

1960

Ray Keith Sudbury and Ruth Jean Sudbury v. Olaf Theodore Stevensen, Jr., and Barbara Ann Stevensen : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

SEP 7 - 1960

RAY KEITH SUDBURY, and
RUTH JEAN SUDBURY,
Plaintiffs and Appellants,

vs.

OLAF THEODORE
STEVENSEN, JR., and
BARBARA ANN
STEVENSEN,
Defendants and Respondents.

Clerk, Supreme Court, Utah

Case No. 9220

BRIEF OF RESPONDENTS

McBROOM & HANNI

*Attorneys for Defendants
and Respondents*

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IN THE SUPREME COURT
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RAY KEITH SUDBURY, and
RUTH JEAN SUDBURY,
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BARBARA ANN
STEVENSEN,
Defendants and Respondents.

Case No. 9220

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

On January 28, 1960, a summary judgment was entered in favor of defendants. Plaintiffs appeal from that judgment.

Prior to June, 1958, plaintiffs and defendants were engaged in the business of conducting Ollies Terrace Room in Salt Lake City, Utah, as a limited partnership. Keith Sudbury and Olaf Theodore Stevensen, Jr., (hereinafter called Ted Stevensen) were general partners and each owned a forty per cent interest in and to the assets of said partnership. Ruth Jean Sudbury and Barbara Ann Stevensen

each owned a ten per cent interest in the assets of said partnership. (Exhibit P-8, R. 34)

In the month of June, 1958, the parties entered into and executed the agreement of sale, a copy of which is marked Exhibit "A" and attached to plaintiffs' complaint. The agreement provides for the purchase by defendants of the undivided one-half interest in and to the partnership assets owned by plaintiffs for the total sum of \$36,200.00. (R. 5) The downpayment of \$10,791.59 was paid by defendants assuming and paying the sum of \$4,591.59 that represented plaintiffs' share of the then existing obligations of the partnership, the cancellation by defendants of the sum of \$2,500.00 owed by plaintiffs to defendants and by the payment of the sum of \$3,700.00 in cash. (R. 6) The balance of \$25,408.41 under the terms of said agreement was to be paid in weekly installments of \$100.00, the first installment of which became due on September 1, 1958. Under the terms of the agreement defendants were granted a grace period of fifteen weeks. Defendants used the entire grace period before making any of the installment payments.

The first weekly installment that became due after the expiration of the fifteen week grace period was on December 15, 1958. On December 8, 1958, defendants paid plaintiffs the sum of \$300.00 (Ex-

hibit P-3) This payment represented three weekly installments. Thereafter defendants paid the weekly installments down to and including the installment that became due on July 27, 1959.

On August 10, 1959, defendants delivered a check to plaintiffs in the amount of \$200.00. This check represented the payment that became due on August 3rd and the payment that became due on August 10, 1959. At the same time defendants delivered to plaintiffs a series of checks that were post dated one week apart beginning with August 17, 1959. That after August 10, 1959, and prior to August 17, 1959, plaintiffs presented said \$200.00 check (Exhibit P-1) to the First Security Bank of Utah, N.A., Main at First South Branch, and the same was wrongfully dishonored by said bank and was marked "refer to maker". On Monday, August 17, 1959, plaintiff, Keith Sudbury, presented the August 10, 1959, check (Exhibit P-1) in the amount of \$200.00 and the August 17, 1959, check (Exhibit P-2) in the amount of \$100.00 for payment. The bank on that day wrongfully refused to honor the checks.

On the same day the bank dishonored both of said checks, Keith Sudbury consulted Mr. George Bridwell, one of the attorneys for plaintiffs, relative to his rights under said agreement. The letter dated August 17, 1959, (Exhibit P-4) was written

on the date it bears and was delivered by Keith Sudbury to one of Ted Stevensen's employees sometime within the next week. Defendants were in Europe on a vacation at the time Exhibit P-4 was delivered. The defendants returned from Europe immediately after Exhibit P-4 was delivered, and on September 1, 1959, defendants made a tender to plaintiffs of all installments that were due under the agreement of sale as of that day. Plaintiffs refused to accept the tender of said weekly installments and returned the \$500.00 so tendered to defendant's attorney on September 11, 1959, together with a letter (Exhibit P-5) from Mr. Reynolds, one of plaintiffs' attorneys.

Plaintiffs' complaint was filed on November 10, 1959, seeking a forfeiture of not only the one-half interest in the property purchased by defendants from plaintiffs but also the one-half interest in said property that defendants owned in their own right prior to said agreement of sale.

