1975

Wangsgard v. Peggy Fitzpatrick, William Lence, Thomas R. Matthews, and Bonnie J. Matthews : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROSS WANGSGARD,

Plaintiff-Appellant,

vs.

PEGGY FITZPATRICK, WILLIAM LENCE, THOMAS R. MATHEWS, and BONNIE J. MATHEWS, his wife,

Defendants-Respondents.

Case No. 13890

APPELLANT'S BRIEF

Appeal from the Judgment of the District Court
for Salt Lake County,
Honorable Marcellus K. Snow, Judge

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STATEMENT OF THE CASE

This is an action to recover damages which the plaintiff alleges he sustained when the defendants forcibly entered certain real property located at 368 South Main Street, Park City, Utah. Plaintiff further alleges the defendants wrongfully evicted him from the said premises by ousting he and one Marvin Ryan to whom the plaintiff had subleased a portion of the premises; and by changing the locks on the door of the premises. [See complaint R. 105-109].

DISPOSITION IN THE LOWER COURT

This matter was originally set for Jury trial on October 9, 1974. [R. 118]. After all of the parties, counsel and the jury had appeared, counsel for the defendants made a motion to dismiss the complaint on the grounds it failed to state a cause of action in that the plaintiff had no standing under the laws of Utah to bring the action. [R. 119]. Both parties made a substantial oral argument at that time [R. 119-127]; after which the court took the matter under advisement, dismissed the jury, and asked both counsel to file simultaneous briefs dealing with their respective positions. [R. 127-129]. Thereafter, the defendants filed their Memorandum In Support of Their Motion To Dismiss [R. 2-7]; and the plaintiff filed his Memorandum In Opposition To the Defendants' Motion to Dismiss. [R. 110-117]. After reviewing these written memorandam, the court denied the defendants' motion to dismiss. [R. 74-a, 74-b].

The case was then reset for jury trial to commence November 6, 1974 [R. 73, 130]; whereupon a two-day jury trial was held November 6, and 7, 1974. [R. 130-326]. During this time, the defendants again renewed their motion to dismiss which was taken under advisement. [R. 215]. The court subsequently granted a motion for Summary Judgment after both sides rested. [R. 329-336]. This judgment was signed on November 12, 1974. [R. 14-15]. The plaintiff thereafter filed his notice of appeal on November 15, 1974. [R. 13].

RELIEF SOUGHT ON APPEAL

The appellant seeks the following relief: (1) to reverse the decision of the Honorable Marcellus K. Snow in granting the respondents' motion for summary judgment, (2) to find and so order that all respondents were guilty of both a forcible entry and wrongful eviction of the appellant Ross Wangsgard, (3) to remand this case for a new trial on the issue of damages only, and (4) in the event this court remands the entire case for a new trial on all issues then the appellant also requests a ruling from this court as to the admissibility of certain real property leasehold agreements and as to testimony from the landlord.

STATEMENT OF FACTS

In March, 1971, the plaintiff and one Gene Mayfield entered into a joint venture to operate a bar business known as the BLACKOUT located at 368 South Main Street, Park City, Utah. [R. 134]. Mr. Mayfield had previously lived in California, had moved to Utah, and was interested in finding employment. [R. 134]. He contacted the plaintiff about conducting the BLACKOUT business in Park City. The plaintiff agreed to advance the necessary finances for their initial investment; and Mr. Mayfield agreed to conduct the actual operation of the business. [R. 134]. Prior to this time, the BLACKOUT business was being run by one E. B. Cooksey and/or his

corporation known as The Silver Park Limited. [Ex. 12-P, R. 174].

On March 17, 1971, the plaintiff and Gene Mayfield entered into an Earnest Money Receipt and Offer To Purchase the said BLACKOUT business from Mr. Cooksey. [Ex. 12-P]. The sale was handled by Imperial Realty Company. [Ex. 12-P, R. 174]. The sale was consummated on March 26, 1971, when the said plaintiff and Mayfield paid $9,650.00 for the purchase of the business. [Ex. 13-P, R. 174]. Approximately $2,000 was paid down and a balance of $7,650 was financed in a Title Retaining Promissory Note bearing date of March 25, 1971, and calling for monthly payments of $250.70. [Ex. 8-P, R. 134].

Concurrent with the purchase of the business from Mr. Cooksey, the plaintiff and Mayfield also entered into an *ASSIGNMENT OF LEASE* whereby Mr. Cooksey assigned all of the interest he had in and to the real property at 368 South Main Street, Park City, Utah, to Gene Mayfield and Ross Wangsgard. [Ex. 7-P, R. 133-135]. This *ASSIGNMENT OF LEASE* was executed by the plaintiff, Mayfield, Cooksey, and three other men who were the landlords and who owned the premises: Robert E. McConaughy III, Walker M. Wallace, and John M. Wallace. [Ex. 7-P, R. 2].

This *ASSIGNMENT OF LEASE* referred to certain underlying documents, to-wit: *REAL PROPERTY LEASE* [Ex. 5-P] and *AMENDMENT OF REAL*

PROPERTY LEASE [Ex. 6-P]. The defendants objected to Exhibits 5-P, 6-P and 7-P being received in evidence; and the court took the objection under advisement. [R. 133-139]. The plaintiff sought repeatedly to introduce testimony as to the plaintiff's status under the leases; but each time the court took the matter under advisement or sustained objections to the testimony. [R. 133-139, 179, 308-312]. Finally and after extensive further oral argument by counsel, [R. 204-220], the trial judge sustained the defendant's objections to Exhibits 5-P, 6-P, and 7-P. [R. 221]. Thereafter, the plaintiff made an offer of proof pursuant to Rule 43(c) of the Utah Rules of Civil Procedure as to the admissability of Exhibits 5-P, 6-P and 7-P. [R. 223]. Because of this offer of proof, the plaintiff is referring to these exhibits and the testimony concerning these exhibits in this brief.

After the lease agreements were executed, the plaintiff and Gene Mayfield entered onto the premises at 368 South Main Street, Park City, Utah, and began to operate the BLACKOUT business. [R. 140]. Approximately one to three months after they entered onto the premises, the plaintiff purchased some pool tables, juke boxes, pinball machines, and cigarette machines at a cost of approximately $5,000 and put these on the premises. [R. 141, 252]. These items are referred to in the testimony as recreational or amusement items as opposed to the bar equipment which was being purchased from Mr. Cooksey.

Approximately one year after they commenced the business, Gene Mayfield had another business

opportunity; and the plaintiff purchased all of Mayfield's interest in the real property leases and the other items of personal property and trade equipment. [R. 141-142]. Mr. Mayfield executed a *BILL OF SALE* dated May 27, 1972, and an *ASSIGNMENT OF INTEREST IN LEASE* in connection with this transaction. [Ex. 11-P, 9-P, R. 141-142, 173]. Therefore, after May of 1972, the plaintiff was the only person who had any interest in the real property lease or in the personal property or trade equipment on the premises at 368 South Main Street, Park City, Utah. The plaintiff made all of his rental payments to the landlords and operated the business himself personally through January, 1973. [R. 143]. During this period of time, the plaintiff realized an annual profit of $5,000 from the bar business and an additional $5,000 from the recreational or amusement items. [R. 144].

