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Property Improvement Corporation v. CLEON D. TUCKER and MRS. CLEON D. TUCKER, also known as BETTY J. TUCKER, hrs wife; WILLARD M. TUCKER and MRS. WILLARD M. TUCKER, also known as PHYLLIS 0. TUCKER, his wife : Brief of Respondent

Utah Supreme Court

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Kay M. Lewis; Jensen and Lewis; Attorneys for Plaintiff-Respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

PROPERTY IMPROVEMENT CORPORATION, a corporation,

Plaintiff and Respondent,

vs.

CLEON D. TUCKER and MRS. CLEON D. TUCKER, also known as BETTY J. TUCKER, his wife; WILLARD M. TUCKER and MRS. WILLARD M. TUCKER, also known as PHYLLIS O. TUCKER, his wife;

Defendants and Appellants,

EUGENE S. SIMPSON and MRS. EUGENE S. SIMPSON, also known as JANE DOE SIMPSON, his wife; CONTINENTAL ACCOUNT SERVICING HOUSE, INC., a Utah corporation; and KEY ACCOUNT COLLECTION HOUSE, INC., a Utah corporation,

Defendants.

No. 14237

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action on a promissory note bearing the names of the Defendants-Appellants and others.

DISPOSITION IN LOWER COURT

Plaintiff filed its complaint based upon a promissory note bearing the names of the Defendants-Appellants and others. Plaintiff's motion for summary judgment as to all defendants was granted as to the individual defendants but denied as to the corporate defendants whose cases are still pending before the trial court. Defendants-Appellants have appealed the lower court's order of summary judgment against them.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks affirmance of the judgment of the trial court.

STATEMENT OF FACTS

Defendants-Appellants Tucker (hereinafter referred to as "Defendants Tucker") and others executed a promissory note to Plaintiff-Respondent (hereinafter referred to as "Plaintiff") on March 26, 1974, in the amount of $150,000.00, part of the proceeds therefrom being received by the Defendants Simpson, as agreed, for their own benefit and part of the proceeds being received, as agreed, by agents of the Defendants Simpson as their broker's commission for the transaction. The promissory note was executed for the purpose of facilitating a sale of certain stock and other interests in Continental

Account Servicing House, Inc., and Key Account Collection House, Inc., both party defendants in this action but not participating in this appeal. The seller in this transaction was Eugene S. Simpson and the buyers were Mr. and Mrs. Cleon D. Tucker and Mr. and Mrs. Willard M. Tucker, all named defendants.

As partial security for the promissory note, the Defendants Tucker were required to and did place into Continental Account Servicing House, Inc., certain real properties valued in excess of $1,000,000.00. As additional security, the Defendants Simpson were required to and did place into escrow certain stock of the Defendant corporations, constituting controlling interest therein. However, on or about June 17, 1974, the Defendants Tucker removed the real properties from the said corporation, allegedly because they believed themselves to have been defrauded by the Defendants Simpson.

As a result of the transfer of that real property out of the corporation, the terms of both the promissory note and the contract of sale were breached and Plaintiff's security on the note was seriously jeopardized. Plaintiff brought this action for judgment on the promissory note. After pleadings were filed by all parties, Plaintiff moved for summary judgment.

The trial court granted Plaintiff's motion for summary judgment as against the individual defendants, but inasmuch as the court felt the corporate defendants had pled certain

defenses which established issues of material fact, judgment was denied as against the corporate defendants (R.101).

It was 6 days later that the escrow agent holding the stock as security voluntarily deposited said stock with the court for disposition as the court deemed proper (R.131A). Some six days after that the Defendants Tucker moved the court to vacate its judgment (R.105, 111), which motion was duly considered by the court and denied (R.130).

Some 77 days after the Defendants Tucker had filed their answer to Plaintiff's amended complaint (R.51) and 23 days after the court entered judgment against them (R.96), Defendants Tucker sought to file an amended answer to amended complaint (R.115) without leave of court or opposing counsel. This is significant for it is the first point in the pleadings wherein Defendants Tucker raise the issue of an "offset" purportedly owing to them (R.120, Fourth Affirmative Defense).