On January 18, 1960, defendants paid the sum of \$2,500.00 in the form of a cashier's check to the clerk of the court with instructions to deliver the same to plaintiffs or their attorney upon request. This \$2,500.00 represented all weekly installments that were then due under the agreement. On January 20, 1960, at the time of the argument of the motions for summary judgment, defendants through

their attorney and in open court again tendered to plaintiffs said \$2,500.00. (R. 25) Plaintiffs refused to accept said tender.

The foregoing statement of fact is undisputed. Plaintiffs claim in their brief that defendants were eighteen weeks delinquent in the payment of the weekly installments as of August 17, 1959, when First Security Bank of Utah, N.A., dishonored the checks of August 10 and August 17, 1959. This statement is not correct because it ignores, as is readily apparent from reading plaintiffs' brief, the fact that defendants were granted a fifteen week grace period. When the bank wrongfully dishonored defendants' two checks on August 17th, defendants were delinquent only three payments; namely, the August 3, August 10 and August 17, 1959, payments. No matter which way it is stated, all parties agree that had the bank honored the checks on August 17, 1959, as it should have done, defendants would not have been in default under the agreement in question.

STATEMENT OF POINTS

POINT I

THE "AGREEMENT OF SALE" THAT IS THE SUBJECT OF THIS ACTION IS IN LEGAL EFFECT A CHATTEL MORTGAGE AND NOT A CONDITIONAL SALES CONTRACT.

POINT II

THE OPTION TO ACCELERATE PAYMENTS AND

MAKE ENTIRE DEBT DUE WAS NOT EXERCISED
BY PLAINTIFFS AND DEFENDANTS ARE NOT IN
DEFAULT UNDER THE AGREEMENT.

POINT III

FORECLOSURE IS PLAINTIFFS' EXCLUSIVE
REMEDY UNDER THE AGREEMENT IN QUESTION.

POINT IV

ANSWER TO PLAINTIFFS' BRIEF.

ARGUMENT

POINT I

THE "AGREEMENT OF SALE" THAT IS THE
SUBJECT OF THIS ACTION IS IN LEGAL EFFECT A
CHATTEL MORTGAGE AND NOT A CONDITIONAL
SALES CONTRACT.

All parties agree that the agreement in question was one of sale and was not an agreement to sell. Title to plaintiffs' one-half interest in the property sold passed to defendants at the time of the execution of the agreement. (R. 4, par. II, plaintiffs' brief p. 16) Immediately following the execution of the agreement of sale, defendants owned the entire legal title to all of the property described in the agreement.

The first question the trial court was faced with in this case was to determine whether the agreement in question was in legal effect a "chattel mortgage" or a "conditional sales contract".

In answering this question there are certain basic rules that must be kept in mind.

INTENTION OF THE PARTIES

1. Whether a particular transaction is a conditional sale or a chattel mortgage, in the final analysis, depends on the intention of the parties, which is to be ascertained from their conduct, the attendant circumstances, and the terms of the agreement. The above rule is announced in the annotation entitled, "What amounts to conditional sale" in 175 A.L.R. 1366 at page 1378.

IF DOUBTFUL, MORTGAGE PREFERRED

2. Where it is doubtful from the face of an instrument whether the contract is a conditional sale or mortgage, the courts generally treat it as a mortgage, for the reason that such construction is most apt to attain the ends of justice and prevent fraud and oppression. The cases cited in 175 A.L.R. 1366 announce and demonstrate this rule. To the same effect see *Kliks v. Courtemanche*, 150 Ore. 332, 43 P. 2d 913; *Great American Indemnity Company v. Utility Contractors*, 21 Tenn. App. 463, 111 S.W. 2d 901; 92 A.L.R. 311. Consistent with this general attitude of the courts is the attitude of the Utah Supreme Court as declared in the case of *Green v. Pallfreyman*, 109 U. 291, 166 P. 2d 215, where it said,

"Forfeitures are not favored, and in interpreting an agreement, every reasonable presumption should be indulged against an intention to allow a forfeiture."

To the same effect see *Peterson v. Hodges*, 121 U. 72, 239 P. 2d 180.

PASSING OF TITLE

3. Did title pass under terms of the agreement at the time of its execution or was title retained by the plaintiffs, as security for the payment of the purchase price? Did the agreement in question constitute a sale or is it a "contract to sell"? Our court in *Middleton v. Evans*, 86 U. 396, 45 P. 2d 570, points up the difference by using the following language,

"In a contract to sell, the parties agree to transfer property and goods at some future time, whereas in a sale, the parties agree to transfer property presently."

a. The annotation in 175 A.L.R. at page 1380 states,

"That a simple retention of title to the chattel sold, in the seller, usually evidences a conditional sale, in the absence of provisions more consistent with a mortgage."

