1990

Ford Consumer Finance Credit Company v. Gary Salazar, Peggy Salazar, Gabe Salazar, and Chad Salazar : Brief of Appellant

Utah Court of Appeals

Mikel M. Boley; Attorney for Plaintiff/Appellee.
Wesley F. Sine; Attorney for Defendants/Appellants.

IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

FORD CONSUMER FINANCE CREDIT COMPANY, a Corporation, Plaintiff/Appellee, v. GARY SALAZAR, PEGGY SALAZAR, GABE SALAZAR and CHAD SALAZAR, Defendants/Appellants.	BRIEF OF APPELLANT Docket No. 900515-CA Circuit No. 903007491CV Priority Classification 16

* * * *

APPEAL FROM THE RULING OF THE THIRD CIRCUIT COURT,
SALT LAKE COUNTY, MURRAY DEPARTMENT, STATE OF UTAH
THE HONORABLE MICHAEL K. BURTON PRESIDING
TO THE COURT OF APPEALS FOR THE STATE OF UTAH

* * * *

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IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

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TABLE OF AUTHORITIES

A. Cases

B. Statutes and Rules

C. Jurisdiction

This Court has jurisdiction over this action pursuant to Section 78-2a-3(2)(d), Utah Code, plus Rule 3 and 4 Utah Court of Appeals.

D. Nature of Proceedings

This is an Appeal from an Order of the Circuit Court striking defendant's Appeal as not being timely, which allowed defendants to be evicted from their home since the Court further denied Defendant the right to put up a Supersedeas Bond based upon the Court's belief that it would not be overruled.

E. Statement of Issues on Appeal

I. In an action for restitution and possession of real property, where no mention of Unlawful Detainer is acknowledged in the Complaint or Summons and the Complaint reserves the right to amend if plaintiff is damaged by defendants causing a potential sale of the property to fall through, does the action fall under the ten day limitation UCA 78-36-11, for appeal from an Unlawful Detainer action or does the appeal period become thirty days, under Rule 4, Utah R. App. P.

II. If the action is found to be one of Unlawful Detainer, where the Judgment was filed on September 10, 1990, and was mailed by plaintiff to defendants on the same day; and on September 21,

1990, a Bankruptcy with its Automatic Stay was filed by defendants Gary and Peggy Salazar, which Automatic Stay was released by the Bankruptcy Judge late in the afternoon on September 25, 1990 and filed with the Circuit Court on September 26, 1990, does one add the three days for mailing plus the four days during which the Bankruptcy Automatically Stayed the tolling of the Appeal time which would then make the Appeal filed on September 26, 1990 timely?

III. Did the Court have the power to deny Appellants the right of putting forth a Supersedeas Bond to Stay Execution on the Judgment until the Appeal could be heard?

F. Determinative Statutes

The statutes and rules which defendant Gary Salazar believes may be determinative are copied or set forth in their entirety in Appendix I hereto.

STATEMENT OF CASE

A. Nature of the Case

This is an Appeal from a Final Judgment or Decree of the Circuit Court denying Appellant the right of appeal to the Supreme Court for the State of Utah. This was based upon the Court's belief that this was a Statutory Unlawful Detainer Action and therefore only ten days were allowable for the Appeal to be made

instead of thirty days and that Appellants' (defendants') Appeal therefore was not timely. R 9-10. In making its determination the Circuit Court failed to take into consideration the Automatic Stay of the Bankruptcy Court with added four additional days to the Appeal Period. R 16-17.

B. Course of Proceedings

Ford Consumer Finance served Appellants (defendants) Gary Salazar, et al., with a Notice of Trustee's Sale to be held on the real property located at 1886 Foxmoor Circle, Sandy, Utah, on the 8'th day of May, 1990. Appellant, Gary Salazar met with Gary Powers, the agent of Ford Consumer Finance (Appellee), to pay a part of the back payments. These funds were accepted by Gary Powers but after the time for the Trustee Sale was over, Powers returned said funds to Salazar stating that the sale was complete.

Subsequently, a ten day notice to move was served by Ford on the Salazars followed by service of a three day Summons and Complaint which demanded restitution, possession of the property, and claimed Unlawful Detention.

The Salazars answered Ford's Complaint, denying that the Trustee's Sale was effective and claiming that the title for the real property was still in the Salazars.

At the trial the Salazars (Appellants) complained that the Circuit Court did not have the jurisdiction to make a determination on who held the title to the property under UCA section 78-4-7(1). The Circuit Court determined that it was not determining title to

the property. R 9-11.

The Circuit Court, after the evidence on the title to the property presented found that the Trustee's Sale was valid and gave restitution and possession of the property to Ford. This Judgment was signed on September 10, 1990 and was mailed to the Salazars on that same day. R 3.

On the 21'st of October, 1990, Gary Salazar took out a Chapter 13 Bankruptcy whose Automatic Stay was set aside per an ex parte motion of Appellee on the 25'th of September and filed on the 26'th of September with the Circuit Court. R 16-17. Whereupon the Salazars immediately filed an appeal from the Circuit Court's Judgment of September 10, 1990 on September 26, 1990, R 3., with the Circuit Court and filed a Supersedeas Bond. On a shortened time schedule, agreed to by the attorneys, at the hearing on the Supersedeas Bond, Appellee then proceeded to attack the timeliness of the Appeal filing. The Circuit Court found, that the appeal was not timely in an Unlawful Detainer Action even though Appellant contended that this was not solely and Unlawful Detainer Action but was partially an equity action due to the several causes of action contained in the Complaint and therefore subject to a thirty day appeal period. R 11-12.

C. Disposition at Hearing

After the Oral Argument on October 1, 1990, the Court found that the action was originally brought as an Unlawful Detainer Action and that there were no issues of equity which would take the

action outside of the Unlawful Detainer ten day Appeal Rule and allow for the thirty day Appeal Rule. In determining that Salazar had not met the ten day schedule, the Court, allowed for three days for mailing of the Notice and ten days for filing but did not allow three days for mailing of the Notice of Appeal. R 10-12. Although in later discussions the subject of the bankruptcy and the withdrawal of the Automatic Stay being obtained by Appellee was acknowledged by the Court, its extension of the ten day rule was not discussed or argued but the Circuit Court ruled that it had no authority to allow the Appeal and therefore Stayed the Appeal. the Court also ruled that a Bond by Appellants would not be allowed to retain them in their home pending the outcome of a potential Appeal, but that Appellees would have to put up a Bond. R 10-16.

D. Bond Proceeding

Subsequent to the Court dismissing Salazars' Appeal as untimely, this Appeal was brought by the Salazars, claiming:

1. This action was not solely in unlawful detainer but in equity and therefore had a thirty day appeal period.

2. Even in an action in unlawful detainer, the time period had not lapsed and therefore was timely because the Automatic Stay of the Bankruptcy action, and the three day for receiving the mail. R 16-17.

3. The Circuit Court did not have the right to deny the Supersedeas Bond which would then have left the Salazars in their property until this Appeal could be heard. R 19-20.

E. Relevant Facts

The Salazars (Appellants) purchased the property in August of 1988. Several times during their period of occupancy they fell behind in their payments. Each time Gary Salazar (Appellant) met with Ford's (Appellee's) agent, Gary Powers had made substantial payments whereby the account was reinstated.

On the day of the Trustee Sale prior to its execution, Appellant met with Appellee and gave a substantial payment which he understood would stop the Trustee Sale. After receiving the money, Appellee (Powers) talked with Appellant (Salazar) for about an hour after which Appellee gave the money back, and said its too late the sale is now over.

SUMMARY OF ARGUMENT

Utah's Unlawful Detainer Statute offers quick, harsh remedies. Its use and applicability must be narrowly construed to specific circumstances.

FIRST DEFENSE. This action was not brought as an Unlawful Detainer but as a hybrid or equity action. this case was brought as an action against Appellant Salazar to prove that title had been transferred by a Trustee's Sale to Ford Consumer Finance (Appellee) and if so have Appellants removed from the property. Salazars (Appellants) were in turn claiming that the sale was conducted under fraudulent circumstances by the Appellee's agent and was therefore invalid.

Appellee after making allegations of title possession left open the possibility in their complaint that damages might be suffered by Appellee from Appellants' refusal to leave the property, and therefore reserved in their Complaint the right to ask for damages if they lost their Sale to a third party; thereby making their action one in equity and subject to a thirty day appeal period.

SECOND DEFENSE. Even if the ten day appeal period was followed if credit were given for the three day mailing at front and for the time that the Bankruptcy Stay was in force, then the Appeal would have been timely. Appellant filed its Appeal on the same day the Stay Release was filed with the Court. It could not have proceeded any sooner without being in contempt of the Bankruptcy Court.

THIRD DEFENSE. The Court did not have the authority to reject Appellants' use of a Supersedeas Bond based upon the premises that Appellees would ultimately win anyway. This would have prevented the execution of the Judgment whereby Appellants could have remained in their home until the Appeal on the Denial of the Appeal could have been heard.

ARGUMENT

1. On or about the 28'th day of June 1990, Appellee filed a Complaint with the Circuit Court alleging the following: (Appendix I)

a. That a Trustee Sale had taken place and that title to the property was now in Appellee's name. (Appendix I, paragraphs

3, 4)

b. That because of the Trustee Sale and the transfer of ownership that Appellants were now tenants at will. (Appendix I., paragraph 5)

c. That the Appellants had refused to vacate the premises, even though given a ten day Notice to Quit Premises had been served upon them. (Appendix I, paragraphs 6, 7)

d. That the Appellants still retained possession of said premises and were in "Unlawful Detention thereof", and the reasonable rental was $35.00. (Appendix I, paragraph 8)

e. That Appellee had a prospective buyer for the premises and Appellants had interfered with the potential sale. (Appendix I, paragraphs 10, 11)

f. That if the sale fell through due to the actions of Appellants which resulted in a loss to Appellee's; Appellees would be able to amend the Complaint to reflect the loss. (Appendix I, paragraph 12)

2. In Appellee's prayer for the Judgment and Relief he requests the following: (Appendix I, paragraphs a, b, c & d of prayer)

a. An order granting restitution and possession of the premises and Court costs.

b. Judgment for thirty-eight days for $1330.00 and $105.00 per day from the date of service of the Notice to Quit until Appellee actually takes possession "and for such other and further relief as to the Court seems proper".

3. At no time does Appellee make mention of the unlawful

detainer statute or that he is bringing his action pursuant to Section 78-36-1 to 78-36-12 UCA. The only mention that even closely relates to Unlawful Detainer is a mention that Appellant was "in unlawful detention thereof". An Unlawful Detention Action according to section 76-5-304 is from the criminal code and is a "(1) A. Person commits Unlawful Detention if he knowingly restrains another unlawfully so as to interfere substantially with his liberty. (2) Unlawful Detention is a Class B misdemeanor".

4. Furthermore under paragraphs 10, 11, and 12 of Appellee's Complaint, the process was set up for proving further damages if necessary against Appellants, if a potential sale should fall through causing a loss to the Appellee.

5. While it is true that Appellee requested triple the daily rent for each day the Appellants stayed after the Notice to Quit had been served, no mention is made as to upon what basis the triple rent is allowable. Therefore nowhere is unlawful detainer mentioned only restitution and possession of the premise, unlawful detention and a desire for equity relief if damages from the non sale of the property is suffered.

6. Under a recent Utah case, Fashions Four Corporation vs. Fashion Place Associates 681 P. 2d 830, the Supreme Court found that "we are compelled to conclude that the hybrid nature of plaintiff's action, containing additional declaratory and equitable clauses, and from the defendants' counterclaim with the similar clauses, prevents section 78-36-11 from controlling the time for appeal". Under an older case, Ottenheimer, et al. vs. Mt. States Supply Co. 56 Utah 190, where the court finds "While it is true

that the relief prayed for in the first cause of action might have been had in a proceeding of forcible detainer, yet it is also true that the relief sought and obtained by plaintiff under the second cause of action is purely equitable, and could not have been had in a forcible detainer action under our statute. Moreover, the case was tried throughout and submitted to the Court, and by it determined, as an action in equity."

7. What were the requested actions demanded by the Appellee in his Complaint?

a. He requested the Court give him restitution and possession of his property. Restitution being an action in equity according to Black's Law Dictionary, "restitution is the act of restoring; restoration; restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage, or injury;". Under the Common Law a Writ of Restitution was act in equity, "Restoration of both parties to their original condition".

The Appellees did not designate that this was an action in Unlawful Detainer. In order to make an issue clear especially where rights are clearly effected, i.e., ten day appeal period for Unlawful Detainer vs. a thirty day appeal period for all other actions, it is necessary for the Complaint to clearly designate which theory a plaintiff brings in action.

b. The second action in equity requested was the alleging the potential damages if a sell were lost by the Appellees, and the reserving of a right to amend the complaint to reflect that loss if it transpired. Even if the Court were to find that the restitution and possession of the property was not an equitable action, then

and possession of the property was not an equitable action, then requesting potential relief from the loss of the sale brings it back to a hybrid action of both unlawful detainer and equity which according to Fashions Four Corporation vs. Fashion Place Associates, takes it outside of the ten day Appeal period and makes it a thirty day Appeal period.

8. What did the Judgment entered by the Court designate the action under consideration?

The title to the Judgment signed by the Court was "JUDGMENT, JUDGMENT FOR RESTITUTION OF PREMISES AND DECLARING FORFEITURE OF TENANCY". (Appendix IV) Nothing in the title designates that this was an action brought under the Unlawful Detainer Statute, although as a part of the Judgments, Appellees are given triple damages, based upon the normal rent to be charged, and triple damages are adjudged to be given, until the Appellants leave the premises plus that the Appellants "are guilty of unlawful detainer", that "a writ of restitution issue"; and "that any interest of" Appellants "to lease or tenant said premises" "is forfeited and terminated". Some are items incumbent in statutory unlawful detainer but can be parts of an action in equity. Certainly if this were an action in unlawful detainer under Utah's Act, a designation of qualification would be appropriate. At least all parties would know what the action really was.

9. What did the Findings of fact show the action to be? Appendix III)

Under the Finding of Fact the Court made a number of findings relative to who held title to the property. It also found that

regarding the Appellants and the premises but made no reference to whether or not this action was brought as an unlawful detainer action. It goes on further to mention that Appellants had claimed fraud relative to Appellee's agents relation to the Trustee's Sell and found no fraud and then states, "**That defendants claims in equity regarding the fairness of plaintiff's (Appellant's) actions were not sufficiently proven to justify the Court's disallowance of the Trustee's Deed, although plaintiff through its attorney, did stipulate at the start of trial that the Court could so hold and rule, if the evidence so warranted**", (Appendix iii, paragraph 8) clearly showing that equity was a part of the action either by the complaint and the answer thereto or by appellees stipulation in open court that the equity issues could be heard. It is also evident that the Court had no authority in an action to determine title under section 78-4-7(1) UCA, and is beyond its civil jurisdiction in both law and equity.

10. What did the Conclusions of Law find the action to be?

The Court found that Appellees were owners of the land showing that determination as to who had title, had been made. It also found that the Appellants had been tenants at will and Appellees had followed statutory requirements to evict Appellants from the premises but did not state which statutory requirements- still leaving undetermined whether this was an action in Statutory Unlawful Detainer, or Equity, or both. It found that the Appellants are in Unlawful Detention of the premises, (which is a criminal action) that the Appellee was entitled to a writ of restitution removing Appellants and their belongings from the

restitution removing Appellants and their belongings from the premises, and that damages including those for triple damages were proper. Still at no time is the Statutory Unlawful Retainer referred to nor even a guilt of Unlawful Detainer but only a guilt of Unlawful Detention, (a criminal act).

11. Therefore, under none of the Court filings, (Complaint, Findings of Fact, or Conclusions of Law) are the Appellants found guilty of statutory Unlawful Detainer, but only unlawful detention. While it is true that unlawful detainer is mention in the judgment, no reference of statutory unlawful detainer is mentioned.

12. Wherefore, this action was not brought as statutory unlawful detainer action but as one for restitution and possession of the premises under an equity theory. If the court finds that this was a statutory unlawful detainer action under UCA section 78-36-11, time for appeal then, the equity portions of the Complaint would take it outside of the ten day rule under Fashions Four vs. Fashion Place Assoc., 681 P.2d 8 30 (Utah 1984), etc.

13. Supposing the appeal is subject to UCA section 78-36-11, ten day appeal period. Was this period complied with?

Under the Utah Rules of Civil Procedure, Rule 6(e), " whenever a party x . . . x is required to do some act within a prescribed period after the service of a Notice x . . . x upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period". Since the Judgment was dated the 10'th day of September, the three days plus the ten days would take the due date of the Appeal period to September 23'rd. Appellants, Salazars filed their Chapter 13 Bankruptcy on September the 21'st.

Bankruptcy automatically stayed the tolling of the clock on the Appeal for the appellants Gary C. Salazar and Peggy C. Salazar which stay was released by the signing of the Order of Relief from Automatic Stay by the Bankruptcy Judge on September 25'th (Appendix V) and filed by the Appellee with the Circuit Court on September 26'th. This being the first day that appellant had knowledge that the stay was released by the Bankruptcy Court. The Appeal was immediately filed on September 26, 1990, along with a Supersedeas Appeal Bond which then had been accepted as to form and amount by the Court.

Since the Automatic Stay stopped the tolling of time on the Appeal from the 21'st to the 25'th or 26'th, this would have made the appeal deadline as the 27'th or 28'th of September well within the timing for Appeal.

14. What effect did appellants non arguing the effect of the Bankruptcy on staying the time of Appeal have on extending the time limit?

The meeting time with Appellant before the Court was shortened by mutual consent of appellee with the Appellant, but at the time the shortening of the time for the hearing was communicated to appellants counsel, the hearing was to be on the appropriateness of the Supersedeas Bond not on the Motion to Strike Appeal. Appellant was caught by surprise that this Motion was before the Court. The fact of the filing for Bankruptcy was given by Appellee's counsel and was before the Court. Therefore the striking of the Appeal should be overruled by the Court.

CONCLUSION

This action was brought as one in equity and therefore the Appeal period should have been thirty days which would have made the Appeal of September 26, 1990 timely.

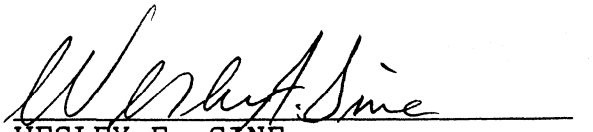
If the Court finds that this was in fact a Statutory Unlawful Detainer action, then the fact that the Complaint left open the question of damages if the sell of Appellee failed because Appellant stayed on the premises made it an equity action and therefore made this an action subject to the thirty day rule.

The Appeal should be reinstated because it was filed within the ten day period. If you took into consideration the additional three days for mailing and the four days during which the Automatic Stay of the Bankruptcy Court was in effect, the Appeal was filed timely and certainly as soon as Appellants could legally file it.

Under any of the theories, the Appellants filed their Appeal as soon as the Stay was lifted.

THEREFORE, for the above reasons the Circuit Court's Order Striking defendants Appeal should be overruled and the Circuit Court ordered to send the Appeal and records on to the Court of Appeals. The Court should also rule on whether the lower court acted properly in denying Appellants right of filing a Supersedeas Bond.

Respectfully so requested this 14'th day of November, 1991.



WESLEY F. SINE
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 14'th day of November, 1991, I mailed a true and correct copy, postage prepaid of the foregoing BRIEF OF APPELLANT to the following:

MIKEL M. BOLEY
Attorney for Plaintiff
3535 South 3200 West
West Valley City, Utah 84119

Samantha Lane

APPENDIX I.

MIKEL M. BOLEY
Attorney for Plaintiff
3535 South 3200 West
West Valley City, Utah 84119
Telephone: 968-3501 or 968-8282

DATE 6 JULY 90 TIME 6502PM
BY 1886 FORD CONSOE C.R.
UPON BECKY SALAZAR
SANDY PRECINCT, SALT LAKE COUNTY, UTAH
DEPUTY

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

FORD CONSUMER FINANCE,
a Corporation,

Plaintiff, : SUMMONS
(Three-Day)

vs.

