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Tracy Collins Bank and Trust Company v. Richard H. Seiger, Connie Seiger, Jerry D. Timothy, Ann W. Timothy, Utah Title & Abstract Company, First Security State Bank, Salt Lake City Suburban Sanitary District No. 1, Transportation Safety Systems, Inc., Pacific States Cast Iron Pipe Co., Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * * * * * * * * * *

TRACY COLLINS BANK & TRUST COMPANY, a Utah corporation,

Plaintiff,

v.

RICHARD H. SEIGER and CONNIE SEIGER, his wife, JERRY D. TIMOTHY, and ANN W. TIMOTHY, his wife, UTAH TITLE & ABSTRACT COMPANY, a Utah corporation, FIRST SECURITY STATE BANK, a Utah corporation, SALT LAKE CITY SUBURBAN SANITARY DISTRICT NO. 1, TRANSPORTATION SAFETY SYSTEMS, INC., a Utah corporation, and PACIFIC STATES CAST IRON PIPE CO., INC., an Oregon corporation,

Defendants.

CASE NO. 14,125

* * * * * * * * * * * * *

BRIEF OF PLAINTIFFS-RESPONDENTS

* * * * * * * * * * * * *

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY,
THE HONORABLE ERNEST F. BALDWIN, JUDGE

* * * * * * * * * * * * *

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

* * * * * * * * * * * * * *

TRACY COLLINS BANK AND TRUST CO.,	)	
Plaintiff-Respondent	)	
v.	)	
FIRST SECURITY STATE BANK, and UTAH TITLE AND ABSTRACT CO., et al.,	)	CASE NO. 14,125
Defendants-Appellants.	)	

* * * * * * * * * * * * * *

BRIEF OF PLAINTIFF/RESPONDENT

TRACY COLLINS BANK AND TRUST CO.,

* * * * * * * * * * * * * *

STATEMENT OF THE NATURE OF THE CASE

This is a trust deed foreclosure action, wherein Plaintiff/Respondent Tracy Collins Bank and Trust Company, (herein referred to as "Plaintiff"), brought suit to foreclose a trust deed on property situate in Salt Lake County, State of Utah, and joined, among others, Appellants First Security State Bank (herein referred to as "First Security") and Utah Title and Abstract Company (herein referred to as "Utah Title") as Defendants. First Security, as Beneficiary, also prayed for foreclosure of its trust deed (of which Utah

Title is Trustee) against the same property. The question presented on appeal is whether Plaintiff is entitled to priority over the lien of First Security, as the Trial Court found, by virtue of the fact that Plaintiff's trust deed on the subject property was a valid and enforceable lien executed and recorded five months prior to the trust deed of First Security.

DISPOSITION IN THE LOWER COURT

The District Court, the Honorable Ernest F. Baldwin, Jr., presiding, found that Plaintiff's trust deed had priority over First Security's trust deed and awarded judgment of foreclosure giving Plaintiff the right to the first proceeds derived from the foreclosure sale, subject only to the claim of Salt Lake City Suburban Sanitary District No. 1.

RELIEF SOUGHT ON APPEAL

Plaintiff/Respondent seeks affirmance of the Trial Court's judgment that Plaintiff's lien has priority over the lien of First Security and an award of attornies' fees incurred in defense of this appeal.

STATEMENT OF FACTS

Plaintiff accepts Paragraphs 1 and 2 of Defendants'/Appellants' Statement of Facts. Plaintiff controverts Paragraphs 3 through 8 of Defendants'/Appellants' Statement of Facts,

the same violating the fundamental rule of appellate procedure that the facts are to be taken in the light most favorable to the lower court's decision; Defendants'/Appellants' facts are argumentative only and do not reflect the basis of the court's decision. Plaintiff offers the following proper Statement of Facts:

On December 13, 1972, Defendant Richard Seiger made and delivered to Plaintiff his promissory note in the sum of $55,974.70, the proceeds of which Plaintiff disbursed in payment for bicycles received by Seiger (R.258, Exhibit 3P). The face of said note shows that it was due on February 12, 1973, and that interest thereon accrued at the rate of nine percent (9%) per annum until maturity and twelve percent (12%) per annum thereafter. Defendant Richard Seiger defaulted in payment of said note (R.261), and, following negotiations between Plaintiff and Defendants Richard and Connie Seiger (represented by their attorney), said Defendants executed and delivered to Plaintiff their promissory note, dated March 14, 1973, in the amount of $50,000.00 (Exhibit 1P, R.259). As security for payment of said note, Defendants Richard and Connie Seiger contemporaneously executed and delivered to Plaintiff a trust deed, dated March 14, 1973, covering the property which is the subject of this action; said trust deed was recorded on March 16, 1973 (Exhibit 2P, R.259, 260).