This annotation also demonstrates quite clearly that if title is not retained by the seller and if it is apparent from the instrument involved that the intention was to pass title that then the effect of the transaction is that it is a chattel mortgage and not a conditional sale.

CANNOT BE BOTH A CHATTEL MORTGAGE AND A CONDITIONAL SALES CONTRACT

4. The agreement cannot be both a chattel mortgage and a conditional sales contract.

a. The court in *Perkins v. Skates*, 220 Ala. 216, 124 S. 514, announces the rule that the relationship of conditional vendor and vendee, and of mortgagee and mortgagor, cannot subsist as to the same property at the same time. The state of the title and the incidence of the transaction are widely different.

A conditional sales contract by definition is one where title is retained by the seller until the purchase price is paid or until the happening of some other specified event. An examination of the agreement involved in this case adequately demonstrates and all of the parties to this lawsuit agree that the plaintiffs did not retain title to their one-half interest in the property, but on the contrary it was the intention of the parties that title pass at the time of the execution of the agreement. That fact in and of itself would probably prevent the agreement in question from having the legal effect of a conditional sales contract.

Paragraph V of the agreement (R. 7) provides that defendants will give plaintiffs a chattel mortgage on not only the one-half interest in the property that defendants were purchasing but also on the

one-half interest in the property that defendants already owned prior to the agreement. The strict foreclosure provision of the agreement contained in Paragraph VI, (A) provides that in the event of default that plaintiffs would be permitted to sell not only the property they had sold to defendants but also defendants' one-half interest that they already owned, and that plaintiffs would be entitled to retain all of the proceeds from that sale. The forfeiture provision contained in Paragraph VI, (B) provides that in the event of default the buyers will not only forfeit their interest in the one-half interest purchase from plaintiffs but that the buyers will also forfeit their one-half interest in the property that they already owned prior to the agreement.

The agreement clearly contemplates that plaintiffs will acquire a security interest in not only the one-half interest in the property that they sold to defendants but that they will also get a security interest in the one-half interest in the property that was owned by the defendants. By the terms of the agreement title to plaintiffs' interest in the property passed immediately to the defendants. Plaintiffs never did have title to the one-half interest that was owned by defendants, so the only way that plaintiffs could possibly get a security interest in the one-half interest owned by the defendants prior to the execution of the agreement would be for the defendants

to give the plaintiffs a chattel mortgage on such interest. Since title to the one-half interest sold passed at the time of the execution of the agreement, the only way the plaintiffs could acquire a security interest in the property sold was for defendants to give plaintiffs a chattel mortgage back. It would be inconsistent to hold that plaintiffs had a chattel mortgage on the one-half interest belonging to defendants originally and had a conditional sales contract on the one-half interest that they sold to defendants. Defendants never did execute and deliver a chattel mortgage as called for by the agreement; however, an agreement to execute a mortgage in equity is deemed a mortgage as between the parties.

The agreement is inconsistent. Paragraph V of the agreement provides that defendants will give plaintiffs a chattel mortgage on all of the property that constitutes Ollies Terrace Room. Paragraph VI, (A) provides that in the event of default the chattel mortgage may be foreclosed and all of the property (which would include defendants one-half interest) can be sold and all of the money realized therefrom retained by plaintiffs. This in effect is a provision for a strict foreclosure of the chattel mortgage. Paragraph VI, (B) provides that in the event of a default defendants will forfeit not only all of their interest in the property they purchased from plaintiffs but also all of their interest in the property

they owned prior to the agreement in question. This provision is a forfeiture provision and is one that is common to a conditional sales contract. As we have already seen an instrument in legal effect cannot be both a chattel mortgage and a conditional sales contract. It must be one or the other. In the event of a default, the methods of enforcing a chattel mortgage are entirely different than the methods of enforcing a conditional sales contract.

Construing the agreement as a mortgage instead of a conditional sale will do justice to the parties. Defendants will be required to pay the balance due under the agreement. Plaintiffs will get their money and defendants will retain their business.

The trial court in finding of fact No. 5 (R. 35) and in its conclusion of law (R. 36) and in its judgment (R. 37) found as a fact that it was the intention of the parties that the agreement in question have the effect of a chattel mortgage, and the court held that it in legal effect was a chattel mortgage. We think the court was clearly right in so holding.

POINT II

THE OPTION TO ACCELERATE PAYMENTS AND MAKE ENTIRE DEBT DUE WAS NOT EXERCISED BY PLAINTIFFS AND DEFENDANTS ARE NOT IN DEFAULT UNDER THE AGREEMENT.

