1971

Walker Bank & Trust Company, A Utah Corporation v. A. P. Neilson And Lillie Neilson, His Wife, William Arthur Waller And Minnie Eula Waller, His Wife, William A. Lewis And Joann D. Lewis, His Wife, Earl S. Spafford, Granite National Bank, Kent W. Nordgren, John G. Marshall, John Elwood Dennett, Herschel J. Saperstein As The Trustee In Bankruptcy Of John Elwood Dennett, Herta K. Dennett, Alvin I. Smith, Receiver, Utah State Tax Commission, United States Of America, Interstate Brick Company, Southeast Ready Mix, Bank Of Salt Lake, Utah State Industrial Commission : Brief of Plaintiff-Appellant

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Plaintiff

v.

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WALLER, his wife
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Brief

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1971

Court, Utah

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STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

WALKER BANK & TRUST COMPANY, a Utah corporation,

Plaintiff-Appellant,

v.

A. P. NEILSON and LILLIE NEILSON, his wife, WILLIAM ARTHUR WALLER and MINNIE EULA WALLER, his wife, WILLIAM A. LEWIS and JOANN D. LEWIS, his wife, EARL S. SPAFFORD, GRANITE NATIONAL BANK, KENT W. NORDGREN, JOHN G. MARSHALL, JOHN ELWOOD DENNETT, HERSCHEL J. SAPERSTEIN as the trustee in bankruptcy of JOHN ELWOOD DENNETT, HERTA K. DENNETT, ALVIN I. SMITH, Receiver, UTAH STATE TAX COMMISSION, UNITED STATES OF AMERICA, INTERSTATE BRICK COMPANY, SOUTHEAST READY MIX, BANK OF SALT LAKE, UTAH STATE INDUSTRIAL COMMISSION,

Defendants-Respondents.

CONSOLIDATED CASES 12235 and 12348

BRIEF OF PLAINTIFF-APPELLANT

NATURE OF THE CASE

This is an action which was instituted for the purpose of foreclosing a Trust Deed, which had been executed by A. P. Neilson and Lillie Neilson, his wife, to plaintiff, in which the defendants John Elwood Dennett and Herta K.

Dennett interposed the defense that the Trust Deed could not be foreclosed because a tender of delinquent installments had been made.

DISPOSITION IN THE LOWER COURT

The case was tried to the Court without a jury in January and March, 1970. The court entered its Findings of Fact and Conclusions of Law and Order in the case on May 7, 1970, and the same were amended and supplemented by the Court July 30, 1970, September 30, 1970 and November 17, 1970, and a judgment and decree was signed by the Court on November 17, 1970.

The trial court found that the Trust Deed, executed by A. P. Neilson and Lillie Neilson, to plaintiff, dated April 8, 1966, was a valid first lien against the real property therein described. It further found that an addendum to the Trust Deed, also dated April 8, 1966, provided that in the event A. P. Neilson and Lillie Neilson conveyed any of their interest in said property, that the holder of the note secured by the Trust Deed could declare the unpaid balance immediately due and payable. On July 25, 1968, A. P. Neilson conveyed the property to one Elsie Powers, who thereafter executed a deed to the property to Herta K. Dennett. In October of 1968, three monthly installments on the Trust Deed were delinquent. On about October 24, 1968, John Elwood Dennett tendered the amount of the three delinquent payments to plaintiff. Plaintiff refused to accept the tender and informed John Elwood Dennett that the tender could not be accepted since it was insufficient to cover late charges, costs and

attorneys' fees which had been incurred and because Dennett was not the borrower. The Court concluded that plaintiff could not foreclose its Trust Deed and was not entitled to its costs and attorneys' fees because the addendum to the Trust Deed was void as being against public policy and because the tender was valid and sufficient and plaintiff was obligated to accept the same.

The trial court ordered, adjudged and decreed that the plaintiff's Trust Deed was a valid, first lien against the real property covered thereby, having an unpaid principal balance of $76,726.20, and that there was past due to the plaintiff on said Trust Deed as of October, 1970, the sum of $22,733.38, representing unpaid principal and interest installment payments, taxes and insurance premiums. It gave the defendants until June 1, 1970 to pay the sums past due on the Trust Deed. The time for paying the past due sums was later extended by the Court to July 30, 1970, then to September 30, 1970, then to October 20, 1970 and finally to October 26, 1970. It further ordered that plaintiff's right to foreclose its Trust Deed be denied.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Order, Judgment and Decree of the trial court, and that the case be remanded to the trial court to fix the amount of costs and attorneys' fees to be awarded, to direct the disposition of the funds in the hands of the Court and for a judgment ordering foreclosure of the trust deed and sale of the property by the sheriff in the manner provided by law for the fore-

closure of mortgages on real property to satisfy the indebtedness.

