

1940

# Robert B. Swaner v. Union Mortgage Company : Brief of Appellant

Utah Supreme Court

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# In the Supreme Court Of the State of Utah

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ROBERT B. SWANER, Plaintiff and Respondent, vs. UNION MORTGAGE COMPANY, a corporation, Defendant and Appellant.	}	No. 6234
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## APPELLANT'S BRIEF

This is an appeal from a judgment rendered against appellant and in favor of plaintiff, and the facts over which the litigation resulting in such appeal arose are contained in the following:

## STATEMENT

The plaintiff and respondent, Robert B. Swaner, is a young man 22 years of age venturing into the contracting and building field. His experience consists of remodeling and building some eight or nine houses, and the defendant and appellant is a corporation engaged, among other things, in financing building loans and securing Federal Housing Administration insurance on such loans.

In the month of July, 1938 Swaner applied to defendant for Federal Housing Administration insurance

commitments upon a loan for \$4,000.00, hereinafter referred to as the 10th Avenue property, and asked the defendant to provide for appraisals, credit reports, initial service charges, recording fees, abstracting and fire insurance, in order that such application would in all respects meet the terms and conditions and comply with the rules and regulations of said Federal Housing Administration. Thereafter, on or about the 20th of July, 1938 the Federal Housing Administration approved such loan, subject to the qualification that George B. Swaner, father of the plaintiff, should be a co-signer on the note and mortgage evidencing and insuring the payment of such loan, and the note and mortgage duly secured as requested were executed and delivered on the 22nd day of July, 1938.

Thereafter, Swaner began work on the property described in such mortgage and the defendant, in compliance with the terms and conditions of its contract, advanced money upon the order of the plaintiff to material men and laborers as such improvements proceeded, which were approved by the Federal Housing Administration, until the advancements had approximated \$2,800.00.

On or about September 15, 1938 Swaner made application to the defendant to obtain three additional Federal Housing Administration loans for \$3,000.00 each. Each loan was to be evidenced by the note of the plaintiff and be secured by a mortgage on the property described by plaintiff in his application. Immediately defendant and appellant presented such applications to the F. H. A. people and, at plaintiff's request, made advancements and expenditures in his behalf. On November 6, 1938, as the

result of its efforts in such behalf, the Federal Housing Administration approved one loan upon the property described in plaintiff's complaint (see abstract, page 2) and hereinafter referred to as the 16th East property, conditioned that George B. Swaner and Charlotte L. Swaner, father and mother of the plaintiff, should become co-signers thereon; and on the 11th day of November, 1938 the note and mortgage so required were made and executed under the terms and conditions required by the Federal Housing Administration, among which were that the construction should be according to F. H. A. requirements and should pass inspection by the Federal Housing Administration. In addition, at the time said application was made, the defendant was required to and did make certain expenditures in behalf of plaintiff and was required to and did carry insurance upon the improvements upon the property.

Shortly after the note and mortgage last above described were made and executed and before any work or improvements were made upon such 16th East property by plaintiff, defendant was advised that plaintiff was failing to comply with the terms and conditions of the Federal Housing Administration rules and regulations in that he was not keeping the property referred to in the note and mortgage of July 22, 1938 the 10th avenue property free from debt, except for the mortgage above referred to, and that he was failing to keep the property free from claims and that he hadn't paid accruing bills thereon, and that several material men and mechanics had already filed liens against such property; that he was failing to pay his wages and that complaint had

been made to the Industrial Commission of Utah by laborers who had not been paid. That thereupon defendant advised plaintiff of the circumstances and plaintiff immediately informed defendant that he would at once put the first above described loan back into condition so that it might be finally approved by the Federal Housing Administration. As the result of such representation, this defendant made additional advances on the construction of the 10th Avenue property, the last advancement of which occurred on the 23rd of December, 1938. Plaintiff, however, failed to keep his agreement, and there was much difficulty encountered with respect to the first loan and this defendant found that plaintiff was a bad credit risk, and it became desirable to discontinue the relationship.

Sometime prior to December, 1938 plaintiff began construction under the mortgage dated November 14, 1938. In the meantime, at the request of plaintiff, defendant had expended in behalf of plaintiff on such mortgage and Federal Housing Administration commitment 16th East property the appraisal fee of \$10.00, the credit report of \$6.00, a recording fee of \$7.10, an abstract fee of \$5.00, and had placed fire insurance on the property under the terms of the Federal Housing Administration commitment, with the loss payable to defendant and its assigns as its interest appeared, and had paid therefor the sum of \$21.00.

When defendant found that plaintiff was not complying with his agreement on the transaction designated as the 10th Avenue property, it indicated to the plaintiff that it was no longer interested in doing business with the

plaintiff. The plaintiff made demands upon defendant and appellant for advancements for expenditures incurred by him with respect to the property described as the 16th East property.

That on or about the time the mortgage of November 14, 1938, the 16th East property, was signed and executed, defendant agreed with plaintiff that advancement would be made approved Federal Housing Administration inspection, as follows: 10% when the first floor joists were on, 15% when the roof was done, \$20.00 when the house was ready for plastering, 25% when it was ready for decoration, and the balance when it had passed the final F. H. A. inspection.

