

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 1469

W. L. DEVANY, JR., TRUSTEE, AND G. GILDEN,

vs.

LESLIE B. COLGIN.

*To the Honorable Judges of the Supreme Court of Appeals
of Virginia:*

Your petitioners, W. L. Devany, Jr., Trustee, and G. Gil-
den, respectfully represent that they are aggrieved by a
decree entered in the Circuit Court of the City of Norfolk,
Virginia, on the 3rd day of July, 1933, wherein a perma-
nent injunction was awarded against your petitioners for-
bidding them from selling certain real estate situated in
the City of Norfolk, under and by virtue of a deed of trust.

Briefly stated the facts are as follows:

On the 5th day of February, 1932, said Leslie B. Colgin
conveyed certain real estate in the City of Norfolk, and de-
scribed in the bill of complaint, to W. L. Devany, Jr., Trus-
tee, to secure G. Gilden the sum of \$3,577.50 together with
the interest and taxes on the said property during the term
of the loan. \$100.00 principal was due February 5th, 1933,
together with the taxes. Balance of the loan 1925. There
was default in the payment of the taxes and interest and a
note for \$100.00 due February 5th, 1933, this being a part
of the principal indebtedness. Numerous requests were
made to the maker of the note to pay the taxes, interest and
past due note without success. The maker of the note on

June 16, 1933, had directed the property to be sold. The holder of the note in accordance with the terms of the deed of trust had declared the entire indebtedness to be due. The deed of trust contains an accelerative clause by which on default in payment of any note, the due interest or taxes, that the mortgagee had the right to declare the entire indebtedness due and payable, which privilege the mortgagee had asserted and after which the mortgagee had directed the Trustee to advertise the property for sale in accordance with the terms of the deed of trust, which was done and the property was advertised to be sold on July 6th, 1933, according to the terms of the said trust.

On June 26th the mortgagor paid the taxes amounting to \$160.24 and tendered to the Trustee the interest and principal note of \$100.00, which was due on February 5th, 1933, all of which being subsequent to the time the property was advertised for sale, which several amounts the mortgagee refused to accept.

This case was heard on the bill and answer which set forth these facts none being in dispute and upon which facts the Court enjoined the said Trustee from proceeding to sell the said property.

The sole question before this Court to decide is whether the Court was in error in refusing to adjudge the entire indebtedness represented by the notes and deed of trust to be due and payable and whether the decree in granting the said injunction was erroneously entered.

ARGUMENT.

“The proposition is accepted without dispute that a stipulation in a mortgage providing that the whole debt secured thereby shall become due and payable upon the failure of the mortgagor to pay interest annually or to comply with any other condition of the mortgage is a legal, valid and enforceable stipulation and is not in the nature of a penalty or forfeiture.”

19 R. C. L. 493-494.

Olcott vs. Bynum, 21 U. S. 570.

Schooley vs. Romain, 31 Md. 574.

White vs. Miller, 52 Minn. 367, 54 N. W. 736.

“It would seem that the general accelerative provisions in mortgages are not even viewed with disfavor by the Courts, but are to be construed and the intention of the parties ascertained by the same rules as of other contracts.”

Swerning vs. Lehner, Ia. 61 N. W. 431.

National Life Insurance Company vs. Butler, Neb. 85 N. W. 437.

“Generally speaking, the affirmative exercise by a mortgagee of the option to declare the mortgage due on the breach of a stipulated condition brings the mortgage to a maturity for all purposes as effectively as if maturity had resulted from the lapse time. Both parties are bound by the election and neither party can thereafter without the consent of the other, treat the mortgage as not matured”—

In like manner the exercise of the option to declare the entire debt secured by the mortgage to be due terminates the right to make partial payments and to secure a partial release of the property from a mortgage, “Prior to maturity”, of the mortgage debt.

Bartlett Estate Co. vs. Fairhaven Land Co., 49 Wash. 58, 94 Pac. 900.

In the above case there were provisions which provided that upon the payment of specified sums to the Trustee, certain parts of the property could be released from the mortgage. There was an offer of payment of specified amounts, for the release of a portion of the property after the entire debt had been declared due, and the mortgagee refused to release the said property. The Court said, “This must mean the time prior to the election of the mortgagee to declare the entire debt due and payable, for a *mortgage due by election of the mortgagee is as fully matured as one due by the expiration of the extreme limit of time fixed for payment.*”

We request that this petition be treated as a brief on behalf of the appellants.

We respectfully submit that the Trial Court erred in granting the said injunction and that that decree should be reversed and annulled.

Respectfully submitted,

W. L. DEVANY, JR., TRUSTEE,
G. GILDEN,

By W. L. DEVANY, JR., Counsel.

