

1975

Merril B. Anderson, Dorothy M. Anderson, and Ralph Bitner Morris v. Capitol Thrift and Loan Co, James B. Mason, and Mid Valley Investment : Brief of Respondent

Utah Supreme Court

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Graham Dodd; Kirton, McConkie, Boyer and Boyle; Attorney for Appellants.

Ralph R Mabey; Irvine Smith and Mabey; Robert D Merrill; Van Cott, Bagley, Cornwall and McCarthy; Attorneys for Respondents.

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IN THE SUPREME COURT OF
THE STATE OF UTAH

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BRIGHAM YOUNG UNIVERSITY
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MERRILL B. ANDERSON,
DOROTHY M. ANDERSON and
RALPH BITNER MORRIS,

Plaintiffs-Appellants,

vs.

CAPITOL THRIFT AND LOAN
COMPANY, JAMES B. MASON,
as Trustee, and MID VALLEY
INVESTMENT,

Defendants-Respondents.

Case No.

14144

Appeal and cross-appeal from the Third District
Court of Salt Lake County, State of Utah; Hon.
Stewart M. Hanson, Jr., District Judge, presiding
at Summary Judgment hearing; Hon. Stewart M.
Hanson, Sr., District Judge, presiding
at trial of counterclaims.

BRIEF OF DEFENDANT-RESPONDENT MID VALLEY INVESTMENT

Robert D. Merrill
Van Cott, Bagley, Cornwall
& McCarthy
Attorneys for Defendants-
Respondents Capitol Thrift
and Loan Company and
James B. Mason
141 East First South
Salt Lake City, Utah 84111

Ralph R. Mabey
Irvine Smith & Mabey
Attorneys for Defendant-
Respondent Mid Valley Investment
225 South 200 East
Salt Lake City, Utah 84111

Graham Dodd
Kirton, McConkie, Boyer & Boyle
Attorneys for Plaintiffs-Appellants
336 South Third East
Salt Lake City, Utah 84111

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TABLE OF CONTENTS

	<u>Page</u>
ABBREVIATIONS HEREIN	1
STATEMENT OF THE NATURE OF THE CASE	2
DISPOSITION IN THE LOWER COURT	2
RELIEF SOUGHT ON APPEAL	3
SUPPLEMENTAL STATEMENT OF FACTS	
A. Material Facts in Addition to those Stated by Plaintiffs- Appellants	4
B. Facts Found Inaccurately Stated by Plaintiffs-Appellants	8

THE LOWER COURT

PROPERLY GRANTED

SUMMARY JUDGMENT

ARGUMENT

POINT I: SUMMARY JUDGMENT IS APPROPRIATE TO THE PRESENT FACTS AND LAW . . .	12
POINT II: PLAINTIFFS-APPELLANTS, NOT HAVING DONE EQUITY, WERE NOT ENTITLED TO EQUITABLE RELIEF	12

POINT III: PLAINTIFFS-APPELLANTS RATIFIED
 THE DISPUTED SALE AND THEREBY
 WAIVED THEIR RIGHT TO CHALLENGE
 IT 16

POINT IV: DEFENDANT-RESPONDENT MID VALLEY WAS
 A BONA FIDE PURCHASER FOR VALUE
 WITHOUT NOTICE WHOSE TITLE TO
 THE PROPERTIES CANNOT NOW BE
 INVALIDATED 18

POINT V: THE DISPUTED TRUSTEE'S SALE WAS IN
 ALL MATERIAL RESPECTS PROPERLY
 CONDUCTED 20

A. Defendant-Respondent Mid Valley's
 Payment Within 24 Hours of the
 Sale was "forthwith" under UTAH
 CODE ANN. §57-1-28 and, in any
 Event, is not Subject to
 Challenge by Plaintiffs-
 Appellants Who Were Not
 Injured by any Delay 20

B. The Disputed Sale Occurred
 on the Date Noticed. It
 was not Unlawfully Postponed . . . 26

C. Notice Requiring Cash Pay-
 ment at the Time of Sale

	Neither Invalidates the		
	Sale nor Renders it Unfair . . .		27
D.	The Disputed Sale was Fair		
	in All Other Respects		30
E.	In Any Event, the Alleged		
	Sale Irregularities are		
	Insufficient to Affect		
	the Sale		34
POINT VI:	CONCLUSION: SUMMARY JUDGMENT		
	WAS PROPERLY GRANTED		35

THE LOWER COURT IMPROPERLY
DENIED MID VALLEY'S COUNTERCLAIMS
RESPECTING UNLAWFUL DETAINER
OF THE 11th EAST PROPERTY AND
BOND FORFEITURE

ARGUMENT

POINT I:	THE ANDERSONS WERE IN UNLAWFUL		
	DETAINDER OF THE 11th EAST COM-		
	MERCIAL PROPERTY		37
A.	Under UTAH CODE ANN. §78-36-3(1)		
	No Notice was Required to Create		
	the Circumstance of Unlawful		
	Detainer and Amended Conclusion		
	of Law 3 is Erroneous		37

- B. The Andersons' Continued Possession of the 11th East commercial property was Authorized by Restraining Order for a Period of Eight Days Only. Amended Conclusions of Law 4, and Amended Findings of Fact 7 and 8 are in Part Erroneous 38
- C. Neither the Andersons' Honest Belief That They Owned the 11th East Commercial Property, Nor Their Litigation of That Question Protects the Andersons From Unlawful Detainer Status. Amended Conclusions of Law 1 and 2 are Erroneous 40
- D. The Fair Rental Value of the 11th East Commercial Property was \$310.00 a Month 42
- E. Mid Valley is Entitled to Damages for Unlawful Detainer in the Amount of \$660.00 42

POINT II:	AMENDED CONCLUSION OF LAW 7	
	IS ERRONEOUS AND THE ANDER-	
	SONS SHOULD FORFEIT THEIR	
	\$300.00 BOND TO MID VALLEY	43
POINT III:	CONCLUSION: MID VALLEY IS	
	ENTITLED TO DAMAGES AND	
	BOND FORFEITURE IN ITS	
	FAVOR	44

CASES CITED

<u>Admiral Co. v. Thomas</u> , 164 F. Supp. 569 (D.D.C. 1958)	26, 29
<u>Anderson v. Cape Trust Co.</u> , Civil No. 223415, Third Dist. Ct., Salt Lake County, Utah (1974)	5
<u>Application of County Collector</u> , 266 N.E. 2d 383 (Ill. App. 1970)	23, 24
<u>Beach Realty Co. v. City</u> , 105 N.J.L. 317, 144 A. 720, (1929)	38
<u>Bottle Mining and Milling Co. v. Kern</u> , 9 Cal. App. 527, 99 P. 994 (1908)	25
<u>Brown v. Busch</u> , 152 Cal. App. 2d 200, 313 P.2d 19 (1957)	34
<u>Burningham v. Ott</u> , 525 P.2d 620 (Utah 1974) . . .	12
<u>Coggins v. Wright</u> , 22 Ariz. App. 217, 526 P.2d 741 (1974)	44
<u>Cohen v. Superior Court</u> , 56 Cal. Rptr. 813 (Cal. App. 1967)	39
<u>Crofoot v. Tarman</u> , 147 Cal. App.2d 443, 305 P.2d 56 (1957)	34

	<u>Page</u>
<u>Denson v. Davis</u> , 256 N.C. 658, 124 So. E. 2d 827 (1962)	16, 18
<u>Dettmer v. Mayo</u> , 61 So. 2d 192 (Fla. 1952)	24
<u>Di Nola v. Allison</u> , 143 Cal. 106, 76 P.976 (1904)	20
<u>Dodge v. Stone</u> , 76 R.I. 318, 69 A. 2d 632 (1949)	19
<u>Donovan v. Frick</u> , 458 S.W. 2d 282 (Mo. 1970)	20
<u>Dugan v. Manchester Federal Savings and Loan Assn.</u> , 92 N.H. 44, 23 A. 2d 873 (1942)	20
<u>First Federal Savings and Loan Assn. v. Sharp</u> , 347 S.W. 2d 337 (1961), rehearing <u>denied</u> , 359 S.W. 2d 902 (Tex. App. 1962)	21, 27, 29
<u>Foge v. Schmidt</u> , 101 Cal. App. 681 226 P.2d 73 (1951)	34
<u>Forrester v. Cook</u> , 77 Utah 137, 292 P.206 (1930)	40, 41, 42
<u>Harbel Oil Co. v. Steele</u> , 80 Ariz. 368, 298 P.2d 789, rehearing granted, 81 Ariz. 104, 301 P.2d 757 (1956)	25
<u>Hill v. Gibraltar Savings and Loan Assn.</u> , 62 Cal. Rptr 188, (Cal. App. 1967)	29
<u>Hoffman v. Stuckslager</u> , 48 Ill. 2d 262, 269 N.E. 2d 501 (1971)	24, 25, 29
<u>Howick v. Bank of Salt Lake</u> , 28 Utah 2d 64, 498 P.2d 352 (1972)	31
<u>Hyams v. Bamburger</u> , 10 Utah 3, 36 P.302 (1894)	14
<u>Kleckner v. Bank of America National Trust and Savings Assn.</u> , 97 Cal. App. 2d 30, 217 P.2d 28 (1950)	28, 29
<u>Leavitt v. S.D. Mercer Co.</u> , 64 Neb. 31, 89 N.W. 426 (1902)	22
<u>LeVine v. Whitehouse</u> , 37 Utah 228, 109 P. 2 (1910)	14

