

1989

Washington National Insurance Company, and Illinois corporation v. SHERWOOD ASSOCIATES, a Utah limited partnership; THE RIDGE ATHLETIC CLUB, INC., a Utah corporation; DARRELL D. TANNER, individually, and as Trustee of the Tanner Family Trust; JASON TANNER, an individual; TRACY A. TANNER MCDONALD, an individual; LINLEY A. TANNER, an individual; BRADLEY H. TANNER, an individual; et al. : Brief of

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BRIEF

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DOCKET NO. 89-0502 IN THE COURT OF APPEALS
OF THE STATE OF UTAH

WASHINGTON NATIONAL INSURANCE :
COMPANY, an Illinois :
corporation, :

Plaintiff-Appellee, :

Case No. 890502-CA

vs. :

Category 14b

SHERWOOD ASSOCIATES, a Utah :
limited partnership; :
THE RIDGE ATHLETIC CLUB, INC., :
a Utah corporation; :
DARRELL D. TANNER, :
individually, and as Trustee :
of the Tanner Family Trust; :
JASON TANNER, an individual; :
TRACY A. TANNER McDONALD, an :
individual; LINLEY A. TANNER, :
an individual; BRADLEY H. :
TANNER, an individual; et al., :

Defendants-Appellants.

BRIEF OF APPELLANTS

APPEAL FROM THE SUMMARY JUDGMENT OF
THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
THE HON. RAY M. HARDING

JACKSON HOWARD and
LESLIE W. SLAUGH, for:
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ATTORNEYS FOR APPELLEES

DEPOSITED BY THE
STATE OF UTAH

AUG 17 1990

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

WASHINGTON NATIONAL INSURANCE	:	
COMPANY, an Illinois	:	
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 Plaintiff-Appellee,	:	Case No. 890502-CA
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a Utah corporation;	:	
DARRELL D. TANNER,	:	
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Salt Lake City, Utah 84102

ATTORNEYS FOR APPELLEES

LIST OF PARTIES

Plaintiffs

In addition to the attorneys shown on the cover page, plaintiffs were represented by Sherman Young, of Ivie & Young, Provo, with respect to the title dispute with Holladay Bank & Trust.

Defendants

All defendants in this action are listed below, in groups, with the names of the defendants beginning at the left margin, and the names of the attorneys indented.

SHERWOOD ASSOCIATES, a Utah limited partnership;
WAYNE E. PEARCE, individually, and as general partner of Sherwood Associates;

Represented by Michael D. Esplin, of Aldrich, Nielson, Weight & Esplin, Provo.

DAVID R. STEWART, individually, and as general partner of Sherwood Associates;
OSMOND BROTHERS INVESTMENT TRUST, a Utah partnership;
GEORGE V. OSMOND, individually, and as Trustee of Osmond Brothers Investment Trust;
OLIVE DAVIS OSMOND, individually, and as Trustee of Osmond Brothers Investment Trust;
ALLAN R. OSMOND and SUZANNA P. OSMOND, individuals;
MERRILL D. OSMOND and MARY C. OSMOND, individuals;
M. WAYNE OSMOND and KATHRYN L. OSMOND, individuals;
DONALD C. OSMOND and DEBRA A. OSMOND, individuals;
JAY W. OSMOND, an individual;
OLIVE MARIE OSMOND, aka MARIE OSMOND, an individual;
OSMOND STUDIOS, a Utah partnership;
DURINDA A. STEWART, an individual;

Represented by Richard L. Hill and Douglas M. Whitehead, of Olsen, Hintze, Nielson & Hill, Provo.

CAROL PEARCE, an individual;

No return of service of summons.

HOLLADAY BANK & TRUST, a Utah corporation;

Represented by Ronald G. Russell, of Kimball, Parr,
Crockett & Waddoups, Salt Lake City

IFG LEASING COMPANY, a Minnesota corporation;

Not represented by counsel. Default judgment entered.
(R. 145-48.)

MOORE LEASING COMPANY, fka, FMS LEASING COMPANY, a Utah corporation;

Represented by Geri A. Allison, Salt Lake City.
Disclaimed any interest in property. (R. 126-29.)

BOW VALLEY DEVELOPMENT COMPANY, a Utah corporation;

Represented by John K. M. Olsen, of Olsen, Hintze,
Nielsen & Hill, Provo. Disclaimed any interest in the
property, and default judgment entered. (R. 103-06.)

ELIAS MORRIS & SONS COMPANY, a Utah corporation;

Not represented by counsel. Default judgment entered.
(R. 141-44.)

THE RIDGE ATHLETIC CLUB, INC., a Utah corporation;
DARRELL D. TANNER, individually, and as Trustee of the Tanner
Family Trust;
JASON TANNER, an individual;
TRACY A. TANNER McDONALD, an individual;
LINLEY A. TANNER, an individual;
BRADLEY H. TANNER, an individual;

Represented by the attorneys shown on the cover page.

THE RICHARD GILL COMPANY, dba GILL COMPANIES, a Texas corporation;

Represented by Robert F. Nelson, Sr. Vice President and General Counsel. Disclaimed any interest and dismissal entered. (R. 117-19.)

BLUNDELL and WEBER, INC., dba UTAH ENGINEERING COMPANY, a Utah corporation;

Not represented by counsel. Default judgment entered. (R. 99-102.)

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IN THE COURT OF APPEALS
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WASHINGTON NATIONAL INSURANCE	:	
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individual; LINLEY A. TANNER,	:	
an individual; BRADLEY H.	:	
TANNER, an individual; et al.,	:	
 Defendants-Appellants.	:	

BRIEF OF APPELLANTS

JURISDICTION

This is a trust deed foreclosure action in which plaintiffs moved for summary judgment. The plaintiff's motion for partial summary judgment was granted and a judgment and decree of foreclosure were entered on May 11, 1989. (R. 582-588.) The Tanner defendants¹ filed their notice of appeal on May 19, 1989. (R. 626-628.) In response to the Tanner defendants' oral motion

¹"Tanner defendants" in this brief shall refer to Appellants, Darrell D. Tanner, Jason Tanner, Tracy A. Tanner McDonald, Linley A. Tanner, Bradley H. Tanner, Darrell D. Tanner as trustee of the Tanner family trust, and the Ridge Athletic Club, Inc.

for a determination of finality under Rule 54(b) of the Utah Rules of Civil Procedure (R. 552), the Order granting the motion for summary judgment expressly provided that the judgment was final and appealable. (R. 581.) This court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) (Supp. 1989).

ISSUES PRESENTED

1. When a statutory amendment extinguishes the trustor's right to cure any default before a decree of foreclosure is entered, does the amendment apply retroactively to trustors in default who guaranteed a trust deed before the amendment?

2. Does an "after-acquired property" provision in a security agreement operate to grant a security interest in personal property placed on the premises by a person who guaranteed performance of the security agreement (with respect to the initial collateral) but did sign any security agreement with respect to the after-acquired property?

DETERMINATIVE STATUTES

A copy of the pre-amendment statute, Utah Code Ann. § 57-1-31 (1983, amended 1985) is reproduced in Appendix "A," and a copy of the post-amendment statute, Utah Code Ann. § 57-1-31 (1988), is reproduced as Appendix "B."

STATEMENT OF THE CASE

A. Nature of the Case.

This is an action to judicially foreclose a deed of trust.

B. Course of Proceedings Below.

On December 10, 1987, plaintiff filed its Complaint to judicially foreclose a deed of trust on real property situated in Utah County. (R. 1-45.) The Tanner defendants filed an Answer on January 5, 1988. (R. 81-83.) On June 27, 1988, the Osmond defendants² filed a Cross-Claim for indemnity and breach of contract against Darrell Tanner. (R. 260-283.)

Plaintiff filed a motion for summary judgment on November 21, 1988. (R. 308-09) The Tanner defendants responded on December 19, 1988, and also filed their own motion for summary judgment. (R. 374-75.) Plaintiff subsequently amended its motion to omit any claims against defendant Holladay Bank & Trust. (R. 477-479.) On March 31, 1989, oral arguments on the motions for summary judgment were heard before the Hon. Ray M. Harding of the Fourth District Court.

On May 11, 1989, the district court entered a Judgment and Decree of Foreclosure. (R. 582-588.) An Order of Sale was issued on May 12, 1989. (R. 589-594.) The Tanner defendants filed a Notice of Appeal on May 19, 1989. (R. 626-628.) On May 22, 1989, a Temporary Restraining Order was issued to enjoin the

²"Osmond defendants" refer to the Osmond Brothers Investment Trust, a Utah partnership, George V. Osmond, individually and as Trustee of the Osmond Brother Investment Trust; Olive Davis Osmond, individually and as Trustee of the Osmond Brothers Investment Trust; Allan R. Osmond and Suzanna P. Osmond, individuals; Merrill D. Osmond and Mary C. Osmond, individuals; M. Wayne Osmond and Kathryn L. Osmond, individuals; Donald C. Osmond and Debra A. Osmond, individuals; Jay W. Osmond, an individual; and Olive Marie Osmond, an individual.

execution of the Order of Sale pending this appeal. (R. 629-630.)

C. Statement of Facts.

On or about December 24, 1979, Sherwood Associates executed a Trust Deed Note ("Note") in favor of Bettilyon Mortgage Loan Company ("Bettilyon") in the principal sum of \$1,200,000.00. To secure payment of the Note, Sherwood Associates executed in favor of Bettilyon a Deed of Trust with Assignment of Rents ("Trust Deed") dated December 24, 1979, with respect to real property located in Utah County and now commonly known as the Ridge Athletic Club. (Appendix "C") Payment of the Note was guaranteed by the Osmond defendants. (R. 10, 90.) Washington National Insurance Company ("Washington National"), is the successor in interest of Bettilyon. (R. 8.)

Darrell Tanner purchased the property on December 24, 1982 (R. 261, 265-73, 296), and on January 10, 1983, executed a guaranty of the obligations evidenced by the Note and Trust Deed. (R. 33-32.) The property was operated by Ridge Athletic Club, Inc. (Deposition of Darrell D. Tanner, p. 12 lines 21-23.) There is no dispute that the defendants' interests³ in the property are subordinate to that of the Plaintiff. (R. 82 and 377.)

