

1977

State Bank of Lehi v. Ralph O. Woolsey and Sylvia W. Woolsey : Brief of Defendants-Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Heber Grant Ivins;

Attorney for Plaintiff and Respondent;

S. Rex Lewis; Howard, Lewis & Petersen; Attorneys for Defendants and Appellants;

Recommended Citation

Brief of Appellant, *State Bank of Lehi v. Woolsey*, No. 14719 (Utah Supreme Court, 1977).

https://digitalcommons.law.byu.edu/uofu_sc2/458

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE BANK OF LEHI,
a Utah corporation,

Plaintiff-
Respondent,

vs.

RALPH O. WOOLSEY and
SYLVIA W. WOOLSEY,

Defendants-
Appellants.

Case No. 14,719

BRIEF OF DEFENDANTS-APPELLANTS

APPEAL FROM A JUDGMENT BY THE FOURTH JUDICIAL
DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH,
HONORABLE J. ROBERT BULLOCK, JUDGE

S. REX LEWIS, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601
Attorneys for Defendants-
Appellants.

HEBER GRANT IVINS
75 North Center
American Fork, Utah 84003
Attorney for Plaintiff-
Respondent.

TABLE OF CONTENTS

	<u>PAGE</u>
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT ON APPEAL	3
POINT I	
THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S MOTION TO STRIKE DEMAND FOR JURY TRIAL	3
POINT II	
THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE PARTIES HAD ORALLY A- GREED TO EXTEND THE DUE DATE OF THE \$115,000 NOTE TO MARCH 1, 1976	9
POINT III	
THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF PROPERLY ACCELERATED THE PAYMENTS DUE UNDER THE NOTES AND THAT THE DEFENDANTS HAD NOT ESTABLISHED A LACK OF GOOD FAITH IN DECLARING A DE- FAULT UNDER THE SECURITY AGREEMENT	13
POINT IV	
THE TRIAL COURT ERRED IN STRIKING TES- TIMONY FROM THE RECORD CONCERNING FRAUD IN THE INDUCEMENT IN THE FORMATION OF THE SECURITY AGREEMENT WHICH ASSIGNED MRS. WOOLSEY'S INTEREST IN A HOME IN PROVO	22
CONCLUSION	25
AUTHORITIES CITED	
11 Am.Jur.2d, Bills and Notes, §298, p. 326	13
Anderson, <u>Uniform Commercial Code</u> , §3-109:19, p. 659 .	13

CASES CITED

<u>Abdulkadir v. Western Pacific Railroad</u> , 7 U.2d 53, 318 P.2d 339 (1957)	8
<u>Butz v. Union Pacific Railway Co.</u> , 233 P.2d 332 (Utah 1951)	7
<u>Corbet v. Cox</u> , 30 U.2d 361, 517 P.2d 1318 (1974)	8
<u>Ferri v. Sylvia</u> , 214 A.2d 470 (R.I. 1965).	14
<u>Fort Knox National Bank v. Gustalfson</u> , 385 S.W.2d 196 (1964)	5
<u>Glenn Dick Equip. Co. v. Galey Const., Inc.</u> , 541 P.2d 1184 (Ida. 1975)	24
<u>Davies v. Courtney</u> , 11 Ariz.App. 248, 463 P.2d 554 (1970)	24
<u>Holland v. Wilson</u> , 8 U.2d 11, 327 P.2d 250 (1958). . . .	8
<u>Jensen v. Nielsen</u> , 26 U.2d 96, 485 P.2d 673 (1971) . . 19	
<u>Klingbiel v. Commercial Credit Corp. Inc.</u> , 8 U.C.C. Rep. 1099 (10th Cir. 1971).	22
<u>Kupka v. Morey</u> , 541 P.2d 740 (Alas. 1975).	22
<u>Mawhinney v. Jensen</u> , 120 Utah 142, 232 P.2d 769 (1951)	24
<u>Mecham v. United States Bank of Arizona</u> , 107 Ariz. 437, 489 P.2d 247 (1971)	14
<u>Northern State Const. Co. v. Robbins</u> , 76 Wash.2d 357, 457 P.2d 187 (1969)	24
<u>Petty v. Clark</u> , 102 Utah 186, 129 P.2d 568 (1942) . . 6, 7	
<u>Ruff v. Boltz</u> , 252 Ore. 236, 448 P.2d 549 (1968) . . . 24	
<u>Smith v. Kalavitz</u> , 515 P.2d 473 (Colo.1973) 24	
<u>Stickle v. Union Pacific Railway Co.</u> , 251 P.2d 867 (Utah 1952)	7
<u>Universal C.I.T. Credit Corp. v. Shepler</u> , 329 N.E.2d 620 (Ind. 1975)	5
<u>Valley Mortuary v. Fairbanks</u> , 225 P.2d 739 (Utah 1950) 8	
<u>Williamson v. Wanlass</u> , 545 P.2d 1145 (1976). 18, 1	

STATUTES CITED

Utah Code Annotated, §70A-1-208 (1953)	5, 17, 18 19, 22
Utah Code Annotated, §70A-3-109(a) (1953)	14, 15
Utah Code Annotated, §78-1-103 (1953).	17
Utah Code Annotated, §78-21-2 (1953)	4

BRIEF OF DEFENDANTS-APPELLANTS

NATURE OF THE CASE

This is an action to declare certain notes in default and to foreclose a security interest held by the plaintiff-respondent in the real and personal property which constitutes the defendant-appellants mink ranch, located on Saratoga Road near Lehi, Utah and a mortgage on defendants, Sylvia Woolsey's home. The appellants claim that the trial court erred in several respects in granting judgment in favor of the plaintiff-respondent and that the trial judge erred in ruling that the plaintiff-respondent had not acted wrongfully in declaring a default and having a receiver appointed.