	<u>Page</u>
<u>Lewis v. Hojer</u> , 16 N.Y.S. 534, (Comm. Pleas 1891)	25
<u>Lilenquist v. Utah State Nat. Bank</u> , 99 Utah 163, 10 P.2d 185 (1940)	14
<u>Mack v. Golino</u> , 213 P.2d 760 (Cal. App. 1950)	13
<u>Meux v. Trexvant</u> , 132 Cal. 487, 64 P. 848 (1909)	34
<u>Minnesota Debenture Co. v. Scott</u> , 106 Minn. 32, 119 N.W. 426 (1908)	22, 23
<u>Moore v. Crawford</u> , 130 U.S. 122 (1888)	19
<u>Nevada Land and Mortgage Co. v. Hidden Wells Ranch Inc.</u> , 83 Nev. 501, 435 P.2d 198 (1968)	34
<u>Peterson v. Peterson</u> , 112 Utah 554, 190 P.2d 135 (1948)	19
<u>Preston v. Lamb</u> , 20 Utah 2d 260, 436 P.2d 1021 (1968)	31
<u>Py v. Pleitner</u> , 161 P.2d 393 (Cal. App. 1945)	13, 14, 26, 29
<u>Security-First Nat. Bank v. Cryer</u> , 37 Cal. App. 2d 657, 104 P.2d 66 (1940)	15, 16
<u>Sheldon v. Steele</u> , 114 Iowa 616, 87 N.W. 683 (1901)	25
<u>Skeen v. Pratt</u> , 87 Utah 121, 48 P.2d 457 (1935)	19, 20
<u>Smith v. Deeson</u> , 14 So. 40 (Miss. 1893)	26, 29
<u>Smith v. Pritchett</u> , 168 Md. 347, 178 A. 113 (1935)	38
<u>Tanner v. Lawler</u> , 6 Utah 2d 84, 305 P.2d 882, rehearing granted, 6 Utah 2d 268, 311 P.2d 791 (1957)	41
<u>Webster v. Knop</u> , 6 Utah 2d 273, 312 P.2d 557 (1957)	19
<u>Williams v. Continental Securities Corp.</u> , 22 Wash. 1, 153 P.2d 847 (1944)	22
<u>Zier v. Osten</u> , 135 Mont. 484, 342 P.2d 1076 (1959)	19

STATUTES, RULES AND REGULATIONS CITED

UTAH CODE ANN. §57-1-27 (1974)	21
UTAH CODE ANN. §57-1-28 (1974)	18, 20, 21, 26
UTAH CODE ANN. §78-36-3(1) (1953)	37, 38
UTAH CODE ANN. §104-54-8 (1943) (repealed)	14
UTAH R. CIV. P. 43(e)	44
UTAH R. CIV. P. 56(e)	31
UTAH R. CIV. P. 65A	3, 8, 43

AUTHORITIES CITED

55 <u>AM. JUR. 2d</u> Mortgages §829 (1971)	34
74 <u>AM. JUR. 2d</u> Tender 1974	14
76 <u>AM. JUR. 2d</u> Trusts §269 (1975)	19
Annot., 55 <u>A.L.R.</u> 454 (1928)	44
Annot., 64 <u>A.L.R.</u> 304 (1929)	38
Annot., 98 <u>A.L.R.</u> 212 (1935)	38
30 <u>C.J.S.</u> Equity §90 (1965)	13
30 <u>C.J.S.</u> Equity §92 (1965)	13
59 <u>C.J.S.</u> Mortgages §576b (1949)	26, 27, 28, 29
59 <u>C.J.S.</u> Mortgages §579 (1949)	26
59 <u>C.J.S.</u> Mortgages §601 (1949)	16
59 <u>C.J.S.</u> Mortgages §601a (1949)	20
59 <u>C.J.S.</u> Mortgages §601b (1949)	34
86 <u>C.J.S.</u> Tender (1954)	14
6 MOORE'S FEDERAL PRACTICE ¶56.22[1] (1974)	31

ABBREVIATIONS HEREIN

The Plaintiffs-Appellants are sometimes hereinafter referred to as the "Andersons" or as "Mr." or "Mrs. Anderson". The Defendant-Respondent Mid Valley Investment is sometimes hereinafter referred to as "Mid Valley." The Defendant-Respondent Capitol Thrift and Loan Company is sometimes hereinafter referred to as "Capitol Thrift." The premises at 246 South 11th East, Salt Lake City, Utah, in which Mrs. Anderson had her office, and which also contains several apartments is sometimes hereinafter referred to as the "11th East commercial property." The premises at 474 East 12th Avenue, Salt Lake City, Utah, in which the Andersons live is sometimes referred to as the "12th Avenue home". The 11th East commercial property and 12th Avenue home are hereinafter sometimes collectively referred to as the "Andersons properties" or the "properties". Pages of the record on appeal are hereinafter referred to as "R [page]." Pages of the Plaintiff-Appellant's Brief on appeal are hereinafter referred to as "P.-App. Brief [page]." The Utah Rules of Civil Procedure are hereinafter referred to as "UTAH R. CIV. P."

STATEMENT OF THE NATURE OF THE CASE

The nature of this case is two fold: first, Plaintiffs-Appellants' action, as trustor, to invalidate the trustee's sale of Plaintiffs-Appellants' real properties; and, second, the counterclaim of the Defendant-Respondent Mid Valley, as purchaser of these real properties at the trustee's sale, claiming their unlawful detainer by Plaintiffs-Appellants and, in addition, requesting bond forfeiture pursuant to UTAH R. CIV. P. 65A(c) for wrongful judicial restraint of Mid Valley's possession of one of these properties.

DISPOSITION IN THE LOWER COURT

Summary Judgment on Plaintiffs-Appellants' Complaint was entered against Plaintiffs-Appellants and in favor of Defendants-Respondents by the Hon. Stewart M. Hanson, Jr., Judge, Third District Court.

Thereafter, the counterclaims of the Defendant-Respondent Mid Valley were tried to the Hon. Stewart M. Hanson, Sr., Judge, Third District Court. Judge Hanson, Sr., dismissed Mid Valley's counterclaims but ordered Plaintiffs-Appellants to vacate that premises (the 110 East commercial property) which they had retained in their possession, within 30 days of April 13, 1975, because the summary judgment against them ousted them of any possessory rights, and ordered them to pay

Mid Valley \$300.00 as they apparently had agreed to do in a written agreement between the parties (Ex. I-d).

RELIEF SOUGHT ON APPEAL

Defendant-Respondent Mid Valley seeks the affirmance of Judge Hanson, Jr.'s, entry of summary judgment and with it the affirmance of Judge Hanson, Sr.'s, corollary order that Plaintiffs-Appellants vacate the 11th East commercial property within 30 days of April 13, 1975.

Defendant-Respondent Mid Valley further seeks partial reversal of Judge Hanson, Sr.'s, judgment dismissing two of Mid Valley's counterclaims: first, Mid Valley's counterclaim of unlawful detainer of the 11th East commercial property; and, second, Mid Valley's counterclaim for bond forfeiture pursuant to UTAH R. CIV. P. 65A(c). Upon reversal of the judgment dismissing these counterclaims, Mid Valley seeks the entry of a corresponding judgment in its favor and against the Plaintiffs-Appellants to the following effect: that Plaintiffs-Appellants were in unlawful detainer of the 11th East commercial property for a period of 20 days and that Mid Valley recover \$660.00 from Plaintiffs-Appellants constituting damages, trebled, resulting from this unlawful detainer; and that Plaintiffs-Appellants' Rule 65A(c) bond in the amount

of \$300.00 be forfeited to Mid Valley. In the alternative, the Defendant-Respondent Mid Valley seeks partial vacation of Judge Hanson, Sr.'s, judgment in the respects described above, and remand to the lower court for a determination of the damage suffered by Mid Valley.