³Many of the defendants did not claim any interest in the property, and no monetary relief was sought against those defendants. The Tanner defendants against whom no monetary relief was sought, and who never at any time claimed any interest in the real property, are Jason Tanner, Tracy A. Tanner McDonald, Linley A. Tanner, and Bradley H. Tanner.

By letter dated November 30, 1987, Washington National declared that the Note was in default and purported to declare all sums due and owing under the Note to be immediately due and payable, and demanded payment in full by December 7, 1987. (A copy of the letter appears in Appendix "D") Ridge Athletic Club, through Darrell Tanner, its president, responded by tendering payment of the entire delinquency due under the Note. (A copy of the Tender appears in Appendix "E.") Darrell Tanner had the ability on that date to cause Ridge Athletic Club, Inc., to pay the full amount tendered. (R. 382.) Plaintiff objected to the Tender on the grounds that the entire unpaid balance was due and owing (not just the delinquency) and that Plaintiff doubted the Defendant's ability to pay the Tender. (A copy of this letter, dated December 8, 1987, is attached as Appendix "F.")

Plaintiff filed its complaint, seeking judicial foreclosure of the trust deed, on December 10, 1987. On cross-motions for summary judgment, the trial court found the issues in favor of plaintiff. A final judgment for the Plaintiffs was entered on May 11, 1989, which gave rise to this appeal.

SUMMARY OF ARGUMENT

When the Tanner Defendants guaranteed the Note in 1983, Utah Code Ann. § 57-1-31 granted debtors the right to cure a default "at any time prior to the entry of the decree of foreclosure" if the beneficiary chose to foreclose judicially. The right to reinstate the note existed regardless of whether

the note had been accelerated. A 1985 amendment to Section 57-1-31 arguably extinguished the debtor's right to cure. It was error for the lower court to apply the amended statute to this case because its retroactive application violates Utah Code Ann. § 68-3-3 and the prohibition against impairment of contracts in the State and Federal Constitutions. In addition, the pre-1985 version of the statute was an implicit part of the contract of the parties, and should have been applied to govern any action under the contract.

If the Court nonetheless determines that plaintiff was entitled to foreclose, the Order of Sale should be amended. The Order of Sale can be read as directing the sale of personal property owned by the original debtor (Sherwood Associates), plus that added to the premises by the Tanner defendants. There was no allegation in the complaint, and no basis in the contract, for an order for the sale of the personal property added by the Tanner defendants.

ARGUMENT

POINT I

THE PRE-1985 VERSION OF SECTION 57-1-31 APPLIED TO GIVE DEFENDANTS THE RIGHT TO CURE ANY DEFAULT AT ANY TIME PRIOR TO THE FORECLOSURE SALE.

A. The 1985 Amendments to Utah Code Ann. § 57-1-31 Do Not Apply Retrospectively.

At issue in this appeal is whether the 1985 amendments to Utah Code Ann. § 57-1-31 apply to trust deeds executed or

guaranteed before 1985. Utah Code Ann. § 57-1-31 provided, prior to the 1985 amendment, in pertinent part as follows:

Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in such obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, . . . the trustor or his successor in interest . . . or any other person having a subordinate lien or encumbrance of record thereon . . . , at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale is to be exercised, or, otherwise at any time prior to the entry of the decree of foreclosure, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust deed . . . other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and, thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect as if no such acceleration had occurred.

(Emphasis added.) The 1985 amendment deleted the underlined phrase and made other minor changes in phraseology and punctuation.

This statute, as in effect at the time the Trust Deed was guaranteed by Darrell Tanner, clearly provided that the trustor had the substantive right to reinstate the Trust Deed at any time prior to the entry of a decree of foreclosure. The district court erred when it gave retrospective effect to the amended version of Section 57-1-31 for the following reasons:

1. There is no evidence that the legislature intended the 1985 amendment to apply retroactively. See subpoint I.B. below at page 8.

2. The court's retrospective application of the law impairs a substantive provision of an existing contract in violation of the Utah Constitution, Art. I, Section 18. See subpoint I.C. below at page 9.

3. The terms of the contract imply that the parties intended pre-amendment foreclosure law to govern in case of default. See Point II below at page 12.

B. Absent Legislative Intent, Statutory Amendments That Alter Substantive Law or Affect Vested Rights Can Not Be Applied Retrospectively.

A legislative enactment which alters substantive law or affects vested rights will not be read to operate retrospectively unless the legislature has clearly expressed that intention. Pilcher v. State, 663 P.2d 450, 455 (Utah 1983), In re J.P., 648 P.2d 1364, 1369 (Utah 1982).

Utah Code Ann. § 68-3-3 (1986) states that no statute "is retroactive unless expressly so declared." If the legislature fails to indicate that an amendment of existing law is retroactive, the amendment is presumed to affect legal rights. Madsen v. Borthick, 769 P.2d 245, 252, n. 11 (Utah 1988).

Legislative intent is conspicuously absent from the 1985 amendment to Section 57-1-31. Therefore, a presumption arises that the amendment was not intended to affect trust deeds executed before the effective date of the statute. Plaintiff

failed to rebut this presumption. Accordingly, it was error for the district court to grant Plaintiff's motion for summary judgment.

C. The 1985 Amendment to Section 57-1-31 Affects Substantive Rights.

A statute may apply retrospectively without express legislative intent if it affects procedural (or remedial) rather than substantive rights. Foil v. Ballinger, 601 P.2d 144, 151 (Utah 1979). Distinguishing the difference between substance and form is no easy task. Chief Justice Hughes once wrote: "No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances." Home Building and Loan Association v. Blaisdell, 290 U.S. 398, at 430 (1933) (quoting Von Hoffman v. City of Quincy, 71 U.S. 535, 553 (1866)).

The question this court must decide is whether the right to cure, as contained in Section 57-1-31 prior to the 1985 amendment, is a substantive right or merely "procedural" or "remedial" in nature.

This appears to be a case of first impression in Utah, however, the court has not hesitated to reverse judgments when it was error to give retrospective application to amended statutes where the legislature made no provisions for retroactivity. It is the Tanner defendants' position that these

cases demonstrate that the right to cure must be recognized as a genuine, substantive right--not a mere "procedural" or "remedial" right.

In Stephens v. Henderson, 741 P.2d 952, 953-54 (Utah 1987) (quoting Petty v. Clark, 113 Utah 205, 192 P.2d 589, 593-94 (1984)), this court stated that a law "is substantive if it 'creates, defines and regulates the rights and duties of the parties . . . as distinguished from adjective law which pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective.'"

It has also been written that "procedural statutes enacted subsequent to the initiation of a suit which do not enlarge, eliminate, or destroy vested or contractual rights apply not only to future actions, but also to accrued and pending actions a well." State Department of Social Services v. Higgs, 656 P.2d 998, 1000 (Utah 1982)) (emphasis added). See also Carlucci v. Utah State Industrial Commission, 725 P.2d 1335, 1337 (Utah 1986). Similarly, if an amendment serves only to clarify or amplify existing law, it should not be considered "substantive." In re Disconnection of Certain Territory from Highland City, 668 P.2d 544, 548-49 (Utah 1983).

In the language of the foregoing decisions, statutory amendments that are "remedial" or "procedural" generally amplify or clarify the existing law rather than create or destroy the law as it existed. If the amendment "eliminates" or "destroys"

a contractual right, then substantive law has been altered and retroactive application is improper without express legislative consent. Carlucci, at 1337.

In Stephens v. Henderson, 741 P.2d 952 (Utah 1987), this court held that a statute eliminating joint and several liability could not be applied to a negligence action brought by a roller rink patron for injuries occurring before the statute's effective date. Since the legislature did not direct that the statute should have retroactive effect, the substantive law when the cause of action arose governed.

Other examples of amendments that have been found to affect "substantive" law are: Worthington and Kimball Construction Co. v. C & A Development Co., 777 P.2d 475 (Utah 1989), (amendment deleting a requirement that notice of liens be verified by oath); Madsen v. Borthick, 769 P.2d 245 (Utah 1988), (amendment changing requirement that the state be served notice in "all" cases where it may be required to indemnify rather than "only if" it may be required to indemnify); In re Disconnection of Certain Territory From Highland City, 668 P.2d 544 (Utah 1983), (amendment creating new factors that the district court must consider in a suit to disconnect territory from a city); Schultz v. Conger, 755 P.2d 165 (Utah 1988), (amendment required filing of notice pursuant to Governmental Immunity Act regardless of whether the function giving rise to the claim is governmental or non-governmental).

Chief Justice Hughes stated that the determination of "substantial" and "remedial" rights depended on the circumstances of each case. Blaisdell, at 430. The circumstances of this case are that the Tanner defendants have been denied a right to reinstate the Note even though they are ready, willing, and able to do so. This right existed when the trust deed was executed and when the Tanner defendants obtained their interest in the property and guaranteed the Note. The Tanner defendants had every right to rely on the law as it existed when they sat down and negotiated the agreements now in dispute.

The 1985 amendment to Section 57-1-31 excised a core provision that gave defaulting trustors the right to reinstate an accelerated loan if the beneficiary chose to judicially foreclose. The 1985 amendment "eliminates" or "destroys" the contractual right of the trustor to cure a default. It does not merely reduce the trustor's rights under the statute--it absolutely extinguishes them. For this reason, and because there is no legislative intent stating otherwise, Section 57-1-31 must not be applied retroactively to trust deeds executed before 1985.

POINT II

THE PRE-AMENDMENT LAW WAS A PART OF THE CONTRACT
AS IF EXPRESSLY REFERRED TO AND INCORPORATED THEREIN.

This court has stated: "[i]t has always been recognized that a contract contains, implicitly, the laws existing at the time it was completed." Beehive Medical Electronics, Inc v.

Industrial Commission, 583 P.2d 53, 60 (Utah 1978). Beehive cited with approval Edwards v. Kearzey, 96 U.S. 595, 24 L.Ed. 793 (1878), which states:

It is also the settled doctrine of this court, that the laws which subsist at the time and place of making of a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those [laws] which affect its validity, construction, discharge, and enforcement.

Edwards, at 601 (emphasis added) (citing Von Hoffman v. City of Quincy, 71 U.S. 535, 553 (1866)).

