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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 4965

In the Supreme Court of Appeals of Virginia at Richmond

L. FELDMAN, ETC.

v.

A. D. RUCKER, TRUSTEE, ET AL.

FROM THE CHANCERY COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

NOTICE TO COUNSEL

This case probably will be called at the session of court to be held.

APR 1959

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

Howard G. Turner, Clerk

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4965

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 28th day of November, 1958.

L. FELDMAN, ETC., Appellant,

against

A. D. RUCKER, TRUSTEE, ET AL., Appellees.

From the Chancery Court of the City of Richmond

Upon the petition of L. Feldman, also known as Leon Feldman, an appeal and *supersedeas* is awarded him from a decree entered by the Chancery Court of the City of Richmond on the 23rd day of June, 1958, in a certain chancery cause then therein depending wherein A. D. Rucker, Trustee, et al., were plaintiffs and the petitioner was defendant;

And it appearing that a *supersedeas* bond in the penalty of four thousand dollars, conditioned according to law has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

* * * * *

Your plaintiffs, A. D. Rucker and C. E. Richardson, Jr., Trustees, respectfully represent:

* * * * *

page 2 } 2. That default having been made in the payment of the debt secured in said deed of trust, the plaintiffs, A. D. Rucker and C. E. Richardson, Jr., Trustees, being required by the noteholder therein secured, after advertising in accordance with the terms of said deed of trust, offered for sale at public auction, on the premises, on Monday, June 18, 1956, at 4:30 P. M., the above described real estate, at which sale L. Feldman, also known as Leon Feldman, made the highest bid and became the purchaser thereof for $3,250.00 and made a deposit of $250.00 to be applied to the purchase price.

* * * * *

page 4 } EXHIBIT A.

SALE TO-DAY
By
RUCKER & RICHARDSON
Auctioneers
118 N. Eighth St., Phone 2-4741
RICHMOND, VA.

RUCKER & RICHARDSON
AUCTIONEERS

In execution of a certain Deed of Trust, dated January 15, 1948, made by Purley Adams and Alice P. Adams, recorded in the Clerk's Office of Richmond Chancery Court, Richmond, Va., in Deed Book 502-C, page 478, default having been made in the debt thereby secured and being required by the noteholder so to do, we shall offer for sale at public auction on the premises

MONDAY JUNE 18, 1956
4:30 P. M.

that certain two-story brick building (two flats, three rooms each) known as 711 North Fourth Street, Richmond, Va.

For a more particular description of said property, reference is hereby made to the above-mentioned Deed of Trust.

DEPOSIT OF $100 REQUIRED.
TERMS—CASH.

A. D. RUCKER,
C. E. RICHARDSON, JR.,
Trustees. 18M

I hereby agree to purchase the above described property at the price of $3,250.00, on the terms stated above.

MR. L. FELDMAN
4025 Augusta Avenue
Richmond, Virginia
L. FELDMAN (Seal)

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* * * * *

MOTION TO DISMISS BILL OF COMPLAINT.

This day comes the defendant, by counsel, and moves to dismiss the bill of complaint filed herein, the matters set out therein being *res judicata* as to this defendant.

L. FELDMAN
By LIONEL MOSES
Counsel.

* * * * *

page 27 }

* * * * *

OPINION DATED JUNE 18, 1958.

This is a suit for specific performance in which the complainants, trustees under an ordinary deed of trust on real property to secure a debt, ask the court to require the defendant to complete his purchase, the property having been knocked out to him as the highest bidder at an auction foreclosure sale.

A photostat copy of the auctioneer's card with the ad-

vertisement is one of the exhibits. It shows at the foot the purchase at $3,250.00 and bears the defendant's signature. No question is presented about the sufficiency of the advertisement or about the regularity of the sale.

The plaintiff's proofs are in the form of depositions. By consent of counsel the defendant's evidence was heard orally before the court on June 5, 1958, and on that day the case was argued and submitted. At this hearing the judge saw the defendant and his witnesses. At an earlier hearing in another suit between the same parties growing out of the same transaction the judge saw all the witnesses, those for the plaintiffs here as well as those for the present defendant.

Allusion to the earlier suit affords an opportunity at this point to explain the confusion in the identification of the exhibits in this suit. They are the original exhibits that were filed in the first suit. There the parties were reversed, Feldman being the plaintiff seeking rescission. The two exhibits marked Defendant Exhibit 1 and 2 are page 28 } the plaintiff's exhibits here, and the two marked Plaintiff Exhibit 1 and 2 are the defendant's exhibits here. By agreement of the parties these original exhibits have been withdrawn from the papers in the earlier suit under Code §8-279 and filed as a part of the evidence in this case.

The defendant, a man sixty-one years of age, saw the advertisement in the newspaper on Sunday, June 17, 1956, and took a preliminary look at the property. On the morning of Monday, June 18, 1956, he called the office of the trustees to confirm his understanding that the auction sale would be held that afternoon at 4:30. He got to the premises before the hour fixed for the sale and inspected the property, which was open for the purpose. In the course of his inspection he saw the property,—inside, upstairs and downstairs, front rooms and back rooms, and outside, front, sides and rear.

The condition of the building, which was a two-story brick dwelling, was such that it can be fairly described as dilapidated. It was not only unoccupied but it was obvious that it was untenantable and had been so some time. The defendant observed that extensive repairs would be necessary. The floors in the rear rooms, especially the kitchen, were slanting at an angle due to the settling of the walls, the plaster was cracked and would have to be renewed, painting was required, and the plumbing had to be replaced. Those things the defendant admits he observed.

Also the rear wall of the house and a portion of one of the side walls in the rear were leaning. In these walls there was a v-crack that was not filled or covered up in any way—an

open crack that was extensive and plainly obvious upon the most casual inspection. There was evidence of
page 29 } efforts to remedy the condition by shoring around the foundations and there was on one of the walls an iron plate such as is used with a tie-bar. These things the defendant says he did not observe.

At the appointed hour the auction began. The auctioneer read the notice and asked if there were any questions (Depos. p. 6). There were no questions and the bidding began. The representative of the noteholder opened the bidding at $1,000.00 and stopped bidding at $1,600.00. From then on the bidding was by the defendant and one other. These two bid back and forth in raises of $50.00 and $100.00 until the defendant reached $3,250.00, and at that bid the property was knocked out to him.

The title was promptly examined and found clear and marketable. The following Friday, June 22nd, was agreed upon for settlement and the deed of conveyance was prepared and ready for delivery. The defendant's funds were drawing interest and he learned at the bank on the morning of the 22nd, when he went to withdraw the money to close the transaction, that he would lose $90.00 if he took his money out then. This he explained to the trustees, offering an earnest money deposit of $250.00 for a week's delay in settlement. The delay was granted and the settlement day was by agreement then fixed for a week later.

To this point everybody was satisfied and the purchaser, pleased with the postponement, was content to carry out his bargain. But on the following Monday, June 25th, he communicated with Charles F. Hollis, of the Building Inspector's office, who met him at the property at 11 o'clock that morning. It was then that the defendant learned the following facts, some by information from Mr. Hollis and the rest by looking with his own eyes at the building:

The building inspector had found the premises unsafe and unfit for use as a dwelling some months earlier and
page 30 } had required the colored family of the owner to move out. The premises were vacated about December, 1955, and had been contenanted for about six months. On May 16, 1956, a month before the foreclosure sale, the Building Inspector wrote a letter to the owner; "Plaintiff Exhibit 1" (same as "Defendant Exhibit 2"). This letter advised the owner that "approximately 20 feet of the rear portion has settled to the extent that it has become dangerous"; and the owner was "directed by this office to start work at once to correct the condition." The property was

not then "condemned," nor was it placarded for condemnation. Condemnation proceedings were not begun until the following fall, November, 1956, some five months later.

The defendant also observed, from the inspection he and Mr. Hollis then made, the wide open v-crack "about three feet down," the cement around the bottom to bolster the footing and foundation, the iron tie-plate, and the leaning brick walls in the rear. All this he saw, and he learned that 'about 20 feet of the wall had to be pulled down and a new wall erected on a new foundation at the southeast corner of the dwelling.' Yet he still protested there was 'nothing but a 3-foot alley and you can't see much.'

The plaintiffs were, and continued to be, ready, willing and able to consummate the sale. The defendant was no longer willing to carry out his bargain. His position was that he was not bound. And he took and adhered to this position without even undertaking to inquire what the necessary rehabilitation of the premises would cost; *he never got a price from any contractor.*

On August 22, 1956, the defendant instituted in this court a suit against the trustees and others to rescind the contract of purchase. The bill alleged that the building had page 31 } been condemned; that a notice of such condemnation had been affixed to the building; that the notice had been removed prior to the foreclosure sale; that the trustees knew of the condemnation; that the plaintiff was ignorant of it; that it was the trustees' duty to "disclose the eyistence of a latent defect"; and that the opening bid on behalf of the noteholder was made merely "to lend an air of respectability to the sale."

This rescission suit was tried over a year later, on September 16, 1957, all the evidence being heard orally in open court. Why this hearing was delayed for such a time has not been intimated by either side. Spas. were served on all the defendants on August 22, 1956, the very day the suit was instituted. The hearing was fixed when counsel moved for it. The evidence and argument were heard on September 16, 1957, and the decision was then rendered from the bench on that day. No basis for rescission was established by the plaintiff's evidence. The proof fell so far short of the allegations that upon the defendants' motion the court struck the plaintiff's evidence and announced its decision in favor of the defendants, refusing rescission of the contract. No evidence on behalf of the defendants was heard.

And on October 23, 1957, after a further unexplained delay, that rescission suit was dismissed by a final decree.

It may be that during these periods of delay efforts looking to settlement were being made. The court is not advised. The foregoing facts are stated because a delay of two years is unusual in specific performance suits. More than half of this time is accounted for by the pendency of the rescission suit; and for this the complainants here cannot be blamed—their "readiness, willingness and ability" are not impaired.

Less than two weeks later, on November 4, 1957, the instant suit for specific performance was instituted by the vendor-trustees, adhering to their consistent posi-
page 32 } tion that the contract of purchase was valid and should be enforced.