During the period between the time when defendant had called plaintiff's attention to the fact that he was not complying with the terms of the F. H. A. on the 10th Avenue property and the 21st of December, 1938, plaintiff made demand upon defendant for advancements on both properties. With respect to the 16th East property, over which the present litigation arises, the defendant and appellant answered that there had been no F. H. A. approval sufficient to justify making such advancements. Plaintiff persisted and finally an evidence of inspection by the F. H. A., Exhibit No. "1," was received by defendant and a copy of Exhibit "3" was placed upon the property and another sent to this defendant. Appellant refused to make advancements further, and thereupon the plaintiff Swaner demanded that the mortgages on the 16th East property be released, and to this demand defendant and appellant consented and agreed, insisting, however, that it should be re-imbursed for the

expenditures it had made for recording, inspection, service and insurance. Plaintiff refused to make these payments or any part thereof and brought this action for cancellation of the mortgages and for certain damages, including \$2,000.00 for personal humiliation, embarrassment and mental distress, \$10.00 for demurrage charges, \$40.00 for discounts unrealized, \$250.00 for damage to the building from the elements, and \$200.00 attorney's fees. The case was heard by a jury which, acting in an advisory capacity, answered ten interrogatories propounded by the trial judge and rendered an advisory verdict granting cancellation of the mortgage and certain damages, amounting to \$25.00 for loss of value due to the elements, \$40.00 for unrealized discounts, \$10.00 for demurrage charges and \$200.00 attorney's fees.

### ASSIGNMENT OF ERRORS

Supplemental assignments of error have been filed and served as follows:

12. The Court committed error prejudicial to appellant when he sustained plaintiff's objection to the following question: "You didn't pay those expenses?" (Tr. 100.)

13. The Court committed error prejudicial to the defendant and appellant when it found, as it did, in paragraph 6 of its findings of fact, that plaintiff thereafter demanded of the defendant that it release the said mortgages of record and surrender to the plaintiff the said promissory note "which the defendant likewise refused to do" for the reason that there is no evidence in the record to justify such finding. (Tr. 56.)



## ARGUMENT

Heretofore appellant has assigned errors committed by the Court during the trial of these proceedings, and for the convenience of the Court this argument will be divided first into a discussion of the facts, and second, a discussion of the law, and thus all of its assignments of error will be considered.

The Court has found that the defendant below, appellant here, had refused to release the mortgage on the property referred to as the 16th East property, which are the only mortgages with which we are concerned directly in this action. (See abstract, page 20, particularly findings six and ten.) It is the contention of the appellant that no such testimony will be found in the record. The amended answer of appellant (abstract page 11) contains a paragraph numbered 7 which reads as follows:

“Upon receipt of such notification by defendant, plaintiff demanded the release of the mortgage described in plaintiff’s complaint. Upon such demand being made upon it, this defendant consented that such release of mortgage be made, and informed the plaintiff that upon payment by him to it of the expenses and outlay made by it on his behalf, in connection with such loan, that said loan would be immediately released.”

Reference to plaintiff’s answer to defendant’s counterclaim shows that in making such answer the plaintiff set forth the following: (Abstract page 15.)

“Answering paragraph 7 plaintiff admits that he demanded the release of the mortgage described in plaintiff’s complaint and that the defendant refused to release said mortgage, except



upon condition that the plaintiff pay to the defendant certain alleged costs and expenses claimed by the defendant to have been incurred by it in connection with said loan, and in this connection plaintiff denies that the defendant was entitled to any such payment of costs and expenses, as a condition for the release of said mortgage.”

The testimony of the plaintiff at page 30 of the abstract shows the following upon cross examination of the plaintiff:

Question: Now at the time you made demand for the release of this mortgage, the defendant told you that it would release immediately if you would pay certain expenses it had incurred, didn't it?

Answer: Yes.

It is true that there are certain conclusions of this witness at various places in the record, but at no place is there a denial of the fact that the defendant at all times stood ready to release such mortgages upon payment by the plaintiff to the defendant of the costs and expenses which it had incurred in his behalf, and it is undisputed in the record that the defendant was perfectly willing to release the plaintiff from the contract entered into on November 14, 1938, and that it would discharge the mortgages upon being made whole on its expenditures in his behalf. Upon this question, it would seem that a lengthy discussion would not be needed because the record bears out the contention of the defendant and appellant without dispute, and the good faith of the appellant is evidenced in its willingness expressed by it to release upon getting back its actual outlay. And what were the expenses which had been incurred by it in behalf of the plaintiff:

Recording, abstract fees, Federal Housing Administration fees and fire insurance. It is true that the Court struck out of appellant's pleading the items above referred to and would allow no proof on the subject, but this has been assigned as error. Appellant feels that the Court was in error in striking this portion of its pleading for the reason that these expenditures were made by defendant at the request of plaintiff and for plaintiff's benefit in conformity with the rules and regulations of the Federal Housing Administration, and no commitment could be secured from said administration without these expenditures or agreement to make them when called upon. The mortgage had to be recorded, the abstract of title had to be prepared, and the Federal Housing Administration appraisal fees had to be paid; and certainly, after the improvements were made upon the property, insurance had to be carried thereon.