In 1983, Section 57-1-31 provided for a right to cure at any time before the entry of a decree of foreclosure. There is no indication in the Trust Deed or Note that the law at the time of foreclosure would govern in case of default. If the parties did not contemplate such an arrangement, they must have intended to be governed by foreclosure law as it then existed.

When the Tanner defendants guaranteed the Note they had every right to believe that they would have a period before the entry of foreclosure in which to cure any past due amounts and reinstate the accelerated loan. Because the amended version of Section 57-1-31 would deny the appellant this right as bargained for in the Note and Trust Deed, application of that statute would violate both the intentions of the parties and the provisions against impairment of contracts in the Federal and State Constitutions.

POINT III

THE DEFENDANTS WERE ENTITLED UNDER THE CURRENT
VERSION OF SECTION 57-1-31 TO CURE THE DEFAULTS
BECAUSE PLAINTIFF HAD NOT ELECTED TO PROCEED
BY JUDICIAL FORECLOSURE AT THE TIME TANNER TENDERED
PAYMENT OF THE DEFAULT.

Points I and II of this brief establish that the rights of the parties were governed by the pre-1985 version of Utah Code Ann. § 57-1-31. Even if this Court holds that the 1985 amendments do govern this action, however, the result would be the same.

Plaintiff purported to accelerate the entire unpaid balance under the contract by letter dated November 30, 1987, and filed its complaint, seeking to foreclose its trust deed as a mortgage on December 10, 1987. In the interim, on December 7, 1987, Ridge Athletic Club, Inc., made a valid tender of all amounts necessary to cure the default under the trust deed. Plaintiff responded by claiming that the tender was ineffective because the entire unpaid balance was due, not just the amount necessary to cure the default.

Utah Code Ann. § 57-1-31 (both before and after the 1985 amendments) provides that the trustor under a trust deed has a right to cure the default at any time within three months after the filing of a notice of default. For contracts governed by the 1985 amendments, that right to cure can arguably be extinguished by electing to proceed by judicial foreclosure. Such an election was not made in the instant case, however, until December 10, 1987, the date plaintiff filed its complaint. The

November 30, 1987, letter does not contain such an election. It does give notice that the plaintiff will proceed to "foreclose" if the payment is not made, but the term "foreclose" can just as readily be understood to mean a trustee's sale under the deed of trust.

The defendant therefore had the right to cure at all times prior to the plaintiff's first clear election to proceed by judicial foreclosure, which was on December 10, 1987. The written tender by Ridge Athletic Club made on December 7, 1987, was rejected. Utah Code Ann. § 78-27-1 (1987) provides that such a rejected tender has the same effect as if Ridge Athletic Club had actually paid the amount in default.

Because the defendants had the right to cure at all times prior to December 10, 1987, and because Ridge Athletic Club tendered payments of all amounts necessary to cure, the defendants were not in default on December 10, 1987, the date the complaint was filed. The complaint should have been dismissed for failure to state a claim.

POINT IV

PLAINTIFF IS NOT ENTITLED TO FORECLOSE ON ANY EQUIPMENT PLACED ON THE PROPERTY BY THE TANNER DEFENDANTS.

The order of sale entered in this matter directs the sheriff to sale the real property in issue and also states the following concerning the personal property:

It is further ordered that the equipment, furniture, fixtures, furnishings and other property described in said Judgment and

Decree of Foreclosure and more particular
described as follows be sold at public
auction:

All machinery, equipment, material, appliances and fixtures installed or placed by Debtor in the premises for the generation and distribution of air, water, heat, electricity, light, fuel or refrigeration, or for ventilating or air-conditioning purposes, or for sanitary or drainage purposes, or for the exclusion of vermin or insects, or for the removal of dust, refuse or garbage, and including all awnings, window-shades, draper [sic] rods and brackets, screens, floor coverings, incinerators, carpeting and all furniture and fixtures used in the operation of the buildings, together with all additions to, substitutions for, changes, in or replacements of the whole or any part of any or all of said articles of property.

(the "Personal Property").

R. 592-93 (emphasis added).

The order does not define the term "debtor," and is ambiguous as to whether it orders the sale of any property placed on the premises by the Tanner defendants. If that term is construed to mean Sherwood Associates, then the Tanner defendants have no objection to the first portion of the order. The emphasized portion of the order, however, purports to empower the sheriff to sale any additions to the personal property. The Tanner defendants have made substantial additions to the personal property subsequent to their purchase of the Ridge Athletic Club.

To the extent that the Order directs the sale of any personal property added by the Tanner defendants, it is improper. First, plaintiff did not seek such relief in its complaint. The complaint contained the following allegation:

49. Under the Security Agreement and Financing Statement, the Defendant Sherwood Associates pledged as additional security for the repayment of the indebtedness evidenced by the Note all machinery, equipment, material, appliances and fixtures then or thereafter installed or placed by Sherwood Associates in the Subject Property (including all replacements and proceeds thereof).

(R. 12.)

The prayer for relief with respect to the personal property stated as follows:

3. On Plaintiff's Third Cause of Action, that the Court enter a Judgment and Decree adjudging that Plaintiff is the holder of a perfected security interest in all machinery, equipment, material, appliances and fixtures placed or used in or about any part of the Subject Property by Sherwood Associates, and ordering that said personal property be sold by the Sheriff of Utah County, State of Utah, to satisfy amounts which are found to be due and owing Plaintiff from Defendant Sherwood Associates.

R. 17.

In addition, even if plaintiff had pleaded a claim for the sale of the personal property added by the Tanner defendants, plaintiff would not have been entitled to that relief. The Tanner defendants did not grant plaintiff any security interest in that property. Although Darrell Tanner did guarantee the obligations of Sherwood Associates under the initial security

agreement, none of the Tanner defendants signed any security agreement granting plaintiff a security interest in any personal property added by the Tanner defendants. Without such a signature on a security agreement, no security interest exists. Utah Code Ann. § 70A-9-203(1)(a) (1980).

This case should be remanded with directions that the order of sale should be clarified to clearly provide that plaintiff is entitled to foreclose only the personal property placed on the premises by Sherwood Associations, and that plaintiff has no security interest in any personal property placed on the premises by the Tanner defendants.

CONCLUSION

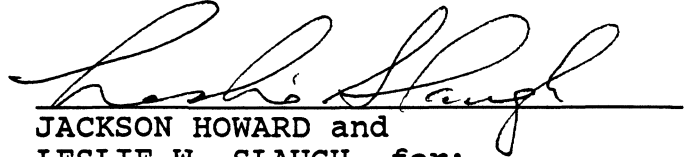
Applying the law of foreclosure as it existed prior to the 1985 amendment, the Tanner defendants had a right to tender past due amounts with interest as agreed in the Note until a decree of foreclosure was entered. Since the Tanner defendants made a valid tender of such amounts on December 7, 1988, the Note was not in default when Plaintiff filed its action to foreclose.

The Tanner defendants are therefore entitled to a reversal of the judgment in favor of Plaintiff and an order directing the district court to grant appellant's motion for summary judgment in its entirety.

In the alternative, if the Court determines that plaintiff is entitled to foreclose, the trial court should be directed to amend the Order of Sale to clearly reflect that the only

personal property to be sold is that placed on the premises by Sherwood Associates.

DATED this 17th day of October, 1989.



JACKSON HOWARD and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 17th day of October, 1989.

Clark W. Sessions
Cynthia K. Cassell
SESSIONS & MOORE
400 First Federal Plaza
505 East 200 South
Salt Lake City, Utah 84102



APPENDIX "A"

Utah Code Ann. § 57-1-31 (1983, amended 1985)

57-1-31. Trust deeds — Default in performance of obligations secured — Reinstatement — Cancellation of recorded notice of default. (1) Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in such obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of ~~[such]~~ the trust deed, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with terms of such obligation or of such trust deed, the trustor or his successor in interest in the trust property or any part thereof or any other person having a subordinate lien or encumbrance of record thereon or any beneficiary under a subordinate trust deed, at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale is to be exercised, ~~[or, otherwise at any time prior to the entry of the decree of foreclosure,]~~ may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust deed ~~[and the obligation secured thereby]~~ (including costs and expenses actually incurred in enforcing the terms of such obligation, or trust deed, and the trustee's and attorney's fees actually incurred) other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and, thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred.

(2) If the default is cured and the trust deed reinstated in the manner ~~[hereinabove]~~ provided in Subsection (1), the beneficiary, or his assignee, shall, on demand of any person having an interest in the trust property, execute and deliver to him a request to the trustee to execute, acknowledge, and deliver a cancellation of the recorded notice of default under such trust deed; and any beneficiary under a trust deed, or his assignee, who, for a period of 30 days after such demand, refuses to request the trustee to execute and deliver such cancellation ~~[shall be]~~ is liable to the person entitled to such request for all damages resulting from such refusal. A release and reconveyance given by the trustee or beneficiary, or both, or the execution of a trustee's deed ~~[shall constitute]~~ constitutes a cancellation of a notice of default. Otherwise, a cancellation of a recorded notice of default under a trust deed ~~[shall]~~ is, when acknowledged, ~~[be]~~ entitled to be recorded and ~~[shall be]~~ is sufficient if made and executed by the trustee in substantially the following form:

Cancellation of Notice of Default

The undersigned hereby cancels the notice of default filed for record _____, 19____, and recorded in Book _____, Page _____, Records of _____ County, (or filed of record _____, 19____, with recorder's entry No. _____, _____ County), Utah, which notice of default refers to the trust deed executed by _____ as trustor, in which _____ is named as beneficiary and _____ as trustee, and filed for record _____, 19____, and recorded in Book _____, Page _____, Records of _____ County, (or filed of record _____, 19____, with recorder's entry No. _____, _____ County), Utah.

(legal description)

Signature of Trustee _____

APPENDIX "B"

Utah Code Ann. § 75-1-31 (1988)

57-1-31. Trust deeds — Default in performance of obligations secured — Reinstatement — Cancellation of recorded notice of default.

(1) Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in such obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of the trust deed, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with terms of such obligation or of such trust deed, the trustor or his successor in interest in the trust property or any part thereof or any other person having a subordinate lien or encumbrance of record thereon or any beneficiary under a subordinate trust deed, at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale is to be exercised, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust deed (including costs and expenses actually incurred in enforcing the terms of such obligation, or trust deed, and the trustee's and attorney's fees actually incurred) other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and, thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred.

