

1976

Ronald P. Stubbs v. Lyman W. Hemmer : Brief of Appellant

Utah Supreme Court

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McCune & McCune; Attorneys for Appellant Dale M. Dorius; ATTORNEY RESPONDENT

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

RONALD P. STUBBS,)
)
Plaintiff and Appellant,)
)
vs.)
)
LYMAN W. HEMMERT,)
)
Defendant and Respondent.)

Case No.
14801

BRIEF OF APPELLANT

Appeal from Judgment of Fourth Judicial District
Court, Utah County, State of Utah, Honorable
J. Robert Bullock, District Judge

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Clerk, Supreme Court, Utah

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Legend

D = defendant exhibit
P = plaintiff exhibit
T = transcript
R = record
A = appendix

IN THE SUPREME COURT OF THE STATE OF UTAH

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RONALD P. STUBBS,)	Brief
Plaintiff - Appellant,)	of
)	Appellant
vs.)	
)	
LYMAN W. HEMMERT,)	
Defendant - Respondent,)	No. 14801

STATEMENT OF THE KIND OF CASE

This is an action by appellant on a note foreclosing a mortgage securing same and counterclaim by respondent for breach of contract.

DISPOSITION IN LOWER COURT

Plaintiff was granted judgment and foreclosure in the amount of \$810.00 on unpaid note and \$150.00 attorney fee minus setoff of \$62.04 for utility bill and \$200.00 damage for breach of contract to supply cooling equipment.

RELIEF SOUGHT ON APPEAL

Appellant seeks striking of \$200.00 damage and interest awarded defendant and increase of attorney fees awarded in lower court and additional attorney fees for appeal.

STATEMENT OF FACTS

On February 3, 1971, plaintiff and defendant entered into an agreement whereby plaintiff would buy defendant's

home in Provo, Utah and transfer to defendant all of plaintiff's interest in a store in Santaquin, Utah which plaintiff had run as a grocery store until December 31, 1970 (T27). Plaintiff was allowed a sales price of \$13,000.00 for said store (T7:12), \$8,700.00 of which was applied as a down payment on the purchase of defendant's home and the balance of \$4,300.00 was reduced to a note (Exhibit "A" of Complaint, R100; pre-trial order, R44).

The original earnest money receipt and exchange agreement provided that two walk-in coolers and their cooling equipment were to be part of the exchange and sale (D1).

Plaintiff executed a Warranty Deed in favor of defendant to the store on February 18, 1971, and defendant and his now deceased wife gave plaintiff a mortgage on said store dated February 20, 1971, to secure plaintiff's \$4,300.00 note from defendant (Exhibits "A" and "B" of Complaint, R100). Both the Warranty Deed and mortgage were recorded in the office of the Utah County Recorder on February 23, 1971.

At the time the store exchange was made, the parties agreed that plaintiff could leave the display cases and other personal property of the grocery store business in the store building and the parties would attempt to sell the personal property and realty together (T8:2-9; 15:5-15; 33:1-5). When this proved fruitless, plaintiff sold \$3,200.00 of the

personal property inventory to Burt Durrant (T32; 37:22-30; 38).

Mr. Durrant removed two compressors from the walk-in coolers when he was removing the rest of the equipment purchased by him (T34:14-30).

Defendant was very anxious to sell the store (T15:5-10) but no offers were received from anyone desiring to buy the building to operate as a grocery store or otherwise use the walk-in coolers (T16:24-30). Then defendant sold the building to Milo Janssen for \$7,500.00 on August 1, 1973 (T9:30; 23-25; D4).

About July 30, 1974 plaintiff began contacting defendant about delinquent payments on the mortgage and note (T36:1-2), after which defendant sent plaintiff a memo dated August 19, 1974, complaining about the two compressors (D2). Plaintiff responded and requested payments on the delinquent note (D2).

Shortly thereafter, plaintiff enlisted the services of his counsel to collect the note and foreclose the mortgage (T36:13-15).

Numerous contacts were made to get the note paid including efforts on the part of plaintiff to contact Durrant, obtain the return of the compressors by Durrant to Stubbs, and attempt to return said compressors to the store in Santaquin but defendant rejected said compressors and was uncooperative (T10:17; 29; 36; 28; 39; 21:51-55). Plaintiff's

attorneys have since performed considerable services for
plaintiff in foreclosing plaintiff's mortgage (T52-58; R1-106).

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING THE EARNEST MONEY RECEIPT AND EXCHANGE AGREEMENT INTO EVIDENCE WHEN SAME HAD BEEN EXTINGUISHED AND MERGED BY EXECUTION AND DELIVERY OF THE WARRANTY DEED TO BUYERS DATED FEBRUARY 18, 1971.

The general doctrine of merger is recognized by our court as follows:

It has become elementary that, in the absence of fraud, all the conditions and provisions contained in an antecedent executory contract or agreement are merged in the deed which is executed and delivered in fulfillment of the stipulations contained in said agreement. In the case of *Siocum v. Bracy*, 55 Minn. 22, 56 N. W. 826, 43 Am. St. Rep. 499, Mr. Justice Mitchell states the rule clearly thus:

'No rule of law is better settled than that, where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is functus officio, and the rights of the parties rest thereafter solely on the deed. This is so although the deed thus accepted varies from that stipulated for in the contract, as where the vendee accepts the deed of a third party in lieu of the deed of his vendor; and as, in the sales of land, the law remits the party to his covenants in his deed, if there be no ingredient of fraud or mistake in the case, and the party has not taken the precaution to secure himself by covenants, he has no remedy for his money, even on failure of title.'
Reese Howell Co. vs. Brown, 48 U 142, 158 P 684 (Utah 1916)

In the absence of fraud or mistake, merger is only avoided where it is clearly shown the parties intended to avoid merger or where the provisions were clearly collateral.
38 ALR2d 1311, Secs. 2 and 16. And a collateral agreement

is often designed to take effect after the execution of the deed such as a covenant to make improvements or repairs. 38 ALR2d 1311, Sec. 2.