During the latter part of 1972, the plaintiff decided to sell the BLACKOUT business and to retain only his interest in the recreational items. [R. 145]. This decision was based on several factors: the plaintiff had met his present wife about this time and planned a marriage for April, 1973. This prompted a desire to spend more time with his family of four teenage sons. He also had four eye operations that were needed in the coming year. Finally, he had experienced some problems with employees and some unexplained disappearances of money. Based upon all these factors, he decided to sell the BLACKOUT business. [R. 145, 235].

He listed the business with Imperial Realty Company at a price of $10,000. [Ex. 8-P, R. 146]. He did not include the amusement or recreational items in the sale because he was making a good profit on them for the investment he incurred. [R. 146]. Moreover, since he was willing to sell the bar business on a contract, he felt he should make frequent trips to Park City, to insure his investment in the bar equipment was not being wasted. [R. 146]. So, since he was going there anyway to protect his investment, it was a simple matter for him to maintain his amusement or recreational machines. [R. 146].

One Marvin Ryan had been plaintiff's manager in the operation of the BLACKOUT business. During January, 1973, Mr. Ryan and the plaintiff agreed to a purchase and sale of the business at a price of $10,000.00. [R. 147-148]. As stated, the sale did not include the recreational or amusement items. Mr. Ryan was to pay the $10,000 for the business at the rate of $300 per month. In addition, he was to pay all utilities and to pay the monthly rental due under the lease agreements. [R. 181]. Mr. Ryan was to take possession of the property on February 1, 1973. [R. 177]. The plaintiff retained the title to all of the bar equipment until the full purchase price was paid because no down payment was made. [R. 177-178]. The plaintiff testified Mr. Ryan was going to operate the business for two to six months; and if Ryan could get in a profitable financial condition, there would be a formal written contract pertaining to the $10,000.00 purchase price. [R. 178]. The contract was never

formalized; and Mr. Ryan died in approximately November, 1973. [R. 178]. The defendant William Lence testified that Ryan told him there was no intent on Ryan's part to purchase the items because Ryan felt the price was too high and the tourist season was about over. [R. 275].

The landlord sold the premises at 368 South Main Street, Park City, Utah, to the defendants Mathews on March 28, 1973. [Ex. 4-D, R. 311]. The sale was on a Uniform Real Estate Contract in which the seller retained title until the full purchase price was paid. [See paragraph 18 of Ex. 4-D]. The purchase price was $50,000 payable $10,000 down and the balance of $40,000 at the rate of $250.00 per month. The said principal amount drew interest at the rate of eight percent (8%) per annum. The plaintiff did not receive any official notice from either the sellers or the purchasers of the sale. [R. 192-193]. And even though he had heard rumors about a sale, Mr. Robert Cole, selling agent for Imperial Realty Company with whom he had listed the BLACKOUT business, assured him that the landlords through Mr. McConaughy said there would be no problem renewing the lease agreements. [R. 192-193, 239-241].

The first notice of any kind the plaintiff received concerning the sale of the real property at 368 South Main Street, Park City, Utah [R. 192-193], or concerning the desire of the new owner to have the plaintiff remove his property [R. 249] was in the form of a telephone call from the defendant, Peggy Fitz-

patrick, sometime during the early part of April, 1973, probably the second week. [R. 243]. Mrs. Fitzpatrick called the plaintiff's laundromat business in Granger, Utah, and left word with plaintiff's son that she wanted to talk to the plaintiff. [R. 183]. When the plaintiff returned the call, Mrs. Fitzpatrick told him that she represented purchasers of the property in Park City and asked him if he was aware the bar business had been closed during the weekend. [R. 183]. The plaintiff said he didn't know the property had been sold, nor that it had been closed. [R. 183, 242-243]. He said he had been there two or three days prior to the weekend, and the business had been fully operating at that time. [R. 183].

Mrs. Fitzpatrick also told the plaintiff at this time that she wanted him to get his equipment out of the premises. [R. 183]. When the plaintiff tried to find out who the new purchasers of the premises were, Fitzpatrick told him that it was none of his business, that Mrs. Fitzpatrick was representing them and they expected him to remove his property. [R. 242-247]. In later telephone conversations, he attempted to find out who the new landlords were and talk to them about a renewal of the lease; but Mrs. Fitzpatrick continued to tell them that the landlords were not available to talk to him, there was no need for conversation and he was to move his equipment out immediately. [R. 242-247]. During this first telephone conversation, the plaintiff told Mrs. Fitzpatrick that he would get back in touch with her. He then got in his van and drove immediately to Park City.

[R. 183]. He found the bar was open, the bar was running with business as usual, customers were in the place and there was no appearance of any damage to the premises. [R. 183].

The plaintiff testified he talked to Marvin Ryan and asked Ryan if anybody had told him about closing up the business or about a sale of the property. He said Ryan replied he was not aware of any sale or that the business was supposed to be closed. [R. 189]. Plaintiff told Ryan about the telephone call and stated to him emphatically plaintiff considered he was a legal tenant and he had a right to keep the business operating until the new landlords took whatever action was necessary to get the business stopped. [R. 189].

The plaintiff testified he called the defendant Fitzpatrick back the next day and told her the business was not closed and asked her why she was calling him about getting his equipment out of the premises. According to the plaintiff's testimony, Fitzpatrick said, "You are the tenant of record that was on the lease there," and that she was calling him as a representative of the new owners. [R. 190]. Fitzpatrick stated again the reason she called him was because he was a tenant of record on the lease. [R. 192, 194]. The plaintiff testified he told Fitzpatrick he was indeed the tenant of the property, he did not wish to move; that he had been assured the lease would be renewed and he was going to continue his business at this location. [R. 194]. Fitzpatrick

again emphasized that the plaintiff would have to get out of the premises. [R. 194].

Plaintiff said he then went back to Park City and talked to Ryan again and told him to stay on the premises and not to stop the business. [R. 194]. The plaintiff testified Ryan told him all of the rent payments had been made for February, March and April, 1973. [R. 194]. The plaintiff himself had made all the rental payments due to the landlord through the date of the sale to Ryan on February 1, 1973, and also had made all of the payments on the bar equipment through January, 1973. [R. 177].

The plaintiff testified Peggy Fitzpatrick called him again about two days later and asked him when he was going to move his equipment out of Park City. He told her he had a going business and would like to meet with the new owners to negotiate a new lease on the premises and continue in the building. [R. 195]. He was refused this right. [R. 242-247]. Plaintiff testified he went back to Park City the following Sunday and the bar was being closed, there was no business going on and Mr. Ryan was removing his personal effects. [R. 195-196].

When he asked Ryan why he was closing the business, Ryan told him the defendant William Lence who was the Justice of the Peace in Park City told him to get out of the building. Ryan said Lence stated unless Ryan vacated the building by that Sunday evening, Lence was going to proceed with action

against him. Ryan said that since he lived in Park City and Lence was the Justice of the Peace, he had no choice but to close the business. [R. 196].

Plaintiff testified since the bar was closed, the only thing he could do was to try and salvage what was left; but he could not remove his equipment immediately because of physical problems with his eyes which made it difficult to see very well at night. [R. 196].