(2) If the default is cured and the trust deed reinstated in the manner provided in Subsection (1), the beneficiary, or his assignee, shall, on demand of any person having an interest in the trust property, execute and deliver to him a request to the trustee to execute, acknowledge, and deliver a cancellation of the recorded notice of default under such trust deed; and any beneficiary under a trust deed, or his assignee, who, for a period of 30 days after such demand, refuses to request the trustee to execute and deliver such cancellation is liable to the person entitled to such request for all damages resulting from such refusal. A release and reconveyance given by the trustee or beneficiary, or both, or the execution of a trustee's deed constitutes a cancellation of a notice of default. Otherwise, a cancellation of a recorded notice of default under a trust deed is, when acknowledged, entitled to be recorded and is sufficient if made and executed by the trustee in substantially the following form:

Cancellation of Notice of Default

The undersigned hereby cancels the notice of default filed for record _____, 19____, and record in Book _____, Page _____, Records of _____ County, (or filed of record _____, 19____, with recorder's entry No. _____, _____ County), Utah, which notice of default refers to the trust deed executed by _____ as trustor, in which _____ is named as beneficiary and _____ as trustee, and filed for record _____, 19____, and recorded in Book _____, Page _____, Records of _____ County, (or filed of record _____, 19____, with recorder's entry No. _____, _____ County), Utah.

(legal description)

Signature of Trustee _____

APPENDIX "C"

Deed of Trust with Assignment of Rent

BETTILYON MORTGAGE LOAN CO.

P.O. BOX 15749

SALT LAKE CITY, UTAH 84115

50572

TRUST DEED

With Assignment of Rents

Space Above This Line For Recorder's Use

1979 DEC 28 PM 4:00

RECORDED
PAGE ONE
STEWART TITLE GUARANTY COMPANY
DEPUTY CLERK
MINA L. HARRIS
CLERK
UTAH COUNTY RECORDER
JAN 2 1980

50572

THIS TRUST DEED, made this 24th day of DECEMBER, 1979

between SHERWOOD ASSOCIATES, A Utah Limited Partnership

as TRUSTOR,

whose address is 4303 North Foothill Drive, Provo, Utah
(Street and number) (City) (State)

STEWART TITLE GUARANTY COMPANY, Provo, Utah, as TRUSTEE,* and

BETTILYON MORTGAGE LOAN CO., Salt Lake City, Utah, as BENEFICIARY,

WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST,

WITH POWER OF SALE, the following described property, situated in UTAH

County, State of Utah:

Commencing at a point which is SOUTH 79.94 feet and WEST 980.57 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 68° 25' East 417.00 feet; thence North 84° 57' East 160.00 feet; thence South 81° 31' 52" East 102.97 feet; thence along the arc of a 766.41 foot radius curve to the right 168.13 feet, the chord of which bears North 27° 17' 05" West 167.80 feet; thence along the arc of a 286.93 foot radius curve to the left 137.72 feet, the chord of which bears North 34° 45' West 136.40 feet; thence North 48° 30' West 178.86 feet; thence along the arc of a 1002.77 foot radius curve to the right 166.26 feet, the chord of which bears North 43° 45' West 166.08 feet; thence North 39° 00' West 250.32 feet; thence along the arc of a 2628.32 foot radius curve to the right 49.55 feet, the chord of which bears North 38° 27' 34" West 49.55 feet; thence South 52° 04' 48" West 362.79 feet; thence South 0° 40' 42" West 335.65 feet; thence South 20° 24' 30" West 98.88 feet; thence South 65° 06' 39" East 39.08 feet; thence South 35° 52' 55" East 41.26 feet; thence South 70° 42' 19" East 53.96 feet; thence South 55° 05' 10" East 54.25 feet; thence South 25° 31' 15" West 179.58 feet; thence South 24° 17' 45" East 58.84 feet; thence South 64° 06' 15" East 48.30 feet; thence North 50° 17' 13" East 158.78 feet to the point of beginning.

Containing 10.788 acres.

LESS 0.410 acre of OSMOND BROTHERS (Parcel A), A Utah Partnership.

Commencing at a point which is North 425.65 feet and West 895.81 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 24° 59' 48" West 158.00 feet; thence South 65° 00' 12" West 113.00 feet; thence South 24° 59' 48" East 158.00 feet; thence North 65° 00' 12" East 113.00 feet the point of beginning. Containing 0.410 acres.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits;

FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$1,200,000.00, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

*NOTE: Trustee must be a member of the Utah State Bar; a bank, building and loan association or savings and loan association authorized to do such business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.

PLAINTIFF'S

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TO PROTECT THE SECURITY OF THIS TRUST DEED, TRUSTOR AGREES

1 To keep said property in good condition and repair, not to remove or demolish any building thereon, to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon, to comply with all laws, covenants and restrictions affecting said property; not to commit or permit waste thereof, not to commit, suffer or permit any act upon said property in violation of law, to do all other acts which from the character or use of said property may be reasonably necessary, the specific covenants herein not excluding the general, and if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property, Trustor further agrees

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary and

(b) To allow Beneficiary to inspect said property at all times during construction.

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder

2 To provide and maintain insurance of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary instead of to Trustor and Beneficiary jointly and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged

3 To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto

4 To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee, and should Beneficiary or Trustee elect to also appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee

5 To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property, to pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto, to pay all costs, fees, and expenses of this Trust

6 Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof may Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes, commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee, pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto, and in exercising any such powers incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees

7 To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ~~ten~~ ^{eighteen} per cent (18%) or highest rate permissible under the laws of the State of Utah.

IT IS MUTUALLY AGREED THAT

8 Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require

9 At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustee may (a) consent to the making of any map or plat of said property, (b) join in granting any easement or creating any restriction thereon, (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof, (d) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of truthfulness thereof. Trustor agrees to pay reasonable Trustee's fees for any of the services mentioned in this paragraph

10 As additional security, Trustor hereby assigns Beneficiary, during the continuance of these trusts, all rents, issues, royalties and profits of the property affected by this Trust Deed and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right power and authority to collect the same. Nothing contained herein nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option

11 Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person by agent or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid and apply the same less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine

12 The entering upon and taking possession of said property, the collection of such rents, issues, and profits or the proceeds of fire and other insurance policies or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice

13 The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default

14 Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereof, and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby

SHERWOOD ASSOCIATES, A Utah Limited Partnership

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15. Trustors agree to provide and maintain the following insurance coverage written with companies having a Best's rating of A+ or A with mortgagee clauses in favor of the Beneficiary.

- 1) Fire and Extended Coverage Insurance for the full insurable value.
- 2) Public Liability Insurance in amount and terms acceptable to Beneficiary.
- 3) Business Interruption Insurance in the amount of \$533,000.00.
- 4) Other required insurance.
- 5) All policies shall be kept in force by the Borrower for the life of the loan and shall be held as directed by Beneficiary.

16. Trustor agrees that upon demand of the Beneficiary, Trustor will pay to Beneficiary on the first day of each month until the note secured hereby is fully paid, together with and in addition to the monthly payments of principal and interest set forth in the Trust Deed Note; (a) An installment of the taxes and assessments levied or to be levied against said property, and an installment of the premium or premiums that will become due and payable to renew the insurance on the improvements on said property. Such installment shall be equal, respectively, to the estimated premium or premiums for such insurance and taxes and assessments next due (as estimated by Beneficiary) less all installments already paid therefore, divided by the number of months that are to elapse before one month prior to the date when such premium or premiums and taxes and assessments will become due. The Beneficiary shall use such monthly payments to the extent that they will suffice to pay such premium or premiums and taxes and assessments when due. Beneficiary or its Assignee will not pay Trustor interest with respect to the funds held, as outlined above.

(b) All monthly payments mentioned in the preceding sub-section (a) of Paragraph 16, and all payments to be made under the Trust Deed Note secured hereby shall be added together and the aggregate amount thereof shall be paid by Trustor each month on the date specified in said Trust Deed Note for the payment of monthly installments in a single payment to be allocated by Beneficiary to the following items in the order set forth:

- i Taxes, assessments, insurance premiums;
- ii Interest on the indebtedness secured hereby;
- iii Amortization of the principal of the indebtedness secured hereby.

Any deficiency in the amount of any such aggregate monthly payment shall constitute an event of default under this Trust Deed.

If the total of the payments made by Trustor under (a) hereof shall exceed the amount of payments actually made by Beneficiary for taxes and assessments, or insurance premium, as the case may be, such excess, at the election of Beneficiary, shall be credited on subsequent payments to be made by Trustor for such items. If there shall be a default under any of the provisions of this Trust Deed resulting in a sale of the property covered hereby, or if Beneficiary acquires said property otherwise after default, Beneficiary may apply, at the time of the commencement of such proceedings, or at the time said property is otherwise acquired, the amount then remaining to the credit of Trustor under (a) thereof, as a credit on the interest accrued on the note to said date, and the balance, if any, in reduction of the principal amount of said indebtedness.

17. Trustor agrees to supply Beneficiary a certified annual operation statement for the subject property and copies of Sherwood Associates audited annual statements within ninety (90) days after the close of each calendar or fiscal year during the term of this mortgage.

Said statement shall contain at least the following information:

- | | |
|-------------------------------------|---|
| A. Current Rent Roll, Tenant Roster | E. Federal & State Income Tax |
| B. Gross Rental Income | F. Operating Expenses in Reasonable Detail |
| C. Other Income and Source | G. Depreciation Deduction (for Federal Income Tax purposes) |
| D. Real Estate Taxes | H. Insurance |

The statements are to be prepared by a C.P.A. in good standing.

18. Upon the occurrence of any of the following events, the Beneficiary will have the right to call the loan and make demand for payment of the unpaid principal and interest balance in full, including Prepayment penalty as outlined in Paragraph 25.

(a) Failure of Trustors to furnish annual operation statements as provided in Paragraph 16. Insolvency or business failure or the appointment of a permanent Receiver for any of the Trustors or appointment of a Receiver for the property or an assignment for the benefit of creditors, by, or the filing of a petition under bankruptcy, receivership, insolvency or debtor relief or the pendency of any such petition undismissed for a period of 30-days against any endorser or guarantor hereof or any person now or hereafter liable, absolutely or contingently for the payment of the whole or a part of this mortgage; (b) or in the event the described property shall be sold or if any person shall gain an interest in the property by deed, contract or other conveyance without prior written consent of Beneficiary, or by operation of law.