SUPPLEMENTAL STATEMENT OF FACTS

A. The following material facts are in addition
to those of Plaintiff-Appellant's fact statement:

During a long period preceding at the time of, and immediately following the disputed trustee's sale, the Anderson's were represented by legal counsel who advised them on matters regarding the sale. See, reference to stipulation of counsel on postponement of sale, at R 40; Affidavit of James B. Mason, at R 48, to the effect that he spoke with Anderson's counsel before accepting Mid Valley's payment for the properties; Affidavits of Roy and Mary Lou Broadbent, at R 60-61, David Doxey, at R 65, Austin Belnap, at R 67, Helen and Ross Broadbent, at R 70, all to the effect that Anderson's counsel conferred and advised on various aspects of the sale.

The Andersons were acquainted with the mechanics, operation and effect of default notices and a trustee's sale, having brought and subse-

quently having dismissed with prejudice an action challenging the default notices and proposed trustee's sale which preceded the presently disputed notice and sale. Anderson v. Cape Trust Co., Civil No. 223415, Third District Court, Salt Lake County (order and dismissal of this case are found at R 40-42).

The notice of the now-disputed January 16, 1975, sale gave the correct time and place of the sale. R 52. The Andersons failed to attend because Mr. Anderson was told the wrong place by Mrs. Anderson. Affidavit of Mr. Anderson, at R 78.

The purchaser at the sale, Mid Valley Investment, was a bona fide purchaser for value without notice, having learned of the sale through official means, having paid value and having no notice of infirmity of the sale. Affidavit of Ross and Helen Broadbent, at R 69.

On the morning following the sale, the trustee was advised by the Andersons' counsel that a trustee's deed should be issued to Mid Valley since the Andersons still did not have the money to tender. Affidavit of James B. Mason, at R 48. Mid Valley paid for the properties by cashier's check and recorded their trustee's deed within 24 hours of the sale. Affidavit of Ross and Helen Broadbent at R 70.

On the afternoon of January 17, 1975, the day following the sale, Mid Valley's representatives met with the Andersons and the Andersons' counsel in

the counsel's office. There the Andersons, either personally or through their counsel, offered to repurchase the property from Mid Valley. Affidavit of Roy and Mary Lou Broadbent, at R 60; Affidavit of Ross and Helen Broadbent, at R 70; cf., Testimony of Mr. Anderson, at R 194 (which testimony, however, was not before the court when summary judgment was granted and cannot here be considered in reviewing the summary judgment determination). After Mid Valley rejected this offer, the parties validly entered into a rental, lease or occupancy agreement covering the Anderson properties. Defendant's Exhibit I-d and R 24; Amended Findings of Fact No. 2, at R 143; see, Affidavit of Roy and Mary Lou Broadbent, at R 60; Affidavit of Ross and Helen Broadbent, at R 71; Affidavit of Mr. Anderson, at R 77-78. This agreement, drawn in the hand of the Andersons' counsel, required the Andersons to vacate the 11th East commercial property by January 31, 1975, and to pay \$150 a month rent for the 12th Avenue home until April 17, 1975, at which time they were also to vacate this property. Defendant's Exhibit I-d and R 24.

In respect of the 12th Avenue home, the Andersons paid to Mid Valley \$150.00 covering the rent from January 18 to February 18, 1975.

Affidavit of Ross and Helen Broadbent, at R 71.

Thereafter they failed to pay anything further and they remain in possession of the home by virtue of a bond staying Judge Hanson, Sr.'s order that they vacate the premises within 30 days of April 13, 1975.

In respect of the 11th East commercial property, the Andersons failed to vacate the premises on January 31, 1975, as specified by their written agreement. Instead, they negotiated with Mid Valley for additional time (Testimony of Ross Broadbent, at R 178-80) and then, on February 10, 1975, obtained a temporary restraining order preventing, among other things, the removal of their possessions from these commercial premises pending a hearing. R 10-11.

At this time, the Andersons posted a \$300 bond pursuant to UTAH R. CIV. P. 65A(c). Amended Findings of Fact No. 9, at R 144. This order was superseded by the court's further order, in the nature of a preliminary injunction, issued February 18, 1975. R 13-14. This superseding order continued the Anderson's in possession of their former office in the 11th East commercial property during the pendency of the litigation, "upon the posting and filing by the Plaintiffs [-Appellants] of a \$7,500 corporate or cash bond." Id. The Andersons never posted this bond. Instead, their per-

sonal property remained on the premises until the first week in March, 1975, at which time they vacated the premises. Amended Findings of Fact No. 9, at R 144. While the Andersons remained in possession of their office in the 11th East commercial property between February 1 and the first week in March, 1975, their only access to the office was through Mid Valley which had changed the locks and by arrangement with Anderson's counsel, would allow access to the office only to remove the Anderson's personal property or to conduct business in presence of a representative from Mid Valley. Id. About one week after the Andersons vacated the office premises, Mid Valley rented them for \$310.00 a month. Testimony of Ross Broadbent, at R 181. At the time Mid Valley moved for summary judgment, it also moved for bond forfeiture pursuant to UTAH R. CIV. P. 65A(c), and filed an affidavit showing its attorney's fees incurred in defending against the temporary restraining order. R 44.

B. The Plaintiff-Appellants Statements of Fact are Inconsistent with the Facts or Inaccurate in the Following Respects:

Plaintiffs-Appellants state that the total

appraised value of their properties was approximately \$179,000.00 P-App. Brief, at 4. This figure arises from Mr. Anderson's Affidavit, R 80, which states that it is derived from two attached appraisals. Id. However, the attached appraisals or, more accurately, value findings, are \$98,950.00 for the 11th East commercial property and \$65,950.00 for the 12th Avenue home ("plus \$5,000" for refrigerated airconditioning if installed, but which, concededly was never installed). (Value Findings are found in the record between pages 99 and 100.) This totals only \$164,900.00. Furthermore, these "appraisals" are based on unsworn documents and appear contradicted by Plaintiff-Appellants own brief. Compare, P.-App. Brief, at 4 with P.App. Brief, at 24 (e.g., at 24, "no appraisal was had on the home...."). It may also be noted that the "appraisal" of the 11th East commercial property states that the "value is mostly in the land" and gives the size as 100 x 135 when, as may be seen from Plaintiffs-Appellants' own complaint, at R 2, the actual size of the property is 76.5 x 130. Plaintiffs-Appellants correctly state Mid Valley's purchase price as \$36,750, but omit to state that Mid Valley took title subject to substantial first mortgages and judgments the total amount of which does not appear from the record. Trustee's deed, at R 51; (Affidavit of Ross and Helen Broadbent, at R 69 (as to judgments); Affidavit of Roy and Mary Lou Broadbent, at R 61 (as to first mortgages).

Plaintiffs-Appellants state that, after the sale, Mr. Anderson met an officer of Mid Valley, Merlin Hanks, who made certain representations. P-App. Brief, at 6. Mr. Hanks is, in fact, an officer of Capitol Thrift. Affidavit of Mr. Anderson, at R 78.

Plaintiffs-Appellants state that Capitol Thrift refused to accept "bids" from Belnap, Doxey, Hill and Nelson. P-App. Brief, e.g. at 7. In fact, none of these individuals attended the sale or sent a bid to the sale. E.g., P.-App. Brief, at 5. Belnap and Doxey never implied that they would put up money for the purchase but only that they "might be interested." Affidavit of David W. Doxey, at R 65. They later concluded that in view of the "perhaps exaggerated values imputed to the properties," their "margin seemed too thin" and they should make no attempt to purchase the property. Id. Hill never contacted the trustee and only contacted the beneficiary the day after the sale. Affidavit of Larry Hill, at R 88. Nelson's cryptic and unsworn statement (to which the lower court was not required to give weight) implies only that the beneficiary Capitol Thrift still was willing to allow the Andersons to redeem their default if they could do so with Nelson's help before the time of the sale. No bid to buy the property is stated.

Unsworn statement of Barbara M. Nelson, at R 87.

The foregoing discrepancies between the factual characterization found in Plaintiffs-Appellants' Brief and the factual characterization found here are decisively resolved by resort to the record and, in any event, create no genuine issue as to any material fact as may be seen from the following Argument.

THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT

ARGUMENT

POINT I

SUMMARY JUDGMENT IS APPROPRIATE TO THE PRESENT FACTS AND LAW

The validity of the present trustee's sale, reflecting the daily occurrence of similar sales under analogous circumstances, is a proper subject for summary judgment. Such a judgment promotes judicial economy while preserving the integrity of the courts and of the statutorily delimited trustees' sales. Where the law and the material facts are clear, a failure to grant summary judgment would be a harsh thing. See, e.g., Burningham v. Ott, 525 P.2d 620 (Utah 1974) (majority and concurring opinions).

For reasons of fact and law which follow, those facts which are disputed by Plaintiffs-Appellants are immaterial and summary judgment should be sustained.

POINT II

PLAINTIFFS- APPELLANTS, NOT HAVING DONE EQUITY,
WERE NOT ENTITLED TO EQUITABLE RELIEF

The Andersons sought in the trial court the equitable relief of invalidating the trustee's sale. They were not entitled to this relief as a matter of

law because they failed to do equity. E.g., 30 C.J.S. Equity §90 (1965).

In the present circumstance, this rule requires the Andersons to do equity by tendering the full payment for the property to the trustee before they could properly seek invalidation of the sale. This rule makes sense since (1) invalidation without tender would leave the trustee and beneficiary with no satisfaction of the debt owed and, (2) unless the trustor could tender, he could not successfully bid at the sale in any event, and, therefore, would most probably not be injured by the sale.

This rule is well established in those jurisdictions which have considered the question. E.g., 30 C.J.S. Equity §92 nn. 74.35 and 74.40 (1965), and cases cited. California is such a jurisdiction. Thus, where a trustor challenged a sale pursuant to a trust deed as having been irregular, the California court held, in the alternative, that since the trustor did not tender the full amount due,

even if the sale should be regarded as voidable, nevertheless, Plaintiff is in no event entitled to have the same set aside through her own complete failure to offer to do equity. In the case of *Leonard v. Bank*, 16 Cal. App. 2d at page 346, 60 P.2d at page 328:

'[I]f the said sale be for any reason treated as voidable, nevertheless Plaintiff is in no event entitled to have the same set aside through her own complete failure to do equity.'

Mack v. Golino

213 P.2d 760, 762 (Cal. App. 1950)

And in Py v. Pleitner, 161 P.2d 393, 396 (Cal. App. 1945),

the court said: "The rule in this state is settled that a tender of the indebtedness is a prerequisite to a judgment canceling a sale under a trust deed."

The general question as to what constitutes a tender is well discussed by courts and commentators and allows of a many-faceted answer. E.g., 74 AM. JUR. 2d Tender (1974), and cases cited; 86 C.J.S. Tender (1954). However, one conclusion is clear from the treatises cited: the tender must, at the very minimum, be backed up by a good faith ability to pay actual value. Thus, in Hyams v. Bamburger, 10 Utah 3, 36 P. 302 (1894), this court noted that ordinarily a tender requires the actual production of the money to the creditors. Even where a statute requires less than that (as the since repealed Utah Statute once did, UTAH CODE ANN § 104-54-8 [1943]) the party tendering was required to "have the ability to produce [the money]," and to "act in good faith." Id., 36 P. at 203 (dictum). Cf., Lilienquist v. Utah State Nat. Bank, 99 Utah 163, 100 P.2d 185 (1940); LeVine v. Whitehouse, 37 Utah 228, 109 P. 2 (1910).

In the present case, the actions of Belnap, Doxey and Hill do not amount to a tender for the Andersons since, at most, these men were interested only in discussing or considering the purchase of the property for themselves (which interest never crystallized). Affidavit of David W. Doxey, at R 65; Affidavit of Austin Belnap, at R 67; Affidavit of Larry Hill, at R 88-89.

The affidavits of the Andersons state that they are "willing" to pay Defendants-Respondents the money they "owe" and that this statement "constitutes an official tender of money owed." Affidavit of Mr. Anderson, at R 81; Affidavit of Mrs. Anderson, at R 86. This statement is ambiguous as to whether the Andersons intended thereby to bring their payments current (which, coming as it did after the three month redemption period, was patently insufficient) or to pay the sale price of the properties. Furthermore, this statement is backed by no showing of a good faith ability to pay. It is instead backed by a record of many months of default and inability on the part of the Andersons to pay their notes to Capitol Thrift. Under such circumstances, the Andersons have made no tender. As the California appellate court stated in Security-First Nat. Bank v. Cryer, 37 Cal. App. 2d 657, 104 P.2d 66,69 (1940):

Surely it cannot be said that upon a trustee's sale under a deed of trust the auctioneer is required to accept any bid that is made, irrespective of whether the amount of the bid is produced and where no information is forthcoming as to the financial ability of the bidder. If this were true, any debtor could attend a foreclosure sale of his property and make any bid he cared to, without any intention of actually paying the amount of his bid. The sale then of course, would have to be held all over again, new notices gotten out, etc. If such a procedure were permitted and carried to its possible ultimate conclusion, any foreclosure sale could be prevented indefinitely. Further, it must be remembered in the instant case that it was necessary to foreclose the two deeds of the trust because the trustor, Mr. Cryer, had defaulted in his payments upon the notes they secured. Was not the trustee's agent at the sale warranted therefore, in assuming that if Mr. Cryer were financially responsible he would not in the first place have allowed the trust deeds to reach a sale on foreclosure: We

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think so. And indeed, as heretofore pointed out, at no time during the proceedings now under review was any attempt made to assert the financial ability of appellant Cryer to pay in cash the amount of the bids he proffered.

Without a more substantial "tender" by the Andersons, equitable relief if granted by the lower court would reinstate the Andersons' still-uncured defaults, an inequitable and unsatisfactory result contravening the weight of authority.

Under these circumstances, the lower court was justified in determining as a matter of law that Plaintiffs-Appellants, not having done equity, were not entitled to equity and summary judgment should have been entered, as it was.

POINT III

PLAINTIFFS-APPELLANTS RATIFIED THE DISPUTED SALE
AND THEREBY WAIVED THEIR RIGHT TO CHALLENGE IT

Trustors ratify a trustee's sale and waive any right to challenge it if they, with knowledge of the material circumstances, subsequently offer to repurchase the property or begin renting the property or take other action inconsistent with a claim of title. While there appears to be no Utah case law on this point as it touches trustee's sales, the principle is well established generally. See, e.g., 59 C.J.S. Mortgages §601 at 1051 (1949); see, especially, Denson v. Davis, 256 N.C. 658, 124 So. E. 2d 827, 831 (1962) (collecting cases) (a trustor who rents or seeks to purchase from purchaser ratifies voidable sale).

In the present circumstance, the Andersons stipulated that the disputed sale could be conducted (R 40-42) and then, by their counsel, instructed the trustee to consummate the sale and issue a trustee's deed to Mid Valley. Affidavit of James B. Mason, at R 48.

Thereafter, the Andersons offered to repurchase the properties in the presence of and with the advice of counsel. Affidavit of Roy and Mary Lou Broadbent, at R 60. Affidavit of Ross and Helen Broadbent, at R 70. (Note: This repurchase offer is amplified by the testimony of Mr. Anderson at the trial of the counterclaims in this case. However, that testimony was not before the lower court at the summary judgment hearing and is therefore not germane to this discussion.)

When their repurchase offer was refused, the Andersons entered into a formal rental agreement, drawn by their own attorney and executed by all concerned, and covering the Anderson properties. Defendant's Exhibit I-d and R 24; Amended Finding of Fact No. 4, at R 143; see, Affidavit of Ross and Helen Broadbent, at R 71; Affidavit of Roy and Mary Lou Broadbent, at R 60; Affidavit of Mr. Anderson, at R 77-78. As a final, conclusive gesture of ratification and waiver, the Andersons paid to Mid Valley the first month's rent due under the rental agreement. Affidavit of Ross and Helen Broadbent, at R 71.

The Andersons' clear cut ratification of the now-disputed sale constitutes a waiver of any right to challenge it and, as a matter of law, again validates the lower court's entry of summary judgment against them. E.g., Denson v. Davis, supra.

POINT IV

DEFENDANT-RESPONDENT MID VALLEY WAS A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE WHOSE TITLE TO THE PROPERTIES CANNOT NOW BE INVALIDATED

Mid Valley was a bona fide purchaser of the Anderson properties for value without notice. This fact was argued to the lower court, R 36, was unchallenged by the Andersons in the lower court and is not now at issue. The record shows without contradiction that Mid Valley purchased for value without actual or constructive notice of any defect in the sale. E.g., Affidavit of Ross and Helen Broadbent, at R 69. As such a purchaser, Mid Valley's title to the properties is not now subject to successful attack by the Andersons.