I, W. L. Devany, Jr., attorney practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion the decree complained of in the foregoing petition is erroneous and should be reviewed and reversed by this court.

4 Supreme Court of Appeals of Virginia.

Given under my hand this 21st day of September, 1933.

W. L. DEVANY, JR.

A copy of this petition was this date mailed to Louis B. Fine, Esq., attorney of record for Leslie B. Colgin.

Appeal allowed. Bond \$300.00. Oct. 20/33.

HENRY W. HOLT.

Received Oct. 23, 1933.

M. B. WATTS, Clerk.

RECORD

VIRGINIA:

Pleas before the Circuit Court of the City of Norfolk, at the Courthouse thereof, on the 3rd day of July, in the year 1933.

Be It Remembered, that heretofore, to-wit: In the Clerk's Office of the Circuit Court of the City of Norfolk, on the 28th day of June, in the year 1933, came the Complainant, Leslie B. Colgin and lodged his Bill of Complaint against W. L. Devany, Jr., Trustee, and G. Gilden, Defendants, in the following words:

Virginia:

In the Circuit Court of the City of Norfolk.

In Chancery.

Leslie B. Colgin, Complainant,

vs.

W. L. Devany, Jr., Trustee, and G. Gilden, Defendants.

BILL OF COMPLAINT.

To the Honorable Judge Allan R. Hanckel, Judge of the aforesaid Court:

Your complainant, Leslie B. Colgin, respectfully showeth unto your Honor the following case:—

1. That your complainant is owner of the following property to-wit:

page 2 } All that certain lot together with improvements thereon situated in the City of Norfolk, Virginia, and more particularly described as follows: Beginning at a point on the south side of 12th Street, which is 292 feet 6 inches in a westerly direction from the southwestern intersection of 12th Street and Moran Avenue and running thence westerly along the south side of 12th Street 27 feet 6 inches, thence in a *southerly* direction and parallel with the Western line of Moran Avenue 100 feet to the northern side of a 15 foot lane, thence *easterly* of the north side of said line 27 feet 6 inches and thence northerly 100 feet to the point of beginning.

2. That on the 5th day of February, 1932, your complainant conveyed the said property to W. L. Devany, Jr., as trustee, to secure an indebtedness of \$3,537.50 dollars, and the defendant G. Gilden, is the holder of the note.

3. That on the 5th day of December, 1932, the taxes on said property were due and at that time your complainant was not able to pay the taxes, but since that date your complainant has paid the taxes, which were due on said property in accordance with tax receipt attached herewith, and marked Exhibit "A".

4. That on the 5th day of February, 1933 the amount of one hundred dollars (\$100) was due on said deed of trust and your complainant later wished to tender said payment in payment of the amount that had become due and the defendants refused to accept the said payments, and maintained that the whole amount of said deed of trust had become due and payable. And accordingly the defendants have advertised the hereinbefore described property for sale at public auction at the Norfolk Real Estate Board, 213 *Monticell* Arcade Building, Norfolk, on Thursday, July 6th, 1933, at 12 o'clock noon, in accordance with advertisement hereto attached and marked Exhibit "B", notwithstanding the fact that your complainant is ready, able and willing to pay the installment which is due on said property.

5. Your complainant further alleges that unless an injunction is granted your complainant restraining and enjoining the said W. L. Devany, Jr., Trustee, and G. Gilden, from making sale of the said property and enjoining and restraining the defendants, W. L. Devany Jr., Trustee and G. Gilden

from selling said property, that your complainant will suffer irreparable damage and injury.

Wherefore: Your complainant being without remedy save in a court of equity, where *manners* of this kind are property cognizable, prays that the said W. L. Devany, Jr., Trustee, and G. Gilden, be made parties defendant to this Bill of Complaint, that they be required to answer the same, answer under oath being hereby expressly waived, that an injunction may be awarded your complainant, enjoining and restraining W. L. Devany, Jr., Trustee and G. Gilden, defendants from making sale of the said property or either of them, or their agents; that an order may be entered directing the said trustee and holder of said note, parties defendant to this suit to accept payment which is now due, and that your complainant may have all such other and page 4 } further *relief* as the nature of his case may require, and to equity may seem meet.

And he will ever pray, etc.

LESLIE B. COLGIN,
By LESLIE B. COLGIN.

State of Virginia,
City of Norfolk, to-wit:

Leslie B. Colgin, named in the foregoing Bill of Complaint, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information, and that so far as they are therein stated to be upon information he believes them to be true.

LESLIE B. COLGIN, Complainant.