STATEMENT OF FACTS

The following are the facts in the case as found by the trial court and set forth in the Findings of Fact as amended and supplemented:

In February of 1966, A. P. Neilson made application to Walker Bank & Trust Company for a loan on certain real property located in Salt Lake County, Utah. (R. 128) At this time, Herta K. Dennett, the wife of John Elwood Dennett, was the record title owner of said real property. (R. 125-126) The loan application of A. P. Neilson was approved by the plaintiff and on about April 8, 1966, the loan was closed. (R. 128, 129) On that date Herta K. Dennett executed and delivered a Special Warranty Deed to A. P. Neilson covering the property. John Elwood Dennett executed a Quit-Claim Deed to A. P. Neilson covering the property. (R. 129) A. P. Neilson and Lillie Neilson, his wife, then executed a note in the sum of $85,000 to plaintiff, dated April 8, 1966. (R. 129) At the same time the Neilsons, to secure the payment of said note, executed and delivered to plaintiff a Trust Deed covering the real property which is the subject of this action. (R. 129)

At the time the loan was closed an addendum to said Trust Deed was executed by A. P. Neilson and Lillie Neilson. The addendum stated:

"It is mutually understood and agreed that notwithstanding any other provision of the above Trust Deed and the Note securing the same, that in the event A. P. Neilson and Lillie Neilson transfer any of their interest in the property covered by said Trust Deed, the holder of the Note secured by said Trust Deed, may, at its option, declare the entire unpaid balance thereof immediately due and payable."

This addendum was shown to John Elwood Dennett before the loan was closed and Dennett agreed that the transaction proceed on the basis of the said addendum. (R. 130) Both the Trust Deed and the addendum were recorded in the office of the Salt Lake County Recorder on April 12, 1966. (R. 129, 130)

On July 25, 1968, A. P. Neilson executed a deed conveying the property in question to one, Elsie S. Powers. The money which was paid to A. P. Neilson for this deed was furnished through John Elwood Dennett. Elsie S. Powers then executed a Quit-Claim Deed conveying the property to Herta K. Dennett. (R. 135)

After the conveyance of the property to Herta K. Dennett no further payments were made on the trust deed. By the middle of October, 1968, three monthly installment payments of $728.90 each were delinquent on the Trust Deed and the real property taxes covering the property for the previous year remained unpaid. (R. 133,136) Notice of these delinquencies was given by plaintiff and on about October 24, 1968, John Elwood Dennett tendered a check to plaintiff in the sum of $2,186.70. The plaintiff refused to accept that tender and informed Dennett

that the tender could not be accepted since it was insufficient to cover the late charges, costs and attorneys' fees, which had been incurred and because Dennett was not the borrower. (R. 136)

Suit was instituted, the case proceeded to trial and following the trial the Court denied plaintiff the right to foreclose its Trust Deed and gave the Dennetts until June 1, 1970, to pay the delinquent amounts and bring the loan current. (R. 140, 142) The time to bring the loan current was later extended by the Court to July 30, 1970, (R. 142) then to September 30, 1970, (R. 208, 209) then to October 20, 1970 (R. 212) and finally to October 26, 1970. (R. 231-232) Although the supplemental Findings of Fact and Conclusions of Law indicate that sufficient sums were tendered by check on or before October 26, 1970, to bring the loan current (R. 232), and that the tenders of these checks were in substantial compliance with the Court's order as from time to time extended (R. 233), in fact, payment of one of the checks representing part of the tender was stopped (R. 245).

The Court further ordered that until the appeal in this case was decided, the monthly installment payments commencing with the November, 1970 payment, be paid when due to the Clerk of the Court, and that the 1970 real property taxes assessed against the property be deposited with the Clerk of the Court on or before November 30, 1970. (R. 224). This order was not complied with (R. 261).

ARGUMENT

POINT I

THE PLAINTIFF HAS THE RIGHT TO FORECLOSE ITS TRUST DEED BECAUSE OF DEFENDANTS' CONVEYANCE OF THE PROPERTY IN DELIBERATE VIOLATION OF THE VALID AND LEGALLY ENFORCEABLE TERMS OF THE ADDENDUM.