Under UTAH CODE ANN. §57-1-28(1), the recitals of statutory compliance in the trustee's deed, R 51, are conclusive evidence thereof in favor of Mid Valley as a bona fide purchaser for value without notice. As a result, the Andersons' attack on the sale, as against Mid Valley, simply fails as a matter of law.

Furthermore, the case law--in addition to the conclusive Utah statute--strongly suggests that any peccadillo (or larger transgression) committed by the trustee in the course of the sale must be answered in damages by the trustee and should not affect Mid Valley's title. In Peterson v. Peterson, 112 Utah 554, 190 P.2d 135, 138-39 (1948) the Court announced the rule that the beneficiary to a trust cannot reclaim trust property (in that case real property) in the hands of a bona fide purchaser for value without notice. See, also, 76 AM. JUR. 2d Trusts §269 (1975). In Webster v. Knop, 6 Utah 2d 273, 312 P.2d 557 (1957), the Court reiterated this rule in the context of disputed mining claims. See also, e.g., Moore v. Crawford, 130 U.S. 122 (1888); Zier v. Osten, 135 Mont. 484, 342 P.2d 1076 (1959); Dodge v. Stone, 76 R.I. 318, 69 A.2d 632 (1949).

By strict analogy this rule limits the trustor's as well as the beneficiary's recourse to the property since the trustor's legal right to the trust property after his uncured default certainly does not exceed the interest of the beneficiary. Thus, when this Court considered a motion to set aside a mortgage sale, it noted with care that the motion preceded the expiration of the redemption period and was part of the original foreclosure suit, thereby establishing by implication that the vested title of a bona fide purchaser for value without notice was not affected by the motion. Skeen v. Pratt, 87 Utah 121,

48 P. 2d 457, 458 (1935).

The effect of the rule, as adopted by other states, is that the title of a purchaser such as Mid Valley cannot now be voided by the Andersons. E.g., Donovan v. Frick, 458 S.W. 2d 282 (Mo. 1970); Dugan v. Manchester Federal Savings & Loan Assn., 92 N.H. 44, 23 A. 2d 873 (1942); Di Nola v. Allison, 143 Cal. 106, 76 P. 976 (1904); 59 C.J.S. Mortgages §601a and n. 70 at 1051 (1949). Indeed, this Defendant-Respondent has found no case whose facts reveal the invallidation of the vested title of a bona fide purchaser for value without notice at a trustee's sale. Instead, trustor's in the circumstance of the Andersons should look if at all, to the trustee for relief in damages.

As a result, summary judgment in favor of Mid Valley was correctly entered by the lower court.

POINT V

THE DISPUTED TRUSTEE'S SALE WAS IN ALL
MATERIAL RESPECTS PROPERLY CONDUCTED

A - Defendant-Respondent Mid Valley's Payment Within 24 Hours of the Sale was "forthwith" under UTAH CODE ANN. §57-1-28 and, in any Event, is not Subject to Challenge by Plaintiffs-Appellants Who Were Not Injured by Any Delay.

As the record shows without dispute, Mid Valley, the only outside bidder, appeared at the January 16, 1975, trustee's sale and placed the highest

bid, whereupon the properties were declared "sold" to Mid Valley. E.g., Affidavit of James B. Mason, at R 46-48. Mid Valley and the trustee, having spoken earlier on the subject, then agreed that full payment could be made within 24 hours, which it was. E.g., id.; Affidavit of Ross and Helen Broadbent, at R 69-70. This typical procedure in no way invalidates the sale since the term "forthwith" in the context of UTAH CODE ANN. §57-1-28 comprehends a reasonable, 24-hour opportunity to pay if the trustee so allows.

A bidder cannot reasonably be expected to carry cash or cashier's check in the exact amount needed since the sum of the highest bid cannot be known in advance. Indeed, this fact is understood and anticipated by UTAH CODE ANN. §57-1-27 which allows the trustee to resell the property following a sale in which the high bidder could not or did not produce money in the amount of his bid, taxing the added expense to that bidder. If the law anticipated instantaneous payment before the conclusion of the auction sale, there would be little need for the resale provision. And UTAH CODE ANN. §57-1-28 requires the trustee to execute and deliver his deed "upon the receipt of payment," suggesting some opportunity for filling out the deed in an orderly fashion after the sale and before money and deed change hands. See, First Federal Savings & Loan Assn. v. Sharp, 347 S.W.2d 337 (1961), rehearing denied, 359 S.W.2d 902 (Tex. App. 1962) (a cash sale is a sale concurrent with delivery of the deed which delivery may follow the auction by hours or

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days).

The courts of other jurisdictions in interpreting sales statutes requiring payment "forthwith" have recognized the practical wisdom in interpreting such provisions to allow a reasonable time to produce the money. In Williams v. Continental Securities Corporation, 22 Wash. 1, 153 P.2d 847 (1944) the court in interpreting the forthwith payment required by statute at a sheriff's sale said:

In the instant case, it could not have been expected that the parties interested in purchasing the property would have \$33,000 or more in their pockets at the place of sale; and, since there was to be competitive bidding, no one could tell just how much would be required of the successful bidder. It was therefore proper for the deputy sheriff to allow the appellant, as the highest bidder, a reasonable time to produce the amount of his bid. What was a reasonable time would necessarily depend upon the circumstances.

Id., 153 P.2d at 854.

In accord are Minnesota Debenture Co. v. Scott, 106 Minn. 32, 119 N.W. 391 (1908); Leavitt v. S.D. Mercer Co., 64 Neb. 31, 89 N.W. 426 (1902).

In determining the limits of a "reasonable time" for payment, the courts have affirmed the judgment of the trustee or sheriff unless obviously unreasonable. Thus, in Williams v. Continental Securities, supra, where the sheriff decided to wait less than one hour for payment, the court sustained the sheriff, noting that he is vested with powers to evaluate bids and to allow a reasonable time to make the bid good. 153 P.2d at 855. The court added, however, that a period of more than one hour, ex-

tending into the next day, might also be reasonable under proper circumstances. 153 P.2d at 854; see, Minnesota Debenture v. Scott, supra (payment the day following sale allowed). It is additionally noted that a trustee's judgment as to the payment time affects only the creditor-beneficiary and may well be flexible within the requirements of the creditor-beneficiary, while the sheriff's judgment may be fettered by the state's interest in receiving its tax lien revenue, or etc.

In the present circumstance, the trustee, after conferring with the bidder (R 59,69), determined that a reasonable time acceptable to the creditor-beneficiary in which to allow an out-of-town bidder to make its payment would at least encompass 24 hours (the actual payment time). In the instant case, this is not as a matter of law an unreasonably long period of time to allow payment and is consistent with the statutory requirement of "forthwith" payment.

A review of Plaintiffs-Appellants' citations on the question of "forthwith" payment leaves the foregoing conclusion un rebutted.

In P-App. Brief, at 13, the Andersons quote (actually paraphrase) Application of County Collector, 266 N.E.2d 383, 387 (Ill. App. 1970) to the effect that the term "forthwith" as used in the Illinois Revenue Act to describe payment at a tax sale "means that purchaser at a tax sale must make payment on date of sale." However, as noted above, the interest by the state in immediate payment at tax sales is not present in the in-

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stant case. More importantly, perhaps, the court in County Collector reached its result "in accord with the reasoning and result of Hoffmann v. Stuckslager." 266 N.E.2d at 387. The Hoffman case, which like County Collector was the product of an Illinois intermediate appeals court, was reversed by the Illinois Supreme Court and with it the "reasoning and result" of the County Collector case was overturned. Hoffman v. Stuckslager, 48 Ill.2d 262, 269 N.E.2d 501 (1971). The Illinois Supreme Court first cited Illinois precedents to the effect that "forthwith" implies a reasonable time for payment, then rejected these precedents since the Illinois Revenue Act has now been amended to require the tax sales price to be "paid in cash at the time of sale." 269 N.E.2d at 504. The court next reversed Stucklager stating:

So far as an owner of delinquent property is concerned, it is sufficient to conclude... that the provisions for payment are directory and do not afford a basis for an attack upon the validity of the sale.

269 N.E.2d at 504.

Thus, in Illinois, "forthwith" when coupled with the phrase "paid in cash at the time of sale" means immediate payment but is directory so far as a property owner is concerned and affords no basis for an attack upon the validity of the sale.