There has been no undue delay in the prosecution of this suit by the complainants. They were first met with a demurrer and a motion to dismiss on the ground that the issue was *res judicata.* These points were argued and decided against the defendant, who noted his objection to this decision. Then followed a misunderstanding of counsel about the method of hearing the case on the merits, the complainants' counsel being under the impression that it would be heard upon evidence heard orally in open court as the former suit had been heard. The defendant's counsel insisted that the plaintiffs' proofs be in the form of depositions and the court did not force a hearing *ore tenus.* When the plaintiffs' depositions were filed, the defendant asked that his proofs be heard *ore tenus,* to which the plaintiffs interposed no objection—and the merits were so heard on June 5, 1958.

A word should be said about the plea of *res judicata.* The answer of the trustees in the rescission suit was not a cross-bill but the prayer asked for the affirmative relief of specific performance. It is true that in equity the court may sometimes treat such an answer as a cross-bill; 7 M. J. "Equity," §§110-113. But this was not done in the former suit. The court at the conclusion of the plaintiff's evidence in that suit sustained a motion to strike and entered a final order of dismissal. The defendants there, who are complainants here, did not ask the court to treat their answer as a cross-bill, and that part of the prayer of the answer was never reached. It passed out of the picture. In view of this conclusion of the earlier suit the plea of *res judicata* has been overruled.

The defendant resists specific performance of the contract of purchase upon several grounds, as appears from his answer: (1) failure to disclose to the bidder the
page 33 } fact that the building "was in the process of being condemned" and would have to be "rebuilt from a new foundation at an expense that would exceed the sale

price"; (2) the subsequent condemnation and demolition of the building by the municipal authorities "for the dangerous and defective condition of the wall, a situation which was known to the sellers, but unknown to the buyer at the time of the sale"; (3) that enforcement of the contract of purchase "would be inequitable and would work a hardship * * *"; (4) that there are involved "elements of fraud, misrepresentation and mistake"; and (5) that performance is not now possible because of "lack of subject matter."

Of the foregoing it is sufficient to say that (1) and (4) are not supported by the evidence. The defense comes down to: (a) failure to disclose, that is, mere silence; (b) inequity and hardship; and (c) destruction of the subject matter by *vis major* applied some six months after the execution of the contract and after the time agreed upon for its consummation.

With regard to failure to disclose, mere silence on the part of the sellers, little need be said. The trustees at the auction sale made no representations of any kind, express or implied. They had the house open for inspection and took no steps to conceal the defects. They invited questions but none were asked.

Certain it is that the parties were dealing at arm's length. In such foreclosure sales by trustees the law is settled that the rule of *caveat emptor* applies in full force: *Motley* v. *Hodges,* 120 Va. 498, 499: "In such a transaction there is no element of guaranty or warranty, either of title or quantity of land. * * * To such a sale the principle of *caveat emptor* applies."

This is approved in the later cases: *Smith* v. *Woodward,* 122 Va. 356; *Wills* v. *Chesapeake Western Ry.*, 178 Va. 314; *Powell* v. *Adams,* 179 Va. 170.

page 34 } The reasons for this rule of law are clear. Such a trustee is an agent acting under a power of sale. He has no powers except those conferred upon him by the deed of trust. He is agent for both parties, the owner and the lienor, under duties to them. Among those duties is that of bringing "the property to the hammer under every possible advantage to his *cestui que trusts,*" using all reasonable diligence to obtain the best price. To the bidders he owes no duty except to refrain actively from doing anything to hamper them in their search for information or to prevent the discovery of defects by inspection. He is under no duty to make representations or to answer questions; but if questions are asked and he undertakes to answer, then such answers must be full and accurate—nothing must then be concealed. If authority be sought for these plain principles

of settled law it is found in the cases already cited, in *Preston* v. *Johnson,* 105 Va. 238, in *Linney* v. *Normoyle,* 145 Va. 585, and in other Virginia cases too numerous to require citation.

This disposes of the defense that the trustees had information that they failed to impart to the bidders at the sale, and that this was a fraudulent breach of duty. There was no such duty imposed upon them by law. They made no representations, answered no questions—though questions were invited none were asked—and did not conceal, or in any way attempt to conceal, the obviously dilapidated condition of the building.

Suppose they had "disclosed," what information did they have to impart? Only that the building inspector was of opinion that the condition of the building was dangerous, because about twenty feet of the rear portion had settled and that this condition had to be corrected promptly. All of which was open and obvious, so plain that he who page 35 } runs may read. No prophet, or municipal authority, need be conjured up from the deep to tell a grown man this. The dwelling was untenantable, "everybody knew it * * * it was very obvious—you couldn't help but see it if you went up the street." (Depos. p. 12).

On this point the foregoing quotation from the evidence of the plaintiffs' is not all. It is a fact that in the former suit Mr. Hollis of the office of the Building Inspector was put on the stand by the defendant here, who was plaintiff then. Mr. Hollis at Mr. Feldman's request met him at the premises on Monday morning, June 25th, 1956, about eleven o'clock and pointed out the dangerous conditions in detail. This is Mr. Feldmans' testimony in the instant case.

The fact that the defendant did not place Mr. Hollis on the stand in the instant case warrants the presumption that his testimony would not be favorable to the defense.

But we do not, in the search for truth, have in this case to rely upon this presumption alone. The court, with the judge's notes taken at the hearing of the former case before it—there was no transcript of the record—asked Mr. Feldman if he would deny that Mr. Hollis had testified that 'the building looked good from the front and front rooms but you could see the cracks from the back, either from the outside or from the inside in the rear rooms.' Mr. Feldman did not deny that this was Mr. Hollis' testimony. He would not deny it.

The court holds that the alleged failure of the trustees to disclose is not a sound defense to this suit. There was upon them no duty to disclose. Even if there were such a

duty their "disclosure" would merely call attention to what was already obvious.

37 Am. Jur., page 209: "Mortgages," §821:

"* * * At a sale by a trustee under a power, where the facts or means of information concerning the condition and value of the property sold are equally accessible to both parties, and nothing is said or done which tends to impose on the other, or to mislead him, there is no fraud of which the law can take notice, * * *"

page 36 } *Milligan* v. *Milligan*, 145 Va. 184, 189:

" 'Persons cannot close their minds to every avenue of information and knowledge, benumb their acquisitive instinct with indifference, and subsequently expect the courts to relieve them from their self-imposed ignorance.' " (quoting from an earlier Virginia case.)

This brings us to the defense of inequity and hardship that enforcement of this contract would work upon the defendant.

It is true that our Virginia Court has gone very far in giving weight to such considerations and has shown great reluctance to require specific performance of "hard bargains". Perhaps in no case has our Court of Appeals gone further than in *Clay* v. *Landreth,* 187 Va. 169. It will appear, however, that the facts in that case present aspects that differ from those in the instant case. This will be pointed out in a moment.

This claim of inequity and hardship is closely related to the last enumerated defense, impossibility of performance by reason of the intervening demolition of the building by the municipal authorities in the exercise of superior power, *vis major.* This occurred in December, 1956, about six months after the contract was entered into at the auction sale on June 18, 1956, and after the time agreed upon for settlement, June 29, 1956.

Suppose the building had been totally destroyed by an accidental fire in December, 1956. Upon whom would the loss fall?

19 M. J. "Vendor and Purchaser," §56:

"Where a vendor, having good title and capacitity to perform, makes a valid enforceable contract for the sale of land and thereafter, and before a deed is executed passing the legal title, a fire destroys a building thereon, without his

fault or neglect, the loss is sustained by the purchaser. In such a case there is no implied warranty that the condition of the property at the time of sale shall continue until after a deed is made."

pag 37 } This text is supported by the opinion of Judge Staples, a very able judge, in the case cited, *Christian* v. *Cabell,* 22 Grat. 82, 105. I find nothing to the contrary in any subsequent Virginia case.

Surely, had there been such a fire, there would be the same "impossibility of performance" due to "destruction of the subject matter" as is here relied on as a defense. Yet that would not be a defense. The loss would have to be borne by the vendee, despite the "hardship."

A fortiori the demolition that occurred here can be no defense. I say 'for the stronger reason' because the fire was accidental, nobody could prevent it, whereas if the defendant in the instant case had recognized his responsibility instead of relying upon the process of law to relieve him, he could have prevented the destruction of the subject matter—he could have prevented it, and it should be recognized, and emphasized, that he was *the only person* who was in a position to prevent it.

It is urged on behalf of the defendant that the property advertised and the property he bought was a lot "with the improvements thereon, known as No. 711 North Fourth Street" and no such deed can be given now, there being no such improvements. This is specious. The mention of improvements is unnecessary; Code §55-50. The house number serves only to aid in identification; or, as was said in *Motley* v. *Hodges,* 120 Va. 498, 500, "The statement (that the tract was seventy acres, instead of only forty-six and a fraction) was a mere matter of description."

Something more is to be said about the defense that to enforce specific performance in the instant case would work such a hardship on the vendee-defendant that such relief would be inequitable and unconscionable.

page 38 } A lot is said in the cases about hardship upon the defendant in specific performance cases. Something should be said in the situation presented now about hardship imposed upon others if specific performance is denied.

The security of the noteholder—two noteholders, in fact, for there is a second deed of trust behind the one that was foreclosed in June, 1956—the security of the noteholders was seriously impaired by the dwelling becoming untenanted in December, 1955, and by the fact that the Building Inspector

would not permit it to be occupied until major repairs were made to render it safe.

Between December, 1955, and June, 1956, who was there in a position to minimize the loss? No one but the owner of the equity of redemption, the occupant who moved out in December, 1955. Faced with two deeds of trust, without means to rehabilitate the property, unable to borrow the necessary funds, he had thrown up his helpless hands before June, 1956.

There was nobody who could step in and take charge of the situation. The trustees in the deeds of trust were of course without power to authorize repairs, even if funds were made available out of the blue, for their powers were limited by the provisions of the deed of trust. The noteholder, whose security was already greatly impaired, was without authority to make such repairs, even had he been ill-advised enough to do so. He was a mere lienor—for a Virginia deed of trust to secure an indebtedness merely creates a lien, and no estate; *Gravatt* v. *Lane,* 121 Va. 44.