Our court of 1966 held an earnest money receipt merged in a deed of conveyance which was poorly drawn providing for ultimate conveyance to be made in the name of "to be arranged" and also providing that same would be abrogated by execution of the final deed. Kelsey v. Hansen, 18 U2d 226, 419 P2d 199 (Utah 1966). In the Kelsey case the earnest money receipt had obligated the buyers to furnish certain draperies. Our court indicated further in Kelsey that such a situation was not convincing to them as being a collateral agreement and that only equity, fraud, mistake, and the like could have made them rule otherwise but no such equities were pleaded.

Our case is essentially the same type of situation. An earnest money agreement was entered into by the parties (D1) on February 3, 1971 providing for transfer of the grocery store in Santaquin to defendant for a credit of \$8,700.00 on plaintiff's purchase of defendant's home in Provo. Consummating the exchange, a Warranty Deed dated February 18, 1971 (P7) conveying the grocery store to defendant and defendant's wife was delivered and recorded in the office of the Utah County Recorder on February 23, 1971. Said facts were admitted in the court's pre-trial order (R44) and in testimony by

defendant (T31). An examination of the earnest money receipt shows no intent on the parties that the plaintiff would be obligated to make sure the walk-in coolers were attached to the building for an indefinite period of time nor can the statement on lines 69 through 72 of said agreement stating "the two walk-in coolers with their cooling equipment are to be left in tact with the building" be considered a collateral covenant.

The statement that the walk-in coolers were to remain with the building is dependent upon the obligation to convey. On February 18, 1971, the property was conveyed. From that point in time plaintiff had fulfilled his obligations under the earnest money agreement.

From that point on any obligation remaining to defendant by plaintiff to protect the coolers and equipment was in the form of a duty recognizable in tort and recovery on the principles of negligence or unlawful conversion against plaintiff would be necessary.

Moreover defendant had a duty to make sure he was getting what he contracted for. The principle of caveat emptor also applies. It has been stated:

The doctrine of caveat emptor applies in instances where there is inspection or investigation of premises by purchaser prior to execution of contract for purchase. McDaniel v. Quinn, 307 P2d 127 (Okla. 1957).

And the doctrine also applies to the purchase of real property except as otherwise provided by statute. Mosley v. Magnolia Petroleum Co., 45 NM 236, 114 P2d 740 (N.M. 1941). It is incumbent upon the purchaser to examine the property prior to taking possession. Mr. Hemmert indicated he had inspected the premises after signing the earnest money agreement (T15).

There was no intent shown that the parties intended a provision regarding walk-in coolers and their equipment not to merge nor is there any collateral covenant which would abrogate the doctrine of merger in this case. The earnest money agreement was improperly admitted into evidence over plaintiff's objection (T4:18-27). (The record should read "extinguished" in place of "distinguished" and "recording" instead of "reporting" on lines 19 and 20 of T4.)

POINT II

THE COURT COMMITTED SUBSTANTIAL ERROR BY AWARDING DEFENDANT AN OFFSET OF \$200.00 TOGETHER WITH INTEREST FROM DATE OF REMOVAL AS REDUCTION IN VALUE OF REAL PROPERTY NOT BASED UPON COMPETENT PROOF OF WEIGHT AND SUFFICIENCY TO ESTABLISH SAID REDUCTION IN MARKET VALUE.

The trial court's pre-trial order (R44) set forth the issue of defendant's damage on his counterclaim, if any, to be:

Whether or not the value of the mortgaged property set forth above was reduced by removal of two air compressors from the building on said premises, whether said removal was wrongfully done by plaintiff, and if so, the amount in which the market value of said property was reduced by said wrongful removal.

And defendant's counsel indicated this was his understanding of the issue before the court (T64:12; T80:2).

The issue before the court was whether the market value of the real property mortgaged had been reduced by the improper removal of two compressors by plaintiff. Our court has defined "market value" to mean:

'Market value' is the price which property will bring when offered for sale by one desiring, but not compelled, to sell, and bought by one desiring, but not compelled, to purchase. Southern Pacific Co. vs. Arthur, 10 U2d 306, 352 P2d 693 (Utah 1960) 31A CJS Evidence, Sec. 181, note 72.

In an action for a breach of contract in sale of realty, our court has set down the following rule:

The proper measure of damages would be the difference between the defendant's offer and the

actual market value of the property, but the market value should be properly established. . . . Andreasen v. Hansen, 8 U2d 370, 335 P2d 404 (Utah 1959).

The above rule was restated by our jurisdiction in 1972 as follows:

The measure of damages where the vendor has breached a land sale contract is the market value of the property at the time of the breach less the contract price to the vendee. Bunnell v. Bills, 13 U2d 83, 368 P2d 597 (Utah 1962).

The court in Bunnell further stated:

Where a rule of law has been established for the measurement of damages, it must be followed by the finder of fact, and to recover damages plaintiff must prove not only that she has suffered a loss, but must also prove the extent and amount thereof. Furthermore, to warrant a recovery based on the value of the property there must be proof of its value or evidence of such facts as will warrant a finding of value with reasonable certainty. Bunnell v. Bills, supra.

Am Jur on damages states with regards to property attached to or forming a part of realty:

The measure of damages for injuries for destruction of property attached to, or forming a part of, real estate, and the admissibility of evidence to establish such damages, depends to some extent upon the character of the property taken or destroyed. If the property destroyed or injured is so closely connected with the land as to have little value separate from, and independent of the land, the measure of damages is the difference in value between the real estate before the injury and after it; the evidence to prove the amount of damages should relate to such difference in value rather than to the value of the property destroyed or injured. For example, testimony as to the value of shade trees is not admissible upon the question of damages for their destruction, since such damages

are measured in the depreciation of the value of the land. 22 Am.Jur.2d, Damages, Sec. 326.