At the time the plaintiff made its loan to A. P. Neilson, the Neilsons and plaintiff executed an addendum to the Trust Deed which provided as follows:

> "It is mutually understood and agreed that notwithstanding any other provision of the above Trust Deed and the Note securing the same, that in the event A. P. Neilson and Lillie Neilson transfer any of their interest in the property covered by said Trust Deed, the holder of the Note secured by said Trust Deed, may, at its option, declare the entire unpaid balance thereof immediately due and payable."

This addendum was shown to John Elwood Dennett prior to the time the loan was closed and Dennett agreed that the transaction proceed on the basis of said addendum. The Trust Deed and addendum were recorded together on April 12, 1966. (R. 129-130) In July, 1968, Dennett provided the funds to arrange a transfer of the property by A. P. Neilson, and on July 25, 1968, A. P. Neilson deeded the property to one, Elsie S. Powers. John Elwood Dennett then obtained a deed conveying the property from Elsie S. Powers to Herta K. Dennett. (R. 135)

The Dennetts and the Neilsons were not only aware of the restrictions in the addendum, but agreed, prior to the time the loan was closed, that the loan be granted on the basis of said addendum. Less than a year and a half later Neilson and Dennett deliberately violated the terms of said addendum by causing the property to be transferred, and after the property was transferred no further payments were made on the trust deed.

It is plaintiff's contention that this deliberate violation gives the plaintiff the right to immediate payment of the entre unpaid balance of the loan and to have its Trust Deed foreclosed when such payment was not made. The trial court ruled, however, that the addendum was void as being against public policy and that plaintiff could not foreclose its trust deed because of the violations of the addendum by defendants (R. 139). The trial court was in error in its ruling on this point.

In its ruling on this point the trial court may have adopted Dennett's argument that the addendum created some sort of unreasonable restraint on alienation. The addendum cannot be construed as a provision which could disable the Neilsons from conveying the property, however. The addendum does not state that any attempted conveyance by the Neilsons is void or unenforceable. It does not state that should the Neilsons attempt to convey the property, the title of the Neilsons becomes divested. The addendum does not provide that Walker Bank could prevent the Neilsons, by injunction proceedings, an action for specific performance, or otherwise from conveying the property in violation of the addendum.

All the addendum states is the date when the unpaid balance of the note may become due and payable. That date is the date when the Neilsons — the parties with whom Walker Bank contracted — conveyed their interest in Walker Bank's security. Such a provision which merely sets forth a date on which the balance of the note becomes due is not a restraint on alienation or otherwise against public policy. A case directly in point on this matter is *Ray v. Oklahoma Furniture Mfg. Co.,* 40 P2d 663, 170 Okla. 414, (1934). In that case the defendant executed a note which provided that the holder of the note might declare the note due and payable should certain conditions occur, including any change in the ownership of the business of the maker or any encumbrance of the maker's stock in trade. The defendant contended that these provisions were contrary to public policy and were void. This contention was rejected by the Oklahoma Supreme Court and the validity of the note was sustained. The Court stated:

> "We are of the opinion that the only purpose of the conditions was to accelerate the maturity of the obligation in the event of their happening for the protection of the plaintiff. Such conditions did not prevent the sale of the property, but merely provided for an earlier maturity of the obligation in the event of the happening of the conditions therein stated. We are unable to find anything oppressive in the conditions complained of."

Similar provisions which accelerate the due date of an indebtedness on the happening of other contingencies have uniformly been upheld by the Courts. E.g. *Chambers v. Marks,* 9 So. 74, 93 Ala. 412, (Acceleration because of

failure to pay taxes and insurance); *Cedar Rapids National Bank v. Snoozy,* 215 NW 96, 55 N. Dak. 655, (acceleration on maker's assignment for benefit of creditors).

The addendum in this case is nothing more than an agreement between the parties as to the date when the unpaid balance of the obligation will be due and payable. Such acceleration provisions are valid and legally enforceable provisions. As stated by the Court in *Messner v. Mallory,* 236 P.2d 898, 900, 107 Cal. App.2d 377 (1951):

> "A provision in an agreement for accelerated maturity is not in the nature of a penalty or forfeiture, but simply an agreement as to the time when a debt shall become due and enforceable according to its terms. Such an agreement is a lawful one which the parties may enter into, and when they do so the conditions will be enforced by courts of equity. No forfeiture is involved in such act, and no penalty imposed. Plaintiff is not asking for anything that has been paid under the contract by way of forfeiture, but is simply refusing to extend the credit for the reason that defendant has failed to comply with his contract."