In the following quotation from the opinion of Mr. Justice (now Chief Justice) Hudgins in *Powell* v. *Adams*, 179 Va. 170, 174, italics have been supplied to denote my present emphasis:

page 39 } "The trustees were not authorized by the expressed or implied powers in the deed of trust under consideration to have the land surveyed, after the date of sale, for the benefit of the purchaser. *The contract of sale was consummated when the auctioneer cried the property out to the person making the highest and last bid. The only power remaining in the trustees,* so far as the purchaser was concerned, was to collect the purchase money and execute a proper deed conveying such property and title as had been conveyed to them."

The noteholder in the first deed of trust availed himself of his only remedy and called upon the trustees to foreclose. It then became the duty of the trustees to offer the property for sale in accordance with the provisions of the deed of trust. This they did. And in so doing they acted as agents for both parties, the noteholder and the owner of the equity. It was their duty to bring the property to the hammer under every possible advantage to the *cestuis,* to quote again the language of Lord Eldon, approved by our Court of Appeals. Had they made gratuitous disclosures at the sale, disclosures they were not called upon to make, they would render themselves liable to the charge that they had deliberately

chilled the bidding so the noteholder might buy for a song—in violation of their duty to the owner of the equity.

So the trustees conducted the sale openly and fairly, making no representations whatever and without answering questions. At the opening of the auction they invited questions but none were asked. When the property was knocked out to the defendant at his bid of $3,250.00, this purchaser, the defendant here, became at once *the only person* in a position to take charge of the situation and minimize the loss—the only person who could preserve whatever value remained in the improvements on the property. And this value was undoubtedly substantial.

Nothing intervened between the sale and the time agreed upon for settlement. In fact nothing occurred for five months. Then the City issued the notice of condemnation and placarded the property. And it was six months
page 40 } before the building was razed by the municipal authorities. This affords a sound basis for distinguishing the case of *Clay* v. *Landreth*, 187 Va. 169, in which the Court of Appeals said on page 171:

"It was averred that between the time the contract was made and the time for the delivery of the deed the city council rezoned this lot so that it could be used only for residence purposes; * * *"

Also in that case the Court said in conclusion on page 180:

"The agreed facts contain nothing that would show any inequitable conduct on the part of either the complainant or the defendant."

In the instant case there was inequitable conduct,—and this inequitable conduct was *on the part of the defendant,* as will now be pointed out.

During the period of six months between the sale and the demolition of the building, the purchaser, the only one who could step in, did nothing whatever to preserve the value of the improvements. He did not even inquire what the required repairs might cost; he obtained no contractor's estimate. All he did was to bring a suit for rescission in which the bill made extravagant and unfounded allegations of fraud. And this suit he did not press to trial until the better part of a year after the dwelling had been condemned and torn down.

There was never (until five months after the foreclosure sale) a placard (notice of condemnation) affixed to the building. The statement in the bill of complaint in the defendant's rescission suit that there had been such a placard on the building before the foreclosure sale which had been removed, is an allegation, and an innuendo, that was contrary to fact. No effect was made to support this reckless charge of active concealment and deliberate fraud.

No, there was never such a placard. But there was, figuratively speaking, a red flag of warning on the premises when the foreclosure sale was held. To this attention is now directed.

page 41 } The scope of judicial notice has been expanded in recent years; cf. Code §8-273; *Randall* v. *Com.*, 183 Va. 182; *Williams* v. *Com.*, 190 Va. 280. In *the Randall Case* Judge Holt, of blessed memory, complimented the trial judges of the Commonwealth in his remark on page 188: "We are not compelled to believe that judges are ignorant of facts known to everybody else."

It is a matter of general knowledge that there has been a shortage of housing in the colored sections of Richmond for some years; and before the foreclosure sale here involved this shortage had reached an acute stage, being aggravated especially by acquisition of many such dwellings for the right of way of the Richmond-Petersburg Turnpike. So it may be fairly said that the fact that this two-story brick dwelling was unoccupied, and obviously had been unoccupied for some time, was a warning flag, exciting inquiry into the reason.

It is also a matter of general knowledge that the Building Inspector and the health authorities of the City are constantly engaged in inspecting such properties in the interest of health and safety; and requiring extensive alterations and improvements—structural strengthening, inside plumbing, sewer connections and the like, often calling for substantial outlay, not infrequently beyond the means of the owners. It is not unusual for the properties of owners who are unable or unwilling to meet the requirements to be demolished by the authorities.

The physical condition, open and obvious, of this house on June 18, 1956, and these surrounding intangible considerations, known to all, were such as to put the defendant upon notice and inquiry. A reason for his closing his eyes and his mind may be suggested.

page 42 } The judge has not visited and viewed the premises for the purposes of this case because he has not been requested to do so by counsel. However, having lived in Richmond for something over three score years and

ten, he takes judicial notice of the fact that this north Fourth Street section is on the way to Shockoe Cemetary, beyond which is the poorhouse,—both appropriate objects for judicial contemplation. It is a middle class colored residential section; not in the "slums," of course, but still quite far from the best. It is a location in which the value of the improvements is low and the rental return high. The gross annual rent is expected to run to eighteen, or possibly as much as twenty, per cent of the value. And with high rental return risks are normal.

The defendant was not a home buyer. His purpose was to pick up at a bargain a piece of property to bring in high potential income—to pick it up at a forced, distress sale. He was well aware, as he admits, that much was to be done to make the building habitable—painting, plastering, a slanting kitchen floor, and plumbing,—and plumbing surely runs into money nowadays. He was satisfied with his bargain until he learned that a portion of the rear walls had to be rebuilt,—that is, until he found out that the work to be done was more extensive and more costly than his two inspections before the sale had led him to believe. How much more he didn't bother to inquire. Throwing up his hands, he left others with the bag to hold,—and instituted a suit for rescission based upon the imagined wrong that had been done him, without scruple to charge fraud when there was not a scintilla of evidence to support the charge.

On November 21, 1956, five months after the foreclosure sale, came the condemnation notice from the Department of Public Safety; and that was when the premises page 43 were placarded; "Plaintiff Exhibit #2." One month was given to start the repairs, failing which the City authorities stated they would raze the building. This was addressed to Adams and wife, they being the owners of record. That it came to the attention of Mr. Feldman is shown by the fact that he, as plaintiff in his rescission suit, filed it as one of his exhibits. He still did nothing, relying passively on his sleeping rescission suit.

There is loss to be suffered and hardship to be endured. The owner of the equity of redemption and the holder of the notes secured by the second deed of trust will, it appears, lose out entirely. If specific performance is refused it would seem that the innocent holder of the notes secured by the first deed of trust will also lose out; probably also lose out entirely when the cost of demolition by the City is asserted as a prior lien. If specific performance is granted the purchaser may get little, or perhaps nothing, for his $3,250.00.

On whom, before a court of equity, should this loss fall? Who is to endure the hardship that is inevitable?

There having been no shadow of fraud or overreaching, equity, despite the hardship, must place the loss upon the only party who could have prevented it, that is, upon the defendant.

I am impressed with the following language in *Millman* v. *Swan,* 141 Va. 312, 321. The court was pointing out when a court of equity may refuse specific performance; and says it may do so when

"there has been no inexcusable laches or inattention by the party resisting performance, in not foreseeing and providing for contingencies which have subsequently arisen * * *."

The defendant here has certainly been guilty of laches and inattention.

It was the reverse in the outcome but the principle here involved is covered by the words of Judge Staples page 44 } in *Christian* v. *Cabell,* 22 Grat. 82, at page 108:

"This is a hard case upon the appellees, and deeply to be lamented. It would be equally hard upon the appellant, who is in no default, to compel him to pay the consideration for property no longer in existence."

What was said of the litigants claiming that they were the victims of a bad bargain in *Broaddus* v. *Broaddus,* 144 Va. 227, at page 747, may with equal truth and propriety be said of the defendant here:

"The heirs were men and women of mature years, in physical and mental health, which the temptation to receive their legacies at once could not have disturbed. Besides the three men, two of whom were heirs and the other the husband of an heir, actually engaged in business, and had business experience sufficient to make them independent of guardianship."

A great judge (Keith in *Merchant's Admr.* v. *Shry,* 116 Va., 437) said in concluding an opinion in which it seemed to him there was a failure to meet "the ends of justice in the particular case": (page 448)

"we must declare the law as we find it written and comfort ourselves with the confident belief that in its results it will promote the ends of justice to all."

It is not my view that the decision in this case fails to meet the ends of justice. The defendant was seeking a good bargain but by his own carelessness, inattention and total misconception of his contractual obligations and indifference to the resulting injury to others who were helpless to protect themselves,—he was seeking a good bargain but has ended up with a bad one. That is about the sum and substance of the case.

Many words of wisdom were spoken by the elder Burks, as we are accustomed to refer to him. Perhaps none were sounder than those in the distressing case of *Harris* v. *Harris*, 31 Grat. 13; on page 16 of the report he says:

page 45 } "The exercise of discretionary power by a judge to whom it is confided is always more or less embarrassing, and what is said by an English writer, speaking of the British constitution and jurisprudence, applies as well to ours, that it is a principle consonant to the spirit of our constitution, and which may be traced as pervading the whole body of our jurisprudence, that *optima est lex quae minimum relinquit arbitrio judicis, optimus judex qui minimum sibi*—that system of law is best which confides as little as possible to the discretion of the judge—that judge is the best who relies as little as possible on his own opinion."

In that case a divorce was granted to the husband upon the ground of the wife's desertion, and it was held error to allow alimony to the wife even though she was destitute. So there the appeal to human sympathy was naturally greater than in the instant case, which after all involves only a comparatively small sum of money. So the first clause of the following quotation from page 32 may have no application here; but the second clause reins us up by the terse statement of a fundamental principle to which, being reminded, a judge must adhere:

"The unhappy condition of the appellee excites my commiseration; but courts of justice are not allowed to be controlled in their decisions by considerations of that character."

