

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF

IDAHO, IN AND FOR THE COUNTY OF CARIBOU.

E. T. RALPHS, L. R. ANDERSON, ROBERT H. HURTON,
GEORGE J. CANNON and CLARON O. SPENCER, as the
duly qualified and acting Protective Committee
for all holders of certificates evidencing de-
posited six percent bonds of Austin Brothers
Association, a corporation, of the issue of
February 1, 1929,

Plaintiffs,

vs.

DECLARATORY JUDGMENT

AUSTIN BROTHERS ASSOCIATION, a corporation;
ZION'S SAVINGS BANK AND TRUST COMPANY, a cor-
poration, and GEORGE S. SPENCER, as trustees
under the trust deed, dated February 1, 1929,
which secured all bonds of the aforesaid issue;
UTAH HOME FIRE INSURANCE COMPANY, a corporation;
BENEFICIAL LIFE INSURANCE COMPANY, a corpora-
tion; and A. FRANK BARNES, JR., as holders of
certificates issued by said Protective Com-
mittee under and by virtue of a 'Bondholders
Deposit and Protective Agreement', dated
September 21, 1932, which certificate holders
are joined as defendants in behalf of them-
selves and of all others similarly situated;
and H. H. ALLEN, JR.,

Defendants.

The above entitled matter having come on regularly for hearing on Tuesday, September 4, 1945, at 2 o'clock p.m., before the Honorable Isaac McDougall, one of the judges of this court sitting without a jury in Pocatello, Idaho, Ashby D. Boyle appearing as counsel for plaintiffs and Herbert Van Dam appearing as counsel for the defendant H. H. Allen, Jr., and no one appearing on behalf of any of the defendants other than the said Allen, and it appearing from the records and files herein that on the 11 day of ~~Sept~~ 1945 plaintiffs filed in the office of the clerk of this court their complaint herein, duly verified, and that thereafter all of the defendants were regularly served herein with summons, together with a copy of plaintiffs' said complaint, and that within the time allowed by law said Allen filed herein his verified answer admitting certain allegations of plaintiffs' complaint but denying other allegations, and that each and all of said defendants, other than said Allen, have failed to answer or otherwise plead to said complaint within the time allowed by law, or at all, and that the default of each of said defendants, other than said Allen, has been regularly entered, and evidence in support of the allegations of said complaint, and no evidence in rebuttal having been offered by said Allen, and the matter having been submitted to the court for its decision, and the court having made and entered its findings of fact and Conclusions of Law,

IT IS HEREBY ADJUDGED

I.

That from the language used in the Bondholders Deposit and Protective Agreement, dated September 21, 1932, power on the part of the persons who from time to time comprise the Protective Committee thereunder to acquire, sell and convey property in the course of their

administration is clearly to be implied and is hereby declared to exist as effectively as if expressly granted.

II.

That by reason of their having accepted the benefits of the Protective Committee's administration with knowledge of the settlement with Austin Brothers Association, the acquisition of said ranches and other properties, the surrender and cremation of all bonds of said issue of February 1, 1929, the releasing of said trust deed securing said bonds and the sale of said properties, as well as by reason of their having acquiesced in plaintiffs' construction of the terms of said Protective Agreement, all of said certificate holders and all beneficiaries of the aforesaid trust should be precluded from denying and are estopped to deny the correctness of such construction or the validity of plaintiffs' acquisition and sales of said properties.

Dated at Pocatello, Idaho, this 4th day of September, 1945.

Isaac McFayall

J U D G E

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF CARIBOU.

E. T. RAIPHS, L. R. ANDERSON, ROBERT H. BURTON,
GEORGE J. CANNON and CLARON O. SPENCER, as the
duly qualified and acting Protective Committee
for all holders of certificates evidencing de-
posited six percent bonds of Austin Brothers
Association, a corporation, of the issue of
February 1, 1929.

Plaintiffs,

VS.