The plaintiff testified the next call he received was from Peggy Fitzpatrick who told him the locks had been changed on the building and he would be allowed to remove his equipment by obtaining keys which she would leave in businesses near the BLACK-OUT. She said the new owners had a contractor coming to remodel the building; they had another tenant they wanted to get in the building; and they wanted the plaintiff's equipment out. [R. 198]. The plaintiff had not received any legal notice from either the defendants or from the landlords to vacate the building and no lawsuit had been commenced to have him vacate the building at the time Mrs. Fitzpatrick called him, nor after that time. [R. 192-193, 249]. Peggy Fitzpatrick refused to allow the plaintiff to remove the back bar or front bar [R. 197-198] as did Mr. Lence. [R. 257].

The plaintiff testified that he sent his sixteen and eighteen year old boys with a U-haul type truck to Park City to remove some of the equipment. He said

the boys removed the equipment over a three to four day period, but defendant Lence told them they could not take the back bar nor the front bar. [R. 197-198]. The plaintiff testified that Ryan told him none of the defendants had given Ryan any notice to close the bar other than when the Justice of the Peace, William Lence, told Ryan to get out. [R. 249]. Plaintiff said when his equipment was moved from the premises, he did not detect any vandalism damage or excessive water problems in the premises.

The plaintiff's son, Ric Wangsgard, stated he and his brother rented an Easy Haul Truck, an eighteen foot van, and went to Park City to remove the equipment. He said the defendant William Lence drove up in his Jeep Wagoneer; and he was definitely mad. He said Mr. Lence had his fists clenched and he was growling and talking through his teeth. He said that Lence came up to him with kind of a half smile and said, " 'I bet your dad is pretty pissed off about me kicking him out of here, or locking him out,' and then he strolled around a while longer and told me the back bar wasn't to be removed." [R. 257]. Ross Wangsgard testified he removed his equipment from the premises *after* the locks were changed but not before. [R. 322].

The plaintiff testified he tried to sell his equipment over about the next year and one half; and he received approximately $1,900.00 for the bar equipment which he had purchased for $9,650.00 and the recreational items which he had brought onto the

property at a cost of $5,000.00. [R. 199-200]. He stated he lost approximately $200 per month profit on the recreational items that he had in the business and prior to the time he sold the bar equipment to Marvin Ryan he was making a profit of $400 per month. [R. 202]. He further testified as to the mental anguish and embarrassment he had experienced because of the forcible entry and wrongful eviction from the premises. [R. 228]. He stated even after he removed his equipment, he attempted to work this matter out with Mrs. Fitzpatrick for an additional two or three week period of time, but was unable to do so. [R. 299-230]. Thereafter, he commenced his lawsuit on June 29, 1973—about one and one-half months after he removed his equipment from the business. [R. 229-230].

The defendant William Lence testified that Ryan closed the business on Sunday, April 15, 1973, and early Monday morning, April 16, 1973. [R. 278]. He testified that the locks were changed about April 26 or 27th or about ten days after Ryan left the business. [R. 280]. During this ten day period all of the property in the premises at 368 South Main Street, Park City, Utah, belonged to the plaintiff. When Ryan left, he abandoned any interest he had in the property he was purchasing from the plaintiff. Lence said he had talked to Mathews about changing the locks but it was really instructions from Peggy Fitzpatrick that actually made him do it. [R. 280]. He stated he was an employee of the defendants Mathews. [R. 282]. On cross-examination by his own

attorney, Mr. Lence stated Peggy Fitzpatrick told him Ross Wangsgard owned the equipment in the building such as table and chairs and few things like that. [R. 282]. He said he (Lence) knew Wangsgard owned the property when he talked to Marvin Ryan. [R. 277]. The defendant Lence further testified Marvin Ryan told him Ryan was renting the premises from Ross Wangsgard. [R. 275]. Lence further testified Ryan told him he was paying $100 per month rent to the plaintiff Ross Wangsgard and Ryan never mentioned he was paying rent to anyone else. [R. 276].

I

THE TRIAL JUDGE ERRED IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT THEREBY TAKING THE CASE FROM THE JURY BECAUSE THERE WERE DISPUTED ISSUES OF FACT REGARDING THE PLAINTIFF'S LEASEHOLD INTEREST AND STATUS AT THE TIME OF THE DEFENDANTS' FORCIBLE ENTRY AND WRONGFUL EVICTION OF PLAINTIFF.

1. *What causes of action are involved in the instant lawsuit?* The complaint raises two issues or causes of action, to-wit: (1) wrongful eviction and (2) forcible entry. The pleadings are sufficient to establish both causes of action; even though each is not separately pleaded in separate counts. [*Alice Ellefsen* v *William Dibblee Roberts*, ... U. 2d. ....., 526 P. 2d 912 (1974).] Both of these issues were argued by the parties at the defendants' motion to dismiss at the

commencement of the first trial on Wednesday, October 9, 1974, [See plaintiff's "Trial Memorandum In Opposition To Defendants' Motion to Dismiss" (R. 110-11) and especially paragraph two at R. 114, *et sequel;* and defendants' "Memorandum of Points and Authority In Support of Defendants' Motion to Dismiss. (R. 2-7)]. Both of these issues were also raised at the defendants' motion to dismiss held just before noon on the second day of trial, November 7th. [R. 216]. And both of these issues were raised by the defendants in their final motion for summary judgment held on the third day of the trial, [R. 329-331]; at which time defendants' counsel refers to the forcible entry cause of action as the "statutory" cause of action and the wrongful eviction cause of action as the "common law" cause of action. It is clear the trial judge was considering both of these causes of action at the time the motion for summary judgment was made and in fact his written summary judgment is granted as to both causes of action. [R. 14-15]. Both of these issues were the subject matter of the plaintiff's requested instructions [R. 36-66] and both will be considered in this brief.

2. *What was the basis for the trial judge's order granting the defendants' motion for summary judgment?* Commencing at line 7 on page 335 of the record, the trial judge discusses his feelings regarding the defendants' motion for summary judgment and the reasons why he thinks the motion should be granted. The court states in part as follows:

". . . the Court feels . . . these jurors could not disagree *as to the status of the plaintiff at the time the overt acts took place on the part of the defendants*, which is claimed amounted or could have amounted to a lockout or eviction, *because of the fact at that point the court finds [plaintiff] had no status or proprietory interest in the premises which would give rise in him to a cause of action for damages against these defendants.* So the court will dismiss the matter." [R. 335-336]. [Emphasis added.]

"*However, the court does find that the plaintiff owns the back bar and the front bar*, and as testified to this morning, it was 30 lineal feet on the front bar and I think 33 on the back bar, and so that will be timesed by the cost due for lineal foot, as testified to yesterday by the expert, and then that will be reduced by 50%, whatever that turns out to be. That will be the amount that will either be paid to Mr. Wangsgard by the defendants or if he chooses, he could have the front and back bars actually in lieu thereof if they are in fact available and can be separated from the real property without damaging the real property or the back bar." [R. 336]. [Emphasis added.]

From the foregoing citation, it appears clear the trial judge felt the plaintiff Ross Wangsgard did not have any leasehold interest or status in the real property at 368 South Main Street, Park City, Utah, at the time the defendants forcibly entered onto the premises and changed the locks on the door; nor at the time some two weeks earlier when the local Justice of the Peace of Park City entered into the

BLACKOUT business and told Marvin Ryan he would have to close the business and get his belongings out of the premises by the coming Sunday evening. This conduct as well as the threatening telephone calls and demanding messages from Peggy Fitzpatrick to the plaintiff Ross Wangsgard were clearly willful, wanton and malicious and were done without any written notice to vacate the premises and/or any legal action being commenced against either Ross Wangsgard or Marvin Ryan in unlawful detainer or otherwise. Consequently, the trial judge would be in error if the plaintiff did in fact have some leasehold or proprietory interest in the premises superior to the interest of the defendants.