This opinion should not be concluded without reference to two Virginia cases having to do with specific performance of 'hard bargains' by a court of equity. The opinions were by two of the ablest of Virginia's appellate judges, the first by Judge Riely and the second by Judge Burks (the younger). So far as a careful examination of Shepard discloses neither has been overruled or cited with unfavorable comment.

Neither is overruled, nor are the principles announced in any way impaired, by the recent case of *Clay* v. *Landreth*, 187 Va. 169. Neither is cited in the later case.

In the first, *Southern R. Co.* v. *Franklin*, 96 Va. 693, Judge Riely says (beginning on page 708):

page 46 } "The enforcement of the contract is also objected to on the ground of hardship. It is not pretended that the lease was induced by fraud or false representations of facts. * * * The hardship is due in the main to miscalculation in making the contract, and in part to subsequent events and a change of circumstances in nowise attributable to the lessor.

"It is not doubted that there are adjudged cases which hold that a court of equity will not decree specific performance of the agreement, where it would entail great hardship, and the hardship was due, in some measure at least, to the conduct of the other party. (citing cases)

"But we question whether a court of equity ever refuses specific performance upon the sole objection of hardship, where the contract, in its inception, was fairly and justly made, and the hardship is the result of miscalculation, or is caused by subsequent events or a change of circumstances, and the party seeking performance is wholly without fault. In *Marble Company* v. *Ripley*, 10 Wall. 356, Mr. Justice Strong, in speaking of contracts that were supposed to be fair and equal when made, but in the lapse of time have become bad bargains, said: 'Besides, it is by no means clear that a court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which has become a hard one by the force of subsequent circumstances and changing events.' The element of risk enters more or less into every contract, and the obligation to perform it cannot be allowed to depend upon the question whether it has proved to be advantageous or disadvantageous. It would be a travesty upon justice, and the reputed sanctity of contracts would be of little avail, if parties could refuse the performance of contracts having some years to run, which were fairly entered into, and believed to be just and equal when made, merely because from contingencies, whose possibility might have been foreseen, they had turned out, in the course of execution, to be a losing instead of a profitable bargain."

In the other, *Davis* v. *Alderson*, 125 Va. 681, Judge Burks says on page 685:

"The mere fact that a party has made a bad trade or unprofitable bargain will not relieve him from specific performance."

After this succinct statement, Judge Burks cites and quotes the last sentence of the passage that has been quoted above from Judge Riely's opinion, "It would be a travesty upon justice, etc."

page 47 } The truth must be squarely faced that the principles announced in these two cases, with no dissenting voice, are not altogether in accord with those adopted in the case of *Clay* v. *Landreth*, 187 Va. 169, again with no dissent. Yet these earlier cases are not overruled, in whole or in part, nor are they disapproved or expressly modified or qualified in this, or any other, more recent case. They are not cited at all.

Such situations are perplexing to a *nisi prius* judge. The proper course to follow is not plainly marked out. The conscientious trial judge, who is not only conscious of his duty to hold himself bound by the laws of the Commonwealth and by the decisions and opinions of the appellate court but is exquisitely sensitive to his obligation,—such a judge is not always led by a kindly light but must feel his way cautiously in the encircling gloom. Is he at liberty to regard a plain principle, solemnly pronounced by his appellate court, that has not been altered by statute or overruled or modified by any subsequent appellate opinion, as still prevailing,—as still the law he seeks to administer?

The question is a difficult one and I cannot give a glib and ready answer. It happens that no answer is required in the instant case, for I have found, and pointed out, aspects in which this case differs from *Clay* v. *Landreth*, *supra*,—aspects that distinguish the cases to my mind in a reasonably satisfactory manner.

My conclusion in the instant case is that specific performance will be decreed in accordance with the prayer of the bill of complaint. To do otherwise would but add to the cases of which it has been said "hard cases make bad law." Any other decision would be bad indeed for the innocent lienor whom the complainants represent.

BROCKENBROUGH LAMB.

Richmond, Virginia,
June 18, 1958.

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DECREE FOR SPECIFIC PERFORMANCE AGAINST VENDEE.

This cause which has been regularly matured, set for hearing and docketed, came on the 5th day of June, 1958, to be heard upon the bill of complaint, the demurrer thereto and the plea of *res judicata,* both the demurrer and the said plea having been overruled by the court; upon the amended bill of complaint and the depositions taken on behalf of the plaintiff and duly filed and the *ore tenus* hearing of the evidence of the defendant the 5th day of June, 1958, and was argued by counsel; and

It appearing to the court from the pleadings and proof in this case that the defendant L. Feldman, also known as Leon Feldman, entered into a contract with the plaintiffs, A. D. Rucker and C. E. Richardson, Jr., Trustees, whereby he did agree to purchase from the said Trustees the land in the bill and proceedings mentioned and described at the contract price of $3,250.00; and the said defendant L. Feldman after having paid $250.00 on account of said purchase, has declined and refused and still declines and refuses to perform his part of said agreement by taking the land and paying therefor the balance due of $3,000.00; and it further appearing to the court, as fully set forth in the written opinion of this court, dated June 18, 1958, that the said agreement should be specifically enforced, it is therefore ADJUDGED, ORDERED AND DECREED that the said agreement between the said plaintiffs and defendant, whereby said plaintiffs did agree to sell to the defendant the land in the bill and proceedings mentioned and described, known as No. 711 North Fourth Street, Richmond, Virginia, and which the said defendant agreed to purchase from the said plaintiffs at the price of $3,250.00 be, and the same is hereby, enforced.

page 50 } It is further ADJUDGED, ORDERED and DECREED that the defendant L. Feldman, also known as Leon Feldman, do pay to the plaintiffs, A. D. Rucker and C. E. Richardson, Jr., Trustees, the said sum of $3,000.00 with legal interest thereon from the 18th day of June, 1956, until paid, and the costs of this suit; and it is further ADJUDGED, ORDERED and DECREED that upon the payment of the said sum of $3,000.00 and interest thereon and costs of this suit, the said A. D. Rucker and C. E. Rich-

ardson, Jr., Trustees, do deliver unto the said L. Feldman, also known as Leon Feldmen, the deed from said Trustees to Leon Feldman and Esther P. Feldman, his wife, dated June 18, 1956, and mentioned and described in the bill of complaint; and thereupon the said A. D. Rucker and C. E. Richardson, Jr., Trustees, asked leave to file such deed at this time in the papers of this cause, duly executed and acknowledged by said Trustees, bearing revenue stamps in the amount of $3.85 and bearing date on the 18th day of June, 1956, to be delivered to the said Leon Feldman by the Clerk of this court upon the payment by the said Leon Feldman of the said sum of $3,000.00 with interest accrued thereon and costs aforesaid, which deed is hereby accordingly filed among the papers of this cause to be delivered to the said Leon Feldman by the Clerk of this court upon the payment to the said A. D. Rucker and C. E. Richardson, Jr., Trustees, of said money, interest and costs aforesaid, which payment shall be evidenced by the receipt of the said Trustees of the payment of said money.

We ask for this

MIZELL, GAYLE & BINNS, Attys.
By ROBERT B. GAYLE
Of Counsel.

Seen and objected to:

PURCELL & HOUSE, Attys.
1128 Mutual Bldg.
By MEREDITH A. HOUSE, p. d.

Seen and objected to:

LIONEL MOSES.

Enter June 23, 1958.

B. L.

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CERTIFICATE NO. 2.

Statement of Incidents of the case on the defendant's motion to dismiss.

The Court, in hearing and determining the issues raised by the defendant's motion to dismiss, referred to and considered the pleadings and the final decree entered in this Court on October 23, 1957, in the case of Leon Feldman against A. D. Rucker, Trustee, and C. E. Richardson, Jr., Trustee, and others, attested copies of which pleadings and decree are hereto attached for certification under the Rules of the Supreme Court of Appeals of Virginia, Rule 5:1 Section 3, and consist of the following:

1. Bill of Complaint
2. Answer of A. D. Rucker, Trustee, and C. E. Richardson, Jr., Trustee
3. Answer of Charles B. Ford, Trustee
4. Separate answer of H. W. Goodwyn
5. Final decree of October 23, 1957

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To the Honorable Brockenbrough Lamb, Judge of said Court:

Your complainant, Leon Feldman, respectfully represents unto the Court and alleges:

1. That Purley Adams and Alice P. Adams, his wife, are the owners, as Tenants in Common, of all that certain parcel of land in the City of Richmond, Virginia, known as No. 711 No. 4th Street, which they acquired by deed dated January 15, 1948, recorded in the Clerk's Office of the Chancery Court of the City of Richmond, Virginia, in Deed Book 502-0, at page 476.

2. That, on January 15, 1948, Adams and wife caused to be recorded a first Deed of Trust, to secure the sum of $2,250.00, wherein A. D. Rucker and C. E. Richardson, Jr. were named as Trustees, and which Deed of Trust is recorded in Deed Book 502-C, at page 478, in the aforesaid Clerk's Office.

3. That, Laura Cauthorne is the noteholder secured by said first Deed of Trust.

4. That, on January 15, 1948, Adams and wife caused to be recorded a second Deed of Trust, to secure the sum of $2,150.00, wherein Charles E. Ford was named as Trustee, and which Deed of Trust is recorded in Deed Book 502-C, at page 479, in the aforesaid Clerk's Office.

page 56 } 5. That, H. W. Goodwyn, in his own right, or, as Trustee for persons unknown to your complainant, is the noteholder secured by said Deed of Trust.

6. That, on June 18, 1956, the defendant, C. E. Richardson, Jr., one of the Trustees named in the First Deed of Trust published notice of a foreclosure sale under the terms of the aforesaid First Deed of Trust; that your complainant, having read said notice on the morning of the sale day, attended the sale that same afternoon and made the last and highest bid of $3,250.00 for the property.

7. Your complainant alleges and avers that, prior to the date of sale, the building covered by said Deed of Trust had been condemned by the Building Inspector of the City of Richmond as unfit for human habitation unless and until a dangerous rear wall was re-built; that a notice of Condemnation was duly affixed to said premises and that the Owners thereof moved from and abandoned said premises pursuant to such notice; and that said notice had been removed from said property prior to June 18, 1956, the date of sale, by some person unknown to your complainant.