DISPOSITION IN THE LOWER COURT

After a trial on the merits, the trial court entered its Findings of Fact and Conclusions of Law which allowed the plaintiff-respondent to foreclose its security interests. The trial court had previously permitted the ex parte appointment of a receiver, who has continued in possession of the property until a sale was held pursuant to the foreclosure decree.

RELIEF SOUGHT ON APPEAL

The appellants seek to have this Court reverse certain Findings of Fact and Conclusions of Law entered by the trial court and to enter judgment against the respondent and for

the appellants or, in the alternative, to remand this matter to the trial court for further hearings on the matter. Appellants request this Court to order that the issues of fact in the further hearings be heard and decided by a jury.

STATEMENT OF FACTS

The appellants, Ralph O. Woolsey and Sylvia Grossgebauer Woolsey, were the owners and operators of a mink ranch near Lehi, Utah. To finance the expansion and operation of the mink ranch, the appellants had obtained several loans from the respondent, the State Bank of Lahi. The loans in question were made on June 19, 1974, July 3, 1975, and December 12, 1975. The appellants pledged all of the personal and real property which constituted the mink ranch as security for these loans. In addition, Mrs. Woolsey's interest in a home in Provo, Utah, was mortgaged as additional security for the 1974 loan. The parties disagree as to the terms for the release of the security interest in that home.

In December of 1975, approximately 981 mink pelts were stolen from the Woolsey ranch. These pelts were insured and the insurance proceeds have subsequently been paid.

On January 2, 1976, the Bank obtained the appointment of a receiver to take possession of the mink ranch and to manage it. This was done at an ex parte hearing and no notice was given to the appellants prior to the receiver's arrival at the ranch to take possession. The appointment of the receiver was based on the Bank's declaration of default on the grounds that it deemed itself insecure due to the theft

of the pelts. The appellants have alleged that there was

no valid basis for the default or the appointment of the receiver and that the same were not done in good faith.

ARGUMENT ON APPEAL

The appellants argue on appeal that the trial court erred as a matter of law in striking their demand for a jury trial and in ordering appellant Sylvia Woolsey's testimony concerning fraud stricken from the record as violative of the parol evidence rule. The appellants also argue that the trial court erred in failing to find that the parties had agreed to extend the payment of the \$115,000 note to March 1, 1976, erred in finding that the plaintiff properly accelerated the payments due under the notes, and that the defendants (appellants) had not established a lack of good faith in declaring a default under the security agreement. Appellants believe that all of the factual findings were against the clear weight of the evidence.

POINT I

THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S MOTION TO STRIKE DEMAND FOR JURY TRIAL.

On June 9, 1976, the trial court granted the plaintiff's motion to strike the defendants' demand for a jury trial. (R. 57) The order granting the motion gave the following as the grounds for denying the defendants their right to a jury trial:

This Order is based upon the finding by this Court that the issues to be decided are largely equitable and arise from an interpretation of written contracts and therefore the defendants are not entitled to a jury trial.

(R. 57)

As the appellants will show, this finding was erroneous and the trial court improperly precluded the defendants-appellants from presenting their case to a jury.

A review of the Findings of Fact and Conclusions of Law entered in this action will readily disclose that the greater number of issues in this matter were factual and not equitable in nature. (R. 43-49) The findings of fact, seventeen in number, take approximately four full pages to enumerate, while the conclusions of law, ten in number, take only two and a half. Not only are the factual issues more numerous, but their determination is the crucial factor in this case and the conclusions of law are merely subsidiary to those fact questions. This is illustrated by the following example:

1. As shown in Point II, it was an essential fact question whether or not the parties had made an oral agreement to extend the time for payment of the \$115,000 note to March 1, 1976. This fact was critical to the determination of the respondent's rights to declare the notes in default as ruled in Findings 2(a) and 9.

The existence of such an agreement was obviously, a fact question to be decided by a jury. This matter was not "entirely founded in the interpretation of legal documents", or in giving legal effect to such instruments. There were valid fact questions in this case which the appellants were constitutionally and statutorily entitled to have submitted to a jury. U.C.A. §78-21-2 (1953).

2. The findings of fact concerning the alleged mismanagement of the mink ranch and the other grounds for insecurity

alleged by the Bank were obviously important in determining whether or not it had acted in good faith in declaring the notes to be in default and in having a receiver appointed.

3. The most important determination made by the trial court was a fact question; i.e. did the Bank act in good faith in declaring the debtors (appellants) to be in default? This issue is determinative of most of the important issues in this case.