Some question was raised that no tender of the insurance policy had been made to plaintiff and hence no liability. Of course this must immediately appear to be without foundation, because the policy was issued and plaintiff knew it. The policy was made to the mortgagor for the benefit of the mortgagee as its interest appeared, and it must be manifest that when the mortgagee had furnished no money upon the mortgage its interest would be nothing, and if a fire had occurred the mortgagor would have been the sole beneficiary. Why, then, should not the mortgagor pay for the insurance policy which was made entirely for his benefit and which would protect him at all times from its issue and even during the trial of this cause? The mortgagee was in absolute

good faith in asking for the return of the money expended by it for the benefit of the plaintiff, and the Court's refusal to allow proof of such obligation and his action in striking that portion of the defendant's answer and counterclaim was prejudicial in the extreme to defendant.

Appellant feels that at no time during its relations with the plaintiff in connection with the 16th East mortgage was there ever a compliance by the plaintiff with the rules and regulations of the Federal Housing Administration and with the agreement entered into by the plaintiff and defendant which would entitle the plaintiff to any advancements whatever. It is alleged by appellant and testified to again and again by the plaintiff that his loan and any advancements were to be subject to the rules and regulations of the Federal Housing Administration and subject to inspections made by that institution. The record shows (see plaintiff's complaint, abstract page 2 and his testimony, abstract page 27) that the plaintiff was to receive money, "10% when the first floor joists were on, 15% when the roof was completed \* \* \* ."

An inspection was made by the Federal Housing Administration on or about the 21st of December, 1938 and a record of such inspection was made and sent to appellant (see Exhibit "1") and a photostatic copy of such exhibit is made a part of this brief. A careful examination of the exhibit will show that there was an objection to the concrete which never yet has been approved, at least no evidence indicates such approval, that certain portions of the construction were approved but it will

be noted that the floor and other construction above the foundation is specifically marked as unacceptable, though indicated as partially complete or in progress.

At the same time that this inspection was made, there appears to have been a piece of paper left at the building which is marked Exhibit "3". A photostatic cut of that document is also a part of this brief, and an examination of the document will show that that refers to exhibit 1 which sets the defects and indicates just what is required and expressly shows that approval is subject to the correction of the defective work, and there is absolutely no other testimony in the record which shows that then or at any time since has the F. H. A. ever approved that defective work. It is true that plaintiff says the floor was completed, but it is submitted that such statement is a self-serving declaration and can mean nothing when a strict compliance on his part would be required to entitle him to any advancement under the contract between himself and appellant.

Edward O. Anderson, a witness on behalf of the defendant, was called and qualified himself as Chief Architectural Supervisor in charge of the documents, records and files of the F. H. A. corporation, and he recognized the two exhibits herein referred to. Exhibit "1" is dated the same day that Exhibit "3" is dated, and it is clear that Exhibit "3" is but a documentary evidence that on that day a certain inspection was made which is clearly evidenced by Exhibit "1," and it is inconceivable that Exhibit "3" would have the effect of more widely approving the work done on the property than Exhibit "1" which carries the demand for the correction of de-

fective work, and on which the F. H. A. would hold appellant on its obligation to provide properly constructed security.

It is submitted that with the inspection evidenced by Exhibits "1" and "3," no such compliance with the requirements of the contract between plaintiff and appellant had been had as would entitle plaintiff to an advancement of money thereunder.

The question of the \$25.00 general damages which was allowed to stand by the Court, after motion for new trial had been made and presented, is in appellant's opinion entirely without foundation or justification. The only evidence supporting it in any sense is the testimony of the plaintiff himself, and the wild judgments of the witness A. J. Dean, who by his own testimony is a cement man and is certainly not qualified to make judgments of the type he was called upon to testify to. Witness his testimony about the rusty nails (abstract page 36) and compare that testimony with the facts presented in the testimony of O. C. Nielson (abstract page 45) and see Exhibit "5," and then determine what reliance could be put on even a guess by such witness. It is submitted that no proof of any type worthy of the name was submitted to substantiate the \$25.00 damage, and the judgment of the experts long in the building business, Buehner and Nielson, clearly demonstrates that the building had not suffered at all. In fact, careful reading of their testimony will indicate that the drying out process that the building was subjected to was really an advantage rather than a detriment. There is no evidence upon which findings 6, 7 and 10 can be justified.

One of the novel features presented in this case was the allowance by the Court of \$200.00 attorney's fees for the bringing of this action. The general rule is that no recovery can be had as damages for costs and expenses of litigation or expenditure of counsel fees, unless special provision is made for such allowance (a) by statute, (b) by contract, or (c) as exemplary damages growing out of wrongful and malicious acts and in some cases out of wanton or malicious injury or gross negligence or fraud. It is the belief of the appellant that none of these prerequisites are to be found in the case at bar.

In 29 Fed. 2nd 78, the Court says:

“No right of action for damages exists at common law for failure to satisfy mortgage or to release or discharge a lien or other claim against property.”

The State of Utah has not been called upon to pass on this question directly, but it does have a statute, Section 78-3-8, Revised Statutes of Utah, 1933, with reference to the release of mortgages, which reads as follows:

“If the mortgagee fails to discharge or release any mortgage after the same has been fully satisfied, he shall be liable to the mortgagor for double the damages resulting from such failure. Or the mortgagor may bring an action against the mortgagee to compel the discharge or release of the mortgage after the same has been satisfied; and the judgment of the Court must be that the mortgagee discharge or release the mortgage and pay the mortgagor the costs of suit, and all damages resulting from such failure.”