(over)

SHERWOOD ASSOCIATES, a Utah Limited Partnership

By:

David R. Stewart, General Partner

By:

Wayne E. Pearce, General Partner

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19. EMINENT DOMAIN:

The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation of or injury to the property, or part thereof, or for conveyances in lieu of condemnation, are hereby assigned and shall be paid to the Beneficiary.

20. Trustor agrees that in the event any of the subject property is sold during the term of this Trust Deed, without the prior written approval of the Beneficiary, the Beneficiary reserves the right to either call the loan or approve the purchaser as a satisfactory purchaser or trustor. Trustor agrees that no secondary financing is permitted on the secured property without the prior written approval of the Beneficiary. Approval or disapproval of the above shall not be unreasonably withheld by the Beneficiary.

21. UNIFORM COMMERCIAL CODE:

It is agreed that if any part of said premises is of a nature so that the security interest therein can be perfected under the Uniform Commercial Code, as adopted and in effect from time to time in Utah, this instrument shall constitute a Security Agreement and Trustor agrees to join with the Beneficiary in the execution of any financing statement and to execute any other instruments that may be required for the perfection or renewal of such security interest under said Uniform Commercial Code.

22. ASSIGNMENT OF RENTS AND PROFITS:

As additional security and collateral for the indebtedness secured by this Trust Deed, trustor agrees to the terms and conditions of the Assignment of Rents and Profits of even date executed by the trustor covering the subject property.

23. That as additional and collateral security for the payment of the indebtedness, Trustor hereby assigns to Beneficiary all of the bonus, rents, royalties, rights and benefits accruing under all oil, gas or mineral leases on said property, or which may hereafter be placed thereon, including all water and riparian rights, and the lessee or assignee or sublessee is hereby directed upon production by the holder of the indebtedness secured hereby of a certified copy thereof, to pay said bonus, rents, royalties, rights, and benefits to the owner of said debt; this provision to become effective, however, only upon secured, such direction to terminate and become null and void upon payment of the indebtedness hereby secured. Any amount received by Beneficiary under this provision shall be applied to the reduction of indebtedness secured hereby.

24. The Trustors hereby waive any and all rights of redemption from sale under any order or decree of foreclosure of this Trust Deed on its behalf and on behalf of each and every person except decree or judgment creditors of the Trustors; acquiring any interest in or title to the premises subsequent to the date of this Trust Deed. Trustor hereby waives any and all redemption rights in the event of Foreclosure.

25. PREPAYMENT PRIVILEGE:

The loan will be closed to prepayment for the first ten years. Thereafter the Borrower will be permitted to prepay the loan in full at 105%, decreasing 1/2 of 1% per year to a minimum of 101%. Loan year means any twelve-month period commencing on the first principal and interest installment date, and on every yearly anniversary thereafter.

Payment during foreclosure will constitute a prepayment. Such payments, to the extent permitted by law, will therefore include the premium required under the prepayment, a premium of 11.5 per cent of the principal balance outstanding, shall be due and payable. In the event a tender of payment of the amount necessary to satisfy the entire indebtedness evidenced by the Trust Deed Note and Trust Deed is made at any time prior to the sale under foreclosure of the Trust Deed, it will constitute an evasion of the prepayment terms and be deemed to be a voluntary prepayment.

26. After the lapse of such time as may then be required by law following the recordation of said notice of default, and notice of default and notice of sale having been given at then required by law, Trustee, without demand on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale; provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without

SHERWOOD ASSOCIATES, a Utah Limited Partnership

By:

David R. Stewart, General Partner

By:

Wayne E. Pearce, General Partner

any covenant or warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 18% per annum or highest rate permissible under the laws of the State of Utah from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County in which the sale took place.

27. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto including a reasonable attorney's fee in such amount as shall be fixed by the court.

28. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

29. This Trust Deed shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Trust Deed, whenever the context requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

30. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action of proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

31. This Trust Deed shall be construed according to the laws of the State of Utah.

32. The undersigned Trustor request that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

SHERWOOD ASSOCIATES, A Utah Limited Partnership

BY: David R. Stewart
DAVID R. STEWART, General Partner

BY: Wayne E. Pearce
WAYNE E. PEARCE, General Partner

STATE OF UTAH)
: ss.
COUNTY OF UTAH)

On the 24th day of December, 1979, personally appeared before me DAVID R. STEWART, who being by me duly sworn did say that he is a General Partner of SHERWOOD ASSOCIATES, A Utah Limited Partnership, and that the foregoing instrument was signed in behalf of said Partnership by authority of its articles of Partnership, and said DAVID R. STEWART, acknowledged to me that said Partnership executed the same.

My commission expires:

1/8/80

Hoyt S. Wimer
Notary Public residing at:

Hoyt S. Wimer, Bountiful, Utah

STATE OF UTAH)
: ss.
COUNTY OF UTAH)

On the 24th day of December, 1979, personally appeared before me WAYNE E. PEARCE, who being by me duly sworn did say that he is a General Partner of SHERWOOD ASSOCIATES, A Utah Limited Partnership, and that the foregoing instrument was signed in behalf of said Partnership by authority of its articles of Partnership, and said WAYNE E. PEARCE, acknowledged to me that said Partnership executed the same.

My commission expires:

1/8/80

Hoyt S. Wimer
Notary Public residing at:

Hoyt S. Wimer, Bountiful, Utah

50572

BOOK 1803
PAGE 239

(To be used only when indebtedness secured hereby has been paid in full)

TO: TRUSTEE.

The undersigned is the legal owner and holder of the note and all other indebtedness secured by the within Trust Deed. Said note, together with all other indebtedness secured by said Trust Deed has been fully paid and satisfied; and you are hereby requested and directed, on payment to you of any sums owing to you under the terms of said Trust Deed, to cancel said note above mentioned, and all other evidences of indebtedness secured by said Trust Deed delivered to you herewith, together with the said Trust Deed, and to reconvey, without warranty, to the parties designated by the terms of said Trust Deed, all the estate now held by you thereunder.

Dated....., 19.. 87. WASHINGTON NATIONAL INSURANCE COMPANY

By:

J.E. Dresmal, Vice President

Attest:

J.W. Craig, Assistant Secretary

Mail reconveyance to

TRUST DEED

With Assignment of Rents

TO

AS TRUSTEE FOR

Dated, 19..

APPENDIX "D"

Letter, dated November 30, 1987

SESSIONS & MOORE

ATTORNEYS AT LAW

400 FIRST FEDERAL PLAZA

505 EAST 200 SOUTH

SALT LAKE CITY, UTAH 84102

(801) 359-4100

CLARK W. SESSIONS
ROY B. MOORE, P.C.
JOHN F. CLARK
KEVIN EGAN ANDERSON
DEAN C. ANDREASEN
DOUGLAS J. PAYNE
JOHN K. WEST

E. CRAIG SMAY
OF COUNSEL

November 30, 1987

Sherwood Associates
a Utah limited partnership
4303 North Foothill Drive
Provo, Utah 84604

Re: Washington National Insurance Co. v. Sherwood Associates

Gentlemen:

This is to advise that we are counsel for Washington National Insurance Company, the assignee of a certain Trust Deed Note executed by Sherwood Associates, a Utah limited partnership in favor of Bettilyon Mortgage Loan Co. dated December 24, 1979, in the principal sum of \$1,200,000.00. The loan evidenced by the Trust Deed Note was secured in part by a Trust Deed with Assignment of Rents dated December 24, 1979, (hereinafter the "Trust Deed") which covers certain real property and improvements described therein and situated in Utah County, State of Utah.

This is to further advise that the loan evidenced by the Trust Deed Note is in default and the principal amount thereof is \$1,024,797.87, together with interest thereon to November 1, 1987, in the sum of \$68,746.86, and applicable late charges in the sum of \$9,984.00. It further appears that the property taxes on the real property described in the Trust Deed are delinquent and various mechanics and materialmens liens have been filed against the property.

This is to therefore advise that pursuant to Paragraph 27. of the Trust Deed and Paragraph 2. of the Trust Deed Note, Washington National Insurance Company hereby declares all sums secured by the Trust Deed immediately due and payable. Unless the total sum of \$1,103,528.73, together with interest at the per diem rate of \$327.37 from November 1, 1987, is received in the office of the undersigned on or before Monday, December 7, 1987, at 5:00 p.m., action will be commenced to collect the total sum due and owing, to foreclose the Trust Deed, to appoint a Receiver

SESSIONS & MOORE

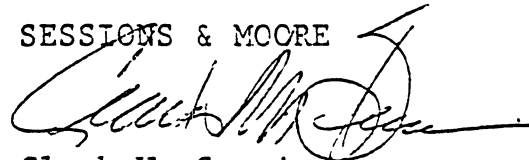
Sherwood Associates
November 30, 1987
Page -2-

over the subject property and to otherwise protect the interest of Washington National Insurance Company as by law provided together with costs and attorneys' fees.

GOVERN YOURSELVES ACCORDINGLY.

Yours truly,

SESSIONS & MOORE



Clark W. Sessions

CWS/mc

cc: Guarantors and General Partners as per attached

George V. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Olive Davis Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Allan R. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Suzanna P. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Merrill D. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Mary C. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

M. Wayne Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Kathlyn L. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Donald C. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Debra A. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Jay W. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Olive Marie Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

David R. Stewart, General Partner & Guarantor
Sherwood Associates,
a Utah limited partnership
4303 North Foothill Drive
Provo, Utah 84604

Durinda A. Stewart, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

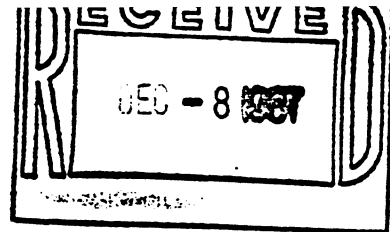
Wayne E. Pearce, General Partner & Guarantor
Sherwood Associates,
a Utah limited partnership
4303 North Foothill Drive
Provo, Utah 84604

Carol Pearce, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

APPENDIX "E"

Tender, dated December 7, 1987

RIDGE ATHLETIC CLUB, INC.
4303 North Foothill Drive
Provo, UT 84604
224-6969



TENDER

TO: Washington National Insurance Co.
c/o Clark W. Sessions
505 East 200 South #400
Salt Lake City, UT 84102

Tender is hereby made to Washington National Insurance Co., hereinafter referred to as "WNI" of One Hundred Nineteen Thousand Two Hundred and no/100 Dollars (\$119,200.00) the amount the undersigned calculates to be due under that certain note, executed by Sherwood Associates, a Ltd. Partnership, secured by Trust Deed dated December 24, 1979. Notwithstanding the specific sum tendered, the undersigned tenders the entire delinquency due under said note upon presentation of satisfactory proof demonstrating the calculation of such indebtedness.