Said promissory note and trust deed (Exhibits 1P and 2P) were given to induce Plaintiff to forbear from collection of the promissory note of December 13, 1972 (Exhibit 3P), which was then in default (R.261, 264). As further consideration, Plaintiff made several additional concessions to Defendants Seiger, i.e.: (a) that the proceeds of the loan would be placed in an "undisbursed ban control" account, without interest until June 1, 1973 (an extension of 108 days on the original note), (b) that Plaintiff would immediately release 25 bicycles held by it as security for payment of the original note, and that additional bicycles would be released in increments of 25 bicycles as sales thereof were made and payments therefor were paid to Plaintiff, (c) that Defendant Richard Seiger could locate and furnish a suitable warehouse, acceptable to the Plaintiff, for storage of bicycles (Exhibit 4P, R.284). Additionally, the faces of the promissory notes dated December 13, 1972 and March 14, 1973 (Exhibits 3P and 1P) show that the interest of twelve percent (12%) per annum being charged against the December 13, 1972 promissory note then in default was reduced to nine percent (9%) per annum.

Defendant Seiger defaulted in payment of the March 14, 1973 promissory note (Exhibit 1P) and at his request Plaintiff gave him several further extensions of time in which to pay said note (R.265,266). The note still being unpaid on May 10, 1974, funds were disbursed therefrom in payment of the December 13, 1972 note (Exhibit 3P) (R.266). The said note

(Exhibit 1P) remains unpaid and the balance due thereon, with interest from May 10, 1974 to April 3, 1975 is $50,349.41 (Exhibit 13P).

On August 24, 1974 Mr. and Mrs. Jerry D. Timothy, Defendant Seigers' successors in interest to the subject property, executed a promissory note in the amount of $40,000.00 to First Security, which note was secured by a trust deed on the subject property, executed by Mr. and Mrs. Timothy on August 24, 1974, and recorded August 28, 1974 (R.290, 291, Exhibits 9D and 10D). Mr. and Mrs. Timothy defaulted in payment of said note (R.292) and First Security foreclosed said trust deed as a part of the instant action. There is no evidence as to the date First Security disbursed funds under said promissory note.

ARGUMENT

In this action, Plaintiff foreclosed its trust deed as a mortgage. For the purposes of the following argument, Plaintiff has treated the terms "trust deed" and "mortgage" as being synonomous inasmuch as both are lien instruments affecting real property. The legal distinction between the two terms is not pertinent to the issues herein discussed.

POINT I

PLAINTIFF'S PROMISSORY NOTE AND TRUST DEED ARE SUPPORTED BY ADEQUATE CONSIDERATION TO ESTABLISH ITS PRIORITY OF MARCH 14, 1973.

The sufficiency and validity of the consideration given by Plaintiff for execution and delivery by Defendants Seiger of the March 14, 1973 promissory note and trust deed (Exhibits 1P and 2P) are established by any one of four independant alternatives: (A) The promissory note and trust deed were executed to secure a bona fide pre-existing liability; (B) the promissory note and trust deed were executed and delivered as an inducement to Plaintiff to forbear any action upon other delinquent debts of the Defendant Seiger; (C) Plaintiff relinquished several rights and obligations due it by the Defendant Seiger; and (D) the promissory note and trust deed were executed to secure future disbursements of funds, which disbursements were in fact made.

Each of the above alternatives is established by the evidence adduced at trial and each, standing alone, is sufficient to establish the validity of Plaintiff's promissory note and trust deed and its priority date of March 16, 1973; cumulatively, the alternatives compel an affirmance of the trial court's judgment. Each of the alternatives, and its legal significance is discussed as follows:

A. Pre-existing Debt as Consideration. The uncontradicted evidence in this case is that the trust deed of March 14, 1973 was given by the Defendants Seiger to secure payment of

an antecedent debt which was then in default, said antecedent debt being reflected by the $55,974.70 promissory note of December 13, 1972 (Exhibit 3P) and being further acknowledged by the $50,000.00 promissory note of March 14, 1973 (Exhibit 1P). It is clear that under both the statutory law and the case law of Utah a trust deed given to secure an antecedent debt is supported by adequate consideration.

The statutory expression of the law is found at Section 70A-3-408, Utah Code Annotated (1953, as amended), which provides:

> Want or failure of consideration is a defense . . . except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind. (emphasis added)

The official comment contained in the Uniform Commercial Code with respect to this section states the purpose thereof as follows:

> 2. The "except" clause is intended to remove the difficulties which have arisen where a note or a draft . . . is given as payment or as security for a debt already owed by the party giving it, or by a third person. The provision is intended to change the result of decisions holding that where no extension of time or other concession is given by the creditor the new obligation fails for lack of legal consideration . . .