Also significant is the fact that on August 8, 1975, Plaintiff received a letter from Defendants Simpson advising Plaintiff that when the Tuckers unlawfully took their real property and abandoned the corporation, the Defendants Simpson intentionally issued additional stock, thereby destroying the value of the stock held as security.

Defendants Tucker have appealed the trial court's decision.

ARGUMENT

POINT I

THE DECISION OF THE TRIAL COURT WAS PROPER FOR THE REASON THAT THERE WERE NO DISPUTED ISSUES OF MATERIAL FACT CONTAINED IN ITS ORDER OF SUMMARY JUDGMENT.

Defendants Tucker have raised two major issues as purportedly being disputed issues of material fact. The first issue concerns an offset which the Defendants Tucker claim is owing to them. However, such alleged offset was never pled before the court nor did the court ever make a holding concerning any such offset. The second issue is the matter of attorney's fees.

Even a cursory examination of the court's amended order granting summary judgment in part (R.101), however, will disclose that the matter of attorney's fees was neither included in the judgment nor decided, but was, rather, reserved for future hearings. Both of these matters will be discussed in more detail immediately following.

A. There is no disputed issue of material fact concerning an offset purportedly owing to Defendants Tucker since such was never alleged in the pleadings before the court.

Defendants Tucker first introduced their claim to an "offset" in their amended answer to amended complaint, Fourth Affirmative Defense (R.120). This is also the only portion of the record where they claim an offset.

This amended answer was ignored by the trial court, and rightly so for several reasons.

First, the amended answer was filed on August 20, 1975, 23 days after the court entered its order granting summary judgment in part (R.96), and 20 days after the court entered its amended order granting summary judgment in part (R.101). In other words, the issue of an offset was first raised by the Defendants Tucker after the case had been fully adjudicated as to them. This is simply not the proper and timely way to raise an issue. Rule 56(e), U.R.C.P. At 4A C.J.S., Appeal and Error, §1207 (1957), this fundamental point of logic is inscribed. "A matter will not be considered by the appellate court although it may appear in the record if it is not properly there."

Second, the amended answer was filed 77 days after the filing of the answer and without leave of either the court or opposing counsel as required by Rule 15(a), U.R.C.P. Not only was it filed far too late for consideration but also it was never properly before the trial court. Such being the case, the amended answer must be stricken from the record.

Third, even if the trial court could have considered the issue of offset -- which, of course, was physically impossible due to the chronological sequence of the filing of the amended answer -- it was never raised by sworn affidavit as is required

by Rule 56(e), U.R.C.P. The affidavit of Willard M. Tucker (R.86) states at Paragraph 6 simply that the Tuckers never received any of the proceeds of the loan. There was absolutely no allegation that an offset was owing or even an allegation that the Defendants Tucker should have received some of the loan proceeds. In fact, there was no legal or contractual requirement that the Tuckers receive any of the proceeds of the loan, which, logically, were to be paid to the seller and to seller's brokers, and the Tuckers simply were not included in that group. Such being the case, they cannot now attempt to raise an issue before the appellate court which was not before the trial court. 4 C.J.S., Appeal and Error, §243 (1957).

Defendants Tucker have alleged that the issue of "offset" was raised by the court in its minute entry prior to the entry of the judgment. However, the minute entry cannot be considered under well-established principles of law. The court's formal written judgment supersedes all previous statements as to the court's intentions. This included previous oral arguments (Newton v. State Road Commission, 23 Ut.2d 350, 463 P.2d 565, 567 (1970)) and also, more importantly, previous written statements (Cook v. Gardner, 14 Ut.2d 197, 381 P.2d 78 (1963)).