GARY SALAZAR, MRS. GARY SALAZAR
and JOHN OR JANE DOES #1-10,

Defendants : Civil No.

THE STATE OF UTAH TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned and required to file an answer in writing to the attached Complaint with the clerk of the above court, which is located at 5022 South State Street, Murray, Utah 84107, a written answer to the attached complaint, and to serve upon or mail to the plaintiff's attorney at 3535 South 3200 West, West Valley City, Utah 84119 a copy of your answer within 3 days after service of this summons upon you.

If you fail to so answer, judgment by default will be taken against you for the relief demanded in the complaint, which has been filed with the clerk of the above court and a copy of which is attached and herewith served upon you.

O R D E R

It appearing to the Court that good cause exists therefor, and pursuant to statute,

IT IS HEREBY ORDERED that the time to answer or otherwise plead to Plaintiff's Complaint in the above-entitled action shall be shortened to three (3) days from the date of service.

DATED this 29 day of June, 1990.

BY THE COURT:

Michael D. Burton

CIRCUIT COURT JUDGE

THIRD CIRCUIT COURT MURRAY

Serve Defendant(s) at:
1886 FOXMOOR CIRCLE
SANDY UTAH 84092

MIKEL M. BOLEY (0375)
Attorney for Plaintiff
3535 South 3200 West
West Valley City, Utah 84119
968-3501 or 968-8282

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

FORD CONSUMER FINANCE,
a Corporation,
Plaintiff, : C O M P L A I N T
vs.
GARY SALAZAR, MRS.SALAZAR and
JOHN OR JANE DOES #1-10,
Defendants. : Civil No.

For cause of action against Defendants, Plaintiff alleges as follows:

1. That Defendants are residents of Salt Lake County, State of Utah; that the property in question is located in Salt Lake County, State of Utah; and that less than TEN THOUSAND DOLLARS ($10,000.00) is at issue herein..

2. That the true names and capacities; whether individual, corporate, children, relatives, associates or otherwise; of Defendants Doe #1-10 are unknown to Plaintiff, who, therefore sues said Defendants by such fictitious names. Plaintiff will seek leave of the Court to amend this complaint and set forth said Defendants' true names when said have been ascertained.

3. That on May 8, 1990, pursuant to a previously executed Deed of Trust and pursuant to Section 57-1-27, Utah Code Annotated, a Trustee's Sale was held as to the real property located at 1886 Foxmoor Circle, Sandy, Utah.

4. That at said Trustee's Sale, Plaintiff purchased said real property and was granted a Trustee's Deed, which was later recorded in the office of the Salt Lake County Recorder.

5. That as a result of said Trustee's Sale and Trustee's Deed, Plaintiff became the owner of said real property and Defendants became tenants at will of Plaintiff.

6. That Defendants have retained occupancy in said real property to the present time but have not done so with the consent of Plaintiff, nor have Defendants paid any rentals to Plaintiff.

7. That due to Defendants' refusal to vacate the premises in question, Plaintiff did cause to be served upon Defendants a Notice To Quit Premises. A true and correct copy of said Notice To Quit Premises is attached hereto as Exhibit "A" and hereby made a part hereof as if fully set forth.

8. That Defendants still retain possession of said premises and are now in unlawful detention thereof.

9. That the reasonable daily rental value of said premises is $35.00.

10. That Plaintiff presently has a prospective buyer for the premises in question.

11. That Defendants or some of Defendants have interferred with said sale and have refused to cooperate with Plaintiff and Plaintiff's agents regarding said sale.

12. That Plaintiff reserves the right to amend this complaint in the event that said sale falls through due to actions of Defendants, resulting in a loss to Plaintiff.

WHEREFORE, Plaintiff prays for judgment and relief against Defendants jointly and severally as follows:

(a) For an Order granting to Plaintiff restitution and possession of the premises lcoated at 1886 Foxmoor Circle, Sandy, Utah 84092.

(b) For Judgment against Defendants in the sum of $1330.00 for the 38 days Defendants have held possession after sale and prior to service of this Notice to Quit and for the additional sum of $105.00 per day from the date of service of the Notice To Quit until Plaintiff actually retakes possession.

(c) For Plaintiff's costs of Court herein incurred.

(d) For such other and further relief as to the Court seems proper.

DATED this 28th day of June, 1990.

MIKEL M. BOLEY - Bar No. 0375
Attorney for Plaintiff
3535 South 3200 West
West Valley City, Utah 84119

Plaintiff's Address:
3540 South 4000 West Suite 430
West Valley City, Utah 84120

OWNER'S NOTICE TO QUIT PREMISES

DATE 15 June 90 TIME 12:22 PM
1886 Foxmoor Cir
UPON Posted door
SANDY PRECINCT, SALT LAKE COUNTY, UTAH
DEPUTY

TO: Gary Salazar and any other tenants in possession of 1886 Foxmoor Circle Sandy, Utah 84092

(E-11070 S.)

YOU ARE HEREBY NOTIFIED AND REQUIRED within ten (10) days after this Notice is served upon you to vacate the above-listed premises and to take all of your personal belongings with you.

As you know, said premises are now the property of Ford Consumer Finance, who received title to said premises as a result of a sale held May 8, 1990. You no longer hold either title or any other legal claim to said premises.

If you fail to vacate within the time set forth above, a lawsuit will be commenced against you in which Ford Consumer Finance will seek reasonable rentals from May 8, 1990 until the service of this Notice and for the recovery of treble (three times) rents for any days thereafter until you vacate the premises.

DATED this 14th day of June, 1990.

Mikel M. Boley

MIKEL M. BOLEY
Attorney for Ford Consumer Finance
3535 South 3200 West
West Valley City, Utah 84119
968-8282 or 968-3501

... on a duly appointed Deputy Constable of Sandy Precinct, Salt Lake County, State of Utah, a citizen of the United States over the age of 21 years at the time of service herein, and not a part of or interested in the within action.

I received the within and hereto annexed,

OWNER'S NOTICE TO QUIT PREMISES

on the 14 of JUNE , 1990 , and served the same upon SALAZAR, GARY

the within named defendant in said,

OWNER'S NOTICE TO QUIT PREMISES

by serving a true copy of said,

OWNER'S NOTICE TO QUIT PREMISES

for the defendant with POSTED DOOR

a person of suitable age and descretion there residing at,

1886 FOXMOOR CIRCLE , SANDY

his/her usual place of ABODE , on this 15 day of JUNE , 199

I further certify that at the time of service of the said,

OWNER'S NOTICE TO QUIT PREMISES

I endorsed the date and place of service and added my name and official title thereto.

On the 15 day of JUNE , 1990

Deputy O. Meeks

Deputy Constable
Sandy Precinct, Salt Lake County

Subscribed and sworn to before me this On the 15 day of JUNE , 1990

My Commission Expires April [illegible] Jeany Notary Public

NOTARY PUBLIC
JEANY MCCLELLAN
1295 No 675 West
West Bountiful, Utah 84087
My Commission Expires
April 20, 1991
STATE OF UTAH

Fee's	Service fee	3.75
	Mileage	14.25
	2nd address	
	3rd address	
	Copies	
	P&H/Extra s	1.50
	Total	19.50

MAILED COPY TO DEFENDANT ON
6/18/90

APPENDIX II.

WESLEY SINE (2967)
Attorney for Defendant
647 W. No. Temple
Salt Lake City, Utah 84116

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

FORD CONSUMER FINANCE,
a Corporation,

Plaintiff,

-vs-

GARY SALAZAR, MRS. SALAZAR and
JOHN OR JANE DOES # 1-10,

Defendants.

A N S W E R

Civil No. 9030074?/

Comes now the Defendant and answers Plaintiff's allegations contained in his complaint, as follows:

1. Defendant admits Plaintiff's paragraph number one.

2. Defendant neither admits nor denies Plaintiff's paragraph number two.

3. Defendant does not know for a fact that the actions contained in Plaintiff's paragraphs three, four and five took place. If they did, then Defendant denies that they were properly done under the law and that by subsequent acts has abbrogated the sell, in that Plaintiff's agent, Jerry Powers, mislead and misrepresented to Defendant Gary Salazar that he would stop the Sheriff Sale upon certain actions being fullfilled by Defendant Salazar. That while Salazar was conversing with and negoiating with Powers, the sell (supposedly) was accomplished. That said Plaintiff's agent Jerry Powers by fraud did keep Salazar away from the sell and did mislead same, thereby voiding said sell if it actually did go through. That subsequently to the sell and to the notice to vacate the property, Plaintiff has accepted $15,000.00 toward what is owed on the home and credited it towards the balance due. Therefore Defendant's deny paragraphs # Three, Four and Five.

4. Defendant's admit that they have retained possession of the real property but deny that they have received proper notice to move from the property and alledge that Plaintiff's have received adequate funds to cure what ever breach existed and that Plaintiff's have credited Defendants account for the amount owed. Therefore Defendant denies Plaintiff's paragraph numbers six, seven, and eight.

5. Defendant's admit paragraph # 9, and denies paragraph #'s ten, eleven and twelve.

WHEREFORE, Defendant's request that Plaintiff's Complaint be dismissed and for such judgment and relief as the court may deem proper under the premises.

Dated this 9th day of Junly, 1990.

WESLEY SINE Attorney for Defendants
Telephone 801-364-5125
647 W. North Temple
Salt Lake City, Utah 84116

Plaintiff's Address:
647 West North Temple
Salt Lake City, Utah 84116

STATE OF UTAH)
ss
County of Salt Lake)

Comes now Gary Salazar, after first being duly sworn and deposes and says that:

1. On May 8, 1990, that he meet with Jerry Powers and agent and representative of the Plaintiff who negoiated with him to put off the sale of the property that is a part of this lawsuit, and led him to believe that the Sale was put off until after the time was spent after which he said that it was now too late and the sale was done.

2. That on or about the 27th day of June, 1990, he received a receipt from Ford Consumer Finance Company that $15,000.00* had been credited to his account for 1886 Foxmoor Cir, Sandy, Utah. This property being the property subject to the above lawsuit.

3. That it is his belief that the plaintiff had by so accepting said payment reinstated his property.

DATED this 9th day of July, 1990.

Gary Salazar

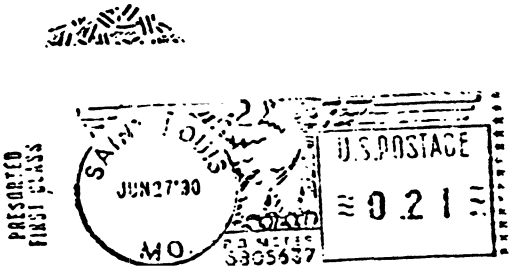
GARY SALAZAR

SUBSCRIBED AND SWORN to before me this 9th day of July, 1990.

* See Exhibit A

NOTARY PUBLIC residing in Salt Lake County, Utah Commission expires 10-27-91

EXHIBIT A



3540 S 4000 WEST SUITE430
WEST VALLEY CITY UT 84120 H

DATE 06/26/90

OFFICE NO. 08-44-0132
ACCOUNT NO. 109900

HOWARD D SHERWOOD
1886 FOXMOOR CIR
SANDY UT 84092

DATE RECEIVED	06/26/90
DATE DUE	04/20/90
AMOUNT RECEIVED	15,000.00
PRINCIPAL AMOUNT	15,000.00
INTEREST OR	
LATE CHARGES PAID	.00
NEW BALANCE	122,071.76

FORD CONSUMER FINANCE
COMPANY

THANK YOU FOR YOUR RECENT PAYMENT

APPENDIX III.

MIKEL M. BOLEY (0375)
Attorney for Plaintiff
3535 South 3200 West
West Valley City, Utah 84119
968-8282 or 968-3501

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

FORD CONSUMER FINANCE,
a Corporation,
Plaintiff, : FINDINGS OF FACT AND
vs. CONCLUSIONS OF LAW
GARY SALAZAR, PEGGY SALAZAR,
GABE SALAZAR and CHAD SALAZAR,
Defendants. : Civil No: 903007491CV
JUDGE: MICHAEL K. BURTON

The above-entitled cause came on regularly for trial before the Honorable Michael K. Burton, Circuit Court Judge, on the 6th day of September, 1990. Plaintiff was present through its agent, Gerald L. Powers, and represented by its attorney, Mikel M. Boley; Defendant Gary Salazar was present; Defendants Gary Salazar and Peggy Salazar were represented by their attorney, Wesley Sine. Prior to proceeding the Court did sign an order substituting "Peggy Salazar" for "Mrs. Gary Salazar" and adding Gabe Salazar and Chad Salazar as Defendants in place of the Doe Defendants, although the Court specifically held that the hearing would only affect the rights of Gabe Salazar and Chad Salazar to inhabit the premises and not allow for a money judgment against them. Witnesses were called, testimony was received, exhibits were presented into evidence; the cause was argued to the Court and thereafter submitted to the Court for consideration and decision. The Court being fully advised in the premises, and upon motion of Mikel M. Boley the Corut now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That title to the premises located at 1886 Foxmoor Circle, Sandy, Salt Lake County, State of Utah, is in the name of Ford Consumer Finance, pursuant to a Trustee's Deed dated and recorded 5/8/90.

2. That Defendants Salazar have no written claim to said premises, but claim an interest through a verbal agreement with Howard Sherwood, the previous owner of the premises.

3. That Defendants Salazar have resided in said premises from 8/22/90 to the date of trial.

4. That Plaintiff properly notified Defendants to quit the premises.

5. That Plaintiff otherwise satisfied the statutory requirements of unlawful detainer regarding Defendants and the premises in question.

6. That Defendant Gary Salazar did claim that he was either misled or fraudulently induced by Gerald Powers, Plaintiff's agent, on 5/8/90, not to attend a trustee's sale or to take other action.

7. That Gerald Powers did not mislead or fraudulently induce Gary Salazar not to attend or not to take other action on 5/8/90.

8. That Defendants' claims in equity regarding the fairness of Plaintiff's actions were not sufficiently proven to justify the Courts disallowance of the Trustee's Deed, although Plaintiff, through it attorney, did stipulate at the start of trial that the Court could so hold and rule, if the evidence so warranted.

9. That Defendants at no time after the initiation of the foreclosure action, which was done by the filing of a Notice of Default on 4/28/89, ever brought the account of Howard Sherwood with Plaintiff current.

10. That a reasonable rental of the premises is $35.00 per day.

11. That Plaintiff is entitled to a judgment against Defendants Gary Salazar and Peggy Salazar for $715.00 for the 49 days from 5/8/90 (the date of Plaintiff's ownership) and 6/26/90 (which is 11 days after Defendants were served with a Notice to Quit Premises) based upon $35.00 per day.

12. That Plaintiff is entitled to a judgment against Defendants Gary Salazar and Peggy Salazar in the sum of $7455.00 for the 71 days from 6/27/90 to 9/6/90, based upon treble damages of $105.00 per day, plus $105.00 per day until the premises are vacated by Defendants.

13. That Plaintiff is entitled to a judgment against Defendants Gary Salazar and Peggy Salazar in the sum of $74.75 as court costs.

14. That Plaintiff is entitled to a judgment of restitution against all Defendants.

Based upon the foregoing Findings of Fact the Court hereby makes the following:

CONCLUSIONS OF LAW

1. Plaintiff is the owner of the premises located at 1886 Foxmoor Circle, Sandy, Salt Lake County, State of Utah, pursuant to a Trustee's Deed.

2. Defendants have been tenants at will of Plaintiff since 5/8/90.

3. Plaintiff properly followed statutory requirements to evict Defendants from the premises.

4. Defendants are in unlawful detention of the premises.

5. Plaintiff is entitled to a writ of restitution removing all Defendants and their belongings from the premises.

6. Plaintiff is entitled to a judgment against Defendants Gary Salazar and Peggy Salazar in the sum of $9170.00, plus court costs of $74.75, plus $105.00 per day for any days after 9/6/90, that Defendants remain in the premises.

DATED this day of 1990.

BY THE COURT:

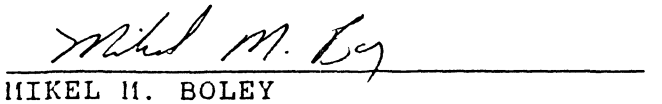
_____

CIRCUIT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, postage prepaid, this 7th day of September, 1990, addressed as follows:

WESLEY SINE, ESQ.
647 WEST NORTH TEMPLE
SALT LAKE CITY, UTAH 84116



MIKEL M. BOLEY
Attorney for Plaintiff

APPENDIX IV.

MIKEL M. BOLEY (0375)
Attorney for Plaintiff
3535 South 3200 West
West Valley City, Utah 84119
968-8282 or 968-3501

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

FORD CONSUMER FINANCE, a Corporation, Plaintiff, vs. GARY SALAZAR, PEGGY SALAZAR, GABE SALAZAR and CHAD SALAZAR	JUDGMENT, JUDGMENT FOR RESTITUTION OF PREMISES, AND DECLARING FORFEITURE OF TENANCY
Defendants.	Civil No: 903007491CV JUDGE: MICHAEL K. BURTON

The above-entitled cause came on regularly for trial before the Honorable Michael K. Burton, Circuit Court Judge, on the 6th day of September, 1990. Plaintiff was present through its agent, Gerald L. Powers, and represented by its attorney, Mikel M. Boley; Defendant Gary Salazar was present; Defendants Gary Salazar and Peggy Salazar were represented by their attorney Wesley Sine. Prior to proceeding the Court did sign an order substituting "Peggy Salazar" for "Mrs. Gary Salazar" and adding Gabe Salazar and Chad Salazar as Defendants in place of the Doe Defendants, although the Court specifically held that the hearing would only affect the rights of Gabe Salazar and Chad Salazar to inhabit the premises and not allow for a money judgment against them. Witnesses were called, testimony was received, exhibits were presented into evidence; the cause was argued to the Court

and thereafter submitted to the Court for consideration and decision. The Court being fully advised in the premises, having previously made and entered its Findings of Fact and Conclusions of Law, now upon Motion of Mikel M. Boley, it is hereby

ORDERED, ADJUDGED AND DECREED: that Plaintiff Ford Consumer Finance do have and is hereby granted judgment against Defendants as follows:

1. That Plaintiff do have and recover judgment from the Defendants Gary Salazar and Peggy Salazar in the sum of NINE THOUSAND ONE HUNDRED SEVENTY AND NO/100 DOLLARS ($9,170.00) for regular rental and treble damages through 9/6/90.

2. That Plaintiff do have and recover judgment from Defendants Gary Salazar and Peggy Salazar for treble rent in the sum of ONE HUNDRED FIVE AND NO/100 DOLLARS ($105.00) per day from 9/6/90 per day until Defendants vacate said premises.

3. That all Defendants are guilty of unlawful detainer of the premises at 1886 Foxmoor Circle, Sandy, Salt Lake County, Utah, and that a writ of restitution issue therefore forthwith and that any interest of Defendants to lease or tenant said premises be and the same is hereby forfeited and terminated.

DATED this day of 1990.

BY THE COURT:

_____

CIRCUIT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing JUDGMENT, JUDGMENT FOR RESTITUTIONOF PREMISES, AND DECLARING FORFEITURE OF TENANCY, postage prepaid, this 7th day of September, 1990, addressed as follows:

WESLEY SINE, ESQ

647 WEST NORTH TEMPLE
SALT LAKE CITY, UTAH 84116

MIKEL M. BOLEY
Attorney for Plaintiff

APPENDIX V.

MIKEL M. BOLEY (0375)
Attorney for Ford Consumer Finance
3535 South 3200 West
West Valley City, Utah 84119
968-8282 or 968-3501

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:

GARY CURTIS SALAZAR
and PEGGY COON SALAZAR
Debtors.