The action of the trial judge in granting the defendants' motion to dismiss, is inconsistent with his prior ruling refusing to grant an identical motion to dismiss which the defendants made at the commencement of the first trial in October [R. 74-a, 74-b, 118-129]; and is further inconsistent with the refusal of the trial judge to grant the motion to dismiss made at approximately 11:30 a.m. on the second day of the trial November 7, 1974. [R. 205-215].

The plaintiff further submits the trial judge's summary judgment is inconsistent within itself, [R. 14-15; 355-336], for the following reasons: In paragraph one of the said summary judgment, [R. 14], the trial judge granted the defendants' motion for summary judgment as to both (1) forcible entry and (2) wrongful eviction. Yet in paragraph two of the

summary judgment [R. 15] the trial judge admitted the back bar and the front bar were the sole property of the plaintiff; and he was entitled to recover the said items or their reasonable value. By holding the plaintiff did have his equipment, to-wit: the back bar and the front bar on the premises at 368 South Main Street, Park City, Utah, it is inconsistent for the trial judge to also hold the plaintiff did not have any of his property on the premises and therefore did not have any leasehold or proprietory interest in the premises.

This point becomes even more clear when we examine paragraph 17 of Exhibit 5-P which is the *REAL PROPERTY LEASE*. This paragraph provides as follows:

> "17. HOLD OVER: In the event Tenant shall remain in possession of the leased premises *or any part thereof* after the expiration of the term of this Lease without any written agreement therefore, such holding over shall constitute a tenancy from month-to-month at a monthly rental equivalent to the then reasonable rental value of the leased premises but not less than $175.00 per month." [Emphasis added.]

It is obvious the back bar and front bar must have constituted a possession by the plaintiff of "*any part*" of the leased premises. Accordingly, the plaintiff by virtue of paragraph 17 itself, would be entitled to a tenancy from month-to-month and would have had a proprietory or leasehold interest in the property at the time of the wrongful conduct by the defend-

ants. This would be so even if all the other property on the premises belonged to someone else; which point the plaintiff does not concede; since he had not only the front bar and the back bar on the premises but also his recreational and amusement machines; and the bar equipment he was selling to Marvin Ryan and which Ryan abandoned when the Justice of the Peace ordered him out.

The trial judge himself appears to have some reservation about his summary judgment. In addition to having denied the same motion two times previous, the trial judge recommended an appeal be taken in this matter in the following language:

> "And I may be wrong here. And, Mr. McIntosh, be sure that *this Court is desirous of your appealing this thing*, so if I am mistaken here or if I have done something prematurally or not completely, I want to be told by the Supreme Court, and, so don't in any way think that this court feels, is going to feel offended, *whatever*, *about an appeal*, *because I expect it and I want it*." [R. 337, lines 20-26]. [Emphasis added.]

The plaintiff would have appealed the case even without this encouragement from the trial judge; but the language used by the trial judge shows he had some doubts about the correctness of his ruling. Such doubts on a motion for summary judgment should be enough by themselves to indicate to the trial judge there were legitimate disputed issues of fact to be tried by the jury; and this case was not all that clear

so reasonable minds could not differ. It appears the trial judge was disposed to grant the plaintiff's proposed jury instructions on this issue and even marked them as "Given." [R. 41-46]. Why he suddenly changed his mind on the case is a mystery to the plaintiff.

It is interesting that the very point in issue upon which the judge decides this case, to-wit: the status of the plaintiff in the premises at the time the wrongful conduct of the defendants took place, was the very issue the trial judge denied the plaintiff the right to prove. That is, the plaintiff was prohibited from introducing testimony as to his status and his right to possession of the premises under either of the written lease agreements [Exs. 5-P, 6-P, and 7-P] or through the testimony of the landlord Robert McConaughy or through plaintiff's own testimony concerning the said lease documents. It is not clear why the judge refused to allow the lease documents into evidence nor to allow the testimony of the former landlords Robert McConaughy; but the plaintiff submits this Supreme Court should rule on this matter as a guide for the admissibility of this testimony in a second trial in the event this case is remanded for a new trial on all issues.

3. *What was the plaintiff Ross Wangsgard's interest in the premises at 368 South Main Street, Park City, Utah, at the time of defendants' wrongful conduct?* The plaintiff's status as a tenant is reflected

in the *Statement of Facts, supra.* He had the following leasehold, proprietory, and possessory interest.

(1) Plaintiff was the tenant described in all the leasehold document—Exhibits 5-P, 6-P, and 7-P; and the only person entitled to possession of the premises. Although Gene Mayfield was also named as a co-tenant in Ex. 7-P, he assigned all of his interest to the plaintiff in May 1972, [See Exs. 9-P, 11-P, R. 141-142, 173].

(2) The plaintiff had been assured by Imperial Realty's selling agent, Robert Cole, that the landlord Robert McConaughy would renew the lease agreements as soon as he returned from his trip out of state. [R. 176, 239-241]. So even though the lease had expired, there was an affirmative statement by the landlord to renew.

(3) The plaintiff was *holding over* as a tenant pursuant to paragraph 17 of the *REAL PROPERTY LEASE.* [Ex. 5-P]. The initial lease terms was for a period of five years ending October 31, 1972. All of the parties admit Ross Wangsgard was the only tenant in the premises during November and December, 1972, and January, 1973.

(4) After February 1st, 1973, there were really two businesses being conducted on the leased premises—one by the plaintiff and one by Marvin Ryan. The plaintiff was holding over under paragraph 17 of the *REAL PROPERTY LEASE* because

(1) he had $5,000 worth of recreational and amusement items of his own on the property which he was not selling to Marvin Ryan, (2) he retained title to the bar equipment worth $10,000 which he was selling to Marvin Ryan, (3) no other tenant was named on the Real Property documents, and (4) the landlord Robert McConaughy said he never did have any oral or written agreement with Marvin Ryan or anyone else to lease the premises other than with Ross Wangsgard. The plaintiff's business with the recreational items was substantial and he testified in 1971 and 1972 he had earned a profit of $5,000 from these items as well as $5,000 from the bar equipment sales.

(5) Plaintiff did not assign his leasehold interest to Marvin Ryan because (1) the lease documents gave the plaintiff the first option to purchase the property which he considered a valuable property right, [Ex. 6-P, ¶8, R. 193-194] (2) the sale of the business was tentative only and it would not be formalized in writing for two to six months and until Marvin Ryan could get in a sound financial position; therefore, the plaintiff wanted to wait and see how Ryan did. If he did poorly, and the plaintiff had to take back the business, he did not want to have to renegotiate his position on this lease, (3) plaintiff was liable anyway since there was no written agreement with the landlord to assign the leasehold interest to Marvin Ryan, or to remove plaintiff from the leases as the party primarily responsible, (4) plaintiff had his own recreational and amusement items worth $5,000 on part of the leased premises which satisfied

paragraph 17 of the Real Property Lease for a hold-over status on the leased premises "*or any part thereof,*" and (5) he retained title to all of the other property on the premises which he was selling to Marvin Ryan.