FINDINGS OF FACT

AUSTIN BROTHERS ASSOCIATION, a corporation;
ZION'S SAVINGS BANK AND TRUST COMPANY, a cor-
poration, and GEORGE S. SPENCER, as trustees
under the trust deed, dated February 1, 1929,
which secured all bonds of the aforesaid issue;
UTAH HOME FIRE INSURANCE COMPANY, a corporation;
BENEFICIAL LIFE INSURANCE COMPANY, a corpora-
tion; and A. FRANK BARNES, JR., as holders of
certificates issued by said Protective Com-
mittee under and by virtue of a Bondholders
Deposit and Protective Agreement, dated
September 21, 1932, which certificate holders
are joined as defendants in behalf of them-
selves and of all others similarly situated;
and H. H. ALLEN, JR.,

Defendants.

AND

CONCLUSIONS OF LAW

The above entitled matter having come on regularly for hearing on Tuesday, September 4, 1945, at 2 o'clock p.m., before the Honorable Isaac McDougall, one of the judges of this court sitting without a jury in Pocatello, Idaho, Ashby D. Boyle appearing as counsel for plaintiffs and Herbert Van Dam appearing as counsel for the defendant H. H. Allen, Jr., and no one appearing on behalf of any of the defendants other than the said Allen, and it appearing from the records and files herein that on the ~~11~~ day of ~~July~~, 1945 plaintiffs filed in the office of the clerk of this court their complaint herein, duly verified, and that thereafter all of the defendants were regularly served herein with summons, together with a copy of plaintiffs' said complaint, and that within the time allowed by law said Allen filed herein his verified answer admitting certain allegations of plaintiffs' complaint but denying other allegations, and that each and all of said defendants, other than said Allen, have failed to answer or otherwise plead to said complaint within the time allowed by law, or at all, and that the default of each of said defendants, other than said Allen, has been regularly entered, and evidence, both oral and documentary, having been offered by plaintiffs in support of the allegations of said complaint, and no evidence in rebuttal having been offered by said Allen, and the matter having been submitted to the court for its decision, the court being fully advised makes the following

FINDINGS OF FACT

I.

That plaintiffs bring this action under and pursuant to the provisions of Sections 7-1201 to 7-1216, both inclusive, of Idaho Code Annotated, 1932, as amended, in order to obtain a declaratory judgment resolving certain controversies which exist (a) in relation to the powers and administration of the Protective Committee, as constituted from time to time, under the Bondholders Deposit and

Protective Agreement dated September 21, 1932, and (b) in relation to said Committee's title to the properties acquired in the course of its administration and later sold.

II.

That plaintiffs are the duly appointed, qualified and acting Protective Committee for all holders of certificates evidencing deposited six percent bonds of Austin Brothers Association of the issue of February 1, 1929; that during all times mentioned in said complaint the defendants Austin Brothers Association and Zion's Savings Bank and Trust Company were, and now are, corporations duly organized under and existing by virtue of the laws of the state of Utah and authorized to do business in the state of Idaho by virtue of having complied with all provisions of the constitution and laws of the state of Idaho relating to foreign corporations doing business in the state of Idaho; that during all of said times the defendants Utah Home Fire Insurance Company and Beneficial Life Insurance Company were, and now are, corporations duly organized under and existing by virtue of the laws of the state of Utah and authorized to do business in the state of Idaho by virtue of having complied with all provisions of the constitution and laws of the state of Idaho relating to foreign insurance corporations doing business in the state of Idaho; that the defendant George S. Spencer is a resident of Salt Lake City, Utah; that said Zion's Savings Bank and Trust Company and said George S. Spencer were, respectively, the corporate trustee and the individual trustee under the trust deed, dated February 1, 1929 which secured all bonds herein mentioned; that the defendant A. Frank Barnes, Jr., is a resident of Salt Lake County, Utah; that the defendant H. H. Allen, Jr., is a resident of Caribou County, Idaho.

III.