This tender is made pursuant to U.C.A. §78-27-1 et. seq.

DATED this 7th day of December, 1987.

RIDGE ATHLETIC CLUB, INC.

By: 
DARRELL TANNER, President

APPENDIX "F"

Letter, dated December 8, 1987

SESSIONS & MOORE

ATTORNEYS AT LAW

400 FIRST FEDERAL PLAZA

505 EAST 200 SOUTH

SALT LAKE CITY, UTAH 84102

(801) 359-4100

CLARK W SESSIONS
ROY B MOORE PC
JOHN F CLARK
KEVIN EGAN ANDERSON
DEAN C ANDREASEN
DOUGLAS J PAYNE
JOHN K WEST

E CRAIG SMAY
OF COUNSEL

December 8, 1987

Darrell Tanner, President
Ridge Athletic Club, Inc.
4303 North Foothill Drive
Provo, Utah 84604

Re: Sherwood Associates

Dear Mr. Tanner:

We received today your letter dated December 7, 1987, in which you tender the amount of \$119,200.00 or in the alternative "the entire delinquency due under said note . . .". Pursuant to Utah Code Annotated §78-27-3, Washington National Insurance Company hereby objects to your tender on the following grounds:

1. Pursuant to the terms of the subject Trust Deed Note and Trust Deed and our letter to you dated November 29, 1987, the entire unpaid principal balance and accrued interest together with all amounts secured and due under the Trust Deed were accelerated on November 30, 1987, and were and are now due and payable.

2. The specific amounts due and payable are as follows:

a.	Unpaid principal balance as of November 1, 1987	\$1,024,797.87
b.	Unpaid accrued interest as of November 1, 1987	68,746.86
c.	Unpaid accrued interest for November, 1987	9,820.98
d.	Late Charges	11,520.00
e.	Unpaid accrued interest for December 1-8, 1987, at 18% (per diem rate of \$512.40)	<u>4,099.19</u>
	TOTAL DUE	<u>\$1,118,984.90</u>

SESSIONS & MOORE

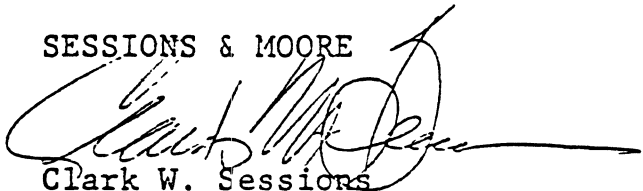
Darrell Tanner, President
December 8, 1987
Page -2-

3. Based upon past performance and various promises made in connection with the subject loan as evidenced by the Trust Deed Note and Trust Deed, it is highly doubtful that performance pursuant to the tender would be accomplished. Representations have been made to the undersigned concerning various avenues of funding, letters of credit, etc. since September and as recently as yesterday. All to no avail.

On behalf of our client Washington National Insurance Company, the action previously described in our letter dated November 29, 1987, will be taken and pursued.

Yours truly,

SESSIONS & MOORE



Clark W. Sessions

CWS/mc

cc: James W. Craig,
Washington National Insurance Company

APPENDIX "G"

Judgment and Decree of Foreclosure

CLARK W. SESSIONS (2914)
CYNTHIA K. CASSELL (5050)
SESSIONS & MOORE
Attorneys for Plaintiff
400 First Federal Plaza
505 East 200 South
Salt Lake City, Utah 84102
Telephone: (801) 359-4100

IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

WASHINGTON NATIONAL INSURANCE
COMPANY, an Illinois
corporation,

Plaintiff,

vs.

SHERWOOD ASSOCIATES, a Utah
limited partnership;
WAYNE E. PEARCE, individually,
and as general partner of
Sherwood Associates;
DAVID R. STEWART, individually,
and as general partner
of Sherwood Associates;
OSMOND BROTHERS INVESTMENT
TRUST, a Utah partnership;
GEORGE V. OSMOND, individually,
and as Trustee of Osmond
Brothers Investment Trust;
OLIVE DAVIS OSMOND,
individually, and as Trustee
of Osmond Brothers Investment
Trust; ALLAN R. OSMOND and
SUZANNA P. OSMOND, individuals,
MERRILL D. OSMOND and MARY
C. OSMOND, individuals;
M. WAYNE OSMOND and KATHRYN
L. OSMOND, individuals;
DONALD C. OSMOND and DEBRA
A. OSMOND, individuals;
JAY W. OSMOND, an individual;
OLIVE MARIE OSMOND, aka

JUDGMENT AND DECREE
OF FORECLOSURE

Civil No. CV872702

Judge Ray M. Harding

MARIE OSMOND, an individual;	:
OSMOND STUDIOS, a Utah	:
partnership; DURINDA A.	:
STEWART, an individual;	:
CAROL PEARCE, an individual;	:
THE RIDGE ATHLETIC CLUB, INC.,	:
a Utah corporation; HOLLADAY	:
BANK & TRUST, a Utah	:
corporation; IFG LEASING	:
COMPANY, a Minnesota	:
corporation; MOORE LEASING	:
COMPANY, fka FMA LEASING	:
COMPANY, a Utah corporation;	:
BOW VALLEY DEVELOPMENT	:
COMPANY, a Utah corporation;	:
ELIAS MORRIS & SONS COMPANY,	:
a Utah corporation;	:
DARRELL D. TANNER,	:
individually, and as Trustee	:
of the Tanner Family Trust;	:
JASON TANNER, an individual;	:
TRACY A. TANNER McDONALD, an	:
individual; LINLEY A. TANNER,	:
an individual; BRADLEY H.	:
TANNER, an individual;	:
THE RICHARD GILL COMPANY, dba	:
GILL COMPANIES, a Texas	:
corporation; BLUNDELL and	:
WEBER, INC., dba UTAH	:
ENGINEERING COMPANY, a Utah	:
corporation; and JOHN DOES	:
1 through 30,	:
	:
Defendants.	:

Based upon the Order granting Plaintiffs' Motion for Summary Judgment on file herein, the Memoranda and exhibits filed by the Plaintiff, the amended affidavit of costs and attorney's fees and other pleadings on file herein, including the Memorandum Decision of the above-entitled Court, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants Sherwood Associates, a Utah Limited Partnership, Wayne E. Pearce, David R. Stewart, Osmond Brothers Investment Trust, a Utah partnership, George V. Osmond, George V. Osmond as Trustee of Osmond Brothers Investment Trust, Olive Davis Osmond, Olive Davis Osmond as Trustee of Osmond Brothers Investment Trust, Allan R. Osmond, Suzanna P. Osmond, Merrill D. Osmond, Mary C. Osmond, M. Wayne Osmond, Kathryn L. Osmond, Donald C. Osmond, Debra A. Osmond, Jay W. Osmond, Olive Marie Osmond aka Marie Osmond, Durinda A. Stewart, Carol Pearce and Darrell D. Tanner, jointly and severally, owe Plaintiff the following amounts: unpaid principal on the Promissory Note in the amount of \$1,024,797.87 together with interest thereon in the amount of \$274,346.09 through April 1, 1989, and accruing thereafter at the per diem rate of \$512.40, late charges of \$768.00, and attorney's fees and costs of \$ 12,000.00 not including fees and costs for preparation of final Judgment and Decree of Foreclosure and supporting documents, and fees and costs of sale, which fees and costs may be filed by affidavit for inclusion in the Deficiency Judgment if a deficiency, after sale, exists.

2. The Plaintiff's lien on the real property and improvements thereon that is the subject of this action is prior and superior to the interests of all named Defendants to this

action, excluding the interest claimed by Holladay Bank & Trust. The subject real property affected and encumbered by Plaintiff's lien is located at 4303 North Foothill Drive, Provo, Utah, and is more particularly described as follows, to-wit:

Commencing at a point which is South 79.94 feet and West 980.57 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 68° 25' East 417.00 feet; thence North 84° 57' East 160.00 feet; thence South 81° 31' 52" East 102.97 feet; thence along the arc of a 766.41 foot radius curve to the right 168.13 feet, the chord of which bears North 27° 17' 05" West 167.80 feet; thence along the arc of a 286.93 foot radius curve to the left 137.72 feet, the chord of which bears North 34° 45' West 136.40 feet; thence North 48° 30' West 178.86 feet; thence along the arc of a 1002.77 foot radius curve to the right 166.26 feet, the chord of which bears North 43° 45' West 166.08 feet; thence North 39° 00' West 250.32 feet; thence along the arc of a 2628.32 foot radius curve to the right 49.55 feet, the chord of which bears North 38° 27' 34" West 49.55 feet; thence South 52° 04' 48" West 362.79 feet; thence South 0° 40' 42" West 335.65 feet; thence South 20° 24' 30" West 98.88 feet; thence South 65° 06' 39" East 39.08 feet; thence South 35° 52' 55" East 41.26 feet; thence South 70° 42' 19" East 53.96 feet; thence South 55° 05' 10" East 54.25 feet; thence South 25° 31' 15" West 179.58 feet; thence South 24° 17' 45" East 58.84 feet; thence South 64° 06' 15" East 48.30 feet; thence North 50° 17' 13" East 158.78 feet to the point of beginning.

Containing 10.788 acres.

LESS 0.410 acre of OSMOND BROTHERS (Parcel A), a Utah Partnership.