The doctrine is similarly expressed in the case law. In Abraham v. Abraham, 15 U.2d 430, 394 P.2d 385 (1964), this Court considered the effect of a first mortgage and underlying note given to the mortgagee in consideration of

an antecedent indebtedness and for a further advancement of cash. In concluding that the mortgage and underlying note were supported by adequate consideration, thereby giving priority over a second mortgage, the Court quoted from 59 C.J.S. Mortgages §95a, P.135, as follows:

> Where a note and mortgage to secure it are executed contemporaneously and as part of the same transaction, the consideration sustaining the note will sustain the mortgage.

The Court further quoted from Glenn on Mortgages, Volume 3, Section 383.2, P.1566 as follows:

> If, then, the debtor secures his antecedent indebtedness by executing a negotiable note and securing it by mortgage, . . . the creditor holds the security free from latent equities, for he is a bona fide purchaser within the law of commercial paper. (15 U.2d 431, 394 P.2d 386).

To the same effect, see Bowman v. White, 13 U.2d 173, 369 P.2d 962 (1962); McCallister v. Farmers Development Company, 55 P.2d 657 (N.M. 1936); State Bank of Down v. Criswell, 124 P.2d 500 (Kan. 1942); Campbell v. Bagley, 276 F.2d 28, 33 (5th Cir., 1960).

This Court, in the Abraham case, supra., quoted favorably from 59 C.J.S. Mortgages. Section 91 of 59 C.J.S. Mortgages summarizes the state of the law as follows:

> A pre-existing debt or liability is a sufficient consideration to support a mortgage given as security therefor, and there need not be a new consideration at the time of the making of the mortgage. (Citing cases)

The uncontroverted evidence in the instant case clearly established that the Defendant Richard Seiger was previously

indebted to Plaintiff in the sum of approximately $56,000.00 prior to execution of the March 14, 1973 promissory note. (R.261, 262, 263, 266, 279). The note and trust deed of March 14, 1973 (Exhibits 1P and 2P) were clearly given to secure that pre-existing liability. As such, they were adequately supported by valid consideration on the date of recording and Plaintiff's priority date as to its lien on the subject property must be determined to be March 16, 1973, and prior to the lien of First Security, and the trial court so found at Paragraph (4)(a) of its Findings of Fact where it stated:

> As evidence of and as security for payment of the pre-existing debt represented by the Promissory Note dated December 13, 1972, which debt was due and payable on February 12, 1973, and was in default on and before March 14, 1973. (R.197)

B. Forbearance as Consideration. The Courts in many jurisdictions have held that a creditor's forbearance to sue upon a past due obligation is sufficient consideration for a new note and trust deed securing a promise to pay. The applicable law is well stated by the authors of 59 C.J.S. Mortgages, §92, as follows:

> . . . [T]he forbearance of a creditor to enforce a payment of a debt or claim by legal proceedings or his extension of the time for payment of the debt or interest thereon may constitute a sufficient consideration for a mortgage. . . .

The rational of the Courts in establishing the foregoing principle is clear. By forbearing any action on delinquent

debts, the creditor detrimentally extends further credit to an already proven poor risk, and the debtor is benefited by that extension as well as by saving the forfeiture of any security given for the prior debt. In In re Las Colinas, Inc., 294 F.Supp. 582, 596 (D.P.R. 1968), the federal district court stated the appropriate law as follows:

> A contract without consideration is wholly void and nonexistent and has no effect whatsoever (Citing cases). But the fact that no money or property was received by the debtor from the creditor at the time an obligation is subscribed by the former, does not preclude the existence of consideration in said note. (Citing cases) Any detriment to the opposite party is a valuable consideration. (Citing cases) As a matter of law, where a promissory note is subscribed by a debtor in substitution for other prior obligations, the fact that no money or property is received from the creditor by virtue of the obligation thus subscribed, does not preclude the existence of consideration in said note, and a debtor can not avoid liability by claiming that no benefit was received. (Citing cases)

Similar results have been reached by the Courts in Oil Tool Exchange, Inc. v. Schuh, 153 P.2d 976, 980 (Calif. 1944); Havel v. Havel, 66 P.2d 399 (Kan. 1937); Hahn v. Hahn, 266 P.2d 519 (Calif. 1954); and Russell v. Russell, 120 So.2d 733, 738 (Ala. 1960). The Oklahoma Supreme Court was faced with a factual issue substantially similar to the instant facts in A & S Distributing Company v. Nall-Tucker, Inc., 428 P.2d 254 (Okla. 1967) where several creditors contested the validity of a trust deed held by a senior creditor. The Plaintiff had obtained a trust deed from the debtor in November, 1961, duplicating its security of a chattel mortgage.

In December, 1961, Defendant obtained a note and trust deed on the same property. Subsequently, in October, 1962, Plaintiff renewed the 1961 note, which note had been secured by the trust deed of November, 1961. The Oklahoma Court held that the November, 1961, trust deed was security for a pre-existing debt and that the credit extension in 1962 was a forbearance by Plaintiff of action on that pre-existing debt. Accordingly, the Court determined that Plaintiff's notes and trust deed were supported by sufficient consideration and that Plaintiff's lien was prior to and superior to those held by Defendant.