The Cook case, supra, is perhaps the most definitive statement on the matter. There the court upheld the formal judgment of the trial court which differed from the minute entry, by holding that ". . .of controlling importance is the fact that the minute entry is superseded by the document signed by the judge which becomes the order of the court. . . ." Id. 80. The minute entry could not possibly be construed as the judgment of the trial court because it is insufficient to act as a judgment under Rule 58(a) of the Utah Rules of Civil Procedure where it is stated that "all judgments shall be signed by the judge and filed with the clerk." The court's minute entry in this case is both unsigned and superseded by the formal judgment.

In Osborne v. Osborne, 60 Wash. 2d 163, 372 P.2d 538 (1962), that court explained the significance of a minute entry.

> "But an unsigned minute entry is not a judgment. As was said in State ex rel Thomas v. Lawler, 23 Wash.2d 87, 159 P.2d 622, a minute entry made by the clerk of the court has nothing to do with the final judgment of the court. It is merely evidence of what the judge has decided to do at the time. He is free to change his decision at any time before the entry of his final order or judgment. If the minute entry is different from the judgment entered, it cannot be used for the purpose of contradicting or impeaching the judgment." Id. 541. (Emphasis added.)

In addition, it must be considered that in the present case the trial court had full opportunity to reconsider its minute entry and its order when it signed its amended order of summary judgment and when it heard and denied Defendants' motion to correct amended order (R.105) and Defendants' motion for order vacating judgment (R.111). Even after having considered the matter on four distinct occasions, the trial court refused to disturb its formal order of summary judgment.

This is the law not only in Utah but also in almost all jurisdictions. 46 Am.Jur.2d, Judgments, §153 (1969) states:

> "The records of the judgment should be distinguished from the judge's minutes which are merely memoranda which the judge makes upon his own docket, for his own convenience, to enable him to see that the clerk accurately makes up the record."

In Pierce County v. Thurston County, 13 Wash.App. 602, 536 P.2d 3 (1975), a most recent decision, the court held: "Whatever a trial court may assert in an oral or memorandum decision has no binding effect unless it is incorporated in its formal findings or conclusions." Id. 4.

The minute entry was not the court's judgment nor was it a pleading. It should not be considered part of the record of the court but purely as an informal note evidencing what the court was thinking at the time. Such being the case, then, it cannot be considered on appeal.

In Southern Pacific Transportation Company v. Lueck, 11 Ariz. 560, 535 P.2d 599 (1975), that court held under its Rule 75(h) (which is similar to Rule 75(h), U.R.C.P.) that it would follow ". . .the general rule of wide application that an appellate court can determine a cause only upon the record of the court below." Id. 614. The Utah decision of Williams v. Tuckett, 98 Ut.398, 95 P.2d 982 (1939), follows the same rule. This case is particularly relevant to the point that a minute entry cannot be considered on appeal for any purpose whatsoever.

> "We are of the opinion that there is nothing for us on appeal. An appeal may not be taken from a minute entry, but must be taken from a judgment entered upon the order evidenced in the minute entry." Id. 982.

See also Omega Investment Company v. Woolley, 75 Ut. 274, 284 P. 523 (1930).

The matter of an offset is not a disputed issue of material fact for the simple reason that it was neither properly alleged in the pleadings before the court nor ever mentioned in any of the court's orders. The first mention arises in Appellants' Brief. The rule is firmly established that if a matter was not raised before the trial court it cannot be raised on appeal.

B. There is a disputed issue of material fact concerning attorney fees, but this is irrelevant to the appeal since the trial court reserved the matter for future hearings.

The trial court's reservation of the matter of attorney fees until a future hearing had the effect of denying the Plaintiff's motion for summary judgment as to attorney fees. This issue, therefore, is still before the trial court; no money judgment as to attorney fees has been entered in this case (R.101). The judgment being appealed from does not include a judgment for attorney fees, and any execution proceedings to exact the amount of the judgment from the Defendants' property will most certainly not include attorney fees.