The above quotation is the only expression in the Utah Statutes with respect to attorney's fees in connection with mortgages.

An early Utah decision held such a penalty statute unconstitutional.

Openshaw vs. Haflin, 68 Pac. 138, 24 Utah 426.

In Utah the question of attorney's fees as damages has been before the Court but rarely, and for the most part these pronouncements grew out of attachment suits. While it cannot be said that such cases are directly in point, yet it does appear to appellant that the expression of the Court does indicate clearly that unless attorney's fees are provided for by statute, not only in attachment cases but in others, this Court is rather definitely on record against it.

St. Joseph Stock Yards Co. vs. Love, et al, 195 Pac. 305, 57 Utah 450 (see especially pages 463-465) wherein the Court says:

“We do not wish to be understood as holding, or even as intimating, that in a case where the whole defense is directed against the attachment and to show that the same was wrongful, as was the case in Whitney vs. Brownell, supra, and in similar cases, attorney's fees may not be allowed, but what we contend for is that where there is no motion assailing the attachment or no plea in abatement, as in Missouri, and a trial upon the issues presented by the pleadings results in favor of the defendant, *then the rule which is applicable to all cases prevails, namely, that, unless there is a statute expressly authorizing the allowance of attorney's fees, none can be awarded by the Court.*”

“There is, therefore, no reason why Courts should depart from the salutary rule which authorizes the allowance of costs and expenses that



are provided by the usual so-called cost statutes. In addition to that, no costs should be allowed except when expressly authorized by statute. The Courts of this state are always open to all for the redress of grievances and the protection of legal rights, and in our judgment they should refrain from allowing the imposition of costs and expenses upon the losing party except such as are provided for by statute and such as by the consensus of the opinions of the Courts by long and uniform usage have been allowed in certain cases as necessary for the protection of legal rights. In our judgment such is not the case here.”

(Our italics.)

The text books and encyclopedias have considered the question of attorney’s fees and expenses of litigation as damages, and, except when the items fall within the subdivisions above referred to, are unanimous in disallowing such claims.

17 C. J. 807, Section 133 lays down the rule as follows:

“Expenses of Litigation and Attorneys’ Fees.  
(a) In General. Apart from the sums allowable and taxed as costs, there can, as a general rule, be no recovery as damages of the costs and expenses of litigation, or expenditures for counsel fees. In cases of civil injury or breach of contract, in which there is no fraud, willful negligence, or malice, the Courts have considered that an award of the costs in the action is sufficient to cover expenses of litigation and make no allowance for time, indirect loss, and annoyance.

“By statute in some jurisdictions provision is made for the allowance of the expenses of litigation as damages in certain cases. “Contractual provisions. Expenditures made for attorney’s

fees in an action based on a contract containing a stipulation for such fees are in the nature of special damages incidental to the breach of the contract, which, according to the terms of the contract, are to be compensated for in addition to a recovery of the principal sum due.”

Sedgwick on Damages, 9th Edition, Section 299, page 463, announces the rule as follows:

“We have seen that in order to recover complete compensation, the plaintiff should, in case he is successful, be allowed the expenses of litigation. *Nevertheless, the general rule is that counsel fees are not recoverable as damages.* The law awards to the successful party his taxable costs, but the fees which he pays to counselors are not taken into consideration. (Citing cases.) In general the law considers the taxed costs as the only damages which a party sustains by the defense of a suit against him and these he recovers by judgment in his favor.”

Section 233 of the same volume on page 466 is as follows:

“ \* \* \* It is, however, firmly established that counsel fees cannot be included in compensatory damages, at least where there was no malice or oppression.” (Citing many cases.)

The same work, section 234, page 470, reads:  
“ \* \* \* And accordingly, by the better opinion, no inquiry into counsel fees should be allowed, even in those actions of tort in which the jury may give exemplary damages.”

(Our Italics.)

In American Jurisprudence, Volume 15, Section 154, page 550, the rule is laid down to the same effect.

There can be no question but that exemplary damages cannot be claimed in this action, because it is neither pleaded nor proved.

Rugg vs. Tolman, 39 Utah 295, 117 Pac. 54.

Falkenberg vs. Neff, 72 Utah 258, 264 Pac. 1008.

The Supreme Court of Oklahoma considered the question here presented, and in Pittsburg M. & Investment Company vs. Cook, 1 Pac. 2nd 665 says:

“The remedy and measure of damages, as provided by Section 6242, C. O. S. 1921, for failure to release a mortgage is exclusive. Damages thereby provided, cannot be recovered, nor can recovery be had when provisions of the statute have not been complied with.”

Morrill vs. Title Guaranty Company, 94 Wash. 258, 163 Pac. 733.

Stapley vs. Rogers, 25 Ariz. 308, 216 Pac. 1072, in the course of an opinion disallowing attorney's fees the Court says:

“It is difficult to determine upon what theory the Court entered judgment for \$75.00 attorney's fees. The item is not taxed as costs and there is no allegation in the answer upon which to base it nor is there any evidence to support such a charge. We know of no rule nor of any statute that would authorize the allowance of attorney's fees to the winning party to be taxed against the loser. \* \* \* Since no law nor authority exists that would authorize the entry of judgment for attorney's fees, it was error for the Court to enter such a judgment.”

