

1963

# Lester Ralph Romero and Maxine Romero v. Victor Schmidt et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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FILE

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LESTER RALPH ROMERO and  
MAXINE ROMERO, his wife,  
*Plaintiffs and Appellants,*

Clerk, Supreme Court,

vs.

VICTOR SCHMIDT and RAE SCHMIDT,  
his wife; TOM B. WILCOX and  
MRS. TOM WILCOX, his wife; and  
MR. ART CASEY and MARIE CASEY,  
his wife,

No. 9922

*Defendants and Respondents.*

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BRIEF OF APPELLANTS

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Appeal from the Judgment of the District Court of the  
Third Judicial District for Salt Lake County,  
Honorable Merrill C. Faux, Judge

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# IN THE SUPREME COURT OF THE STATE OF UTAH

---

LESTER RALPH ROMERO and  
MAXINE ROMERO, his wife,  
*Plaintiffs and Appellants.*

*vs.*

VICTOR SCHMIDT and RAE SCHMIDT,  
his wife; TOM B. WILCOX and  
MRS. TOM WILCOX, his wife; and  
MR. ART CASEY and MARIE CASEY,  
his wife,  
*Defendants and Respondents.*

No. 9922

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## APPELLANTS' BRIEF

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### STATEMENT OF THE KIND OF CASE

Action to foreclose real estate contract as note and mortgage. Respondents allege tender and estoppel as a defense.

### DISPOSITION IN LOWER COURT

All elements necessary to prove Plaintiffs' and Appellants' case were admitted and the defenses alleged were tried by the court sitting as a court of equity with an advisory jury. Judgment of no cause of action was entered against Plaintiffs and Appellants on the theories of tender and equitable estoppel.

## RELIEF SOUGHT ON APPEAL

Plaintiffs and Appellants seek an order vacating the judgment of no cause of action and directing the District Court to enter judgment for foreclosure of the mortgage and a reasonable attorneys' fee for services in connection with the trial and this appeal.

## STATEMENT OF FACTS

Appellants sold a residence to respondents Schmidt, July 17, 1961 (R. 100-101), on a uniform real estate contract (Ex. 1-P) with a \$45.00 down payment (R. 100). Romeros demanded and received payments promptly for 13 months, to and including the August 1, 1962 payment, at which time Schmidts sold the residence to Respondent Wilcox (R. 173-174), who assumed and agreed to pay the balance due on the Schmidt-Romero contract (Ex. 1-P; R. 179, L. 19-22). Appellants were not contacted concerning the sale to Wilcox or the balance due on the contract in connection with that sale.

Respondents Wilcox entered into an agreement with Respondents Casey for the sale of the residence to Caseys (Ex. 3-P). Wilcox and his partner, Glavas (R. 109), contacted Appellant Romero and/or Romeros' associate, Taylor, several times concerning the unpaid balance due on the residence (R. 110-118; R. 147-151; R. 156-159), and Romero was also contacted by Wallace, the real estate agent handling the sale between Wilcox and Caseys (R. 131-133); however, the parties did not reach an agreement as to the unpaid balance due on the contract.

About September 19-20, 1962, during a meeting with



Wilcox and Glavis (R. 156; R. 110), Romero stated that the September 1, 1962 payment was delinquent, at which time Wilcox made an unqualified promise to pay before the end of the 30-day grace period (R. 164, L. 20-30, R. 165, L. 1-2). Wilcox actually paid the September 1, 1962 payment within the grace period by delivering a check (Ex. 2-P) to Romero's office about September 29, 1962, which check was returned marked "Insufficient Funds" about October 18, 1962 (R. 101, L. 24-30). About October 15, 1962, prior to the time when the September check was returned, Romero stated to Wilcox's realtor that the October 1, 1962 payment had not been made (R. 161, L. 21-25). On October 24, 1962, Romeros caused a notice (R. 9-10) to be served upon the Respondents (R. 102, L. 3-17) wherein Romeros elected, under the provisions of paragraph 16C of the real estate contract (Ex. 1-P), to treat said contract as a note and mortgage, to declare the entire unpaid balance on said contract to be immediately due and payable (R. 9-10). Payment was not made, thus on January 8, 1963, Romeros commenced this action for foreclosure.