Taken, sworn, to and subscribed before me, Sarah Cohen, a Notary Public in and for the city and state aforesaid, in my city aforesaid, this 27th day of June, 1933.

SARAH COHEN,
Notary Public.

My commission expires on the 18th day of November, 1933.

The following are exhibits attached to the foregoing Bill of Complaint:

W. L. Devany, Jr., Tr., and G. Gilden, v. L. B. Colgin. 7

page 5 } M Colgin, Leslie B. CITY OF NORFOLK, VA.
No. 3110

To B. Gray Tunstall, City Treasurer. City Real Estate Tax
Receipt 1932

(27.5') Pts. 19 & 20 Blk B-371 W. Pr. Anne Rd.	Assessment	At \$2.80 per \$100	
		5250	147.00
			<hr/>
PAID	1½% Interest		\$147.00
			2.21
			<hr/>
Jun 26 1933			
B. Gray Tunstall	Total		149.21
S. L. E. City Treasurer	Penalty		11.03
			<hr/>
			160.24

Examine this Bill Carefully as to
Amount and Description and see that
you have not paid on Property not
owned by you.

CITY 1932.

Default having been made in the terms of a deed of trust to the undersigned trustee, dated the 5th day of February, 1932, recorded in the Clerk's Office of the Corporation Court of the City of Norfolk, Virginia, in deed book 322-C, page 394, and having been requested so to do, said trustee will offer for sale at public auction at the Norfolk Real Estate Board, 213 Monticello Arcade Building, Norfolk, Virginia, on Thursday, July 6, 1933, at 12 o'clock noon, the following property, to-wit:

All that certain lot together, with improvements thereon situated in the City of Norfolk, Virginia, and more particularly described as follows: Beginning at a point on the south side of 12th Street, which is 292 feet 6 inches in a westerly direction from the southwestern intersection of 12th Street and Moran Avenue and running thence westerly along the south side of 12th Street 27 feet 6 inches, thence in a *southernly* direction and parallel with the Western line of Moran Avenue 100 feet to the northern side

of a 15-foot lane, thence *easterly* of the north side of said line 27 feet 6 inches and thence northerly 100 feet to the point beginning.

Terms: Cash. A deposit of \$100 will be required of the successful bidder.

W. L. DEVANY, JR., Trustee.

H. L. PAGE & CO., INC.,
Auctioneers.

Je 24-10t

And on the same day, to-wit: In the Circuit Court aforesaid on the 28th day of June, in the year 1933.

This cause came on this day to be heard upon the Bill of Complaint filed herein and duly verified by the complainant, and upon motion of the complainant herein for an injunction to restrain the said W. L. Devany, Jr., Trustee, and G. Gilden, parties defendant, from selling the following property to-wit:

All that certain lot together with improvements thereon situated in the City of Norfolk, Virginia, and more particularly described as follows: Beginning at a point on page 7 } the south side of 12th Street, which is 292 feet 6 inches in a westerly direction from the southwestern intersection of 12th Street and Moran Avenue and running thence westerly along the south side of 12th Street 27 feet and parallel with the Western line of Moran Avenue 100 feet to the northern side of a 15-foot lane, thence *easterly* of the north side of said line 27 feet 6 inches and thence northerly 100 feet to the point of beginning.

and it appearing to the Court from the said Bill of Complaint that unless such injunction is granted the plaintiff will suffer irreparable damage and injury, it is hereby adjudged, ordered and decreed:

That the said W. L. Devany, Jr., Trustee and G. Gilden, be, and the same are hereby enjoined and restrained of and from making sale of said property hereinabove described; this injunction to be in full force and effect for a period of ten days,

from and after the date hereof, unless sooner enlarged or dissolved, but before the complainant shall have the benefit of this order he shall enter into a bond in the penalty of five hundred dollars (\$500.00) with sufficient surety to be approved by the Clerk of this Court, conditioned according to law, and it is further ordered that the said Sargeant of the City of Norfolk, Virginia, do serve a copy of this order upon the defendants herein and make a return of such service to the Clerk of this Court.

The following is the answer of the defendants filed herein on the 3rd day of July, 1933:

The said respondents upon an answer to bill of complaint filed against them in this cause, answer and saith:

page 8 } They admit the allegations contained in paragraphs one (1) and two (2).

In answer to paragraph three (3) answer and saith that the taxes were delinquent on the said property and were not paid until the 26th day of June, 1933, after an advertisement of the property by the said Trustee and that the said complainant had refused to pay the said taxes up until that time and to make any arrangements to secure the payment thereof.