In the instant case, the uncontradicted evidence shows that the Seiger trust deed to Plaintiff was executed and delivered as an inducement to Plaintiff to forbear bringing any action on the delinquent note of December 13, 1972. (R.261, R.264, R.284). Plaintiff's witness specifically testified as follows:

> [T]he $55,000.00 note -- was at that point past due and we -- our bank had gotten together with Mr. Seiger and his counsel and indicated that we wanted our money and the $50,000.00 note was taken to induce the bank to forbear against closing on that Note at that point. (R.261)

Clearly, Plaintiff's forbearance to collect the debt which was then past due and in default was, standing alone, adequate consideration for the execution and delivery of the note and trust deed of March 14, 1973, and the trial court so found at Paragraphs (4)(b), (c) and (d) of its Findings of Fact

wherein it stated:

> [The note and trust deed were given]
>
> (b) In consideration of Plaintiff's extension of time in which to pay the debt evidenced by the Promissory Note dated December 13, 1972, from February 12, 1973, to June 1, 1973 and thereafter.
>
> (c) As an inducement to plaintiff to forbear from collection of the debt evidenced by the Promissory Note dated December 13, 1972, which Note was in default after February 12, 1973, and was in default on March 14, 1973.
>
> (d) As additional security for payment of defendants Seiger's debts and as an inducement to plaintiff to forbear from collection of such debts and to extend the time for payment thereof. (R.197,198)

There being sufficient consideration, Plaintiff's March 16, 1973 priority date must be affirmed.

C. Relinquishment by Plaintiff of Rights and Obligations Due It. The uncontradicted evidence in this case further shows that in addition to the antecedent debt owed by Defendant Seiger and Plaintiff's forbearance to sue, Plaintiff relinquished several substantial rights. The relinquishment of these rights also constitutes sufficient consideration for the promissory note and trust deed of March 14, 1973 and the validity of Plaintiff's March 16, 1973 priority date. These additional rights are as follows:

Plaintiff reduced the interest on the antecedent debt from twelve percent (12%) per annum to nine percent (9%) per annum, as shown on the faces of the promissory notes (Exhibits 1P and 3P). Simple mathematics show that on the principal

amount now due of $46,511.51, the period from March 14, 1973 to trial on April 3, 1975, this reduction of interest saved Defendants Seiger and cost Plaintiff the sum of $2,860.52. Obviously, the execution of the new promissory note and trust deed operated as a substantial benefit to Defendants Seiger and a substantial detriment to Plaintiff.

Additionally, the faces of the two notes show that Plaintiff extended the due date of the original obligation from February 12, 1973 to June 1, 1973, an extension of 108 days (Exhibits 1P and 3P). Defendants Seiger had the use of the money for an additional 108 days without obligation to repay the same during said period. Thus a substantial benefit was conferred on Defendants Seiger to Plaintiff's detriment.

Plaintiff also authorized the immediate release of 25 bicycles, which it held as security for payment of the original note (Exhibit 4P, R. 264) in order that Defendant Seiger could show the same to potential customers and, hopefully, effect a sale thereof. Again, Plaintiff's action acted as a benefit to Defendants Seiger and a detriment to Plaintiff in that Plaintiff gave up physical custody of its collateral security.

Finally, Plaintiff permitted Defendant Seiger to place the remaining bicycles in which Plaintiff held a collateral security interest in a warehouse of his own choosing.

(Exhibit 4P, R.264). The record is silent as to the effect of Plaintiff's action but it must be assumed that such action was of substantial benefit to Defendants Seiger. If not, why would his counsel negotiate for such authorization?

Each of the foregoing benefits/detriments individually constitutes sufficient consideration for the promissory note and trust deed of March 14, 1973 under fundamental contract law on consideration. The black letter rule is stated in C.J.S. as follows:

> There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor. 17 C.J.S. Contracts, §74.

And this Court, in Allen v. Rose Park Pharmacy, 120 Utah 608, 237 P.2d 823 (1951) quoted Williston on Contracts, Revised Edition, Volume I, Section 103F:

> "[N]o briefer definition of sufficient consideration in a bilateral contract can be given then this: Mutual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void, are sufficient consideration for one another." 120 Utah 613, 237 P.2d 825.