The trial court has found and properly so that the agreement in legal effect is a chattel mortgage.

That being so the question then arises was the option to accelerate the payments and make the entire debt due exercised? In determining the answer to this question certain things should be kept in mind.

OPTIONAL OR AUTOMATIC ACCELERATION

1. Paragraph VI (A) of the agreement provides that in the event of default the "Sellers may, at their option, declare the whole of the unpaid balance under this agreement at once due and payable" * * *. It should be noted that this provision gives the seller an option to accelerate the payments in the event of default. It does not provide that in the event of default the payments are automatically accelerated without any act on the part of the sellers.

10 C.J.S. Sec. 251 (c), page 749, states the rule as follows,

"An acceleration clause may be absolute or optional in form. If absolute, maturity occurs on the happening of the specified default; if optional, maturity does not occur until the exercise of the option."

To the same effect see the annotation in 159 A.L.R., 1077 entitled Acceleration of Note or Mortgage as Automatic or Optional, where the rule is stated at page 1091, as follows:

"It has been uniformly held that a provision in a note or mortgage accelerating the maturity for non-payment of interest or installments, or other default, at the option of

the holder or the mortgagee, is not self executing but requires some action on the part of the holder or mortgagee without which the amount will not become due.”

AFFIRMATIVE DECLARATION NECESSARY

2. What is essential to the proper exercise of an option to accelerate maturity?

a. The general rule is stated in 5 A.L.R. 2d 968,

“That a provision in a bill or note accelerating the maturity thereof on nonpayment of interest or installments, or other default at the option of the holder, requires some affirmative action on the part of the holder, evidencing his election to take advantage of the accelerating provision, and that until such action has been taken the provision has no operation. In other words, some positive action on the part of the holder is an essential condition for the exercise of his option and a mere mental intention to declare the full amount due is not sufficient.”

b. As demonstrated by the annotation in 5 A.L.R. 2d 968, it is uniformly held that it is essential for a valid exercise of an option to accelerate the maturity of a bill or note or an installment under a contract that the holder or payee or the seller do some positive act to indicate the exercise of the option.

DECLARATION NOT SUFFICIENT TO ACCELERATE UNLESS FOLLOWED BY AFFIRMA-

TIVE ACT TOWARD ENFORCING DECLARED INTENTION.

3. The next question is, what constitutes a positive act on the part of a person who is exercising the option to accelerate?

a. On page 972 of 5 A.L.R. 2d the general rule is stated,

“While it is impossible to formulate a hard and fast rule by which each act can be immediately classified in regard to its sufficiency, the test seems to be the definiteness and finality of the holders action as expression of his election. Stated generally, the rule is that the exercise of the option must be made in a manner so clear and unequivocal as to leave no doubt as to the holders intention and to apprise the maker effectively of the fact that the option has been exercised.” (See to the same effect *Union Central Life Insurance Company v. Adams*, 169 Okla. 572, 38 P. 2d 76.)

b. In 36 Am. Jur., Sec. 393, p. 884 the rule is stated as follows:

“The general rule is that where the acceleration of the maturity of a mortgage debt on default is made optional with the mortgagee, some affirmative action must be taken by him evidencing his election to take advantage of the accelerating provision, and that until such action has been taken, the provision has no operation. (See cases cited under Note 18, page 884 of 36 Am. Jur.) The exercise of the option should be made in a man-

ner clear and unequivocal, so as to leave no doubt as to the mortgagees intention * * * even a declaration may be a sufficient exercise of the option, but to be effective, the declaration must be followed by an affirmative act toward enforcing the declared intention."

A mere declaration of intention to accelerate is not sufficient but to be effective as stated by the Supreme Court of Oklahoma in *Union Central Life Insurance Company v. Adams*, 169 Okl. 572, 38 P. 2d 26,

"The declaration must be followed by an affirmative act towards enforcing the declared intention."

WHO MAY EXERCISE OPTION

4. Who may elect to exercise the option to accelerate the payments?

a. In 59 C.J.S., Sec. 495 (5) (d) the rule is stated,

"The terms of the deed of trust or mortgage control as to the person who may elect to accelerate the maturity of the debt secured * * * joint owners of a mortgage must join in an election. (See *Seligman v. Berg*, 251 N.Y. Supp. 689; *Beach v. Tangier Hotel Company*, 179 N.Y. Supp. 657.)

In 10 C.J.S., Sec. 251 (d) p. 750, the rule is stated,

"WHO MAY EXERCISE OPTION.
* * * Where under the provisions of the instrument, only the holders of the note can

declare the entire indebtedness mature, if there are more than one holder a unanimous exercise of the option is required, and anything short of that is ineffective.”