ORDER GRANTING RELIEF
FROM AUTOMATIC STAY

Bankruptcy No: 90C-05730
Chapter 13

The Ex Parte Motion For Relief From Automatic Stay of Ford Consumer Finance came before the Honorable Glen E. Clark, Bankruptcy Court Judge in his chambers on September 25, 1990. Based upon the verified motion, for good cause shown and upon motion of Mikel M. Boley, it is hereby

ORDERED, that the Automatic Stay is hereby partially lifted as follows: Ford Consumer Finance shall be entitled to proceed with its eviction proceedings seeking the restitution of the following real property located in Salt Lake County, State of Utah:

Lot 62, BRANDON PARK NO. 1, as recorded in the official plat thereof in the Salt Lake County Recorder's Office

DATED this 25 day of September, 1990.

BY THE COURT

Glen E Clark
BANKRUPTCY COURT JUDGE

I hereby certify that the annexed and foregoing is a true and complete copy of a document on file in the United States Bankruptcy Court for the District of Utah.
Dated: 9-25-90
Attest:

Deputy Clerk

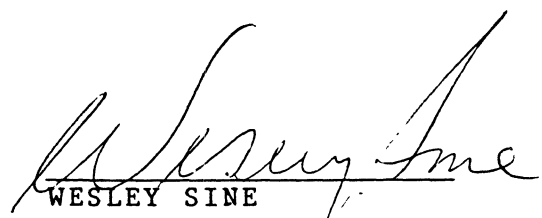
DATE 25 Sept 90 TIME 7:00 pm
SVB 1886 Foxmoor Cir
UPON Posted door
SANDY PRECINCT, SALT LAKE COUNTY, UTAH

WESLEY SINE (2967)
Attorney for Defendant
647 West North Temple
Salt Lake City, Utah 84116
Telephone (801) 3645125

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

FORD CONSUMER FINANCE, a corporation, Plaintiff,	NOTICE OF APPEAL
vs.	Civil # 903007491 CV
GARY SALAZAR, PEGGY SALAZAR, GABE SALAZAR and CHAD SALAZAR, Defendants.	

Notice is hereby given that GARY SALAZAR, PEGGY SALAZAR, GABE SALAZAR, AND CHAD SALAZAR, Defendants above named, hereby appeal to the COURT OF APPEALS OF THE STATE OF UTAH from the Judgment, Judgment for Restitution of premises, and Declaring Forfeiture of Tenancy entered in this action on September 10, 1990 in the Circuit Court, Salt Lake County (Murray Division).



WESLEY SINE
Attorney for Appellant
647 West North Temple
Salt Lake City, Utah 84116

APPENDIX VI.

MIKEL M. BOLEY (0375)
Attorney for Plaintiff
[illegible] South 3200 West
West Valley City, Utah 84119
967-1252 or 968-3501

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

FORD CONSUMER FINANCE,
a Corporation,
Plaintiff, : FINDINGS OF FACT AND CONCLUSIONS OF LAW

v.

GARY SALAZAR, PEGGY SALAZAR,
GABE SALAZAR and CHAD SALAZAR,
Defendants. : Civil No: 903007491CV
JUDGE: MICHAEL K. BURTON

Plaintiff's Motion to Strike Appeal came on for hearing and disposition 10/1/90, before the Honorable Michael K. Burton, Circuit Court Judge. Plaintiff was represented by its attorney, Mikel M. Boley. Defendants were represented by their attorney, Wesley Sine. The cause was argued to the Court, which was fully advised in the premises. Whereupon, for good cause shown and upon motion of Mikel M. Boley, the Court does hereby make and enter the following

FINDINGS OF FACT

1. The pending action was based completely in unlawful detainer and not partially upon some other theory or basis.

2. Defendants did not file their appeal within ten (10) days of either the date of entry of judgment or of notice to Defendants of entry of judgment.

3. In the event that Defendants should appeal this ruling and ultimately succeed in having their previously filed appeal heard, and should Defendants prevail on said appeal, and should an higher Court order that Defendants can move back into the premises in quesion, Plaintiff should pay for the costs and expenses reasonably incurred by Defendants in moving out and in moving back into said premises.

4. Defendants must vacate the premises no later than 12:00 Noon on or about 10/5/90, whether or not this ruling is appealed.

5. Should Defendants appeal this ruling, there will be no stay of proceeding nor will a Supersedeas bond be accepted.

Based upon the foregoing Findings of Fact the Court now enters the following

CONCLUSIONS OF LAW

1. Defendants were attempting to appeal the judgment in this unlawful detainer but did not do so within ten (10) days.

2. Defendants' failure to file an appeal within ten (10) days is jurisdictional, and the appeal cannot take place.

3. Defendants' appeal should be denied and sticken.

4. To protect Defendants in the event they appeal this decision and in the event they prevail on their original appeal and are allowed to re-occupy the premises in question, Defendants should file a $10,000.00 bond to cover Defendants' expenses in moving out and back into the premises.

5. Defendants are ordered to vacate the premises no later than 12:00 Noon on 10/5/90, whether or not this ruling is appealed.

6. There shall be no further stay or proceedings in this matter, whether Defendants appeal or not.

DATED this 4 day of October, 1990.

BY THE COURT:

Michael K. Burton

CIRCUIT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, postage prepaid, this 2nd day of October, 1990, addressed as follows:

WESLEY SINE, ESQ.
647 WEST NORTH TEMPLE
SALT LAKE CITY, UTAH 84116

Mikel M. Boley

MIKEL M. BOLEY
Attorney for Plaintiff
3535 South 3200 West
West Valley City, Utah 84119
968-8282 or 968-3501

MIKEL M. BOLEY (0375)
Attorney for Plaintiff
3535 South 3200 West
West Valley City, Utah 84119
968-8282 or 968-3501

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

FORD CONSUMER FINANCE,
a Corporation,
Plaintiff, : ORDER STRIKING DEFENDANTS APPEAL

V.

GARY SALAZAR, PEGGY SALAZAR,
GABE SALAZAR and CHAD SALAZAR,
Defendants. : Civil No: 903007491CV
JUDGE: MICHAEL K. BURTON

Plaintiff's Motion To Strike Appeal came on for hearing and disposition on October 1, 1990, before the Honorable Michael K. Burton, Circuit Court Judge. Plaintiff was represented by its attorney, Mikel M. Boley. Defendants were represented by their attorney Wesley Sine. The matter was argued by the attorneys and submitted to the Court for its disposition. Whereupon, for good cause shown, based upon the failure of Defendants to appeal within ten days as required by Utah Code Section 78-36-11, and upon motion of Mikel M. Boley, it is hereby

ORDERED, that Defendants' appeal be and is hereby stricken and denied.

DATED this 1st day of October, [illegible]

BY THE COURT:

CIRCUIT [illegible]

STATE OF UTAH
THIRD CIRCUIT COURT
MURRAY

APPENDIX VII.

The majority finds "no evidence whatsoever of a rigid or inflexible application of the in-person-contact requirement." To the contrary, the rigid syllogistic reasoning of the appeals referee is evident from the face of his written opinion. The referee only notes that Ms. Payotelis had been aware of the requirement to make at least two or three in-person contacts to prospective employers each week and that she had failed to meet this requirement between October 3 and October 23. He then summarily concludes that she had not met the eligibility requirements of the Department of Employment Security for three weeks in October. No analysis of Ms. Payotelis' particular circumstances and no response to her attorney's arguments are contained in the referee's written decision. The language of the referee's opinion quoted by the majority refers only to the period after November 28 and is not applicable to the earlier period.

I would overrule the Department's decision denying benefits from October 3, 1982, through October 23, 1982, and eliminate the resulting assessment of an overpayment. There may be some special merit to an in-person contact as opposed to a phone call, and I do not question the expertise of the Department of Employment Security in this respect. However, it does appear from the facts of this case that Ms. Payotelis, based on her experience in the business, intelligently and prudently conserved her resources by calling ahead to discover whether a personal visit would prove worthwhile. I can see little sense in refusing to allow the use of the telephone in those cases where it is appropriate and instead requiring people of limited means to knowingly waste their last dollars on certainly futile personal contacts. If the Department has some reason for requiring this, it should state it in the context of these facts. The opinion of the appeals referee is a mechanical application of a requirement that in this case has been shown to be irrelevant and futile. I would reverse.

FASHIONS FOUR CORPORATION, a Utah corporation, and Elgin Williams, Plaintiffs and Respondents,

v.

FASHION PLACE ASSOCIATES, a limited partnership, and Bob Garwood, Defendants and Appellants.

No. 18194.

Supreme Court of Utah.

April 18, 1984.

Lessor appealed from a judgment of the Third District Court, Salt Lake County, David B. Dee, J., enjoining it from interfering with lessee's possession of premises. The Supreme Court, Howe, J., held that reassignment of lease by assignee back to original lessee under unexpired lease did not require consent of lessor under lease requiring consent of lessor to transfer or assignment of rights to third persons.

Affirmed.

1. Appeal and Error ⇐351(1)

Where lessee's complaint against lessor contained four causes of action, including claims for forcible entry and detainer and damages for breach of the lease, appeal from order awarding general damages to lessee was not governed by statute requiring appeal to be filed within ten days from date of entry of judgment for forcible entry and detainer. U.C.A.1953, 78-36-10, 78-36-11; Rules Civ.Proc., Rule 73(a).

2. Landlord and Tenant ⇐79(1)

Upon assignment, privity of estate terminates between lessor and lessee and arises between lessor and assignee; however, privity of contract between lessor and lessee continues until expiration of the lease.

3. Landlord and Tenant ⇐75(3)

Assignment of lease back to original lessee is excepted from rule that assignment without consent of lessor confers no rights upon assignee.

4. Landlord and Tenant ⇐76(3)

Reassignment of lease by assignee back to original lessee under unexpired lease did not require consent of lessor under lease requiring consent of lessor to transfer or assignment of rights to third persons.

Raymond Scott Berry, Salt Lake City, for defendants and appellants.

E.H. Fankhauser, Salt Lake City, for plaintiffs and respondents.

HOWE, Justice:

This appeal involves the reassignment of a lease that had been entered into between plaintiff, Fashions Four Corporation (Fashions Four), as lessee, and defendant Fashion Place Associates (Fashion Place), as lessor.

Fashion Place was the lessor and Fashions Four was the lessee under a ten-year lease dated May 6, 1974, for premises at the Fashion Place Mall, commercially known as "Charlie's." Article 15 of the lease provided for the lessor's written consent to any assignment by the lessee. In September of 1978, Fashions Four assigned its lease to Norsal Development Corporation. Fashion Place consented. In November of 1979, ownership of Norsal was acquired by one Neil Davidson, who continued the operation of Charlie's without any objection by Fashion Place. By June of 1981, the business had failed, Davidson was delinquent in rent, the inventory of Charlie's had been attached, and a sheriff's sale was scheduled to satisfy creditors. Davidson negotiated with Fashions Four for the repossession of the premises and the reassignment of the lease to Fashions Four. Fashion Place changed the locks on June 19 and denied Fashions Four access to the premises on the ground that Fashion Place had not consented to the reassignment of the lease. Fashions Four obtained a temporary restraining order against Fashion Place, which put it back into possession pending the outcome of the trial. The trial court awarded Fashions Four damages and attorney fees and permanently enjoined Fashion Place from interfering with Fashions Four's possession of the premises under the terms of the lease.

Fashion Place appeals, contending that as a matter of law the reassignment of the lease from Davidson to Fashions Four was without force and effect because it had not given its consent under Article 15. Fashions Four also claims that this Court is without jurisdiction to hear this appeal inasmuch as Fashion Place failed to file its appeal within ten days from the date of entry of judgment for forcible entry and detainer as required by U.C.A., 1953, § 78-36-11. We first address this threshold issue.

[1] Fashions Four's verified complaint contained four causes of action, asking for treble damages for forcible entry and detainer under the first two causes of action, a temporary restraining order and temporary injunction under the third, and damages for breach of the lease under the fourth. Fashion Place filed its counterclaim, likewise containing four causes of action, asserting wrongful reoccupation by Fashions Four, asking for declaratory relief in striking the temporary restraining order, as well as for an expedited trial setting. The remedy for forcible entry and detainer is treble damages and restitution of premises. U.C.A., 1953, § 78-36-10. Conversely, judgment was entered in favor of Fashions Four for general damages only, a permanent injunction and a dismissal with prejudice of Fashion Place's counterclaim. Consequently, we are compelled to conclude that the hybrid nature of plaintiff's action, containing additional declaratory and equitable causes, and of the defendant's counterclaim with similar causes, prevents § 78-36-11 from controlling the time for appeal. *Belnap v. Fox, et al.*, 69 Utah 15, 251 P. 1073 (1927); *Dunbar, et al. v. Hanson, et al.*, 68 Utah 398, 250 P. 982 (1926); *Oppenheimer, et al. v. Mountain States Supply Co.*, 56 Utah 190, 188 P. 1117 (1920). Instead, the appeal is gov-

erned by Utah R Civ P 73(a) and was therefore perfected in timely fashion We proceed to the merits of the case

The central issue to be decided here is whether the lessor's consent in writing is necessary before an assignee may assign a lease back to the original lessee for the unexpired term of the lease This is a case of first impression in our forum

Article 15 of the lease agreement provides in pertinent part as follows

> The tenant shall not transfer, assign, sublet this Lease or the tenant's interest in and to the premises without first procuring the written consent of the landlord Any attempted transfer, assignment, subletting without the landlord's written consent shall be void and confer no rights upon any *third person* [Emphasis ours]

Article 35 G provides in pertinent part

> Landlord's consent to or approval of any act by tenant requiring landlord's consent or approval shall not be deemed to waive or render unnecessary landlord's consent to or approval of any subsequent similar act by tenant

Fashion Place contends that, construing these articles in harmony, its consent to the earlier assignment did not operate to waive a subsequent required consent Fashion Place buttresses this argument by invoking public policy considerations and pointing to the intent of the parties under contractual provisions Specifically, Fashion Place argues that the consent to assignment provision is designed to serve two purposes, one, to reject contractually the common law rule that leaseholds are freely assignable, and two, and more importantly, to insure that the lessor has a responsible tenant to look to for performance of the lease From that thesis Fashion Place then derives its conclusion that once the original lessee assigns its lease to an assignee, the lessor must have the opportunity to pass on the qualifications of all potential tenants, including those of the original tenant under the unexpired lease We disagree

[2, 3] The language of Article 15 clearly *states the parties' objectives in requiring* the lessor's consent to assignment Unless that consent is given, no rights are conferred upon *third persons* We agree with Fashion Place that the assignment or transfer of a lease interest by a tenant is of critical importance to a lessor of an enclosed shopping mall and that its consent gives it the requisite control to create the optimum commercial environment for all mall tenants However, once certain rights have been conferred upon the lessee, those rights may not be vitiated absent a breach of covenant by the lessee Only the rights of assignees of the lessee may be defeated by an assignment without consent The purport of the contractual language is clear It expressly excepts from the consent to assignment an assignment back to the original lessee who does not qualify as a third person under the terms of the lease in which he is a contracting party Upon assignment privity of estate terminates between lessor and lessee and arises between lessor and assignee However, privity of contract between the lessor and the lessee continues until the expiration of the lease *Broida v Hayashi*, 51 Hawaii 493, 464 P 2d 285 (1970) It follows that an assignment back to the original lessee is excepted from the rule that an assignment without consent of lessor confers no rights upon the assignee Absent a release by the lessor, the original lessee remains liable for the performance by its assignee of the covenant to pay rent *Kintner v Harr*, 146 Mont 461, 408 P 2d 487 (1965) Where that burden persists, the concomitant benefit should likewise obtain, allowing the lessee to step into the shoes of the assignee whose performance has been placed in jeopardy The rationale for the exception has been stated as follows

> The covenant by the lessee, that he or others having his estate in the premises will not assign this lease without the written consent of the lessor, does not by its true construction extend so far as to prohibit a reassignment to the lessee himself without a new and special consent of the lessor By the lease itself, the lessor consents to take the lessee as *his tenant for the full term mentioned* in the lease This consent is available for any reassignment to the original lessee during the term There is therefore no breach of the covenant The statement that the reassignment has never been consented to, means only that no special consent has been given, and this is unnecessary

G Thompson, Thompson on Real Property (1981 Replacement) Volume 3A § 1213, citing *McCormick v Stowell*, 138 Massachusetts 431, 433–34 (1885), see also *Coulos v Desimone*, 34 Wash 2d 87, 208 P 2d 105 (1949)

[4] We hold that the assignment by Davidson back to Fashions Four as the original lessee under the unexpired lease was not contingent upon the consent of Fashion Place and that the trial court properly reinstated Fashions Four in the leasehold premises The judgment below is affirmed with costs awarded to Fashions Four

HALL, C J, and STEWART, OAKS and DURHAM, JJ, concur

STATE of Utah, Plaintiff and Respondent,

v.

Jay Richard NEWTON, Defendant and Appellant.

No. 19065.

Supreme Court of Utah

April 23, 1984

Defendant was convicted in the Third District Court, Salt Lake County, Dennis Fredrick, J, of aggravated robbery, and he appealed The Supreme Court, Oaks, J, held that refusal to give a proffered instruction stressing the special pitfalls of eyewitness identification was not prejudicial error where the witness, who had about three minutes to observe the unmasked defendant, most of the time at a close range and in a store that was well illuminated, was positive in her identification

Affirmed

Durham, J, concurred in the result and filed opinion in which Stewart, J, concurred

Criminal Law ⇐1173 2(5)

Refusal to give a proffered instruction stressing the special pitfalls of eyewitness identification was not prejudicial error where the witness, who had about three minutes to observe the unmasked defendant, most of the time at a close range and in a store that was well illuminated, was positive in her identification

Bradley P Rich, Salt Lake City, for defendant and appellant

David L Wilkinson, Atty Gen, J. Stephen Mikita, Asst Atty Gen, James F. Housley, Deputy Salt Lake County Atty, Salt Lake City, for plaintiff and respondent

OAKS, Justice.

A jury convicted defendant of aggravated robbery U C A, 1953, § 76–6–302 The only evidence linking defendant to the crime was the eyewitness identification of the victim On appeal, defendant claims that the trial court committed prejudicial error by refusing his proffered instruction stressing the special pitfalls of eyewitness identification *See United States v Telfaire*, 469 F 2d 552 (D C Cir 1972) We affirm

During the morning of May 6, 1981, Sandra Shephard, a registered pharmacist with 22 years' experience, was working at Salt Lake Drug East She saw a man enter the

Counsel call attention to the principle that, if a party detaining property did not use same, the deterioration which it would have suffered by use as the owner would have used it must be deducted from the value of the use, and that in this case no deduction was made because of deterioration. This issue was not raised by defendant's answer. No instruction was requested upon the subject, and in no way is the question before us for review. It is apparent that in the trial court appellant relied wholly upon his contention that in replevin when the value of the property is fixed at the time of the taking the damages may not exceed the interest on such value, and thus relying upon that theory of the case, counsel logically perceived no reason for raising an issue which they thought immaterial.

The record discloses no prejudicial error.

The judgment is therefore affirmed, with costs to respondent.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

OTTENHEIMER et al v. MOUNTAIN STATES SUPPLY CO.

No. 3419. Decided March 30, 1920. Rehearing denied April 24, 1920. (188 Pac. 1117.)

1. APPEAL AND ERROR—RESPONDENTS NOT ENTITLED TO ASSERT APPEAL WAS NOT TAKEN IN TIME. In an action in which the first count sought recovery of real property and the second count asked that plaintiff's title to an adjoining strip be quieted, where the case was tried and submitted and determined as an action in equity, plaintiffs could not assert that it was other than one in equity, as the basis for a motion to dismiss the appeal, because not taken in time, though the relief prayed for in the first cause of action could have been recovered in an action of forcible detainer.