Where there is direct and positive evidence of the present value of property, the mere cost thereof at some prior time is not controlling if of any weight whatever to show its present value. Crosby v. Anderson, 49 U 167, 162 P75 (Utah 1916). And generally even offers to buy or sell real estate are not admissible to prove the value of property. 32 CJS Evidence, Sec. 182(3). Our jurisdiction's cases are numerous in stating that substantial evidence is required to support a finding (Bingham Coal and Lumber Co. vs. Board of Education of Jordan School District of Salt Lake County, 61 U 149, 211 P 981, Utah 1922) and that a finding of fact cannot be based on surmise, conjecture, guess, or speculation. Just a few additional citations are: Dern Investment Co. vs. Carbon County Land Co., 74 U 76, 76 P2d 616 (Utah 1938); Higley vs. Industrial Commission, 75 U 361, 285 P 306; Karren vs. Bair, 63 U 344, 225 P 1094; and Olsen vs. Warwood, 255 P2d 725 (Utah 1953). Nor can a finding be based on mere possibilities. Smith vs. Industrial Commission, 104 U 318, 140 P2d 314. See also 32A CJS Evidence, Sec. 1042.

The defendant has not sustained his burden of proof in this action sufficient to warrant the award of any damages for loss in market value due to removal of two compressors

from the store acquired from plaintiff. The trial court itself was concerned about any measure of damage (T67:17-22; T71:27).

Any evidence bearing upon damage was certainly speculative. No clear or precise evidence was presented to show the market value had been reduced because two compressors were not present in the building. All that was shown was that \$13,000.00 was allowed by Mr. Hemmert as a credit to Mr. Stubbs for the grocery store building with fixtures attached (T7:12). No personal property, the display cases and other items of movable grocery store equipment, were considered in the exchange. Then Mr. Hemmert sold the property to Mr. Jensen for \$7,500.00 (T9:30; 23:25). Hemmert then states that he feels he could have sold the store together with personal equipment as a grocery store (T11:19). However, no offers to purchase the building for a grocery store or for a use to otherwise utilize the walk-in coolers was received (T16:24-28). Jensen purchased the building at the price offered by the realtor (T25:5-8); and Jensen would not have paid one cent more for the property if the compressors had been in the building (T25:20-23).

The testimony of the refrigeration man, Larry Hopkin (T43-44) was offered by plaintiff to impeach the allegations

of Hemmert who claimed damages in his complaint in the amount of over \$5,000.00, and was not offered nor can it be accepted to prove the reduction in value of the realty, 22 Am.Jur.2d Damages, Sec. 326, Supra. Mr. Hopkins testified that he examined two compressors. But the evidence does not even establish the fact that these two compressors were in fact the two compressors present in the building when it was sold to Hemmert.

The only other evidence which in any way could bear upon damage was the testimony of real estate agent Eugene Black which is not before the court in the transcript and which defendant did not designate as further record on appeal. But the trial court's understanding of his testimony as being merely conjectural and speculative is clear in the transcript (T79:19-21).

No competent evidence of sufficient weight was produced at trial to in any way prove damage to market value and the finding of the trial court regarding \$200.00 damage should be set aside.

POINT III

THE COURT ABUSED ITS DISCRETION AND COMMITTED SUBSTANTIAL ERROR BY AWARDING DEFENDANT \$200.00 DAMAGE FOR THE VALUE OF COMPRESSORS REMOVED FROM THE BUILDING CONTRARY TO THE PRINCIPLES OF EQUITY WHEN SAID COMPRESSORS HAD BEEN RECOVERED FROM THE THIRD PARTY WHO REMOVED THEM, TENDERED TO DEFENDANT, REJECTED BY DEFENDANT, AND RETURNED TO THE BUILDING FROM WHICH REMOVED.

A fundamental maxim of equity is that equity seeks to do justice and avoid injustice. 30 CJS Equity, Sec. 89; Valcarce v. Bitters, 12 U2d 61, 362 P2d 427 (Utah 1961). Coinciding with this maxim is the principle that equality is equity. Rich v. Stephens, 79 U 411, 11 P2d 295 (Utah 1932).

No greater injustice and inequity can result than to require plaintiff to pay defendant the sum of \$200.00 for two compressors when plaintiff through his own efforts obtained return of two compressors to the grocery store in Santaquin. Equity will not suffer a double satisfaction to be taken nor unjust enrichment. 30 CJS Equity, Sec. 89, pg. 1059-1060.

Once Mr. Hemmert's complaint was known, plaintiff took it upon himself to obtain the compressors from Mr. Durrant, the person who had taken them from the grocery store (T34; 10:29; 29:19). Then plaintiff attempted to return said coolers to defendant (T17:9-24; 36:19-25; 38:15-20). But defendant rejected said compressors and claimed he had no use for them (T39:8-20; 21:22-27).

The testimony is not clear as to what plaintiff did with the compressors after Mr. Hemmert rejected them, but it may be inferred from the testimony of Mr. Hopkin (T42-44) indicating that he examined two compressors at the grocery store in Santaquin on July 27, 1976. And the purchaser of the store from defendant, Mr. Janssen was to receive the two walk-in coolers with the purchase (T23:26-30, 24:1-3). Plaintiff housed the compressors for several months in his own garage and then delivered them to the Santaquin store where Mr. Hopkin examined them.

Equity cannot allow defendant to be paid for compressors returned to the store where they were to be. To rule otherwise would be unjust enrichment and double recovery. Equity should step in and equalize the status of the parties.

POINT IV

THE COURT ABUSED ITS DISCRETION AND COMMITTED SUBSTANTIAL ERROR BY AWARDING PLAINTIFF ONLY \$150.00 FOR THE SERVICES OF HIS ATTORNEY.

The most important point which plaintiff raises on his appeal is the inadequate award of attorney fees since the measure of fees granted is a tool of justice. Their inadequate or excessive taxation thwarts justice. 57 ALR3rd 475, 2(a).