Respondents admit that the September 1, 1962 payment was not made within the grace period, that Romeros elected to treat the contract as a note and mortgage and served notice upon them declaring the contract balance all immediately due and that payment of the balance due on the contract was not made. Based upon the stipulations of fact, Appellants established a prima-facie case. The only issues are the defenses of tender and of equitable estoppel asserted by the Respondents.

There is little dispute about the facts, except as to the

content of the conversation between Romero and Wallace, and even Wallace's version of the conversation does not aid Respondents in either of their defenses, as indicated more fully in the discussion under the specific points.

## ARGUMENT

### POINT I

RESPONDENTS DID NOT MAKE A LEGAL TENDER OF DELINQUENT PAYMENT PRIOR TO ACCELERATION OF BALANCE DUE AND APPELLANTS ARE ENTITLED TO A FORECLOSURE JUDGMENT AS A MATTER OF LAW.

The word "Tender" is defined as an unconditional offer of payment, coupled with a present ability to do so, and consists of the actual production and offer to pay, in current coin of the realm, at the time and place specified in the contract, of a sum not less than the amount due on a specific debt or obligation (*Somerton State Bank v. Maxey*, 22 Ariz. 365, 197 P. 892, 14 ALR 1117; *Walker v. Houston*, 215 Cal. 742, 12 P.2d 952, 87 ALR 937; *Equitable Life Assur. Soc. v. Boothe*, 170 Or. 79, 86 P.2d 960; 52 Am. Jur. Tender Sec. 2).

Respondents alleged and the court found (R. 83, Par. 3) that plaintiffs' right to declare the entire balance due was cut off by reason of an alleged tender, to Appellants, of delinquent payments prior to the service, by Appellants, of the notice declaring the entire contract balance immediately due and payable (R. 9-10). The advisory jury in this equitable action (R. 184) was given instructions as to the meaning of "Tender" (R. 78) and answered

special interrogatories to the effect that a tender of all delinquent payments was made to Romeros (R. 80, Par. 3 and 4); however, said interrogatories failed to inquire whether the alleged "tender" occurred after or before the notice which declared the contract balance due. Tenders of delinquent installments (R. 33, Par. 5) were made by the Respondents after said notice (R. 9-10) was served, however, those tenders were made too late. The only effect of a tender after maturity is to prevent the acquisition of any further rights on the part of the creditor and not to deprive him of rights acquired prior to that time. (*McClellan v. Davis*, 45 Idaho 541, 263 P. 1002; Anno: 15 LRA(NS)1165.) It is likely that the jury answered this interrogatory on the basis of tenders made after October 24, 1963, and since tenders after that date are wholly immaterial to the issues in the case, the answer of the jury to interrogatories concerning tender (R. 80) are unreliable and should be disregarded. The definition given to the jury by the court as to the meaning of "tender" (R. 78) is improper, since it would permit the jury to find that a "tender" was made by "... an offer to pay, ..." whereas a legal "tender" requires far more than an "offer to pay."

It is uncontroverted that the September 1, 1962 payment was made September 29, 1962 by a personal check (Ex. 2-P), which was dishonored by the bank and returned about October 18, 1962, marked "Insufficient Funds" (R. 101, L. 24-30), and that the notice declaring the balance due was served October 24, 1962 (R. 102, L. 3-17). The only indication of any "offer to pay" prior to the service of the notice on October 24, 1962, is the statement allegedly made to Romero by Wallace, the Realtor—which statement Romero testified was not made (R. 161,

L. 17-20)—to the effect that Caseys' funds were available in Wallace's trust account from which any delinquency that existed could be paid at any time that Romero verified the unpaid contract balance to be assumed by Caseys and the Wilcox-Casey sale was closed (R. 133-135).

Wallace, as a realtor hoping to earn a commission, was an interested party to the Casey-Wilcox transaction, and his testimony should be weighed with that in mind. It is impossible for him to have made a tender concerning the September, 1962 payment, which is the default upon which this action is made, since the conversation with Romero during which the alleged "tender" occurred was October 15, 1962 (R. 131, R. 159-160) — the check for the September payment (Ex. 2-P) was not returned until three days later on October 18, 1962 (R. 106, L. 21-30, R. 107, L. 1-9). The statement by Wallace that "... I believe he did tell me at that time that there was a check given him for that \$89.00 that was returned, ..." (R. 141, L. 15-17) is obviously in error and is contrary to his prior testimony in which he stated that Romero did not indicate to him in what manner Respondents were in default and that Wallace knew nothing about the check that was issued and later dishonored (R. 141, L. 2-8). Romero testified (R. 163, L. 10-14) that he could not have told Wallace that he was going to foreclose as alleged by Wallace (R. 133, L. 5-9) since he, at that time, had no knowledge concerning the dishonor of the check for the September payment (Ex. 2-P). Romero's testimony is uncontroverted that he had no conversations with Wallace, Wilcox or Glavas after the check (Ex. 2-P) was returned and that he immediately took it to the office of his attorney (R. 161, L. 26-30, R. 162, L. 1-3). Romero