To the same effect see *Harris v. Kessler,* 12 P.2d 467, 124 Cal. App. 299, (1932) and *Foreman v. Myers,* 444 P.2d 589, 79 N.M. 404 (1968).

A provision in a mortgage allowing the lender to declare the unpaid balance of his loan due and payable on sale by the mortgagor of his interest in the mortgaged property is not only valid and enforceable, but is an entirely reasonable provision. This becomes apparent on a cursory examination of the relationship of the parties in

a morgage loan transaction. Most mortgage loan transactions contemplate a continuing relationship between the borrower and the lender over a long period of time. Many mortgage and trust deeds run for a period of up to 30 years. The trust deed involved in this case was to run for a period of 10 years provided the agreements of the borrower were kept. During this long period of time the lender, of course, looks to the borrower to pay the monthly installment payments promptly when due. The lender also expects the borrower to do all those other things which an honest and responsible property owner would do with respect to the property, such as paying taxes and assessments on the property before they become delinquent, keeping the property adequately insured against fire and other hazards, keeping the property in good condition and repair and free from tax liens, mechanic's liens and other adverse claims, etc.

A lender may well be willing to make an $85,000 mortgage loan at 6¼% for 10 years to a borrower who, through his past dealings, has shown himself to be a financially and morally responsible person and one from whom the lender can expect prompt and complete performance of his legal and moral obligations.

Assume, however, that the party applying to the lender for a loan holds no property in his own name and has numerous judgments entered against him with other suits pending against him, or that he is then in bankruptcy, or that there are over $200,000 in federal tax liens filed against him, or that he is under federal indictment, or all of the above. The lender in such a case would certainly not make an $85,000 loan to that applicant and certainly

not for 10 years at 6¼% interest. In fact, it is almost certain that the lender would not make that applicant any loan whatsoever. The reason is obvious. The first thing a lender looks to in making a mortgage loan is the borrower himself, his financial and moral responsibility and the prospect of an amicable and trouble free relationship over the long years ahead.

The addendum in this case is an entirely reasonable and proper provision to protect this legitimate interest of the lender. Without it a borrower, after obtaining a large, low interest rate, long term loan, could sell the property to an irresponsible third party and thereby subject the lender to continual defaults, harassments, trouble and protracted litigation for years to come. To hold that the addendum in this case is unenforceable is to tell a lender that he has no right to consider the financial and moral responsibility of the borrower in deciding the terms of a loan, or in deciding whether a loan will be made at all. Such a ruling would declare that a lender could not protect himself in preserving the principal inducement to his making the loan in the first place — the identity of the other contracting party. It would, in effect, tell a lender that he has no choice in deciding with whom he will deal.

The courts have long recognized the right of a lender to choose with whom he will deal, and have long upheld the validity of provisions in mortgages and trust deeds accelerating the unpaid balance of the indebtedness on sale of the mortgaged property by the mortgagor. The general rule regarding this matter is set forth in 59 CJS, Mortgages §495(4), as follows:

"Where the agreement of the parties so provides, the principal sum secured by the mortgage or deed of trust may be declared due and payable immediately although otherwise not yet due, with the consequent accrual of the right to foreclose on default in the performance of any covenant or agreement contained in the mortgage, or where the mortgage so provides, on the breach of any specific covenant on which the right to accelerate is conditioned. Accordingly, where there is a provision therefor, the maturity of the debt secured by the mortgage may be accelerated and the mortgage foreclosed where there is default in the payment of a prior encumbrance, default in the payment of interest on a prior mortgage, default in the payment of other debts owed by the mortgagor to the mortgagee, *a sale by the mortgagor* . . . " (emphasis added).