(6) The plaintiff visited the premises two to three times each week after February 1, 1973, until he was wrongfully evicted by the defendants in the latter part of April, 1973. These visits were to maintain his own recreational and amusement items as well as to check on the business that he was selling to Marvin Ryan to be sure that it was not being wasted.

(7) Marvin Ryan defaulted in the monthly payments due on the bar equipment almost immediately and only paid $300 during February, March, and April, whereas he should have paid $300 per month. Therefore, he was in a default status and had no interest in the property. Under these circumstances, the plaintiff Ross Wangsgard would be the only title holder to the property and entitled to repossess it at any time. This ownership interest together with the fact he visited the business two to three times weekly, gives Ross Wangsgard a status of actually possessing the premises; even if he had not had his recreational amusement items on the premises.

(8) Marvin Ryan left the BLACKOUT business on Sunday, April 15, 1973, when he was ordered out by the local Justice of the Peace, the

defendant — William Lence. At this time, he abandoned any and all interest he may have had in the bar equipment. Therefore, for the next ten days until the locks were changed on April 26 or 27th and thereafter, the only person who had any ownership rights to the property was the plaintiff Ross Wangsgard.

(9) The defendants Peggy Fitzpatrick and William Lence both knew that Ross Wangsgard was the owner of the property and under the lease agreement he was the recognized tenant. This is why they contacted him about removing the property. The contact by Peggy Fitzpatrick was *before* William Lence even contacted Marvin Ryan and *before* Ryan left the premises.

(10) The plaintiff was in the premises through the subtenant Marvin Ryan who stated to the defendant William Lence, he, Ryan, was renting the premises from Ross Wangsgard. [R. 275].

It appears clear the plaintiff had a substantial leasehold, proprietory, possessory interest in the real property at 368 South Main Street, Park City, Utah, at the time of the defendants' wrongful conduct. He was the responsible party on all the real property agreements Exs. 5-P, 6-P, 7-P, and was holding over pursuant to paragraph 17 of Exhibit 5-P. The landlords acknowledged the status of Wangsgard as the tenant they dealt with prior to the sale to defendants Mathews; and they stated they never did have any

dealing with Ryan or any oral or written agreement with Ryan to lease the premises.

4. *What was Marvin Ryan's interest in the real property at 368 South Main Street, Park City, Utah, at the time of the defendants' wrongful conduct?* Since Marvin Ryan died in November, 1973, [R. 178] he did not testify at the trial. However, his status on the premises is found in the testimony of the plaintiff Ross Wangsgard and the defendant William Lence. Counsel for defendants waived the hearsay objections to conversations with Ryan. [R. 186-187].

The plaintiff testified Marvin Ryan had worked for him and operated the bar for him during December, 1972, and January, 1973. [R. 147-148]. In January, 1973, Mr. Ryan and the plaintiff agreed to the purchase and sale of the business at a price of $10,000. [R. 147-148]. The sale didn't include the recreational or amusement items for which the plaintiff had paid $5,000 and which he owned in his own name. [R. 146]. Mr. Ryan was to pay the $10,000 for the business at the rate of $300 per month. In addition he was to pay all utilities and to pay the monthly rental due under the lease agreements. [R. 181]. Mr. Ryan was to take possession of the property on February 1, 1973. [R. 177]. The plaintiff did not assign his leasehold interest to Ryan; [R. 180]; although he did in fact sublease a portion of the premises to Ryan; at the same time he sold the bar equipment.

Since Ryan didn't pay anything down, the plaintiff retained the title to all the bar equipment until

the full purchase price was paid. [R. 177, 178]. The plaintiff testified Mr. Ryan was going to operate the business for two to six months; and if Ryan could get in a profitable financial condition, there would be a formal written contract pertaining to the $10,000 purchase price. [R. 178]. The contract was never formalized and Ryan died in November, 1973. [R. 178]. Although Ryan should have paid to the plaintiff a total of $900 during February, March and April, 1973; in actuality, he only paid to the plaintiff $300 which consisted of $100 on one occasion and $200 on another occasion. [R. 234-235].

The defendant William Lence testified Ryan told him he was renting the premises from Ross Wangsgard. [R. 275]. Ryan also told Lence Ross Wangsgard owned the equipment in the building such as a table, chairs, and a few similar items; and this knowledge had been conveyed to him, Lence, by Peggy Fitzpatrick, as well as by Ryan himself. [R. 277, 282]. He testified Ryan closed the business on Sunday, April 15th and early Monday morning, April 16, 1973. [R. 278]. He testified the locks were changed about April 26 or 27th or about ten days after Ryan left the business. [R. 280]. During this ten day period, all of the property in the premises at 368 South Main Street, Park City, Utah, belonged to the plaintiff. When Ryan left the premises, it is obvious he abandoned any interest he had in the property he was purchasing from the plaintiff.

Since the plaintiff had never relinquished his status as a tenant under the real property leases, and

since the landlord had no oral agreement or written agreement to lease the premises to Marvin Ryan, it is clear the plaintiff is the only one who had any interest in the leasehold agreements and was the tenant who was holding over after the expiration of the lease pursuant to paragraph 17 of the *REAL PROPERTY LEASE*. [Ex. 5-P]. When Marvin Ryan told William Lence he, Ryan, was leasing the property from Ross Wangsgard, it is clear Ryan understood he was at most a subtenant *de facto;* even though the official written consent of the landlord to said subtenancy had not yet been obtained. It further appears clear the subtenancy from the plaintiff to Ryan was for less than the entire area the plaintiff was leasing. This is so because the plaintiff retained a portion of the premises for his $5,000 worth of recreational and amusement items.

It is well settled that a tenant may sublet the premises in whole or in part; and a lessee need not be in possession of the demised premises, his right to sublet not being dependent upon his possession. Thus a lessee may, before entry, make a good sublease. The only limitation on the right of a lessee to sublet the premises is they cannot be sublet to be used in a manner inconsistent with the terms of the original lease or injurious to the premises. 49 Am. Jur. 2d, *Landlord and Tenant*, 470 §481 "Right to Sublet."

A subletting creates a new estate dependent upon or carved out of but distinct from the original leasehold. When Ross Wangsgard rented a portion of the

leased premises to Ryan and retained a portion for Wangsgard's amusement items, Wangsgard in effect subblet a portion of the premises to Ryan. Imperial Realty and its agent Robert Cole had assured plaintiff the landlord would renew the lease with plaintiff upon the landlord's return from out of State. Therefore there would be no violation of the lease provision affecting a sublease without the consent of the landlord; since this consent was given. Moreover, it has been held the courts do not favor such provisions against subletting since they are in restraint of alienation. Some courts hold where the lease restricts the use of the premises to a particular purpose and provides the lessee shall not sublet the premises for any other purpose, the lessee may sublet the premises to be used for the particular authorized purposes. 49 Am. Jur. 2d, *Landlord and Tenant*, 473, Part B, RESTRICTIONS AGAINST SUBLETTING, Section 485 "Generally." It is clear Marvin Ryan was using the premises for the same purposes Wangsgard had used them.