TENDER BEFORE OPTION EFFECTIVELY EXERCISED.

5. What is the effect of a tender of the sum as to which there has been a default if the tender is made before the option to accelerate is exercised?

The law is to the effect that a tender of the sum as to which there has been a default, if made before the option to accelerate is exercised, bars acceleration of the maturity of the debt secured by the mortgage. In 59 C.J.S., Sec. 495 (6) (b) the rule is stated.

“A tender of the sum as to which there has been a default, if made before election to accelerate, bars acceleration of the maturity of the debt secured by the mortgage or deed of trust.”

Our Utah Court in the case of *Home Owners Loan Corporation v. Washington*, 180 U. 469, 161 P. 2d 355 (1945) adopts the rule stated above and in so doing says,

“The law relative to tender under contracts, which provide that in case of default the holder has the option to declare the whole amount due, is well set forth in 52 Am. Jur. page 245, Section 41, which is as follows: ‘Under a contract which provides that any de-

fault in the payment of the interest or an installment of the principal when due shall give the obligee an option to declare the whole amount due, the general rule is that a tender of payment of the overdue principal or interest before the option to declare the whole debt due has been exercised cuts off the right to exercise the option. *Stansbury v. Embrey*, 128 Tenn. 103, 158 S.W. 991, 47 LRA., N.S. 980; *Weinberg v. Naher*, 51 Wash. 591, 99 P. 736. This is so because the debt does not become due on the mere default in payment, but by affirmative action by which the creditor makes it known to the debtor that he intends to declare the whole debt due."

The Supreme Court of Idaho in the case of *Clark v. Paddock*, 24 Ida. 142, 132 P. 795, has adopted the same rule as the Supreme Court of Utah.

In applying the foregoing principles of law to the case now before this court, it is readily apparent that the agreement in question gives plaintiffs an option to accelerate the payments. By the clear terms of Paragraph V (A) the right to accelerate is an optional one and is not an automatic or a self-executing one. In determining whether or not plaintiffs effectively exercised the option to accelerate the payments, we should look at the first act claimed by plaintiffs to constitute such acceleration. That was the letter of August 17, 1959, Exhibit P-4, from Keith Sudbury to Ted Stevensen. That letter reads verbatim as follows:

“Dear Ted:

“Because of First Security Bank’s failure to honor your checks to me, dated August 10th and 17th, I am electing to accelerate the money you owe me under our agreement.

“There is due me the sum of \$23,506.51, which I will expect paid to me within a short time after you return from Europe so that it will not be necessary for me to foreclose your equipment or take over the business.

“I am enclosing both of these dishonored checks to you and I will accept no further sums less than the full amount due me. For that reason, I am also enclosing checks dated August 24th, August 31st, September 7th, September 14th, and September 21st, each in the amount of \$100.00.

It should be noted from the letter first of all that it is not an unequivocal statement that Sudbury elects to accelerate the payments and intends to go ahead with the mortgage foreclosure. The first paragraph states he elects to accelerate, but the second paragraph then says that he may foreclose on the equipment or he may take over the business. Foreclosure of the chattel mortgage is completely inconsistent and completely different than treating the agreement as a conditional sale and attempting to enforce the forfeiture provision by taking over the business as such. To effectively exercise the option the courts all hold that it must be made in a manner so clear and unequivocal as to leave no doubt as to

the holders intention and to apprise the defendants effectively of the fact that the option has been exercised, and in addition to that there must be an affirmative act toward enforcing the declared intention. And as stated in 36 Am. Jur., Sec. 393, p. 884,

“Even a declaration may be a sufficient exercise of the option, but to be effective, the declaration must be followed by an affirmative act toward enforcing the declared intention.”

In this case there has been no affirmative act by plaintiffs toward enforcing the mortgage by a foreclosure proceeding. On the contrary plaintiffs affirmative action has been completely inconsistent with a foreclosure of the mortgage. Plaintiffs instead of attempting to foreclose have sought all the way to enforce the forfeiture provisions of the agreement and have attempted to take over the business lock, stock and barrel. The absolute and clear cut evidence of this fact is contained in the letter from Mr. Reynolds, one of the attorneys for plaintiffs, Exhibit P-5, wherein it states,

“The Sudburys have elected to pursue their remedies under the terms of the agreement of June, 1958, based upon the default of your client, Olaf Theodore Stevenson, Jr., in failing to make the payments required of him pursuant to said agreement, and that the Sudburys have elected to declare a forfeiture of Mr. Stevenson’s right, title and

interest in as subject matter of said agreement pursuant to paragraph VI B thereof; accordingly, demand is hereby made upon you as attorney for Stevenson for the immediate delivery of possession to Sudburys of the premises, property goods, chattels and properties of every kind and character which may be the subject matter of the agreement of June, 1958, and for the execution of appropriate instruments of conveyance and transfer of titles to Sudbury.