2. APPEAL AND ERROR—ACCEPTANCE OF BENEFITS OR ACQUIESCENCE IN JUDGMENT DEFEATS APPEAL. A party to an action accepting the benefit of a judgment in his favor or acquiescing in a judgment against him thereby waives his right to have the judgment reviewed on appeal.

3. APPEAL AND ERROR—SURRENDER OF POSSESSION OF PROPERTY IN DISPUTE HELD TO PREVENT REVIEW. In an action to recover possession of land and quiet title and to recover the reasonable rental value, defended on the ground that defendant had a lease at a rental less than the alleged reasonable rental and having some time to run, defendant's surrender of the premises after an adverse judgment prevented an appeal by it, as it thereby abandoned its contention that it had a lease and escaped liability for the rent for the rest of the claimed term.

Appeal from District Court, Third District, Salt Lake County; *P. C. Evans*, Judge.

Action by Albert Ottenheimer and others against the Mountain States Supply Company.

From a judgment for plaintiffs, defendant appeals. On motion to dismiss appeal.

APPEAL DISMISSED.

C. E. Norton, of Salt Lake City, for appellant.

F. C. Loofbourow and *Dey, Hoppaugh & Mark*, all of Salt Lake City, for respondents.

FRICK, J.

Two causes of action are stated in the complaint. In the rst one plaintiffs seek to recover possession of certain real roperty, describing it, the possession of which, it is alleged, wrongfully withheld from the plaintiffs by the defendant, id for damages for withholding the same. In the second use of action plaintiffs seek to quiet title to a certain strip ground which adjoins the property involved in the first use of action, and it is asked that the defendant be re-

quired to set forth its claim, if any it has. The defendant, in its answer to the complaint, denied the allegations of the complaint, and, as an affirmative defense, alleged that it held the property in question by virtue of a lease which it had obtained from plaintiffs' grantors by the terms of which it was entitled to the possession of the premises in question at a specified rental for a fixed period of time which would not expire for several years. By way of counterclaim it further alleged that pursuant to the terms of the lease it had made improvements and betterments on the devised premises to the value of $2,000. It prayed that the plaintiffs' action be dismissed; that it be adjudged that the defendant has a valid lease upon the premises aforesaid under which it is entitled to possession thereof until May 1, 1923, and that it recover the value of said alleged improvements. The plaintiffs, in their reply, denied the material averments of the answer and counterclaim, and more fully explained the reasons why the defendant is not entitled to the possession of the aforesaid property.

A trial to the court resulted in findings of fact and conclusions of law in favor of the plaintiffs upon which a judgment was entered from which the defendant appeals and assigns numerous errors.

We are met at the threshold with a motion by plaintiffs to dismiss the appeal upon the ground that it was not taken within the time required by our statute. The motion is based upon the contention that the action is one of forcible detainer under our statute (Comp. Laws Utah, 1917, sections 1713 to 1727, inclusive, and hence that an appeal must be taken within the time therein specified, which is within ten days after judgment. While it is true that the relief prayed for in the first cause of action might have been had in a proceeding of forcible detainer, yet it is also true that the relief sought and obtained by plaintiffs under the second cause of action is purely equitable, and could not have been had in a forcible detainer action under our statute. Moreover, the case was tried throughout and submitted to the court, and by it determined, as an action in equity. The plaintiffs, therefore, in order to defeat the appeal, may not now

be heard to say that the action was other than one in equity. There is no merit to the motion to dismiss the appeal upon the ground stated therein, and hence the motion should be, and it accordingly is, denied.

Some time after the cause was submitted on the appeal plaintiffs' counsel made application to this court for leave to file another motion to dismiss the appeal upon the ground that the defendant had abandoned its appeal, and hence had waived its right to have the judgment reviewed by this court. That motion is grounded upon the following proceedings:

The judgment, or decree as it is designated in the record, awarded plaintiffs the possession of the property mentioned in the first cause of action, and also awarded them the sum of $2,400 "damages * * * for withholding the possession of said premises." The court also quieted the title to the strip of property before referred to and described in the complaint of plaintiffs, and awarded them costs. The defendant appealed from the judgment "and from the whole thereof." After the cause had been submitted the defendant served notice upon plaintiffs' counsel as follows:

"To the Plaintiffs and Their Attorneys: Please take notice that pursuant to your notice to vacate and the order of said court requiring said defendant to vacate the premises described in the complaint in the above-entitled action the defendant has vacated said premises and here delivers possession thereof without waiving any of its claims against said plaintiffs, or against the Zion's Savings Bank & Trust Company, or against the City Trust & Investment Company, or against any of them, by reason of being required to vacate said premises contrary to the terms of the said leases named and set forth in its answer and counterclaim herein."

Immediately upon serving that notice plaintiffs' counsel asked and obtained leave to file the additional motion to dismiss the appeal before referred to.

It is elementary that in case a party to an action accepts the benefits of a judgment in his favor or acquiesces in a judgment against him he thereby waives his right to have said judgment reviewed on appeal. 2 Cyc. 644; 3 C. J. p. 665, section 536. In the same volume of Cyc., at page 556, it is said:

"Any act on the part of a defendant by which he impliedly recog-

nizes the validity of a judgment against him operates as a waiver of his rights to appeal therefrom or bring error to reverse it."

In 2 Ency. Pl. & Pr., at page 174, the rule is stated thus:

"It is a settled doctrine that where a party recovering a judgment or decree accepts the benefits thereof, voluntarily and knowing the facts, he is estopped to afterwards reverse the judgment or decree on error The acceptance operates as and may be pleaded as a release of error."

See, also, *Elwert* v. *Marley*, 53 Or. 591, 99 Pac. 887, 101 Pac. 671, 133 Am. St. Rep. 850; *Male* v. *Harlan*, 12 S. D. 627, 82 N. W. 179, and *Sheldon* v. *Motter*, 59 Kan. 776, 53 Pac. 127.[1]

Counsel for the defendant does not dispute or question the rule as stated in the foregoing citations, and hence it is not necessary to pursue the subject further. 2

The question, therefore, is, Does this case come within the rule? As we have seen, the principal question that was litigated was whether the defendant had a lease to the premises under which it was entitled to hold possession? The court found that it had no lease, and therefore continued in possession without authority or law and against the consent of the plaintiffs, the owners. The further question as to whether the plaintiffs were entitled to recover the sum of $500 a month for the use of the premises, or were limited to the sum of $350 a month, the amount that it is contended was specified in the alleged lease, entirely depended upon whether the defendant had the alleged lease or not. The court found that there was no lease, and hence found that the amount that defendant should pay was not fixed by any contract, and therefore it should be required to pay the reasonable rental value of the premises, which was $500 a month. In voluntarily surrendering the premises upon which it claimed to have a lease, defendant necessarily surrendered or waived the right to have the question of whether it had or had not a subsisting lease on the premises reviewed by this court. By serving the notice and yielding possession of

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 59 Kan. 776.

the premises to the owners it in effect intimated that it did not desire the premises longer, and hence conceded 3 the plaintiffs' claim that they were entitled to the possession thereof. Defendant therefore abandoned the question of whether it had a lease or not, and that question is out of the case. Now the question whether the defendant should pay $500 as monthly rent or only $350, the amount specified in the alleged lease, again depended upon whether the defendant could establish that it had a lease. Having surrendered the premises, and thereby abandoned the contention that it had a lease, it must also be deemed to have abandoned the right to have the question whether it should pay rent according to the terms of the alleged lease or in accordance with the judgment reviewed here. That the adandoning of the question of whether it had a lease carries with it the question of the payment of rent seems quite clear. Assuming that this court should find that the district court erred in holding that defendant did not have a lease and should find that it had one which would expire in May, 1923, as contended by the defendant, it would then follow that the defendant was liable to pay rent for the premises until that time, although it had already surrendered them. That it was so liable, or might be held liable, is precisely what the defendant escapes by acquiescing in the finding of the court that it had no lease upon the premises. If, therefore, it escapes liability and concedes that it has no lease, it likewise must concede that it cannot have the question of whether it should pay rent according to the lease or in accordance with the court's finding reviewed here. We could not review the question of rent without necessarily considering the question of whether the defendant had a lease or not. The question of whether it had a lease being abandoned, the question of rent goes with it.

To avoid any misunderstanding respecting the scope of this opinion, we feel constrained to say that we do not hold that in paying a judgment the defendant is necessarily prevented from prosecuting an appeal, or that he waives or abandons the one already taken, but what we do hold is, where, as here, the acquiescence in the judgment and the surrendering of pos-

session of the premises necessarily amounts to a waiver of all the litigated questions, this court is precluded from reviewing the judgment.

It follows, therefore, that the second motion to dismiss the appeal should be, and it accordingly is, sustained; and the appeal is dismissed, at appellant's cost.

CORFMAN, C. J., and WEBER, GIDEON and THURMAN, JJ., concur.

BIG COTTONWOOD TANNER DITCH CO. et al. v. SHURTLIFF et ux.

No 3374. Decided Nov. 28, 1919. On Modification of Opinion, April 21, 1920. (189 Pac. 587.)

1. WATERS AND WATER COURSES—USERS HELD ENTITLED TO FLOW FOR CULINARY PURPOSES IN ADDITION TO THAT ALLOWED FOR IRRIGATION. In an action by an irrigation company against users of water from its ditch, *held*, that users were entitled to the continuous flow they had used for years for culinary and domestic purposes in addition to the quantity awarded for irrigation.[1]

2. WATERS AND WATER COURSES—DITCH COMPANY ENTITLED TO WASTE WATER SAVED BY IMPROVING CONDUIT. 20,000 gallons of water delivered daily at defendant's home for culinary purposes *held* proper, although in excess of amount generally used by others under similar circumstances, and where, because of waste of ditch, 323,000 gallons must be released to supply such amount, it was proper to allow plaintiff irrigation company the privilege to construct an economical conduit and use the water saved.[2]

3. WATERS AND WATER COURSES—COURTS MAY PERMIT USER TO CHANGE PRIOR USER'S METHOD OF DIVERSION TO SAVE WASTE. While an original appropriator of water acquires a right in his

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[1] *Big Cottonwood Tanner Ditch Co.* v. *Shurtliff*, 49 Utah 574, 164 Pac. 856.

[2] *Big Cottonwood Tanner Ditch Co.* v. *Shurtliff*, 49 Utah 574, 164 Pac. 856.

APPENDIX VIII.

Detaining child beyond visitation period.

Parent's detention of child beyond visitation period did not constitute crime of custodial interference when the child was detained for a brief period for the purpose of seeking legal intervention to modify custody award and there was a good faith belief by parent that he had good cause, which he substantiated by filing a petition for custody modification and receiving a temporary restraining order to prevent the child's removal from the state until the custodial issue could be determined Nielsen v Nielsen, 620 P 2d 511 (Utah 1980)

Violation of custody order an element.

Subsection (1)(b) criminalizes the conduct of those who, when exercising visitation or custody under the authority of a custody order, act to deprive another person of her or his custodial or visitation rights in derogation of that existing order Even one who is subject to a custody or visitation decree does not violate this section unless he or she acts in derogation of his or her right under the order State v Smith, 764 P 2d 997 (Utah Ct App 1988)

COLLATERAL REFERENCES

Am. Jur 2d. — 1 Am Jur 2d Abduction and Kidnaping § 19

C.J.S. — 51 C J S Kidnapping § 4

A.L.R. — Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child, 49 A L R 4th 7

Key Numbers. — Kidnapping ⇐ 3

76-5-304 Unlawful detention.

(1) A person commits unlawful detention if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.

(2) Unlawful detention is a class B misdemeanor.

History: C. 1953, 76-5-304, enacted by L. 1973, ch. 196, § 76-5-304.

NOTES TO DECISIONS

ANALYSIS

Elements.

For cases discussing definition and elements of former offense of false imprisonment, see Smith v Clark, 37 Utah 116, 106 P 653, 26 L R A (n s) 953, 1912B Ann Cas 1366 (1910), Mildon v Bybee, 13 Utah 2d 400, 375 P 2d 458 (1962)

Kidnaping a minor.

Unlawful detention is not a lesser included offense of kidnaping a minor, § 76-5-301 State v Cross, 649 P 2d 72 (Utah 1982)

Liability of peace officer.

A peace officer would not necessarily be held liable for mistaking identity of person named in warrant of arrest if he had exercised reasonable diligence and care in ascertaining identity before he served warrant Mildon v Bybee, 13 Utah 2d 400, 375 P 2d 458 (1962)

COLLATERAL REFERENCES

Am. Jur. 2d. — 32 Am Jur 2d False Imprisonment § 151

C.J.S. — 35 C J S False Imprisonment § 71

A.L.R. — Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest, 48 A L R 4th 165

Penalties for common-law criminal offense of false imprisonment, 67 A L R 4th 1103

Key Numbers. — False Imprisonment ⇐ 43

(c) If the governing body of a municipality establishes a municipal department of the circuit court, a municipal justice court judge may not be appointed or elected. The circuit judges are successors of the justice court judges acting in the municipality where municipal departments of the circuit court are established.

(2) (a) Governing bodies of municipalities establishing municipal departments of the circuit court may vacate the establishment of the circuit court by ordinance and return to a municipal justice court.

(b) If a governing body establishes a circuit court or returns to a justice court system, it shall cause the Office of the State Court Administrator to be notified in writing within 30 days after the fact.

History: C. 1953, 78-4-6, enacted by L. 1977, ch. 77, § 1; 1987, ch. 228, § 3; 1988, ch. 248, § 30; 1990, ch. 59, § 31.

Repealed effective January 1, 1992. — Laws 1991, ch. 268, § 49 repeals § 78-4-6, as last amended by Laws 1990, ch. 59, § 31, relating to report to court administrator regarding municipal department of circuit court, effective January 1, 1992.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, deleted former Subsection (1)(a) which read "A municipal department of the circuit court is created for all municipalities which have created city courts. The circuit court and the judges of them succeed the city courts and have all the powers and duties of the city judge"; redesignated the following subsections accordingly; and made minor stylistic changes.

The 1990 amendment, effective April 23, 1990, substituted "justice court judge" for "justice of the peace" in the first sentence and "justice court judges" for "justices of the peace" in the second sentence in Subsection (1)(c) and substituted "justice court" for "justice of the peace" twice in Subsection (2).

78-4-7. Civil jurisdiction — Exceptions [Effective until January 1, 1992].

The circuit court has civil jurisdiction, both law and equity, in all matters if the sum claimed is less than $10,000, exclusive of court costs, except:

(1) in actions to determine the title to real property, but not excluding actions to foreclose mechanics' liens;

(2) in actions of divorce, child custody, and paternity;

(3) in actions under the Utah Uniform Probate Code;

(4) in actions to review the decisions of any state administrative agency, board, council, commission, or hearing officer;

(5) in actions seeking remedies in the form of extraordinary writs; and

(6) in all other actions where, by statute, jurisdiction is exclusively vested in the district court or other trial or appellate court.

Civil jurisdiction — Exceptions [Effective January 1, 1992].

The circuit court has civil jurisdiction, both law and equity, in all matters if the sum claimed is less than $20,000, exclusive of court costs, except:

(1) in actions to determine the title to real property, but not excluding actions to foreclose mechanics' liens;

(2) in actions of divorce, child custody, and paternity;

(3) in actions under the Utah Uniform Probate Code;

(4) in actions to review the decisions of any state administrative agency, board, council, commission, or hearing officer;

(5) in actions seeking remedies in the form of extraordinary writs; and

(6) in all other actions where, by statute, jurisdiction is exclusively vested in the district court or other trial or appellate court.

History: C. 1953, 78-4-7, enacted by L. 1977, ch. 77, § 1; 1983, ch. 76, § 1; 1986, ch. 121, § 1; 1988, ch. 248, § 31; 1991, ch. 268, § 31.

Amended effective January 1, 1992. — Laws 1991, ch. 268, § 31 amends this section effective January 1, 1992. See amendment note below.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, deleted the subsection designation (1) at the beginning of the section; substituted the subsection designations (1) to (6) for former subsection designations (1)(a) to (1)(f); deleted former Subsection (2) which read "The circuit court shall have concurrent jurisdiction with justices of the peace courts where the sum claimed is less than $750"; and made minor stylistic changes.

The 1991 amendment, effective January 1, 1992, substituted "$20,000" for "$10,000" in the introductory language.

NOTES TO DECISIONS

ANALYSIS

Arbitration.
Title to real estate.

Arbitration.

The Utah Arbitration Act creates a statutory remedy for judicial enforcement, modification, or vacation of an arbitration award, and specifically provides that the remedy will be implemented by proceedings in the district courts of this state. A circuit court cannot have subject matter jurisdiction under the Utah Arbitration Act, notwithstanding this section. Transworld Sys. v. Robison, 796 P.2d 407 (Utah Ct. App. 1990).

Title to real estate.

An order of the circuit court purporting to adjudicate ownership rights to real property and the proceeds of its sale was null and void. A circuit court could not, through consent or waiver, expand its jurisdiction to adjudicate claims involving the title to real property. Thompson v. Jackson, 743 P.2d 1230 (Utah Ct. App. 1987).

78-4-7.5. Trials de novo.

The circuit court has appellate jurisdiction to hear trials de novo of the judgments of the justices' courts and trials de novo of the small claims department of the circuit court.

History: C. 1953, 78-4-7.5, enacted by L. 1986, ch. 47, § 66; 1988, ch. 73, § 2; 1988, ch. 248, § 32.

Amendment Notes. — The 1988 amendment by Laws 1988, Chapter 73, effective April 25, 1988, rewrote the section which read "The circuit court has jurisdiction to hear trials de novo of the judgments of the justices' courts."

The 1988 amendment by Laws 1988, Chapter 248, effective April 25, 1988, inserted "appellate" before "jurisdiction."

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

78-4-8. Venue and change of judge provisions — Exceptions [Repealed effective January 1, 1992].

Provisions of law regarding venue and change of judge apply to the circuit courts the same as district courts, except cases arising under or by reason of the violation of municipal ordinances may, upon stipulation of the parties or upon order of the court for good cause shown, be tried and decided in a municipality or county within the circuit other than the municipality or county in which the violation occurred.

Court.

History: C. 1953, 78-2a-2, enacted by L. 1986, ch. 47, § 45; 1988, ch. 248, § 7.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, in Subsection (1), divided and rewrote the former third sentence, which read "Thereafter, the term of office of a judge of the Court of Appeals is 6 years and until a successor is appointed and approved under Section 20-1-7.1," into the present third and fourth sentences and made minor stylistic changes.

78-2a-3. Court of Appeals jurisdiction [Effective until January 1, 1992].

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from district court in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate

78-36-1. "Forcible entry" defined.

Every person is guilty of a forcible entry, who either:

(1) by breaking open doors, windows or other parts of a house, or by fraud, intimidation or stealth, or by any kind of violence or circumstances of terror, enters upon or into any real property; or,

(2) after entering peaceably upon real property, turns out by force, threats or menacing conduct the party in actual possession.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-1.

Cross-References. — Burglary and criminal trespass, §§ 76-6-201 to 76-6-206.

NOTES TO DECISIONS

Analysis

Damages.

—Mental anguish.

Tenant who is wrongfully evicted can collect damages for mental anguish and humiliation. Mental pain and suffering in connection with a wrong which apart from such pain and suffering constitutes a cause of action is a proper element of damages where it is a natural and proximate consequence of the wrong. Lambert v. Sine, 123 Utah 145, 256 P.2d 241 (1953).

—Nominal.

The statute places a duty upon any person, whether entitled to possession or not, not to use force or stealth or fraud in gaining possession of realty. Correspondingly, it creates a right in the person in actual peaceable possession not to have his possession disturbed other than by legal process. Therefore, regardless of his lack of entitlement to the property, the tenant has a cause of action for the invasion of that right. Where no actual damages are proved he should be awarded nominal damages to preserve the right. King v. Firm, 3 Utah 2d 419, 285 P.2d 1114 (1955).

Forcible detainer distinguished.