Commencing at a point which is North 425.65 feet and West 895.81 feet from the Northeast

Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 24° 59' 48" West 158.00 feet; thence South 65° 00' 12" West 113.00 feet; thence South 24° 59' 48" East 158.00 feet; thence North 65° 00' 12" East 113.00 feet to the point of beginning.

Containing 0.410 acres.

AND LESS the following:

Commencing at a point located on the West Right-of-Way line of Foothill Drive, Provo, Utah, said point being North 626.41 feet and West 761.02 feet from the Southeast corner of Section 18, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence South 65°00'12" West 207.00 feet; thence North 24°59'48" West 20.00 feet; thence North 65°00'12" East 201.978 feet to the West Right-of-Way line of Foothill Drive; thence South 39°00'00" East 20.75 feet along said Right-of-Way line to the point of beginning.

(the "Subject Property").

3. The Sheriff of Utah County, State of Utah shall forthwith sell the Subject Property pursuant to Rule 69(e) of the Utah Rules of Civil Procedure, as amended, and thereafter file a written return to the Court on said sale, and shall apply the proceeds thereof in satisfaction of the amounts due under this Judgment and Decree of Foreclosure including costs of sale and interest accruing on the principal through the date of sale, and any excess shall be applied as the Court shall direct.

4. All persons having an interest in the Subject Property shall have the right, upon producing satisfactory proof of such

interest, to redeem the same within the time provided by law for such redemption; that from and after the period of redemption as provided by law or agreement, that Defendants and all persons claiming by, through or under them be and they are forever barred and foreclosed of all right, title and interest in and to the Subject Property; and from and after delivery of the Sheriff's Deed to the Subject Property, that the purchaser at the Sheriff's Sale shall be given possession of the Subject Property.

5. The Sheriff of Utah County, State of Utah shall sell, pursuant to Rule 69(e) of the Utah Rules of Civil Procedure, as amended the following described property:

All machinery, equipment, material, appliances and fixtures installed or placed by Debtor in the premises for the generation and distribution of air, water, heat, electricity, light, fuel or refrigeration, or for ventilating or air-conditioning purposes, or for sanitary or drainage purposes, or for the exclusion of vermin or insects, or for the removal of dust, refuse or garbage, and including all awnings, windowshades, draper rods and brackets, screens, floor coverings, incinerators, carpeting and all furniture and fixtures used in the operation of the buildings, together with all additions to, substitutions for, changes, in or replacements of the whole or any part of any or all of said articles of property.

(the "Personal Property").

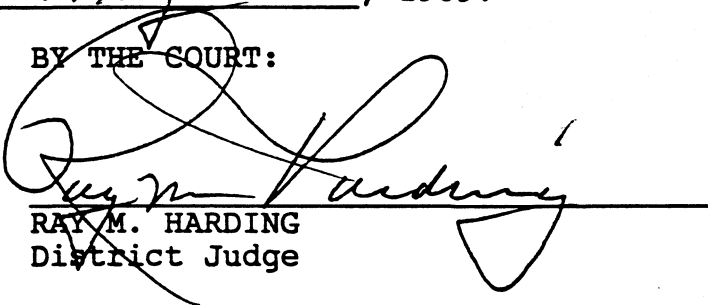
6. The Sheriff of Utah County, State of Utah shall apply the proceeds of the sale of the Personal Property in satisfaction

of this Judgment and Decree of Foreclosure and otherwise as set forth in paragraph 3 hereof.

7. In the event that a deficiency results after due and proper application of the proceeds of such sale or sales, Plaintiff is entitled to a Deficiency Judgment against Defendants, jointly and severally, for such sum and amount, including interest on the Judgment at the contract rate of 18% per annum. All parties to this proceeding and any other person may bid at said Sheriff's Sale or sales of the Subject Property and the Personal Property described herein.

DATED this 11 day of May, 1989.

BY THE COURT:


RAY M. HARDING
District Judge

APPENDIX "H"

Order (granting summary judgment

1981 JUL 11 PM 1:24

32

CLARK W. SESSIONS (2914)
CYNTHIA K. CASSELL (5050)
SESSIONS & MOORE
Attorneys for Plaintiff
400 First Federal Plaza
505 East 200 South
Salt Lake City, Utah 84102
Telephone: (801) 359-4100

IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

WASHINGTON NATIONAL INSURANCE :
COMPANY, an Illinois :
corporation, :
:
Plaintiff, :
:
vs. :
:
SHERWOOD ASSOCIATES, a Utah :
limited partnership; :
WAYNE E. PEARCE, individually, :
and as general partner of :
Sherwood Associates; :
DAVID R. STEWART, individually, :
and as general partner :
of Sherwood Associates; :
OSMOND BROTHERS INVESTMENT :
TRUST, a Utah partnership; :
GEORGE V. OSMOND, individually, :
and as Trustee of Osmond :
Brothers Investment Trust; :
OLIVE DAVIS OSMOND, :
individually, and as Trustee :
of Osmond Brothers Investment :
Trust; ALLAN R. OSMOND and :
SUZANNA P. OSMOND, individuals, :
MERRILL D. OSMOND and MARY :
C. OSMOND, individuals; :
M. WAYNE OSMOND and KATHRYN :

ORDER

Civil No. CV872702

Judge Ray M. Harding

L. OSMOND, individuals;	:
DONALD C. OSMOND and DEBRA	:
A. OSMOND, individuals;	:
JAY W. OSMOND, an individual;	:
OLIVE MARIE OSMOND, aka	:
MARIE OSMOND, an individual;	:
OSMOND STUDIOS, a Utah	:
partnership; DURINDA A.	:
STEWART, an individual;	:
CAROL PEARCE, an individual;	:
THE RIDGE ATHLETIC CLUB, INC.,	:
a Utah corporation; HOLLADAY	:
BANK & TRUST, a Utah	:
corporation; IFG LEASING	:
COMPANY, a Minnesota	:
corporation; MOORE LEASING	:
COMPANY, fka FMA LEASING	:
COMPANY, a Utah corporation;	:
BOW VALLEY DEVELOPMENT	:
COMPANY, a Utah corporation;	:
ELIAS MORRIS & SONS COMPANY,	:
a Utah corporation;	:
DARRELL D. TANNER,	:
individually, and as Trustee	:
of the Tanner Family Trust;	:
JASON TANNER, an individual;	:
TRACY A. TANNER McDONALD, an	:
individual; LINLEY A. TANNER,	:
an individual; BRADLEY H.	:
TANNER, an individual;	:
THE RICHARD GILL COMPANY, dba	:
GILL COMPANIES, a Texas	:
corporation; BLUNDELL and	:
WEBER, INC., dba UTAH	:
ENGINEERING COMPANY, a Utah	:
corporation; and JOHN DOES	:
1 through 30,	:
	:
	:
Defendants.	:

The Motion of the Plaintiffs for Partial Summary Judgment and
the Motion of the Defendant Darrell D. Tanner, Jason Tanner, Tracy
A. Tanner McDonald, Linley A. Tanner, Bradley H. Tanner, Darrell

D. Tanner, as Trustee of the Tanner Family Trust, and Ridge Athletic Club, Inc. (hereinafter collectively the "Tanner Defendants") came on regularly for hearing before the undersigned, one of the Judges of the above-entitled Court, on the 31st day of March, 1989, at 9:00 a.m. The Plaintiff was represented by Clark W. Sessions and Cynthia K. Cassell, of Sessions & Moore, and Sherman Young, of Ivie & Young, their attorneys. The Tanner Defendants were represented by Leslie W. Slaugh of Howard, Lewis & Petersen, their attorneys. The Osmond Defendants and Defendants David and Durinda Stewart were represented by Douglas M. Whitehead of Olsen, Hintze, Nielson & Hill, their attorneys. The Defendants Sherwood Associates and Wayne Pearce were represented by Michael D. Esplin of Aldrich, Nielson, Weight & Esplin, their attorneys. The Defendant Holladay Bank & Trust was represented by Ronald G. Russell of Kimball, Parr, Crockett & Waddoups, its attorneys. The Court heard the arguments and statements of counsel for the respective parties, reviewed the files, records, memoranda, exhibits and affidavits, including certain depositions on file herein, and having taken the matter under advisement and having issued its Memorandum Decision on the 6th day of April, 1989, and good cause appearing therefor, it is hereby ORDERED as follows:

1. That the Motion of the Tanner Defendants for Summary Judgment be and the same is hereby denied, and

2. That the Stipulation of the Plaintiff and the Defendant Holladay Bank & Trust that the Motion for Summary Judgment of the Plaintiff shall apply to all parties other than the Defendant Holladay Bank & Trust, be and the same is hereby accepted and approved, and,

3. That the Motion of the Plaintiff for Summary Judgment, (by stipulation for Partial Summary Judgment), be and the same is hereby granted, the Court specifically finding as follows:

a. There remains no genuine issue of any material fact and the Plaintiff is entitled to Summary Judgment, (by stipulation for Partial Summary Judgment), as a matter of law;

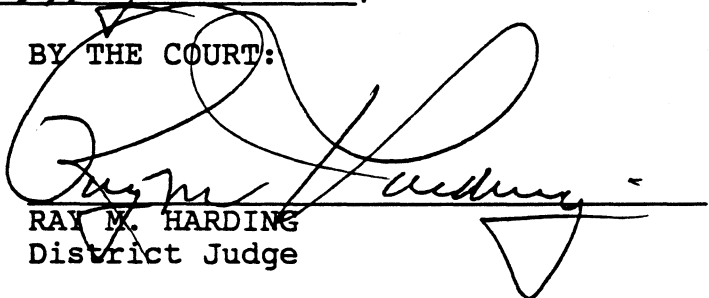
b. When the Defendants went into default under the Promissory Note, Deed of Trust and other security agreements, which are a part the subject matter of the above-entitled action, the Plaintiff had the option of electing a remedy, which the Plaintiff elected as that of judicial foreclosure. The Court further finds that such remedy included the right of the Plaintiff to accelerate the entire debt by declaring the same due and payable which the Court finds the Plaintiff did. The Court finds, in addition, that because the debt had been accelerated, the tender by the Tanner Defendants of a percentage of the accelerated amount of the debt due and payable was ineffective and without legal force or effect.

c. That the Plaintiff has a valid first lien on the property described in the Deed of Trust and is entitled to a Judgment and Decree of Foreclosure and an Order of Sale subject to the Defendants' rights of redemption as by law provided.