Other courts have held that permitting a third person to enter into the joint occupation of the premises with the lessee is not necessarily a subletting, and that the fact that a lessee conducting a business on the demised premises takes a third person into partnership with him and thus lets such third person into joint possession of the premises is not a breach of a covenant against subletting, 49 Am. Jur., 2d, *Landlord and Tenant*, 472 §484 "What Constitutes A Subletting." Consequently, it appears clear, Marvin Ryan

was at most a subtenant of the lessee Wangsgard. Wangsgard still remained liable on the original lease agreements including the holding over provisions and the landlord would have looked to Wangsgard not Ryan for any breach of the lease.

5. *What was the defendants' interest in the real property at 368 South Main Street, Park City, Utah, at the time of their wrongful conduct?* Counsel for the defendants on the last day of the trial stipulated and admitted each of the defendants would be bound by the conduct of any of them because they were in a common agency with each other. [R. 326].

The plaintiff submits none of the defendants had any proprietory or possessory interest in the premises at 368 South Main Street, Park City, Utah, which was superior in point of time or in any other way to that of the plaintiff. Any interest of the defendants must have come about by virtue of the interest which the defendants Mathews had in the property. The defendants Mathews interest in the property came by virtue of the Uniform Real Estate Contract which they entered into with the former landlords, Robert McConaughy, et al. [Ex. 4-D]. It is clear from this contract the *former* landlords retained title to the premises until all of the payments were made. [Ex. 4-D, §19].

Certainly any sale of the premises would have to be made subject to any valid leasehold interest which a tenant had in the premises. Both Fitzpatrick

and Lence knew the plaintiff owned the equipment on the premises at the time the locks were changed and each of them knew he was the party responsible on the lease. They both assumed the telephone calls to vacate the premises or the visits to the premises were all that was necessary. They did not observe the statutory requirements of notice, lawsuit, etc.

6. *Why the defendants' conduct constituted a wrongful eviction of the plaintiff.* In this action the plaintiff is claiming he was wrongfully evicted from the premises he was occupying at 368 South Main Street, Park City, Utah; and that as a sole, direct and proximate cause of said wrongful eviction he has sustained certain damages. A wrongful eviction of a tenant by his landlord may be either an actual or constructive eviction. Any disturbance of the tenant's possession by the landlord, or someone acting under his authority which renders the premises unfit for occupancy for the purposes for which they were demised or which deprives the tenant of the beneficial enjoyment of the premises causing him to abandon them, amounts to constructive eviction. In this regard, the intention on the part of the landlord to wrongfully evict the tenant may be indicated by the acts of the landlord and may be presumed by the character of the act if the neccessary result of it is to deprive the tenant of the beneficial enjoyment of the premises. The landlord's interference with the tenant's right of ingress and egress, as by locking the door of a building, is sufficient to constitute a con-

structive eviction. 49 Am. Jur. 2d *Landlord and Tenant*, Part X, EVICTION; 314 *et sequel*, Section 301 "Actual or Constructive Eviction," p. 317 Section 302 "Elements and Requisites—Generally; Intention of Landlord," p. 323 Section 307 "Interference with Ingress and Egress."

In the instant case, the intention of the defendants to wrongfully evict both the plaintiff and Marvin Ryan is indicated by the action of William Lence in ordering Marvin Ryan to close the BLACKOUT business or Lence would take action against him; by the telephone calls from Peggy Fitzpatrick to Ross Wangsgard saying the building had been sold, the new owners would not talk to Wangsgard; that a contractor was coming to remodel the premises for a new tenant and that Wangsgard had no choice but to remove his equipment and get out. It was also indicated by changing the locks on the building and by refusing to allow the plaintiff to remove the back bar and front bar which belonged to him.

A lease of real property from a landlord to a tenant caries with the lease an implied covenant the tenant or lessee shall have the quiet and peaceable possession and enjoyment of the leased premises, so far as regards the lessor or anyone lawfully claiming through or under him or anyone asserting title to the premises superior and paramount to the lessor. This means the landlord is bound not to do anything calculated to interfere with the free and full enjoyment and possession and use of the premises by the

tenant or lessee. Where there is an interference with, or interruption of, the peaceable and quiet enjoyment and possession and use of the premises through some act or failure to act of the the lessor or landlord, an action may be maintained based upon the breach of this implied covenant of quiet enjoyment. Any direct, substantial interference by the landlord, or by persons acting under his authority, with the actual possession of the tenant constitutes a breach of this covenant of quiet enjoyment. 41 A.L.R. 2d 1414, "Breach of Covenant for Quiet Enjoyment of Lease," Section 3, p. 1420, "Implied Covenant In General." *Sandall v. Hoskins*, 104 U. 50, 137 P. 2d 819 (1943).

In this case, the defendants contend they are not liable to the plaintiff for wrongful eviction because the plaintiff was not in lawful possession of the premises; but had in fact and effect subleased the premises to Marvin Ryan. This argument overlooks both the fact that actual possession is not required in the case of wrongful eviction and the fact that damage to a subtenant is actionable damage to the tenant. The right of the lessee or tenant to use and occupy the demised premises is not, in the absence of restrictions in the lease, limited to a personal occupation. In the absence of any such restrictions, the tenant may occupy and use the premises through his agents and servants, or he may sublet or assign the leased premises so as to confer upon his sublessee or assignee his right to use or occupancy. 49 Am. Jur. 2d, *Landlord and Tenant*, p. 248 Section 229 "Duty of Lessee to Occupy Premises."

The tenant is under no obligation, in the absence of specific provisions therefore, to occupy or use or to continue to use the leased premises; even though one of the parties or both expected and intended that they should be used for the particular purpose to which they seem to be adapted or for which they seem to be constructed. *In other words, making entry upon or taking possession of a demised premises, is not a general obligation of a lessee.* The lessee's mere removal from the demised premises does not entitle the landlord in the absence of some provision in the lease giving him the right to do so, to enter onto the premises and terminate the lease, 49 Am. Jur. 2d, *Landlord and Tenant*, p. 248 Section 229 "Duty of Lessee to Occupy Premises."

The defendant's contention that Ross Wangsgard was not in actual possession of the leased premises misinterprets the scope and degree of the possession required for *wrongful eviction* as opposed to *forcible entry*. Actual possession is not an element of wrongful eviction although it may be an element of "forcible entry." However, even assuming actual possession is a necessary requirement of "forcible entry" the plaintiff, Ross Wangsgard, contends he did have sufficient actual possesion of the leased premises prior to the unlawful acts of the defendants as stated in part 3 *supra*, "*What was the plaintiff Ross Wangsgard's interest in the premises at* 368 *South Main Street, Park City, Utah, at the time of defendants' wrongful conduct?*"

Under these facts and circumstances, the plaintiff, Ross Wangsgard, was in fact in lawful actual use and occupancy of the premises at 368 South Main Street, Park City, Utah, for more than five days prior to the time the locks were changed, and for more than five days prior to the time the defendant Lence entered the premises and ordered Ryan out threatening legal action if Ryan did not leave. *Hargrave v. Leigh*, 73 U. 178, 273 P. 298 (1928); *Paxton v. Fisher*, 86 U. 408, 45 P. 2d 903, (1935); *Buchanan v. Crites*, 106 U. 428, 150 P. 2d 100 (1944); *Larsen v. Knight*, 120 U. 261, 233 P. 2d 365 (1951); *Lambert v. Sine*, 123 U. 145, 256 P. 2d 241 (1953); *King v. Firm*, 3 U. 2d 419, 285 P. 2d 1114 (1955); *Peterson v. Platt*, 16 U. 2d 220, 400 P. 2d 507 (1965); *Freeway Park Building Inc. v. Western States Wholesale Supply*, 22 U.2d 266, 451 P. 2d 778 (1969); *Monter v. Kratzers Specialty Bread Company*, 29 U. 2d 18, 504 P. 2d 40 (1972); *Perkins v. Spencer*, 121 U. 468, 243 P. 2d 446 (1952); 6 A.L.R. 3d 177 "Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process."