And again, the authors of C.J.S. have related the forgoing rule in 59 C.J.S. Mortgages §90, as follows:

"The rule applicable to contracts generally that the adequacy of the consideration, as long as it is a valuable consideration, is immaterial in the absence of fraud . . . applies in the case of a mortgage. A mortgage will not be held invalid for want of consideration if it is supported by any consideration recognized by the law as sufficient to sustain a promise to pay. The consideration may be a benefit moving to the mortgagor, or may consist in a detriment to the mortgagee although there is no actual benefit to the mortgagor, but there must be some benefit to one party or some injury or detriment to the other. (Citing cases)

Clearly the benefits to the Defendants Seiger and the detriments to Plaintiff compel a determination that Plaintiff's promissory note and trust deed of March 14, 1973 were supported by valid consideration and, that consideration being effective as of the date of recordation, determination that Plaintiff's priority date is March 16, 1973 is compelled, and the trial court so found at Paragraphs (4)(e) through (j) of its Findings of Fact wherein it stated:

[The note and trust deed were given]

(e) In consideration of plaintiff's agreement that no funds would be dispersed thereunder prior to June 1, 1973, at which time all sums due and owing to plaintiff would be due and payable.

(f) In consideration of plaintiff's agreement that no interest would be charged thereon until the funds represented thereby were dispersed.

(g) In consideration of plaintiff's agreement to release twenty-five bicycles then held by it as security for pre-existing debts and to periodically release additional bicycles.

(h) In consideration of plaintiff's agreement to permit defendant Richard Seiger to locate and furnish

at his expense a suitable warehouse for storage of the bicycles held by plaintiff as security for payment of pre-existing debts due from defendants Seiger.

(i) In consideration of the reduction of interest from twelve percent (12%) per annum to nine percent (9%) per annum.

(j) Defendant Connie Seiger gave such Promissory Note and Trust Deed as an accomodation to plaintiff and to defendant Richard Seiger in addition to the foregoing considerations. (R.198)

D. Plaintiff's Disbursement of Funds as Consideration.

In addition to the consideration shown in sub-sections A, B, and C above, the disbursement of funds under the March 14, 1973 note constitutes substantial consideration and supports the trust deed given as security for payment thereof. As early as 1919, the Supreme Court of Virginia recognized the predominant and logical business policy of first obtaining security and then disbursing funds, wherein it stated:

> In the business world, nothing is more common than the execution of such securities [trust deeds], in contemplation of a loan.
>
> * * *
>
> As soon as the note is negotiated, the liability to take care of it arises, and the holder's right to the security attaches. C.D. Van Nostrand & Co., v. Virginia Zinc & Chemical Corp., 101 Southeast 65, 68 (Va. 1919). (emphasis added)

The Virginia court then found adequate consideration for a trust deed given as security for funds subsequently disbursed by the creditor. Neither the law nor the business practice has changed in the intervening 56 years and other courts have readily

followed this practical policy, for to do otherwise would wreak havoc in the credit industry. See for example Whiddon v. Forshee, 184 S.E. 2d 349 (Ga. 1971) and Strangi v. Wilson, 77 So. 2d 697 (Miss. 1955). In the Strangi case, the Mississippi court similarly held that the trust deed was supported by adequate consideration arising from Plaintiff's subsequent disbursements of funds which related back to the execution of the trust deed, validating it from its date of execution. Therefore, Plaintiff's claim was superior to that of subsequent creditors of Defendant.

In 1969, the Supreme Court of Maryland in Stack v. Marney, 248 A.2d 880, citing Nostrand, supra., with approval recognized 59 C.J.S. Mortgages, §89 as stating the "general rule." That section of C.J.S., which considers the time of transfer of funds as affecting the validity of the consideration for a trust deed, states:

> "The consideration need not pass at the time of the execution of the mortgage; that may be either a prior or subsequent matter . . . [C]onsideration subsequently furnished by the purchasers of the note will relate back and sustain the mortgage . . . ." (Citing cases, emphasis added)

By disbursing funds under the March 14, 1973 note on May 10, 1974, Plaintiff has provided consideration for the Seiger trust deed, and the trial court so found at Paragraph (4)(k) of its Findings and Fact wherein it stated:

> Plaintiff dispersed funds from the Promissory Note on May 10, 1974, in the amount of $48,323.51; said

> disbursement did not create the debt herein, since the underlying debt for which the Trust Deed was given had been in existence since December 13, 1972, and was in existence on March 14, 1973. (R.198)

That disbursement "relates back and sustains" the trust deed and thereby makes this Plaintiff's claim to the property superior to all others.

The trust deed in favor of Plaintiff Tracy-Collins Bank and Trust Company cannot be attacked for lack of consideration. By statutory law, Utah case law, and the overwhelming majority of case law in other jurisdictions, the trust deed may be sustained on any one of four separate bases: It secures a pre-existing debt; it was executed to induce Plaintiff to forbear action on a delinquent debt; Plaintiff suffered substantial economic and actual detriment to Defendant Seigers' benefit; and, funds were actually disbursed under the promissory note which said trust deed secured. Each of these bases constitutes sufficient consideration standing alone -- cumulatively, they constitute unquestionable consideration. Accordingly, the validity of Plaintiff's trust deed as of March 14, 1973 and its priority date as of the date of recording of March 16, 1973 must be affirmed.

