besides relinquishing an opportunity to purchase another comparable AM-FM radio property in Boise, Idaho. Failure to carry out the terms of the FMC offer would be contrary not only

*Under the Utah Act (§ 16-10-92 et seq.), it is clearly provided that when a termination of a receivership is sought, the burden of proof rests with the moving party to *establish* the justification:

The liquidation of the assets and business of a corporation may be discontinued . . . when it is established that cause for liquidation no longer exist . . . (§ 16-10-96 U. C. A.) (Emphasis added.)

Only if a cause for termination is *established*, then a court still has *discretion* to decide whether or not to terminate because of the use of the permissive "may," and not "shall." Of course, the discretion does not exist if third party rights intervene, *supra*. Such discretion is typical in Utah receiverships provided for instance by the Rules of Civil Procedure. *Rudd v. International*, 26 Utah 2d 263, 480 P. 2d 298 (1971).

to sound equitable principles but also to the doctrine of promissory estoppel:

A promise which the promisor would reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. (Restatement *Contracts*, Section 90.)

POINT II.

THE LONG FORM "AGREEMENT FOR THE SALE AND PURCHASE OF ASSETS" IS BASED UPON AND CONFORMS TO THE COURT-ACCEPTED WRITTEN FMC OFFER, BUT WHETHER OR NOT IT DOES IS NOT RELEVANT TO THE VESTING OF RIGHTS IN FMC.

- A. The Long Form "Agreement for the Sale and Purchase of Assets" is Based Upon and Conforms to the Written FMC Offer.
-

A careful reading and comparison of the detailed FMC offer and the long form "Agreement for the Purchase and Sale of Assets" evidences material consistency. A mere difference in length in the documents does not evidence inconsistency, otherwise courts would be constrained to look with a jaundiced eye upon real estate agreements which are substantially more detailed than an earnest money receipt. As explained by the Receiver's

counsel, the long form agreement is “. . . simply more flesh on the bones.” (Tr. June 7, 1974, p. 13.)

Essential contract elements are found in both the accepted FMC offer and the long form including:

1. Property to be sold is clearly set out in both.
2. The price is the same.*
3. The normal representations called for in paragraph 6 of the FMC offer are consistent with the representations in the “long form.”**

*It was suggested in Appellants' Brief at p. 45 that the provision for an Indemnification Escrow of a portion of the purchase price to be paid at closing was not consistent with FMC's offer. This provision is neither unreasonable nor inconsistent with paragraph 2 of the accepted offer. The amount involved is precisely the same, and the mechanical process of payment is the “. . . flesh on the bones.” The portion used to establish the Indemnification Escrow will not in any way be under the control, dominion or supervision of FMC. The distribution of the escrow is entirely within the control of the Receiver and KOVO, Inc.

The Receiver has not represented that the escrow is a change. One of the principal reasons for the provision is that the Receiver stated that KOVO, Inc. could not provide the usual boilerplate warranty found in radio station purchase agreements that the financial statements of KOVO, Inc. were prepared “. . . in conformity with generally accepted accounting principles consistently applied . . .” but could only represent that the financials were unaudited, and to some extent based upon information prepared by those not necessarily skilled in accounting. Thus, the long form “Agreement for the Sale and Purchase of Assets” as represented by the Receiver, as well as similarly perceived by FMC, is consistent with the Court-accepted short form offering document.

**The provision as to a consulting and non-competition agreement with Shaw and Robison is not part of the long form per the directions of the Receiver as Shaw and Robison are *not* parties to this long form “Agreement.” (See Receiver's Motion, May 11, 1974, R. 187, Par. 3.)

B. Robison and Shaw Were Provided an Opportunity to Comment on the Long Form and Did Not Timely Suggest That it Differed in any Material Way From the FMC Offer.

In his Motion of May 11, 1974, the Receiver states that he attempted to obtain suggestions from Shaw and Robison in preparation of the long form and to the extent possible were incorporated (R. 186). The FMC offer and the detailed explanation of it was of record, and no claim or misunderstanding of the FMC offer could in good faith be made at the hearings in June and July, 1974. In fact, the record shows that as far back as February 6, 1974, Robison's attorney in presenting Robison's first offer represented to the Court that "Essentially as far as the terms of the offer are concerned we are looking at approximately the same type of an offer as presented by FMC, if I can abbreviate it that way." (Tr. Feb. 6, 1974, p. 38.) He stated further, "Essentially the same contingent paragraphs are in Mr. Robison's offer as were present in the FMC." (Tr. Feb. 6, 1974, p. 34.) Appellant's present argument that there is now some inconsistency is in furtherance of their attempt to become new offerors after failing to have their offers accepted during the orderly bid process.

C. The Receiver Represented to the Court and FMC the Consistency of the Offer and Long Form "Agreement for the Sale and Purchase of Assets," and FMC Should Not Now Be

Penalized if for Some Reason any Inconsistency is Shown.

The Court's Receiver* represented to the Court and FMC that the long form and the written offer are consistent:

In the opinion of the Receiver, the agreement is consistent with the initial offer and proposal filed by First Media Corporation in this proceeding (R. 186). (Emphasis added.)

On June 7, 1974, in open court, Receiver's counsel reaffirmed and rearticulated this basic position:

MR. ROBERTS (Counsel for Receiver): The contract is essentially the contract — that is, the same terms as contended by First Media's offer *simply with more flesh on the bones*. There *aren't any major changes that I am aware of*. It's simply a matter of having worked out the various exhibits in the contract language, *but the format is essentially what has been discussed since the original offer*. (Tr. June 7, 1974, p. 13.) (Emphasis added.)

If, for some reason, arguendo, it should be found there is some material non-conformity, FMC should *not* be penalized. Rather, the long form should be made to conform to the short form, since the original accepted offer or short form constituted the basic agreement, and the long form was to be the more detailed min-

*Under Utah law a Receiver is an officer of the Court. *Richins v. Mitchell*, 19 Utah 2d 406 (1967).

isterial reflection thereof. Accordingly, any material variance would *not* vitiate the existence of a binding agreement represented by the short form or accepted offer, *supra*. Analogous is the situation postulated by the Lower Court, i.e., if a uniform real estate contract were found to be different from an earnest money receipt, there would still be a binding contract arising from a meeting of the minds as per the earnest money receipt agreement. Similarly, if indeed any material difference exists between the Agreement of the parties represented by the original accepted offer and the long form document, the Court should simply order that the one be required to conform to the other.

CONCLUSION

It is submitted that the Lower Court's action was proper at both law and equity. Pursuant to and in full reliance upon Court approved procedure for liquidation after appointment of a Receiver, FMC made a detailed written offer with a time limit for acceptance. With full opportunity for hearing, the Lower Court accepted the offer on February 22, 1974. Thereafter, the ministerial details were to be concluded, including preparation of a long form "Agreement for the Sale and Purchase of Assets." FMC went forward in reliance upon the integrity of the court-ordered sale, changed its position and expended substantial sums and invested much time. The resultant long form agreement which was tendered to the Court as the final ministerial detail in the sale procedure does in fact conform to the original FMC offer, as the

Receiver so represented to the Court. If any material difference were found to exist, however, the Court should order conformity one with the other since FMC acted in good faith in reliance upon the Receiver as to the basic consistency and conformity of the offer with the long form.

It is submitted that the action of the Lower Court in ordering the completion of the sale to FMC should be affirmed.

DATED this 14th day of April, 1975.

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