testified (R. 162, L. 4-7) that no one ever tendered to him the amount of money necessary to cover the dishonored check (Ex. 2-P) before service of the notice declaring the balance of the contract due (R. 9-10). Wallace testified that he never offered or handed any money to Romeros (R. 139, L. 30; R. 140, L. 1-6); that he could not offer or hand the money to Romeros (R. 140, L. 4); that there were no funds in his trust account for Romeros (R. 140, L. 17-19); that all funds in his trust account were held for payment to Wilcox (R. 140, L. 14-15); that the funds held by him were paid to him by Caseys with authority to release the money only after a correct contract balance was determined, which they could assume, and after the transaction between Wilcox and Caseys was closed (R. 135, L. 17-22; R. 136, L. 19-25). The money which was allegedly "tendered" was still the property of Caseys and who had not authorized a tender of that money to Romeros, as shown by the above quoted testimony of Wallace, and accordingly that money was not available for Wallace to tender to Romeros on behalf of Wilcox, as urged by Mr. Hoggan (R. 135, L. 5-12). A tender cannot be made of funds which are not the debtor's to tender and in which he has then no property (*Vernon Center State Bank v. Mangelsen*, 166 Minn. 472, 208 NW 186, 48 ALR 710). The present ability to make a strict tender is essential to a valid tender (*Somerton State Bank v. Maxey*, *supra*). It is not sufficient that a person is present from whom the money might be borrowed, unless he actually consents to loan it for the purpose of the tender (*Vernon Center State Bank v. Mangelsen*, *supra*), which tender was expressly forbidden under the authority given to Wallace by Caseys (R. 135, L. 17-22; R. 136, L. 19-25). A person making a

written tender of money in accordance with 78-27-1, UCA, 1953, quoted below, which excuses the actual production of the money if the tender is in writing, must act in good faith and have the ability to produce the money for the tender to be valid (*Hyams v. Bamberger*, 10 U. 3, 10; 36 P. 202), and under the facts in our case, even if the alleged tender by Wallace had been in writing it would have been insufficient because he had no authority to tender the money in his possession at that time as indicated above. A mere offer to pay does not constitute a valid tender (*Talty v. Freedman's Sav. & T. Co.* 93 US 321, 23 L ed 886; *Somerton State Bank v. Maxey*, *supra*) and accordingly even without the conditions attached by Wallace in his alleged tender, his acts and statements (discussed above) would be insufficient to constitute a valid tender. A tender requires the physical act of offering the money or thing to be tendered, and this cannot rest on implication alone. The law requires an actual, present, physical offer; it is not satisfied by a mere spoken offer to pay, which, although indicative of present possession of money and intention to produce it, is unaccompanied by any visible manifestation of intention to make the offer good (*Peugh v. Davis*, 113 US 542, 28 L ed 1127, 5 Sup. Ct. 622; *Somerton State Bank v. Maxey*, *supra*; *Wooten v. Dahlquist*, 42 Idaho 121, 244 P. 407; 52 Am. Jur. Tender Sec. 7). Mr. Hoggan's position throughout the case has been that a legal tender was made when Wallace stated that payment of delinquencies would be made if Romero first determined and agreed with the defendants as to the correct contract balance (R. 135, L. 8-12; R. 33, Par. 3; R. 41, Par. 3; R. 188, L. 29-30; R. 189, L. 1-6). Even if defendants complied with all other requirements of a

valid tender (which we deny), the alleged tender was expressly conditional upon Romeros first performing certain acts and making certain agreements, which Romeros had no legal obligation to do under the terms of their contract with Schmidts (Ex. 1-P). Romeros were not parties to the Wilcox-Casey transaction, and had no duties or obligations with respect to that transaction. Romeros' only obligation was to convey title to the property when the full purchase price had been paid. Romeros demanded payment of the full purchase price (R. 9-10), but it was not paid, therefore the duty to convey did not arise.