Finally the defendants argue they are not liable to plaintiff because any damage was to the sublessee Marvin Ryan and not to the plaintiff. Even assuming the plaintiff was not conducting any business on the leased premises and did not have his recreational items there, the overwhelming weight of authority is to the effect the landlord is responsible to the tenant for a wrongful interference by the landlord with the tenant's sublessee. The interference may be such as

to be a breach of the covenant for quiet enjoyment or an eviction as where the landlord might expel the sublessee. 49 Am. Jur. 2d, *Landlord and Tenant*, 483 Section 502 "Liability of the Lessor to the Lessee for Interference;" 70 A.L.R. 1477, "Liability of Landlord for Interferring with Tenants of Lessee."; *Levitzky v. Canning*, 33 Calif. 299 (1867); *Central Business College v. Rutherford*, 47 Colo. 277, 107 P. 279 (1910); *Aste v. Putman's Hotel Co.*, 247 Mass. 147, 141 NE 666, 31 A.L.R. 149 (1923); *New York v. Mabie*, 13 NY 151, 64 Am. Dec. 538 (1855).

When the landlords Mathews and/or their agents Lence and/or Fitzpatrick interferred with the sublessee, Marvin Ryan, to such an extent to constitute a breach of the covenant for quiet enjoyment to which the said Marvin Ryan was entitled so as to constitute a wrongful eviction or a forcible entry upon the premises occupied by the said Marvin Ryan, then the landlord and/or their agents would be liable in civil damages to the tenant Ross Wangsgard for such interference.

From the Statement of Facts, it is clear the defendants wrongfully evicted Ross Wangsgard and also his subtenant Marvin Ryan at the time of their wrongful conduct by threatening Ryan with action if he did not leave the premises; and by changing the locks on the doors.

7. Why the defendants' conduct constituted a forcible entry against the plaintiff. The statutes of

the State of Utah dealing with forcible entry and detainer provide as follows:

> "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."

In this action, the plaintiff alleges the defendants were guilty of a violation of subsection (1) of the state statutes when William Lence entered onto the BLACKOUT premises and then ordered Marvin Ryan out threatening further legal action if Ryan did not leave by Sunday night. The plaintiff further alleges a forcible entry occurred when the defendants changed the locks on the doors on the premises at 368 South Main Street, Park City, Utah, and refused to allow either the plaintiff and/or Marvin Ryan to continue operating the business on the said premises after the date the locks were changed.

The plaintiff alleges he satisfied the actual possession requirements of the subsection by virtue of his leasehold, proprietory, and possessory interest as set forth in part 3 of this argument entitled *"What was the plaintiff Ross Wangsgard's interest in the*

premises at 368 South Main Street, Park City, Utah, at the time of defendants' wrongful conduct?

The plaintiff further submits the word "possession" as used in section 78-36-1(2), U.C.A. - 1953, is broad enough to include possession by a subtenant as well as by the plaintiff personally. This position is taken because of the provisions of section 78-36-3 dealing with unlawful detainer. The latter statute uses the word *possession* to mean either "in person or by subtenant." The plaintiff submits the legislature did not intend to attach any different meaning to the word *possession* in subsection 78-36-1(2); since both the forcible entry statute and the unlawful detainer statutes were enacted at the same time.

The forcible entry statute says "every person" who does certain things is guilty of forcible entry. There is no exception for one who may by contract or lease be authorized to enter or for an owner or landlord who as a matter of law may have right to possession. *Everyone* is guilty of a forcible entry who commits the acts specified. All that an occupant needs to show in order to be protected by the provisions of this statute, is that he was in peaceful possession of the land or premises prior to the "forcible entry" by the other party. If the landlord takes the law into his own hand and turns a tenant in peaceful possession out by means of force, fraud, intimidation, stealth or by any kind of violence, he makes himself liable to that tenant for damages. *Freeway Park Building, Inc. v. Western States Whole-*

sale Supply, 22 U. 2d 266, 451 P. 2d 778 (1969); *Paxton v. Fisher*, 86 U. 408, 415, 45 P. 2d 903 (1935).

The landlord has no right without the tenant's consent to enter upon the tenant's use and occupancy of the premises, to use a key to gain entrance to the premises without the tenant's permission and/or to change the locks on the doors to the premises without the tenant's permission. It is clear that even rightful owners cannot without being civilly liable for their actions take the law into their own hands by violence or by entry in the night time or during the absence of the occupants of any real property. *Freeway Park Building, Inc. v. Western States Wholesale Supply*, 22 U.2d 266, 451 P. 2d 778 (1969); *Paxton v. Fisher*, 86 U. 408, 415, 45 P. 2d 903 (1935). It appears clear the defendant entered onto the premises and changed the locks between April 16-26, when Wangsgard was temporarily absent and at a time when Lence and Fitzpatrick both knew the property belonged to Wangsgard; that he was the tenant in the lease agreements and they had not served him or Ryan with any notice to quit or vacate the premises or commenced any legal action to accomplish same; and at a time when they knew Wangsgard was claiming his leasehold rights to continue in business.

Insofar as the forcible entry statutes are concerned, "peaceful possession" may exist without occupancy as where a man's servant is in actual possession of the property and is holding possession for him. *A party's possession continues notwith-*

standing the presence of other persons or their property on the land provided they hold in subordination to the tenants rights and not as independent claimants or possessors.

In this case, the possession of the plaintiff Ross Wangsgard continued on the premises at 368 South Main Street, Park City, Utah ,even though Marvin Ryan was also on or in the property. This would be so because Marvin Ryan's claim to the use and occupancy of the premises was subordinate to Ross Wangsgard's right and was dependent upon whatever rights Ross Wangsgard had. Marvin Ryan did not have any independent claim or possessory right with the landlord separate and apart from the right which Ross Wangsgard held. The landlords testified they had no oral or written agreement with Ryan to lease the BLACKOUT premises and Ryan told defendant Lence he was renting the premises from Wangsgard.

To constitute peaceful possession as contemplated by the forcible entry statutes, it is not necessary the party be personally present on the premises at the time of the offense; if he is in actual exercise of authority and control over them. Generally speaking, the actual possession which is sufficient consists in exercising acts of dominion over the land in dispute and making the ordinary use of it and may consist in, and may be shown by, a great number and combination of acts, the character of which may necessarily vary with the situation of the parties, the character of the land, and the purpose to which

it is adapted. 35 Am. Jur. 2d, *Forcible Entry and Detainer*, 901 Section 15 "Character and Sufficiency of Possession" and Section 16 "Exclusiveness of Possession," 36A C.J.S. *Forcible Entry and Detainer* 1084 Section 111 "Nature and Elements of Offense, and p. 970 Section 10 "Character of Possession in General."