The question of good faith in accelerating notes which are due "on or before" a certain date (as are those in this case) has always been a jury question under the provisions of the U.C.C. Although this issue has not been treated by the Utah Supreme Court, the courts of other states appear to be unanimous in this matter. In Fort Knox National Bank v. Gustafson, 385 S.W.2d 196 (1964), the Kentucky Court of Appeals ruled that the question of "good faith" under the section in question (analogue to U.C.A. §70A-1-208) is required to be submitted to the jury unless there is no competent evidence to support such a finding. Universal C.I.T Credit Corp. v. Shepler, 329 N.E.2d 620 (Ind. 1975) also recognizes that the question of good faith is a jury question. Because this fact question, as well as the others listed above, was of such crucial importance in the resolution of this matter, the appellants assert that the trial court's ruling was clearly erroneous and that the appellants were wrongfully denied their right to a jury trial.

The right to a jury trial has always been jealously guarded in this state and the appellants believe that the

trial court ignored firm precedent in striking their demand for a jury trial. The appellants believe that the case of Petty v. Clark, 102 Utah 186, 129 P.2d 568 (1942) is controlling in this matter and that the rationale of that case affirms the appellants' argument that they were entitled to a jury trial. In the Petty case, there was only one fact raised in a foreclosure action, which is similar to the facts in the present case except that there were fewer fact issues. In Petty, the history of equitable and legal pleadings were reviewed and then this Court found that the existence of one fact issue was enough to entitle the defendant to a jury trial:

At common law, law and equity were administered by different courts. In courts of law, the parties were entitled to a jury to determine issues of fact, but in courts which administered equity, there was no jury. Often the courts of equity required parties to litigate certain issues in the law courts before equity would intervene, and in many instances it required two suits to determine what is now determined in only one suit.

Under the common-law system, two suits would have been required to determine this action: (1) a suit in the law court to determine the amount owing under the contract; (2) if the judgment for that amount were not paid, the plaintiff would be required to go into a court of equity to foreclose the defendant's equity of redemption.

Under the Utah Constitution and Statutes, there is but one form of civil action—the same court administers both law and equity, often in the same action. Constitution of Utah, Article VIII §19; Revised Statutes of Utah, 1933, 104-1-2. In order to prevent more than one action in the foreclosure of mortgages, the legislature in 104-55-1 expressly provides: "There can be but one action for the recovery of any debt or the enforcement of any right secured by mort-

The legislature thus contemplated the joining of an action at law and a suit in equity in the same action.

* * *

In the present case the only disputed issue of fact in the case, and the one which was submitted to the jury, is whether the interest paragraph was a part of the contract when it was delivered. That issue was a part of plaintiff's main action to recover money owing under the contract, which action is clearly an action at law. The mere fact that plaintiff demanded equitable relief, to wit: the foreclosure of his lien would not deprive the defendant of his right to have the issue of fact determined by a jury.

This holding directly opposes the holding of the trial court on this issue. (R. 241-242). In light of the facts that there were many factual issues in this case and that these were the predominant issues, this rationale is clearly applicable and demonstrates the error of the trial court in striking the defendants' demand for a jury.

The Petty decision is clearly in line with other Utah cases which have consistently protected a citizens' right to a jury trial. Several of these cases have held that the right to a jury trial should be scrupulously guarded. See e.g. Butz v. Union Pacific Railway Co., 233 P.2d 332 (Utah 1951) and Stickle v. Union Pacific Railway Co., 251 P.2d 867 (Utah 1952). In the latter case, this Court gave the basis for the preservation of these rights:

In our democratic system, the people are the repository of power whence the law is derived; from its initiation and creation to its final application and enforcement, the law is the expression of their will. The functioning of a cross-section of the citizenry as a jury is the method by which the people express this will in the application of law to controversies which arise under it. Both our constitutional and statutory provisions assure trial by jury to citizens of this state.

Courts, as final arbiters of law, could arrogate to themselves arbitrary and dangerous powers by presuming to determine questions of fact which litigants have a right to have passed upon by juries. Part of the merit of the jury system is its safeguarding against such arbitrary power in the courts. To the great credit of the courts of this country, they have been extremely reluctant to infringe upon this right, and by leaving it unimpaired have kept the administration of justice close to the people.

This rationale and holding of this case are found repeatedly in other Utah cases. See Abdulkadir v. Western Pacific Railroad, 7 U.2d 53, 318 P.2d 339 (1957); Holland v. Wilson, 8 U.2d 11, 327 P.2d 250 (1958); Valley Mortuary v. Fairbanks, 225 P.2d 739 (Utah 1950); and Corbet v. Cox, 30 U.2d 361, 517 P.2d 1318 (1974). Even though some of these cases upheld summary judgments or other judicial acts which would take the determination of a case from the jury, all of them gave the same standard.

It is important to note that in this case the parties had progressed for four months in this case before the plaintiff made its motion to strike the defendant's request for a jury. The motion was made after the pre-trial conference had been held and the court had issued a Pre-Trial Order dated March 12, 1976, which clearly anticipated a jury trial in this matter. (R. 74). It was months later that the plaintiff made its motion to strike the defendants' demand. It would seem to the appellants that such conduct approximates a waiver of any objection.

In summary, the appellants believe that the trial court was clearly in error when it struck the defendants' request for a jury trial. That action was erroneous because there

were many issues of fact which the defendants were entitled to have decided by a jury and because the fact issues were clearly the major issues in this trial, even though the action was nominally an equitable one.