The matter of attorney fees will no doubt come before the trial court either at trial or on special hearing at a future date. Should a certain amount be awarded as attorney fees at that time, that judgment will be separate and distinct from the judgment in issue at the present time. Plaintiff would point out to the court, then, that it concedes that the question of attorney fees is still in dispute, but Plaintiff would also point out that the trial court's judgment recognized that fact and denied Plaintiff's motion for summary judgment as to attorney fees. By the trial court's own judgment, the matter of attorney fees was reserved for a future hearing.

POINT II

THE ORDER OF THE TRIAL COURT WAS CORRECT AND PROPER AND WAS FULLY WITHIN ITS POWER AND AUTHORITY.

The Defendants Tucker claim in their brief that the trial court grossly exceeded its power and authority by granting summary judgment to the Plaintiff. They have taken issue with the trial court's judgment on three major points, each of which is discussed immediately following.

A. The trial court is limited in its decision neither by the pleadings of Plaintiff nor by the terms of the breached agreement.

Particularly in the present case, the trial court was not restricted in the relief it could afford the Plaintiff by Plaintiff's prayer for specific relief. This is the well-settled rule and is stated at 49 C.J.S., Judgments, §49 (1947).

> "In contested cases, or cases in which an answer has been filed, the relief which may be granted is not limited to that demanded in the complaint or specifically prayed for, particularly under statutes in effect so providing; the court may grant any relief which is consistent with the case made by the pleadings and proof and embraced within the issues." Id. 113.

The same section further states that when there are claims for both general and specific relief, the court's alternatives are not limited by the request for specific relief.

> "Where a prayer for general relief is added to the demand of specific relief, the court is not limited to the specific demand, but may grant, particularly under code practice,

> such other appropriate relief as may be consistent with the allegations and proofs and necessary to adjust fully the equities of the case. . . ." Id. 114.

Such is the situation in the present case. Plaintiff's amended complaint contains a demand for specific relief (R.39, ¶¶1-3) and a demand for general relief (R.40, ¶4). The Utah courts are in agreement with the general rule which allows the trial court to grant relief as it chooses. In Walker v. Singleton, 63 Ut. 283, 225 P. 81 (1924), this court held:

> "It may also be the case that where both specific and general relief are prayed for, as in this case, the court may not follow the prayer for specific relief, but may grant general relief. Such seems to have been the course pursued in the case at bar. The objection, therefore, that the relief granted by the court was broader than the specific relief prayed for, is not tenable." Id. 82.

The Defendants Tucker have also argued that the trial court was limited in the relief granted by its judgment to the express terms of the breached agreements. This argument is not appropriate in this case for the reason that this action is for breach of performance on a promissory note contract and not for the performance of a contract.

It must also be added at this point that it is almost unconscionable for the Defendants Tucker to argue that Plaintiff is restricted to the relief afforded by the terms of the agreement when the Defendants Tucker have been directly responsible for destroying all the security and all of the avenues of relief

open to the Plaintiff under the contract. Defendants Tucker have accomplished this by being the initial parties to breach the contract by their withdrawal from the corporation of the real properties they had placed therein as security for the promissory note, thereby withdrawing the real properties from the terms of the agreement. Next, the Defendants Tucker completely abandoned the corporation to the Simpsons, thereby allowing the Simpsons to destroy completely the value of the stock held as security by issuing new stock which destroyed the controlling interest once held as collateral.

It is fundamental to the doctrine that a court may determine matters on the basis of public policy that a party should not be allowed to destroy completely all of the security in a contractual agreement and then require the injured party to look only to that security for relief. By their own conduct the Defendants Tucker have come into this court without "clean hands" and are estopped from claiming that the Plaintiff can look only to the security outlined in the terms of the agreement. 27 Am.Jur.2d, Equity, §136 (1966).

The Defendants Tucker were the parties initially in breach of the contract and did everything within their power to destroy the collateral held for Plaintiff. They cannot now demand that this court restrict Plaintiff's remedy solely to acquisition of the now worthless stock. The trial court's decision was most certainly not limited by the terms of the breached agreement.