“Specifically, you are advised that Sudburys elect hereby not to enforce the remedy of foreclosure and do elect to pursue their rightful alternative, namely forfeiture as set forth in the aforesaid agreement.

“In addition, Sudburys hereby demand an accounting on the part of your client of all receipts and disbursements, a balance sheet and a profit and loss statement applicable to the operation of the business heretofore conducted under the name and style, “Ollies Terrace Room” which business is the subject matter of the agreement of June 1958, from the date of this letter over the period to the date of delivery of possession to Sudburys as aforesaid.

“Also, you are hereby notified that Sudburys intend to pursue their legal remedies as against Stevenson for any unlawful detainer on the part of Mr. Stevenson, which may be appropriately determined.

“Finally, you are hereby advised that notwithstanding the foregoing Sudburys are willing to accord Stevenson the right to pay in full the current remaining balance of prin-

cipal and interest due on said contract within 30 days from date hereof as an additional right not provided in said agreement.”

Acceleration of all of the unpaid installments is only necessary in the event plaintiffs elected to foreclose the chattel mortgage. Acceleration of the payments would be a necessary condition precedent to a foreclosure action, while acceleration of the payments would not be a condition precedent to enforcing a forfeiture. Because plaintiffs, acting through their attorney, specifically stated that they elected not to enforce the remedy of foreclosure but did elect to pursue the remedy of forfeiture, we submit that no proper exercise of the option to accelerate was ever made by plaintiffs or if it was ever properly made, it was waived or abandoned. The declared intention to accelerate contained in Exhibit P-4 was not followed by affirmative action toward enforcing the declared intention, but on the contrary was followed by action inconsistent with enforcing the declared intention.

It should also be noted that the letter of August 17, 1959, Exhibit P-4, is from Keith Sudbury only and is addressed to Ted Stevenson only. Keith Sudbury's wife owned a ten per cent interest in the partnership assets and was a party to the agreement in question. Under the rule stated in 59 C.J.S. Sec. 495 (5) (d) * * * “Joint owners of a mortgage must join in an election” Sudbury's wife had to

join in the election to make it effective. Even if the court were to treat Exhibit P-4 as a valid exercise of the option so far as the language of it is concerned, it would not be effective because both Sudbury and his wife did not join in the election to accelerate the payments.

On September 1, 1959, and before any other affirmative act was taken by the Sudburys, a tender of all delinquent installments under the agreement was made to the Sudburys. As shown by Mr. Reynolds' letter of September 11, 1959, Exhibit P-5, the installments so tendered were returned.

On November 10, 1959, plaintiffs filed their complaint in this action and asked the court to forfeit all of defendants' interests in the entire business and assets covered by the agreement. The complaint does not seek a foreclosure of the chattel mortgage. Motions for summary judgment were made by both parties and were argued on January 20, 1960. Two days prior to the date of that argument and again on the date of that argument defendants made a tender to plaintiffs of all installments that had occurred down to those two dates.

Since no effective exercise of the option to accelerate the payments had been made as of September 1, 1959, and since none had been made as of January 18, and January 20, of 1960, under the holding of the Utah Supreme Court in *Home Own-*

ers Loan Corporation v. Washington, supra, the tender of payment of the installments that were due under the contract cut off the right of the plaintiffs to exercise the option to accelerate. That being true defendants are not in default under the agreement in question.

Defendants at this time stand ready, willing and able to pay plaintiffs all installments that are due under said agreement. Defendants would at this time deposit the installments that are due with the Clerk of this Court, if to do so would not be a useless act. The letter dated February 27, 1960, from Mr. Reynolds (R. 40) clearly demonstrates that plaintiffs will not accept the past due installments until this case is finally determined.

POINT III

FORECLOSURE IS PLAINTIFFS' EXCLUSIVE REMEDY UNDER THE AGREEMENT IN QUESTION.

The trial court has held that the agreement in question is in legal effect a chattel mortgage. The clear and convincing reasons for the trial court so holding are discussed at length under Point I. If the trial court was correct, as we think it clearly was, in the construction it placed on the agreement, the question then arises what are plaintiffs' remedies under Utah law for the enforcement of a chattel mortgage?

Section 9-1-15 U.C.A., 1953, reads as follows.

Conditional Sales Excepted — conveyance in nature of mortgage included.