Our code governs the award of attorney fees in foreclosure actions as follows:

In all cases of foreclosure when an attorney's fee is claimed by the plaintiff, the amount thereof shall be fixed by the court, any stipulation to the contrary notwithstanding; provided no other or greater amount shall be allowed or decreed than the sum which shall appear by the evidence to be actually charged by and to be paid to the attorney for the plaintiff. If it shall appear that there is an agreement or understanding to divide such fees between the plaintiff and his attorney, or between the attorney and any other person except an attorney associated with him in the cause, only the amount to be retained by the attorney or attorneys shall be decreed as against the defendant. 78-37-9 UCA 1953, as amended.

There is general agreement not only that fees of attorneys should be adequate, but also that fees should be determined on the basis of a number of factors, no one of which should be controlling. 57 ALR3rd 475, 2(a).

Both the Revised Rules of Professional Conduct of the

Utah State Bar and the corresponding Disciplinary Rule of the code of professional conduct of the American Bar Association, DR2-106(b) sets forth many of the criteria layed down by the courts in the past as follows:

A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

DR2-106(B), RRBC Utah State Bar; Code of Professional Responsibility ABA.

In 1949 our court discussed the old Canon 12 from which the new disciplinary rule for our Bar and the ABA stems. In counseling the State Industrial Commission on how to determine a reasonable fee they said in part:

While ordinarily our power does not go beyond that of setting aside an order of the commission, in a case such as this we think it wise to advise the commission as to some of the factors which enter into the determination of a reasonable fee for legal work performed. . . . The commission would not be arbitrary or unreasonable unless it fixed a fee which any reasonable mind, familiar with the value of attorneys' services would say was less than reasonable. That of course means that there must necessarily be a wide range because attorneys themselves vary widely as to the reasonableness of fees for professional work. And it must be kept in mind that here we are dealing with compensation benefits. Much could be said regarding the amount of attorneys' fees. Lawyers perform differently according to their ability and experience. Some work faster and more accurately and thoroughly than others. Each brings to his task his own capacity, expertness, ability, dispatch and experience. The author in a dissenting opinion in the case of *Ellis v. Industrial Commission*, 91 Utah 432, 64 P2d 363, dwelt at some length on these factors. It may be briefly said that an incompetent lawyer is apt to be a detriment to his client and is usually overpaid, whatever he receives, while a competent, well-trained, and skillful attorney may oftentimes be underpaid for the services he renders.

Rule 12 of the Revised Rules of the Utah State Bar, adopted May 28, 1936, approved by the Supreme Court of the State of Utah March 1, 1937, with amendments effective March 10, 1940, provides as follows:

"In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's

ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

"In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and for the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

"In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

"In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

It should be noted the above does not lay down a rule but presents guides for the fixing of attorneys' fees and so expressly states. . . .

It would be the duty of the commission by evidence to fix a fee within the zone of reasonableness. The

commission would not ordinarily be required to determine from the evidence what would be the lower and upper limits of the zone for the services in any particular case. But it must be satisfied from evidence adduced as to the reasonable worth of the services rendered that the fee it fixes is within the zone. Thatcher vs. Industrial Commission, 207 P2d 178 (Utah 1949).

The amount of time and labor expended by the attorney is of major importance. American Law Reports state:

It appears to be universally agreed that the amount of time and labor expended by the attorney on behalf of his client is, in general, one of the most important factors, if not the most important factor, considered by the courts in determining what constitutes a reasonable fee in a particular case. . . . 57 ALR3rd 475, 2(a).

But the real test is the value of the services performed by the attorney for his client. The Supreme Court of Kansas has said on this point:

The real test in the allowance of attorney fees is the value of the services performed by the attorney on behalf of his client; and the court in determining the amount thereof may consider labor, time and trouble involved, as well as the extent of services rendered and the nature and importance of the litigation; also the responsibility imposed on such counsel; the amount of money involved; the skill and experience called for in the performance of the services; the professional character and the standing of the attorney; and the results secured. Attebery vs. MFA Mutual Insurance Company, 191 Kan. 178, 388 P2d 647 (Kan. 1963).

Applying the value of service test in the above case, the Kansas court rejected the contention that the amount in

controversy should control the fee awarded and granted attorneys' fees of \$400.00 in an action to recover the value of an automobile under collision coverage where verdict for plaintiff was only \$300.00 and insurer tendered \$272.50. Attebery v. MFA Mutual, Supra.

Our own court found \$1,056.00 not excessive attorney fees in successfully foreclosing a \$6,068.00 mortgage where the defendant set up as a defense a breach of a separate contract and a counterclaim for specific performance. Wallace v. Build, Inc., 16 U2d 401, 402 P2d 699 (Utah 1965). And our court has also felt that an attorney fee of \$2,500.00 is not unreasonable in a summary judgment on a trust deed securing a note of \$27,500.00 where the time and amount of work was taken in evidence. Security Title Company vs. Pay Less Builders' Supply, 17 U2d 179, 407 P2d 141 (Utah 1965).

In addition to the foregoing criteria, Bar Association suggested fee schedules, charges in the same locality, and current inflationary trends and cost of living are all persuasive evidence of what constitutes a reasonable fee. 57 ALR3rd 475; 58 ALR3rd 201; 7 CJS Attorney and Client, Sec. 191(2).

Further, our Utah court as early as 1915 had this to say about what constitutes a reasonable fee:

By a 'reasonable fee,' no doubt, is meant one which is reasonable under all the facts and circumstances

of each case. What is reasonable, therefore, in a large measure at least, must depend upon the amount in controversy, the labor, and responsibility imposed upon the attorney in obtaining judgment, as these things may have arisen from the issues presented and tried. If an attorney is required to do no more than to prepare the formal pleadings and decree in a default case, a smaller sum, no doubt, would be reasonable, than in a contested case, and especially in one where the issues were numerous and where intricate questions of both fact and law arose and had to be determined. Jensen vs. Lichtenstein, 45 U 320, 145 P 1036 (Utah 1915), emphasis added.