The delivery of the dishonored check (Ex. 2-P) did not constitute a tender (*Sieverts v. White*, 2 U.2d 351, 273 P.2d 974, 975). 78-27-1, UCA, 1953, reads as follows:

“An offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property, is, if not accepted, *equivalent to the actual production and tender of the money*, instrument or property.” (Emphasis added.)

This statute creates an exception in the case of written tenders, to the common law rule which requires the actual production and offer of the money. No written tender was made in our case, and, accordingly, under this statute, the Respondents were required to actually *produce and tender* the money to constitute a legal tender, which they clearly failed to do. The law requires that the tenderer have the money present and ready, and that he produce and actually offer it to the other party. (*Somerton State Bank v. Maxey*, *supra*; Anno: 33 LRA 234.) The money must be actually shown to the person to whom it is tendered (*Peugh v. Davis*, *supra*), and some courts have attached much importance to this, on the theory that



the sight of the money might be highly persuasive in tempting the creditor to accept (*Finch v. Brook*, 1 Bing NC 253, 131 Eng. Reprint 1114, 6 Eng. Rul Cas 591).

The conditions discussed above, which were attached to the alleged tender, were not conditions upon which the Respondents had a right to insist under the contractual relationship between Appellants and Respondents, and accordingly, even if the alleged tender were otherwise sufficient, the conditions attached thereto would render it ineffective. (*Sieverts v. White*, *supra*; *Bohler v. Callaway*, 267 US 479, 69 L ed 745, 45 S Ct 431; *Queensboro Nat. Bank v. Kelly* (CCA 2d) 48 F2d 574, 87 ALR 1172, writ of certiorari denied in 284 US 620, 76 L ed 529, 52 S Ct 9; *Bellamah v. Schmider*, 68 NM 247, 360 P.2d 656; 52 Am. Jur. Tender Sec. 24.)

Mr. Hoggan has at all times acknowledged that the alleged "tender" by Wallace was conditional (R. 33, Par. 3; R. 41, Par. 3; R. 135, L. 8-12; R. 188, L. 29-30; R. 180, L. 1-6) and could not be otherwise, for the alleged reason that information concerning the unpaid balance was required before an unconditional tender could be made, which information was allegedly in the exclusive possession of the Appellants (R. 189); however, this assertion is contrary to the facts since only 13 payments had been made on the contract (R. 122, L. 11-15); there was no disagreement as to the original balance (R. 121, L. 8-16), the interest rate (R. 121, L. 16-19), the dates and amounts of the payments made on the contract (R. 120-121), the insurance costs to be added and the small difference concerning taxes was readily resolved by the parties (R. 121-122). Glavis and Wallace had computed such balances on



contracts many times and could make such a computation easily (R. 122, L. 11-15; R. 137, L. 25-28), and accordingly the determination of an accurate balance was a simple mathematical computation which the Respondents could have easily made. No information concerning the contract was within the exclusive knowledge of Appellants, and Appellants had no duty, under the terms of his contract (Ex. 1-P), to make the mathematical computation and to enter into an agreement that the balance thus determined was correct. Respondents' obligation to pay \$89.00 per month to Appellants within the time specified in the contract (Ex. 1-P) is clear and unambiguous and has no relationship to a possible sale between Wilcox and Caseys, or the desire of the Respondents to determine an accurate unpaid balance due on the contract as of a specific time. The parties expressly contracted and agreed that time was of the essence in the contract (Ex. 1-P, Par. 17), and such a stipulation is binding upon the courts of equity (*Cheney v. Libby*, 134 US 68, 33 L ed 818, 10 S. Ct. 498; Anno: 79 ALR 1231). The court should enforce the clear intention of the parties as expressed by the written contract. (*Forrester v. Cook*, 77 U 137, 292 P. 206; *Burt v. Stringfellow*, 45 U. 207, 143 P. 234; *Udy v. Jensen*, 63 U. 94, 222 P. 597; *Peck v. Judd*, 7 U. 2d 420.)

Clearly the Court erred in holding that Respondents had tendered the delinquent September, 1962 installment to Appellants prior to the service of the notice declaring the entire unpaid balance to be immediately due and payable, and accordingly the judgment of the District Court should be reversed and a decree of foreclosure entered in favor of Appellants and against Respondents.