Scurich vs. Ryan (California) 113 Pac. 123 is another attorney's fee case, and in the course of the opinion is found the following: “By con-

ceding that he is entitled to a judgment, and leaving out attorney's fees, which are not a proper element of damages, (Miller vs. Kehoe, 107 Cal. 340, 40 Pac. 485; Sanger vs. Ryan, 122 Cal. 52, 54 Pac. 522) it must be held that the verdict is excessive."

Boob vs. Hall, (California) 40 Pac. 117, is a case wherein an attorney's fee was attempted in the foreclosure of a mortgage. There was no provision for attorney's fees in the contract, and in considering an assignment of errors based upon the allowance of \$400.00 for counsel services the Court said:

"Neither the prayer in the complaint for its allowance nor the averment of the amount which would be reasonable can supply the necessity of a direct averment that an attorney's fee had been agreed to be paid by the mortgagor. The motion to dismiss the appeal is denied, and the cause is remanded to the superior Court, with directions to modify the judgment by excluding therefrom the amount included therein for attorney's fees, and, when so modified, the judgment will stand affirmed."

Avalon Construction Corporation vs. Kirch Holding Company (N. Y.) 175 N. E. 651. In the course of the opinion, is found the following: "Another item occurring in the bill of expenses occasioned to defendant is the item for \$3,000.00 for legal services. This item chiefly consists of charges made or to be made by defendant's own attorney for services in conducting this litigation. The legal charges which the plaintiff must pay to the defendant in this action, if any, will be comprehended in defendant's bill of costs. There is no basis for including them in the damages which the defendant may recover. Other items appearing in the expense account may or may not be recovered."

A most enlightening discussion of the subject in hand is found in the case of *J. Abraham Guay, Executor, vs. Brotherhood Building Association*, (New Hampshire) 177 Atl. 409. This was an action to have the stockholders of a certain domestic corporation adjudged liable for its note given to plaintiff's testatrix. All of the questions, except that of damages recoverable in recoupment because of premature foreclosure by the testatrix of the mortgage securing the note, were disposed of in a former opinion. The case was sent back to the master who made two further reports in accordance with which the Court entered judgment, and in the course of its opinion is found the following discussion with respect to attorney's fees:

“The second exception is to the refusal of the master to allow as damages the counsel fees incurred by the defendants in maintaining their rights against the premature foreclosure by the plaintiff's testatrix. It is not enough to say that the foreclosure was wrongful, illegal, or tortious. Ordinarily, one suffering from such a wrong cannot recover the counsel fees incurred in resistance of it, but will be limited to the attorney fee allowed by statute to be taxed as costs. \* \* \*

“Counsel fees other than statutory costs have been allowed under certain classifications. They include:

“(1) Cases of enforcement of judicial authority, as where misconduct of a party amounting to contempt of court has caused the opposing party to incur counsel fees (*Barber vs. George R. Jones Shoe Co.*, 80 N. H. 507, 511, 512, 120 A. 80), or where a person retains possession of property after a judicial determination of the wrongful character of his possession, thus forcing the party



wronged to the expense of further proceedings to recover possession or otherwise enforce his rights. Even in the second proceeding to enforce rights judicially declared in a prior action, the wronged party is not allowed anything for counsel fees in the first litigation. His only right as to counsel fees in the earlier proceeding is to have the statutory costs taxed therein.

“(2) Counsel fees other than those permitted by statute may be allowed by the court as the price of terms. Thus they may be taxed against the applicant for a new trial in some cases as terms for the granting of the motion. And a party guilty of misconduct in consequence of which a mistrial is ordered may properly be required to pay counsel fees to the opposing party as the price of another trial.

“(3) Counsel fees may be allowed as damages in cases where there is contractual liability. Such liability may exist where the contract is to be interpreted as expressly providing for their payment, as in injunction bonds.”

Dahlstrom Metallic Door Co. vs. Evatt Const. Co. (Mass.) 152 N. E. 715.

“The contention of the contractor that it is entitled to be awarded counsel fees incurred cannot be sustained. It is a general rule that taxable costs recovered by the prevailing party are considered full compensation for the expense of conducting the litigation, even if such costs are in fact wholly inadequate. *Barnard vs. Poor*, 21 Pick, 378; *Guild vs. Guild*, 2 Metc. 229, *Henry vs. Davis*, 123 Mass. 345. Notwithstanding this general rule it has been held that there are certain exceptions. In *Inhabitants of Westfield vs. Mayo*, 122 Mass. 100, 23 Am. Rep. 292, an action of tort to recover the amount of a judgment paid by the

plaintiff to one who had sustained personal injuries on a highway which the plaintiff was bound to keep in repair, it was held that the defendant, having negligently created the obstruction in the way, and having been notified to defend the action, was liable to the plaintiff for the amount of the judgment, and also for the reasonable expenses of the suit including counsel fees. It was there said, at page 105:

Sears vs. Nahant, (Mass.) 102 N. E. 491. In this case the Court considered the question of attorney's fees and made several distinctions, but concluded that attorney's fees were not proper charges and sustained the ruling of the lower Court.

Fitzgerald vs. Heady, (Mass.) 113 N. E. 844.

Brown vs. Kidwell, (Kansas) 244 Pac. 236.

Spencer vs. Murphy, (Colo.) 41 Pac. 841.

Flanders vs. Tweed, 82 U. S. 450, 21 L. Ed. 203.