Fundamental principles of Appellate procedure require this Court to affirm the trial court's Judgment unless clearly erroneous. This Court and others have consistently held under the provisions of Rule 72, Utah Rules of Civil

Procedure, and cases annotated thereunder, that the findings of the trial court will be affirmed if there is any competent evidence to support them. See Martin vs. Martin, 29 U.2d 413, 415, 510 P.2d 1102 (1973); Harper vs Tri-State Motors, Inc., 90 Utah 212, 222, 58 P.2d 18, rehearing denied 90 Utah 226, 63 P.2d 1056 (1936). The foregoing argument clearly demonstrates that the trial court had ample evidence before it to support its findings. Similarly, the foregoing argument clearly demonstrates that the trial court accurately applied the applicable law, the Court's Judgment must be affirmed.

POINT II

APPELLANT'S ARGUMENT FOR LIEN PRIORITY IGNORES THE FACT THAT THE TRUST DEED TO PLAINTIFF WAS EXECUTED FOR VALID CONSIDERATION.

Appellant's arguments center around the contention that the 1973 trust deed executed by the Defendants Seiger was not perfected until 1974, when funds were disbursed under the note executed contemporaneously with the trust deed. Appellant's argument is meritorious only if, as of March 14, 1974, no consideration supported the promissory note and trust deed. However, Plaintiff's discussion under Point I hereof, supra, amply shows that there was consideration given on March 14, 1973. Accordingly, Appellants' argument must fail.

Appellants concede that an antecedent debt may act as the indebtedness for a new note and mortgage (App. Brief p.17). As previously discussed, it cannot be questioned that the note of March 14, 1973 was given in recognition of the antecedent debt of the note of December 13, 1972. The evidence at trial clearly established, and the trial court so found, that the 1973 trust deed was given to Plaintiff in consideration of a pre-existing debt created by Defendant Richard Seiger's promissory note of December 13, 1972, which note was in default at the time of execution of the trust deed and promissory note of March 14, 1973. The trust deed was executed primarily as security for the overdue note in return for an extension of time in which to pay the debt, a reduction of interest, forbearance to sue, and other real and substantial consideration.

Appellants claim, however, that in spite of the foregoing well established facts and principles, Plaintiff's trust deed was not "perfected" until a bookkeeping entry in 1974 recorded the disbursement of funds under the 1973 note to cover the still unpaid amounts due under the original 1972 note. However, the arguments they advance to support this contention avoid the fact of the antecedent debt and other consideration.

Section 70A-3-408, Utah Code Annotated, (1953, as amended) specifically negates the requirement of consideration

where an instrument is given in payment of antecedent obligations. That section states:

> ". .[N]o consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind. (emphasis added)

Most of the Appellants' cases cited in support of their argument are cases in which no consideration for the mortgage existed when the mortgage was executed, and the mortgage instrument operated only to secure future advances. However, this is far from actuality and in direct contravention of the evidence before the trial court.

Appellant's cases discussing perfection of security agreements providing for optional future advances are grounded on two basic fact situations. In one, the mortgage secures no prior debt, and the mortgage is therefore not perfected until funds are actually disbursed, because no debt, obligation, or other consideration exists until then. This is logical, since no value is given or owing at the time of the execution of the mortgage. In the instant case, however, Defendants Seiger were already indebted to the Plaintiff for the amount of the note then due, $55,978.91 on March 16, 1973 (Exhibit 3P), and Plaintiff extended the time in which they were to pay said indebtedness, reduced the interest rate, and agreed to forbear from collection of the past due indebtedness, along with other sufficient consideration. Clearly, there

was substantial value given at the time of execution of the trust deed.

In the second type of case cited by Appellants, a debtor already in debt to several creditors, executes a mortgage on real property held by him in order to secure a small additional loan. At that point, the secured creditor buys the claims of the prior unsecured creditors and fore-closes on the mortgage. This is the source of the "Anaconda mortgage" mentioned by Appellant. In such cases, where a mortgage recites that future advances are also secured by the mortgage instrument, and an unscrupulous creditor has taken advantage of the debtor, the terms of the mortgage instrument should indeed be subject to close scrutiny. The cases are not, however, pertinent here. Plaintiff has not taken advantage of Defendants Seiger by making future advances inasmuch as the advances made are exactly as promised and disclosed to the Defendants.

Appellant's remaining citations of authorities regarding optional future advances and mortgages all seem to deal with a situation in which there is no valuable consideration for the mortgage at the time the mortgage is executed. As mentioned before, these references beg the question of the validity of consideration as shown in Point I of this Brief, supra.