“The provisions of this title shall not apply to contracts for the possession, use and conditional purchase of personal property containing a condition that title shall not pass until full payment of the purchase price; but shall extend to and include all such bills of sale, deeds of trust and other conveyance of personal property as shall have the effect of a mortgage or lien upon such property.”

Section 9-1-5 U.C.A., 1953, provides that a chattel mortgage may be foreclosed in the manner provided by law for the foreclosure of mortgages upon real property or that a chattel mortgage containing a power of sale upon default being made in the terms or conditions thereof may be foreclosed by advertisement in the manner provided in Title 9.

Section 78-37-1 U.C.A., 1953, provides,

“There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. Judgment shall be given adjudging the amount due, with costs and disbursements, and the sale of the mortgaged property, or some part thereof to satisfy said amount and accruing costs, and directing the sheriff to proceed and sell the same according to the provisions of law relating to sales on execu-

tion, and a special execution or order of sale shall be issued for that purpose.”

The Utah Supreme Court in the case of *Morgan v. Layton*, 60 U. 280, 208 P. 505, held that the remedy by foreclosure prescribed by Section 9-1-5 U.C.A., 1953, is the only one in this jurisdiction to which a creditor can resort in order to enforce his lien, unless the mortgage contains a power of sale as provided in Title 9. If the mortgage does contain a power of sale, Section 9-1-7 U.C.A., 1953, provides the method of advertisement. Section 9-1-9 prescribes the manner of sale, and section 9-1-12 provides that the money realized from the sale shall be used first to pay the costs and expenses of foreclosure and second the amount of the mortgage debt and third the balance is to be paid to the owner of the mortgaged property.

The statute prescribes the sole remedy for the enforcement of a chattel mortgage. The public policy of the State of Utah as declared by our legislature and as restated by our Supreme Court in the *Layton* case states there is but two ways to foreclose a chattel mortgage, one by advertisement if a power of sale is contained in the mortgage or by an action in court to foreclose. In either event the statute is mandatory that after the costs of foreclosure and the mortgage debt are paid the balance must be paid to the mortgagor. Any agreement of the parties to the contrary to the effect that the plaintiffs would

have the right to sell all of the property covered by the agreement and to retain all of the money realized from said sale, is in effect strict foreclosure and is unenforceable because against the public policy of this state as declared by our legislature.

Section 9-1-15 U.C.A., 1953, quoted above makes it clear cut that Title 9 does not apply to conditional sales contracts but that it does apply with full force to any instrument no matter what its form that is in legal effect a chattel mortgage. Since the agreement in question is in legal effect a chattel mortgage, the provisions of Paragraph VI A and VI B would be and are unenforceable because only the remedies prescribed by Title 9 U.C.A., 1953, are available to the owner of a chattel mortgage.

POINT IV ANSWER TO PLAINTIFFS' BRIEF.

Plaintiffs in their brief have failed to cite one case or any authority or give one reason why the trial court's construction of the agreement and its holding that it in legal effect was a chattel mortgage is erroneous. It seems to us that is the first and most fundamental question involved in this case. Until the legal effect of the agreement has been determined, it is impossible to define the rights of the parties. Once the agreement has been construed and it has been decided whether in legal effect it is a chattel mortgage or a conditional sales contract,

then the remedies that are available to plaintiffs in the event of default can be spelled out. Until the agreement is construed and until its legal effect is determined, the court has no basis for determining what remedies are available nor has it any basis for determining whether or not there was a default on the part of the defendants or whether or not that default may have been cured. If the legal effect of the agreement is that of a chattel mortgage, then it is clear that notwithstanding any agreements of the parties to the contrary, the plaintiffs' remedy is to foreclose in accordance with the statute. If the legal effect of the agreement were determined to be a conditional sales contract, then we would have to look to the law governing the remedies under conditional sales contracts to determine what remedies are available to plaintiffs. In general if a buyer defaults under a conditional sales contract the seller has an election to sue for the balance due under the contract or if the contract so provides, he has the right to retain the amounts already paid as liquidated damages and to retake possession of the property. This latter remedy is available unless the retaking possession of the property and retention of the amounts paid amounts to a penalty and would therefore be unenforceable.

Plaintiffs main attack on the ruling of the trial court is to the effect that the trial court has

rewritten the contract. Plaintiffs' argument in that regard is completely without basis. The trial court has not rewritten any contract. All the trial court has done is to construe the existing agreement. It has determined that in legal effect it is a chattel mortgage and not a conditional sales contract. Once that determination has been made the remedies and the rights of the parties follow in accordance with the rules of law pertaining to chattel mortgages. If one of those rules is that the only remedy available to a mortgagee under a chattel mortgage in the event of default is to foreclose in accordance with the statute, notwithstanding agreements of the party to the contrary, the court is bound by that rule of law and must follow it as the trial court did in this case.