B. The trial court was fully empowered to enter a personal judgment against the Defendants and to provide that the security held by the court should be sold to satisfy such judgment.

Defendants Tucker have attacked the actions of the trial court on the grounds that it was in violation of the supposed "one action rule" (§78-37-1, U.C.A.) and have cited two cases in support thereof, one of which is a Utah decision. (Appellants' Brief, 12-13). Their claim is that the statute and the cases control "the foreclosure of mortgages upon real estate and personal property." However, Defendants Tucker have apparently overlooked the fact that for the past 10 years that statute and the Utah case following it have been stricken from the books.

For the past 10 years §§78-37-1 and 78-37-2 have expressly and purposely omitted any reference to personal property and this would include the stock certificates in the present case. See §78-37-1, U.C.A. (n. 1975 supp.). The Legislature's removal of personal property foreclosure actions from the purview of these statutes can only be interpreted as a legislative determination that the provisions of the two statutes shall definitely exclude actions dealing with personal property. The reason for this is that in that same year the Utah Legislature adopted the Uniform Commercial Code Thereby pre-empting and superseding any other statutes concerning security agreements and personal property. §70A-9-102 (1953,

"History"). Simply stated, the law relied upon by Defendants Tucker was repealed 10 years ago. See also Hubbs vs. Warehouse Service Commission, infra.

When the courts are dealing with security interests and chattel mortgages, the scope of their authority is quite broad. It is stated at 15 Am.Jur.2d, Chattel Mortgages, §233 (1964):

> "When a court exercising equitable powers acquires jurisdiction of a suit to foreclose a chattel mortgage, it has the right to decide all matters involved in the suit. . . . Moreover, the court has inherent power to make supplemental orders affecting the details of the performance of its decree." (Emphasis added.)

Concerning the performance of its decree, the case of Betty v. Tuer, 292 S.W. 271 (Tex.Civ.App., 1927) is instructive. In that case the court exercised the broad scope of its power to decree an order concerning a promissory note and foreclosure of a chattel mortgage by ordering that the plaintiff could execute on the mortgaged truck or any other property of the Defendant. The appellate court affirmed the trial court's order.

In the present case the court entered a personal judgment against the Defendants Tucker in the amount of $151,878.75 plus $52.10 court costs. Ordinarily, it would probably be most appropriate for the Plaintiff to seek to levy on whatever of Defendants' property that it wished. Owing, however, to the unusual circumstances of this case wherein the escrow agent

deposited the stock in question with the court, an execution proceeding would seem somewhat futile since the court already had possession of the stock. Therefore, the court was perfectly justified in couching its order in the terms of a foreclosure proceeding since it already possessed the stock. This the court can do quite properly under Rule 69(a) U.R.C.P. which states, "Process to enforce a judgment shall be by a writ of execution unless the court otherwise directs. . . ." (Emphasis added.) The court, had it wished, could even have ordered that all of the real property owned by the Defendants Tucker or any of their other property be sold to satisfy the judgment. Rule 69(o) U.R.C.P. This the court could not do. It simply entered a personal judgment and stated that "Plaintiff may proceed to sell said security. . . ." (R.102). Since the court itself was holding the security, such an order was necessary to enable the Plaintiff to levy on the stock. If the Plaintiff was granted a money judgment against Defendants Tucker which became a lien on the Tuckers' real property pursuant to §78-22-1, U.C.A., that lien is in no way invalid or void because the Plaintiff chose to levy on the stock first.

The case law concerning foreclosure of chattel mortgages has through the years recognized that a personal money judgment may very easily accompany a decree of foreclosure, the divorce cases cited by Defendants Tucker notwithstanding (Appellants' Brief, 13-14).

In Lassen v. Curtis, 40 Wash.2d 82, 241 P.2d 210 (1952), the court held under a statute similar in its alternatives to our Uniform Commercial Code that a personal judgment for the balance due would be entered along with a decree of foreclosure on the personal property held as security. It is important to note that the court neither objected to nor noted as unusual the fact that the trial court's judgment both foreclosed the chattel mortgage and awarded a personal judgment.