A 1970 case directly in point on this question is the case of *Peoples Savings Association v. Standard Industries, Inc.,* 257 NE 2d 406, 22 Ohio App.2d 35. The mortgage in that case contained a clause which provided that if there should be any change in the ownership of the premises covered by the mortgage the mortgagee could declare the entire unpaid balance of the mortgage immediately due and payable. The property in question was later sold by the mortgagors to the defendant without the consent of the mortgagee, and the mortgagee instituted this action to foreclose the mortgage because of the sale. The defendant contended that the provisions of the mortgage were illegal, inequitable and contrary to the public policy of the State of Ohio and that the plaintiff could not foreclose its mortgage because of the sale of the property in violation of these provisions. This contention of de-

fendants was rejected by the Ohio Appellate Court. The Court stated:

> "Defendant-appellant argues that public policy makes the provision for acceleration based on change of ownership void ab initio and that this Court should so hold. Acceleration clauses in mortgages are not new in Ohio. See *37 Ohio Jurisprudence 2d 268, Mortgages* §*80.* See, also, *Nixon v. Buckeye Building & Loan Co. (1934), 18 Ohio Law Abstract, 261.* In *Coast Bank v. Minderhout,* 61 Cal.2d 311, 38 Cal.Rep. 505, 392 P.2d 265, Justice Trayner, in a thorough opinion, held that a similar provision is a reasonable restraint designed to protect justifiable interests of the parties. We concur, and hold that a significant element in the mortgage contract is the mortgagor himself, his financial responsibility and his personal attitudes. The right of the mortgagee to protect its security by maintaining control over the identity and financial responsibility of the purchaser is a legitimate business objective and is not illegal, inequitable or contrary to the public policy of the State of Ohio."

The California Supreme Court took the same position as the Ohio Court in the case of *Coast Bank v. Minderhout,* 392 P.2d 265, 61 Cal 2d 311, in a unanimous opinion written by Justice Trayner. In that case the plaintiff brought action to foreclose after the borrower had conveyed the property in direct violation of the recorded agreement between the plaintiff and the borrower preventing sale so long as the loan remained unpaid. The defendants asserted the agreement to be void as an illegal restraint on alienation. The California Supreme Court rejected this contention, held the agreement valid and affirmed a judgment of foreclosure.

The most recent reported decision on this question is the case of *Cherry v. Homes Savings & Loan Association,* 81 Cal. Rep. 135, (Cal. App. 1970). In that case, a trust deed was executed which contained a clause that if the trustors conveyed the property or any interest therein without the consent of the lender, the lender could declare the loan immediately due and payable. This was held by the Court to be a valid provision and not to constitute an unreasonable restraint on alienation.

None of the above cases presents as strong a case for upholding validity of the addendum as does the case before this Court. In none of the above cases does it appear that the borrower and the ultimate owner agreed prior to the time the loan was made that the acceleration provisions of the addendum be made a part of the trust deed. In none of the above cases does it appear that the borrower and the party who later acquired title to the property agreed prior to the time the loan made that the loan be made on the basis of this provision. Yet all the above cases uphold the validity of such a provision without these added elements. It is respectfully submitted that the position which has been taken by the California and the Ohio Courts is the position which should be adopted by this court and that a duly recorded provision in a mortgage or trust deed which permits a mortgagee to treat a transfer of the mortgaged property as a default entitling the mortgagee to accelerate the mortgage is in all events a valid and legal provision. Such should certainly be the rule in cases like the one in question here where all parties attacking the validity of the addendum,

including the transferee, agreed to the provision before the loan was made, agreed that the loan be made on the basis of said provision, and then deliberately violated the provision.

POINT II

THE PLAINTIFF WAS NOT REQUIRED TO ACCEPT THE TENDER OF DELINQUENT PAYMENTS, SINCE THE TENDER WAS NOT MADE BY ANY PERSON ENTITLED TO MAKE TENDER OR REINSTATE THE TRUST DEED.

In October of 1968, after the loan was three months delinquent, John Elwood Dennett tendered to the plaintiff the check for the three delinquent installments. Dennett was told at that time that the tender could not be accepted because, among other things, Dennett was not the borrower. It is plaintiff's contention that plaintiff was not required to accept the tender since the tender was not made by any person entitled to reinstate the trust deed and bring the loan current.

It is a generally recognized principle of law that a tender, in order to have any legal effect, must be made by the debtor or someone representing him or by a person having some legal interest in the property in question. A stranger or mere volunteer cannot compel a mortgagee to accept his tender. *86 CJS, Tender* §*35; 59 CJS Mortgages* §*446 (A).* This rule ha been codified in Utah insofar as a tender of delinquent payments to reinstate a trust deed is concerned. The persons who are entitled to tender delinquent payments and reinstate a trust deed are set forth in §57-1-31, Utah Code Annotated, 1953. They are

the trustor, his successor in interest in the trust property, one having a subordinate lien or encumbrance of record or a beneficiary under any subordinate trust deed. John Elwood Dennett, at no time fell into any of the above categories. The court found that Dennett at no time had any legal interest in the real property. (R. 126-127)

It may be the contention of the Dennetts that the tender was made on behalf of Herta K. Dennett. The problem with this contention is that Dennett never informed the plaintiff that the tender was being made on her behalf. In addition, the plaintiff had no way of knowing at the time the tender was made that Herta K. Dennett had any interest whatsoever in the real property. The deed from Elsie Powers to Herta K. Dennett was not recorded at that time and, in fact, has not been recorded to this date. (R. 135) The plaintiff should not be required to exercise clairvoyant powers to determine on whose behalf a tender is being made, and that the person on whose behalf it is made has an interest in the property entitling him to make such tender.