POINT II

THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE PARTIES HAD ORALLY AGREED TO EXTEND THE DUE DATE OF THE \$115,000 NOTE TO MARCH 1, 1976.

The first fact issue to be considered will be whether or not the parties reached an oral agreement in July of 1975 to extend the due date for a \$115,000 note to March 1, 1976. This note was originally executed on June 19, 1974, and was due on or before February 20, 1975. (Plaintiff's Ex. 9, R. 115) This question will be considered first because its resolution is fundamental to the succeeding points.

The appellants believe that the evidence at the hearing of January 16, 1976 and at trial clearly showed that an oral agreement was reached in July of 1975 which gave the defendants until March 1, of 1976 to pay a previously executed and overdue note in the amount of \$115,000. This contention is based on several elements of testimony and evidence:

1. The testimony of the respondent-Bank's president, Calvin H. Swenson.
2. Plaintiff's Exhibit 15, which is a security agreement dated July 3, 1975. (R. 123-124)
3. The testimony of the defendants, Ralph O. Woolsey and Sylvia W. Woolsey.

The first element (the testimony of Mr. Swenson) is

probably the strongest support of the appellants' argument. Mr. Swenson is the president of the State Bank of Lehi (the plaintiff in this action) and was the person with whom the plaintiffs had dealt for several years in obtaining loans for the construction and operation of their mink ranch. In his deposition, which was taken on March 11, 1976, Mr. Swenson clearly admits that the date of March 1, 1976, was established as the date for payment of the new note for \$45,000 as well as the old one for \$115,000:

Q. Was any mention made at this time of the \$115,000 note?

A. I don't recall the specific mention, but they were aware that there was still a carry-over of \$111,000 and that this was just in addition just to tide them through in the operations this year.

Q. And was it the position of the bank at this time that the \$115,000 note and the \$45,000 note would then all be due at the same time?

A. Well, it was our intention that the \$115,000 note - - it was our knowledge that that was past due and we agreed to carry that with them in its present state until such time as he could effect the refinancing.

Q. Was the target date for that March 1, 1976?

A. Well, we assumed that it would be necessary to get the mink pelts sold in order to know at that point just how we stood.

Q. Is that why the March 1st date was arrived at?

A. Yes.

Q. Was it because of your past experience that you knew that once the pelts are sent to the market, it takes a period of time before they're sold and before you get your money back?

A. That's right. And it was Mr. Woolsey's in-

tention to send the mink so they'd get in on the early sale.

Q. And the early sale is the January sale?

A. Yes.

Q. Did you know that when the mink go in the January sale, that it is generally in mid or late February before payments are received?

A. That's why we set the March 1st date.
(emphasis added) (R. 125, pp. 52-53, and R. 294-296).

Although Mr. Swenson attempted to hedge and qualify these answers at trial, it is obvious from the deposition testimony that the Woolseys were given until March 1, 1976, to repay all of the loans through receipt of income and by additional financing from other sources. (R. 136-137) Mr. Swenson tried to state at trial that the loan was to have been refinanced during the pelting season. Such a statement is unreasonable in light of the fact that Mr. Swenson knew that the mink sale monies would not be received until late February or early March and that it was highly unlikely that any institution would provide financing until the outstanding debt had been reduced by payments from the sale receipts. (See Swenson's testimony, R. 295-296). The predisposition of the trial judge was evident from his statements at the first hearing, which occurred before the issue was ever in question. (R. 210-211). Thus, the right to a jury trial was clearly essential.

The appellants' contention is also supported by the Security Agreement which was executed by the parties on July 3, 1975 (Plaintiff's Exhibit 15, also reproduced at R. 123-

124) This agreement specified that it is to secure the payment of the old and new loans, including the \$115,000 note which had been overdue since February 20, 1975. (R. 115). It is of critical importance to note that the bank did not foreclose the \$115,000 note in July of 1975, but chose instead to loan the appellants another \$51,000 for the coming year. Both of the new notes which were executed pursuant to this Security Agreement were due on March 1, 1976, which was the date Mr. Swenson testified was the target date for refinancing.

Both of the defendants testified that an express oral agreement was entered into which gave the Woolseys until March 1 to pay off the loan which was overdue. Mr. Woolsey testified that Mr. Swenson agreed to extend the due date of the "big loan" to the time when the new, \$45,000 note would be due (R. 350) and that the Bank was willing to work with him one hundred percent (R. 185) and Mrs. Woolsey testified that the old note "would be extended for a year with the new note". (R. 468). Both of the defendants testified that new collateral was pledged as consideration for the extension. (R. 351, 468).

Appellants contend that, inasmuch as the above three witnesses were the only ones that testified concerning the transactions of the parties, their testimony obviously constitutes the clear weight of the evidence and that such evidence clearly showed that the Bank (through Mr. Swenson) granted the Woolseys until March 1, 1976 to obtain refinancing and to pay off the \$115,000 which had accumulated over

several years. The failure of the trial court to so find is clearly error and, because such a finding would substantially affect the other findings in the matter, the failure constitutes reversible error by the trial court.