## POINT II

APPELLANTS ARE NOT ESTOPPED BY THEIR ACTS OR OMISSIONS TO EXERCISE THE ACCELERATION CLAUSE OF THE CONTRACT AND FINDINGS OF COURT WITH RESPECT TO ESTOPPEL ARE NOT WITHIN THE ISSUES OF THE CASE.

Respondents allege equitable estoppel as a defense and asked the Court of Equity to relieve them from the effect of the operative acceleration clause contained in the contract (Ex. 1-P, Par. 16C), which acceleration clause was exercised by Appellants (R. 9-10; R. 102) after the check issued September 29, 1962, by Respondent Wilcox (Ex. 2-P) in payment of the September 1, 1962, installment due on said contract, was dishonored by the bank and returned marked "Insufficient Funds" on October 18, 1962, which was 18 days after the expiration of the 30-day grace period allowed by the contract (Ex. 1-P, Par. 16; R. 101, L. 24-30). Respondents' theory as shown by the Findings of Fact (R. 82-84) seems to be that Mr. Romero's misrepresentations, actions and conduct in failing to determine and agree upon a correct contract balance, allegedly *MISLED* Respondents to their detriment, *PREVENTED* Respondents from making their September 1, 1962 contract payment to Appellants and thus *CAUSED* the September 1, 1962, payment not to be paid within the grace period and thus *CAUSED* that delinquency, which is the delinquency relied upon by Appellants in exercising the acceleration clause that declared the entire contract balance to be immediately due and payable (R. 33, Par. 3; R. 41, Par. 3; R. 51, Par. 2; R. 83, Par. 4 through 11; R. 189).

**RESPONDENTS' POSITION IS WHOLLY WITHOUT MERIT OR CANDOR.** The sole and proximate cause of non-payment of the September 1, 1962 contract payment was "INSUFFICIENT FUNDS" in the bank account (Ex. 2-P). No acts or omissions of Appellants **CAUSED** that check to be dishonored.

The Court awarded judgment of no cause of action (R. 86) against Appellants on their foreclosure action on the theories of tender (discussed under Point I above) and on the theory of equitable estoppel, however, the Findings of Fact (R. 82-84) entered as a part of and in support of that judgment go far beyond the findings of the advisory jury (R. 80) used in this equitable action (R. 184) or the decision announced by the Judge in open Court, and the findings and issues contained therein are, for the most part, wholly unsupported by the issues raised in the pleadings (R. 32-34; R. 40-42), the issues specified for trial in this matter by the pre-trial order (R. 50-52) or which were actually tried or litigated before the Court during the trial of this case.

The only issue raised by the Respondents concerning equitable estoppel in their answers (R. 33, Par. 3; R. 41, Par. 3) and in the pre-trial order (R. 51, Par. 2) is the allegation that Appellants *failed and refused to verify the contract balance* to facilitate closing of the sale of the residence by Wilcox to Caseys. Respondents waived their right to raise additional defenses by not asserting those defenses in their answer as required by Rule 12(b), URCP. Rule 12(h), URCP, pertaining to waiver of defenses, reads in part as follows:

“WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except . . .”

The pre-trial order (R. 51, Par. 2) made in this case limited the estoppel issue to the question of whether:

“2. Plaintiffs are estopped from claiming failure to pay within the time allowed by reason of their own *failure to verify the contract balance* on the Schmidt-Romero contract to facilitate the Wilcox-Casey closing.” (Emphasis added.)

The pre-trial order required that “Any objections to this pre-trial order must be filed within one week from date hereof.” No objections were filed by Respondents, and, in accordance with the provisions of Rule 16, URCP, that order controlled the subsequent course of the action and limited the issues to be tried to those specified by the pre-trial order. The Court erred in including findings involving new issues concerning estoppel in its Findings of Fact (R. 82-84), which were outside the scope of the issues to be tried in this case as specified by the pleadings and pre-trial order and which findings are, for the most part, wholly unsupported by any evidence received in this case.

Since the matters tried to the Court were equitable and the jury was only advisory (R. 80), the appeal in this case is as to both the law and fact (Rule 72(a), URCP), and the question of the sufficiency of the evidence to support the findings may be raised on appeal (Rule 52(b), URCP).