That subject only to the rights of the defendant H. H. Allen, Jr., as purchaser under a sales contract in writing, dated May 9, 1941, which contract is now in force and effect, plaintiffs, as a Protective Committee for all holders of certificates evidencing deposited six percent bonds of Austin Brothers Association of the issue of February 1, 1929, are the owners, and entitled to the possession, of the following described real property in Caribou County, Idaho, to-wit:

The South half of Section 9; all of Section 12, the West half of the Northeast quarter, the West half of the Southeast quarter and the West half of Section 15; the Northeast quarter, the North half of the Southeast quarter, the North half of the Southwest quarter, the South half of the Northwest quarter of Section 25; the South half of Section 26; the South half of Section 27; the South half and the South half of the North half of Section 33; the Northwest quarter and the Northeast quarter, and the East half of the Southeast quarter of Section 34; the West half of Section 35; the Northeast quarter, and the North half of the Southeast quarter of Section 35, all in Township 7 South, Range 43 East, Boise Meridian; Lots 2, 3 and 4, the South half of the Northwest quarter, the Southwest quarter of the Northeast quarter and the Southwest quarter and the West half of the Southeast quarter of Section 2; the West half and the West half of the Northeast quarter, the West half of the Southeast quarter of Section 11; the East half of the Southeast quarter of said Section 11; the West half of the Northwest quarter and the West half of the Southwest quarter of Section 13; the East half and the East half of the Northwest quarter and the Northeast quarter of the Southwest quarter of Section 14; the Northeast quarter, the East half of the Southeast quarter of Section 23; the West half of Section 24, all in Township 8 South of Range

43 East Boise Meridian, comprising approximately 6200 acres.

Together with all water rights thereunto appurtenant, which said water rights include 55% of the waters heretofore used upon the above described lands comprising the so-called Lower Austin Ranch and lands heretofore sold comprising the so-called Upper Austin Ranch, and decreed to certain individual prior owners of said lands in an action brought in the District Court of Bingham County, Idaho, entitled Fred S. Stevens, et al, plaintiffs, v. Eastern Idaho Water Company, et al, defendants, of record in Book 1 of Judgments, page 31, Caribou County, Idaho.

IV.

That after entering into said sales contract, dated May 9, 1941, said Allen made application for a loan to be secured by mortgage upon said Lower Austin Ranch and submitted in that connection an abstract of title to said premises; that after examining said abstract the loan agency to which application had been made as aforesaid asserted, and it is now contended by said Allen and by other defendants, but denied by plaintiffs, that the title to said Lower Austin Ranch and other properties acquired by the Protective Committee under its settlement with Austin Brothers Association, hereinafter more particularly referred to, is unmarketable for the reason that it cannot be determined from said Bondholders Deposit and Protective Agreement or from the title records of the various counties wherein the properties acquired by the Protective Committee as aforesaid are situated:

- (a) What persons have constituted from time to time, and now constitute, the Protective Committee under said Bondholders Deposit and Protective Agreement; or
- (b) Whether said Protective Committee possesses under said Bondholders Deposit and Protective Agreement, or otherwise acquired, the power to take title to said Lower Austin Ranch and other properties formerly owned by Austin Brothers Association, as well as the power to sell and convey said properties in the course of its administration; or
- (c) Whether the settlement made between said Protective Committee and Austin Brothers Association on or about October 16, 1938, whereby the Association agreed to convey to the Protective Committee certain properties, including those described or referred to in paragraph II above, and the Protective Committee agreed to cause the trust deed, dated February 1, 1929, to be released or record by the trustees therein named and to cause all deposited bonds to be cancelled and destroyed, was valid; or
- (d) Whether the conveyance or conveyances of property thereafter made by Austin Brothers Association to said Protective Committee were made merely as additional security on said bond issue of February 1, 1929, or on the contrary, were intended to, and did in fact, vest in said Protective Committee fee simple title to all properties purportedly conveyed, including said Lower Austin Ranch; or
- (e) Whether all holders of six percent bonds of Austin Brothers Association of the issue of February 1, 1929, deposited their respective bonds with Zion's Savings Bank and Trust Company, the depository named in the Bondholders Deposit and Protective Agreement of September 21, 1932, and became bound by the terms and provisions of such agreement; or
- (f) Whether any of the six percent bonds secured by the trust deed, dated February 1, 1929, remain outstanding or, on the contrary, the entire issue of said bonds has been lawfully cancelled and destroyed; or
- (g) Whether Zion's Savings Bank and Trust Company, as corporate trustee, or George S. Spencer, as individual trustee, or any beneficiary