The appellants believe that the majority of legal authorities support the propriety of such a mutual extension agreement. Anderson in his treatise, the Uniform Commercial Code, states, on page 659 of §3-109:19, that a contract for extension of time may be either written or oral. 11 Am.Jur2d, Bills and Notes, §298, p. 326 states that such an agreement is a separate contract and is governed by the law of contract and is not regulated by the Uniform Commercial Code. The appellants contend that the evidence establishes such a contract and that the consideration for the extension was furnished by the additional collateral which was listed in the 1975 security agreement.

Appellants believe that the above clearly shows that the parties agreed to extend the due date for the \$115,000 note to March 1, 1976, and that such an extension is clearly legal.

POINT III

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF PROPERLY ACCELERATED THE PAYMENTS DUE UNDER THE NOTES AND THAT THE DEFENDANTS HAD NOT ESTABLISHED A LACK OF GOOD FAITH IN DECLARING A DEFAULT UNDER THE SECURITY AGREEMENT.

Having previously established that the parties had reached an agreement which made all of the notes due on March 1, 1976, the appellants now desire to show that the

plaintiff-respondent had no right to accelerate the date of payment of the notes and that their actions in so doing were not in good faith as required by Utah statute and general case law.

The first issue concerns the right of the respondent, State Bank of Lehi, to accelerate the notes and to declare them due and owing on January 2, 1976. (See the complaint in this action, R. 113).

Both the testimony at trial and the great weight of legal authority show that notes such as those in this action are not demand notes. The Secured Promissory Notes which were executed on July 3, 1975 (for \$45,000) and on December 12, 1975 (for \$6,000) stated that they were payable "on or before March 1, 1976". The great majority of jurisdictions which have ruled on such notes have held they are not demand notes but, rather, that they are notes which are due on a date certain. See e.g. Mecham v. United States Bank of Arizona, 107 Ariz. 437, 489 P.2d 247 (1971) which states that "when a note, such as this one, provides for payment on or before a stated date, it is payable at a definite time". To the same effect is Ferri v. Sylvia, 214 A.2d 470 (R.I. 1965) which states that "at the law merchant it was generally settled that a promissory note or a bill of exchange payable 'on or before' a specified date fixed with certainty the time of payment" and then cites five other cases from as many jurisdictions as authority for that proposition. This is established in Utah under U.C.A. §70A-3-109(a) which

states:

70A-3-109. Definite time. - (1) An instrument is payable at a definite time by its terms it is payable
(a) on or before a stated date or at a fixed period after a stated date; . . .

These authorities clearly establish that the notes for \$45,000 and \$6,000 were not due until March 1, 1976, contrary to the allegations contained in the respondent's complaint. (R. 110-111) For the reasons set forth in Point I above and because the payment of the \$115,000 note was tied to the other notes, the appellants believe that it too was due "on or before" March 1, 1976 and was thus not due and owing on January 2, 1976.

The only basis that the respondent could have for declaring the notes due would be the assertion that the notes were in default. Paragraph 8 of the Security Agreement dated July 3, 1975 sets forth the grounds for the declaration of default. (R. 124). Although the Conclusions of Law flatly state that "the plaintiff did exercise good faith in accelerating said payments and all notes are in default and due and payable in full," (R. 47) the only specification of the grounds for the default which are found in the Record on Appeal are set out in the plaintiff-respondent's Memorandum in Support of Motion to Strike Demand for Jury Trial. (R.

71) These are:

(1) "Debtor fails to pay any of the Obligations when due;"

(4) "Debtor becomes insolvent or unable to pay debts as they mature."

(10) "Any of the Collateral is lost, stolen, or materially damaged;"

(11) "Bank shall deem itself insecure for any reason whatsoever."

As explained above, ground #1 and the second half of #4 are inapplicable because the obligations did not become due until March 1, 1976, the date of maturity of the notes. The first part of #4 cannot reasonably be advanced by the respondent because the defendants-appellants were more insolvent on January 2, 1976 than they were when the notes were executed. It was always known by the Bank that the appellants were heavily financed for the purpose of expanding and establishing their mink ranch. The Bank acknowledged that they knew in July of 1975 that the Woolseys were indebted and that this would be the last year that the Bank would carry them. (R. 294-295).

Subparagraph (10) of the default provision states that the debtor shall be in default if "any of the collateral is lost, stolen or materially damaged." While the appellants admit that some 968 mink pelts were stolen in late December of 1975, they believe that the facts will demonstrate the unreasonableness of employing this provision as the basis for a default. This allegation is based on the following facts: pursuant to the requirements of Paragraph 6 of the Security Agreements, ¹ all of the stolen pelts were insured

¹ This paragraph reads as follows: 6. INSURANCE: Debtor agreed, at his expense, to insure the Collateral against loss, damage, theft (and such other risk as Bank may require) to the full insurable value thereof with insurance companies and under policies and in form satisfactory to Bank. Proceeds of insurance shall be payable to Bank as its interest may appear and all policies shall provide for 10 days minimum written notification notice to Bank. Upon request, policies or certificates attesting, the coverage shall be deposited with Bank. Insurance proceeds may be applied by Bank toward the payment of any obligations when they become due in such order of application as Bank may determine.

and the Bank knew that its interests were insured and that the insurance payments would be made to the Bank. (R, 139 and 355). Because the theft of the insured pelts in no way diminished the value of the secured property, the Bank cannot use this as a valid basis to declare the notes in default and accelerate their payment. This is in accordance with the general rules of equity which apply to these Code provision as well as all others. U.C.A. §78-1-103.