It clearly appears from the evidence introduced on the part of plaintiff that upon his failure to agree with appellant he demanded a discharge of his mortgages, and that at once appellant agreed that such discharge would come immediately upon payment to it of its costs and expenses, and appellant believes that in view of the fact that it was in good faith entitled to a return of the expenditure made by it on behalf of plaintiff that no damage in the nature of attorney's fees could properly be assessed against it, and that the trial Court was in error when it allowed any proof to be made as to attorney's fees in the light of the claims of appellant which were clearly made in good faith, and which appellant pleaded in its answer and which the court struck out, thereby prejudicing appellant.



Plaintiff has relied very extensively upon the case of Kelly vs. Narregang Investment Company, 41 S. Dak. 222, 170 N. W. 131, and this case seems to be the base from which has grown the consideration of attorney's fees in cases of the type of the one at bar.

The case of Mathieu vs. Boston, also a South Dakota case, found in 216 N. W. 361, and decided eleven years later than the Kelly case, considers the question of good faith on the part of the mortgagee in demanding further and additional compensation. This was an action brought by plaintiffs and appellants, as owners of certain lands mortgaged to secure a debt of \$8,000.00 to respondent. After certain payments had been made thereon, \$1,600.00 was tendered in full satisfaction of the mortgage, which was refused because the respondent believed that he was entitled to a sum in excess of \$1,800.00. At the trial, the Court instructed the jury that the section of the South Dakota statute providing for damages and penalties for failure to release a mortgage when full payment was made did not apply where the holder of the mortgage refused to discharge, relying in good faith, even though mistakenly, upon some supposed legal rights. In the Mathieu case the defendant believed he was entitled to more money. The Court held otherwise but, notwithstanding that fact, sustained the judgment of the lower Court, denying all damages, including attorney fees, and in the course of the opinion, referring to the section of the statute providing for penalties and damages for failure to release, says:

“The foregoing section is almost identical in language with subdivision 6 of Section 1735 of

the Civil Code of Dakota Territory, quoted by Justice Carland in *Kronebusch vs. Raumin*, 6 Dak. 243, 42 N. W. 656. Therein our territorial Supreme Court said: 'If, before he (the mortgagee) is satisfied of the correctness of the amount, a demand is made upon him for a discharge of the mortgage, and he refuses, and action is brought by the mortgagor for the penalty, we should hold that, if he could show that his refusal was in good faith, and made in the honest belief that the mortgage was not entitled to be discharged, he would not be liable to the penalty, as the refusal of the mortgagee or his representative, under subdivision 6 of our statute, must be intentional and willful in order to incur the penalty.'

"True, the foregoing quotation from *Kronebusch vs. Raumin*, supra, is mere dicta; but, in *Jones on Mortgages*, 7th ed. vol. 2, Section 991, the learned author states that, 'the mortgagee is not bound, upon tender of payment, to determine doubtful questions at his peril, and he is not generally held liable to the statutory penalty if his refusal is made in good faith and in the honest belief that he is not bound to accept the tender.'

"See also Section 982 of the Title, 'Mortgages,' 41 C. J. 819.

"It is urged by appellant that this construction of our statute calls for reading into it a proviso not contained within its language. This objection has heretofore been considered by the courts. The Supreme Court of Wisconsin, in *Schumacher vs. Falter*, 113 Wis. 563, 89 N. W. 485, in construing Section 2256 of the Revised Statutes of Wisconsin says: 'Although that section does not provide, in terms, that the failure to discharge must be a willful or malicious one, it is very evident that it was not enacted to punish honest mistakes. A statute in almost the iden-

tical language of our section has been construed many times by the Supreme Court of Michigan; and the substance of the decisions in that state is that where there is no intentional wrong in the refusal to discharge, but rather, a reliance in good faith upon some supposed legal right, the penalty will not be imposed, even though the supposed right may be found not to exist.' "

It is submitted that if the trial Court had not been imbued with the zeal of a crusader to award damages to the plaintiff and had been willing to listen to the testimony which appellant would have produced and had not stricken from its answer its allegations upon which such proof would have been admitted, the Court would have been presented with the same type of testimony of which the Court in the Mathieu case says:

"The merest reading of the testimony in the present case shows that the defendant, in refusing to discharge, was acting in the honest belief that his mortgage was still unpaid and under the advice of counsel."

See also *Parkes vs. Parker*, 57 Mich. 57, 23 N. W. 458.

*Haubert vs. Haworth*, 9 Phil. (Pa.) 123.

*American National Bank vs. Jordan*, 123 Okla. 165, 254 P. 706.

*First National Bank vs. Elam*, 126 Okla. 93, 258 Pac. 892.

*Myer vs. Hart*, 40 Mich. 517, 29 Am. R. 553.

Penalty under sec. 6369 for failure to release a mortgage should not be imposed for failure to release a mortgage which has been satisfied, where facts indicate a substantial controversy.

Harding, et ux, vs. Home Investment & Savings Company, 49 Idaho 64, 286 Pac. 920.

In the case of Smith vs. Colson, 31 Okla., 703, 123 Pac. 149, it is said:

“In an action by the mortgagor against a mortgagee to recover under Section 3057, Ind. Ter. Statute, for the mortgagee’s failure to acknowledge satisfaction of a mortgage as required by said statute, it is a competent defense for the mortgagee to show that there was a controversy between him and the mortgagor as to whether the mortgage debt had been paid, and upon substantial grounds and in good faith, he refused to satisfy the mortgage, believing that the mortgage debt or part thereof had not been paid, and that he is entitled to recover same; and where there is evidence tending to support this issue of defense, it was error for the Court to refuse an instruction thereon, correctly stating the law applicable to such issue.”