The decision of the District Court also should be reversed because the findings prepared by Respondents and signed by the court do not respond to and are not in conformity with the issues (*Giauque v. Salt Lake City*, 42 U. 89, 129 P. 429), go far beyond the findings of the advisory jury (R. 80) in this equitable action (R. 184) or the decision announced by Judge Faux in open Court, the findings are made without the issues, and there is no evidence to support them. (*In re Evans*, 42 U. 282, 314, 130 P. 217; *Hathaway v. United Tintic Mines Co.*, 42 U. 520, 132 P. 338; *Greenhalgh v. United Tintic Mines Co.*, 42 U. 524, 132 P. 390; *Brittain v. Gorman*, 42 U. 586, 133 P. 370; *Skeen v. Van Sickel*, 71 U. 577, 268 P. 562; *Thomas v. Farrell*, 82 U. 535, 26 P.2d 328; *Parowan Mercantile Co. v. Gurr*, 83 U. 436, 30 P.2d 207; *Pieper v. Hatch*, 86 U. 292, 43 P.2d 700.)

Said Findings of Fact are also objectionable for the further reason that said findings are findings of fraud and misrepresentation, and the provisions of Rule 9(b), URCP, pertaining to pleading fraud was not observed by Respondents, which rule reads in part as follows:

“Rule 9(b) FRAUD, MISTAKE, CONDITION OF THE MIND. In all averments of fraud or mistake, *the circumstances constituting fraud or mistake shall be stated with particularity . . .*” (Emphasis added.)

The purpose of this rule is to require the pleader to specify the particular acts, representations and conduct alleged to be fraudulent, and to require the pleader to show the materiality of the representations with particularity. (*Davis Stock Co. v. Hill*, 2 U.2d 20, 268 P.2d 988, 989; *Heathman v. Hatch*, 13 U.2d 266, 372 P.2d 990; *Heath-*

*man v. Fabian*, 14 U.2d 60, 377 P.2d 189.) Respondents not only failed to aver the circumstances constituting fraud or mistake with particularity, but failed to aver fraud at all.

The Court erroneously instructed the advisory equity jury that the burden of proof required was a "... preponderance of the evidence ..." (R. 74) whereas since its findings are of fraud, the instructions should have clearly specified that evidence must be proved by "clear and convincing" proof.

Appellants were not advised by the pleadings, evidence or pre-trial order that fraud and misrepresentation were issues in the case, and, accordingly, no objection was made to that instruction. Since the jury was merely advisory (R. 80) in accordance with the provisions of Rule 39(c), URCP, and this action is equitable, the failure to object to that instruction is immaterial to the right of the Appellants to raise the question of the propriety of that instruction on appeal (Rule 72(a), URCP), and the Court is not bound by the finding of the jury (*Smith v. Richardson*, 2 U. 424).

The Findings of Fact concerning alleged false and fraudulent representations by Appellants and which are objectionable for the many reasons specified above are as follows:

(a) That Appellants misrepresented the unpaid balance due on the contract (R. 83, Par. 5).

(b) That Respondents were misled by Appellants' conduct to believe that Appellants would cooperate in arriving at a correct contract balance (R. 83, Par. 5).

(c) That Appellants intended that Respondents would rely upon the false representations concerning the contract balance (R. 83, Par. 6).

(d) That the Appellants knew or should have known that their representations concerning the contract balance were false (R. 83, Par. 7).

(e) That Respondents relied upon Appellants' representations that Appellants would attempt to work out a correct balance (R. 84, Par. 9).

(f) That the reliance prejudiced Respondents (R. 84, Par. 11).

(g) That the Respondents failed to make payments due on the contract pending clarification of the contract balance and in reliance upon the alleged representations by Appellants that they would attempt to work out a correct contract balance (R. 84, Par. 10).

A cursory examination of the foregoing findings shows clearly that they are founded upon the theory of fraud and misrepresentation rather than upon the theory of estoppel allegedly arising from a simple "...*failure to verify the contract balance*..." which was the only issue concerning estoppel which was an issue in the case as shown by the pre-trial order (R. 51, Par. 3). The decision of the Court is based upon findings of fraud and misrepresentation which were not issues in this case, and accordingly the decision should be reversed.