The law in Utah is clear if the defendants or either of them did enter upon the premises at 368 South Main Street, Park City, Utah and order the plaintiff and Ryan out with threats of action or if they changed the locks on the doors to the premises without the consent of Ross Wangsgard and without complying with the state statutes as to the giving of proper notice and obtaining a valid court order allowing the defendants to take possession, these acts would be sufficient to find the defendants had violated the provisions of the forcible entry statutes of the State of Utah. In this connection, the changing of the locks on the door without the tenant's permission would be sufficient force and/or sufficient conduct as contemplated by the statute. *Buchanan v. Crites*, 106 U. 428, 150 P. 2d 100 (1944).

The defendants raise as a defense the fact the plaintiff was permitted to remove his equipment from the premises after the locks were changed and therefore was not damaged. The fact that Ross Wangsgard may have removed his property from the premises *after* the locks were changed is not material and would not constitute a defense to the charge of

either "wrongful eviction" and/or "forcible entry." 35 Am. Jur. 2, *Forcible Entry and Detainer*, 920 Section 42 "Defenses."

Furthermore, the damages the plaintiff alleges he sustained are not merely the loss of the sale of the business to Marvin Ryan but also the loss of $200 net monthly profit from his own recreational items and the mental anguish he experienced which clearly are elements of damage in either wrongful eviction or forcible entry. 49 Am. Jur. 2d, *Landlord and Tenant*, 339 Section 323 "Damages for Wrongful Eviction, Measure and Elements Generally"; p. 341 Section 326 "Injuries to Business; Lost Profits"; p. 342 Section 327 "Physical Injury and Mental Anguish"; 17 A.L.R. 2d 936 "Recovery by Tenants of Damage for Physical Injuries or Mental Anguish Occasioned by Wrongful Eviction"; *Hargrave v. Leigh*, 73 U. 178, 273 P. 298 (1928); *Lambert v. Sine*, 123 U. 137, 256 P. 2d 241 (1953); *Peterson v. Platt*, 16 U. 330, 400 P.2d 507 (1965); *Perkins v. Spencer*, 121 U. 468, 243 P. 2d 446 (1952); *Freeway Park Building, Inc. v. Western States Wholesale Supply*, 22 U. 2d 266, 451 P. 2d 778 (1969).

It is clear in the State of Utah, a landlord who is entitled to possession of certain premises must, on refusal of the tenant to surrender the premises, resort to the remedies given by law to secure it. If the landlord, contrary to the terms of the Utah Statutes enters by force without resort to legal process, he is by statute made civilly liable to the disposed tenant.

In this case, even if the tenant, Ross Wangsgard, and/or Marvin Ryan, were behind in the payment of their rent and even though the lease had expired and even though the lease contains a provision permitting the landlord to re-enter the leased premises and take possession of same upon default of the tenant and even though the lease may have been breached in other ways such as subletting, etc., the landlord has no right to deprive the tenant of the possession of his premises without taking the legal steps that are required by law.

These legal steps include, among other things, a proper notice to the tenant to vacate the premises and a court order ordering or permitting the landlord to retake physical possession of the property in question. The tenant who is entitled to the protection of this process and these steps is the tenant who has the responsibility under the lease to the landlord which in this case would be Ross Wangsgard. *Hargrave v. Leigh*, 73 U. 178, 273 P. 298 (1928); *Paxton v. Fisher*, 86 U. 408, 45 P. 2d 903 (1935); *Buchanan v. Crites*, 106 U. 428, 150 P. 2d 100 (1944); *Larsen v. Knight*, 120 U. 261, 233 P. 2d 365 (1951); *Lambert v. Sine*, 123 U. 145, 256 P. 2d 241 (1953); *King v. Firm*, 3 U. 2d 419, 285 P. 2d 1114 (1955); *Peterson v. Platt*, 16 U. 2d 330, 400 P. 2d 507 (1965); *Freeway Park Building Inc. v. Western States Wholesale Supply*, 22 U. 2d 266, 451 P. 2d 778 (1969); *Monter v. Kratzers Specialty Bread Company*, 29 U. 2d 18, 504 P. 2d 40 (1972); *Perkins v. Spencer*, 121 U. 468, 243 P. 2d 446 (1952); 6 A.L.R.3d 177 "Right of Landlord

Legally Entitled to Possession to Dispossess Tenant Without Legal Process."

Neither Ross Wangsgard nor Marvin Ryan gave their consent and permission to the defendants or any of them to change the locks on the premises at 368 South Main Street, Park City, Utah, and/or to re-enter and take possession of the said premises at that address.

Insofar as the proper notice which a landlord must give to the tenant to vacate the property is concerned, Section 78-36-3(2) Utah Code Annotated, 1953, as amended, provides when a tenant has leased real property for an indefinite time with monthly rent reserved, he is entitled to a notice requiring him to quit the premises at the expiration of such month and this notice must be served upon him fifteen days or more prior to the end of the month.

And even though the *REAL PROPERTY LEASE* [Ex. 5-P] terminated on October 31, 1972, paragraph 17 in the said lease continues the tenancy on a month-to-month basis. This paragraph provides as follows:

> "17. HOLD OVER: In the event tenants shall remain in possession of the leased premises or any part thereof after the expiration of the term of this lease without any written agreement, such holding over shall constitute a tenancy for month to month at a monthly rental equivalent to the then reasonable rental value of the leased premises but not less than $175.00 per month."

This provision of the lease means when the tenant Ross Wangsgard remained in possesion of the leased premises after October 31, 1972, without any written agreement therefore, he became a tenant from month to month and he would be entitled to the protection of the provisions of Section 78-36-3(2) cited above.

None of the defendants in this action, complied with Section 78-36-6, Utah Code Annotated, 1953, dealing with notice and each of them are therefore guilty of both a "wrongful eviction" of the tenant Ross Wangsgard and were guilty of a "forcible entry" upon the premises being occupied by the said Ross Wangsgard as those terms "wrongful eviction" and/or "forcible entry" are discussed hereinabove in the brief. *Perkins v. Spencer*, 121 U. 468, 243 P. 2d 446 (1952); 50 Am. Jur. 2d *Landlord and Tenant*, 93-94 Section 1206 "Notice to Quit - Form, Certainty, and Sufficiency; Notice in the Alternative to Pay Back Rent or to Quit."

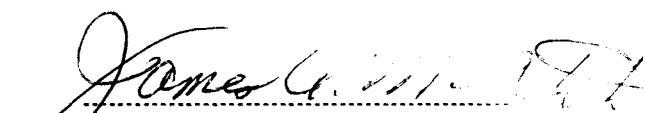
CONCLUSION

For the reasons set forth above, the appellant respectfully submits this Honorable Supreme Court should do the following: (1) reverse the decision of the Honorable Marcellus K. Snow in granting the respondents' motion for summary judgment, (2) find and so order that all respondents were guilty of both a forcible entry and wrongful eviction of the appel-

lant Ross Wangsgard, (3) remand this case for a new trial on the issues of damages only, and (4) in the event this court remands the entire case for a new trial on all issues then the appellant also requests a ruling from this court as to the admissibility of certain real property leasehold agreements Exs. 5-P, 6-P, and 7-P and as to the testimony from the landlord.

Respectfully submitted

McINTOSH & ROBERTSON



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CERTIFICATE

I certify that I delivered two copies of the Appellant's Brief to James N. Barber, 455 South 300 East, Salt Lake City, Utah, this 15th day of April, 1975.

McINTOSH & ROBERTSON