8. Your complainant alleges that the defendant, Richardson, Trustee under the First Deed of Trust, and Goodwyn, Noteholder under the second Deed of Trust and Adams, owner of said property, all knew that the building had been condemned when the said Adams endeavored to secure funds from the said Richardson and the said Goodwyn to enable him to make the required repairs. Your complainant had no knowledge of said dangerous wall and no opportunity to discover it.

9. Your complainant alleges that it was and became the duty of the Trustee-Auctioneer, C. E. Richardson, Jr., to announce and make known at the time of sale to your complainant and other prospective purchasers at the sale the condition of the aforesaid rear wall and the existence of a latent defect known to him and not known to the complainant or the other prospective bidders then present.

page 57 } That, in direct violation of such legal and moral duty to your complainant, the Trustee failed and neglected to call attention to such latent defect and, in viola-

tion thereof caused one of his own employees to attend the sale to lend an air of respectability to said sale by making the opening bid in the sum of $1,000.00.

10. That said building is "dead" and worthless since the cost of repairs to remove the latent defect will exceed the value of the building and the last and highest bid made at the sale; the assessed valuation of said property being, Land $410.00, and Improvements $2,750.00, to a total assessment of $3,160.00.

11. That, your complainant, in good faith, made a deposit of $250.00 on his bid not knowing of the existence of said latent defect and dangerous wall. That such defect is not visible from the street or from an examination of the interior of the building. That, the existence of said defect did not and could not have become known to your complainant until after the date of the sale.

12. That demand has been made of the named Trustee for a refund of the deposit and invalidation of the sale.

WHEREFORE, your complainant prays that he may be relieved from his contract bid, which contract shall be declared null, void and of no effect; that the Trustee may be directed to refund the deposit of $250.00.

Respectfully,

LEON FELDMAN
Complainant by Counsel.

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ANSWER OF A. D. RUCKER, TRUSTEE, AND C. E. RICHARDSON, JR., TRUSTEE.

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For further answer, the said C. E. Richardson, Jr., Trustee, would respectfully showeth unto the court that he in good faith has attempted to comply with the laws of the Common-

wealth in connection with sale under foreclosure under a first deed of trust, and having performed those duties, believes that the sale should be confirmed and that the petition of Leon Feldman be dismissed and he be ordered and required to take the property in accordance with the terms of his bid made at the sale hereinbefore mentioned.

A. D. RUCKER, Trustee
C. E. RICHARDSON, JR., Trustee
By JOE T. MIZELL, JR.
Of Counsel.

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SEPARATE ANSWER OF H. W. GOODWYN.

3. Paragraphs 6, 7, 8, 9, 10, 11, 12. This respondent is advised that the said house was condemned by the Building Inspector at some time prior to the date of the said sale but was not in any way connected with the said Auction Sale and was not present at the sale and is otherwise wholly unadvised as to what transpired between the Trustees under the First Deed of Trust and the purchaser of the said property.

And having fully answered he prays that he may be hence dismissed with his reasonable cost in this behalf expended.

H. W. GOODWYN.

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In the Chancery Court of the City of Richmond: The 23rd day of October, 1957.

FINAL DECREE.

This cause came on this day to be heard upon the bill of complaint, answers of the defendants and upon evidence

heard in open court in support of the bill of complaint, and the complainant having rested, upon the evidence submitted, C. E. Richardson, Trustee, one of the defendants, by counsel, moved the court to strike the evidence submitted by the complainant on the ground that the said evidence was not sufficient in law to grant the relief asked for by the complainant and was argued by counsel.

Upon consideration whereof, the court doth

ADJUDGE, ORDER and DECREE that the evidence of the complainant is not sufficient in law to grant the relief prayed for by the complainant in his bill of complaint and the said bill of complaint is hereby dismissed and that the cause be stricken from the docket and the papers placed in the order files.

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CERTIFICATE NO. 3 INCIDENTS OF THE CASE.

Pursuant to Rule 5:1, this Certificate No. 3 of Incidents of the Case is authenticated by the judge.

On August 8, 1958, pursuant to notice to counsel for the complainants, counsel for the defendant presented in the Clerk's Office a paper styled "Petition for Rehearing." The Clerk, being without authority under Rule 2:1 to file an instrument of this character, properly noted on the back thereof: "Lodged Aug. 8/58 S. Morton, D. Clk."

Under the rule referred to the Clerk may file pleadings permitted to be filed by the Rules or by leave of court; and there is no provision in the rule permitting the filing of a petition for rehearing, nor has leave to file the same been granted. The action of the Clerk in marking the paper as he did and placing it with the papers in the cause conforms to the correct practice.

The petition for rehearing and the notice are attached to this certificate as a part hereof.

On August 18, 1958, counsel for all parties being present, counsel for the defendant asked leave of court to file the petition and requested the entry of an order filing it.

Such leave is denied. The court declines to permit the

petition to be filed for reasons now to be stated.
page 70 } The points on which a rehearing is sought may be briefly summarized as follows:

(1) It does not appear that both trustees in the deed of trust participated in the foreclosure sale; and, (2), there may be other persons concerned with the regularity of the foreclosure sale who are not before the court in this cause.

Neither of these points have heretofore been brought to the attention of the court at any time in the present aspect; see last paragraph on page 5, ...

It will be seen from the pleadings in a former suit, in which the defendant here was complainant seeking rescission of the foreclosure sale, that all parties who might be interested in the regularity of the foreclosure sale were properly before the court. These pleadings are made a part of this record by Certificate Number 2. Yet no irregularity, technical or otherwise, was in that cause brought to the attention of the court or in any way intimated.

In that prior suit a final decree dismissing the bill was entered on October 23, 1957. No application for appeal therefrom having been made the question of rescission of the foreclosure sale at the instance of the present defendant (complainant there), or by any other party to that suit, for formal irregularity or any other reason, is determined and settled. This has become the law of the case.

Furthermore the bill in the instant case alleges that "the plaintiffs, A. D. Rucker and C. E. Richardson, Jr., Trustees, * * * offered for sale at public auction on the premises" the real property here concerned. This allegation of the bill of complaint is not traversed by the defendant. And it is now repeated that until August 18, 1958, no such point was suggested to this court. Neither this nor any other alleged formal irregularity in the foreclosure sale had theretofore been alluded to.
page 71 } The progress of the litigation has been pointed out in the written opinion in the case. It is sufficient now to say that on June 5, 1958, the court considered the depositions taken on behalf of the complainants and heard, without a reporter, the testimony on behalf of the defendant orally in open court; and on the same day the court proceeded to hear the arguments of counsel for the complainants and for the defendant.

In this full hearing and presentation no formal defect or irregularity in the foreclosure sale such as is now sought

to be injected into the case was intimated or alluded to. At the conclusion of this hearing the court took the decision under advisement; and after mature consideration of all evidence and arguments of counsel handed down a written opinion dated June 18, 1958. By virtue of Rule 5:1 this opinion is a part of the record.

On June 23, 1958, a decree adjudicating the principles of the cause in conformity with the opinion was entered, by which specific performance of the contract was awarded. As allowed by this decree a proper deed of conveyance, duly executed and acknowledged by both the trustees and ready for delivery upon the payment of the purchase price, was filed and now reposes in the safe of the Clerk.

On July 14, 1958, three weeks later, the court at the instance of the present counsel for the defendant suspended the operation of the decree of June 23, 1958, for four months in order that the defendant might apply for an appeal, which suspension was conditioned upon the posting of a bond in the double aspect provided by Code Section 8-477.

This bond in the double aspect was given in accordance with the order on July 16, 1958.

page 72 } An appointment was then made with counsel for all parties for August 18, 1958, for the purpose of making the incidents of the trial, and especially the evidence of defendant's witnesses heard orally by the court on June 5, 1958, a part of this record for appellate purposes. Since this evidence was not taken down by a reporter Certificate Number 1 has been formulated in narrative form with the aid of counsel and the judge's notes. It is at this juncture that the defendant now seeks, upon the grounds mentioned, to have the merits of the cause reheard here.

To permit under these circumstances the filing of a petition for rehearing, first brought to the attention of the court nearly two months after the entry of the decree complained of, upon grounds that might have been presented in a timely fashion but were not in any way intimated or alluded to, would deprive the conclusions of the court, arrived at after full presentation and mature consideration and embodied in a formal decree, of that definiteness and finality which should be an important characteristic of the decisions of courts. To permit the orderly processes of the administration of justice to be disrupted by permitting such afterthoughts to hold such conclusions in abeyance, and thus to stay the operation of adjudicating decrees beyond the generous period fixed for appellate purposes, would be a travesty. It would bring about an intolerable situation. There must be an end of litigation. Every litigant is entitled to one fair hearing on

the merits of his controversy. The litigant who here seeks to begin this controversy all over again has already had two ample opportunities to present the merits of his case, the first as plaintiff in his suit for rescission and the second as defendant in this suit for specific performance.

page 73 } It happened that he had the two chances because the suit for rescission and the counter-suit for specific performance are not each the precise antithesis of the other; it is possible for a litigant to fail to procure rescission and yet prevail as defendant in a subsequent suit for specific performance.

The court for these reasons declines to permit the petition for rehearing to be filed and refuses to enter the requested order filing the same; to which action by the court the defendant by counsel objected.

It is true that a defect in parties was urged upon the demurrer but this is a different aspect from that in which the point is now sought to be made. Now the point sought to be injected is that other parties may be concerned in the formal regularity of the foreclosure sale. The aspect is different because no irregularity in the sale in which such other parties might be concerned was then brought to the attention of the court or suggested.

Tendered to me August 19, 1958.
Signed by me August 19, 1958:

BROCKENBROUGH LAMB, Judge.

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NOTICE OF MOTION FOR ORDER GRANTING REHEARING.

To: Mizell, Gayle and Binns
1115 Mutual Building
Richmond 19, Virginia.