> "Where a tender is made by one other than the debtor, the creditor must be informed on whose behalf it is made, or have an opportunity of knowing the authority by which it is made." *86 CJS Tender* §35.

Plaintiff was not required to accept the original tender because the tender was not made by or on behalf of a party entitled to reinstate the trust deed. It is not required to accept the sums which have been deposited with the court for the same reason. There has been de-

posited with the clerk of the court pursuant to the court's order of May 7, 1970, as amended and extended, for payment on plaintiff's trust deed the sum of $22,433.38. Only $238 of this sum was tendered by any person having any interest whatsoever in the real property, while $23,195.38 of the amount tendered to the clerk was tendered by complete strangers. The court specifically found:

> "That with the exception of the check for $238 which was delivered to the clerk on October 22, 1970, all of the deposits which were made were made by third parties other than the persons who are parties to this action." (R. 232)

The plaintiff cannot be required to accept payments from such strangers to reinstate the trust deed.

POINT III

THE PLAINTIFF WAS NOT REQUIRED TO ACCEPT TENDER OF DELINQUENT PAYMENTS SINCE THE TENDER WAS INSUFFICIENT IN AMOUNT TO REINSTATE THE TRUST DEED.

The tender which was made by John Elwood Dennett on October 24, 1968, was $2,186.70, an amount equal to three monthly principal and interest installment payments on the trust deed. Mr. Dennett was informed at that time that his tender could not be accepted because, among other things, it was insufficient to cover the late charges, costs and attorneys' fees which the Bank had incurred. (R. 136-137)

A tender, in order to have any legal effect, must be sufficient in amount to cover all sums which are then

due to the creditor because of the default. As stated in 86 CJS, Tender §7:

> "In order to constitute a valid tender, the tenderer must offer a specific amount. While such amount need not be beyond reasonable dispute, nothing short of an offer of everything that creditor is entitled to receive is sufficient, and a debtor must at his peril tender the entire sum due, including all necessary expenses incurred or damages suffered by the creditor by reason of the default of the debtor, and a mistake in tendering an amount less than the sum due is the misfortune of the tenderer, the tender having no legal significance if refused, and the position of the parties remains the same as though no tender had been made."

Dennett was informed by plaintiff when he made his tender that the amount tendered was insufficient because it did not include the late charges as provided by the trust deed note.* He was informed that the tender was insufficient in failing to cover the costs of a foreclosure report which the plaintiff had obtained. He was informed that the tender was insufficient in that it did not cover the attorney's fees which the plaintiff had incurred and was told that these fees amounted to $300. None of these sums was ever tendered by any party. (R. 136, 137)

The right to reinstate a delinquent trust deed is conditioned upon payment of these sums. Where a person who has a right to reinstate a trust deed tenders delin-

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*The trust deed note specifically provides for a late charge of 2% of a delinquent installment not paid within 15 days. (R. 8)

quent payments he is entitled to have the trust deed reinstated, *provided* he pays "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 trustees and attorneys' fees actually incurred not exceeding in the aggregate $50 or one-half of one percent of the entire of the unpaid principal sum secured, whichever is greater) other than such portion of principal as would not then be due had no default occurred . . ." (§57-1-27 Utah Code Annotated, 1953 as amended)

Even if the tender in this case had been made by a party entitled to reinstate the trust deed, the tender would have been insufficient because: (1) The failure to pay the late charges on the delinquent installments which were "then due under the terms of such trust deed and the obligation secured thereby;" (2) The failure to pay "the costs and expenses actually incurred in enforcing the terms of such obligation or trust deed," consisting of $60 paid by plaintiff for a title report of the property covered by the trust deed; and (3) The failure to pay "the attorneys' fees actually incurred" of $300, which was "less than one-half of one percent of the entire unpaid principal sum secured."