Then, we also feel as a tool of justice for all concerned, the adequacy of the fees should always be considered where allowed for to insure the aggrieved will obtain adequate representation. We agree with the learned justices in the Thatcher v. Industrial Commission case, supra, when they advised:

While attorneys may not hope to be compensated to the full measure of the value of their time and work, they must not be limited to such niggardly fees that they cannot afford to accept compensation cases. And particularly where it has become necessary to carry a compensation case to this court should the commission be at least moderately liberal in allowance of attorneys' fees. Better that an applicant should lose 15% to 20% of his benefits in attorneys' fees than that he should receive no benefits at all merely because no lawyer could afford or would be willing to accept his case and properly present it to the commission and the courts, for the main reason that the compensation for such services would be grossly inadequate. Thatcher v. Industrial Commission, supra.

See also R22 for plaintiff's additional analysis.

Justice Wade in his concurring opinion in Thatcher also said:

I do not believe that the legislature intended this kind of work to be done without compensation or for unreasonable low compensation. If we adhere to the rule that such compensation may be so fixed then many cases will have to be litigated without the benefit of legal counsel and many a deserving person who is entitled to compensation will be barred therefrom. . . and the applicant will not be fortunate enough to contact a lawyer who would take his case, knowing that he would not be adequately compensated for his services. The attorneys' fees should therefore be fixed within the bounds of reasonable compensation for the services rendered and should be sufficient in that the average lawyer can afford to take that kind of case without losing money by such employment. Thatcher v. Industrial Commission, supra.

Even Chief Justice Pratt dissenting in Thatcher said:

It is human nature to shy away from the arbitrary control of others, and attorneys are no exception. Met with a law in which the layman is given such unbridled control of his fees, the attorney where arbitrariness is less apt to follow. Who suffers as a result? The applicant before the commission, as he (or she, as in this case) is handicapped in acquiring justice. He either must accept inferior service, or must fight his battle alone against astute well paid counsel of--in many instances--his corporate employer. Thatcher v. Industrial Commission, supra.

We do not feel the trial court followed the above principles in its award of attorney fees. See R22 and R14.

The applicable contractual provision of the mortgage note (Exhibit "A" of Complaint, R100; A1) states:

If this note is placed with an attorney for collection, or if suit be instituted for collection, then in either event, the undersigned agrees to pay reasonable attorneys' fees.
(Emphasis added)

The applicable contractual provision of the mortgage securing said note (Exhibit "B" of Complaint, R100; A2) states:

The mortgagors agree to pay all taxes and assessments on said premises, and a reasonable attorney's fee in case suit is brought to collect the debt hereby secured, which fee is secured hereby. . .
(Emphasis added)

The last published Central Utah Bar Association minimum fee schedule of 1969 (A3) and the Advisory Schedule of Minimum Fees of the Utah State Bar last published in March 1969 (A4) both suggest \$500.00 as a minimum fee for foreclosure of mortgages on real property. The suggested minimum fee for appearance in any district court for any reason is the sum of \$150.00, and minimum fee for pre-trial conferences \$100.00. Said schedules also provide a suggested percentage fee for default foreclosures of \$50.00 of the first \$100.00 recovered, one-third of the next \$400.00 recovered, and 25% of the next \$500.00 recovered in no contest situations.

A recent Utah State Bar letter reported average hourly attorney fees to be \$53.00 per hour in early 1974 (A5). The usual and ordinary minimum fee charged by attorneys in Provo for office work and court work is \$35.00 per hour (T5712⁵).

and in the Salt Lake area \$47.00 to \$52.00 an hour (T57:2-4).

Cost of living for attorneys as well as any other member of society have appreciated considerably. The inflationary rate evidenced by the Consumer Price Index indicates 80.3 on the index in 1956 and 156.5 for the present. There has been over a 100% increase in the cost of living since 1956.

Of major importance is the time expended and labor performed by counsel on behalf of plaintiff. The following amounts of time expended were testified to by plaintiff's counsel:

4 1/8 hours negotiating prior to suit for return of compressors by Durrant and settlement (T55:18)

3 3/8 hours preparation of Complaint, Lis Pendens, and further negotiation with Attorney Dorius and Hemmert regarding possible settlement (T55:28)

6 3/8 hours responding to Counterclaim, preparing Interrogatories to defendant, and attempting to obtain answers to Interrogatories (T56:2)

3 1/4 hours preparing and appearing on Motion to Dismiss (T56:5)

6 1/2 hours further discovery after receiving answers from Attorney Dorius pursuant to court's order of August 22 (T56:10)

6 3/8 hours pre-trial preparation from time court sent notice of pre-trial and including pre-trial conference and negotiations regarding settlement (T56:13)

3 7/8 hours trial preparation (T56:17)

Total: 33 7/8 hours.

An examination of the pleadings prepared and filed in this action shows further the labor expended on behalf of plaintiff by plaintiff's counsel including Complaint, Lis Pendens, Summons, Reply to Counterclaim, Interrogatories to Defendant, Memorandum of Costs and Disbursements, Motion for Default Judgment and Dismissal, Notice of Readiness, and the final Findings, Conclusions, and Foreclosure Decree and Judgment. Since the Judgment was entered, plaintiff's counsel has further moved the court to amend Findings and Judgment and prepared the Statement of Points and Authorities in support of said Motion and reply Points to defendant's objections.

The record also reflects in defendant's Answer and Counterclaim (R96) an affirmative defense of release of mortgage. The mortgage and note in this action was ambiguous and the defense raised by defendant required plaintiff's counsel to prepare detailed interrogatories, prod for their answer, examine the law, and interview officers at First Security Bank in Payson in preparation for trial. It was only at pre-trial and after this exhaustive preparation that plaintiff was able to obtain admission from defendant to the continuing genuineness of the mortgage lien.

Further testimony establishing attorney fees (T52:55-57) establishes the expertise and qualifications of counsel, and

the fee of \$600.00 to be charged plaintiff for the foreclosure. None of this testimony establishing a reasonable attorney fee was contradicted by testimony presented by defendant. Morrison v. Federico, 232 P2d 374, 379 (Utah 1951).