Please take notice that on August 18, 1958, at 11:30 o'clock a. m., or as soon thereafter as counsel may be heard, the undersigned will move the Chancery Court of the City of Richmond to enter an order granting a rehearing in this cause and setting aside and annulling the decree of June 23, 1958, heretofore entered in this cause, in conformity with the petition for rehearing this day filed with the Court.

Given under my hand this 8th day of August, 1958.

HAROLD H. DERVISHIAN
Counsel for Defendant.

Executed in the City of Richmond, Virginia, this 8th day of Aug., 1958, by delivering a true copy of the above mentioned papers attached to each other in writing to Robert B. Gayle, of the firm of Mizell, Gayle and Binns, in person.

JAMES H. YOUNG
Sheriff, City of Richmond, Va.
By JAMES H. YOUNG, Sheriff.

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PETITION FOR REHEARING.

To the Honorable Brockenbrough Lamb, Judge of said Court:

The defendant respectfully represents unto the Court that he is aggrieved by the interlocutory decree entered herein on June 23, 1958, whereby it was decreed that a contract between the defendant and the complainants be specifically enforced and that the defendant pay unto the complainants the sum of $3,000.00 with legal interest thereon from June 18, 1956, until paid, and the costs of this suit, for which payment the complainants would be required to deliver thier deed to the defendant and his wife conveying to them the land, No. 711 North 4th Street, Richmond, Virginia, and filing the said deed with the Clerk for delivery to the defendant upon payment of the sum decreed to be paid by him to the complainants.

The defendant respectfully submits that said interlocutory decree is erroneous because it is apparent on the face of the record in this cause that the alleged sale is void and otherwise insufficient to sustain a decree for specific performance, and more particularly because:

1. The deed of trust, complainant's "Exhibit A with Amended Bill of Complaint," conveys the realty
page 77 } to the complainants jointly as Trustees with no authority for either to act without the other.

2. The uncontradicted evidence in the case is that the complainant A. D. Rucker, Trustee, was not present at the foreclosure auction sale.

3. That accordingly said alleged sale is void.

4. That any subsequent action or ratification by the complainant A. D. Rucker, Trustee of the complainant C. E. Richardson, Jr., Trustee in selling the subject property is not sufficient to remove the aforesaid material irregularity.

5. That the beneficiaries under any other lien obligations, the Trustees thereunder, any other lien creditors and the Trustors, their heirs, successors and assigns, not being parties to this suit, the alleged sale to the defendant by the complainants and any conveyance by them would be subject to the rights of such persons.

6. That the result of the decree is to require specific performance of the defendant by requiring the defendant to accept a deed, the breach of the warranty of title of which appears on the face of the record.

Wherefore, the defendant prays for a rehearing of this cause, that the decree of June 23, 1958 be set aside and annulled, and that the complainant's bill be dismissed with costs against the complainants.

It is certified that a copy of the foregoing petition for rehearing was delivered to Robert B. Gayle, Esquire of Mizell, Gayle and Binns, Counsel of Record for the complainants this 8th day of August, 1958.

LEON FELDMAN
By HAROLD H. DERVISHIAN
516 American Building
Richmond 19, Virginia.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

1. The Court erred in overruling the defendant's demurrer grounded on the non-joinder of necessary parties, namely, Purley Adams and Alice P. Adams, record owners of the realty in the bill and proceedings mentioned and described; the noteholders under the first deed of trust on said realty; and the trustees and noteholders under the second deed of trust on said realty.

2. The Court erred in refusing to allow the defendant to

file his petition for rehearing grounded on the lack of proper parties apparent on the face of the record.

3. The Court erred in overruling the defendant's plea of *res judicata,* since in a prior proceeding between the same parties (and others) upon the same facts and issues, in which prior proceeding the complainant's pleading called for affirmative relief, as follows: "that the sale should be confirmed and that the petition of Leon Feldman be
page 81 } dismissed and he be ordered and required to take the property in accordance with the terms of his bid," and the Court entered a final decree which failed to grant said affirmative relief or to reserve any such claim to the complainants for further proceedings.

4. The Court erred in determining that the defendant entered into a contract with the complainants for purchase of the realty aforesaid, and in determining that the complainants were, and continued to be, ready, willing and able to consumate the alleged sale, since the deed of trust under which authority the complainants, as trustees, purported to act required joint action by said complainants, it being apparent on the face of the record that only one of said trustees was present at the time and place of the alleged sale.

5. The Court erred in determining that a side wall of said building contained an open crack which was extensively and plainly obvious upon casual inspection of the property, the same being contrary to the evidence.

6. The Court erred in determining that the building was not condemned at the time of the sale, the same being contrary to the uncontradicted evidence, prior to said sale, that by letter from the City Building Inspector of May 16, 1958, filed as an exhibit, the property had been declared dangerous, and the occupant owner and his family had been required to move, and that subsequent to the sale the building was demolished by the City of Richmond; and on the further ground that under the only law applicable, City Ordinance 54-206-138, the building was actually condemned prior to the sale.

7. The Court erred in determining that the rule of *caveat emptor* applied to the alleged sale in litigation,
page 82 } since it is apparent from the face of the record that the defendant bid at the alleged trustees' sale of said property under a material mistake of fact, the same being known or obvious to the complainants, as to the subject matter of the sale.

8. The Court erred in determining that the complainants owed no duty to disclose the dangerous condition of the said

building wall to the defendant, or the notice of condemnation or order to repair of which the complainants had knowledge, the same being contrary to law.

9. The Court erred in requiring specific performance since performance of the alleged contract of sale was impossible because of lack of subject matter thereof, the said building having been condemned and demolished by the City of Richmond, and since specific performance is inequitable and would work a hardship on the defendant.

10. The Court erred in not refusing to grant specific performance on grounds of fraud or misrepresentation on the part of the complainants, they having induced the alleged contract of sale by purporting to sell a two-story brick building containing two flats and having failed to disclose to the defendant the impossibility of said building being used for the only purpose for which it appeared to be suited.

11. The Court erred in requiring specific performance, it being apparent on the face of the record that the deed of trust under which authority the complainants, as Trustees, purported to act required joint action by complainants, there being no affirmative showing that the power granted jointly to the two trustees was so executed, and it appearing on the face of the record that only one of said trustees was present at the time and place of the alleged sale.

page 83 } 12. The Court erred in refusing to allow the defendant to file his petition for rehearing grounded on it being apparent on the face of the record that the purported sale by one Trustee was void, there being no affirmative showing that the power granted jointly to the two Trustees was so executed, and it appearing on the face of the record that only one Trustee undertook to act.

LEON FELDMAN
By MARSHALL L. LOVERSTEIN
Of Counsel.

* * * * *

Dep.
page 3 } C. E. RICHARDSON, JR.,

one of the plaintiffs, called on his own behalf, after first being duly sworn, deposes and says as follows:

C. E. Richardson, Jr.

DIRECT EXAMINATION.

By Mr. Robert B. Gayle:

Q. Will you please state your name, age, residence and occupation?

A. C. E. Richardson; age, sixty-three (63), I believe; occupation, real estate broker, Rucker & Richardson; location of my home, residence, 309 Albemarle Avenue.

* * * * *

Dep.
page 4 } Q. You allege in your Bill of Complaint that a default *occured* under this deed of trust; is that correct?

A. Yes, sir.

Q. Did you as trustee advertise the property for sale in accordance with the terms of the deed of trust?

A. I did.

Q. Did you as trustee conduct this sale?

A. Yes, sir.

Q. When was the sale held?

A. June 18, 1956 at 4:30, I think.

* * * * *

Dep.
page 5 }

* * * * *

Q. Filed with the original Bill of Complaint is the offer to purchase by L. Feldman. When was the $250.00 deposit made?

A. June 22, 1956; $250.00.

Q. Did you prepare the deed as directed by Mr. Feldman?

A. We did.

Q. When was the deed tendered to Mr. Feldman?

A. I think it was tendered to him early in July; I think it was the 2nd. He asked postponement of the full settlement until after the end of June in order that he could collect interest on his deposit.

Q. Did he offer at that time any reasons to you for refusing to accept delivery of the deed?

C. E. Richardson, Jr.

A. Yes. Of course, he was offered settlement the day after I received the title report, the deed was prepared and offered at that time, but he said it would inconvenience him and be expensive to him to make cash settlement then.

Dep. page 6 } If I could hold it until the end of the month after June, it would save him some interest, which we agreed to do, and after that he came to my office several days after that, it may have been a week or ten days after that, it may have been a week or ten days, and explained that he had been up to the Building Inspector's office to ask him some questions about the building and they had told him it was condemned.

Q. Had notice been served on you or the owner at that time that the property had been condemned?

A. No notice had been served to me, and I don't think on the owner because he had brought me letters that he had received from the Building Inspector's office.

Q. Was opportunity given to the buyers at the sale to inspect the premises?

A. Yes. The property was opened and everyone, I think, inspected the upstairs and downstairs and front and rear.

Q. Did you make any representations whatever as to the condition of what was being sold?

A. No. I followed the usual proceedings, the reading of the ad and asking if there are any questions. No questions were asked.

* * * * *

Dep. page 7 }

* * * * *

CROSS EXAMINATION.

By Mr. Meredith A. House:

Q. Who is the note holder under this deed of trust, sir.

Mr. Gayle: Objection. It is an irrelevant question. He represents the note holder under that deed of trust.

Q. Who was the note holder under the deed of trust, sir?

C. E. Richardson, Jr.

A. Mrs. Laura Cauthorne who lived at 2510 East Marshall Street at that time.

• • • • •

Q. Were you familiar with this property prior to the time that all that you have testified about arose?

A. Yes. I mean I was familiar with it in this way, we had threatened foreclosure for sometime.

Q. How long have you been threatening foreclosure?

Dep. page 8 } A. Well, I think it is about three (3) months.

Q. And prior to that time were you familiar with this property or had any dealings with it?

A. Yes, I had inspected the property before the sale, before I advertised it.

• • • • •

Q. Did Rucker and Richardson loan the money on that transaction?

Dep. page 9 } A. The first deed of trust?