An authority relied on by Appellants makes this distinction

clear. At page 15 of their Brief, Appellants quote from Osborne on Mortgages, Section 114 (1951). Plaintiff has been unable to find the passage quoted by Appellants, but the following pertinent language found in the section cited by Appellants is apropos:

> ". . .[E]ven where the [future] advances are non-obligatory, there is almost invariably present consideration in the form of a concurrent advance, forbearance to sue, or other conduct by the mortgagee sufficient to make the mortgagor's promise immediately binding . . . [I]t would be an extremely rare case in which the obligatory or non-obligatory character of the advances would have any bearing on the question of when the entire mortgage obligation arose or of its enforceability between the parties as of the date of its execution. In both kinds of advances, repayment by the mortgagor is subject to the condition precedent that the mortgagee make the advances, and in both the promise to pay, if the condition is performed, is equally enforceable, although in no case, of course, beyond the amount actually advanced. That all this is so has been obscrued, perhaps, by the distinction drawn in the cases between the two sorts of advances in determining priority over other encumbrances, and the explanation given in some of them that, in the optional advance cases, no mortgage can arise until the advance is made because before then there exists no debt to secure. (Footnote omitted) (Osborn, supra, Section 114 at 278.) (emphasis added)

By the above language, Osborn has recognized that there are a number of forms of consideration which will support perfection of the security interest at the time the trust deed is executed, even though advances on the amount referred to therein are actually made later. In the instant case, in addition to the antecedent debt which was in default at the time of execution of the trust deed, the trust deed was also entered into in consideration of the other factors described previously.

The law, the subject of considerable confusion among the courts, is based on common sense principles. Judicial focus on whether or not a debt actually underlies a mortgage, and the distinction between obligatory and optional future advances recited in mortgages, simply demonstrates a commendable concern over whether or not any value has been given for execution of the mortgage. If some value was given prior to or contemporaneous with execution of the mortgage, the mortgage attaches at the time of its execution. If in fact no value is given until a subsequent time, then there is reason to be concerned over whether the advances are optional or obligatory, since there should be some certainty that the mortgagee will in fact be obligated to give value at some future time.

Under Utah law, "value" includes any consideration that would support a simple contract, including rights acquired "as security for or in total or partial satisfaction of a pre-existing claim." (Section 78-1-201)(44)(d) and (b), Utah Code Annotated (1953, as amended)). However, the niceties of legal construction of future advance provisions become irrelevant where, as in this case, it is clearly established that the trust deed was entered into with the understanding on the part of both parties that it was given to secure a pre-existing obligation of the debtor and with clear and substantial other considerations.

Two policies, in addition to concern with whether or not any value has passed to the debtor, seem to lie at the heart of the question of perfection of security interests involving future advances. The first is that creditors should be given adequate notice of the fact that property has been encumbered by a mortgage for a specific amount, and the second is that such security agreement should secure future advances only so long as they bear some reasonable relationship to the initial advance. In this case, the fact that the disbursements made in 1974 under the 1973 note bore a reasonable relationship to the advance made by Plaintiff in 1972 cannot, and has not, been questioned. With respect to the first consideration, the note recited as consideration in the 1973 trust deed is certainly adequate to put creditors on notice that the property is encumbered to the extent of the $50,000.00 described specifically by the trust deed, as well as any future advances to be made by Plaintiff. The reference to the 1973 note in the trust deed certainly furnishes actual notice to any creditor that the property is encumbered to that extent, and serves to put subsequent creditors on notice to inquire of the bank as to the facts underlying the $50,000.00 note.

Appellants quarrel at this time appears to be based upon the fact that they either overlooked the clear recordation of Plaintiff's prior lien, or disregarded the same. Plaintiff's

trust deed was of record in the Office of the Salt Lake County Recorder, and "one who deals with real property is charged with notice of what is shown by the records of the County Recorder of the County in which the property is situated." Crompton v. Jenson, 78 Utah 55, 70, 1 P.2d. 242. Section 57-3-2, Utah Code Annotated (1953, as amended) provides specifically that:

> "Every . . . instrument in writing affecting real estate . . . shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice." (emphasis added)

Upon being placed on notice of a lien or claim, Appellant had a duty to inquire as to the nature thereof. This court held in Hayes v. Gibbs, 110 Utah 54, 59, 169 P.2d. 781 (1946), (citing from 66 C.J.S., p.1128, § 962):

> A purchaser of land is chargeable with notice of all conditions, restrictions, exceptions, or reservations appearing in his chain of title, or concerning which he is put on inquiry . . .

The court further found in Hayes, citing Dellaughter v. Hargrove, 40 S.W.2d. 253 (Texas) that:

> A purchaser is not only charged with notice of the contents of deeds of his chain of title but, if the same contained anything that would put a prudent man upon inquiry, he is chargeable with notice of whatever an inquiry would reveal. (Citing cases)
>
> The restrictions appear in Defendant's chain of title - therefore he is chargeable with knowledge of the purpose for which the restrictions were made.