If the award of \$150.00 attorney fees to plaintiff herein is allowed to stand, in effect if you subtract the 3 1/4 hours spent by plaintiff's counsel in preparing his original Motion to Dismiss for failure to file proper answers to interrogatories and disregard any time spent since trial in preparing Findings, Conclusions, and Decree and Judgment, etc., plaintiff's counsel has been working for \$5.00 per hour for 30 hours and even if you cut that in half, plaintiff's counsel has been working for only \$10.00 per hour for 15 hours.

Taking the figure of 30 hours billable time per week at \$150.00, an attorney would gross about \$600.00 per month since there is a recognizable amount of nonbillable time each week for indigents, etc. That would not even pay his office rental and secretarial expenses. An attorney has a responsibility to society. But an attorney must also sustain himself.

Even if the amount of time testified to by plaintiff's counsel is divided in half, taking \$150.00 for 15 hours of work, an attorney would gross approximately \$1,200.00 per month. Today subtracting all overhead expenses, he would end up with

an income of approximately \$200.00 a month. Reasonable? If the rule is established that a defendant who brings a counter complaint and proves a right to recover under said counter complaint, no matter how small, is allowed to interfere with the amount of fees awarded plaintiff on his complaint, injustice will result. The argument regarding this point on pages 3 & 4 of plaintiff's Statement of Points and Authorities (R14) is pertinent.

The mortgage note (Exhibit "A" of Complaint, R100; A1) provides for attorney fees both before and after suit. Therefore, the fees awarded plaintiff should encompass services rendered by his counsel in collecting the note and foreclosing the mortgage prior to commencement of suit as well as after. The Florida District Court of Appeal recently held that where an attorney for the prevailing party spent 44 hours on a case, \$500.00 attorney fees awarded was an abuse of discretion and the award was increased to \$1,500.00. Flagala Corporation vs. Hamm, 302 So2d 195 (Fla. 1974). Plaintiff also feels the trial court abused its discretion and plaintiff should be awarded increased attorney fees.

Plaintiff further requests the court to award him a reasonable attorney fee for bringing this appeal. Our court has held that said attorney fees on appeal are discretionary. State vs. Shonka, 3 U2d 121, 279 P2d 709 (Utah 1955).

In neighboring jurisdictions of Arizona and California they deemed them allowable on appeal. Amos Flight Operations, Inc. vs. Thunderbird Bank, 540 P2d 1244 (Arizona 1975); San Luis Obispo Bay Properties, Inc. vs. Pacific Gas and Electric Company, 104 Cal.Rptr. 733, 28 Cal App. 3rd 556 (Cal. 1972). Plaintiff therefore respectfully requests an appropriate fee award on this appeal, and a more respectable fee for the foreclosure action from the time counsel was first retained through entry of findings and decree.

CONCLUSION

The Warranty Deed delivered to defendant by plaintiff merged the earnest money receipt and defendant should not recover damages from plaintiff except upon theories of negligence, unlawful conversion, or some other tort. Moreover, there is not sufficient evidence as a reasonable basis for the award of damages and even if there was, equity cannot allow defendant to recover twice or for plaintiff to pay twice after he obtained the compressors which were taken by Mr. Durrant, attempted to return them to the store in Santaquin, had them rejected by defendant and later returned them to the store to the new owner.

Attorney fees are a tool of justice. The court should have awarded more adequate fees to plaintiff for his attorneys.

THEREFORE, PLAINTIFF PRAYS that the \$200.00 damages plus interest awarded defendant be stricken and that he be awarded additional and more adequate attorney fees together with attorney fees for this appeal.

Respectfully Submitted,

McCUNE & McCUNE
96 East 100 South
Provo, Utah 84601
Attorneys for Appellant

MONTHLY INSTALLMENT

MORTGAGE NOTE

\$ 4,300.00 Payson Utah February 20, 1971

FOR VALUE RECEIVED, the undersigned severally promise to pay to FIRST SECURITY BANK OF UTAH, NATIONAL ASSOCIATION, or order, the principal sum of Forty Three hundred and 00/100 DOLLARS (\$ 4,300.00) with interest from February 20, 1971, at the rate of 6.1 per cent per annum on the unpaid principal balance until maturity. This note is payable in lawful money of the United States of America to the FIRST SECURITY BANK OF UTAH, NATIONAL ASSOCIATION, at its Payson Branch in Payson, Utah, or at such other place as the legal holder hereof may designate in writing, delivered or mailed to the debtor, in monthly installments of One hundred twenty seven and 00/100 Dollars (\$ 127.00) each commencing on the first day of March, 1971, and continuing on the first 20th day of each month thereafter until paid. ~~unpaid shall become due and payable~~

Delinquent installments, including interest, shall bear interest at the rate of eight per cent per annum from the date of delinquency until paid.

Each payment shall be applied first to accrued interest, and the balance, if any, shall be applied upon the principal.

In case of default in payment of any of said installments of principal and interest or any part thereof, it shall be optional with the legal holder of this note to declare the entire principal sum hereof due and payable, and proceedings may at once be instituted for the enforcement and collection of the same by law. If this note is placed with an attorney for collection, or if suit be instituted for collection, then in either event, the undersigned agrees to pay reasonable attorney's fees.

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, protest, notice of protest and of non-payment of this note, and consent that this note and any payment due or to become due hereunder may be extended or renewed without previous demand or notice.

This note is to be governed by and construed in accordance with the laws of the State of Utah.

This note is given for an actual loan of the above amount and is secured by a real estate mortgage.

Sylvan W. Hemmick
Alta B. Hemmick

All of which sums the mortgagors agree to repay, on demand when not otherwise agreed, and if the said mortgagors shall well and truly pay each and all of the sums of indebtedness herein specified, in accordance with the terms then these presents and everything herein contained shall be void, anything herein contained to the contrary notwithstanding; otherwise to remain in full force and virtue.

The lien of this mortgage shall remain in full force and effect during any postponement or extension of payment by the mortgagors to be performed or of the time of payment of the indebtedness or any part thereof secured hereby.