The plaintiffs in their attack on the trial court for so called "rewriting the contract" bases most of their criticism on the idea that plaintiffs were only able to satisfy the balance due under the contract out of the property sold and that plaintiffs could not get a personal judgment against defendants. The thing that plaintiffs overlook is that the defendants paid the sum of \$10,791.59 of the purchase price at the time of the execution of the contract. As security for the payment of the balance of \$25,408.41, defendants not only gave plaintiffs a chattel mortgage on the property purchased from plaintiffs but also gave plaintiffs a chattel mort-

gage on the one-half interest owned by defendants which presumably was worth the sum of \$36,200.00 the same as the plaintiffs one-half interest was worth. We do not think this has anything to do with the case, but we do want to avoid any erroneous impression being made that plaintiffs were not adequately secured.

Again we call the courts attention to the fact that defendants stand ready, willing and able at any time to pay all past due installments to plaintiffs.

CONCLUSION

The defendants position in this case is as follows:

1. The trial court was correct in holding that the agreement in question was in legal effect a chattel mortgage, and this is so because:

- a. Paragraph II of the agreement provides, "That sellers shall and hereby do convey to buyers an undivided one-half interest in and to certain described property".

- b. Title passed to the defendants at the time said agreement was executed.

- c. Defendants prior to the execution of the agreement had title to a one-half interest in the property sold under said agreement.

- d. Paragraph V and VI of the agreement clearly indicate the intention of the parties that

plaintiffs are to acquire a security interest in the property sold and also in the property owned by the defendants prior to the execution of the agreement. This could only be done by a chattel mortgage.

e. A necessary element of a conditional sales contract is that the seller retain title as security for the payment of the purchase price. If title passes by the terms of the agreement, there is only one way to give the seller a security interest in the property sold, and that is by chattel mortgage.

2. Plaintiffs did not accelerate and declare due all of the installments under the agreement.

a. The letter of August 17, 1959, Exhibit P-4, is equivocal and states that the remedy of foreclosure or the remedy of forfeiture and taking over the business may be pursued. Acceleration goes only with foreclosure. It has nothing to do with forfeiture.

b. Only one of the plaintiffs signed the letter of August 17, 1959. It was not signed by both plaintiffs. It was addressed to only one of the defendants. It should have been addressed to both defendants to constitute a valid exercise of the option to accelerate. Plaintiffs being joint owners of the mortgage had to join in exercising the option to accelerate. Failure to so join made the attempted acceleration ineffective.

3. A tender of all unpaid installments was made by defendants on September 1, 1959, and was refused by the plaintiffs.

a. If the August 17, 1959, letter could be construed as a declaration of intention to accelerate the payments, the actions of the plaintiffs thereafter were clearly inconsistent with exercising the option to accelerate and foreclosing a mortgage. A mere declaration of intention to accelerate is not sufficient but to be effective as stated by the Supreme Court of Oklahoma in *Union Central Life Insurance Company v. Adams*, 169 Okla. 572, 38 P. 2d 26,

“The declaration must be followed by an affirmative act towards enforcing the declared intention.”

The letter of September 11, 1959, Exhibit P-5, from plaintiffs' attorney clearly abandons the remedy of foreclosure which is the only remedy that would have to be preceded by an exercise of the option to accelerate.

b. The filing of the complaint on the theory of a forfeiture and not on the theory of a foreclosure was clearly an act inconsistent with enforcing the declared intention contained in the letter of August 17, 1959, to accelerate the payment and hence was either a waiver or abandonment of such declared intention or rendered the dec-

laration to accelerate ineffective because such declaration was not followed by an act toward enforcing the declared intention but was followed by an act clearly inconsistent with such declared intention.

4. The tender made by defendants on September 1, 1959, January 18, 1960, and January 20, 1960, of the sums due under the contract were made before an effective election to accelerate and therefore bars acceleration of the entire debt.

5. Since the agreement is in legal effect a chattel mortgage, the only remedy available to plaintiffs in the event of default was to accelerate the payments and to foreclose the chattel mortgage in accordance with the statute. The provisions of the agreement for a strict foreclosure contrary to the statute and the provisions of the agreement for a forfeiture contrary to the remedy provided by statute are unenforceable.

6. If the judgment is affirmed, the plaintiffs will still get their money with interest and justice will have been done between the parties.

The judgment of the trial court should be affirmed.

Respectfully submitted,

McBROOM & HANNI
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and Respondents*