It is only when these sums have been paid by a person entitled to reinstate that the sums must be accepted by the lender and the trust deed reinstated. The reason that the law requires a defaulting borrower to pay these amounts before being entitled to a reinstatement of his

trust deed is that the lender would otherwise be without a remedy to collect his costs and expenses. The Utah Trust Deed Act prevents a lender from bringing any personal action against the borrower until after the trust deed has been foreclosed as provided in the Trust Deed Act. §*57-1-32, Utah Code Annotated 1953.* The Utah One-Action Statute prevents any personal judgment from being entered against a defaulting borrower until after sheriff's sale of the property in question. §§*78-37-1, 2, Utah Code Annotated 1953.* If the lender could not require as a condition to reinstatement of the trust deed that the defaulting borrower pay the lender's costs and the almost nominal attorney's fees specified in the Trust Deed Act, the lender would be without a remedy for recovering these sums.

POINT IV

THE TENDER WAS INADEQUATE AND OF NO LEGAL EFFECT BECAUSE NOT KEPT GOOD BY THE ONE MAKING THE TENDER.

A tender in order to have any legal effect must be kept good at all times by the party making the tender. He must at all times hold himself in readiness to pay and his failure to do so amounts to an abandonment of the tender. This is a rule which has always existed in this State. The rule was initially enunciated by the Utah Supreme Court in the case of *Hymas v. Bamberger,* 10 Utah 3, 36 Pac. 202 (1894) which concerned a written tender made by a debtor to redeem a pledge of certain securities. The court in that case stated:

"The tender was made in writing, under §3964, Comp. Laws 1888, which provides as follows:

> 'An offering in writing to pay a particular sum of money . . . is, if not accepted equivalent to the actual production and tender of of the money.'

Ordinarily, where a party makes a tender, independently of the statute, he must actually produce the money to the creditor. It must be in sight, capable of immediate delivery, and the creditor be allowed a reasonable time to determine the amount due, and to declare whether he will accept. A tender in writing under this statute is equivalent to the actual production and tender of the money. To have this effect, however, the party tendering must have the ability to produce it, and must act in good faith. Nor does such a tender deprive the creditor of the allowance of a reasonable time in which to ascertain the amount due, and to determine whether he will accept; *and if he accepts, and the debtor fails to produce the money, his tender will be of no avail. Startup v. McDonald,* 46 ECL 623; *Moynahan v. Moore,* 77 Am.Dec. 483; *Proctor v. Robinson,* 35 Mich. 284; *Smith v. Walton,* 5 Houston 141; *Shugart v. Pattee,* 37 Iowa 422. Where a person makes a tender in writing, the statute excuses him from actually producing the money at the time of making the tender, but it excuses no other act or requirement on his part which would be necessary to make a valid tender, independently of the statute. To hold otherwise would be to turn the statute, which was intended as a mere convenience into an instrument of fraud to hinder and delay creditors in the collection of their claims." (Emphasis added)

This position was reaffirmed by the Utah Supreme Court in the case of *LeVine v. Whitehouse,* 109 Pac. 2, 37 Utah 260 (1910).

The case of *Cole v. Cole,* 122 P.2d 201, 101 Utah 355 (1942) involved the validity of a tender of checks made by the defendant to the clerk of the court pursuant to the provisions of a divorce decree. The testimony at the hearing showed that the defendant had not maintained a sufficient balance in his banking account to cover the payment of the checks. The court held that the tender was insufficient because a tender is not good unless it is a continuing good tender. The court stated:

> "The general rule no doubt is, that where a tender is made in a law case which, if accepted, is intended to operate as payment of the debt, the tender, if rejected, must, nevertheless, be kept good." See also *Sieverts v. White,* 273 P.2d 974, 2 Utah 2d 351 (1954).

After Dennett's tender in this case had been rejected by the plaintiff, Dennett wrote a letter to the plaintiff to give the appearance that he was making a continuous tender and was complying with the rules that a continuing tender must be made and the tender must be kept good. Accordingly, Mr. Dennett stated in his letter:

> "The legal problem is keeping the tender continuous. To that end, I declare herewith, a continuing willingness, readiness, and ability to perform the requirements of the lien instrument." (Exhibit D-52(D))

It is not what Dennett said about his willingness, readiness and ability to pay that is important, however,

but the facts which are shown by the record concerning his unwillingness, unreadiness and inability to keep the tender good. By the Court's order of May 7, 1970, all delinquent sums were required to be paid by June 1, 1970. (R. 142) The court extended the time for making these payments to July 30, 1970. (R. 142, 231) This time was further extended by the court to September 30, 1970, at which time Mr. Dennett appealed to the District Court for a further extension. (R. 173, 212, 231) The court then extended the time in which the payments were to be made to October 20, 1970. (R. 212, 232) It was not until October 26, 1970 until the final payment was made to the clerk of the court. (R. 232) Almost six months elapsed between the time of the court's order of May 7, 1970 which required the delinquent installments to be paid, and the date on which Dennett was apparently willing to come up with sufficient money to pay the delinquencies under the trust deed.