See also Pender v. Dowse, 265 P.2d. 644, 1 U.2d 283 (1954).

Clearly, Appellants had notice by the Plaintiff's recorded trust deed that Plaintiff claimed a lien by virtue thereof. Having such notice, they had a duty to inquire as to its basis, which inquiry would have disclosed both the existence and the validity of Plaintiff's lien. Having failed to make such inquiry, they cannot now complain.

Appellants argue that "a description of such [antecedent indebtedness] may easily be inserted in the instrument." (App. Brief, p.19). Turnabout being fair play, Plaintiffs are compelled to note that Appellants could easily inquire of Plaintiff as to the nature of its lien, as they are required to do by law. However, how easy it may or may not have been to avoid the problem does not determine the validity of the consideration for the lien, which consideration perfected the trust deed at the time of its execution. The important fact is that the secured indebtedness was described and that description of the debt afforded notice to all subsequent creditors, including Appellant, of the actual scope of the debt. (See Smith v. Haertel, 244 P.2d. 377, 379 (Colo. 1952)).

POINT III

AWARD OF ATTORNEY'S FEES ON APPEAL

Prior to trial of this matter, the parties stipulated that a reasonable award of attorney's fees to Plaintiff

(should the Court find in Plaintiff's favor) would be $4,500.00. The record shows that that stipulation concerned only attorney fees incurred through the course of trial and issuance of a Judgment and Decree of Foreclosure by the Trial Court (R.249-251). Thus the award of attorney's fees by the trial court did not include attorney's fees incurred in the defense of this appeal. When this Court affirms the Trial Court's Judgment, its award of costs should include reasonable attorney's fees incurred by Plaintiff in defense of this appeal. Thus, upon affirmance, the remand to the District Court should direct that court to determine and assess an appropriate attorney's fee to Plaintiff, to be added to the Judgment heretofore rendered.

CONCLUSION

As discussed in Point I of this Brief, the promissory note and trust deed of March 14, 1973 are supported by ample consideration. In addition to being given as security for an antecedent debt, other good and valuable consideration for the trust deed and the promissory note it secures was given in that Plaintiff agreed to forbear from collection or suit upon the antecedent debt which was then in default, agreed to reduce the interest rate, agreed to release bicycles, agreed to extend the due date for 108 days, and agreed to release certain bicycles in order that Defendant Seiger

could effect a sale thereof. Additionally, the funds represented by the promissory note of March 14, 1973, were in fact disbursed on May 10, 1974. Only the disbursement of the proceeds of the note came after Appellant's claimed lien; all of the other consideration was in effect as of March 14, 1973 and establishes Plaintiff's priority as of that date.

Appellants' Brief wholly ignores the fact that other good and valuable consideration for execution and delivery of the note and trust deed were in effect as of the date of recording thereof. The cases cited by Appellant relate only to liens created in anticipation of future voluntary disbursements of funds and are not pertinent here.

The law is well settled, and Appellant's own authorities support the conclusion, that the mortgage entered into by Respondent in this case was issued for adequate consideration already in existence at the time of its execution and that Plaintiff's security interest in the subject property was therefore perfected as soon as the trust deed was recorded.

It is respectfully submitted that the facts of this case and the applicable law compel a determination that Appellants' lien is not entitled to priority over Plaintiff's lien. Accordingly, the Findings of Fact and Conclusions of Law and Judgment of the Trial Court must be affirmed.

Interestingly, if Appellants' contention is correct, they have argued themselves to the bottom of the priority

list. According to their argument, the actual date of disbursement of funds under a promissory note secured by a trust deed is an essential element of proof in foreclosure of that trust deed. Appellants introduced no evidence as to the date of disbursement of loan proceeds, their witness having testified only that funds were advanced for the account of Mr. and Mrs. Timothy (R.231). Thus, having failed to establish the date of disbursement, and following Appellants' argument to its logical conclusion, they must fall behind all of the other Defendants in priority of claims. We doubt that Appellants seek such a result.

The findings of the trial court should be reversed on appeal only when the lower court was clearly in error. The Findings of Fact and Conclusions of Law entered by the trial court in this case being clearly supported by the facts and the law, its Judgment must be affirmed, and the case remanded to the District Court for award to Respondent of its attorney fees and costs incurred on appeal.

Respectfully submitted this 6th day of October, 1975.

PARSONS, BEHLE & LATIMER

By _____
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_____
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 1975, I personally delivered two (2) copies of the foregoing Brief to Walter P. Faber, Jr. and David Lloyd, of Watkins & Faber, 606 Newhouse Building, Salt Lake City, Utah, 84111, attorneys for Defendants/Respondents, and mailed two (2) copies to each of the following counsel for the Defendants indicated:

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