Each of the Andersons' other citations to the effect that "forthwith" means "immediate" deal with circumstances distantly related to the present.

Dettmer v. Mayo, 61 So.2d 192 (Fla. 1952) P-App. Brief, at

13, (prisoner delivered by sheriff from jail to prison after a three-month delay is not "forthwith"); Bottle Mining and Milling Co. v. Kern, 9 Cal. App. 527, 99 P. 994 (1908), P-App. Brief, at 14, (notice of assessment of corporate shares sufficient if given upon the making of corporate resolution); Lewis v. Hojer, 16 N.Y.S. 534 (Comm. Pleas 1891), P-App. Brief, at 14, (19 days is reasonable time to ship cigars from Florida to New York); Sheldon v. Steele, 114 Iowa 616, 87 N.W. 683 (1901), P-App. Brief, at 14, (suit by County Treasurer against alleged property purchaser; payment delay from December 6, to last of December not "forthwith"). The decision in Harbel Oil Co. v. Steele, 80 Ariz. 368, 298 P.2d 789 (1956), ("forthwith" docket entries should be immediate) relied on by the Andersons, P-App. Brief, at 14, was altered dramatically on rehearing, 81 Ariz. 104, 301 P.2d 757 (1956) (docket entry made one or two days after court's order constitutes a valid starting date from which the time of appeal runs).

The foregoing citations by the Andersons lend no weight to their argument. Payment by Mid Valley was "forthwith" within the intent and meaning of the Statute.

Finally, even if Mid Valley's payment had not been "forthwith," this would not constitute an irregularity about which the Andersons could complain. Hoffman v. Stuckslager, Supra, 269 N.E.2d at 504. The statutory provision is for the benefit of the creditor-beneficiary according to authority from other jurisdictions and a payment delay following a sale does not affect the right of

an owner in default. See, id.; cf., Py v. Pleitner, 161 P.2d 393 (Cal. App. 1945) (trustee may even accept a note from highest bidder in lieu of cash); Admiral Co. v. Thomas, 164 F. Supp. 569 (D.D.C. 1958); Smith v. Deeson, 14 So. 40 (Miss. 1893) 59 C.J.S. Mortgages §576b(2) at 971 (provisions for cash sale benefit the creditor [or beneficiary] enabling him to have his money speedily and an agreement to postpone payment gives the mortgagor [or trustor] no right to complain); §579 at 982 (1949) (statutory requirement of cash deposit by highest bidder at the time of sale may also be waived by trustee or officer).

B - The Disputed Sale Occurred on the Date Noticed. It was not Unlawfully Postponed.

The Andersons argue that there exists a dispute as to whether the sale was postponed from noon January 16, to the forenoon of January 17, 1975, when Mid Valley paid for the properties.

There exists no contradiction in the record as to when the sale was noticed and held. The single, and not unusual fact that Mid Valley paid almost 24 hours later creates no genuine issue as to the date of the sale in light of the legitimacy of that payment as argued in the foregoing section.

Furthermore, the trustee's deed to Mid Valley (R 50-51) affirmatively recites that the sale was proper in respect of notice and other areas of compliance with the applicable statute. Under UTAH CODE ANN. §57-1-28(1), these recitals are conclusive in favor of Mid Valley

which, as evidenced by the Broadbent affidavits (R 58,69) and as conclusively established by the absence of any argument to the contrary in the lower court, is a bona fide purchaser for value without notice. Therefore, there exists no material or genuine issue as to whether the sale was properly held without postponement.

C.- Notice Requiring Cash Payment at the Time of Sale Neither Invalidates the Sale nor Renders it Unfair.

Plaintiffs-Appellants assert the invalidity or unfairness of the disputed sale because the sale notice said the sale would be for cash when, in fact, Mid Valley was allowed to make payment the morning following the sale. P-App. Brief at 16-23. The unfairness arises, according to the Andersons, because: the trustee's cash-only notice discouraged potential bidders who could not pay cash but who could have entered valid bids payable within 24 hours. This argument does not withstand scrutiny.

A cash sale is one in which cash is paid by the time the deed is delivered which may occur well after the sale. A delay of a few days even will not be regarded as extending credit. First Federal Savings & Loan Assn. v. Sharp, supra, 347 S.W.2d at 340, 341; 59 C.J.S. Mortgages §576b (3) at 972 (1949). Furthermore, a trustor or mortgagor cannot complain if a beneficiary or creditor who is entitled to cash allows instead extra time for payment since the cash sale provision of most trust and mortgage documents is only for the benefit of the beneficiary or creditor and does not concern the trustor or

mortgagor. 59 C.J.S. Mortgages §576b(2) at 971 (1949).

Plaintiffs-Appellants refer the Court to one case to support the proposition that the trustee is required to accept immediate cash payment at the sale, Kleckner v. Bank of America National Trust & Savings Association, 97 Cal. App.2d 30, 217 P.2d 28 (Cal. App. 1950); P-App. Brief, at 19-21. But in Kleckner, the court upheld the judgment of a trustee who insisted on cash bids only and refused to wait 20 minutes for a bidder to get cash from his bank. The court did not deal with the present situation where the trustee's notice said cash would be required, and where the trustee allowed the high bidder to pay within 24 hours. Thus, the Kleckner court's holding is that the trustee

is not required to hold up the sale while sundry bidders leave the place to go to banks or elsewhere to get cash. Such conduct of a sale could result in confusion, in the dispersal of bidders present, and in loss to persons represented by the trustee.

217 P.2d at 31.
(Emphasis added.)

This holding, also cited by the Andersons in part, is further refutation of the Andersons' argument of unfairness from the cash sale notice. Under Kleckner, the trustee is fully warranted in actually requiring immediate cash, if he desires. He need not accept anything but immediate cash. Therefore, any non-cash bidders discouraged from the sale of the Andersons properties by his cash sale notice were bidders whom he was under no obligation to recognize in any event, the trustee's conduct

in the instant case may actually have benefitted the Andersons as the following reasoning demonstrates.

At the time of the sale, the trustee agreed to accept later payment from the high bidder, as well he lawfully might. See, POINT V A supra; Hoffmann v. Stuckslager, supra; Py v. Pleitner, supra; First Federal Savings & Loan Assn. v. Sharp, supra; Admiral Co. v. Thomas, supra; Smith v. Deeson, supra; cf., Hill v. Gibraltar Savings & Loan Association, 62 Cal. Rptr. 188, (Cal. App. 1967); 59 C.J.S. Mortgages §576b (2), (3) (1949). Under the instant facts, this resulted in no dispersal of impatient cash bidders (as feared by the Kleckner court) because the only other bidder present was Capitol Thrift. And the high bidder, Mid Valley, actually made good on its bid by paying within the time allowed by the trustee. The effect is a net benefit to the Andersons because the trustee, by allowing payment in 24 hours was able to accept and be paid the highest bid.

As a matter of law, there is no unfairness to the Andersons. Indeed, a ruling by this court to the effect that trustees must require immediate cash payment if they post notice of a cash sale, would most probably be to the detriment of trustors such as the Andersons. In such an event, the trustee would probably continue to post a cash sale notice in order to conform to the provisions of the customary trust agreement forms and in order to avoid unwanted payment delays, and would then, by the Andersons' tortured reasoning, be obligated to insist on cash bids for immediate (not "forthwith")

payment to the exclusion of all other, higher bids.

D - The Disputed Sale was Fair in All Other Respects. The sale of the Anderson properties was not done in a corner. The Andersons received the close advice of counsel at all stages as documented by the Supplemental Statement of Facts. Capitol Thrift and the trustee worked for months with the Andersons in an effort to help them cure their defaults--event to the extent of stipulating to the cancellation of a scheduled sale on the condition that the Andersons bring their obligations current (which they, even then, failed to do). R 40-42. Thereafter, Capitol Thrift entertained numerous schemes and proposals of the Andersons to cure their default, as shown by the Andersons' affidavits, even though the statutory period for redemption had long since lapsed. Now, the Andersons attack the sale claiming that the very accommodations made by Capitol Thrift and the trustee are grounds for voiding the sale. Such a result as that requested by the Andersons would not only cool the cooperation of future trustees and beneficiaries, but would be, as a matter of law, incorrect.