In the Colson case the Court cited with approval:

Burrows vs. Bangs, 34 Mich. 304.

Scott vs. Field, 75 Ala. 419.

Schumacher vs. Falter, 113 Wis. 563, 89 N. W. 485.

The Burrows case is particularly interesting because the opinion was written by Judge Cooley, who disposes of the question of damages and attorney’s fees as follows:

“But as there has been an honest difference of opinion between these parties regarding their rights, we do not think the defendant is subject to the statutory penalty for not discharging the mortgage.”

Continental Bank vs. Kowalsky, (Mich.) 225 N. W. 496 held that where a mortgagee refused tender of an amount due on a mortgage, did not act in bad faith or without an honest belief that the amount did not satisfy the lien, the penalty provided in Section 11745, Compiled Laws of 1915, did not apply.

See also Shelton vs. Wilson, 264 N. W. 854.

McQueen vs. First National Bank of Wetumpka, (Ala.) 160 So. 723.

In Stumph vs. Wheat Belt Building & Loan Ass'n of Pratt, 148 Kan. 25, 79 Pac. 2nd 896, the Court holds that a mortgagor, suing to compel a mortgagee to release a real estate mortgage, was not entitled as a matter of right or statute to a judgment for statutory penalty or for attorney's fees, notwithstanding that the debt secured was paid and the mortgage was subject to be released where there was a bona fide controversy between the parties as to whether the debt had in fact been paid, and in arriving at this conclusion in the course of its opinion the Court said:

“With reference to the cross appeal, whether the appellee was entitled to statutory damages and attorney's fees depended in large part on there being bona fide controversy between the parties. The trial Court held against the association but that did not mean there was no claim in good faith by it. The controversy grew out of a matter on which other Courts had decided both ways and on which this Court had not ruled. We think that under Parkhurst vs. National Bank, 53 Kan. 136, 35 Pac. 1116, the trial Court's ruling was correct.”

The Supreme Court of Oregon had occasion to pass upon the same question presented, and in the case of *Knudson vs. Knudson*, 275 Pac. 663, it was decided that a refusal to enter satisfaction of a mortgage did not create liability for \$100.00 in addition to actual damages under Oregon Law 9891, and at the same time laid down the rule, which seems to be universal in this line of cases, that a statute providing for such damages is a penal statute and is to be strictly construed.

Respondent is relying upon the statute of Utah above quoted to justify the judgment in his behalf for \$200.00 attorney's fees and has cited the *Kelly* case *supra* and the *Cocking* case in Montana in 213 Pac. 594, as justification for its position. As authority for its claim that any damage sustained may contain attorney's fees, we have always felt that mandamus was a little different type of procedure, and we are inclined to the belief that even the mandamus decision in Utah in the *Creer* case, 96 Utah 1, 80 Pac. 2nd 914, is distinguishable for that reason. It would take a hardy advocate, indeed, to justify any other decision than that which was rendered in the case of *Cornelius vs. United States Building & Loan Association*, 50 Idaho 1, 292 Pac. 243, one of the cases upon which respondent relies. This was the case involving usury, and of course included not only the possibility of damage through violation of the law of the State of Idaho with respect to the rate of interest, but also carried the question of damage for failure to release, and no question there is presented as to good faith in such refusal.

Appellant believes that at no time was the plaintiff justified in bringing the action which he brought, because appellant was always ready and willing to release the mortgages upon being made whole for its actual expenses, and an outstanding evidence of the unfairness of plaintiff's position is the fact that he was willing to accept the benefit secured to him through the insurance procured by appellant and yet unwilling to reimburse appellant for the premiums paid in his behalf, not to mention the other expenditures which have heretofore been recited, all of which were incurred at plaintiff's request.

Appellant therefore submits:

1. When respondent demanded release of his mortgages, there was no longer any obligation from appellant to him to advance him money, even if proper compliance with F. H. A. regulations had been had, and approval of construction to agreed degrees had and evidenced.

2. There is no damage shown to respondent supported by any substantial or responsible evidence.

3. Respondent here, plaintiff below, did not comply with his contract in any respect, and at no time was his construction at the 16th East house sufficiently advanced to entitle him to any advancements, and there was no F. H. A. inspection and approval which ever would have justified appellant in giving him any money under the alleged terms of the agreement between the parties.

4. Appellant believes that it was honestly entitled as a condition precedent to the release of mortgages to



demand and receive from respondent Swaner the money which it had expended in his behalf and for his benefit, and that the action of the trial Court in refusing to allow it to plead and prove such expenditures was highly prejudicial to it.

5. That prejudicial error having been committed against appellant by the trial Court in its rulings at the trial on the pleadings and on the admission of evidence, and in entering judgment against appellant and in favor of respondent and in refusing to grant appellant a new trial, the judgment should be reversed.

Respectfully submitted,

DAN B. SHIELDS,  
Attorney for Appellant.