Q. Yes.

A. Yes, that's our business, lending money and we sell, of course.

Q. I understand that. And I understand then that you loaned the money in this case and sold it to Laura Cauthorne who you spoke of previously?

A. That's right.

Q. Now when you mentioned just now you went out to inspect the property—prior to the time that you went out to inspect it Purley Adams had come into your office that you mentioned from the Building Inspector's office hadn't he?

A. Yes, during that time. That's what caused me—

Q. And the tender of these letters, I understand it, was threatening condemnation of the building because of certain imperfections in the construction was it not?

A. No, it was not condemning. It was putting the owner on notice. They had requested him to move, and he had moved, and he has rendered letters where he said he couldn't pay his notes and rent. That's when I was brought into the picture. The letters threatened condemnation, but did not condemn the property.

Dep. page 10 } Q. That's what I mean, they were threatening to do that because of some structural weakness of the building there?

A. Yes. The walls were leaning.

Q. I believe Purley Adams came to you originally to try to borrow some money to correct that, didn't he?

A. Yes, sir, he did.

Q. He was trying to borrow $2,600.00 when he came to you the first time?

A. The first time he tried to borrow $4,000.00. I couldn't make the loan. There was a second mortgage on the property behind our first.

Q. And it was your understanding at that time that the purpose of that loan would be to correct the defects in the construction of that building was it not?

A. That's right.

Q. Now you went out to inspect the building, you say, after you had knowledge of these letters from the Building Inspector. What did you observe out there as far as that wall is concerned?

A. Well, let's see, it is the southeast corner of the building, that's the rear wall on the south side, it was leaning. There was a crack in the building, in the wall.

Dep. page 11

Q. Were the cracks, would you say, in the shape of a "V," "V" shape crack?

A. I don't know. I haven't looked at the property since '56. It was a crack in the wall. I don't know whether it was a "V" crack or not. I don't remember if it was a "V" crack or not.

Q. Well, sir, some attempt was made to shore up that wall was it not that you can observe?

A. Shore it up?

Q. Yes, sir.

A. What do you mean?

Q. Put metal braces on it or anchor the wall to the inside foundation of the house or any such thing as that?

A. That was what the owner was figuring on, yes. That was his idea, to have it fixed so it would pass the inspection.

Q. Well, I mean as a practical matter wasn't there some prior attempt to fix this wall by putting the metal braces on it and anchoring it through the wall?

A. There was a metal piece in the wall, yes. I don't know when that was put in.

Q. Now you knew at the time of the sale then that the owner of it had moved from there on the orders of the Building Inspector of the City of Richmond?

C. E. Richardson, Jr.

A. Yes. That's what he told me.

Dep. page 12 } Q. And you knew that the Building Inspector's complaint regarding this matter was that the house was unusable as a residence until that wall was repaired?

A. Yes, that was my understanding.

Q. So at the time of the sale you knew that the property was unadaptable for the only purpose for which it was apparent that it could be used for, that is, a residence?

A. Yes, everybody knew it.

Q. Everybody knew it, sir?

A. Yes.

Q. How did everybody know it?

A. I mean it was very obvious. You couldn't help but see it if you went up the street.

Q. If you went up the street?

A. Yes.

Q. What could you see from the inside of the building if you went and looked around?

A. The kitchen had settled, the floor was a little somewhat off angle, you know what I mean. See, one corner of the building was settled somewhat.

Q. Do you know approximately when Purley Adams moved out of the property?

A. No, I don't. He told me, but I wouldn't like to swear I know when it was.

Dep. page 13 } Q. I have no objection to your stating what he told you?

A. I don't know what he told me. He had to move out; that's all I can remember. I wouldn't like to give you a definite date. He had some letters, I think there was some letters that would give the date.

Q. Is it possible for you to estimate how long prior to the sale that he moved out, just an estimate?

* * * * *

Dep. page 16 }

* * * * *

A. I think it was at least three months.

Q. So the fundamental cause of this sale was the fact that the property was uninhabitable which rendered Purley

Adams incapable of making the payments, and you thereby had to foreclose; is that correct?

A. Not from my point of view. I was trustee, and the cause of the sale was for notes not being paid, the account being delinquent.

Q. And you were aware of why he had not paid the notes?

A. Yes. He told me.

Q. Do you have the letters from the Building Inspector's office or does Mr. Adams have them?

A. I think they were submitted in the last case. I don't know whether Mr. Mizell has them or not. The letters were in evidence in the last case, and I haven't had them since.

* * * * *

Dep.
page 17 }

* * * * *

Q. Now after the sale I believe that the authorities in the City of Richmond destroyed the residence that was on this piece of property here didn't they?

A. That is what I understand. It was removed.

Q. And right now there is no house but a vacant lot?

A. That's correct.

Q. At the time that Mr. Feldman appeared at the auction sale there was a house there, was it not?

A. Oh, yes.

Q. It is then impossible for you to comply with the terms of the original sale that was to convey to him a lot with all improvements thereon, is it not; all you can convey is a lot?

A. It was conveyed to him at the time. The deed was prepared and executed. He refused to make settlement.

Dep.
page 18 } Q. Well, it wasn't conveyed to him?

A. Well, the deed was prepared. The reason the deed wasn't delivered was because he never delivered the funds.

Q. An undelivered deed is just a piece of paper as far as that is concerned; the property has never been conveyed to him?

C. E. Richardson, Jr.

A. As far as my duties were I performed all the duties I could to make him settle as far as I know.

Q. I understand that, Mr. Richardson, but, as a matter of fact, the property was not conveyed?

A. The deed never went to record.

Q. Nor was delivered to the purchaser?

A. Never delivered.

* * * * *

Dep.
page 20 }

* * * * *

Q. Mr. Richardson, if Mr. Feldman pays to you the amount that you deem is owed by him on this purchase, he would in effect be purchasing a vacant lot wouldn't he?

A. You mean now?

Q. Now, sir?

A. I presume you would say so. I say he purchased a house and lot when he bought it.

Q. Well, sir, you understand you can't convey him a house and lot, you can only convey to him now a vacant lot?

A. I did convey a house and lot, but he wouldn't accept it. I couldn't put the house back on there; no, sir.

Q. So he would be paying for a vacant lot would he not; I mean if he took a conveyance now he would get a vacant lot?

A. That's right.

* * * * *

Dep.
page 21 }

* * * * *

RE-CROSS EXAMINATION.

By Mr. House:

Q. You don't exactly know when the house was taken off do you, Mr. Richardson? Do you know, sir, approximately, say in relation to the sale, how long after the sale?

Dep. page 22 } A. As well as I can remember the letter from the Building Inspector gave them until the latter part of December to remove the house, December 1956, and I am not sure it was cleared off that month, but I am pretty sure it was within a month of that date.

* * * * *

Dep. page 23 } HENRY H. RILEY, JR.,

a witness called on behalf of the plaintiffs, after first being duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. Mizell:

Q. Please state your name, age, residence and occupation?

A. I am Henry H. Riley, Jr., forty-five years old, Manager of the Loan Department of Rucker & Richardson. I live at 511 Somerset Avenue, Richmond, Virginia.

Q. Mr. Riley, were you with Rucker & Richardson on June 18, 1956?

A. I was.

Q. Did you accompany Mr. Richardson on a foreclosure sale of property known as 711 North 4th Street on June 18, 1956?

A. I did.

Q. Were you present during the sale?

A. Yes, sir.

Q. You have heard his description of what transpired at the sale. Would your testimony be the same as his?

A. Yes, sir.

Q. In that connection?

page 24 } A. Yes, sir.

Q. Mr. Riley, do you of your own knowledge know whether or not Mr. Feldman was the successful bidder at this sale and inspected the property? If so, tell us how you know it and what you saw take place?

A. Well, as I remember I think Mr. Feldman came up, he was the last one that was at the sale to arrive, and said something about inspecting the building. Mr. Richardson told him to go on and make any inspection that he wanted

to, to go inside. I remember him telling him to be sure to look at that wall on the back.

Q. Did you see Mr. Feldman go in the property or come out?

A. Yes, I saw him go in.

Q. Did you see him come out?

A. I don't remember seeing him come out. The reason I don't is that as soon as this happened he went right on in the property.

Q. Did you see Mr. Feldman look at the outside of the property?

A. No, sir, I did not. I stayed on the porch during the time he was inspecting the property, but my recollection was that he went around in back of the house also.

Dep. page 25

Q. I see. Now when the sale actually started, Mr. Riley, will you tell us to the best of your recollection exactly what transpired insofar as activity or non-activity of the bidding was concerned?

A. Well, as well as I remember I made the first bid on the property for $1,000.00 and there was another man there, I think his name was Vaughan, I had never seen him before that day, a colored man, and he made a bid right after that that was right much above my $1,000.00, and as soon as he started bidding, why Mr. Feldman entered in and they got down to the point that we were very much interested in the bidding because he would raise him $10.00 and they were going back and forth, and there was some question right up to the last as to who really was going to buy the building.

Q. There was very active bidding even in blocks of $10.00 until you got to the sale figure of $3,250.00?

A. That's right.

Q. The last and highest bid was made by Mr. Leon Feldman?

A. Yes, sir.

Q. In your presence?

A. Yes, sir.

Q. You had no further transactions with Mr. Feldman at all personally?

Dep. page 26

A. No, sir. I saw him in the office one day talking to Mr. Richardson is the only time I had seen him until the trial of this other case.

Henry H. Riley, Jr.

CROSS EXAMINATION.

By Mr. House:

Q. You say that at this sale was Mr. Richardson, yourself, Albert Vaughan and Mr. Feldman. Was anybody else there?

A. Yes, sir. There was one of the Omohundros there in the real estate business. There are three brothers here in town and, frankly, I can never know which is which. I think it was Tom Omohundro. I know them by face, but not to distinguish initials and name of them. I think it was Mr. Tom Omohundro.

Q. I judge, though, that he did not bid?

A. No, sir, he did not.

Q. I believe, I am trying to recall your testimony, I believe you said that you remembered seeing Mr. Feldman going into the house; is that right?

A. That's right.

Q. You don't know what he looked at inside and don't know whether he looked at the outside at all; is that correct?

A. We didn't go in the house with him. We had already been through the house. My recollection is that he went around in back of the house also.