First, the Andersons argue that a Barbara M. Nelson made an "offer to pay Plaintiffs' 'indebtedness'" on the morning of January 16, 1975. In the first place, this statement in the affidavit of Mrs. Anderson is totally devoid of any suggestion as to her competence to testify on this point. R 84. The only suggestion as to her source for this information is the unsworn

statement of Mrs. Nelson. R 87. UTAH R. CIV. P. 56(e) requires that affidavits opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Mrs. Anderson's affidavit meets none of these prerequisites and Mrs. Nelson's unsworn statement fails of even threshold admissibility. Where an insufficient affidavit is not the subject of a motion to strike, a party may not complain on appeal that it was improperly considered by the court. Howick v. Bank of Salt Lake, 28 Utah 2d 64, 498 P.2d 352 (1972). If the rule were otherwise, judicial economy would be undermined. However, the lower court may and should ignore insufficient affidavits regardless of any motion to strike and, when it does so, the appellate court should not disturb its proper decision. Preston v. Lamb, 20 Utah 2d 260, 436 P.2d 1021, 1022 (1968) ("...the trial judge would not be reversed in ignoring [an inadmissible part of an affidavit] even if it tended to support the allegations of Plaintiff's complaint...."); 6 MOORE'S FEDERAL PRACTICE ¶56.22[1] at 2803 and n. 17, at 2817-19 (1974 and 1974 Supp. at n.17). If the rule were otherwise, judicial economy would be undermined. Thus the lower court was justified in entering summary judgment without regard to these materials. Furthermore, this alleged offer is at most ambiguous as to whether a tardy "cure" of default or a property purchase was intended and came at a time (the morning of the sale) when

the Andersons no longer had a statutory right to redeem and any accommodating redemption attempt allowed by Capitol Thrift and the trustee would have to be immediate to avoid another postponement of the sale. Finally, this alleged offer was communicated to Capitol Thrift who at that late date had no legal or equitable obligation to accommodate the Andersons. The trustee, who is charged with conducting a fair sale, never received this alleged offer at all, so far as the record shows. No unfairness results from this alleged occurrence.

Second, the Andersons argue that Capitol Thrift agreed on January 9, 1975, to allow them to cure their default. Affidavit of Mrs. Anderson, at R 84-85. Once again, Capitol Thrift was under no legal or equitable obligation to allow cure, the trustee was not involved and no money changed hands. Furthermore, the Andersons can hardly be heard to say that they were not aware that the sale was being held, in any event, since they were advised by their own attorney on the point. Affidavit of Mr. Anderson, at R 78. Under these circumstances, no unfairness occurred.

Third, the Andersons propose that they were disadvantaged because Hill, Doxey and Belnap were not allowed to bid on the properties. However, Hill never contacted the trustee and only contacted Capitol Thrift the day after the sale. He made no appearance at the sale. Affidavit of Larry Hill at R 88-89. Doxey and Belnap were also not interfered with by the trustee or

Capitol Thrift with regard to any aspect of the sale. Doxey and Belnap simply decided on their own not to get involved. Affidavit of David W. Doxey, at R 65. Affidavit of H. Austin Belnap, at R 67.

In light of the foregoing, the claim that the sale price obtained for the property was depressed by the conduct of Capitol Thrift and the trustee fails as a matter of law. It is additionally noted that no genuine factual issue as to the adequacy of the sale price was raised by the Andersons before the lower court. There is no dispute as to the value of the properties, except as the Andersons dispute it among themselves based on unsworn "value findings" and hearsay. Compare P-App. Brief, at 24, with P.App. Brief, at 4. There is also no dispute as to the price paid by Mid Valley, or to the fact that they assumed first mortgages on the property as well as unsatisfied judgments. Trustee's deed, at R 51 Affidavit of Ross and Helen Broadbent, at R 73. Affidavit of Roy and Mary Lou Broadbent, at R 61. The Andersons simply failed to determine or allege by affidavit the difference between the appraised value of the properties and the price paid for the properties by Mid Valley together with the amount of encumbrances assumed. Neither did the Andersons allege by affidavit even generally a purchase price deficiency.

On balance, the lower court could properly conclude, as a matter of law, that neither trustee nor Capitol Thrift compromised the integrity of the sale by

discouraging bids or by any other conduct.

E - In any Event, the Alleged Sale Irregularities are Insufficient to Affect the Sale.

A trustee's sale should not be disturbed for light or trivial reasons. Meux v. Trexvant, 132 Cal. 487, 64 P. 848, 849 (1909). Indeed, fraud, collusion or gross irregularity coupled with injury to the complainant must be affirmatively shown. E.g., Brown v. Busch, 152 Cal. App. 2d 200, 313 P.2d 19 (1957); 59 C.J.S. Mortgages §601b (1949); 55 AM. JUR. 2d, Mortgages §§829, 831 (1971). The difficulty of meeting this burden is demonstrated by the fact that the disputed sales were upheld in each of the cases cited by Plaintiffs-Appellants for the proposition that gross inadequacy of price coupled with some other irregularity constitutes grounds for invalidation. P. App. Brief, at 24-26; Nevada Land and Mortgage Co. v. Hidden Wells Ranch, Inc., 83 Nev. 501, 435 P.2d 198 (1968); Crofoot v. Tarman, 147 Cal. App. 2d 443, 305 P.2d 56 (1957); Foge v. Schmidt, 101 Cal. App. 681, 226 P.2d 73 (1951). As seen from the earlier discussion, Plaintiffs-Appellants make no supportable claim of fraud, collusion, gross irregularities or mistake coupled with prejudice to them sufficient to affect the disputed sale. And, as seen from POINT IV, above, Plaintiffs-Appellants can in no event disturb Mid Valley's title to the properties by a showing of irregularity which does not involve Mid Valley.

POINT VI

CONCLUSION: SUMMARY JUDGMENT WAS PROPERLY GRANTED

The trustee's sale disputed by Plaintiffs-Appellants came only after many months of their default, after the cancellation of one sale and after the entire transaction had been scrutinized by their counsel.

The sale was held upon the stipulation of Plaintiffs-Appellants that it might go forward. It was consummated by the issuance of a trustee's deed to Mid Valley only after counsel to Plaintiffs-Appellants advised the trustee to do so. Thereafter, the Plaintiffs-Appellants offered to repurchase the properties from Mid Valley and, upon refusal of the offer, entered into an agreement to rent the properties from Mid Valley, paying the first month's rent. Therefore, Plaintiffs-Appellants ratified the sale and waived any right to challenge it.

Plaintiffs-Appellants failed to do equity by a valid tender of purchase price of the properties and, therefore, were foreclosed from the equitable relief they sought.

Mid Valley is a bona-fide purchaser for value without notice against whom the sale cannot be invalidated.

The disputed facts claimed by Plaintiffs-Appellants as material are immaterial because they do not concern cognizable sale irregularities and because, as a matter of law, summary judgment was properly granted

Therefore, the lower court's entry of Summary
Judgment should be affirmed.

THE LOWER COURT IMPROPERLY DENIED MID VALLEY'S
COUNTERCLAIMS RESPECTING UNLAWFUL DETAINER OF THE
11th EAST COMMERCIAL PROPERTY AND BOND FORFEITURE

ARGUMENT

POINT I

THE ANDERSONS WERE IN UNLAWFUL DETAINER OF THE
11th EAST COMMERCIAL PROPERTY

A - Under UTAH CODE ANN. §78-36-3(1) No Notice
was Required to Create the Circumstance of Unlawful
Detainer and Amended Conclusion of Law 3 is Erroneous.

The evidence at trial was undisputed that the Andersons and Mid Valley executed Exhibit I-d. Amended Findings of Fact No. 4, at R 143. The document is in the handwriting of Andersons' counsel who advised them with regard to it. R 174-76. The document is clearly binding on the parties.

With regard to the 11th East commercial property the document provided for a two-week term of occupancy for the Andersons, that term to conclude January 31, 1975. In view of the entry of summary judgment against the Andersons on the question of property ownership, the conclusion seems clear that during this two week period, the Andersons were tenants of Mid Valley for a specific term. As to the unlawful detainer of tenants for a specific term, UTAH CODE ANN. §78-36-3(1) provides:

78-36-3. Unlawful detainer by tenant for term less than life.--

A tenant of real property, for a term less than life, is guilty of an unlawful detainer: (1) When he continues in possession, in person or by subtenant, of the property or any part thereof, after the expiration of the term for which it is let to him. In all cases where real property is leased for a specified term or period, the tenancy shall be terminated without notice at the expiration of such specified term or period;

By the clear meaning of the statute, no notice was required to place the Andersons in unlawful detainer. Although no Utah cases construing this provision have been found, cases in other jurisdictions support the principle that no notice to a tenant for a specific term is required to establish unlawful detainer. E.g., Smith v. Pritchett, 168 Md. 347, 178 A. 113 (1935); Beach Realty Co. v. City, 105 N.J.L. 317, 144 A.720 (1929); Annot., 64 A.L.R. 304 (1929); Annot., 98 A.L.R. 212 (1935).