In answer to paragraph four (4) in bill of complaint, said respondents admit that the sum of \$100.00 was due as of February 5th, 1933, and that they had made numerous efforts to secure the payment of the said \$100.00 but the said complainant even on June 16th, 1933, had directed that the said property be sold as he was unable to pay the same and it was only on the 26th day of June, 1933, that he stated he was willing to pay the said \$100.00. That under the terms of the said deed of trust it was agreed by the said complainant any default of the payment of said \$100.00, that entire amount secured thereby should become due and payable and that the said Trustee should sell the said property immediately upon request of the holders of the said notes, and that the said holders of the said notes had declared the entire amount secured due and had requested the said trustee to sell the said property in accordance with the terms of the said deed of trust, and in accordance with the said request by holders of the notes secured under the deed of trust, the property was advertised for sale, said sale to be made on July 6th, at 12 o'clock noon as set out in said bill of complaint.

page 9 } That in accordance to the terms of the said deed of trust holders of the notes secured thereby, according to the contract made with said complainant, have a right to sell the said property and this Court has not right to change the terms of the said contract.

Now having answered the said bill of complaint the said respondents pray that they be dismissed with their costs in this behalf expended.

W. L. DEVANY, JR., Trustee,
GRIFFEN GILDEN.

And now at this day, to-wit: In the Circuit Court aforesaid on the 3rd day of July, in the year, 1933, the day and year first hereinabove written:

This cause came on this day to be heard upon the Bill of Complaint filed herein and duly verified by the complainant, and answer of the defendants, and by consent of the parties docketed and heard upon bill and answer, and was duly argued by counsel. And upon motion of the complainant herein for an injunction to restrain the said W. L. Devany, Jr., Trustee, and G. Gilden, parties defendants, from selling the following property to-wit:

All that certain lot together with improvements thereon situated in the City of Norfolk, Virginia, and more particularly described as follows: Beginning at a point on the south side of 12th Street, which is 292 feet 6 inches in a westerly direction from the southwestern intersection of 12th Street and Moran Avenue and running thence westerly along the south side of 12th St. 27 feet and parallel with the Western line of Moran Avenue 100 feet to the northern side of a 15-foot
page 10 } lane, thence *easterly* of the north side of said line 27 feet 6 inches and thence northerly 100 feet to the point of beginning.

And it appearing to the Court from the said bill of complaint and answer that the said complainant is indebted to the defendants G. Gilden, in the amount of one hundred dollars (\$100.00), with interest from February 5th, 1933, as appears from the answer, and expenses of advertising in the Ledger-Dispatch, in the amount of \$10.83 making a total of

\$113.33; it is hereby adjudged, ordered, and decreed that the said Leslie B. Colgin, complainant in this cause, do pay unto the said G. Gilden, holder of the note, the amount of \$113.33 and upon payment of the said \$113.33, the said W. L. Devany, Jr., Trustee, and G. Gilden, holder of the note, are hereby enjoined and restrained of and from making sale of the said property hereinabove described from default of payment of Feb. 5, 1933; this injunction to be in full force and effect upon payment of \$113.33 hereinto the Clerk of this Court.

It is further ordered that the Clerk of this Court do record in the current deed book of the *Clerk* Office of the Corporation Court of the City of Norfolk, a copy of this decree and index the same in the name of all parties to this suit. And the Court doth further order that the complainant shall recover of the defendants their costs about this suit, in this behalf expended.

And the respondents do except to the entering of this decree.

The following is the notice for the transcript of the record:

page 11 } To: Mr. Louis B. Fine
 } Attorney for the above Complainant

Take Notice, that we shall on the 17th day of July, 1933, apply to the Clerk of the above Court for a transcript of the record in the above entitled matter.

W. L. DEVANY, JR.,
G. GILDEN,
By Counsel.

I accept Service of the above notice.

LOUIS B. FINE,
Attorney for Leslie B. Colgin.

page 12 } Virginia:

In the Clerk's Office of the Circuit Court of the City of Norfolk, on the 19th day of July, in the year 1933.

I, Cecil M. Robertson, Clerk of the aforesaid Court, hereby certify that the foregoing transcript includes the papers filed,

and the proceedings had thereon in the chancery cause of Leslie B. Colgin, complainant against W. L. Devany, Jr., Trustee, et al., Defendants lately pending in our said court.

I further certify that the same was not made up and completed and delivered, until the plaintiff had received due notice thereof and of the intention of the said W. L. Devany, Jr., Trustee et al., Defendants, to appeal to the Supreme Court of Appeals of Virginia from the decree of said Court entered in said Court on the 3rd day of July, in the year 1933.

Teste: CECIL M. ROBERTSON, Clerk,
By MARGUERITE R. GRONER, D. C.

Fee for Transcript \$12.50.

A Copy—Teste:

M. B. WATTS, C. C.

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