Dep. page 27 } Q. Did you see him go around the back of the house?

A. I think that I did.

Q. You say you think. There is some doubt in your mind about whether he did or did not?

A. Well, I remember that he did, but there is no doubt in my mind; yes, sir.

Q. Were you aware at the time of the sale of the fact that the owner had moved because the house was in the process of being condemned?

A. Yes, sir, I had some knowledge of that fact.

Q. Did you offer that information to anyone there that was bidding?

A. No, sir.

Q. Do you know if anyone else did?

A. Not for certain that they did; no, sir.

Q. Was your capacity there bidding on behalf of the note holder?

A. Yes, sir.

Q. Mr. Riley, were you instructed to bid up to $1,000.00?

Mr. Mizell: I object as being irrelevant and immaterial.

A. That I don't remember clearly, Mr. House.

Dep. page 28 } When we have a deed of trust that has a stated amount of money involved on it, we usually start the bidding off and we don't always—I had just decided to bid $1,000.00. Now why I can't tell you at this time.

Q. May I just ask you this, sir? Did you base your bidding on the value of the property or on the amount that was owed under the deed of trust?

A. We usually consider the deed of trust and not the property.

* * * * *

CERTIFICATE NO. 1.

Statement in Narrative Form of Oral Testimony heard June 5, 1958.

Statement in narrative form of the oral testimony heard by the Court on June 5, 1958, in open court, without any court reporter in attendance, of the following witnesses who appeared and testified on behalf of the defendant as follows:

PURLEY ADAMS,

1. Purley Adams

Purley Adams testified that his address at the date of the hearing was 707 North 27th Street, Richmond, Virginia, that he was 61 years of age, that he and his wife, Alice P. Adams, were the owners of the real estate 711 North 4th Street, Richmond, Virginia, subject to certain deed of trust liens, that a Building Inspector with the Bureau of Building Inspection of the City of Richmond had come to him sometime before December, 1955 and told him that he would either have to fix the house or move out because the building was not safe, that Adams went to Richardson, of the real estate firm of Rucker and Richardson, and tried to borrow the necessary funds. He had two contractors' estimates, one for $4,000.00 and the other $2,600.00. He was unable to procure the loan. Adams moved out of the house about November or December, 1955, being unable to effect repairs.

2. Albert Vaughan.

ALBERT VAUGHAN,

testified that he lived at 718 North 2nd Street, over page 2 } his restaurant which he operates at that location, that No. 711 North 4th Street is about two blocks from his own home. He saw the advertisement of the auction sale in the newspaper and attended the sale conducted by the plaintiff Richardson at 711 North 4th Street on June 18, 1956, arriving there about 4:20 p. m., about 10 minutes before the sale was advertised to take place, that he saw a new porch on the front of the building, that he went inside the building and looked around upstairs and downstairs and saw that the house needed fixing, plumbing, etc., but was not beyond repair, that the fence and gate was on the northeast side of No. 711 North 4th Street, that it started raining and the plaintiff Richardson said, "Lets go on the porch." The plaintiff Richardson read the advertisement, and asked for bids. The bidding started at $1,000.00, that he, Vaughan bid $1,600.00, at which time Feldman began bidding, that the first bidder stopped bidding and Vaughan and Feldman bid against each other, Vaughan bidding up at $100.00 a time, up to $2,500.00 and thereafter at $50.00 a time up to $3,-200.00, and Feldman bidding up at $50.00 a time, until the bidding reached $3,250.00, which bid was made by Feldman, and the property was knocked out to Feldman at that figure.

3. Leon Feldman.

LEON FELDMAN,

Leon Feldman testified that his address was 4117 Kensington Avenue, Richmond, Virginia, that he was 63 years of age, that on Sunday, June 17, 1956, he read the advertisement of the auction sale in the newspaper to the effect that the two-story brick building consisting of two flats, three room each, at 711 North 4th Street, Richmond, Virginia, would be sold at public auction on Monday, June 18, 1956, at 4:30 p. m., that on Monday, June 18, 1956, he called Richarson's office to ascertain whether or not the sale was to take place as scheduled, and was told it would take place page 3 } as scheduled, and the conversation ended; that before the time fixed for the sale, he went to the house at 711 North 4th Street, parked his automobile across the street, noticed that the house had a new front porch on it, that Mr. Richardson and Riley were standing on the sidewalk near the front of the house, that the front door was

open, that he, Feldman, walked in and walked around inside on the first floor, then went upstairs and looked around on the second floor, front rooms and back rooms; that the plumbing fixtures and attachments upstairs and downstairs had been removed and the plaster was damaged, painting needed and windows broken out; that he saw a man looking around inside the house whom he did not know but later learned was Albert Vaughan, that he, Feldman, went outside, looked at the front wall and new porch and walked around the north side of the house and into the back yard and looked at the north wall and the rear or east wall, did not fully see the south wall which adjoined a three-foot walkway between it and the building on the south because of a locked gate on the adjoining property, that the walkway belonged to the adjoining property, that there was no access to the walkway from the rear, that a cinder block fence or wall separated the two properties, that he could not obtain a sufficient view of the south wall to ascertain the presence or absence of a defective condition of the wall, that it began raining at about 4:25 p. m., that Mr. Richardson said, "Lets go on the porch," that Mr. Richardson read the advertisement out loud, and asked for a bid and that Mr. Riley bid $1,000.00, that Vaughan then began bidding against Riley until the bidding reached about $1,600.00, at which point Feldman began bidding and Riley stopped bidding, that the bidding went on between Vaughan and Feldman at the rate page 4 } of $100.00 and $50.00 until it was knocked out to Feldman at $3,250.00, that Mr. Richardson then asked Feldman to sign a writing on which the advertisement of the auction sale was pasted, which Feldman signed, and asked Feldman for a cash deposit of $100.00, and that Feldman told him that he did not have a checking account; that he asked Richardson to call Feldman's attorney, Lionel Moses, to ascertain that Feldman was financially responsible, that Richardson and Feldman then went to the residence at 726 North 4th Street where Richardson telephoned Moses, that Richardson said that he was satisfied after talking to Mr. Moses, that Feldman took Richardson's business card, that the following day Feldman's attorney called Feldman to the effect that Richardson wanted settlement made on Friday, June 22, 1956, four days after the date of the auction, that Feldman took $250.00 in cash with him to Richmond Federal Saving and Loan Association, together with his pass book, to procure a check for $3,250.00 there, of which amount $3,000.00 would have been a withdrawal from his account, that

he was told by the teller that if he withdraw the $3,000.00 that day, he would lose $90.00 interest, that the interest would be payable the following Friday, that this was confirmed to him by a Mr. Taylor at the Richmond Federal Savings and Loan Association, that Feldman then telephoned Richardson from Mr. Taylor's telephone, told him of the situation, that Mr. Taylor took the telephone and confirmed that the $3,000.00 was on deposit and that Feldman would lose the $90.00 interest by withdrawing it on that date instead of waiting until the following Friday, that Richardson then asked to speak to Feldman again and told Feldman that he would wait until the following Friday, but told him to bring in a check for $100.00, that Feldman reminded him that he had no checking account, but that he had $250.00 in cash which he would take to Richardson that day, that

page 5 } Feldman walked to Richardson's office within a few minutes, carried the $250.00 in cash to Richardson that Richardson gave him a receipt, that Feldman asked for the keys to the house so he could start cleaning the house and arrange for replacing the plumbing and fixtures and decorating the house, that Richardson first hesitated but then gave him the keys, that Feldman arranged with two people to meet him at the house the next day, Saturday, June 23, 1956, to help clean and carry away the trash, that on Saturday, June 23, 1956, Feldman went to the location of the house, parking his automobile at the corner of 4th and Jackson Streets, that he was walking by Sporn's Grocery Store there located, that Mr. Sporn called to him and asked him if he had purchased the property 711 North 4th Street, that Sporn told Feldman that the house had been condemned for sometime before the auction sale, (object to,—excluded-and exception), that on the following Monday morning, June 25, 1956, at about 9:00 a. m., he, Feldman, telephoned Mr. Hollis, of the office of the Bureau of Building Inspection of the City of Richmond and asked him what he knew about 711 North 4th Street, that Hollis told Feldman he would meet him at 11:00 a. m. that same morning, that they met and walked around the house exactly as Feldman had walked around it the day of the auction, that Hollis leaned over the fence and tried to point out to Feldman a crack in the south wall near the top of the wall, but Feldman was still not able to see the defect, that the occupant of the adjoining property was in the back yard of her property and Hollis asked for permission to go into her yard, she agreed, she put two dogs which were in the yard in the outhouse at the rear, that Hollis

climbed over the fence, that Feldman asked her to unlock the front gate which she did, that Feldman then went page 6 } into the adjoining yard where Hollis pointed out to him a V-shaped crack running from the top of the wall down three-feet, located in the wall about twenty-feet from the rear of the house, pointed out to Feldman the end of an iron rod or piece near the top of the wall which was fastened through the wall to the roof of the house 711 North 4th Street and pointed out to Feldman concrete which had been poured at the bottom of the wall to protect the wall from going down, that Hollis told him the rear twenty-feet of the wall would have to be rebuilt with a new foundation, that Feldman then went straight to see the plaintiff Richardson, told him what he had just learned and gave him back the keys and demanded his $250.00 deposit back, that Richardson asked Feldman what Feldman's attorney had to say about it, that Feldman telephoned his attorney from Richardson's telephone, found that his attorney was away on a two weeks vacation, that Richardson refused to refund the money, that Feldman told him the only way he would consider to take the property would be if Richardson rebuilt it, that Richardson told him that Purley Adams had asked him for a $2,600.00 loan to use for that purpose, that Feldman learned later that the building had been torn down, that the 1956 assessment on the lot was $400.00 and on the building was $2,900.00.

Certified in conformity with the Rules of the Supreme Court of Appeals of Virginia, Rule 5:1, Section 3.

Date Tendered August 19, 1958.
Date Signed August 19, 1958.

BROKENBROUGH LAMB, Judge.

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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