> "Since they [plaintiffs] held, in the form of a promissory note, a separate obligation for the sum due, appellants asked for and received in addition to a decree of foreclosure a personal judgment for the balance due upon the note. This was in accordance with the provisions of the. . .statute." Id. 211-12. (Emphasis added.)

In Hubbs v. Warehouse Service Commission, 149 Ore. 559, 42 P.2d 180 (1935), the plaintiff sued for both a personal judgment against the defendants and for an order allowing the sale of the personal property held as security. The trial court so ordered and its decision was affirmed on appeal.

> "Upon the trial a judgment was entered in favor of plaintiff for the full amount of the principal of the notes with unpaid interest, attorney's fees, and costs, and a decree for the foreclosure of the mortgage and sale of the mortgaged property was likewise entered." Id. 181.

The court then went on to state that it even foresaw a duty of the trial court to enter both a personal judgment and a decree of foreclosure.

> "The subject of the mortgage in the instant case was personal and not real property. In addition to the mortgage, notes were given evidencing the indebtedness and it became the duty of the court in the foreclosure proceedings to enter judgment against the defendants for the full amount due on the notes. . . . Section 6-505 Oregon Code (1930), relied upon by defendants, applies only to suits for the foreclosure of mortgages on real property and hence has no bearing here." Id. 184.

This is particularly relevant to the case at bar for the reason that Defendants Tucker have also relied upon a statute which applies only to the foreclosure of real estate mortgages (§78-37-1, U.C.A., supra) and is, therefore, irrelevant.

The Uniform Commercial Code, adopted by Utah in 1965, provides for several diverse remedies where a security agreement is involved. These remedies include decrees of foreclosure, personal money judgments, executions and the like. It has been stated authoritatively that these remedies are cumulative and that a party need not elect one or the other.

> "Generally, the remedies provided under Article IX are cumulative, and a party may sue on a debt secured by the security agreement without waiving his security interest." Boyce, The Uniform Commercial Code in Utah, 31 Utah L.Rev. 70 (1966).

Section 70A-9-501(5), U.C.A., makes it clear that after a plaintiff has obtained a money judgment against a defendant, it may proceed to execute or foreclose upon collateral, as was done in the present case.

> "When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section. . . ."

§70A-9-501(1) illustrates that a plaintiff is not limited in the procedural remedies available to it.

> "When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part. . . . He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure." (Emphasis added.)

Defendants Tucker are apparently arguing that where Plaintiff has been granted a money judgment for a sum certain, it cannot foreclose on the collateral but must proceed to execute on the property of the Defendants by some sort of distinct procedure. Official Comment 6 to the Uniform Commercial Code §9-501 indicates that a plaintiff may choose either to foreclose or to execute following judgment. "A judicial sale following judgment, execution and levy is one of the methods of foreclosure contemplated by §§1. . . ."

Under the relevant Utah statutory provisions, then, Plaintiff was fully entitled to a personal money judgment against the Defendants Tucker and was also entitled to execute on the stock held in the custody of the court.

The Defendants Tucker have argued that this judgment could not act as a personal judgment against them since the court was somehow prevented "from arriving at the actual dollar liability of the Defendants." (Appellants' Brief, 9.) This is certainly not the case.

The trial court clearly granted judgment in a sum certain (R.102). The matter of attorney fees is not in that judgment, and if attorney fees are ultimately awarded, they will constitute a separate judgment. 49 C.J.S., Judgments §458 (1947). The judgment allowed Plaintiff to place a lien on all the real property of the Defendants Tucker within the county and further allowed the Plaintiff to sell the stock held by the court. The court's order did not require Plaintiff to sell the stock before obtaining a judgment lien but merely allowed Plaintiff to execute on the stock as though it were held by the Defendants themselves. Such an order was necessary in view of the fact that the stock was held by the court and a court order was required to release it.