under the trust created by the Bondholders Deposit and Protective Agreement of September 21, 1932, has any right, title or interest in and to said Lower Austin Ranch and other properties acquired by the Committee as aforesaid.

V.

That the material facts in relation to the Protective Committee's powers and administration, including the acquisition and sale of said Lower Austin Ranch and other properties acquired through settlement with Austin Brothers Association are as follows:

(a) On or about February 1, 1929 at Salt Lake City, Utah, Austin Brothers Association executed its six percent bonds in the aggregate principal amount of \$200,000, said bonds being numbered consecutively from 1 to 220;

(b) That in order to secure payment of said bonds, according to tenor, said Austin Brothers Association then and there executed a deed of trust, intended as a mortgage, by the terms whereof it purported to convey to Zion's Savings Bank and Trust Company, as corporate trustee, and to George S. Spencer, as individual trustee, all its properties, real and personal, which are described in said trust indenture, wheresoever situate, including said Lower Austin Ranch, all water rights appurtenant thereto, and all ranch equipment situate thereon;

(c) That after being executed, said bonds and deed of trust were delivered to said trustees, who thereupon authenticated said bonds and returned same to said Association for delivery to intending purchasers; that in due course said deed of trust was forwarded to the office of the County Recorder of Caribou County, Idaho, for recording and was duly recorded in said office in Book 7 of Mortgages, page 1;

(d) That thereafter, for value, said Association sold and delivered all of the aforesaid bonds to purchasers;

(e) That thereafter said Association defaulted in the payment of said bonds, and because of such default it was proposed by certain of the holders thereof that a bondholders' protective committee be appointed; that thereupon E. T. Ralphs, Frank E. Bagley, J. M. MacFarlane, Arthur E. Morston and William McEwan, as a Protective Committee for all bondholders who might thereafter deposit bonds, signed and delivered to Zion's Savings Bank and Trust Company a unilateral Agreement which is sometimes herein referred to as the 'Bondholders Deposit and Protective Agreement', dated September 21, 1932, or simply as the 'Bondholders Deposit and Protective Agreement';

(f) That by said Bondholders Deposit and Protective Agreement it was and is, among other things, provided: That holders of bonds of the issue of February 1, 1929 might become parties to said agreement by depositing, under the terms thereof, their respective bonds with all proper coupons thereto attached, to-wit, coupons due August 1, 1932, and all subsequent coupons, with Zion's Savings Bank and Trust Company of Salt Lake City, Utah (therein called the 'Depository') on or before the day of September, 1932, or within such further time as the Committee might prescribe for that purpose; that for each such deposit of bonds the depository should issue to the depositor a certificate of deposit in substantially the form set forth in said agreement; that upon each deposit thereunder, one or more certificates of deposit issued by the depository and transferable in the manner and form therein prescribed, should be delivered to the depositor; that each depositor thereunder and each and every holder of a certificate of deposit issued thereunder, and each transferee of such certificate should be bound by all of the provisions of said agreement as fully as if he had signed the same, and should be considered a party to said agreement, and deemed to have adopted the same and agreed to the terms and provisions thereof; that upon the transfer of any certificate of deposit made in accordance with its terms, the transferee should for all purposes be substituted for the prior holder, subject to all the terms and conditions of said agreement; that the holders of record of the said certificates of deposit