Forcible entry and forcible detainer, while often spoken of together, are in fact separate and distinct wrongs. Buchanan v. Crites, 106 Utah 428, 150 P.2d 100, 154 A.L.R. 167 (1944).

Landlord and tenant.

—Contract rights.

Anyone committing acts specifically prohibited under this section would be guilty of forcible entry including a party who may by contract be authorized to enter or an owner who as a matter of law may have a right to possession; contract purporting to establish right of reentry for default of rent payments did not give landlord right to remove employee of tenants from office and change locks on all doors. Freeway Park Bldg., Inc. v. Western States Whsle. Supply, 22 Utah 2d 266, 451 P.2d 778 (1969).

—Motel operator and occupant.

——Unlawful eviction.

Where evidence disclosed that relationship between operators of a motel and the occupants of an apartment therein was one of landlord

and tenant, and not one of innkeeper and guest, the occupants could only be dispossessed of the apartment by resort to the statutory remedy of unlawful detainer. When the owner of the motel locked out the occupants for unpaid rent, there was an unlawful eviction. Lambert v. Sine, 123 Utah 145, 256 P.2d 241 (1953).

Policy of section.

—Abolishment of common-law.

The forcible entry statute expressed a policy that no person should enter by force, stealth, fraud or intimidation, premises of which another had peaceable possession. This had the effect of taking away the common-law right of a landlord to possess his own property by no more force than was necessary and left the one against whom force was used to pursue his common-law action. Buchanan v. Crites, 106 Utah 428, 150 P.2d 100, 154 A.L.R. 167 (1944).

Purpose of provisions.

—Preventing disturbances of peace.

The forcible entry and detainer statute was enacted for the primary purpose of preventing disturbances of the peace brought about through self-help in the matter of dispossession. King v. Firm, 3 Utah 2d 419, 285 P.2d 1114 (1955).

—Summary remedy.

Purpose of this statute is to provide a speedy remedy, summary in character, to obtain possession of real property. Paxton v. Fisher, 86 Utah 408, 45 P.2d 903 (1935).

——Rent.

This chapter provides a summary remedy for the recovery of real property in case of forcible entry or the forcible or unlawful detainer thereof. That is the purpose of the chapter, and not to deal with the subject of remedies for rent. The question of rent is drawn into the statute, not for the purpose of providing a remedy for its recovery, but to complete a case of unlawful detainer, which is the gist of the action. Voyles v. Straka, 77 Utah 171, 292 P. 913 (1930).

Separate tort action.

A landlord who is entitled to possession must, on the refusal of the tenant to surrender the premises, resort to the remedy given by law to secure it. A violation of that duty set by the statute gives rise to an action for damages, not in an action under the forcible entry and detainer statute but as a separate tort. King v. Firm, 3 Utah 2d 419, 285 P.2d 1114 (1955).

What constitutes forcible entry.

—Removal of doors.

Where defendant landlord entered upon the premises in plaintiff's absence by unlocking the doors and removing the doors from their hinges and carrying them away, the weather being at the time freezing, these facts were held to sufficiently show a forcible entry. Buchanan v. Crites, 106 Utah 428, 150 P.2d 100, 154 A.L.R. 167 (1944).

COLLATERAL REFERENCES

Utah Law Review. — Landlord-Tenant Law: A Perspective on Reform in Utah, 1981 Utah L. Rev. 727, 738.

Am. Jur. 2d. — 35 Am. Jur. 2d Forcible Entry and Detainer § 1.

C.J.S. — 36A C.J.S. Forcible Entry and Detainer §§ 1, 2.

Key Numbers. — Forcible Entry and Detainer ⇐ 4.

78-36-2. "Forcible detainer" defined.

Every person is guilty of a forcible detainer who either:

(1) by force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

(2) in the nighttime, or during the absence of the occupants of any real property, unlawfully enters thereon, and, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who within five days preceding such unlawful entry was in the peaceable and undisturbed possession of such lands.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-2.

Cross-References. — Burglary and criminal trespass, §§ 76-6-201 to 76-6-206.

NOTES TO DECISIONS

Analysis

Consent to entry.

—Evidence.

To show intention of parties and acquiescence by plaintiff in defendant's possession, escrow agreement and quitclaim deed executed by plaintiff were held to be properly admitted in evidence. Seeley v. Houston, 105 Utah 202, 141 P.2d 880 (1943).

—Failure of action.

As one of the elements of this action is the unlawful entry, the action must fail if it is found that defendant entered with consent of plaintiff. Seeley v. Houston, 105 Utah 202, 141 P.2d 880 (1943).

Issues.

—Immediate right of possession.

In action of forcible entry and detainer, the only question involved is the immediate right to possession. Seeley v. Houston, 105 Utah 202, 141 P.2d 880 (1943).

Liability.

—Lessor.

Where, without serving the three days' notice required by § 78-36-3(3), a lessor entered the premises of his tenant, whose rent was two months in arrears, changed the locks on the doors and refused to allow the tenant to enter to remove equipment and perishable goods, lessor was guilty of forcible detainer and conversion of the personal property on the premises. Peterson v. Platt, 16 Utah 2d 330, 400 P.2d 507 (1965).

—Purchaser.

Where purchaser of state land took possession of land while lessee from state was away and refused to quit premises upon demand, he was liable for forcible entry and detainer, since such purchaser should have made proper demand, and if it was refused, should have settled question of possession by law. Paxton v. Fisher, 86 Utah 408, 45 P.2d 903 (1935); Buchanan v. Crites, 106 Utah 428, 150 P.2d 100, 154 A.L.R. 167 (1944).

Fact that one of defendants in forcible detainer action by lessee of state land had signed purchase contract covering such land would not, in itself, make him personally liable. Paxton v. Fisher, 86 Utah 408, 45 P.2d 903 (1935); Buchanan v. Crites, 106 Utah 428, 150 P.2d 100, 154 A.L.R. 167 (1944).

Occupancy "within five days."

—Allegation.

Allegation of "more" than five days includes period of "within" five days. Woodbury v. Bunker, 98 Utah 216, 98 P.2d 948 (1940); American Mut. Bldg. & Loan Co. v. Jones, 102 Utah 318, 117 P.2d 293 (1941), rehearing denied, 102 Utah 328, 133 P.2d 332 (1943).

"Unlawfully enters."

"Unlawfully enters" in Subsection (2) means unlawfully as relating to an occupant who was there within five days. Woodbury v. Bunker, 98 Utah 216, 98 P.2d 948 (1940); Buchanan v. Crites, 106 Utah 428, 150 P.2d 100, 154 A.L.R. 167 (1944).

CHAPTER 35
EXTRAORDINARY WRITS

78-35-5. Penalties for wrongful acts of defendant.

If the defendant attempts to evade the service of the writ of habeas corpus, or if the defendant or any officer willfully fails to comply with the legal duties imposed upon him, or if he disobeys the order of discharge, he is guilty of a class B misdemeanor, and shall also forfeit to the person aggrieved not more than $5,000. Any person knowingly aiding in or abetting invalidation of this section is subject to the same punishment and forfeiture.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-35-5; L. 1986, ch. 178, § 66; 1991, ch. 241, § 107.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted "class B" for "class A" in the first sentence.

CHAPTER 36
FORCIBLE ENTRY AND DETAINER

78-36-3. Unlawful detainer by tenant for term less than life.

(1) A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

(a) when he continues in possession, in person or by subtenant, of the property or any part of it, after the expiration of the specified term or period for which it is let to him, which specified term or period, whether established by express or implied contract, or whether written or parol, shall be terminated without notice at the expiration of the specified term or period;

(b) when, having leased real property for an indefinite time with monthly or other periodic rent reserved:

(i) he continues in possession of it in person or by subtenant after the end of any month or period, in cases where the owner, his designated agent, or any successor in estate of the owner, 15 days or more prior to the end of that month or period, has served notice requiring him to quit the premises at the expiration of that month or period; or

(ii) in cases of tenancies at will, where he remains in possession of the premises after the expiration of a notice of not less than five days;

(c) when he continues in possession, in person or by subtenant, after default in the payment of any rent and after a notice in writing requiring

in the alternative the payment of the rent or the surrender of the detained premises, has remained uncomplied with for a period of three days after service, which notice may be served at any time after the rent becomes due;

(d) when he assigns or sublets the leased premises contrary to the covenants of the lease, or commits or permits waste on the premises, or when he sets up or carries on any unlawful business on or in the premises, or when he suffers, permits, or maintains on or about the premises any nuisance, and remains in possession after service upon him of a three days' notice to quit; or

(e) when he continues in possession, in person or by subtenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those previously mentioned, and after notice in writing requiring in the alternative the performance of the conditions or covenant or the surrender of the property, served upon him and upon any subtenant in actual occupation of the premises remains uncomplied with for three days after service. Within three days after the service of the notice, the tenant, any subtenant in actual occupation of the premises, any mortgagee of the term, or other person interested in its continuance may perform the condition or covenant and thereby save the lease from forfeiture, except that if the covenants and conditions of the lease violated by the lessee cannot afterwards be performed, then no notice need be given.

(2) Unlawful detainer by an owner resident of a mobile home is determined under Chapter 16, Title 57, Mobile Home Park Residency Act.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-3; L. 1981, ch. 160, § 1; 1986, ch. 137, § 1; 1989, ch. 101, § 1.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, inserted the subsection designation (1) at the beginning of the section, designated former Subsections (1) and (2) as Subsections (1)(a) and (1)(b), designated former Subsections (2)(a) and (2)(b) as Subsection (1)(b)(i) and Subsection (1)(b)(ii), designated former Subsections (3) to (5) as Subsections (1)(c) to (1)(e), added Subsection (2), and made minor stylistic changes

78-36-10. Judgment for restitution, damages, and rent — Immediate enforcement — Treble damages.

NOTES TO DECISIONS

Damages.

—Treble damages.

In accord with first paragraph in bound volume See Monroc, Inc v Sidwell, 770 P.2d 1022 (Utah Ct App 1989)

COLLATERAL REFERENCES

A.L.R. — Air-conditioning appliance, equipment, or apparatus as fixture, 69 A L R 4th 359.

COLLATERAL REFERENCES

Am. Jur. 2d. — 35 Am. Jur. 2d Forcible Entry and Detainer § 1.
C.J.S. — 36A C.J.S. Forcible Entry and Detainer §§ 1, 2.

Key Numbers. — Forcible Entry and Detainer ⇐ 5.

78-36-3. Unlawful detainer by tenant for term less than life.

A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

(1) when he continues in possession, in person or by subtenant, of the property or any part of it, after the expiration of the specified term or period for which it is let to him which specified term or period, whether established by express or implied contract, or whether written or parol, shall be terminated without notice at the expiration of the specified term or period;

(2) when, having leased real property for an indefinite time with monthly or other periodic rent reserved:

(a) he continues in possession of it in person or by subtenant after the end of any month or period, in cases where the owner, his designated agent, or any successor in estate of the owner, 15 days or more prior to the end of that month or period, has served notice requiring him to quit the premises at the expiration of that month or period; or

(b) in cases of tenancies at will, where he remains in possession of the premises after the expiration of a notice of not less than five days;

(3) when he continues in possession, in person or by subtenant, after default in the payment of any rent and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, has remained uncomplied with for a period of three days after service which notice may be served at any time after the rent becomes due;

(4) when he assigns or sublets the leased premises contrary to the covenants of the lease, or commits or permits waste on the premises, or when he sets up or carries on any unlawful business on or in the premises, or when he suffers, permits, or maintains on or about the premises any nuisance, and remains in possession after service upon him of a three days' notice to quit; or

(5) when he continues in possession, in person or by subtenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those previously mentioned, and after notice in writing requiring in the alternative the performance of the conditions or covenant or the surrender of the property, served upon him and upon any subtenant in actual occupation of the premises remains uncomplied with for three days after service. Within three days after the service of the notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the condition or covenant and thereby save the lease from forfeiture except that if the cove-

nants and conditions of the lease violated by the lessee cannot afterwards be performed, then no notice need be given.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-3; L. 1981, ch. 160, § 1; 1986, ch. 137, § 1.

Amendment Notes. — The 1986 amendment substituted "three days" for "five days" in the first sentence of Subsection (5) and made stylistic changes throughout the section

Cross-References. — Nuisances, Title 47

Right to recover treble damages from tenants committing waste, § 78-38-2

NOTES TO DECISIONS

Analysis

Cause of action.

—Default in rent.

No cause of action for unlawful detainer based on default in payment of rent survived where tenant tendered rent due within three days after service of unlawful detainer action, regardless of defects in such notice Dang v Cox Corp , 655 P 2d 658 (Utah 1982)

—Prerequisites.

Notice to quit is necessary to give rise to cause of action Carstensen v Hansen, 107 Utah 234, 152 P 2d 954 (1944)

—Presumptions.

Action of unlawful detainer presupposes absence of fraud and force, as well as existence of relation of landlord and tenant Holladay Coal Co v Kirker, 20 Utah 192, 57 P 882 (1899)

—When determined.

Whether a cause of action exists under this section is to be determined at the time the action is commenced Van Zyverden v Farrar, 15 Utah 2d 367, 393 P 2d 468 (1964)

—When exists.

Upon expiration of tenant's lease, the tenant is subject to ouster by an unlawful detainer action (not forcible detainer) under and pursuant to this section Woodbury v Bunker, 98 Utah 216, 98 P 2d 948 (1940), American Mut. Bldg & Loan Co v Jones, 102 Utah 318, 117 P 2d 293 (1941), rehearing denied, 102 Utah 328, 133 P 2d 332 (1943)

Unless tenant has retained the right to refuse inspection by prospective purchasers of premises, unreasonable refusal to permit entry of premises for that purpose constitutes unlawful detainer. Glenn v. Keyes, 107 Utah 415, 154 P.2d 642 (1944).

Federal regulations.

—Modification of state remedies.

OPA rental and housing regulations, under Federal Price Control Act, were binding upon Utah courts and modified any state remedy to extent that such remedy was in conflict with that act. Callister v. Spencer, 113 Utah 497, 196 P.2d 714 (1948).

Notice to quit.

—Administrative claim.

Notice to quit or pay rent served on government as required by this section was not an administrative claim sufficient to satisfy 28 U.S.C. § 2675(a), and federal court therefore had no jurisdiction over forcible entry and detainer action brought under Federal Tort Claims Act. Three-M Enters., Inc. v. United States, 548 F.2d 293 (10th Cir. 1977).

—Liability of tenant.

Action by lessor, after end of fixed term of lease, to terminate lease and require lessee to vacate premises did not terminate provision obliging tenant to pay attorney fees, where parties entered stipulation, while matter was pending, that lessee considered lease in effect and held under it after end of fixed term. Milliner v. Farmer, 24 Utah 2d 326, 471 P.2d 151 (1970).

—Prerequisites.

Notice in accordance with Subsection (5) should precede notice to quit, and must be uncomplied with for five days after the service before a notice to quit is in order. Fireman's Ins. Co. v. Brown, 529 P.2d 419 (Utah 1974).

—Sufficiency.

A notice to quit is sufficient under subsection (2) in the case of a tenancy at will, as provided in contract of sale in case of default, where it merely declares a forfeiture, and is not insufficient under subsection (5) because not giving purchasers alternative of performing conditions of the agreement. Forrester v. Cook, 77 Utah 137, 292 P. 206 (1930); American Holding Co. v. Hanson, 23 Utah 2d 432, 464 P.2d 592 (1970).

Notice by landlord stating that tenants had failed to make payments of rent due under lease, had failed to pay utility bills, and further providing that tenants were to quit premises and deliver up possession to landlord within fifteen days did not comply with statutory requirements under this section; in absence of compliance, landlord was not entitled to maintain action for restitution of premises. American Holding Co. v. Hanson, 23 Utah 2d 432, 464 P.2d 592 (1970).

Notice of forfeiture, while sufficient to terminate a lease for breach of covenant, is not sufficient to put lessee in unlawful detainer; the notice to quit must be in the alternative, i.e., either perform or quit, before lessee becomes subject to the provisions of this chapter. Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317 (Utah 1976).

Lessee was not in unlawful detainer and lessor was not entitled to maintain an action under this section where lessor's notice to vacate premises was defective in that it did not state that lessee had the alternative of paying the delinquent rent or surrendering the premises. Sovereen v. Meadows, 595 P.2d 852 (Utah 1979).

The critical distinction between a notice of unlawful detainer and a notice of forfeiture is that the notice of forfeiture simply declares a termination of the lease without giving the lessee the alternative of making up the deficiency. Dang v. Cox Corp., 655 P.2d 658 (Utah 1982).

A notice to a month-to-month tenant to quit the premises need not contain the alternative of paying rent. Ute-Cal Land Dev. v. Intermountain Stock Exch., 628 P.2d 1278 (Utah 1981).

Notice to quit which notified tenant that he was violating substantial obligations of tenancy by conducting certain businesses on premises, and which plainly informed tenant that he must desist from such objectionable practices by certain date and that, if on or before that date he failed to desist therefrom and had not surrendered premises, action would be commenced for restitution of premises, was not defective because notice was not expressed in the alternative as required by subsection (5) of former § 104-60-3, i.e., that violation must cease or tenancy be vacated, since such was plain intent of notice without use of word "or." Callister v. Spencer, 113 Utah 497, 196 P.2d 714 (1948).

—Tenancy at will.

It is only after buyer is in the status of a tenant at will that he is amenable to the notice provided by this section, which requires him to vacate within five days or be guilty of an unlawful detainer. Van Zyverden v. Farrar, 15 Utah 2d 367, 393 P.2d 468 (1964).

At common law a tenant at will was not entitled to notice to quit possession. Buchanan v. Crites, 106 Utah 428, 150 P.2d 100, 154 A.L.R. 167 (1944).

Where lease was terminated by failure of tenant to pay rent and taxes, the tenant became a tenant at will and landlord properly proceeded to regain possession by the proce-

dure set forth in subsection (2) by giving notice to vacate. Shoemaker v. Pioneer Invs., 14 Utah 2d 250, 381 P.2d 735 (1963).

Notice to purchaser who had become tenant at will for failure to make payment was sufficient under subsection (5) even though several months had elapsed between first and final notice. Beneficial Life Ins. Co. v. Dennett, 24 Utah 2d 310, 470 P.2d 406 (1970).

Persons liable.

No one but tenant of real property for term less than life can be guilty of unlawful detainer. Holladay Coal Co. v. Kirker, 20 Utah 192, 57 P. 882 (1899).

Pleadings.

—Tenancy at will.

Since on month-to-month tenancy owner could recover property on fifteen-day notice, allegation in complaint that such tenant had violated substantial obligations of rental agreement was not necessary in unlawful detainer action. Callister v. Spencer, 113 Utah 497, 196 P.2d 714 (1948).

Right of re-entry.

—Contractual provisions.

Under contract for sale and exchange of real estate, providing that seller at his option could re-enter premises and be released from his obligations upon default of buyer, seller was bound to give buyer notice of his intention to take advantage of forfeiture provision of contract, since such provision was not self-executing. Leone v. Zuniga, 84 Utah 417, 34 P.2d 699, 94 A.L.R. 1232 (1934).

Strict performance.

—Waiver.

Acceptance by vendor of purchaser's past-due payments under uniform real estate contract, and other conduct leading latter to believe that strict performance would not be required by vendor, imposes duty on vendor to give purchaser reasonable notice before vendor may insist on strict performance by purchaser. Pacific Dev. Co. v. Stewart, 113 Utah 403, 195 P.2d 748 (1948).

Strict statutory compliance.

—Not required.

There is no reason for the strict rule that landlord must demand the precise or exact amount of rent due or lose his right to recover possession of the premises. A tenant is guilty of unlawful detainer when he continues in possession after default in payment of any rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the premises, etc. Commercial Block Realty Co. v. Merchants' Protective Ass'n, 71 Utah 505, 267 P. 1009 (1928).

—Required.

This section, which provides a severe remedy, must be strictly complied with before the cause of action thereon may be maintained. Van Zyverden v. Farrar, 15 Utah 2d 367, 393 P.2d 468 (1964).