## APPENDIX

FEDERAL HOUSING ADMINISTRATION

MEMORANDUM OF COMPLIANCE INSPECTION

Inspection of construction FHA Case No. 52-004372

J. L. O.

Ut

(City or town)

(State)

made on 12-21, 1938, and reveals that the work then completed—

Has not passed the 1st inspection.

Subject to correction and reinspection of—

will be more explicitly set forth in a Compliance Inspection Report, copy of which will shortly be mailed to applicant mortgagee.

Corrected items must be left uncovered and visible for reinspection and visible recorection, else the removal of covering and concealing materials may be required.

E. O. Anderson

By B H K, Inspector.

(Initials)

Chief Architectural Supervisor.

RE FOR FHA INSPECTOR:

This form shall be completed in duplicate. The original shall be posted conspicuously at the site of construction. Duplicate copy shall be forwarded to the Insuring Office with Compliance Inspection report.

16-4469

U. S. GOVERNMENT PRINTING OFFICE

FEDERAL HOUSING ADMINISTRATION  
COMPLIANCE INSPECTION REPORT

Swaner

Type of Inspection:

52-004372

(Serial number)

- ☐ First Required. ☐ Second Required. ☐ Third Required. ☒ Additional or Optional. ☐ Repair  
☒ Alternate First.

Property address E. Side of 16 E. N. of 17 South City Salt Lake State Utah

Name of contractor Owner

NOTE.—The term "approved drawings and specifications," used below means those drawings and specifications which approved by the Federal Housing Administration at the time Commitment for Insurance was issued in the case of the above application; together with subsequent changes approved by the Chief Underwriter.

WORK COMPLETED

× Indicates work entirely completed. √ Indicates work in progress or partially complete.

CROSS OUT WORK NOT REQUIRED

- |  |   |  |   |
|--|---|--|---|
| <input checked="" type="checkbox"/> Excavation               | <input type="checkbox"/> Heating (rough-in)       | <input type="checkbox"/> Floor finishing   | <input type="checkbox"/> Grading                  |
| <input checked="" type="checkbox"/> Footings                 | <input type="checkbox"/> Elec. wiring (rough-in)  | <input type="checkbox"/> Trim, doors, sash | <input type="checkbox"/> Walks                    |
| <input checked="" type="checkbox"/> Foundation, walls, piers | <input type="checkbox"/> Insulation               | <input type="checkbox"/> Weatherstrip      | <input type="checkbox"/> Driveway                 |
| <input type="checkbox"/> Backfill                            | <input type="checkbox"/> Septic tank              | <input type="checkbox"/> Hardware          | <input type="checkbox"/> Sodding                  |
| <input checked="" type="checkbox"/> Floor construction       | <input type="checkbox"/> Basement floor slab      | <input type="checkbox"/> Calking           | <input type="checkbox"/> Utilities installed and  |
| <input checked="" type="checkbox"/> Exterior walls           | <input type="checkbox"/> Lathing and plaster base | <input type="checkbox"/> Interior paint    | <input type="checkbox"/> proved by authorities    |
| <input type="checkbox"/> Roof construction                   | <input type="checkbox"/> Plumbing fixtures        | <input type="checkbox"/> Decorating        | <input type="checkbox"/> Utilities connected      |
| <input type="checkbox"/> Roofing in place                    | <input type="checkbox"/> Tile work                | <input type="checkbox"/> Elec. fixtures    | <input type="checkbox"/> Work satisfactorily comp |
| <input type="checkbox"/> Sheet metal                         | <input type="checkbox"/> Plastering               | <input type="checkbox"/> Exterior paint    | <input type="checkbox"/> and building is ready f  |
| <input type="checkbox"/> Partitions                          | <input type="checkbox"/> Heating fixtures         | <input type="checkbox"/> Screens           | <input type="checkbox"/> cupancy (attach two p    |
| <input type="checkbox"/> Plumbing (rough-in)                 |   | <input type="checkbox"/> Detached garage   | <input type="checkbox"/> graphic prints)          |

☐ None

INCOMPLETE WORK OR DEFECTIVE MATERIALS

(LIST ITEMS, IF ANY)

Concrete to be checked for freezing after it has had more time to set up.

How does this incomplete work or defective materials affect the cost estimate or rating of physical security?

☒ None

VARIATIONS FROM APPROVED DRAWINGS AND SPECIFICATIONS

(ALSO INCLUDE OMITTED ITEMS)

How do these variations affect the cost estimate or rating of physical security?

Have you ever inspected this property before, other than F. H. A. inspections? No State Utah  
and for whom

CERTIFICATION: I, the undersigned, have read Section 512 (a) of the National Housing Act, as amended, and do hereby certify that I have carefully inspected this property, that I have noted above all defective work and variations from approved drawings and specifications which have come to my attention, that to the best of my knowledge and belief the statements made in this report are correct, and that I have no personal interest, present or prospective, in the property, applicant, or proceeds of mortgage.

(Date) December 21, 1938

(Signed)  Inspector ☐ Staff. ☐ Fee. ☐ Per Diem

Examined this date.

(Date) December 22, 1938

Construction finally approved

(Date)

(Signed)

Chief Underwriter.

☐ Construction approved to date

☐ Construction not approved

☒ Construction approved to date subject to correction of defective work

☐ Additional inspection required

☐ Construction finally approved (Suggested date)

(Signed)

Chief Architectural Supervisor

2051. Compliance Inspection Report