The mortgagors shall not commit or permit waste; shall make no structural alterations in said mortgaged premises, without the prior written consent of the mortgagee; shall obey and observe all laws, ordinances, governmental regulations, and restrictive covenants pertaining to the use and occupancy of said mortgaged property; and shall maintain the property in as good condition as at present, reasonable wear and tear excepted, and upon any failure so to do the mortgagee, at its option, may cause reasonable maintenance work to be performed at the cost of the mortgagors.

The mortgagors agree to pay all taxes and assessments on said premises, and a reasonable attorney's fee in and to be collected the debt hereby secured, which fee is secured hereby, and to keep said premises free from mechanic's liens, and to keep the improvements thereon constantly insured by some responsible fire insurance company satisfactory to said mortgagee, its successors or assigns, for the sum of \$ until said debt is fully paid. Insurance policy to be delivered to and to be made payable to said mortgagee, its successors or assigns, who is empowered to collect the same and apply the proceeds on said note. If said mortgagors fail to maintain such insurance to pay such taxes and assessments when due, or to keep off mechanic's liens, then said mortgagee, its successors or assigns may at its option, declare said note and mortgage immediately due and payable, and proceed by law to enforce this mortgage, or said mortgagee, its successors or assigns, may, if it so elects, pay said taxes, assessments, and costs of insurance; and the amount so paid, together with interest thereon at the rate of ten per cent per annum be secured hereby, and notice of intention to exercise such option or election is hereby waived.

If said property is left vacant, said mortgagee, its successors or assigns, is authorized to occupy the same, the insurance valid and prevent damage to the property.

The recording and satisfaction of this mortgage shall be at the cost of said mortgagors.

If the mortgagors, or either of them shall be adjudged bankrupt or make assignment of his, her or their property or any part thereof, for the benefit of creditors, or if any portion of the mortgaged premises shall be attached or levied upon in any suit against the mortgagors or either of them, then in either of such events the holder hereof declare the whole indebtedness due and payable and immediately foreclose this mortgage.

If the mortgagors default in any of the payments or covenants contained in this mortgage to be performed hereunder, or if any warranty made by them be broken, then, without notice to the mortgagors, the whole sum secured hereby shall at the option of the holder hereof, immediately become due and payable. This mortgage shall cover and extend to crops, rents, issues and profits from the said mortgaged premises from and after such default, both before and after commencement of foreclosure proceedings. In case of foreclosure the court, upon filing of the complaint, on the part of the plaintiff and without notice to the mortgagors, or either of them, and without regard to the solvency or insolvency of the mortgagors or either of them, and regardless of the nature of the property or the value thereof or the character of the crops, rents, issues and profits therefrom and apply the same to the payment of the debt secured hereby, or hold the same pursuant to the order of the court; and the holder, upon entry of judgment of foreclosure, shall be entitled to the possession of the mortgaged premises during the period of redemption, and the judgment shall provide for such possession and the issuance of the necessary process of court to carry out such provision of the judgment. Each and all of the remedies to the mortgagee by this mortgage shall be deemed additional and cumulative, and not exclusive. If any provision of this mortgage shall be held void, the same shall not affect any other provision hereof.

Whenever used, the singular number shall include the plural, the plural the singular, the use of any gender shall be applicable to all genders, and the term "mortgagee" shall include any payee of the indebtedness hereby secured and transferee thereof whether by operation of law or otherwise.

The said mortgagors covenant and agree to pay any and all taxes and assessments that may be levied upon the mortgage or the debt hereby secured by reason of any State or Federal Law now existing or which may hereafter be enacted.

WITNESS, the hands of said mortgagors this 20th day of February, A.D. 1971

at Payson, Utah.

SIGNED IN THE PRESENCE OF:

Lynnan Hemmert
Alta B. Hemmert

INDIVIDUAL ACKNOWLEDGEMENT

STATE OF UTAH)
COUNTY OF Utah) ss

On the 20th day of February, A.D., 1971, personally appeared

Lynnan Hemmert and Alta B. Hemmert, his wife

the signers of the above instrument, who duly acknowledged to me that they executed the same

My Commission Expires: _____ Notary Public

Contracts, sale or purchase of real or personal property or both	\$ 25.00
Conditional Sales of Personal Property	\$ 15.00
Power of Attorney	\$ 12.50
Bulk Sales Transfers, including affidavit, contract of sale, assignment of lease and other necessary documents	\$ 125.00
Certificate Doing Business under Assumed Name	\$ 10.00
Drawing of Mechanic's Lien (if description is furnished)	\$ 25.00
Income Tax Returns, State and Federal, Farmers and Business Men	\$ 15.00
Income Tax Returns, State and Federal, wages only	\$ 10.00
Escrow Agreements, including deed, etc.	\$ 25.00
Notices to Quit	\$ 15.00

VII. CHATTEL MORTGAGES

Foreclosure by non-judicial process, including all other sales not under judicial process.	\$ 100.00
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VIII. COLLECTIONS AND FORECLOSURES

Notes and Contracts Providing for the Payment of Reasonable Attorneys Fees Where There Is No Mortgage or Lien Security:

(a) Unsecured

Mortgage	Amount of principal and interest in judgment	Per cent for fee	Amount of fee on portion of recovery	Total judgment without fees	Total fees
The first	\$ 100	50%	\$ 50.00	\$ 100	\$ 50.00
The next	400	33 1/3 %	133.33	500	183.33
The next	500	25%	125.00	1,000	308.33
The next	1,000	20%	200.00	2,000	508.33
The next	8,000	15%	1,200.00	10,000	1,708.33
All over	10,000	10%			

Notes, Mortgages and Contracts that Are Supported By a Mortgage or Lien.