Termination of lease.

A lease may be terminated pursuant to an unlawful detainer action. Hackford v. Snow, 657 P.2d 1271 (Utah 1982).

Treble damages.

—Contract of sale.

In a suit for amounts due under a contract of sale of real estate, where the vendors gave notice of forfeiture of the contract only and did not give the purchaser an alternative to pay up or quit, as is required under this section, the vendors were not entitled to treble damages for unlawful detainer. Erisman v. Overman, 11 Utah 2d 258, 358 P.2d 85 (1961).

—Intervenor.

A person not actually occupying the premises who intervenes in an action to obtain possession and for damages for unlawful detainer, and who asserts ownership and the right to possession by the occupier as his tenant, may be guilty of unlawful detainer and liable for treble damages where the court finds this intervener's claim invalid. Tanner v. Lawler, 6 Utah 2d 84, 305 P.2d 882, modified on another point, 6 Utah 2d 268, 311 P.2d 791 (1957).

—Lease.

Under a lease contract for a period of years, in which the lessee defaulted, notice by the lessor for the lessees to quit the premises was not sufficient for treble damages. Under such a lease the statutes require an alternative notice that the tenant either perform or quit before he becomes an unlawful detainer and subject to treble damages. Jacobson v. Swan, 3 Utah 2d 59, 278 P.2d 294 (1954), distinguished, Jensen v. Nielson, 26 Utah 2d 96, 485 P.2d 673 (1971).

COLLATERAL REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d Landlord and Tenant § 1115 et seq.; 50 Am. Jur. 2d Landlord and Tenant § 1205 et seq.

C.J.S. — 52A C.J.S. Landlord and Tenant § 758.

A.L.R. — Right of landlord legally entitled

to possession to dispossess tenant without legal process, 6 A.L.R.3d 177.

Grazing or pasturage agreement as violation of covenant in lease or provision of statute against assigning or subletting without lessor's consent, 71 A.L.R.3d 780.

Express or implied restriction on lessee's use of residential property for business purposes, 46 A.L.R.4th 496.

Key Numbers. — Landlord and Tenant ⇐ 290.

78-36-4. Right of tenant of agricultural lands to hold over.

In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than 60 days after the expiration of his term without any demand of possession or notice to quit by the owner, his designated agent, or his successor in estate, he shall be deemed to be held by permission of the owner, his designated agent, or his successor in estate, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during that year; and the holding over for the 60-day period shall be taken and construed as a consent on the part of the tenant to hold for another year.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-4; L. 1981, ch. 160, § 2.

COLLATERAL REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d Landlord and Tenant § 1193.

C.J.S. — 51C C.J.S. Landlord and Tenant § 136(3).

Key Numbers. — Landlord and Tenant ⇐ 114(3).

78-36-5. Remedies available to tenant against undertenant.

A tenant may take proceedings similar to those prescribed in this chapter to obtain possession of the premises let to an undertenant in case of his unlawful detention of the premises underlet to him.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-5.

COLLATERAL REFERENCES

Am. Jur. 2d. —49 Am. Jur. 2d Landlord and Tenant § 506.

C.J.S. — 51C C.J.S. Landlord and Tenant § 48(1) et seq.

Key Numbers. — Landlord and Tenant ⇐ 80(3).

78-36-6. Notice to quit — How served.

The notices required by the preceding sections may be served:

(1) by delivering a copy to the tenant personally;

(2) by sending a copy through registered or certified mail addressed to the tenant at his place of residence;

(3) if he is absent from his place of residence or from his usual place of business, by leaving a copy with a person of suitable age and discretion at

either place and mailing a copy to the tenant at the address of his place c residence or place of business; or

(4) if a person of suitable age or discretion cannot be found at the plac of residence, then by affixing a copy in a conspicuous place on the lease property. Service upon a subtenant may be made in the same manne

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-6; L. 1981, ch. 160, § 3; 1986, ch. 137, § 2; 1987, ch. 123, § 1.

Amendment Notes. — The 1986 amendment deleted the comma at the end of Subsection (3) and deleted "and also delivering a copy to a person there residing, if the person can be found, and also sending a copy through the mail addressed to the tenant at the place where the leased property is situated" at the end of the first sentence in Subsection (4).

The 1987 amendment deleted "either" and a comma following "may be served" in the intr ductory language; substituted "a person" f "some person" and "mailing a copy" for "sen ing a copy through the mail addressed" an inserted "the address of" in Subsection (3); an deleted "the place of residence of business ca not be ascertained or" preceding "a person" an substituted "at the place of residence" f "there" in the first sentence of Subsection (4

Cross-References. — Service of proces Rules 4, 5, U.R.C.P.

NOTES TO DECISIONS

Analysis

Death of landlord.

—Substitution of parties.

Notice served by agent of landlord during his lifetime did not lose its force upon landlord's death in view of C.L. 1917, § 6513 permitting substitution of personal representative for deceased, nor was executor under necessity of serving another demand for possession before bringing action, for he was entitled to carry on the litigation from point where original party left it. Boland v. Nihlros, 77 Utah 205, 293 P. 7 (1930).

Delay in bringing action.

Mere lapse of time does not operate as an abandonment of all claim and demand under the notice; nor does mere delay in bringing suit, where explained, render demand for possession of the premises of no force or effect. Boland v. Nihlros, 77 Utah 205, 293 P. 7 (1930), an action in which six years elapsed between demand for possession on commencement of action and in which there were delays in bringing suit to trial.

Improper service.

— Failure to mail.

——Leaving copy with spouse.

An action for unlawful detainer cannot b maintained against a tenant to whom no cop of the notice required by the statute wa mailed, although a copy was left with his wif Perkins v. Spencer, 121 Utah 468, 243 P.2 446 (1952).

—Failure to personally serve.

——Mail.

Assuming that compliance with this sectio can be waived by defendant tenant, enterin general appearance cannot have that effect. I was not a compliance with statute for landlor after failing in a few attempts to find tenan at home and serve them personally with notic to mail a copy of notice to quit, addressed t them at their place of residence. Carstensen v Hansen, 107 Utah 234, 152 P.2d 954 (1944 (decided under prior law).

Rules of Civil Procedure.

—Effect.

The general provisions of Rule 4, U.R.C.P., relating to service do not modify the provisions of this section, which specifically applies to service in unlawful detainer actions. Ute-Cal Land Dev. v. Intermountain Stock Exch., 628 P.2d 1278 (Utah 1981).

Strict statutory compliance.

To hold that any method of service other than that prescribed in the statute is sufficient to comply with it would be to nullify the intention of the legislature. Carstensen v. Hansen, 107 Utah 234, 152 P.2d 954 (1944).

Unlawful detainer being a summary procedure, the statute must be strictly complied with in order to enforce the obligations imposed by it. Perkins v. Spencer, 121 Utah 468, 243 P.2d 446 (1954), distinguished, Jensen v. Nielson, 26 Utah 2d 96, 485 P.2d 673 (1971).

COLLATERAL REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d Landlord and Tenant § 1213.

C.J.S. — 52A C.J.S. Landlord and Tenant § 769(1) et seq.

Key Numbers. — Landlord and Tenant ⇐ 283.

78-36-7. Necessary parties defendant.

No person other than the tenant of the premises, and subtenant if there is one in the actual occupation of the premises when the action is commenced, need be made a party defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made a party defendant; but when it appears that any of the parties served with process or appearing in the proceedings are guilty, judgment must be rendered against them. In case a person has become subtenant of the premises in controversy after the service of any notice in this chapter provided for, the fact that such notice was not served on such subtenant shall constitute no defense to the action. All persons who enter under the tenant after the commencement of the action hereunder shall be bound by the judgment the same as if they had been made parties to the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-7.

Cross-References. — Necessary joinder of parties, Rule 19, U.R.C.P.

Nonsuit, dismissal of actions, Rule 41, U.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Liability of parties.

—Intervenor.

A person not actually occupying the premises who intervenes in an action to obtain possession and for damages for unlawful detainer, and who asserts ownership and the right to possession by the occupier as his tenant, may be guilty of unlawful detainer and liable for treble damages where the court finds this intervenor's claim invalid. Tanner v. Lawler, 6 Utah 84, 305 P.2d 882, modified on another point, 6 Utah 2d 268, 311 P.2d 791 (1957).

Necessary parties.

—Agent of landlord.

Agent of landlord is not a necessary or

proper party in forcible detainer proceeding. Dunbar v. Hansen, 68 Utah 398, 250 P. 982 (1926).

—Assignor of sales contract.

It was not necessary for assignee of seller's interest in real estate sale contract to notify original purchaser of the forfeiture for default or make him a defendant in the unlawful detainer action since an action for unlawful detainer is primarily against the person in possession and it is not necessary for everyone having an interest to be made a party. Pearce v. Shurtz, 2 Utah 2d 124, 270 P.2d 442 (1954)

COLLATERAL REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d Landlord and Tenant § 1236.

C.J.S. — 52A C.J.S. Landlord and Tenant § 764.

Key Numbers. — Landlord and Tenant ⇐ 291(6).

78-36-8. Allegations permitted in complaint — Time for appearance — Service of summons.

The plaintiff in his complaint, in addition to setting forth the facts on which he seeks to recover, may set forth any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor or compensation for the occupation of the premises, or both. If the unlawful detainer charged is after default in the payment of rent, the complaint shall state the amount of rent due. The court shall indorse on the summons the number of days within which the defendant is required to appear and defend the action, which shall not be less than three or more than 20 days from the date of service. The court may authorize service by publication or mail for cause shown. Service by publication is complete one week after publication. Service by mail is complete three days after mailing. The summons shall be changed in form to conform to the time of service as ordered, and shall be served as in other cases.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-8; 1987, ch. 123 § 2.

Amendment Notes. — The 1987 amendment substituted "rent due" for "such rent" at the end of the second sentence; deleted "except when publication is necessary, in which case the court shall direct publication for a period of not less than one week" from the end of the third sentence; added the present fourth, fifth, and sixth sentences; deleted the former last sentence, which read "The complaint shall be filed within one day after service of summons if not served therewith"; and made minor phraseology and punctuation changes throughout the first, second and third sentences.

Cross-References. — General rules of pleadings, Rule 8, U.R.C.P.

Service of summons, Rules 4, 5, U.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Action to recover rent.

Plaintiff may bring action to recover rent due, and a separate action in unlawful detainer for recovery of possession and for damages. Judgment in one action will not bar action in the other proceeding, the issues in the two actions not being the same, and, therefore, not being adjudicated. Voyles v. Straka, 77 Utah 171, 292 P. 913 (1930).

Damages.

—Right to demand.

The plaintiff in his complaint may not only ask for possession of the premises, but also for damages accruing to trial. Forrester v. Cook, 77 Utah 137, 292 P. 206 (1930).

Dismissal.

—Joint motion.

Where complaint in forcible entry and detainer action stated cause of action against one defendant, joint demurrer (now motion to dismiss) by two defendants was properly overruled. Paxton v. Fisher, 86 Utah 408, 45 P.2d 903 (1935).

Necessary allegations and proof.

Plaintiff must allege and prove, not only that he has right to property's possession, but also that property is being unlawfully detained from him, after notice to quit, served as provided by law. Barnes v. Cox, 12 Utah 47, 41 P. 557 (1895).

As a rule, all that is required to be alleged by plaintiff, in action of forcible entry and detainer, is facts and circumstances constituting entry or detainer complained of, and either that he was peaceably in actual possession of premises at time of forcible entry, or, in some cases, that he was entitled to possession of premises at time of forcible detainer. Holladay Coal Co. v. Kirker, 20 Utah 192, 57 P. 882 (1899).

Plaintiff, in action of forcible entry and detainer, need not allege his estate in or title to premises, nor, with few exceptions, is he required to allege his right of possession. Holladay Coal Co. v. Kirker, 20 Utah 192, 57 P. 882 (1899).

—Date of notice to surrender.

In action of forcible entry and detainer, held that exact date on which notice to surrender premises was given was wholly immaterial, and that plaintiff was only required to aver and prove specific fact that, subsequent to time of unlawful entry, while defendants were in possession and prior to commencement of action, sufficient notice was given and that surrender of premises by defendants was refused for period of three days thereafter. Holladay Coal Co. v. Kirker, 20 Utah 192, 57 P. 882 (1899).

COLLATERAL REFERENCES

Am. Jur. 2d. — 35 Am. Jur. 2d Forcible Entry and Detainer § 38 et seq.

C.J.S. — 36A C.J.S. Forcible Entry and Detainer §§ 39, 42, 44.

Key Numbers. — Forcible Entry and Detainer ⇐ 24.

78-36-8.5. Possession bond of plaintiff — Alternative remedies.

(1) At any time between the filing of his complaint and the entry of final judgment, the plaintiff may execute and file a possession bond. The bond may be in the form of a corporate bond, a cash bond, certified funds, or a property bond executed by two persons who own real property in the state and who are not parties to the action. The court shall approve the bond in an amount that is the probable amount of costs of suit and damages which may result to the defendant if the suit has been improperly instituted. The bond shall be payable to the clerk of the court for the benefit of the defendant for all costs and damages actually adjudged against the plaintiff. The plaintiff shall notify the defendant that he has filed a possession bond. This notice shall be served in the same manner as service of summons and shall inform the defendant of all of the alternative remedies and procedures under Subsection (2).

(2) The following are alternative remedies and procedures applicable to an action if the plaintiff files a possession bond under Subsection (1):

(a) With respect to an unlawful detainer action based solely upon nonpayment of rent or utilities, the existing contract shall remain in force and the complaint shall be dismissed if the defendant, within three days of the service of the notice of the possession bond, pays accrued rent, utility charges, any late fee, and other costs, including attorney's fees, as provided in the rental agreement.

(b) The defendant may remain in possession if he executes and files a counter bond in the form of a corporate bond, a cash bond, certified funds, or a property bond executed by two persons who own real property in the state and who are not parties to the action. The form of the bond is at the defendant's option. The bond shall be payable to the clerk of the court. The defendant shall file the bond prior to the expiration of three days from the date he is served with notice of the filing of plaintiff's possession bond. The court shall approve the bond in an amount that is the probable amount of costs of suit and actual damages that may result to the plaintiff if the defendant has improperly withheld possession. The court shall consider prepaid rent to the owner as a portion of the defendant's total bond.

(c) The defendant, upon demand, shall be granted a hearing to be held prior to the expiration of three days from the date the defendant is served with notice of the filing of plaintiff's possession bond.

(3) If the defendant does not elect and comply with a remedy under Subsection (2) within the required time, the plaintiff, upon ex parte motion, shall be granted an order of restitution. The constable of the precinct or the sheriff of the county where the property is situated shall return possession of the property to the plaintiff promptly.

(4) If the defendant demands a hearing under Subsection (2)(c), and if the court rules after the hearing that the plaintiff is entitled to possession of the property, the constable or sheriff shall promptly return possession of the property to the plaintiff. If at the hearing the court allows the defendant to remain in possession and further issues remain to be adjudicated between the parties the court shall require the defendant to post a bond as required in Subsection (2)(b). If at the hearing the court rules that all issues between the parties can be adjudicated without further court proceedings, the court shall, upon adjudicating those issues, enter judgment on the merits.

History: C. 1953, 78-36-8.5, enacted by L. 1981, ch. 160, § 4; L. 1983, ch. 209, § 1; 1987, ch. 123, § 3.

Amendment Notes. — The 1987 amendment rewrote this section to the extent that a detailed analysis is impracticable.

Cross-References. — Contracts of suretyship, § 31A-22-101 et seq.

County sheriff, Chapter 22 of Title 17.

Service of summons, Rules 4, 5, U.R.C.P.

78-36-9. Proof required by plaintiff — Defense.

On the trial of any proceeding for any forcible entry or forcible detainer the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, had been in the quiet possession thereof for the space of one whole year continuously next

before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-9.

Cross-References. — Limitation of actions, real property, § 78-12-2 et seq.

NOTES TO DECISIONS

Analysis

Defenses and counterclaims.

—Tenant.

——Counterclaim.

Defendant in forcible detainer action cannot file counterclaim, and is limited to defenses predicated on nonexistence of relationship of landlord and tenant between parties, nonexistence of valid lease or contract to pay rent, or that no rent is due; but he may bring suit in court of equity to determine rights and enjoin forcible detainer proceeding pending such determination. Dunbar v. Hansen, 68 Utah 398, 250 P. 982 (1926) (decided under prior law).

Under Rule 13, U.R.C.P., counterclaim alleging misrepresentation and fraud concerning the contract of purchase of the involved property could be asserted by defendants in an unlawful detainer action. White v. District Court, 232 P.2d 785 (Utah 1951).

—Tender of rent.

A tender by tenant of rent, if insufficient in amount, is no tender at all, and the fact that subsequent tenders were, in the aggregate, equivalent to the rent due, will not make the tender sufficient and valid. Commercial Block Realty Co. v. Merchants' Protective Ass'n, 71 Utah 505, 267 P. 1009 (1928).

Possession.

—Constructive.

——Right of entry.

Under an allegation of possession plaintiff can show constructive possession, in that it is an association of qualified persons in possession of coal mines upon which sufficient money has been expended to give a preference right of entry to 640 acres of surrounding land under the law. Holladay Coal Co. v. Kirker, 20 Utah 192, 57 P. 882 (1899).

—Public land.

Possession of public land is prima facie evidence of right to possession as against a mere intruder or trespasser. Wilson v. Triumph Consol. Mining Co., 19 Utah 66, 56 P. 300, 75 Am. St. R. 718 (1899).

Security interest in personal property.

—Partial possession of premises.

Plaintiff's security interest in bar equipment did not constitute partial possession of premises, and plaintiff could not maintain action for forcible entry or for wrongful eviction. Wangsgard v. Fitzpatrick, 542 P.2d 194 (Utah 1975).

Title adjudication.

In action for possession and damages for unlawful detention of farm lands, trial court erred in rendering judgment and decree in defendant's favor quieting title to premises, since question of title is not ordinarily involved in such actions. Welling v. Abbott, 52 Utah 240, 173 P. 245 (1918).

It is not proper to quiet title to real estate in action of forcible entry or in action for unlaw-

ful detainer. Thomson v. Reynolds, 53 Utah 437, 174 P. 164 (1918).

—Color of title.

——State lease.

In suit for forcible entry, it was proper to introduce lease from State Land Board (now Board of State Lands) to plaintiffs to show that they held under color of title and that it was necessary for defendants to resort to statute to obtain possession. Paxton v. Deardon, 94 Utah 149, 76 P.2d 561 (1938).

—Deed.

——Fraud and duress.

It is not intention of forcible entry and detainer proceedings to try title or equities between parties, so that, in such an action, defendant was not permitted to show that deed executed by him to plaintiff was obtained from him by means of fraud and duress since such defense would constitute an attempt to dispute landlord's title. Williams v. Nelson, 65 Utah 304, 237 P. 217 (1925).

—Tax title.

Affirmative defense and counterclaim setting up tax title and seeking to have property in question quieted in defendant, held not to lie in forcible detainer action. Woodbury v. Bunker, 98 Utah 216, 98 P.2d 948 (1940).

COLLATERAL REFERENCES

Am. Jur. 2d. — 35 Am. Jur. 2d Forcible Entry and Detainer §§ 42 to 44.

C.J.S. — 36A C.J.S. Forcible Entry and Detainer § 53 et seq.

Key Numbers. — Forcible Entry and Detainer ⇐ 29.

78-36-10. Judgment for restitution, damages, and rent — Immediate enforcement — Treble damages.

(1) A judgment may be entered upon the merits or upon default. A judgment entered in favor of the plaintiff shall include an order for the restitution of the premises. If the proceeding is for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease or agreement.

(2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:

(a) forcible entry;

(b) forcible or unlawful detainer;

(c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial; and

(d) the amount of rent due, if the alleged unlawful detainer is after default in the payment of rent.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(c), and for reasonable attorney's fees, if they are provided for in the lease or agreement.