C. The creation of a lien by the trial court's judgment is not a proper subject for appeal since the trial court had no authority to "create" a lien, nor does the record indicate that it did so, and this court cannot review a matter that was never before the trial court."

The trial court's amended order granting summary judgment was absolutely proper in holding the Defendants Tucker liable on the note amount and in allowing the Plaintiff to execute on

the stock held as security, which stock had been deposited with the court prior to the court's final order on this matter (R.131, 131A). Defendants Tucker have presented no evidence whatsoever in the record that the trial court's judgment is acting as a lien on the Defendant's real estate "in Utah County, Carbon County, Duchesne County, Sanpete County (and Davis County) and perhaps in other counties. . . ." (Appellants' Brief, 6). It is the law in the State of Utah and in other jurisdictions that a judgment does not create a lien and if a party is objecting to a lien he must show evidence thereof. In Orton v. Adams, 21 Ut.2d 245, 444 P.2d 62 (1968), the court stated:

> "Thus, it is seen that it is not the judgment but the docketing thereof which creates the lien. Over 2000 acres of the land in question are not in the county where the judgment was rendered. The record does not show that a transcript of the judgment was ever filed in the office of the clerk of the district court in the county where the land lies." Id. 63-4.

Defendants Tucker's objection to the alleged docketing of the judgment in outlying counties is not supported by the record. In the absence of any part of the record evidencing a docketing of the judgment in outlying counties, this court has but one alternative and that is described at 4A C.J.S., Appeal and Error, §1203(a).

> "The court on appeal will not consider questions arising after judgment unless properly raised and supported by a record sufficient to enable the court to determine whether error has been committed."

The Defendants Tucker state that they are fearful that title companies will slander their title and that the judgment will be docketed in outlying counties. There is no proof of this before the court except the acknowledged fears of the Defendants Tucker. Were these fears based on more concrete evidence, we could better sympathize with their position. However, as it is stated in 4A C.J.S., Appeal and Error, §1206, "The appellate court can only take the record as it finds it and cannot. . .consider matters which lie in the imagination or apprehension of court or counsel."

In addition to being concerned about the possibly slanderous future activities of title companies (Appellants' Brief, 15), Defendants Tucker are also apprehensive that prospective purchasers may be dissuaded from buying by virtue of any purported liens on their property (Appellants' Brief, supra). However, it is stated at 5 C.J.S., Appeal and Error, §1324(2), 388 (1958): "The probable effect of a judgment on third parties is not a legitimate basis for an argument addressed to an appellate tribunal." See also 5 C.J.S., Appeal and Error, §1497(d).

If the Defendants Tucker have an objection to the docketing of the judgment, they must present evidence to the court that the judgment was indeed docketed in outlying counties. Further, they should not attack the judgment itself, which creates no lien, but rather they should object to the county clerk's office in those outlying counties where they allege the judgment is docketed or to the title companies who they insist will slander the title or to the prospective purchasers who breach their sales contracts with Defendants.

There has been no evidence before the trial court or before this court in the record on appeal that the judgment in question was ever docketed in outlying counties. Neither can the District Court of Salt Lake County be responsible for whatever interpretations title companies and prospective purchasers may choose to place on a judgment so docketed. This matter is both unsubstantiated and inappropriate for appellate review.

CONCLUSION

The court in the present case was faced with an unusual situation where the court itself held possession of the collateral on a secured transaction. The court entered judgment in a sum certain on the promissory note and allowed the Plaintiff to execute on the stock held by the court. The

trial court's order was completely appropriate to the circumstances of this case, and the court's judgment is supported fully by Utah statutory law and case authority. The judgment of the trial court should be affirmed.

Respectfully submitted,

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I hereby certify that I mailed two copies of the foregoing Respondent's Brief to Arthur H. Nielsen and David S. Cook, Attorneys for Defendants-Appellants Tucker, 200 North Main Street, Salt Lake City, Utah, this 7 day of January, 1976, postage prepaid.