The only real issue which was addressed at trial and in the other hearings was whether the Bank could validly accelerate the notes by reason of the insecurity provision contained in Subparagraph (11) of the Default paragraph in the Security Agreement. That provision states that default may be declared if the "Bank shall deem itself insecure for any reason whatsoever". For the following reasons, the appellants believe that the Bank had no valid basis under this provision to accelerate this payments due under the notes and that its actions in attempting to do so evidence a lack of the required good faith.

The provisions of the Commercial Code Title of the Utah Code superimpose a duty of good faith on the arbitrary right of a secured party to accelerate note payments due to insecurity. This provision is found in U.C.A. §70A-1-208. This statute reads as follows:

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words or similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of estab-

lishing lack of good faith is on the party against whom the power has been exercised.

The purposes of this language is clearly stated by this Comment of the draftsmen of the Uniform Commercial Code:

The increased use of acceleration clauses either in the case of sales on credit or in time paper or in security transactions has lead to some confusion in the cases as to the effect to be given to a clause which seemingly grants the power of an acceleration at the whim and caprice of one party. This section is intended to make clear that despite language which can be so construed and which further might be held to make the agreement void as against public policy or to make the contract illusory or too indefinite for enforcement, the clause means that the option is to be exercised only in the good faith belief that the prospect of payment or performance is impaired. (Emphasis added).

This Court has recently interpreted §70A-1-208 for the first time in the case of Williamson v. Wanlass, 545 P.2d 1145 (1976). Appellants believe that the trial court ignored the holding and rationale of this case and, in so doing, reached an inequitable result that has achieved the harsh results that the Williamson decision had hoped to avoid. Appellants believe that the present case is very similar in many aspects to the Williamson case and that the holding and rules of that decision should have been applied in the trial of this case. A review of that decision will reveal the incorrectness of the trial court's rulings.

In the Williamson decision, this Court recognized the harshness of acceleration clauses without notice:

The clause which allows for acceleration in case of default, if strictly enforced, is a severe covenant, the invocation of which has similarity to other forfeitures. The imposition of such severe conditions is not favored in the law; and the one who seeks to impose them must not, either by acts

or omission permit another to assume that the covenant will not be strictly enforced, then "crack down" on the obligor by rigidly insisting on enforcement, without giving some reasonable notice and opportunity to comply. This is a doctrine of equity which is firmly established in our law by numerous decisions. 545 P.2d at 1147.

This Court noted that these severe sanctions have long been disfavored under Utah law and noted the case of Jensen v. Nielsen, 26 U.2d 96, 485 P.2d 673 (1971) and other cases cited therein as ample support for that proposition. In the present case, the Bank accelerated the note without notice and obtained the appointment of a receiver ex parte, thus causing irreparable harm to the appellants and precluding the appellants from obtaining financing from other sources, thus effectively destroying the defendants' lifesavings and an investment of many years duration which has now been dismantled and sold at far less than market value due to ineffective management by the receivers which were appointed pursuant to the Bank's request. The testimony at trial clearly established that the appellants had made arrangements for additional financing from Mr. Harvey Carson and others and that the premature and unexpected attachment by the Bank destroyed any of these possibilities. (R. 360, 394, 422)

In interpreting the good faith requirements of U.C.A. §70A-1-208, this Court made the following statement:

It seems to recognize that acceleration is a harsh remedy which should be allowed only if there is some reasonable justification for doing so, such as a good faith belief that the prospect of payment is impaired. 545 P.2d at 1149.

In the present case, appellants assert that no valid basis

existed for the acceleration of the notes. Mr. Calvin Swenson, the Bank's president, admitted in the hearing on January 16, 1976, that the Bank was "principally concerned" with the theft (R. 137) but he and his counsel openly acknowledged that the stolen mink were insured (R. 139-140, and 355) and the trial court found that this fact was not disputed. (R. 355) Because the stolen pelts were insured, the Bank cannot assert this as a valid basis for feeling insecure and because the Bank has now received the insurance proceeds, it can hardly be heard to rebut this argument. All of the other bases were similarly improper: the Campbell mink were fed by feed supplied by Campbell (R. 385, 409); no evidence was ever introduced to support the findings that defendant Ralph Woolsey threatened bankruptcy; the marital problems of the defendants were admitted to have been known prior to the execution of the July, 1975 loans (R. 292); and the clear weight of the evidence showed that defendant Ralph Woolsey was caring for his mink ranch in a good husbandry fashion at all times. (R. 166-169, 174-175, 386, 418 and 453) All of these allegations appear to have been manufactured after the original allegations were ascertained to be unsupportive of the insecurity allegations. All of this testimony revealed that the trial court erred in appointing the receivers and in issuing the findings that it did. These actions were in direct opposition to the direction of this court in the Williamson decision when it spoke of equitable principles and guidelines:

The rules of equity arose as a means of avoiding the harshness of legalism in administering the rigidities and harshness of the law.

Machine-generated OCR, may contain errors.

ness of some of the rules and remedies of law. It is also to be observed that the differences between law and equity are not so distinct as they were in former times. The lines between them have become blurred and they have become for the most part blended together in what we refer to generally as equity and justice. Our Constitution, Art VIII, Sec. 19, provided: "There shall be but one form of civil action, and law and equity may be administered in the same action."