(4) If the proceeding is for unlawful detainer after default in the payment of the rent, execution upon the judgment shall be issued immediately after the entry of the judgment. In all cases, the judgment may be issued and enforced immediately.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-10; L. 1981, ch. 160, § 5; 1987, ch. 123, § 4.

Amendment Notes. — The 1987 amendment divided the section into subsections; divided the former first sentence into the present second and third sentences of Subsection (1) by deleting "and" and making a related punctuation change; added the present first sentence of Subsection (1); rewrote the second sentence of

Subsection (1); inserted "or upon the defendant's default", substituted "resulting" for "occasioned" and "from any of the following" for "by any" and made punctuation changes in Subsection (2); deleted "or by any" and made a punctuation change in Subsection (2)(a); deleted "and any amount found due the plaintiff by reason of" and made a punctuation change in Subsection (2)(b); substituted "during the defendant's tenancy, if waste is" for "by the defendant during the tenancy," and "at trial; and" for "on the trial, and find" in Subsection (2)(c); deleted "any" preceding "rent due" and "and" from the end, and made a punctuation change in Subsection (1)(d); substituted "entered" for "rendered", a comma for "and" following "for the rent", and the language beginning "assessed under Subsections (2)(a)" for "thus assessed" and deleted "guilty of the forcible entry, or forcible or unlawful detainer," following "against the defendant" in Subsection (3)"; substituted "If" for "When" at the beginning of Subsection (4); deleted "an" preceding "unlawful detainer" and "execution upon the judgment shall be issued immediately after the entry of the judgement" plus a comma following "payment of the rent" in the first sentence of Subsection (4); and inserted "issued and" and made a punctuation change in the second sentence of Subsection (4).

Cross-References. — Fees of constable, § 21-3-3.

Fees of sheriff, § 21-2-4.

NOTES TO DECISIONS

ANALYSIS

Damages.

—Loss of value.

The loss of the value of the use and occupation of the premises, during the period when the premises were unlawfully withheld from plaintiff, is "damage" suffered. Forrester v. Cook, 77 Utah 137, 292 P. 206 (1930).

—Nominal damages.

Where husband and wife occupy the premises, and the notice required by statute is served only on the wife so that an action for unlawful detainer can be maintained merely against her, the successful plaintiff is entitled to nominal damages only, since, even if the wife had moved, the plaintiff would have had no right to possession of the premises as against the husband, and he thus suffered no actual damage by reason of the fact that the wife remained there. Perkins v. Spencer, 121 Utah 468, 243 P.2d 446 (1952), distinguished, Carlson v. Hamilton, 8 Utah 2d 272, 332 P.2d 989 (1958).

—Rent and profits.

Damages recoverable must be the natural and proximate consequences of the unlawful detainer and nothing more. Rents and profits, or rental value of the premises, during detention are included in damages. Rental value or reasonable value of the use and occupation of the premises becomes an element of damages for retaining possession. This is not rent, it is damages. Forrester v. Cook, 77 Utah 137, 292 P. 206 (1930).

This section was not designed to provide a summary remedy for the recovery of rent. The language thereof that "judgment shall be rendered ...for the rent," etc., is applicable only when rent is claimed in the complaint for it would be improper in any case to award a judgment for what is not so claimed. Voyles v. Straka, 77 Utah 171, 292 P. 913 (1930).

—Treble damages.

After the termination of the tenancy by notice to quit, the person in unlawful possession is not owing rent under contract, but must respond in damages. This is not rent, but "dam-

ages," and, therefore, may be trebled. Forrester v. Cook, 77 Utah 137, 292 P. 206 (1930).

Where all issues were decided in plaintiff's favor, trial court's refusal to treble damages, awarded plaintiff by jury, was error. Eccles v. Union Pac. Coal Co., 15 Utah 14, 48 P. 148 (1897).

Plaintiff's failure to comply with the provisions of § 78-36-8 converted his action for unlawful detainer into one at common law for ejectment and defeated his right under this section to treble damages. Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317. (Utah 1976).

A person not actually occupying the premises who intervenes in an action to obtain possession and for damages for unlawful detainer, and who asserts ownership and the right to possession by the occupier as his tenant, may be guilty of unlawful detainer and liable for treble damages where the court finds this intervener's claim invalid. Tanner v. Lawler, 6 Utah 2d 84, 305 P.2d 882, modified on another point, 6 Utah 2d 268, 311 P.2d 791 (1957).

Where tenant merely remains over upon termination of lease and increase in rent, but does not contest landlord's right to terminate lease or his right to possession, tenant is conclusively presumed to have acquiesced in increased rental and landlord is not entitled to treble damages. Belnap v. Fox, 69 Utah 15, 251 P. 1073 (1926).

The provision for treble damages is highly penal, and, therefore, subject to strict construction. It will be observed that only damages are to be trebled, not rents and waste. But the language is mandatory making it compulsory upon the court to render and enter judgment for three times the amount of the damages assessed, after a finding of damages by the jury. And rents which may not be trebled are such as accrue before termination of the tenancy. Forrester v. Cook, 77 Utah 137, 292 P. 206 (1930).

Execution upon judgment.

—Failure to pay rent.

When landlord prevails in unlawful detainer action because of tenant's failure to pay rent under a lease which has not expired, he cannot have any judgment unless he shows that there is rent due and the amount thereof; when that is done, the tenant has five days in which to pay the judgment and costs, and then he will be restored to the premises under his lease. The landlord cannot prevent the tenant from paying the judgment and regaining his rights under the unexpired lease by the device of failing to have the amount of rent due included in the judgment. In such a case unless the judgment determines the amount of rent due, it is defective, and the restitution part cannot be lawfully enforced. Monter v. Kratzers Specialty Bread Co., 29 Utah 2d 18, 504 P.2d 40 (1972).

Grace period.

—Attempt to use.

Where evicted lessees asserted that they were not afforded the five-day post-judgment grace period to pay the delinquency and preserve the lease, the issue was moot since the defendants did not make an attempt to take advantage of the grace period. Allred v. Smith, 674 P.2d 99 (Utah 1983) (decided under facts existing prior to 1981 amendment).

Real estate sale contracts.

—Liquidated damages.

By common practice in Utah, an action in unlawful detainer may be brought against a vendee of realty whose payments are far in arrears, after sufficient demands for payment have been made and subsequent notice to quit has been given by vendor; where a vendor does cancel the contract for sale and bring such an action, vendee may be required, if the contract so provides, to forfeit as liquidated damages all money theretofore paid to the vendor along with all improvements placed on the land by the vendee, unless such forfeiture would be unconscionable. Weyher v. Peterson, 16 Utah 2d 278, 399 P.2d 438 (1965).

Separate action for rent.

Judgment in unlawful detainer for restitution of the premises and for treble damages does not bar action to recover rent due, rent not being claimed or adjudged in the possessory action, because the right to recover possession by summary remedy, and the claim for rent, do not constitute one entire and indivisible cause of action. Voyles v. Straka, 77 Utah 171, 292 P. 913 (1930).

Statutory remedy.

—Tort liability for noncompliance.

A landlord who is entitled to possession must, on the refusal of the tenant to surrender the premises, resort to the remedy given by law to secure it. A violation of that duty set by the statute gives rise to an action for damages, not in an action under the forcible entry and detainer statute but as a separate tort. King v. Firm, 3 Utah 2d 419, 285 P.2d 1114 (1955).

COLLATERAL REFERENCES

Utah Law Review. — Forfeiture Under Installment Land Contracts in Utah, 1981 Utah L. Rev. 803, 807.

Am. Jur. 2d. — 35 Am. Jur. 2d Forcible Entry and Detainer § 53.

C.J.S. — 36A C.J.S. Forcible Entry and Detainer § 68 et seq.

A.L.R. — Landlord and tenant: respective rights in excess rent when landlord relets at higher rent during lessee's term, 50 A.L.R.4th 403.

Key Numbers. — Forcible Entry and Detainer ⇐ 38.

78-36-11. Time for appeal.

Either party may, within ten days, appeal from the judgment rendered.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-11.

Cross-References. — Stay of execution pending appeal, Rule 62, U.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Applicability of section.

—Held applicable.

Fact that demurrer to complaint required trial court to construe written instrument to determine whether plaintiff was entitled to any relief did not change action from one of unlawful detainer, so that it was necessary to take appeal within ten days as provided by this section. Madsen v. Chournos, 102 Utah 247, 129 P.2d 986 (1942).

Appeal from dismissal of unlawful detainer action for failure to amend complaint within time allowed was governed by this section. Madsen v. Chournos, 102 Utah 247, 129 P.2d 986 (1942).

Time for taking appeal in forcible entry and detainer suit was governed by this section, which is valid, and general provision providing for appeals was not applicable. Hunsaker v. Harris, 37 Utah 226, 109 P. 1 (1910).

A party had ten days, as provided by this section, and not one month, as provided by former Rule 73(a), U.R.C.P., in which to appeal from a judgment for unlawful detainer. Ute-Cal Land Dev. v. Intermountain Stock Exch., 628 P.2d 1278 (Utah 1981).

Fact that judgment rested on construction of whether lease was terminated upon sale of property did not change action from one in unlawful detainer, so that it was necessary to take appeal within ten days as provided by this section. Brandley v. Lewis, 97 Utah 217, 92 P.2d 338 (1939).

—Held inapplicable.

Where a complaint contained two causes of action asking for treble damages for forcible entry and detainer, one cause of action for a temporary restraining order and temporary injunction, and a fourth cause of action for damages for breach of a lease; the hybrid nature of the plaintiff's action prevented this statute from controlling the time limitation for filing an appeal. Fashions Four v. Fashion Place Assocs., 681 P.2d 830 (Utah 1984).

Where plaintiff in forcible detainer action was held liable on counterclaim, time for appeal was not governed by ten-day limitation of this section, but by general six-month statute, ten-day limit of this section being applicable only to judgments in forcible detainer. Dunbar v. Hansen, 68 Utah 398, 250 P. 982 (1926).

Ten-day period for appeal provided in forcible entry and detainer cases was inapplicable to appeal from money judgment entered for landlord after recovery of possession, six-month period of general statute being applicable. Belnap v. Fox, 69 Utah 15, 251 P. 1073 (1926).

Where, in first count, plaintiff sought to recover possession of real estate, and in second count sought to quiet title to certain land adjoining property involved in first cause of action, and it appeared that case was tried as

action in equity, plaintiff could not defeat appeal by contending that action was one of forcible detainer. Ottenheimer v. Mountain States Supply Co., 56 Utah 190, 188 P. 1117 (1920).

Failure to comply.

—Loss of jurisdiction.

Where judgment was entered against appellants on July 1 and they did not file notice of appeal until July 15, appeal was not timely filed and Supreme Court was without jurisdiction to hear it. Coombs v. Johnson, 26 Utah 2d 8, 484 P.2d 155 (1971).

COLLATERAL REFERENCES

Am. Jur. 2d. — 35 Am. Jur. 2d Forcible Entry and Detainer § 55.

C.J.S. — 36A C.J.S. Forcible Entry and Detainer § 90.

Key Numbers. — Forcible Entry and Detainer ⇐ 43.

78-36-12. Exclusion of tenant without judicial process prohibited — Abandoned premises excepted.

It is unlawful for an owner to willfully exclude a tenant from the tenant's premises in any manner except by judicial process, provided, an owner or his agent shall not be prevented from removing the contents of the leased premises under Subsection 78-36-12.6(2) and retaking the premises and attempting to rent them at a fair rental value when the tenant has abandoned the premises.

History: C. 1953, 78-36-12, enacted by L. 1981, ch. 160, § 6.

COLLATERAL REFERENCES

A.L.R. Landlord and tenant: respective rights in excess rent when landlord relets at higher rent during lessee's term, 50 A.L.R.4th 403.

78-36-12.3. Definitions.

(1) "Willful exclusion" means preventing the tenant from entering into the premises with intent to deprive the tenant of such entry.

(2) "Owner" means the actual owner of the premises and shall also have the same meaning as landlord under common law and the statutes of this state.

(3) "Abandonment" is presumed in either of the following situations:

(a) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent within 15 days after the due date, and there is no reasonable evidence other than the presence of the tenant's personal property that the tenant is occupying the premises; or

(b) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent when due and the tenant's personal property has been removed from the dwelling unit and there is no reasonable evidence that the tenant is occupying the premises.

History: C. 1953, 78-36-12.3, enacted by L. 1981, ch. 160, § 7.

78-36-12.6. Abandoned premises — Retaking and rerenting by owner — Liability of tenant — Personal property of tenant left on premises.

(1) In the event of abandonment the owner may retake the premises and attempt to rent them at a fair rental value and the tenant who abandoned the premises shall be liable:

(a) for the entire rent due for the remainder of the term; or

(b) for rent accrued during the period necessary to re-rent the premises at a fair rental value, plus the difference between the fair rental value and the rent agreed to in the prior rental agreement, plus a reasonable commission for the renting of the premises and the costs, if any, necessary to restore the rental unit to its condition when rented by the tenant less normal wear and tear. This subsection applies, if less than Subsection (a) notwithstanding that the owner did not re-rent the premises.

(2) If the tenant has abandoned the premises and has left personal property on the premises, the owner is entitled to remove the property from the dwelling, store it for the tenant, and recover actual moving and storage costs from the tenant. The owner shall make reasonable efforts to notify the tenant of the location of the personal property; however, if the property has been in storage for over 30 days and the tenant has made no reasonable effort to recover it, the owner may sell the property and apply the proceeds toward any amount the tenant owes. Any money left over from the sale of the property shall be handled as specified in § 78-44-18. Nothing contained in this act shall be in derogation of or alter the owner's rights under Chapter 3, Title 38.

History: C. 1953, 78-36-12.6, enacted by L. 1981, ch. 160, § 8; 1986, ch. 194, § 20.

Amendment Notes. — The 1986 amendment moved the Subsection (1) designation to the beginning of the section and made minor word and stylistic changes; and in Subsection (2) substituted "§ 78-44-18" for "§ 78-44-11" and made minor word and stylistic changes.

Meaning of "this act". — The term "this act," referred to in Subsection (2), means Laws 1981, Chapter 160, which appears as §§ 78-36-3, 78-36-4, 78-36-6, 78-36-8.5, 78-36-10, 78-36-12 and 78-36-12.3.

Cross-References. — Residential renters' deposits, Chapter 17 of Title 57.

COLLATERAL REFERENCES

A.L.R. — Landlord and tenant: respective rights in excess rent when landlord relets at higher rent during lessee's term, 50 A.L.R.4th 403.

Rule 6. Time.

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b) and 73(a) and (g), except to the extent and under the conditions stated in them.

(c) **Unaffected by expiration of term.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) **For motions — Affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Compiler's Notes. — This rule is substantially similar to Rule 6, F R C P

Rule 73, cited near the end of Subdivision (b), was repealed upon adoption of the Rules of the Appellate Procedure

Cross-References. — Amendment to pleadings to conform to evidence, time of motion for, Rule 15(b)

Commencement of action, time of service, Rule 4(b)

Corporation or association, mailing of process to, Rule 4(e)(5).

Depositions, objections to errors and irregularities, Rule 32(d).

Discharge of attachment or release of property, Rule 64C(f)

Documents for state or subdivision, filing date on weekend or holiday, § 63-37-3

Election laws, Sundays included in computation of time, § 20-1-12

Failure of term or vacancy in office of judge, proceeding not affected, § 78-7-21

Jury venire, service by mail, § 78-46-13

Advisory Committee Note. — Rule 4(b) is added to the list of those rules that the appellate court may not suspend. The former list of rules that the appellate court could not suspend concerned procedures and time limits that confer jurisdiction upon the court. Under Rule 4(b), the post-judgment motions listed must be filed in a timely manner in the trial court. If the motions are not filed in a timely manner, the appellant may not take advantage of Rule 4(b) that allows 30 days from the disposition of the motion to file the appeal. Both appellate courts treat the failure to file post-judgment motions in a timely manner as a jurisdictional defect. Burgers v. Meredith, 652 P.2d 1320 (Utah 1982).

NOTES TO DECISIONS

Timely filing.

When a motion for summary disposition was clearly meritorious, it would support a suspension of the time limitation contained in Rule 10, Utah R. App. P. Bailey v. Adams, 798 P.2d 1142 (Utah Ct. App. 1990).

TITLE II.

APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS.

Rule 3. Appeal as of right: how taken.

(a) **Filing appeal from final orders and judgments.** An appeal may be taken from a district, juvenile, or circuit court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) **Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) **Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address.

(f) **Filing and docketing fees in civil appeals.** At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court such filing fees as are established by law, and also the fee for docketing the appeal in the appellate court. The clerk of the trial court shall not accept a notice of appeal unless the filing and docketing fees are paid.

(g) **Docketing of appeal.** Upon the filing of the notice of appeal and payment of the required fees, the clerk of the trial court shall immediately transmit one copy of the notice of appeal, showing the date of its filing, together with the docketing fee, to the clerk of the appellate court. Upon receipt of the copy of the notice of appeal and the docketing fee, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

Advisory Committee Note. — The designation of parties is changed to conform to the designation of parties in the federal appellate courts.

The rule is amended to make clear that the mere designation of an appeal as a "cross-appeal" does not eliminate liability for payment of the filing and docketing fees. But for the order of filing, the cross-appellant would have been the appellant and so should be required to pay the established fees.

Cross-References. — Circuit courts, appeals from, § 78-4-11.

Justice courts, appeals from, § 78-5-120.

Juvenile courts, appeals from § 78-3a-51.

NOTES TO DECISIONS

ANALYSIS

Absence of record.
Attorney fees.
Denial of intervention.
Dismissal by trial court.
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Filing of notice.
Final order or judgment.
Judgment nunc pro tunc.
Motion to strike.
New trial.
Partial judgment.
Postjudgment orders.
Purpose of notice.
Review in equity cases.
Summary judgment.
Unsigned minute entry.

Compiler's Notes. — All of the following annotations are taken from cases decided under former Rule 3, R. Utah S. Ct.

Absence of record.

There was nothing for the court to review where the alleged error was not made part of the record. Powers v. Gene's Bldg. Materials, Inc., 567 P.2d 174 (Utah 1977).

Attorney fees.

Where plaintiff was entitled to attorney fees by law, he was entitled to attorney fees incurred on appeal in defending his judgment without the necessity of having to file a cross appeal. Coates v. American Economy Ins. Co., 627 P.2d 92 (Utah 1981); Wallis v. Thomas, 632 P.2d 39 (Utah 1981).

Denial of intervention.

Order denying with prejudice an application for intervention was appealable. Tracy v. University of Utah Hosp., 619 P.2d 340 (Utah 1980).

Dismissal by trial court.

Both an order to dismiss with prejudice, on the merits of the issues under Rule 41(b), U.R.C.P., and an order of dismissal without prejudice under Rule 41(a)(1), U.R.C.P., are final adjudications of the issues and the time for appeal under this rule begins to run with the entry of the order. Steiner v. State, 27 Utah 2d 284, 495 P.2d 809 (1972).

Denial of defendant's motion to dismiss was not a final judgment subject to appeal. Little v. Mitchell, 604 P.2d 918 (Utah 1979).

Dismissal without prejudice of plaintiff's action was appealable where the trial court's ruling went to the legal merits of any cause that plaintiff may have framed. Bowles v. State ex

rel. Department of Transp., 652 P.2d 1345 (Utah 1982).

Filing fees.

It is not the clerk's duty to file notice of appeal until he has received the appropriate filing fee. McLain v. Conrad, 19 Utah 2d 346, 431 P.2d 571 (1967).

Where the notice of appeal was left at the clerk's office prior to the expiration of the time for filing but the filing fee was not paid until after expiration of the time for filing and the clerk did not file the notice until the fee was paid, the notice was untimely filed and the court lacked jurisdiction to hear the appeal. McLain v. Conrad, 19 Utah 2d 346, 431 P.2d 571 (1967).