The foregoing findings are unsupported by the evidence. Findings (a), (c) and (d) above, to the effect that Appellants willfully and intentionally misrepresented the unpaid contract balance are wholly untrue. The Court

made no finding that the Respondents relied upon these representations or changed their position in reliance thereon, and accordingly said findings are irrelevant and immaterial to the issues in this case.

Appellants had several conversations with Respondents concerning the unpaid contract balance, various balances were discussed and some errors were corrected, however, Respondents were informed at that time that the balances might be incorrect (R. 149, L. 11-18; R. 155; R. 117); that the balances mentioned by Respondents as the contract balance might be entirely correct (R. 149, L. 11-18) and that the balances furnished had been computed by a third party and had not been examined by Appellants for accuracy (R. 167). Respondents at all times objected to the contract balances mentioned by Appellants (R. 111; R. 113-118; R. 130-135; R. 155) and claimed that they were unable to close the Wilcox-Casey sale because they were never furnished with a contract balance with which they were satisfied (R. 51, Par. 2). Certainly Respondents were not justified in relying upon said information, and in fact did not rely thereon.

Respondents claimed throughout the case that Appellants were mean, uncooperative, abusive (R. 175, L. 22-30; R. 176, L. 176, L. 1-13; R. 140, L. 20-30; R. 141, L. 1-3; R. 131-132); that Appellants refused to furnish a contract balance which Respondents could use to close the Wilcox-Casey sale (R. 133, L. 5-9) and that 9 days before service of the notice accelerating the contract balance (R. 9-10) Appellants warned Respondents that they were going to foreclose the contract (R. 140, L. 20-30; R. 141, L. 1-3; R. 132-133).



The Court observed the inconsistency between the testimony of Respondents and the claim of estoppel and the obvious fact that if Appellants' conduct was as portrayed by Respondents, they could have not been misled thereby (R. 179), however, the Court apparently overlooked this obvious fact in reaching its decision.

Findings (b), (e) and (f) above, to the effect that Respondents were misled and prejudiced by their reliance upon Appellants' representations that they would attempt to work out a correct balance and cooperate in arriving at a correct balance is also untrue. Appellants actually attempted to compute a contract balance and prepared a schedule which attempted to allocate the various payments between principal, interest, taxes, etc. and to determine the unpaid balance after each payment (Ex. 5-P), which schedule and the information thereon was made available to Respondents R. 114; R. 120-122; R. 146-151); however, Respondents failed to take the time to work out their own schedule of payments and contract balance, although they could easily have done so since all necessary information was available to them (R. 120-123; R. 137, L. 25-28), or to compare their figures in detail with the schedule prepared by Appellants (Ex. 5-P). The obligation to make payments of \$89.00 per month was not contingent in any manner upon ascertaining the unpaid balance due on the contract (Ex. 1-P) or upon the completion of the proposed sale between Respondents Casey and Wilcox, a transaction unrelated to Appellants.

The lack of candor of Respondents' argument is illustrated by the fact that Wilcox was able to ascertain the balance due on the contract (Ex. 1-P) with sufficient

accuracy to permit him to purchase from Schmidts, but then before even one more payment was made, he argues that he was unable to ascertain the contract balance with sufficient accuracy to sell the same property to Caseys, even though the same information concerning the contract, dates and amounts of payments thereon, taxes and insurance to be added, etc. was available to him as to Appellants.

Equitable estoppel requires misleading conduct or language of one person and reliance thereon by another who is misled thereby to his prejudice (*Glendale v. Coquat*, 46 Ariz. 478, 52 P.2d 1178, 102 ALR 837; *Sovereign Camp W. W. v. Newsom*, 142 Ark. 132, 219 SW 759, 14 ALR 903; 10 Am Jur Estoppel 36, P. 637; 70 ALR 994; 36 Am Jur Mortgages 387, 398). Respondents' proposed jury instruction No. 11 (R. 70) correctly recites the rule of law that estoppel requires that the default be caused by the acts or conduct of the person to be estopped, as where he has wrongfully prevented payment. (Quoted from 36 Am Jur Mtgs 398, P. 886-887.) The only thing that prevented the September, 1962 payment from being made on time and caused the default is lack of funds in Respondent Wilcox's bank account, a matter over which Appellants had no control.

The Court found (R. 83, Par. 4) that the default of Respondents "... was the result of unconcionable and inequitable conduct of the Plaintiffs" (Appellants). The Court failed to state what conduct of Appellants was "unconcionable" or "inequitable," and accordingly this finding, particularly in view of the lack of evidence to that effect as demonstrated above, and the fact that the

actual cause of the default was the returned check, is not sufficient to support the judgment of the Court.