Consistent with the foregoing, equitable claims or defenses may be asserted and tried along with or against legal claims or defenses in the same action; and equitable principles may be applied in an action at law. We can see no reason why the doctrine we have just spoken of as being rooted in equity and good conscience should have any affinity for, or limitation in application to, any particular type of conduct or controversy. The principles of equity and justice are universal; they apply wherever appropriate and necessary to enforce rights or to prevent oppression and injustice. (Emphasis added) 545 P.2d at 1148.

A last comment must be made concerning the lack of a demand for payment in this matter. As the trial testimony showed, the defendants had arranged for financing from other sources. (R. 360, 394 and 422) The ex parte action of the plaintiff in having a receiver appointed destroyed these arrangements and caused irrevocable harm. This is contrary to direction of this Court in the Williamson decision:

The question arises as to how the defendants would know that condition came about unless someone so advised them. It is generally true that if there is a condition to be fulfilled, of which one party would be aware and the other would not, it is regarded as fair and proper that the one who knows should be obliged to notify the other party affected thereby, and give him a reasonable opportunity to react thereto. 545 P.2d at 1149.

If the trial court had acted equitably and pursuant to this Court's directions, such damage would probably have been

avoided.

This standard of "good faith" has been applied in other jurisdictions as well. See e.g. Klingbiel v. Commercial Corp. Inc., 8 U.C.C. Rep. 1099 (10th Cir. 1971); and Kupka v. Morey, 541 P.2d 740 (Alas.1975) in which the Alaska Supreme Court makes the following statement:

However, as a minimum requirement for the enforcement of such a provision, the party invoking the clause must reasonably and in good faith believe that the prospect of payment or performance has somehow been impaired.
545 P.2d at 1149.

These decisions are in agreement with this Court's decision in Williamson. Because the testimony at trial clearly showed that the respondent Bank had acted wrongfully and without justification in declaring itself insecure and accelerating the notes, the appellants believe that the trial court erred when it ruled that the appellants had not sustained the burden of proof under U.C.A. §70A-1-208.

Therefore, the appellants believe that the Findings of Fact Numbers 2, 9, 10, 11, 12, 13, 14, 15, 16 and 17 and Conclusions of Law Numbers 1, 21 6 and 10, were contrary to the clear weight of the evidence at trial and they respectfully ask this court to reverse these Findings and Conclusions and to enter judgment for the appellants.

POINT IV

THE TRIAL COURT ERRED IN STRIKING TESTIMONY FROM THE RECORD CONCERNING FRAUD IN THE INDUCEMENT IN THE FORMATION OF THE SECURITY AGREEMENT WHICH ASSIGNED MRS. WOOLSEY'S INTEREST IN A HOME IN PROVO.

As additional security for the \$115,000 loan which was made to the appellants in June of 1974, Mrs. Sylvia Woolsey assigned her interest in a home in Provo, Utah. This property is described on the assignment of contract attached to the respondent's complaint and in the third Finding of Fact in this matter. (R. 119, 45). This home was awarded to Mrs. Woolsey as part of the divorce settlement of a previous marriage.

During the course of the hearings and trial of this matter, the appellants introduced a great deal of testimony to show that Mrs. Woolsey's home was mortgaged pursuant to statements by Mr. Swenson that the mortgage was only necessary to make the loan look good to the bank examiners, that the bank really didn't need the house, that there was no way that her interest in the home would be jeopardized, and that the Bank had not made a practice of foreclosing on people's homes. (R. 458-466, 342-346). For a synopsis of appellants' testimony in this regard, see the answers to the respondent's interrogatory #1, dated January 23, 1976 (R. 85-88), which answer is found in the Record on Appeal at pages 76 to 78.

In her counterclaim, the appellant, Sylvia Woolsey, specifically pled all of the facts set forth above and alleged that such acts were intentional and constituted fraudulent misrepresentation. (R. 59, 98-99). In spite of these allegations and the specific representations by counsel at a hearing (R. 238-241, 244-245), the Court ruled that such evidence was an attempt to vary the terms of a written contract and therefore violative of the parol evidence rule. The appellants believe

that this ruling was clearly erroneous under Utah case law.

It is manifestly clear under Utah case law that evidence to show fraud in the inducement for execution of a contract or other written document is admissible as an exception to the parol evidence rule. The case of Mawhinney v. Jensen, 120 P.2d 142, 232 P.2d 769 (1951) ruled that parol evidence is always admissible to show fraud, even though it has the effect of varying the terms of the written contract. This decision is in line with decisions of other states which have ruled on the matter. See e.g. Davies v. Courtney, 11 Ariz.App. 248, 461 P.2d 554 (1970); Smith v. Kalavitz, 515 P.2d 473 (Colo.1973); Glenn Dick Equip. Co. v. Galey Construction, Inc. 541 P.2d 1184 (Ida. 1975); Ruff v. Boltz, 252 Ore. 236, 448 P.2d 549 (1968); and Northern State Construction Co. v. Robbins, 76 P.2d 357, 457 P.2d 187 (1969). All of these cases stand for the rule previously cited and reflect the fairness of allowing a party an opportunity to show that the terms or enforcement of an agreement may be unjust because they were obtained through fraudulent means.