Filing of notice.

Where the deadline for filing an appeal expired on Saturday, the notice of appeal which was filed on the following Monday was within the time limit, in view of the provisions of § 17-16-9. Transwestern Gen. Agency v. Morgan, 526 P.2d 1186 (Utah 1974).

Without notice of appeal being given, the Supreme Court is without jurisdiction to hear the matter. Yost v. State, 640 P.2d 1044 (Utah 1981).

The Supreme Court cannot take jurisdiction over an appeal which is not timely brought before it; and an untimely appeal will be dismissed for lack of jurisdiction. Burgers v. Maiben, 652 P.2d 1320 (Utah 1982); Bowen v. Riverton City, 656 P.2d 434 (Utah 1982); Nelson v. Stoker, 669 P.2d 390 (Utah 1983).

Mailing a notice of appeal to the clerk of the court does not constitute a "filing" of the notice of appeal under this rule. Isaacson v. Dorius, 669 P.2d 849 (Utah 1983).

Final order or judgment.

An oral finding of contempt of court and sentence of 15 days in the county jail, with 10 days suspended, was not a final judgment from which an appeal could have been taken. Hinkins v. Santi, 25 Utah 2d 324, 481 P.2d 53 (1971).

In the case of a divorce decree which did not, by its terms, become a final judgment until three months after it was entered, appeal had nonetheless to be taken within one month of the decree, which was the last proceeding necessary before the judgment became final. Kessimakis v. Kessimakis, 546 P.2d 888 (Utah 1976).

A judgment is final when it ends the controversy between the parties litigant. Salt Lake City Corp. v. Layton, 600 P.2d 538 (Utah 1979).

Order finding person in contempt was an appealable order. Salzetti v. Backman, 638 P.2d 543 (Utah 1981).

District court orders requiring party to convey property in accordance with divorce decree were final orders and thus appealable where the effect of such orders was to determine substantial rights in the property and to terminate finally the litigation surrounding it. Cahoon v. Cahoon, 641 P.2d 140 (Utah 1982).

Judgment nunc pro tunc.

A judgment nunc pro tunc has no effect on the time for appeal from that judgment and cannot be used to reduce the time, or defeat the right, to take an appeal. Utah State Bldg. Bd. v. Walsh Plumbing Co., 16 Utah 2d 249, 399 P.2d 141 (1965).

Where judgment was entered on April 2 but the judgment recited that it was entered nunc pro tunc as of Februaary 24, this latter recital had no effect upon the time for appeal and appeal could be taken by filing notice within the required time from April 2. Utah State Bldg. Bd. v. Walsh Plumbing Co., 16 Utah 2d 249, 399 P.2d 141 (1965).

Motion to strike.

Order granting plaintiff's motion to strike defendant's pleadings is not a final order or judgment, and is not appealable. Nielsen v. Nielsen, 529 P.2d 803 (Utah 1974).

Where defendant petitioned court for modification of a divorce decree and alternatively alledged in the petition that the decree should be vacated and set aside, the granting of defendant's motion for modification fully satisfied his claim and his alternative claim became moot, so that the court's granting of a motion to strike the motion to vacate and set aside was meaningless and no appeal would lie therefrom Peay v. Peay, 607 P.2d 841 (Utah 1980).

New trial.

An order granting a new trial is not a final judgment; it only sets aside the verdict and places the parties in the same position as if there had been no previous trial. Haslam v. Paulsen, 15 Utah 2d 185, 389 P.2d 736 (1964).

Order denying a motion for a new trial was not appealable. Habbeshaw v. Habbeshaw, 17 Utah 2d 295, 409 P.2d 972 (1966).

Partial judgment.

Where the real issue before the court was whether mountain ground belonged to decedent's estate or to his widow and the decree decided the issue against the widow, the fact that the court retained, jurisdiction to adjudicate further matters did not leave open for reconsideration the question as to who owned the property, and the decree entered was final and appealable and became conclusive in the absence of a timely appeal. In re Voorhees' Estate, 12 Utah 2d 361, 366 P.2d 977 (1961).

Where plaintiff's complaint contained eight causes of action, court's judgment on merits as to one cause with reservation of jurisdiction and judgement as to other causes was not a final judgment from which an appel could be taken. J.B.& R.E. Walker, Inc. v. Thayn, 17 Utah 2d 120, 405 P.2d 342 (1965).

Where court granted one defendant's motion to dismiss with prejudice and entered default judgment in favor of that defendant on his counterclaim, but action against other defendants and one defendant's counterclaim remained alive, court's order was not final and an appeal from it would be dismissed. Kennedy v. New Era Indus., Inc., 600 P.2d 534 (Utah 1979).

A judgment which disposes of fewer than all of the causes of action alleged in the plaintiff's complaint is not a final judgment from which an appeal may be taken. Salt Lake City Corp. v. Layton, 600 P.2d 538 (Utah 1979).

A partial summary judgment is not generally a final judgment and hence it is not appealable under the limitations prescribed by this rule. South Shores Concession, Inc. v. State, 600 P.2d 550 (Utah 1979).

District court order setting aside certain provisions in a default decree of divorce and providing for a further hearing on the matter was not a final ruling from which an appeal could be taken. Pearson v. Pearson, 641 P.2d 103 (Utah 1982).

Postjudgment orders.

An order vacating a judgment is not a final order from which an appeal can be taken pursuant to this rule. Van Wagenen v. Walker, 597 P.2d 1327 (Utah 1979).

The final judgment rule does not preclude review of postjudgment orders; such orders were independently subject to the test of finality, according to their own substance and effect. Cahoon v. Cahoon, 641 P.2d 140 (Utah 1982).

Purpose of notice.

The object of a notice of appeal is to advise the opposite party that an appeal has been taken from a specific judgment in a particular case. Nunley v. Stan Katz Real Estate, Inc., 15 Utah 2d 126, 388 P.2d 798 (1964).

Review in equity cases.

In the appeal of an equity case, the Supreme Court may weigh the facts as well as review the law, but will reverse on the facts only when the evidence clearly preponderates against the findings of the trial court. Crimmins v. Simonds, 636 P.2d 478 (Utah 1981).

In reviewing trial court's findings of fact in equity cases, the Supreme Court would give due deference to the trial court's decision and reverse only when the evidence clearly preponderated against the trial court's findings. Jensen v. Brown, 639 P.2d 150 (Utah 1981).

Summary judgment.

Order setting aside summary judgment was not final judgment from which aggrieved person might appeal as matter of right. Jensen v. Nielsen, 22 Utah 2d 23, 447 P.2d 906 (1968).

Order denying a motion for summary judgment was not a final order and was not appealable. Denison v. Crown Toyota Motors, Inc., 571 P.2d 1359 (Utah 1977).

A summary judgment in favor of one defendant alone does not constitute a final order of judgment where the action against the remaining defendant remains alive. Neider v. State Dep't of Transp., 665 P.2d 1306 (Utah 1983).

Unsigned minute entry.

An unsigned minute entry did not constitute an entry of judgment, nor was it a final judgment for purposes of appeal. Wilson v. Manning, 645 P.2d 655 (Utah 1982); Utah State Tax Comm'n v. Erekson, 714 P.2d 1151 (Utah 1986); Sather v. Gross, 727 P.2d 212 (Utah 1986); Ahlstrom v. Anderson, 728 P.2d 979 (Utah 1986).

An unsigned minute entry does not constitute a final order for purposes of appeal. State v. Crowley, 737 P.2d 198 (Utah 1987).

COLLATERAL REFERENCES

A.L.R. — Appealability of order suspending imposition or execution of sentence, 51 A.L.R.4th 939.

Rule 4. Appeal as of right: when taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3

shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

NOTES TO DECISIONS

ANALYSIS

Attorney fees.

No cross-appeal is necessary where plaintiffs solely sought attorney's fees incurred in defending their judgment on appeal. Wallis v. Thomas, 632 P.2d 39 (Utah 1981).

Cross-appeal.

Subdivision (d) requires that a notice of cross-appeal be timely filed. Absent a cross-appeal, a respondent may not attack the judgment of the court below. Henretty v. Manti City Corp., 791 P.2d 506 (Utah 1990) (decided under former R. Utah S. Ct. 4).

Extension of time to appeal.

Neither Rule 6(b), U.R.C.P., granting the court power to extend a time limit where a failure to act in time is due to excusable neglect generally, nor Rule 60(b)(1), U.R.C.P., authorizing the court to relieve from final judgment for inadvertence or excusable neglect, applies where a notice of appeal has not been timely filed. Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843 (1970).

A party could not extend the time for filing an appeal simply by filing a "Motion for Reconsideration of Order Striking Petition and Motion for Relief from Final Judgment." Peay v. Peay, 607 P.2d 841 (Utah 1980).

When the question of "excusable neglect" arises in a jurisdictional context, as opposed to a nonjurisdictional context, the standard contemplated thereby is a strict one; it is not meant to cover the usual excuse that the lawyer is too busy, but is to cover emergency situations only. Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952 (Utah 1984).

Filing of notice.

The mailing of a notice of appeal was not equivalent to a filing of notice of appeal. Isaacson v. Dorius, 669 P.2d 849 (Utah 1983).

Filing with county clerk.

Filing with the county clerk was not a timely filing with the juvenile court, where there was no indication when the clerk transmitted a copy of the notice of appeal to the juvenile court, and the original was returned to appellant's counsel. State In re M.S., 781 P.2d 1287 (Utah Ct. App. 1989).

Final order or judgment.

Where the trial court signed two different judgments but neither party served his prepared judgment on the other party before submitting it to the court, the filing of either judgment would be erroneous, and an appeal taken from either is premature because the judgments are not properly "final." Larsen v. Larsen, 674 P.2d 116 (Utah 1983).

Juvenile court's order for temporary confinement in a youth facility for observation and assessment prior to a final disposition was not a final order, for purposes of appeal, because it did not finally dispose of all issues, including the rights of the juvenile and/or his mother's rights as parental custodian. In re T.D.C., 748 P.2d 201 (Utah Ct. App.), cert. denied, 765 P.2d 1278 (Utah 1988).

An unsigned minute entry is not a final judgment for purposes of appeal. A judgment, tolled by a timely post-judgment motion, starts to run on the date when the trial court enters its first signed order denying the motion. Gallardo v. Bolinder, 800 P.2d 816 (Utah 1990).

Post-judgment motions.

Where a post-judgment motion was timely filed under Rule 59(a)(6), U.R.C.P., to upset the judgment, and notices of appeal from the judgment were filed after the motion was made, but before the disposition of the motion, the motion rendered the notices of appeal ineffective, and notice of appeal had to be filed within the required time from the date of the entry that disposed of the motion. U-M Invs. v. Ray, 658 P.2d 1186 (Utah 1982).

The time for appeal of an order confirming an arbitrator's award runs from the order denying appellant's timely motion to alter or amend that judgment under Rule 59, U.R.C.P. Robinson & Wells v. Warren, 669 P.2d 844 (Utah 1983).

The Supreme Court may not consider an appeal from the dismissal of a complaint for unpaid overtime compensation until the trial court has had an opportunity to review the order in question by ruling on all pending post-judgment motions. Bailey v. Sound Lab, Inc., 694 P.2d 1043 (Utah 1984).

A notice of appeal filed before the disposition of a proper post-judgment motion is ineffective to confer jurisdiction upon the Supreme Court. Transamerica Cash Reserve, Inc. v. Hafen, 723 P.2d 425 (Utah 1986).

Filing a post-judgment motion of a type listed in this rule suspends the finality of the judgment, and a notice of appeal filed prior to disposition of such a motion by entry of a signed order is not effective to confer jurisdiction on an appellant court. Anderson v. Schwendiman, 764 P.2d 999 (Utah Ct. App. 1988).

Premature notice.

A notice of appeal filed after a ruling on a motion to alter or amend a judgment has been announced, but before the entry of an order disposing of the motion, is premature and does not confer jurisdiction on the court. Anderson v. Schwendiman, 764 P.2d 999 (Utah Ct. App. 1988).

Reconsideration of order.

The Court of Appeals declined to reconsider and overrule its prior denial of the state's request to dismiss an appeal as untimely. State ex rel. C.Y. v. Yates, 765 P.2d 251 (Utah Ct. App. 1988).

Timeliness of notice.

Notice of appeal filed within the required period from date of entry of order of contempt was filed timely and Supreme Court had jurisdiction to hear appeal concerning the contempt order. Burgers v. Maiben, 652 P.2d 1320 (Utah 1982).

An untimely motion for a new trial had no effect on the running of the time for filing a notice of appeal. Burgers v. Maiben, 652 P.2d 1320 (Utah 1982).

Case was temporarily remanded to the juvenile court in order to allow that court to make a determination whether an order extending the time for appeal should be entered by the juvenile court under this rule, when it was not apparent whether the notice of appeal was ei-

ther timely filed or deemed timely filed by the juvenile court. State In re M.S., 781 P.2d 1287 (Utah Ct. App. 1989).

Where plaintiff, one day after the voluntary withdrawal of its motion for directed verdict, filed a notice of appeal and also moved for an extension of time in which to file a notice of appeal, the notice of appeal was timely filed, irrespective of whether the order granting additional time for filing had a nunc pro tunc effect. Guardian State Bank v. Stangl, 778 P.2d 1 (Utah 1989).

Notice of appeal placed in the prison mail by an incarcerated criminal defendant within the 30-day period set forth in this rule was not timely, where the notice was filed in the district court more than 30 days after entry of the judgment being appealed. State v. Palmer, 777 P.2d 521 (Utah Ct. App. 1989).

—Date of notice.

In determining whether a notice of appeal is timely filed and establishes jurisdiction in an appellate court, the appellate court is bound by the filing date on the notice of appeal transmitted to it by the trial court. State In re M.S., 781 P.2d 1287 (Utah Ct. App. 1989).

COLLATERAL REFERENCES

A.L.R. — When will premature notice of appeal be retroactively validated in federal civil case, 76 A.L.R. Fed. 199.

Rule 5. Discretionary appeals from interlocutory orders.

(a) **Petition for permission to appeal.** An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action.

(b) **Fees and copies of petition.** The petitioner shall file with the Clerk of the Supreme Court an original and seven copies of the petition, or, with the Clerk of the Court of Appeals, an original and four copies, together with the fee for filing a notice of appeal in the trial court and the docketing fee in the appellate court. If an order is issued authorizing the appeal, the clerk of the appellate court shall immediately give notice of the order by mail to the respective parties and shall transmit a certified copy of the order, together with a copy of the petition and filing fee, to the trial court where the petition and order shall be filed in lieu of a notice of appeal. If the petition is denied, the filing fee shall be refunded.

(c) **Content of petition.** The petition shall contain.

(1) A statement of the facts necessary to an understanding of the controlling question of law determined by the order sought to be reviewed;

(2) A statement of the question of law and a demonstration that the question was properly raised before the trial court and ruled upon;

(3) A statement of the reasons why an immediate interlocutory appeal should be permitted; and

(4) A statement of the reason why the appeal may materially advance the termination of the litigation.

(5) The petition shall include a copy of the order of the trial court from which an appeal is sought and any related findings of fact, conclusions of law and opinion.

(d) **Answer.** Within 10 days after service of the petition, any other party may file an answer in opposition or concurrence. An original and seven copies of the answer shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals. The petition and any answer shall be submitted without oral argument unless otherwise ordered.

(e) **Grant of permission.** An appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice. The order permitting the appeal may set forth the particular issue or point of law which will be considered and may be on such terms, including the filing of a bond for costs and damages, as the appellate court may determine. If the petition is granted, the appeal shall be deemed to have been docketed by the granting of the petition, and all proceedings subsequent to the granting of the petition shall be as, and within the time required, for appeals from final judgments.

NOTES TO DECISIONS

ANALYSIS

Compiler's Notes. — All of the following annotations are taken from cases decided under former Rule 5, R. Utah S. Ct.

Challenge to sufficiency of evidence.

Intermediate appeal, and not writ of habeas corpus, was only proper means to challenge sufficiency of evidence to support issuance of indictment and trial court's denial of defendant's request for discovery of testimony of witnesses before grand jury. Granato v. Salt Lake County Grand Jury, 557 P.2d 750 (Utah 1976).

Determination regarding substantial rights.

Where plaintiff sued for injuries suffered when her son's car, in which she was riding, collided with a cow which had fallen on highway from defendant's truck, preliminary order by the trial court that unlawful loading of the truck was negligence as a matter of law and that the trial should be held only on the issue of damages involved substantial rights of the parties and would materially affect the final decision and, therefore, was subject to an intermediate appeal. Klafta v. Smith, 17 Utah 2d 65, 404 P.2d 659 (1965).

Irreparable damage.

Temporary order allocating water usage by plaintiff pending further study by court raised sufficient issue of irreparable damage pending the filing of the final order fixing and decreeing the water rights of the respective parties as to be appealable. In re Water Rights, 10 Utah 2d 77, 348 P.2d 679 (1960).

New trial motion.

—Arbitrary exercise of authority.

If a trial court's authority with respect to a motion for a new trial is exercised arbitrarily, the proper redress is either in a petition for interlocutory appeal, which may be granted in a proper case, or in the preservation of error for review, if necessary, upon the final outcome of the case. Haslam v. Paulsen, 15 Utah 2d 185, 389 P.2d 736 (1964).

Order vacating summary judgment.

A party does not have an appeal as a matter of right from an order vacating a summary judgment but may seek an appeal pursuant to this rule. Jensen v. Nielsen, 22 Utah 2d 23, 447 P.2d 906 (1968).

Purpose in granting.

The purpose to be served in granting an interlocutory appeal is to get directly at and dispose of the issues as quickly as possible, consistent with thoroughness and efficiency in the administration of justice. Manwill v. Oyler, 11 Utah 2d 433, 361 P.2d 177 (1961).

When to grant.

The desired objective of efficiency in procedure can be promoted, and an interlocutory appeal is properly granted, if it appears essential to adjudicate principles of law or procedure in advance as a necessary foundation upon which the trial may proceed, or if there is a high likelihood that the litigation can be finally disposed of on such an appeal. Manwill v. Oyler, 11 Utah 2d 433, 361 P.2d 177 (1961).

Whenever it appears likely that the matters in dispute can be finally disposed of upon a trial, or where they may become moot, or where they can, without involving any serious difficulty, abide determination in the event of an appeal after the trial, the desired objective of efficient administration of justice is best served by refusing to entertain an interlocutory appeal and letting the case proceed to trial. Manwill v. Oyler, 11 Utah 2d 433, 361 P.2d 177 (1961).

APPENDIX IX.

MIKEL M. BOLEY (0575)
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968-8282 or 968-3501

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

FORD CONSUMER FINANCE,
a Corporation,

Plaintiff, : NOTICE OF ENTRY OF JUDGMENT AND OF THE SIGNING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

vs.

GARY SALAZAR, PEGGY SALAZAR, GABE SALAZAR and CHAD SALAZAR

Defendants. : Civil No: 900007491CV
JUDGE: MICHAEL K. BURTON

On the 11th day of September, 1990, true and correct copies of the signed Judgment, Judgment for Restitution of Premises, and Declaring Forfeiture of Tenancy along with the signed Findings of Fact and Conclusions of Law, which were all entered on or about September 10, 1990, were mailed to Defendants' attorney, Wesley Sine at 647 West North Temple, Salt Lake City, Utah 84116.

DATED this 13th day of September, 1990.

Mikel M. Boley

MIKEL M. BOLEY
Attorney for Plaintiff
3535 South 3200 West
West Valley City, Utah 84119
968-8282 or 968-3501

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing NOTICE OF ENTRY OF JUDGMENT AND OF THE SIGNING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW, postage prepaid, this 12th day of September, 1990, addressed as follows:

WESLEY SINE, ESQ
647 WEST NORTH TEMPLE
SALT LAKE CITY, UTAH 84116

Mikel M. Boley

MIKEL M. BOLEY
Attorney for Plaintiff