Dennett's compliance with the Court's order to tender all delinquencies by October 26, 1970, was apparent only. Although the supplemental findings of fact and conclusions of law recite the checks which were tendered to the clerk of the court by October 26, 1970, (R. 232), and although the Court concluded that the tender of these checks was made in substantial compliance with prior orders of the Court as from time to time extended (R. 233), in fact, one of the checks representing part of the tendered money bounced. The check of Herta Dennett in the sum of $238.00 was returned unpaid to the Salt Lake County Treasurer by the drawee bank. This was not merely the result of some mistake or oversight on the part

of the bank or maker. The failure was deliberate. Payment of the check had been stopped. (R. 245)

The failure and refusal of Dennett to keep his tender good did not stop with obtaining a judgment and decree preventing Walker Bank from foreclosing on the ground that his tender was good, however. The judgment and decree ordered that until the appeal in this case is decided, the monthly installment payments commencing with the November, 1970, payment, be paid when due to the clerk of the court. It further ordered that the amount of the 1970 real property taxes assessed against the property be paid to the Clerk on or before November 30, 1970. (R. 224) Before two weeks had elapsed from the entry of this order, the order had been violated and Dennett's "continuing tender" had again failed. (R. 261)

It is respectfully submitted that where a court finds that a tender was made which should have been accepted, the court may refuse to grant plaintiff the right to foreclose provided that the continuing tender which was made is immediately made good by the tenderer. The Court has no power, however, to refuse to grant plaintiff the right to foreclose, and, at the same time, give the tenderer six months, nine months, a year, or more, to decide whether or not to make his continuing tender good.

Dennett's continued unwillingness to keep his "continuing tender" good constituted an abandonment of his tender under Utah law. The record in this case is clear that from October of 1968 to the present time, the only thing "continuing" in this lawsuit is not Dennett's tender, but the defaults and delinquencies under the trust deed.

CONCLUSION

The findings of the trial court establish the execution and recording of the addendum to trust deed which gave the plaintiff the right to have the entire unpaid balance of the trust deed due and payable should A. P. Neilson transfer any interest in the property. The court found that prior to the time the loan was closed, this addendum was shown to John Elwood Dennett and Dennett agreed that the loan close on the basis of the said addendum. The court further found that less than a year and a half later Dennett arranged for the transfer of the property from A. P. Neilson to one Elsie S. Powers in direct and deliberate violation of the provisions of the said addendum.

It is the contention of plaintiff that the trial court was in error in concluding as a matter of law that the addendum was void as being against public policy, and in ruling that plaintiff had no right to foreclose its trust deed because of the deliberate violation of the terms of the addendum. Plaintiff believes that this court should adopt the position which has been taken by all of the recent decisions on this point and should recognize that a significant element in a mortgage contract is the mortgagor himself, his financial and moral responsibility, and his personal attitudes. It is respectfully submitted that the addendum in this case is a valid and legally enforceable provision protecting these legitimate business interests of the plaintiff and that plaintiff has the right to foreclose because of the deliberate violation of said addendum.

After Dennett arranged for the transfer of the property in violation of the addendum, payments on the trust deed ceased until the latter part of October, 1968, when Dennett's tender of delinquent installments was made. Plaintiff further contends that it has the right to foreclose its trust deed because no valid tender of the delinquent payments was ever made. The tender which Dennett made in October of 1968 was insufficient in amount and was not made by any person entitled to reinstate the trust deed or by anyone from whom the plaintiff was required to accept the tender. The insufficient tender which was made was abandoned by Dennett because of his failure to keep his tender good.

It is respectfully submitted that the decision of the trial court should be reversed and that the case should be remanded to the trial court to fix the amount of attorneys' fees and costs to be awarded to the plaintiff, to direct disposition of the funds in the hands of the Court and for foreclosure of the trust deed in the manner provided by law for the foreclosure of mortgages.

Respectfully submitted,

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