(b) Secured

The first	\$ 100	50%	\$ 50.00	\$ 100	\$ 50.00
The next	400	33 1/3 %	133.33	500	183.33
The next	500	25%	125.00	1,000	308.33
The next	1,000	15%	150.00	2,000	458.00
The next	18,000	10%	1,800.00	20,000	2,258.33
Above	20,000	no set fee			

NOTE: It is recognized that a fee in foreclosures of Mortgages may be on a non-contingent or guaranteed fee basis, and the usual factors of amount and time involved, and complexities, retainers, etc., may be considered in determining a reasonable fee.

Minimum Fee for Foreclosure of Mortgage on Real Property....\$ 500.00

(c) Trust Deeds

Foreclosure of Trust Deed by Exercise of Power of Sale as Provided for Under Trust Deed Act Enacted by 1961 Legislature.

1. Full fee, if foreclosure proceeds to Trustee's Sale and Deed.

	Amount of Unpaid Principal Advances and Accrued Interest	Percent for Fee	Amount of Fee on Such Percentage	Total Fees
The first	\$ 1,000	6 2/3 %	\$ 66.66 (Min.—\$66.66)	\$ 66.66
The next	7,000	2%	140.00	206.66
The next	42,000	1 1/3 %	560.00	766.66
The next	50,000	2/3 of 1%	333.32	1,099.98
All over	100,000	1/3 of 1%		

STATE DISTRICT COURTS
CIVIL AND CRIMINAL DIVISIONS

a. Appearance for either party	\$150.00
b. Motions	75.00
c. Per diem for conducting trial	200.00
d. Pretrial Conferences	100.00
e. Minimum Retainer (to be credited against total fee)	250.00

The following schedule of attorneys' fees has been adopted by the Third Judicial District Court as of December 1, 1959, in default cases presented without proof as to the reasonableness of attorneys' fees in actions for the collection of money:

(Notes and Contracts Providing for the Payment of Reasonable Attorneys Fees Where There Is No Mortgage or Lien Security)

(a) unsecured

	Amount of principal and interest on judgment	Per cent for fee	Amount of fee on portion of recovery	Total judgment without fees	Total fees
The first	\$ 100.	50%	\$ 50.00	\$ 100.	\$ 50.00
The next	400.	33 $\frac{1}{3}$ %	133.00	500.	183.33
The next	500.	25%	125.00	1,000.	308.33
The next	1,000.	20%	200.00	2,000.	508.33
The next	8,000.	15%	1,200.00	10,000.	1,708.33
All over	10,000.	10%			

**(Notes, Mortgages and Contracts That Are Supported
By a Mortgage or Lien.)**

(b) secured

The first	\$ 100.	50%	\$ 50.00	\$ 100.	\$ 50.00
The next	400.	33 $\frac{1}{3}$ %	133.00	500.	183.33
The next	500.	25%	125.00	1,000.	308.33
The next	1,000.	15%	150.00	2 000.	458.00
The next	18,000.	10%	1,800.00	20,000.	2,258.33
Above	20,000.	no fee is set			

NOTE: It is recognized that a fee in foreclosures of Mortgages may be on a non-contingent on guaranteed fee basis, and the usual factors of amount and time involved, and complexities, etc., may be considered in determining a reasonable fee.

Minimum Fee for Foreclosure of Mortgage on Real Property.....\$500.00

f. Quieting Title	\$250.00
g. Terminate Life Estate	
With Court Action	100.00
Without Court Action	75.00

LAWYERS' FEES ON UPSWING

The typical hourly rates charged by selected law firms in most parts of the United States and in Canada rose sharply between early 1973 and early 1974.

The 1974 Survey of Law Firm Economics, conducted by the consulting organization of Altman & Weil, Inc., shows that median hourly rates went up in all regions except the Midwestern States. The hourly charge rates reported by 181 law firms for lawyers with six to ten years of experience were:

Area	Early 1973	Early 1974
Canada	\$45	\$55
Western U.S.	48	53
Midwestern U.S.	45	45
Southwestern U.S.	40	46
Northeastern U.S.	50	52
Southern U.S.	45	53

The average fee charged by these firms for formation of a business corporation with \$100,000 capital ranges from a low \$419 in the Southwestern United States to a high of \$530 average in the Western States. Canadian firms charge an average of \$480. The range of reported charges for this service is from under \$250 to more than \$1,000.

Average per diem rates for Federal District Court were reported in 1973 and 1974 as follows:

Area	Early 1973	Early 1974
Western U.S.	\$374	\$378
Midwestern U.S.	352	368
Southwestern U.S.	364	369
Northeastern U.S.	355	381
Southern U. S.	362	376

The survey provides similar information for a number of other specific legal services, including legal matters in real estate, estate planning, pensions, professional corporations and SEC practice.

The 1974 Survey of Law Firm Economics is an annual service of Altman & Weil, Inc., a management consulting firm which specializes in the problems of lawyers.



DM

"Grandpa, tell me again about the good old days before 'No-Fault'."

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U.S. SUPREME COURT AUTOMATING

The Office of the Clerk, Supreme Court of the United States, is at present experimenting with automation. Much of the material in the office will be reduced to machine-readable form and as part of the project all accredited attorneys will be listed on machine-readable tape. All attorneys who are members of the Bar of the Supreme Court of the United States are asked therefore to fill out the following form and return it to the Clerk, Supreme Court of the United States, Washington, D.C. 20543, and mark it for the attention of BAR PROJ.

NAME _____ DATE ADMITTED _____

BUSINESS ADDRESS: _____

Street _____

City & State _____ Zip _____

RESIDENCE ADDRESS: Street _____

City & State _____ Zip _____

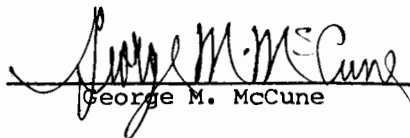
SOCIAL SECURITY ACCOUNT NUMBER _____

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CERTIFICATE OF MAILING

Mailed 2 copies of the foregoing Brief of Appellant
to Mr. Dale M. Dorius, Attorney at Law, P. O. Box 165,
Brigham City, Utah 84032, on this 10th day of
December, 1976.


George M. McCune