4. That this Order is final and appealable.

DATED this 11 day of May, 1989.

BY THE COURT:


RAY M. HARDING
District Judge

APPENDIX "I"

Order of Sale

CLARK W. SESSIONS (2914)
CYNTHIA K. CASSELL (5050)
SESSIONS & MOORE
Attorneys for Plaintiff
400 First Federal Plaza
505 East 200 South
Salt Lake City, Utah 84102
Telephone: (801) 359-4100

IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

WASHINGTON NATIONAL INSURANCE
COMPANY, an Illinois
corporation,

Plaintiff,

vs.

SHERWOOD ASSOCIATES, a Utah
limited partnership;
WAYNE E. PEARCE, individually,
and as general partner of
Sherwood Associates;
DAVID R. STEWART, individually,
and as general partner
of Sherwood Associates;
OSMOND BROTHERS INVESTMENT
TRUST, a Utah partnership;
GEORGE V. OSMOND, individually,
and as Trustee of Osmond
Brothers Investment Trust;
OLIVE DAVIS OSMOND,
individually, and as Trustee
of Osmond Brothers Investment
Trust; ALLAN R. OSMOND and
SUZANNA P. OSMOND, individuals,
MERRILL D. OSMOND and MARY
C. OSMOND, individuals;
M. WAYNE OSMOND and KATHRYN
L. OSMOND, individuals;
DONALD C. OSMOND and DEBRA
A. OSMOND, individuals;
JAY W. OSMOND, an individual;
OLIVE MARIE OSMOND, aka

ORDER OF SALE

Civil No. CV872702

Judge Ray M. Harding

MARIE OSMOND, an individual;	:
OSMOND STUDIOS, a Utah	:
partnership; DURINDA A.	:
STEWART, an individual;	:
CAROL PEARCE, an individual;	:
THE RIDGE ATHLETIC CLUB, INC.,	:
a Utah corporation; HOLLADAY	:
BANK & TRUST, a Utah	:
corporation; IFG LEASING	:
COMPANY, a Minnesota	:
corporation; MOORE LEASING	:
COMPANY, fka FMA LEASING	:
COMPANY, a Utah corporation;	:
BOW VALLEY DEVELOPMENT	:
COMPANY, a Utah corporation;	:
ELIAS MORRIS & SONS COMPANY,	:
a Utah corporation;	:
DARRELL D. TANNER,	:
individually, and as Trustee	:
of the Tanner Family Trust;	:
JASON TANNER, an individual;	:
TRACY A. TANNER McDONALD, an	:
individual; LINLEY A. TANNER,	:
an individual; BRADLEY H.	:
TANNER, an individual;	:
THE RICHARD GILL COMPANY, dba	:
GILL COMPANIES, a Texas	:
corporation; BLUNDELL and	:
WEBER, INC., dba UTAH	:
ENGINEERING COMPANY, a Utah	:
corporation; and JOHN DOES	:
1 through 30,	:
	:
Defendants.	:

TO: THE SHERIFF OF UTAH COUNTY, STATE OF UTAH,

Greetings:

WHEREAS on the 11th day of May, 1989 Plaintiff obtained a Judgment and Decree of Foreclosure in the District Court of Utah County, State of Utah against the above-named Defendants which

Decree of Foreclosure was duly recorded in and docketed in the Clerk's Office, a certified copy of the Judgment and Decree of Foreclosure is attached hereto and by this reference incorporated herein and made a part hereof.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the real property described in said Judgment and Decree of Foreclosure and more particularly described as follows be sold at public auction:

Commencing at a point which is South 79.94 feet and West 980.57 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 68° 25' East 417.00 feet; thence North 84° 57' East 160.00 feet; thence South 81° 31' 52" East 102.97 feet; thence along the arc of a 766.41 foot radius curve to the right 168.13 feet, the chord of which bears North 27° 17' 05" West 167.80 feet; thence along the arc of a 286.93 foot radius curve to the left 137.72 feet, the chord of which bears North 34° 45' West 136.40 feet; thence North 48° 30' West 178.86 feet; thence along the arc of a 1002.77 foot radius curve to the right 166.26 feet, the chord of which bears North 43° 45' West 166.08 feet; thence North 39° 00' West 250.32 feet; thence along the arc of a 2628.32 foot radius curve to the right 49.55 feet, the chord of which bears North 38° 27' 34" West 49.55 feet; thence South 52° 04' 48" West 362.79 feet; thence South 0° 40' 42" West 335.65 feet; thence South 20° 24' 30" West 98.88 feet; thence South 65° 06' 39" East 39.08 feet; thence South 35° 52' 55" East 41.26 feet; thence South 70° 42' 19" East 53.96 feet; thence South 55° 05' 10" East 54.25 feet; thence South 25° 31' 15" West 179.58 feet; thence South 24° 17' 45" East 58.84 feet; thence South 64° 06' 15" East 48.30 feet; thence North 50° 17' 13" East 158.78 feet to the point of beginning.

Containing 10.788 acres.

LESS 0.410 acre of OSMOND BROTHERS (Parcel A),
a Utah Partnership.

Commencing at a point which is North 425.65 feet and West 895.81 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 24° 59' 48" West 158.00 feet; thence South 65° 00' 12" West 113.00 feet; thence South 24° 59' 48" East 158.00 feet; thence North 65° 00' 12" East 113.00 feet to the point of beginning.

Containing 0.410 acres.

AND LESS the following:

Commencing at a point located on the West Right-of-Way line of Foothill Drive, Provo, Utah, said point being North 626.41 feet and West 761.02 feet from the Southeast corner of Section 18, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence South 65°00'12" West 207.00 feet; thence North 24°59'48" West 20.00 feet; thence North 65°00'12" East 201.978 feet to the West Right-of-Way line of Foothill Drive; thence South 39°00'00" East 20.75 feet along said Right-of-Way line to the point of beginning.

(the "Subject Property"). The real property and improvements are located at 4303 North Foothill Drive, Provo, Utah.

IT IS FURTHER ORDERED that the equipment, furniture, fixtures, furnishings and other property described in said Judgment and Decree of Foreclosure and more particularly described as follows be sold at public auction:

All machinery, equipment, material, appliances
and fixtures installed or placed by Debtor in

the premises for the generation and distribution of air, water, heat, electricity, light, fuel or refrigeration, or for ventilating or air-conditioning purposes, or for sanitary or drainage purposes, or for the exclusion of vermin or insects, or for the removal of dust, refuse or garbage, and including all awnings, windowshades, draper rods and brackets, screens, floor coverings, incinerators, carpeting and all furniture and fixtures used in the operation of the buildings, together with all additions to, substitutions for, changes, in or replacements of the whole or any part of any or all of said articles of property.

(the "Personal Property").

NOW THEREFORE, you, the Sheriff of Utah County, State of Utah, are hereby commanded and required to proceed to notice for sale and sell the Subject Property and Personal Property hereinabove described and described in said Judgment and Decree of Foreclosure and apply the proceeds of said sale as directed in said Judgment and Decree of Foreclosure and you shall make and file your report of such sale with the Clerk of this Court within sixty (60) days of the date of your receipt thereof and you shall do all things according to the terms and requirements of said Judgment and

Decree of Foreclosure and the applicable provisions and requirements of law.

EXECUTED this 12 day of May, 1989.

DISTRICT COURT OF UTAH COUNTY

Carna B. Smith

CLERK

By: Jamie Hinton
Deputy Clerk

APPENDIX "J"

Memorandum Decision

1989 APR -7 AM 9:13

DA

IN THE FOURTH JUDICIAL DISTRICT COURT
OF THE STATE OF UTAH, IN AND FOR UTAH COUNTY

WASHINGTON NATIONAL INSURANCE
COMPANY, an Illinois
corporation,

Plaintiff,

CASE NUMBER CV 87-2702

-vs-

RAY M. HARDING, JUDGE

SHERWOOD ASSOCIATES, a Utah
Limited Partnership, et al.

Defendant.

MEMORANDUM DECISION

The Court, having considered plaintiff's motion for partial summary judgment, will grant that motion finding that there are no genuine issues as to any material facts. Plaintiff has asked that the Court not consider the appointment of a receiver at this time. This motion is for partial summary judgment because plaintiff has asked that defendant Holladay Bank and Trust be excluded from the motion.

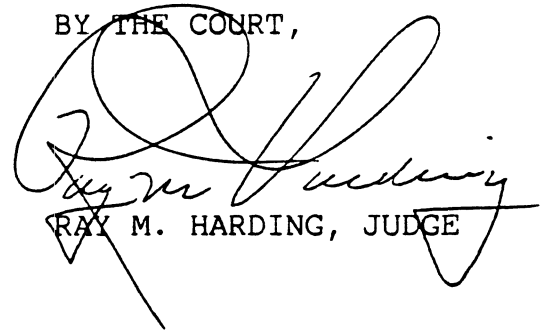
The first issue which the Court will consider is whether the defendant's tender was effective. The Court finds that it was not. When defendants went into default, under the statute governing trust deeds, U.C.A. 57-1-23, plaintiff had the option of electing a remedy. The remedy which was chosen was judicial foreclosure. A part of this remedy includes acceleration of the entire debt making it due and payable. Because the debt had already been accelerated, defendants tender of a small percentage of the accelerated amount of the debt was ineffective.

After consideration of the oral arguments and memoranda concerning this case, the Court finds that the plaintiff has a valid first lien on this property which it is entitled to foreclose against the defendants. Plaintiffs also have a right to bring an action against defendants for any deficiency after the sheriff's sale. As admitted by plaintiff's counsel at the hearing, defendants have a right of redemption.

Counsel for plaintiff to prepare a summary judgment and an order of sale incorporating the terms of this decision and submit it to opposing counsel for approval as to form prior to filing with the Court for signature.

Dated this 6th day of April, 1989.

BY THE COURT,

A handwritten signature in black ink, appearing to read "Ray M. Harding", is written over the printed name. The signature is stylized with large loops and a long horizontal stroke at the end.

RAY M. HARDING, JUDGE

cc: Clark W. Sessions, Esq.
Jackson Howard, Esq.
Richard L. Hill, Esq.
Michael D. Esplin, Esq.
C.T. Corporation Systems