should (subject to the provisions of said agreement) be treated as the absolute holders thereof and of any and all rights represented thereby, and neither the Committee nor any depository should be affected by notice to the contrary; that the bonds deposited with the depository under said agreement should be held by the depository for account and subject to the sole control, direction, disposition and order of the Committee under the terms and conditions set forth in such agreement. That by the terms of said agreement the Committee was vested with, and the depositors of bonds and each of them did thereby assign and transfer to the Committee, the full, legal, equitable and beneficial title to all bonds deposited thereunder for the purposes thereof, and severally agreed that the Committee should be, and it was thereby, vested with every right, power and authority of whatsoever character, nature or purpose, in order to enable the Committee to carry out and perform the purposes and intent of said agreement. That the depositors, respectively, thereby agreed at any time and from time to time, on demand of the Committee, to execute any and all other transfers, assignments, authorizations, and approvals required by the Committee to make effective any act, agreement or undertaking of the Committee in respect of such bonds. That it was thereby further agreed: That the Committee had, and might exercise in its discretion, all the rights and powers of the respective holders of bonds deposited thereunder; that the Committee was authorized to perform such acts as it should consider necessary or advisable in order to enforce the security for, or procure the payment of the deposited bonds; that the Committee was authorized generally to do, or cause to be done, such acts, whether under the mortgage or otherwise, as the Committee might consider advisable to procure the payment of the deposited bonds, or otherwise to protect the rights and interests of the depositors, and to do such other acts or things as might tend in the judgment of the Committee to protect the interests of the depositors and to enforce the rights and security provided by the bonds and the indenture; that the Committee might, at public or private sale, purchase, or cause to be purchased, the mortgaged premises, or any part thereof, use the deposited bonds in payment, or in part payment, of the purchase price on the sale of the mortgaged premises, or any part thereof; that the Committee might apply to the payment of any sums borrowed or procured to be advanced by it, and to the payment of its expenses, indebtedness, obligations or liabilities, any sums collected by the Committee upon the deposited bonds or on account of any other property acquired by or on behalf of the Committee, or on the proceeds thereof; that the deposited bonds and all property purchased or acquired by or on behalf of the Committee, and all proceeds or collections on account of the same, should be charged with the payment of indebtedness, obligations and liabilities of the Committee, and of all of its expenses; that depositors should be permitted to withdraw at any time any bond or bonds deposited by them, but such withdrawal should be subject to any action taken by the Committee under said agreement with respect to said bonds or properties prior to such withdrawal;

(g) That in due course thereafter the holders of all outstanding bonds of said issue of February 1, 1929, deposited their respective bonds with Zion's Savings Bank and Trust Company, as depository, under and pursuant to said Bondholders Deposit and Protective Agreement, and became bound thereby, and there was issued to each of said depositing bondholders in due course an appropriate certificate evidencing such deposit of bonds; that none of the bonds deposited with the Protective Committee as aforesaid has ever been withdrawn;

(h) That on or about October 18, 1938 a settlement was agreed upon between the Protective Committee and Austin Brothers Association, pursuant to which said Association has conveyed and relinquished to said Protective Committee, unconditionally, certain real and personal property, including said Lower Austin Ranch, aggregating, or believed to aggregate, in value not less than the indebtedness evidenced by said deposited bonds;

(i) That such conveyance and relinquishment was intended to, and did in fact, vest in the Protective Committee a fee simple title to the properties purportedly conveyed; that in consideration of, and

as inducement for, such conveyance and relinquishment by said Austin Brothers Association the Committee agreed to cause the trustees named in said trust deed to release the same of record and to cause all deposited bonds to be cancelled and destroyed; that thereafter said trust deed was duly released of record and the entire issue of said bonds was lawfully cancelled and destroyed, as agreed;