The Court found (R. 83, Par. 8) that the Respondents did not know the balance owing to Appellants on the contract (Ex. 1-P) and that without an agreement from Appellants as to the amount of that balance could not be required to assume the balance owing to Appellants. This finding assumes that Appellants had a duty to supply the contract balance to Wilcox (with whom Appellants had no contract or agreement) and that the assumption of the contract balance due to Appellants (Ex. 1-P) was a condition precedent to the obligation of the Respondents to make further payments to Appellants. The rights of Appellants and the duties of Schmidt and all of the Respondents who might undertake to assume and to perform Schmidts' obligations thereunder, are fully defined in the real estate contract (Ex. 1-P), clearly indicate that Appellants have a right to collect \$89.00 per month and a duty to convey title when the contract is paid in full. Until the last payment is due the obligation of Respondents to pay the monthly installments is unconditional and there is no duty for Appellants to ascertain the exact unpaid contract balance (55 Am Jur 106, Page 582).

The Court found that Appellants gave Respondents no notice of default and did not make demand for payment of delinquencies due on the real estate contract (Ex. 1-P) before serving notice upon Respondents, declaring the entire contract balance due and payable (R. 84, Par. 12). This finding is wholly irrelevant and immaterial to the issues in this case. Appellants exercised the right con-

ferred upon them by the contract (Ex. 1-P, Par. 16C) to accelerate the contract balance without notice, and the Court should enforce the clear intention of the parties as expressed by the written contract (*Forrester v. Cook, supra*; *Burt v. Stringfellow, supra*; *Udy v. Jensen, supra*). The Legislature has expressly approved acceleration clauses in notes (44-1-2(3), UCA, 1953), and the holder of a note is not required to give notice of election to declare the note due as a condition precedent to bringing action for its collection (*Thomas v. Foulger*, 71 U. 274, 282, 264 P. 975). Presentment for payment is not necessary in order to charge the person primarily liable on an instrument (44-1-71, UCA, 1953). Appellants actually gave notice declaring the balance due (R. 9-10) and waited 76 days, before commencing this action, to give the Respondents an opportunity to refinance or to make other arrangements to pay the contract balance. If action can be commenced without notice, clearly notice of delinquency and opportunity to reinstate are not conditions precedent to the rights of Appellants to exercise the acceleration clause upon default. (36 Am Jur Mtg. 386, P. 882 and footnote No. 14; *Fed. Land Bank v. Wilmarth*, 218 Iowa 339, 252 NW 507, 94 ALR 1338.) Even a Court of Equity cannot enforce generosity. The acceleration clause in a note is not a penalty (70 ALR 986), the purchasers being required to pay no more on principal by reason of exercise of the acceleration clause, and the purchaser thereby actually saves substantial interest. The Legislature has provided elaborate safeguards and redemption rights in cases of mortgage foreclosure, which rights will all be available to Respondents after this foreclosure is decreed.

## CONCLUSION

Appellants are entitled to a decree of mortgage foreclosure since there is no question about the default of Respondents in making the contract payments, or the right or election of Appellants to declare the entire unpaid contract balance immediately due and payable and to treat the real estate contract as a note and mortgage. Respondents made no legal tender of the delinquent payment prior to acceleration of the contract balance and there can be no equitable estoppel since the Respondents did not change their position to their prejudice in reliance upon any acts, omissions or conduct of the Appellants, and Appellants had nothing to do with the cause of the default. The sole and proximate cause of the default by Respondents in making the September, 1962 contract payment was and is the lack of funds in Respondent Wilcox's bank account which resulted in the check being returned marked "Insufficient Funds." It appears that all of the talk about arriving at a contract balance and suggesting that a tender of delinquent installments would be made in the future, if Wilcox was able to sell to Caseys, is nothing more than a diversionary tactic, since those matters have no relationship to the actual cause of the default — the insufficient funds check.

The decision of the District Court of, no cause of action, should be reversed and the case remanded to the District Court with instructions to enter judgment of foreclosure

of the mortgage, including a reasonable attorney fee for services in connection with the foreclosure of the mortgage and this appeal, as provided in paragraph 21 of said contract (Ex. 1-P).

Respectfully submitted,

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