Without getting to the merits of whether or not the acts of the bank constituted fraud, the appellants believe that the order of the trial court (described above) was clearly erroneous. The court was required to consider that testimony and make a finding on the issue of fraud. It is patently clear that such evidence was not inadmissible as violative of the parol evidence rule.

For the reasons set forth above, the appellants ask the

Court to reverse the third Conclusion of Law entered by

trial court in this matter (R. 47) and to remand the matter to the trial court for a determination of this issue by a jury.

CONCLUSION

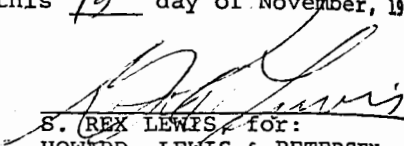
The appellants believe that the trial judge committed several prejudicial errors during the course of this litigation. In striking the appellants' request for a jury trial, the judge deprived them of the right to have the issues of fact resolved by a jury of their peers, a right which is guaranteed by the Constitution and statutes of this state. Because the questions of fact were the predominant issues at trial, the trial judge had no discretion to deny the appellants a jury trial which had been properly requested. The trial court committed prejudicial error by striking the testimony of fraud in the making of a written agreement. Such testimony is clearly admissible under Utah law and the trial court should be required to enter a finding on that issue.

The appellants also assert that several findings of the trial court are against the clear weight of the evidence. As set forth herein, the evidence clearly showed that the parties had made an oral agreement to extend the due date of a promissory note to March 1, 1976, and that the respondent's acceleration of that and others on the grounds of default was done in bad faith and has resulted in irreparable harm to the appellants. For these reasons, the appellants ask the Court to reverse the Findings of Fact and Conclusions of Law of the trial court and to enter judgment in their favor or, in the alternative, to

remand this matter to the trial court for further hearings on

this matter before a jury.

DATED at Provo, Utah, this 15th day of November, 1976


S. REX LEWIS, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendants-
Appellants.

MAILED two copies of the foregoing Brief to Heber Grant
Ivins, 75 North Center, American Fork, Utah 84003, this
16th day of November, 1976.

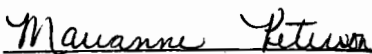

Secretary

TABLE OF CONTENTS

	PAGE
STATEMENT OF NATURE OF CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	2
STATEMENT OF FACTS-----	2
ARGUMENT	
POINT I.	
THE TRIAL COURT ERRED IN SUSTAINING THE OBJECTION OF THE PROSECUTOR TO DEFENDANT'S LINE OF QUESTIONING REGARDING THE ARREST PROCEDURE-----	3
POINT II.	
THE TRIAL COURT ERRED IN ALLOWING DEFEN- DANT'S STATEMENT, GIVEN ORALLY, AND NEVER SWORN TO OR WRITTEN DOWN, TO BE ADMITTED AS EVIDENCE IN THE TRIAL-----	6
POINT III.	
THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL BASED UPON THE PREJUDICIAL MIS- CONDUCT OF THE PROSECUTING ATTORNEY ON CROSS-EXAMINATION-----	8
POINT IV.	
NO EVIDENCE WAS PRESENTED THAT THE DEFEN- DANT "TOUCHED" THE PLAINTIFF'S GENITALS AND THUS ALL THE ELEMENTS OF THE COMPLAINT WERE NOT MET-----	11
POINT V.	
THE TRIAL COURT ERRED IN NOT ADMITTING TESTIMONY REGARDING SPECIFIC BEHAVIOR OF THE DEFENDANT TENDING TO A CRIMINAL STATE. IT IS NOT WITHIN THE PURVIEW OF THE TRIAL JUDGE'S DISCRETION TO RULE ON RULE 47 EVIDENCE-----	13

TABLE OF CONTENTS-----CONTINUED

	PAGE
<u>Cases Cited</u>	
<u>Davis v. Mississippi</u> , 349 U.S. 721 (1969)----	5
<u>Miranda v. Arizona</u> , 884 U.S. 436 (1966)-----	7
<u>Pettingill v. Perkins</u> , 272 P.2d 185, 2 U2d 266-----	9
<u>People v. Lyons</u> , 303 P.2d 329, 47 C.2d 311---	9,10
<u>People v. Seely</u> , 171 P.2d 529, 75 C.A.2d 525-	10
<u>Seely v. Heinze</u> , 68 S.Ct. 147, 332 U.S.819, 92 L.Ed. 396-----	10
<u>People v. Carr</u> , 329 P.2d 746, 163 C.A.2d 568-	10
<u>People v. Ford</u> , 200 P.2d 867, 89 C.A.2d 467--	10
<u>People v. Gibson</u> , 332 P.2d 113, 165 C.A.2d 685-----	10
<u>Buchanan v. Nye</u> , 275 P.2d 767, 128 C.A.2d 582-----	10
<u>Bilbrey v. State</u> , 135 P.2d 999, 76 Okl.Cr 249-----	11
<u>People v. Collier</u> , 111 CA 215, 295 P 898-----	15

<u>Statutes Cited</u>	
§76-5-404 Utah Code Annotated 1953-----	1
§76-13-3 Utah Code Annotated 1953-----	4
§78-24-9 Utah Code Annotated 1953-----	8