(j) That as originally constituted, said Protective Committee consisted of E. T. Ralphs, Frank E. Bagley, J. M. MacFarlane, Arthur E. Moreton and William McEwan. Nevertheless, succession in membership of said Committee has occurred as follows: About October 14, 1936, Lewis R. Anderson was duly appointed to succeed Arthur E. Moreton, resigned; about November 13, 1936, Robert H. Burton was duly appointed to succeed Frank E. Bagley upon the latter's death; about May 25, 1938, George J. Cannon was duly appointed to succeed James M. MacFarlane upon the latter's death; and about March 15, 1945, Claron O. Spencer was duly appointed to succeed William McEwan upon the latter's death; that at present said Committee consists of E. T. Ralphs, L. R. Anderson, Robert H. Burton, George J. Cannon and Claron O. Spencer;

(k) That in the course of the Protective Committee's administration it has made sales of the properties acquired by it in the settlement with Austin Brothers Association, including said Lower Austin Ranch, and from the proceeds of sale has paid liquidating dividends to certificate holders as follows:

November 9, 1939	-	10%	of	face	amount	of	certificate.
September 16, 1940	-	5%	of	face	amount	of	certificate.
December 14, 1940	-	7%	of	face	amount	of	certificate.
December 18, 1941	-	8%	of	face	amount	of	certificate.
October 7, 1942	-	34%	of	face	amount	of	certificate.
January 20, 1943	-	8%	of	face	amount	of	certificate.
December 11, 1943	-	9%	of	face	amount	of	certificate.
April 2, 1945	-	7%	of	face	amount	of	certificate.

Total paid to date - 88%

That each time as payment of a dividend was planned, the Committee has required all holders of certificates to present, the same for endorsement of the dividend, and in every case endorsement of the dividend paid has been made upon the certificate before its return to holder.

VI.

That the foregoing facts in relation to the Protective Committee's administration were communicated by it to all certificate holders as liquidating dividends were paid.

VII.

That while said Bondholders Protective Agreement does not expressly grant to the Protective Committee power to acquire, sell, or convey property in the course of their administration, still such powers were intended to be given; that the holders of all certificates evidencing deposited bonds and all beneficiaries of the trust created under and by virtue of said Bondholders Deposit and Protective Agreement have accepted the benefits of the Protective Committee's administration with knowledge of the settlement with Austin Brothers Association, the acquisition of said ranches and other properties, the surrender and creation of all bonds of said issue of February 1, 1929, the releasing of said trust deed securing said bonds and the sale of said properties, and have acquiesced in plaintiffs' construction of the terms of said Protective Agreement.

VIII.

That the holders of certificates evidencing the deposit of said six percent bonds under said Bondholders Protective Agreement dated September 21, 1932, number approximately one hundred and are widely scattered; that none of said certificate holders or beneficiaries is resident within the state of Idaho; that the rights and interests of all

of said certificate holders arise out of the same facts and transactions, and there is among them a community of interest; that for the foregoing reasons three certificate holders, to-wit: Utah Home Fire Insurance Company, Beneficial Life Insurance Company and A. Frank Barnes, Jr., have been named as defendants in their own right and as representatives of the rights and interests of all beneficiaries as a class.

IX.

That the defendants and each of them are estopped and precluded from denying the correctness of the construction or the validity of plaintiffs' acquisition and sales of said properties.

From the foregoing Findings of Fact the court draws the following

CONCLUSIONS OF LAW

I.

That from the language used in the Bondholders Deposit and Protective Agreement, dated September 21, 1932, power on the part of the persons who from time to time comprise the Protective Committee thereunder to acquire, sell and convey property in the course of their administration is clearly to be implied.

II.

That by reason of their having accepted the benefits of the Protective Committee's administration with knowledge of the settlement with Austin Brothers Association, the acquisition of said ranches and other properties, the surrender and execution of all bonds of said issue of February 1, 1929, the releasing of said trust deed securing said bonds and the sale of said properties, as well as by reason of their having acquiesced in plaintiffs' construction of the terms of said Protective Agreement, all of said certificate holders and all beneficiaries of the aforesaid trust should be precluded from denying and are estopped to deny the correctness of such construction or the validity of plaintiffs' acquisition and sales of said properties.

Dated at Pocatello, Idaho, this 4th day of September, 1945.

Joseph M. Foyall 

JUDGE