That Mid Valley neither by action nor acquiescence implied the continuation of the Andersons' tenancy, is clear from the record. R 178-81. That a tenancy at will does not automatically obtain at the end of a lease for a specific term is clear from the statute and the cases. Thus the court's conclusion that notice was defective is erroneous.

B - The Andersons' Continued Possession of the 11th East Commercial Property was Authorized by Restraining Order for a Period of Eight Days Only. Amended Conclusion of Law 4, and Amended Findings of Fact 7 and 8 are in Part Erroneous.

session of the 11th East commercial property after January 31, 1975, by their failure to remove their belongings from the premises until the first week in March, 1975. Amended Finding of Fact No. 9. Amended Conclusion of Law No. 2 to the effect that the Andersons continued to hold possession of the premises has not been appealed from and is supported by the case law. E.g., Cohen v. Superior Court, 56 Cal. Rptr. 813, 816 (Cal. App. 1967) (Failure of real parties in interest to remove their equipment from premises "may constitute a holding over which deprives the landlord of his right to possession."). This continued possession lasted for more than a month but was authorized by court order for an eight day period only.

The lower court's injunctive orders are in the record and speak for themselves. R 10-11, 13-14. The initial temporary restraining order affecting the 11th East commercial property was dated February 10, 1975. It expired by law no longer than ten days after issuance and, in this case, eight days after issuance since it was then, on February 18, 1975, superseded by the court's further order. The court's further order (in the nature of a preliminary injunction) did not make "permanent" the initial temporary restraining order. In the first place, by its terms the new order was, at most, pendente lite. More importantly, the new order, so far as it enjoined Mid Valley was made to "take effect upon the posting and filing by the Plaintiffs of a \$7,500.00 corpor-

ate or cash bond...." R 13-14. This bond was never posted or filed and the new order, by its own terms, never took effect. Amended Finding of Fact No. 9, R 144.

Therefore, prior to February 10, 1975, and following February 18, 1975, there was neither a temporary restraining order nor preliminary injunction nor any other judicial restraint which would protect the Andersons from unlawful detainer status.

C - Neither the Andersons' Honest Belief That They Owned the 11th East Commercial Property, Nor Their Litigation of That Question Protects the Andersons From Unlawful Detainer Status. Amended Conclusions of Law 1 and 2 are erroneous.

Amended Conclusions of Law 1 and 2 and Paragraph (a) of the lower court's Memorandum Decision, R 103, suggest that unlawful detainer is unavailable to Mid Valley because the Andersons were in good faith litigating the question of ownership of the 11th East commercial property. This reasoning is unsupported in law and would lead to the untoward conclusion that any tenant, by making a claim, counterclaim or defense against his landlord, could automatically minimize his exposure to an unlawful detainer action.

It has long since been established in this state that unlawful detainer is available to the vendor of real property against the vendee (circumstances closely analogous to the present). E.g., Forrester v.

Cook, 77 Utah 137, 292 P. 206 (1930). Obviously, in

litigation by the vendor against the vendee for unlawful detainer, the vendee will most often defend on the ground that his possession is lawful. Such was the case in Cook. This Court has never held such a good faith, but unsuccessful, defense to preclude a finding of unlawful detainer.

Indeed, in the controlling case of Tanner v. Lawler, 6 Utah 2d 84, 305 P.2d 882, rehearing granted, 6 Utah 2d 268, 311 P.2d 791 (1957), the Court held squarely that unlawful detainer was available to the prevailing party despite a defendant's unsuccessful claim of ownership. There Tanner claimed ownership of the property by virtue of his redemption of it from a sheriff's sale. A defendant and counterclaimant Reichert also claimed ownership of the property, establishing that he had received an assignment of the sheriff's certificate of sale from the original purchaser at the sheriff's sale. Ultimately, the Court declared Tanner the owner of the property and held Reichert to be in unlawful detainer (through his tenant) for a substantial period before judgment. In so holding, the Court said at 305 P.2d at 887:

[A] person appearing in this kind of case and asserting that the actual occupant is rightfully in possession as his tenant will be subject to a personal judgment against him for treble damages if the court decides his claim is invalid.
(Footnote omitted.)

In view of the foregoing, the Andersons' good faith litigation of the question of title to the 11th East commercial property does not affect their unlawful

detainer status and the conclusions suggesting it does are erroneous.

D - The Fair Rental Value of the 11th East Commercial Property was \$310.00 a month.

Mid Valley's agent Ross Broadbent testified without contradiction that about one week after the Andersons voluntarily vacated the 11th East commercial property (the first week in March), Mid Valley rented the premises for \$310.00 a month. R 181. Mr. Broadbent further testified that, in his experience, this was a fair rental value. R 181-82. And, in any event, an owner is competent to testify as to the value of his property. In the absence of any testimony or evidence to the contrary, this evidence is sufficient to establish conclusively the fair rental value of the premises. This fair rental value may be used in computing treble damages in the present circumstance where no rent is specified in the occupancy agreement. See, Forrester v. Cook, Supra, 292 P. at 214.

E - Mid Valley is Entitled to Damages for Unlawful Detainer in the Amount of \$660.00.

The Andersons' possession of the 11th East commercial property constituted unlawful detainer from the date of the termination of the occupancy agreement, January 31, 1975, until the first week in March, 1975, less the eight days during which the temporary restraining order protected the Andersons in their possession of the premises. Since the fair market value of the premises is \$310.00 a month, or approximately \$11.00 for

each day in February, and since the Andersons were in unlawful detainer for 20 days, they are liable to Mid Valley in the sum of \$220.00 which trebled is \$660.00.

POINT II

AMENDED CONCLUSION OF LAW 7 IS ERRONEOUS
AND THE ANDERSONS SHOULD FORFEIT THEIR \$300.00 BOND
TO MID VALLEY

On February 10, 1975, a temporary restraining order was signed against Mid Valley enjoining it from occupying the 11th East commercial property. Pursuant to this order, the Andersons, as their own sureties, posted bond in the amount of \$300.00. Amended Findings of Fact No. 9, at R 144. This order remained in effect until February 18, 1975.

For the reasons cited above in support of the entry of summary judgment by the lower court in favor of Mid Valley, Mid Valley was at all relevant times rightfully entitled to occupy the 11th East commercial property and the temporary restraining order operated as a wrongful restraint upon it. Therefore, pursuant to UTAH R. CIV. P. 65A(c), Mid Valley is entitled to forfeiture in its favor of the Andersons' bond in the amount of its resulting injury.

Attorneys' fees incurred as a result of the wrongful restraint amount to more than the amount of the bond as shown by the affidavit of Ralph R. Mabey. R 44. Because Rule 65A(c) instructs Mid Valley to seek bond forfeiture upon motion, the affidavit which was submitted

pursuant to Mid Valley's motion for bond forfeiture is competent. UTAH R. CIV. P. 43 (e). Furthermore, the attorneys' fees established by the affidavit are cognizable as injury to Mid Valley resulting from the wrongful restraint. E.g., Coggins v. Wright, 22 Ariz. App. 217, 526 P.2d 741, 743 (1974) (well recognized that attorney's fees required for procuring dissolution of wrongful injunction constitute recoverable damages); Annot., 55 A.L.R. 454 (1928).

In addition to its attorneys' fees, Mid Valley was injured by the wrongful restraint in the amount of the daily rental value of the premises times eight days. The daily rental value, deduced from the foregoing materials, is approximately \$11.00. Thus, Mid Valley was damaged in the amount of \$88.00 in lost rentals.

Since the amount of Mid Valley's injury resulting from the wrongful restraint exceeds the amount of the bond, Mid Valley is entitled to forfeiture in its favor of the entire \$300.00 bond.

POINT III

CONCLUSION: MID VALLEY IS ENTITLED TO DAMAGES
AND BOND FORFEITURE IN ITS FAVOR

The lower court's refusal to declare the Andersons in unlawful detainer of the 11th East commercial property during the month of February, 1975, less eight days, and its refusal to assess damages for that unlawful detainer in the amount of \$660.00, should

be reversed with instructions to enter judgment in favor of Mid Valley in the amount of \$660.00.

Likewise, the lower court's refusal to grant bond forfeiture to Mid Valley in the amount of \$300.00 should be reversed with instructions to effect the bond forfeiture.

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